REPORT ON

THE PROPOSED NEW JERSEY PENAL CODE

DEPARTMENT OF LAW AND PUBLIC SAFETY

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PREFACE

In 1968, our Legislature created a Commission "to study and review the statutory law pertaining to crimes, disorderly persons, criminal procedure and related subject matter." N.J.S.A.1:19-4. The purpose of the Commission was to prepare a revision of our criminal law "so as to embody" modern principles of justice and to "eliminate inconsistencies, ambiguities" and "redundant provisions." Id. The articulated objective of the enabling legislation was to "revise and codify the law in a logical, clear and concise manner." Id.

Pursuant to its legislative mandate, the Commission issued its final report in October 1971, and recommended the enactment of a comprehensive penal code. The efforts of the Commission were in keeping with those of other jurisdictions where codes have been enacted. Most notable in this context is the recent adoption of penal codes in California, New York, Illinois, Wisconsin, Michigan, Connecticut, North Dakota, Louisiana and Kentucky. In a similar fashion, Congress is presently considering the enactment of a Federal Criminal Code.

Since the Criminal Law Revision Commission issued its final report, those concerned with the administration of justice have carefully scrutinized the proposed Code, as well they should, for the revision drastically alters existing statutes and judicial precedents. In 1972, we prepared an extensive analysis of the proposed Code as it was then written. We recommended extensive modifications, and we pledged the services of our staff to assist the Legislature in this endeavor. The Public Advocate and the Essex County Prosecutor

prepared similar studies also recommending further consideration. Thereafter, the Criminal Law Revision Commission conducted hearings to consider implementation of proposed amendments. Members of the Attorney General's office and staff assistants of the Public Advocate appeared and offered recommendations. The Commission's final report was then presented to the Legislature which conducted public hearings. Thereafter, members of the Legislature sponsored the Code in its present bill form. See A.3228. It is significant to note that many of our prior recommendations were adopted by the proponents of the Code.

Presently, to some, the very idea of codification of the criminal law would appear to be an alien concept since New Jersey has never adopted a comprehensive penal code. Traditionally, our Supreme Court has served as the primary governmental agency in defining and developing most areas of the criminal law. However, the time has come to create a systematic, consistent and comprehensive Code to replace the "hodge-podge" that now exists. In this regard we have reviewed the Code to determine whether it has achieved the purposes and objectives which any revision of the criminal law must embody. These include (1) providing a single source of reference with regard to the penal law, (2) revising and clarifying elements of offenses and defenses, (3) modernizing all aspects pertaining to the criminal law, and (4) providing a comprehensive scheme of sentencing and corrections.

Perhaps, more significant is our evaluation of the Code with respect to the ultimate objects of the criminal law which are (1) protection of the public, (2) deterrence of the offender and would be criminals, and (3) rehabilitation of

the offender.

We have evaluated the Code in accordance with the above criteria and generally endorse the provisions contained therein. An examination of the proposed statutory revision reveals that its drafters were conspicuously aware of the various objectives of the criminal law and the benefits of codification. Principles of criminal liability, such as duress, entrapment and intoxication, are clearly defined. The law of justification, including self-defense, defense of others and the use of force by law enforcement personnel, has been codified. Principles of criminal responsibility, most especially that of insanity, have been clarified. Indeed, the Code abolishes insanity as a defense except where the illness negates a requisite intent. The definition of substantive offenses has been modernized to comport with current societal attitudes. In this regard the Code deletes from the purview of the criminal law certain consensual sexual offenses, as well as purely social gambling. Further, common law crimes are now specifically enumerated and defined. So too, in the area of sentencing, the rational grading of offenses more realistically relates punishment to the moral culpability of the offender and confers expanded charging discretion upon prosecutorial authorities.

Although we generally endorse the Code, that is not to say that it should be enacted in its present form. Many of its provisions are unworkable and not in the public interest. Therefore, it is necessary to evaluate its provisions on their merits. Yet, merely because certain portions of the Code are subject to criticism does not warrant its wholesale rejection.

In no event should enactment of the Code depend upon an "all or nothing" approach. Clearly, too much is at stake.

With regard to the methodology of preparing this report, it must be emphasized that its sole design was to serve as an "in-house" document, and its dissemination will be solely within the discretion of the Attorney General. Further, we have extensively evaluated each of the Chapters of the proposed Code. However, we have been advised that the Legislature expects our comments with regard to the Code by early April or March. Therefore, since it would be most difficult to assimilate the entire Report by that time, we have appended charts which highlight the Code's major provisions or changes in existing law.

SUBTITLE I - GENERAL PROVISIONS

INTRODUCTION

The first Subtitle of the Proposed New Jersey Penal Code represents an entirely new approach to the formulation of general principles of substantive criminal law. Heretofore, development of this area has been left almost entirely to the courts, resulting in a substantial body of case law which is widely accepted and well-understood by members of the bench and bar and, to a lesser extent, the general public. Hence the significance of this codification, which effects a wholesale change -- both in substance and in terminology -- of the basic principles which underly all of the criminal law, can hardly be overstated. Any serious shortcomings in this critical area of the Code will have an immediate disruptive effect on the criminal justice system and ultimately result in great disservice to the public it is designed to protect. It would also, no doubt, generate vast amounts of needless litigation, work a hardship on criminal defendants and impose on the Legislature the burden of amending unsatisfactory provisions. Hence it is essential that this Subtitle speak with the greatest possible clarity, certainty and simplicity, yet at the same time provide sufficient flexibility to meet unanticipated situations and permit growth and development of the law. Obviously, on a substantive level,

the provisions must deal intelligently and comprehensively with the general criminal law and must provide for substantial justice for both the defendant and the public.

For the most part, the proposed Code meets these difficult and often conflicting demands; hence this Office finds the provisions of Subtitle I to be generally satisfactory. However one comment is fairly applicable to the entire Subtitle and bears mention at the outset. It appears to have been the intention of the drafters to make this Subtitle all-inclusive and to explicitly deal with every conceivable situation which might arise under its provisions. As a result, many of the provisions are quite lengthy, are drafted in minute detail, and seek to make exceedingly subtle distinctions between various factual settings. While this is commendable to the degree that it adds certainty and specificity to the Code, at times the results are unduly complex and cumbersome and certain provisions may prove difficult to comprehend and apply.[1] Admittedly this may be an inherent problem in any codification of the criminal law. However, it is felt that this Subtitle would benefit considerably if some of the more complex provisions were drafted in more general language

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1 See, for example, 2C:1-3 (territorial applicability); 2C:1-8 through 2C:1-12 (provisions limiting multiple prosecutions); 2C:2-3 (causal relationship); 2C:2-6 (liability for conduct of another).

with their application in particular factual settings being left to the course of judicial construction. Notwithstanding the fact that such an approach may be contrary to the underlying rationale of codification, it is felt that on balance, it would result in a code which is more easily understood and applied than the present draft.

CHAPTER 1 - PRELIMINARY

Section 2C:1-1 provides for the transition from the current law to the Code and contains the general rules of construction applicable to the Code. The substantive provisions of the Code apply to all offenses committed after its effective date while its procedural provisions will govern in all cases pending on, or initiated after, the effective date. Additionally, the court, with the consent of the defendant, may impose sentence under the Code, in any pending case and "shall" dismiss any prosecution for an offense which is no longer an offense under the Code. The provisions dealing with statutory interpretation are non-controversial and generally consistent with traditional principles of statutory interpretation.

Section 2C:1-3 establishes the territorial jurisdiction of New Jersey law. The existing law in our State is "that an essential element necessary to the invocation of jurisdiction in criminal cases is that the crime be committed in the State in which the crime is tried." State

v. McDowney, 49 N.J. 471, 474 (1967). Whether any particular conduct within our State is sufficient to constitute "commission" of an offense has been left to the case law. The Proposed Code appears to broaden the jurisdiction of our courts to its constitutionally permissible limits. However the exact parameters of this provision are difficult to define in the abstract and must await resolution in concrete controversies. This provision appears to add somewhat more predictability and certainty to this area of the law and is, with one exception, satisfactory.

Subsection (f) provides that the court may dismiss, hold in abeyance or place on the inactive list a criminal prosecution where it appears "in the interests of justice because the defendant is being or is likely to be prosecuted for an offense based on the same conduct in another jurisdiction." Though application of this provision will, no doubt, be infrequent, it is felt that the provision is unwise and should be deleted. As the Commentary to this section notes, this provision is unique in that it permits application of a standard similar to the civil doctrine of forum non conveniens to criminal cases. Omitted from this provision, however, is any method by which the prosecutor may bring to the court's attention matters relevant to the determination of whether the State prosecution should proceed. On yet a more fundamental level it encroaches on the traditional role of the prosecutor in exercising his discretion and control

over pending criminal matters. It is submitted that the prosecutor should be the final arbiter of whether a pending or actual prosecution in another jurisdiction sufficiently vindicates the State's interests so that further prosecution should not be sought.[2] It is clear that the prosecutor has not only the power, but the responsibility not to seek further prosecution where the facts do not warrant it. The good faith of the prosecutor, along with traditional principles of double jeopardy and collateral estoppel, it is felt, afford ample protection to a defendant from multiple prosecutions. In

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[2] A.B.A. Standards, §3.9 (as amended 1971), Discretion in The Charging Decision, provides in pertinent part:

> (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:
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> * * *
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> (VII) Availability and likelihood of prosecution by another jurisdiction.

See Also State v. Winne, 12 N.J. 152, 174 (1953); State ex rel. McKittrick v. Wallach, 353 Mo. 312, 182 N.W.2d 313, 318-19 (S.Ct. 1944).

short, there appears no valid reason to place this traditionally prosecutorial function into the hands of the court.

Section 2C:1-4 reclassifies offenses as either crimes (those offenses for which imprisonment in excess of six months may be imposed) or disorderly persons offenses (all others). Crimes are further categorized only for sentencing purposes.[3] The classification of crimes as misdemeanors or as high misdemeanors is eliminated. While this re-classification is commendable, it is incomplete since the Commission has specifically declined to incorporate the New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1, et seq., into the Code. It would seem that this omission is contrary to one of the primary reasons for enacting a penal code, i.e., codification of all criminal offenses within one document. Failure to incorporate the Drug Act will result in the awkward and cumbersome procedure whereby the entire criminal justice system will be functioning under two separate schemes of sentencing. Therefore, it is recommended that the new drug law be incorporated into the Code.

Section 2C:1-5 effects a major change in New Jersey law by the abolition of all common law crimes. This accords with the prevailing trend of passing responsibility for the growth of the criminal law from the courts to the Legislature. It adds immeasurable certainty and specificity to the law and provides clear notice of the nature of prohibited conduct to

3 See 2C:43-1 et seq..

potential offenders. It is felt that these advantages far outweigh the only realistic harm which might result; i.e., inadvertent failure to include certain conduct justifying criminal sanctions within the code. However, Subsection (d), the pre-emption provision, is in need of modification. This section precludes local governments from enacting any ordinance conflicting with, "any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code." (emphasis added). While the basic principle is manifestly sound and well established in our law,[4] the wording of the underscored portion of the provision provides an unworkable standard for its application.

The requirement that a local ordinance must not be contrary to "any policy of this State ... whether that policy be expressed by inclusion of a provision in the Code or by exclusion of that subject from the Code" places a well-nigh impossible task on a local governing body of ascertaining whether a proposed ordinance would conflict with an abstract standard which finds no direct expression in the Code.[5] The inquiry would often resolve into determining whether

4 See Inganamort v. Bor. of Fort Lee, 62 N.J. 522 (1973); Township of Chester v. Panicucci, 62 N.J. 94 (1973); State v. Ulesky, 54 N.J. 26 (1969).

5 Compare Wagner v. City of Newark, 24 N.J. 467 (1957), with Inganamort v. Bor. of Fort Lee, supra.

something was omitted from the Code through sheer inadvertance or for a policy reason. Local lawmakers cannot reasonably be expected to make such thorny judgments. So too, a high degree of uncertainty would be injected into any local ordinance until such time as a court determines whether a particular ordinance meets this standard. In short, the standard provided by the final phase of Subsection (d) is simply too nebulous to provide a meaningful guideline and it should be deleted.

This Office is in substantial agreement with the time limitations placed on prosecutions by Section 2C:1-6. This Section provides that prosecution for a crime must commence within five years after its commission and for a disorderly persons or petty disorderly persons offense one year after its commission. However, it is recommended that a separate provision be included to deal with public officers and employees. Misconduct by a public officer warrants separate treatment from offenses by the general public since public officials stand in a "fiduciary relationship" to the people and have a higher duty to serve the public interest. See Driscoll v. Burlington Bristol Bridge Co., 8 N.J. 433, 474-475 (1952). Also, official misdeeds are often difficult to detect and the official himself is often in a position to conceal his illegal acts. It is submitted that these factors warrant adoption of a more stringent statute of limitations for public officials. The particular formulation which should be adopted is open to question. If a term of years commencing from the date of the offense is deemed advisable it should be well in excess of the general five year limit, perhaps ten

years. Alternatively, the Code might adopt a statute which runs from the date of discovery of the crime. Originally this type of statute was confined to medical malpractice cases.[6] The rule has since been extended to apply to a variety of other situations and is particularly appropriate to causes of action -- whether civil or criminal -- in which the wrong is not easily detected.[7] To avoid any unfairness to defendant from prosecution for extremely old offenses, this limitation could be coupled with a limitation of an absolute term of years. A third type of statute which is frequently applied to public officials, commences to run from the date the officer or employee leaves office.[8] This too could be coupled with an absolute term of years. But irrespective of which of the above provisions is deemed most appropriate, a separate statute of limitations should be adopted for public officials.[9]

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6 See Fernandi v. Strully, 35 N.J. 434 (1961); Lopez v. Swyer, 62 N.J. 267 (1973).

7 See Comment, 25 Rutgers Law Rev. 711 (1971).

8 Five states presently have general statutes of limitation running from the date of discovery: Georgia, Kansas, Louisiana, Nevada, Tennessee. Four other states have statutes which follow this formulation and deal expressly with public officials: Alaska, Illinois, Oklahoma, Wisconsin.

9 Six states currently have this type of statute: Arkansas, Colorado, Indiana, Louisiana, Pennsylvania and Vermont.

Section 2C:1-7[10] is a new provision in the Assembly Bill which prohibits the dismissal of a first or second degree offense involving use of a firearm. The effect of this provision is to place a limitation on the power of the prosecutor to effect plea bargains which result in the dismissal of certain serious offenses involving use of firearms. While this provision may have a superficial popular appeal, upon closer analysis it proves to be counter-productive and should not be adopted in its present form. Presently it is clearly not the practice of prosecutors or judges to indiscriminately dismiss indictments for serious offenses. Simply stated, our prosecutors and judges can be trusted not to dismiss offenses without just cause. Thus there appears no real need for this statute. In addition to being unnecessary, the provision has certain ramifications which may well have a deleterious effect on the criminal justice system. In instances where a defendant is charged with several first and second degree offenses it may be eminently fair and just to accept guilty pleas on certain counts in exchange for a dismissal on certain other counts. This is particularly true in instances where a defendant remains subject to a substantial custodial sentence on the counts to which he pleads guilty.

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10 Limitation on Dismissals. The court shall not dismiss a prosecution for a first or second degree offense which involves the use of a firearm as defined in 2C:39-1 (f) on a motion by the prosecutor which is made pursuant to an agreement between the prosecutor and the defendant.

For example, as the result of a single robbery, a defendant may be charged with robbery (2C:19-1) and aggravated assault (2C:12-1(b)), both crimes of the second degree, as well as a weapons offense (2C:39-3 et seq.) which, depending on the particular offense, would be a crime of the third or fourth degree.[11] It would not be uncommon for a defendant to enter into a bargain, whereby he would plead guilty to the weapons offense and robbery, in exchange for a dismissal of the assault charge. In most instances such a plea bargain is fair to both the State and the defendant. The defendant may expect to receive less than the maximum sentence, or concurrent sentences on the two counts to which he pled guilty; he will have two rather than three convictions on his record, and will not run the risk of receiving consecutive sentences on all three counts as he would if he proceeded to trial on the indictment.

The "bargain" would be even more advantageous to the State. In addition to saving the time and expense of trial, the State will avoid the risk of an acquittal and be spared the expense of an appeal and possible reversal of the conviction. Additionally, the defendant is still subject to the maximum term on two counts which, as a practical matter, is the most which would have been imposed even if he had proceeded

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11 Offenses of the second degree are punishable by an ordinary term of five to eight years or an extended term of eight to fifteen years. Offenses of the third degree are punishable by an ordinary term of three to five years or an extended term of five to eight years. Offenses of the fourth degree are punishable only by an ordinary term not to exceed 18 months. See 2C:43-6 and 7.

to trial and been convicted on all three counts. Under 2C:1-7, however, the State would be precluded from entering into this sort of highly advantageous bargain since it entails the dismissal of a second degree offense involving use of a firearm. Numerous other examples might be cited where the provision works to the disadvantage of law enforcement interests.

Clearly this limitation on plea bargaining may well inhibit, rather than promote, the conviction and incarceration of serious offenders. Thus Section 2C:1-7 is wholly unsatisfactory and should be deleted.

Section 2C:1-8 deals with the permissible methods of prosecution when conduct constitutes more than one offense. Paragraph a(2) provides both conspiracy to commit an offense and the resulting substantive offense where the completed offense was the sole criminal objective 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 and that a conviction for either adequately deals with such conduct. See Commentary, p.18. It is submitted that both analytically and as a matter of public policy this position is wrong.

An attempt has no collateral consequences beyond the possible completion of the crime attempted. If in fact the crime is completed, conviction and punishment for the completed offense, protects the same values which the law

of attempt seeks to protect. Hence the law defines an attempt as the failure to complete the substantive crimes and does not permit conviction for both.[12]

The crime of conspiracy, however, has ramifications beyond the possible completion of the substantive offense which is its objective. The United States Supreme Court recognized this in Callanan v. United States, 364 U.S. 587 (1961), in an opinion by Mr. Justice Frankfurter which succinctly states the rationale which justifies punishment for both offenses:

> The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.
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> This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement -- partnership in crime -- presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complete than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose

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12 See State v. Swan, 131 N.J.L. 67 (E. & A. 1943); State v. Schwarzback, 84 N.J.L. 268 (E. & A. 1913).

> for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise. Id. at 593-94.

Numerous other courts have followed this rationale and it has long been -- and continues to be -- the rule under both New Jersey and federal law that a conviction may be had for both conspiracy and the substantive offense.[13]

It is submitted that the Code gives insufficient consideration to the ancillary consequences, as summarized in Callinan, which invariably accompany a criminal conspiracy. It is true that the Commentary states there may be a conviction for both the conspiracy and the substantive offense if the prosecution shows that the conspiracy had additional criminal objectives.[14] Commentary, p.19. This concession, however,

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13 See e.g. Dennis v. Untied States, 384 U.S. 855 (1966); Pinkerton v. United States, 328 U.S. 640, 643 (1946); Carter v. McClaughrey, 183 U.S. 365 (1902); United States v. Pappas, 445 F.2d 1194 (3 Cir. 1971), cert. den. 404 U.S. 984 (1971); State v. Carbone, 10 N.J. 329, 337 (1952); State v. Johnson, 29 N.J.L. 453 (E. & A. 1861); State v. Oats, 32 N.J.Super. 435, 453 (App.Div. 1954); State v. Chevencek, 127 N.J.L. 476 (Sup.Ct. 1941).

14 The Code itself does not contain this explicit proviso. Section 2C:1-8(a)(2) provides:

> 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:
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> * * *
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> (2) one offense consists only of a conspiracy or other form of preparation to commit the other;

is wholly insufficient. Conceptually, it should not be necessary to prove the existence of other criminal objectives. The additional dangers which distinguish a criminal conspiracy from other inchoate crimes arises irrespective of whether there is one objective or numerous ones. See United States v. Callanan, supra. "The combination itself is vicious and gives the public an interest to interfere by indictment." State v. Carbone, supra, 10 N.J. at 337. Moreover, as a practical matter, it is doubtful whether the State can show additional objectives, the problems of proof being considerable. If the State should attempt to do so, it would inject further side issues into an already complex area of the law creating a risk of jury confusion and the undue consumption of time. Thus as a practical matter the exception does little to allay the flaws of the provision.

To reiterate, there is simply no unfairness to a defendant, from a conviction for both conspiracy and the substantive offense which is its objective. The offense of conspiracy is designed to protect a distinct interest apart from that of any substantive offense and conviction and punishment for each should be permitted.

Section 2C:1-8(a)(3) provides that a conviction for more than one offense cannot stand if "inconsistent

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14 (Cont'd)

Apparently the Commentary infers this result from the use of the word "only." It is recommended that if the merger of conspiracy into the substantive offense is to be retained as a feature of the Code, the wording of this section should be modified to explicitly provide for this exception. The present wording of the Code does not provide for this result in sufficiently clear terms and is open to conflicting interpretations.

findings of fact are required to establish the commission of the offenses." This is the prevailing law in our State. State v. Bell, 55 N.J. 239 (1970); State v. Emery, 27 N.J. 348 (1958). To avoid confusion the Code might explicitly state that this proviso is not a bar to "inconsistent verdicts"; i.e., a conviction on one count which is inconsistent with an acquittal on another count. Under such circumstances the prevailing rule in this jurisdiction and the majority of others is that the guilty verdict stands. State v. Still, 112 N.J.Super. 368, 373 (App.Div. 1970). See Dunn v. United States, 284 U.S. 390 (1932); Annotation, Criminal Verdict -- Inconsistency, 18 A.L.R.3d 259 (1968).

Section 2C:1-8(a)(4) prohibits separate convictions arising under both a general and a specific statute. Naturally, a single act may be proscribed by two separate statutes designed to prevent separate public harms. Yet, under certain circumstances two separate convictions may be sustained on the basis of this single act. The Code would prohibit this. As in the prohibition against convictions for both conspiracy and the substantive crime which is its object, the section under discussion would have a negative effect upon the deterrence of unlawful conduct. Further, it would seem that this provision would overrule several well reasoned decisions by our courts. For instance, in State v. Montague, 55 N.J. 387, 406 (1970), our Supreme Court upheld convictions of threatening a police officer's life and assault and battery upon that officer. The Court

found that these offenses did not merge and that separate convictions were valid. See also State v. Hampton, 61 N.J. 250 (1972), and State v. Craig, 48 N.J.Super. 276, 279 (App.Div. 1958). It is submitted that no valid purpose is served by addition of this provision to the Code in its present form. Rather separate convictions should be permitted when the State has a valid interest in protecting against distinct harms.

Section 2C:1-8(b) is the mandatory joinder provision, which requires that all offenses charged against a defendant which arise from the same criminal episode and are known to the prosecutor and are within the jurisdiction and venue of a single court, must be disposed of in a single trial. It has already been adopted as New Jersey law and to date has proven satisfactory. See State v. Gregory, 66 N.J. 510 (1975).

Section 2C:1-8(d) anticipated the Supreme Court decision in State v. Saulnier, 63 N.J. 199 (1973), which overruled State v. McGrath, 17 N.J. 41 (1954), and permits conviction for an included disorderly persons offense in a trial on an indictment in county court. As the Court noted in Saulnier, the decision in McGrath had long been subject to criticism and the proposed Code adopts "a more suitable judicial approach." See also Knowlton, "Criminal Law and Procedure," 10 Rutgers L. Rev. 97 (1955). In view of the Saulnier decision, which provides guidelines for the trial of such offenses and meets the objections raised in McGrath, this office favors the Code proposal.

Sections 2C:1-9 and 10 attempt to codify general principles of double jeopardy and collateral estoppel. Section 2C:1-9 precludes retrial for the same statutory offense based on the same facts as a former prosecution following acquittal, conviction or other termination under the enumerated circumstances. Section 2C:1-10 enumerates the circumstances when prosecution is barred by a former prosecution for a different offense. While this Office is in general agreement with the proposed formulations, it must again question the advisability of attempting any codification of this area of the law. Constitutional doctrines are constantly changing and as they do, so must the provisions or interpretation of the Code. As of this date, the law with regard to double jeopardy is in a state of flux and precise standards of application are impossible to define. It is to be noted that even the New Jersey Supreme Court has declined to establish concrete guidelines or rules, but has looked to the "underlying policies rather than technisms" in an attempt to give "primary considerations ... to factors of fairness and fulfillment of reasonable expectations" in light of the constitutional mandate. See State v. Currie, 41 N.J. 531, 538-45 (1964). So too, the United States Supreme Court has "explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial." United States v. Jorn, 400 U.S. 470, 480 (1971). This, however, is precisely what the Code

attempts to do. Whether it will succeed in a task which the highest courts in our State and country have declined to attempt because of its inherent difficulty can be determined only on a case by case basis after promulgation of the Code. One simply cannot anticipate the infinite variety of factual situations which might arise during litigation, or the course the Supreme Court will follow in future decisions in this area. If these sections of the Code prove constitutionally inadequate, they will, in practice, be replaced by the constitutional guarantees as interpreted in future court decisions and no real harm will result. If, however, the Code adopts more stringent standards than constitutionally required, constitutionally valid prosecutions will be unnecessarily frustrated.

In sum, this Office has serious misgivings about any attempt to codify this area of the law. If such a course is nevertheless deemed advisable it is difficult to criticize the particular formulations proposed since their viability can only be determined in the course of actual litigation.

Section 2C:1-11 bars prosecution in this jurisdiction for an offense which was the subject matter of a prosecution in another jurisdiction. Again, there is underlying doubt as to the advisability of any codification of this area of the law and the remarks addressed to Sections 2C:1-9 and 10 are applicable to this section as well.

Beyond that, this Office must also voice disagreement with the substance of this provision.

In a trilogy of cases, the United States Supreme Court has upheld the doctrine of dual sovereignty: Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); and, United States v. Lanza, 260 U.S. 377 (1922).[15]

In Lanza, a unanimous Court held:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give the liberty to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

In State v. Cooper, 54 N.J. 330 (1969), our Supreme Court was faced with the question of whether a conviction of a federal crime barred a subsequent trial on New Jersey indictments for the commission of a crime arising out of the same act or transaction. In upholding the constitutionality of this procedure the Court relied upon the above cited Supreme Court cases. Further, the Court stated that:

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15 The viability of the dual sovereignty concept has been questioned by some. See e.g. Note, 62 J. of Cr.L.C. & P.S. 29 (1971), and cf. Waller v. Florida, 397 U.S. 387 (1970). But recently the United States Supreme Court denied certiorari in several cases emanating from New Jersey which directly raised the issue of whether Bartkus v. Illinois, supra, should be overruled. See Colonial Pipeline Co. v. New Jersey, 404 U.S. 831 (1971); Jacks v. New Jersey, 404 U.S. 865 (1971); Leuty v. New Jersey, 404 U.S. 865 (1971); and, Feldman v. New Jersey, 404 U.S. 865 (1971). To this date the concept remains viable.

> A contrary rule could result in an unseemly race between the Federal and State authorities to obtain early jurisdiction. We are aware of the problem of the idealogical differences between the Federal Government and some of the States in determining the gravity of various criminal offenses. A prohibition against a second trial and indictment could well eventuate in a frustration of either the national or state police in law enforcement. Id. at 337-38.[16]

The actual impact of the Code cannot be determined until its terms are construed by the courts and much depends upon the construction placed on paragraph a(1) which provides that a state prosecution is not barred if:

> 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 ...

However, it seems clear that the Code goes beyond the prevailing case law, both State and Federal, in restricting State prosecution of one previously prosecuted in the Federal District Court. See Commentary, p.32.

It is submitted that this is an undesirable departure from existing law. The State should not abrogate any more authority to control criminal behavior within its jurisdiction than is constitutionally mandated. In the final analysis it is state officials who have the primary task of safeguarding the citizenry from crime. To

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16 The dual sovereignty concept is presently under review by our Supreme Court. State v. Ablemem, 68 N.J. 484 (1975) (granting certification).

meet this responsibility State authorities should have the fullest scope of the criminal process available to them. Traditional principles of due process and the proper exercise of prosecutorial discretion may be relied upon to preclude abusive application of this doctrine.[17] See generally State v. Saulnier, supra; State v. Hampton, supra. To the extent that this provision limits the existing jurisdiction of our courts it may be deemed unwise and should be modified.

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17 For example, shortly after the Supreme Court decision in Abbate v. United States, supra, Attorney General William P. Rogers issued a memorandum to United States Attorneys with the following directive:

> It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said [in Bartkus and Abbate] that although the rule of the Lanza case is sound law, enforcement officials should use care in applying it. * * * We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this is determined accurately, and if followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution should seldom arise. In such event, I doubt that it is wise to formulate detailed rules. * * * However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without * * * [the approval of an Assistant Attorney General after consultation with the Attorney General].

New York Times, April 6, 1959, p.1, col.4, p.19, cols.1, 2.

This policy has been followed by subsequent administrations and has served as the basis for dismissal of convictions on the government's motion in several cases where prosecutions were inadvertently initiated after state prosecutions. See Petite v. United States, 361 U.S. 529 (1960); Marakar v. United States, 370 U.S. 723 (1962); Orlando v. United States, 387 F.2d 348 (9 Cir. 1967). The prosecutorial agencies of our State may be expected to exercise similar good judgment.

CHAPTER 2 - GENERAL PRINCIPLES OF LIABILITY

The first three sections of this chapter (2C:2-1, 2 and 3) codify the fundamental requirements for establishing criminal liability. Essentially they are reiterative of prevailing case law and are generally satisfactory. The most significant change is one of terminology. Section 2C:2-2 provides for and defines four different kinds of culpability: purpose, knowledge, recklessness and negligence.[18]

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18 The terms are defined as follows:

> (1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.
>
> (2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.
>
> (3) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk 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 reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.

Heretofore there has been no consistency in the terminology used to define the mental elements for various crimes. As a result, there has been considerable confusion and much litigation as the courts have had to decide the appropriate mental elements for each particular crime. The clarity and uniformity provided by the Code in this regard is commendable.

Section 2C:2-4 significantly changes the prevailing law on ignorance or mistake of fact or law as a defense. Subsection (a) provides that such a mistake is a defense if the law so provides or if it negatives the culpable mental state. With one exception this appears to be consistent with prevailing case law.[19] Subsection (b) provides that this defense is not available "if the defendant would have been guilty of another offense had

18 (Cont'd)

> (4) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. "Negligently" or "negligence" when used in this code, shall refer to the standard set forth in this section and not to the standard applied in civil cases.

19 As to mistake of fact see State v. Madden, 61 N.J. 377, 399-400 (1972); State v. Fair, 45 N.J. 77 (1965); State v. Chiarello, 69 N.J. 10 (1968); State v. Hudson County News Co., 35 N.J. 284 (1961); State v. Bess, 53 N.J. 10 (1968). As to mistake of law see Cutter ads. State, 36 N.J.L. 125 (Sup.Ct. 1873); State v. Hanly, 127 N.J.Super. 436, 445 (App.Div. 1974), certif. den. 65 N.J. 578 (1974).

the situation been as he supposed." In such a case however the grade and degree of the offense is reduced to that "of which he would have been guilty had the situation been as he supposed." While it is questionable if this provision will have frequent application, it appears undesirable. There seems no sound reason to allow mitigation of the crime when a defendant, intending to commit one crime, commits instead a more serious one. It adds a good deal of confusion to the law with little countervailing benefit to the State.

Subsection (c)[20] effects a wholesale change in existing law in permitting a "mistake of law" in the broad

20 2C:2-4(c) provides:

> c. A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
>
> (1) 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
>
> (2) the actor acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (a) a statute or other enactment, (b) a judicial decision, opinion or judgment, (c) an administrative order or grant of permission, or (d) 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; or
>
> (3) the actor otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances which a law-abiding and prudent person would also so conclude.
>
> The defendant must prove a defense arising under subsection c of this section by a preponderance of evidence.

sense of that term, i.e. lack of knowledge that one's conduct is unlawful, to constitute a defense. It is submitted that a "mistake of law" should not constitute a defense to a criminal action at all. If however the Legislature should disagree and deem it advisable to permit such a defense, the provision as presently formulated is unsatisfactory and should be modified.

New Jersey presently rejects the defense of mistake of law,[21] "The reasons for disallowing it are practical considerations dictated by deterrent effects upon the administration and enforcement of the criminal law, which are deemed likely to result if it were allowed as a general defense." State v. Long, 44 Del. 262, 65 A.2d 489 (S.Ct. 1949). The cases and commentators have noted that this would be a constant source of confusion to juries and would tend to encourage ignorance at a point where it is particularly important to the State that knowledge be as widespread as possible. Ibid. See also, State v. Pruser, supra; State v. Western Union Telegraph Co., supra. So too, it is not overly cynical to suggest that instances where this defense can be raised in good faith will be few. In view of these considerations it is submitted the proposed "mistake of law" defense is ill conceived and should not be adopted.

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21 State v. Hanly, supra; State v. DeMeo, 20 N.J. 1 (1955); State v. Najjar, 1 N.J.Super. 208 (App.Div. 1949), aff'd per curiam, 2 N.J. 208 (1949); State v. Western Union Telegraph Co., 12 N.J. 468 (1953), appeal dismissed 346 U.S. 869 (1952); State v. Benny, 20 N.J. 238 (1955); State v. Pruser, 127 N.J.L. 97 (Sup.Ct. 1941). State v. Atti, 127 N.J.L. 127 (Sup.Ct. 1941), aff'd o.b. 128 N.J.L. 318 (1942). But cf. Cutter ads. State, supra.

As noted above, there are additional flaws in this provision which must be remedied if this provision is to be enacted. 2C:2-4(c)(2)(a) exculpates the actor if he relies upon "an official statement of the law, afterward determined to be invalid or erroneous" which is contained in "a statute or other enactment." (emphasis added). The term "statute" is defined in 2C:1-13(a) as including "the Constitution and a local law or ordinance of a political subdivision of the State." The term "other enactment" is not defined. Since the term "statute" is so broad as to encompass every valid rule-making source, the term "other enactment" appears to have no legitimate purpose in the statute. Its inclusion is confusing, and worse, could be construed to enlarge sources upon which the defense of mistake of law may be based.

The following sentence of this section (2C:2-4(c)(2)(6)) permits reliance on "a judicial decision, opinion or judgment." The deficiency in this provision is that there is absolutely no limit on the Court upon which a defendant may claim he relied. Significantly, the analagous provision in the Illinois Criminal Code permits reliance only "upon an order or opinion of an Illinois Appellate Court or Supreme Court, or a United States appellate court later overruled or reversed." 38 Ill.Rev.Stat. §4-8 (Smith Hurd 1971). Such a limitation is eminently sensible and should definitely be incorporated into the Code. Under the present formulation a person may rely upon an opinion

from literally any court, including our municipal courts.[22] These courts may issue a plethora of conflicting or ill considered opinions, any of which under the present provision, could be asserted as a defense. This is clearly an undesirable provision and should be modified.

A defense of mistake of law may also be based on "an administrative order or grant of permission." 2C:2-4(c)(2)(c). The wording of this provision should be narrowed and should specify more precisely what persons are authorized to give such statements on behalf of the State. Again it is interesting to note that Illinois excludes this provision. 38 Ill.Rev.Stat. §4-8 (Smith Hurd 1971).

Section 2C:2-5 provides for the retention of common law defenses. While this provision is not viewed as overly significant it appears conceptually anamolous to abolish common law offenses yet retain common law defenses. The rationale which justifies abolition of the

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22 There were, as of 1971, some 523 separate municipal courts established pursuant to N.J.S.A. 2A:8-1, each distinctively shaped both the personality of its judge and the community which it serves. Moreover, 29 of the 402 municipal judges as of that date were laymen who retained their positions by virtue of a "grandfather clause." N.J.S.A. 2A:8-7. See "Merging Municipal Courts, Report of the New Jersey Administrative Office of the Courts", 14 (1971). Our Supreme Court has criticized these courts as "antiquated," and has noted it does "not command the complete confidence of the public." State v. DeBonis, 58 N.J. 182, 188 (1971); State v. Nash, 64 N.J. 464, 474 (1974). The inherent weakness of these courts is such that convictions are retried de novo in county court. R. 3:23-8; State v. DeBonis, supra at 188. It seems clear that the Code should be modified, at least to preclude reliance on municipal court opinions.

former, see Commentary p.11, would seem to dictate that the same course be followed with respect to the latter. The only such defense anticipated by the Commentary is the defense of obedience to military orders. Commentary, p.55. The better practice would seem to call for drafting of an explicit provision to this effect rather than leaving it to the vagaries of the common law. Furthermore, it is doubtful whether this provision is necessary to accomplish the stated purpose of the Commission, i.e. to permit retention of an unusual defense not included within the Code. Application of the general principles of liability (Chapter 2) and justification (Chapter 3) would seem to preclude conviction of one with a valid common law defense, notwithstanding the fact that it was not expressly included in the Code. In sum, while there is considerable doubt as to the necessity of this provision it appears unobjectionable and there is no substantial reason to oppose its enactment.

Section 2C:2-6 is a statement of the general principles of accountability for the conduct of another. For the most part it follows existing law[23] of aiding and

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23 Current statutory authority may be found in N.J.S.A. 2A:85-14, which provides:

> Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.
>
> Any person who wilfully causes another to commit a crime is punishable as a principal.

See also State v. Madden, 61 N.J. 377 (1972).

abetting and is generally satisfactory. Certain aspects of the provision, however, bear further comment.

Subsection b(1), makes explicit the principle which is stated with less clarity in the second sentence of N.J.S.A. 2A:85-14, i.e., that one who uses an innocent or irresponsible agent is guilty of the offense the agent commits. This is a universally accepted doctrine which is in accord with the New Jersey cases[24] and should be adopted.

This section departs from existing case law in that it does not make conspiracy alone a basis for complicity in substantive offenses committed in furtherance of its aims. 2C:2-6(c); See Commentary, p.58. Rather, it requires that a co-conspirator satisfy one of the other criteria of 2C:2-6(c)[25] to be held liable for the criminal act. It is submitted that this is an unwise departure from existing law and should not be adopted.

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24 See e.g. State v. Lisena, 129 N.J.L. 569 (Sup.Ct. 1943), aff'd o.b. 131 N.J.L. 39 (E. & A. 1943); State v. Faunce, 91 N.J.L. 333 (E. & A. 1917); State v. Wyloff, 31 N.J.L. 65 (Sup.Ct. 1864).

25 This section provides that:

> A person is an accomplice of another person in the commission of an offense if:
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> (1) with the purpose of promoting or facilitating the commission of the offense, he
>
> (a) solicits such other person to commit it;
> (b) aids or agrees or attempts to aid such other person in planning or committing it; or
> (c) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so; or
>
> (2) his conduct is expressly declared by law to establish his complicity.

The current law and the rationale supporting it was succinctly stated in Pinkerton v. United States, 328 U.S. 640 (1946). In that case the two defendants were each charged with ten substantive counts and one charge of conspiracy to violate the Internal Revenue Code. There was no evidence to show that one of the defendants participated in the commission of the substantive crimes. However, the case was sent to the jury on the theory that both defendants could be found guilty of the substantive offenses on the basis of their participation in the conspiracy alone, if the offenses were committed in furtherance of the conspiracy. The Supreme Court, in an opinion by Mr. Justice Douglas affirmed the conviction and held that:

> It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act.
>
> * * *
>
> The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under §37 of the Criminal Code, 18 U.S.C. §88, 18 U.S.C.A. §88. If that can be supplied by the act of one conspirator,

> we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense. Id. at 646-47.

It is felt that no valid purpose is served by departing from this, the existing law. See State v. Carbone, 10 N.J. 329 (1952). There is simply no unfairness to a defendant in holding him accountable for the commission of crimes in the course of a criminal enterprise into which he enters willingly and knowingly. Criminal acts done in furtherance of a conspiracy are frequently dependent upon the encouragement and support of the group as a whole. Each member may be viewed as a casual agent to each act. Hence it is manifestly reasonable to impose vicarious liability upon one who in alliance with others has declared his allegiance to a particular common object and has implicitly assented to the commission of foreseeable crimes in furtherance of this object and has himself collaborated or agreed to collaborate with his associates, since these acts necessarily give support to the other members of the conspiracy. See "Developments in the Law -- Criminal Conspiracy," 72 Harv.L.Rev. 920 (1959).

Moreover, the rule which the Code seeks to abrogate is not, in practice, unduly harsh since a defendant can be held liable only for those crimes which are reasonably within his contemplation when he enters the conspiracy. As was stated in Pinkerton, supra:

> A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. Id. at 647-48.

This limitation provides ample protection to a defendant from being held accountable for crimes for which his liability is too remote to justify imposition of a criminal sanction.

Furthermore, there appears no demonstrable need for the proposed limit on conspiratorial liability. As a rationale for adoption of this provision the Commentary states that "there appears no other or no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise." Commentary, p.58. Immediately thereafter however, the Commentary concedes that, "[a]ccording to the drafters of the Model Penal Code, no cases actually press the liability for substantive crimes arising out of conspiracies as far as the existing rule would theoretically allow." Hence it appears that the main, if not sole justification for this provision, is to add a small degree of conceptual order to the Code.

It is submitted that the cost of doing this, in practical terms is too great. Specifically, this provision looms as an obstacle to organized crime prosecutions where higher echelon participants are in a position to

insulate themselves from liability for the commission of substantive offenses except as such guilt may be attributable to them by virtue of their participation in an over-all conspiracy. As a practical matter it is difficult to prove that one in control of an extensive criminal enterprise commanded, encouraged, aided or agreed to aid particular substantive offenses committed in its furtherance. Yet from the very nature of the criminal enterprise undertaken, and from law enforcement experience and expertise, it may appear conclusively that their acts were an inevitable and foreseeable adjunct to the over-all conspiracy. In such circumstances successful prosecutions are far more likely under existing law than under the Proposed Code.

Subsection (d) provides that one who is legally incapable of committing an offense may nevertheless be guilty of the offense if it is committed by another, "unless such liability is inconsistent with the purpose of the provision establishing his incapacity." This provision is in accord with prevailing case law[26] and generally satisfactory except for the final phrase, quoted above. It is felt that this language is not sufficiently clear and should be modified.

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26 See e.g. State v. Warady, 78 N.J.L. 687 (E. & A. 1910); State v. Marshal, 97 N.J.L. 10 (Sup.Ct. 1922); State v. Goldfarb, 96 N.J.L. 71 (Sup.Ct. 1921); State v. Jackson & Kisinger, 65 N.J.L. 105 (Sup.Ct. 1900). Further, it appears this section would overrule holdings such as State v. Aiello, 91 N.J.Super. 457, 462-63 (App.Div. 1966), in which the court held that defendant could not be convicted as an aider and abettor pursuant to a statute which prohibited the owner of a building from permitting the operation of a lottery, because the defendant did not himself "own" the building. This result has been criticized and is probably wrong. See Commentary, p.58.

Subsection (e) relieves persons from accountability for the conduct of others in certain instances. Subsection (3)(1) states that the person who is a "victim" of the criminal act does not, unless the particular statute so states, share the guilt of the actor. This appears to be true even though the person is a "willing" victim and counseled commission of the crime. Thus, the victim of a blackmail plot who pays over money, even though he "aids" the commission of the crime, or the girl under age of consent in "statutory rape," even though she solicited the criminal act, or a woman upon whom an illegal abortion has been performed, are not deemed guilty of the substantive offense. Basically, this conforms to existing law and is unobjectionable. See In Re Vince, 2 N.J. 443, 450 (1949); State v. Thompson, 56 N.J.Super. 438, 444 (App.Div. 1959), rev'd on other grounds 31 N.J. 450 (1960).

The same principle is extended in Subsection (3)(2) to situations in which the person does not fit comfortably into the category of a victim. The Model Penal Code suggests such examples as these: Should a man accepting a prostitute's solicitation be guilty of prostitution? Should a woman upon whom a miscarriage is produced be guilty of abortion? Should a bribe-maker be guilty of bribery? (Model Penal Code comment at 35 (Tent. Draft No. 1, 1953)). In many situations, the scope of criminal liability, if extended in this fashion, might make law enforcement more difficult. Particularly as it applies

to bribery, it is submitted that the "victim" should be guilty of the offense, as provided under existing law. See State v. Begyn, 34 N.J. 35 (1961). In any event Subsection a(2) permits the extension of liability to such persons by provision of the particular statute defining the substantive offense. Hence, it is unobjectionable.

Subsection 3(4) permits an accomplice to escape liability for his acts if he satisfies the criteria for renunciation as defined in Section 2C:5-1(d), prior to commission of the offense. While not opposed in principle to this defense, it is urged that more affirmative action should be required of a defendant than is demanded under the proposed law. A further discussion of this subject is found in the comments to Section 2C:5-1(d).

Section 2C:2-8 deals with the defense of intoxication. The general rule adopted is that "intoxication of the actor is not a defense unless it negatives an element of the offense." This is in accord with existing New Jersey law.[27] The Code also follows existing law, albeit using different terminology, by providing that intoxication may either exculpate or mitigate guilt if the defendant's intoxication prevents his having formed a mental state which is a requisite element of the offense.[28] But currently, voluntary intoxication

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27 See State v. Maik, 60 N.J. 203 (1972); State v. Sinclair, 49 N.J. 525, 544 (1967); State v. Trantino, 44 N.J. 358 (1965).

28 See State v. Maik, supra; State v. White, 27 N.J. 158 (1958); N.J.S.A. 2A:113-4.

may only reduce first degree murder to second which carries a maximum term of 30 years imprisonment. Under the Code there is but one degree of murder, so voluntary intoxication would reduce murder to manslaughter, a second degree crime for which an ordinary term of five to eight years may be imposed. There is a serious question whether such a lenient sentence satisfies the demands of public security. While conceptually, as well as for humanitarian reasons, the intoxication provision is deemed advisable, it is urged that the maximum permissible sentence for a homicide committed while intoxicated should exceed that currently permitted.

One other aspect of this provision bears mention. Subsections (d)(1) and (2) provide that non-self induced intoxication and pathological intoxication are affirmative defenses which, if proven, exculpate the actor. As noted by the Commentary, instances where these defenses will be raised are rare and no reported New Jersey case deals with either. However, these provisions are consistent with general legal principles of criminal responsibility in that both defenses tend to negate the criminal intent and criminal act necessary to the imposition of penal liability. Hence this provision is unexceptionable.

Section 2C:2-9 permits the defense of duress to any crime except murder, in which case it is available only to reduce the degree of the crime to manslaughter. This Office generally agrees with the Code proposal but questions the wisdom of permitting the duress defense in murder cases to reduce the crime to manslaughter.

There is no statutory law at present in New Jersey concerning duress as a defense to a criminal act. Two New Jersey cases which discussed the issue left open the question of whether duress is generally a defense. See State v. Palmieri, 93 N.J.L. 195 (E. & A. 1919), and State v. Churchill, 105 N.J.L. 123 (E. & A. 1928). However, in State v. Dissicini, 126 N.J.Super. 565 (App.Div. 1974), aff'd o.b. 66 N.J. 411 (1975), the court expressly found that duress is not a defense to murder. The court found that "there is virtual unanimity in the view that duress is not available as a defense to a charge of that crime." Id. at 569.

The majority of states do not have statutory authority governing the defense of duress. However, where applicable statutes have been enacted, the common law rule that "no man can excise himself under the plea of necessity or compulsion for taking the life of an innocent person" [Arp v. State, 97 Ala. 5, 12, 12 South. 301, 308 (1893)], has generally been incorporated in the statutes, although a few enactments recognize extreme compulsion as an excuse in any situation. It appears that of nineteen states which have 'duress' statutes, nine exclude duress as a defense to any capital crime,[29] while three states expressly exclude

29 Arizona Rev.Stat.Ann., Tit. 13-134 (1956); Arkansas Stat.Ann. §41-117 (1947); Deering's California Penal Code §26(8) (1960); Colorado Rev.Stat.Ann., Ch. 40-1-11 (1963); Idaho Code, §18-201 (1947); Illinois Stat.Ann., Ch. 38, §7-11 (1961); Montana Rev. Code Ann., Tit. 94-201 (1947); Nevada Rev.Stat. §194.010 (1969); Utah Code Ann., Ch. 76-1-41 (1953).

the defense in murder cases.[30] Five states make no distinction between crimes as to the availability of the duress defense.[31] Wisconsin appears to be the only state which follows the Proposed Code and allows the defense in a homicide case to mitigate the offense to manslaughter. Wisconsin Stat.Ann. §939.46 (1950). Hawaii permits the defense only where the threat or imminent danger was of a greater injury than that inflicted. Hawaii Rev.Stat., Tit. 37 §703-5 (1973).

It is evident, then, that the great weight of authority in this country, whether by statute or case law, does not recognize duress as a defense to homicide. The reason appears to be that while most crimes committed under duress involve continuing acts, in which the damage may ordinarily be rectified once the actor is free of the other's power, murder falls in a different category. Since the harm done is irreparable, "society demands that one coerced turn on this threatener rather than take the life of an innocent third person." 11 Oklahoma Law Review, 288, 297 (1958). Also, it may be that one facing such a dilemma will be more inclined to resist the pressure brought to bear and hence save an innocent life, if faced with the

30 Louisiana Rev.Stat. §14-18 (1950); Minnesota Stat.Ann. §609.08 (1963); Washington Rev. Code Ann., Tit. 9.01.112 (1950).

31 Georgia Code Ann. §26:402 (1953); North Dakota Century Ann., Tit. 12-05-04 (1960); Oklahoma Stat.Ann., Ch. 21, §155, 156; South Dakota Code of Laws, §22-5-2, 2 (1962); Texas Stat.Ann. - Penal Code Art. 38 (1965).

realization that duress will not legally mitigate the act of murder. Therefore, it is submitted that while the question is not free from difficulty, duress should continue to be unavailable as a defense to murder.

While not deciding the general availability of the duress defense the court in Dissicini did note that generally the defense is available (with perhaps some isolated exceptions) to all other crimes. This is essentially the position of the Proposed Code. This Office agrees and finds this section satisfactory except as it deals with murder.[32]

A most controversial provision in this chapter is the "de minimus infraction" rule contained in Section 2C:2-11. This Section gives a court the power to dismiss a criminal prosecution, without the consent of the prosecutor if the court finds that the offense was de minimus, i.e., insignificant, within the customary license or tolerance not expressly negated by the victim nor inconsistent with the law, or where extraordinary and unanticipated mitigations for the conduct are present. The Commentary to the Code suggests that:

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32 An alternative treatment of the duress defense is suggested by the opinion in Dissicini at p.570-71 where the court cites the jury's finding of an intent to kill or an intent to inflict great bodily harm in support of its holding that the duress defense was properly excluded. It follows from applying general principles of liability and justification that one who acts under duress does not have the requisite mens rea or, viewed otherwise, has not committed a voluntary act and hence cannot be held criminally liable. Thus even without the inclusion of an affirmative defense of "duress" in the Code, it remains available by application of general principles of criminal law.

> It should be made clear 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 the traditional exercise of discretion by the prosecutor, the grand jury and the police. Commentary, p.75.

Nevertheless, it is felt that this Section would lend itself to the abuses disclaimed by the above quote.

It must be emphasized that this Office fully agrees with the Code that not all technical violations of the law should be prosecuted. Our position is simply that the decision whether to prosecute is one which should be left to the prosecutor. As noted in the comments to Section 2C:1-3(f), under current law, this is solely a prosecutorial function. While there is no express provision in our law permitting dismissal on de minimus grounds, it seems clear that such power is inherent in the office of the prosecutor. In State v. Winne, supra, the Court quoted extensively from the decision of the Supreme Court of Missouri in State ex rel. McKittrick v. Wallach, supra, as to the nature of the prosecutor's discretion. The language of that court goes far to negate the belief that a prosecutor cannot properly refuse to prosecute where "guilt" is clear. Yet more explicit language appears later in Winne where our Supreme Court observed that:

> A county prosecutor within the orbit of his discretion inevitably has various choices of action and even of inaction. This discretion applies as much to the seeking of in-

> dictments from the grand jury as it does from prosecuting or recommending a nolle prosequi after the indictment has been found, but he must at all times act in good faith and exercise all reasonably and lawful diligence in every phase of his work. Id. at 174.

Recent cases support the view that a prosecutor may refuse to present a matter to a grand jury even where there exists probable cause to believe that a criminal offense has been committed. While these decisions concern a prosecutor's discretion in determining which of several charges should be brought against an offender, by inference, they clearly support the right of a prosecutor not to prosecute de minimus violations.[33] In short it appears that prosecutors presently have the power to dismiss on grounds established in this section. It is submitted that no sound reason exists to transfer this power to the courts.

It should be noted that the courts already have the capacity to afford lenient treatment to those prosecuted for de minimus violations. They may impose lenient or probationary sentences, agree to a downgrading of the offense, or, on traditional principles of justification and culpability, grant an acquittal where the State's proofs fail to make out an offense. So too, the availability

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33 See State v. Hampton, 61 N.J. 250, 275 (1972); State v. States, 44 N.J. 285, 292 (1965); See also Kingsley v. Wes Outdoor Advertising Co., 59 N.J. 182, 189 (1971); State v. Reed, 34 N.J. 554, 572-73 (1961); State v. Covington, 113 N.J.Super. 229 (App.Div. 1971), aff'd 59 N.J. 536 (1971); State v. White, 105 N.J.Super. 234 (App.Div. 1969); State v. Milano, 94 N.J.Super. 337 (App.Div. 1967).

of pre-trial diversionary programs[34] and statutory expungement provisions[35] ameliorates the harshness of a conviction for a minor offense. In sum, the existing law has adequate provisions for dealing with de minimus infractions and there appears no valid reason for placing this function primarily on the courts.

Section 2C:2-12 provides for a defense of entrapment to all offenses except those causing or threatening bodily injury.[36] While the exact thrust of this provision is not entirely clear it appears to depart from existing law and is unsatisfactory in certain respects.

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34 See e.g. R. 3:28 and N.J.S.A. 24:21-27.

35 See N.J.S.A. 2A:164-28 (Expungement of record of criminal convictions); N.J.S.A. 2A:169-4 (Expungement of record of disorderly persons convictions); N.J.S.A. 24:21-28 (Expungement of record of drug offenses).

36 In pertinent part, this section provides:

> a. A public law enforcement official or 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 induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense by either:
>
> (1) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
>
> (2) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it ....

In Sorrells v. United States, 287 U.S. 435 (1932), the Supreme Court, in an opinion by Chief Justice Hughes, adopted what is commonly referred to as the "origin of intent" or "subjective" test for entrapment. Under that formulation the question is whether the accused is an "otherwise innocent" person who was lured into the commission of the offense through government instigation. Id. at 448. In other words, "Is the defendant a strayed lamb or an ensnared wolf?" Tentative Draft, Model Penal Code No. 9 at p.21 (1959). The subjective approach focuses on the conduct and propensities of the particular defendant in each individual case: If he is "otherwise innocent," he may avail himself of the defense; but if he had the "predisposition" to commit the crime, or if the "criminal design" originated with him, then -- regardless of the nature and extent of the government's participation -- there has been no entrapment. United States v. Russell, 411 U.S. 423, 439 (1973)(Stewart, J., dissenting) quoting Sorrells v. United States, supra, 287 U.S. at 451. The subjective theory of the defense of entrapment was reaffirmed in Sherman v. United States, 356 U.S. 369 (1958), and, more recently, in United States v. Russell, supra. Also in Russell, the Supreme Court squarely rejected the "objective" test which holds that entrapment is established when there is intolerable government involvement in a criminal enterprise, or improper police conduct. Since entrapment is a non-constitutional defense, state courts are not bound by the Supreme Court decisions on the issue. Yet, despite the opportunity

to experiment, most jurisdictions, including New Jersey, have followed the lead of the federal judiciary and adopted the subjective test for entrapment. State v. Dolce, 41 N.J. 422, 437-38 (1964); State v. Dennis, 43 N.J. 418, 425 (1964); State v. Johnson, 90 N.J.Super. 105, 116-17 (App.Div. 1965), aff'd 46 N.J. 289 (1966).

In view of this overwhelming authority favoring the subjective test it is difficult to comprehend why the Code elected not to follow prevailing law and chose instead what the Commentary calls an "intermediate" position. Under the proposed formulation the basic test for entrapment is whether police were "employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it .... " 2C:1-12(a)(2). This is in essence the "objective" test since it focuses on the "methods of persuasion or inducement" used by police rather than the defendant's own predisposition to commit the offense. It is true that on its face the provision appears also to contain an aspect of the subjective test by defining unacceptable police behavior in terms of whether it causes criminal offenses to be committed by "persons other than those who are ready to commit it .... " But upon closer reading it seems clear that by this language the Code does not put the defendant's own predisposition in issue, as it is under the subjective test. The issue remains one of police conduct and the predisposition-type language is merely descriptive of the type of conduct which is prohibited.

Thus this provision would permit one with a clear and uncontested predisposition to commit an offense and to successfully assert the entrapment defense where the conduct of the police is such that it might also have caused one who was not predisposed to commit the offense. This is a wholly undesirable result and it is for this reason that the objective test should not be adopted.

Specifically, the "objective test" is deemed ill-advised because it permits a defendant who had the requisite criminal intent and has committed a criminal act to escape conviction because of police misconduct. This result is defensible only if one accepts the basic premise that police misconduct can be controlled by the suppression of its fruits. Increasingly both the federal and State Supreme Court have questioned this premise. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (Powell, J., concurring); State v. Bissaccia, 58 N.J. 586, 588 (1971); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U.Chi.L.Rev. 665 (1970). While one cannot predict with certainty the course of future United States Supreme Court decisions, the trend is clearly against the expansion of the exclusionary rule. The proposed Code, however, would adopt the analogous, albeit more drastic rule, of vitiating the prosecution altogether, under the guise of controlling police behavior. It is submitted that no sufficient compensating gain in the reduction of undesirable police conduct will be realized to warrant adoption of the Code proposal. The focus should continue to be subjective; i.e. on the mind of the defendant.

If he has committed the necessary criminal act with the requisite mens rea, that should be deemed sufficient to complete the crime. That the police may have done wrong in no way justifies the criminal act of the defendant so long as the origin of the criminal intent arose from his mind. The subjective test, under the existing law, takes full cognizance of this fact, and therefore should continue.

Moreover, it is submitted that the values which the objective test seeks to protect are fully vindicated, albeit not under the entrapment defense, by virtue of the protection afforded defendants under the Due Process Clause of the United States Constitution. Truly egregious police conduct has, and will continue, to bar the State from involving judicial processes to obtain a conviction.[37] Thus, in addition to being of dubious conceptual merit, the "objective" standard of the Code does not afford significantly greater protection to defendant than does the present law. Change for its own sake should not be a goal of codification. Unless some purpose is served by modifying existing law, it should remain in force. Here the existing law is entirely satisfactory, protecting the valid interests of both the defendant and the State. In view of this, it is submitted that the Code proposal on entrapment is ill-conceived and should not be adopted.

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37 See Rochin v. California, 342 U.S. 165 (1953); United States v. Russell, supra. Cf. State v. Redinger, 64 N.J. 41 (1973).

CHAPTER 3 - GENERAL PRINCIPLES OF JUSTIFICATION

This Chapter describes the situations in which a person may use force upon another without being criminally liable for his conduct. The critical sections of this Chapter are 2C:3-4, 5, 6 and 7 which deal with self-defense, defense of others, defense of property and use of force in law enforcement, respectively. Each provides a detailed listing of circumstances describing when, and to what extent, force may be used and each is subject to the provisions of Section 2C:3-9 which details the circumstances under which justification is not available. Little purpose would be served by a detailed analysis of each subsection. It is simply not possible to anticipate the infinite variety of situations which could arise under each provision, or to anticipate all possible omissions or flaws. Only the course of judicial decisions in actual cases will tell whether the codification has adequately dealt with this area which has heretofore been within the exclusive domain of the common law.

Initially, it should be noted that in the earlier drafts of the Code, the general principles of justification were couched only in terms of the actor's actual belief in the necessity to use force. There was no requirement that the belief be reasonable. The latest draft, however, requires that the actor's belief be reasonable as well as actual. With the addition of this requirement this chapter is essentially consistent with existing law and, with the exceptions noted in the following comments, is deemed generally satisfactory.

Section 2C:3-6(b)(3)(a) permits use of deadly force if the actor believes that "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." The Commentary gives no further explanation of this provision. It is submitted that under these conditions there appears no threat to life or safety such as would warrant the use of deadly force. To the contrary, the aggrieved party appears to have an ample remedy through the normal legal process. It is urged that this provision cannot be reconciled with the general policy against use of deadly force and should be deleted.

Section 2C:3-7 also changes existing law on use of deadly force in law enforcement. The Code eliminates the line between felonies and misdemeanors for purposes of determining when deadly force is permitted to apprehend a fleeing offender. Rather, it permits an officer to use deadly force when three conditions are satisfied.[38] The third condition limits use of deadly force to apprehension of persons whom the officer believes has committed or

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38 The conditions are:

> (a) the person effecting the arrest is authorized to act as a peace officer or has been summoned by and is assisting a person whom he believes to be authorized to act as a peace officer; and
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> (b) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
>
> (c) the actor believes that the crime for which the arrest was made was homicide, kidnapping, rape, sodomy, arson, robbery, burglary of an occupied structure, or an attempt to commit one of these crimes.
> 2C:3-7(b)(2).

attempted any of seven enumerated crimes. The simplicity and ease of application is welcomed. The existing law is unsatisfactory in that many offenses technically denominated "felonies" appeared insufficiently serious -- at least in terms of their potential for physical harm to the public -- to warrant the use of deadly force to affect the arrest of the perpetrator. So too, it places on police the burden of determining which particular offenses are felonies and which are lesser offenses. This Section provides a more rational classification of offenses and clearly puts police on notice as to when deadly force can be used. As with any such listing of offenses, however, the question arises whether additional crimes should be included. Thus it might be well to consider whether serious physical assaults falling short of attempted murder, serious larceny offenses or weapons violations would also warrant the use of deadly force.

Paragraph c of this Section is subject to criticism on grounds that it limits the amount of force which may be used to prevent the escape of a person in custody after arrest (but prior to the confinement in prison) to that amount of force which could be used to effectuate the arrest in the first instance. The prevailing rule at common law seems to be that a person lawfully arrested or confined may be killed if that is necessary to prevent his escape, and no distinction is drawn between a felon and any other offender.[39]

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39 See 2 Bishop on Criminal Law (9th ed.), §§647 and 650; 4 Blackstone Comm. (7th ed.) 180. But see I Wharton's Criminal Law

It is felt that the Code properly declines to follow the rather harsh rule of the common law which would justify the killing of persons arrested for relatively trivial crimes should they attempt to escape custody. On the other hand the Code fails to make any distinction between one who flees prior to arrest and one who is already in custody and then seeks to escape. The latter appears to be more aggravated conduct, warranting the use of greater force, since it involves not only the natural desire to avoid apprehension in the first instance, but indicates a continuing unwillingness to allow the criminal process to run its course. Further, the present formulation takes no account of the manner in which an arrestee flees, or other facts which police may know about him which might warrant more severe measures to keep him in custody.

Of the numerous state statutes which define the right to use deadly force to prevent an escape, the New York Penal Law §35.30 appears to have achieved the best balance. The New York Code provides that an officer may use deadly force:

> to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes (i) has committed or attempted to commit a felony involving the use or threatened use of deadly physical force, or (ii) is attempting to escape by the use of a deadly weapon,

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39 (Cont'd)
(12th ed. §534), which states the rule as applicable only to a felon. See generally, Perkins, "The Law of Arrest," 25 Iowa L.Rev. 201 at 285 to 288 (1940); See also Note, 34 N.Car.L.Rev. 122 (1955).

> or (iii) otherwise indicates that he is likely to endanger human life or to inflict serious physical injury unless apprehended without delay; ...

Similar provisions appear in other codes; See e.g. California, West's Ann.Pen. Code §196(3) and Minnesota, M.S.A. §609.065.

Section ii and iii of the New York Code have no parallel in the proposed New Jersey Code. It is felt that they state significant factors which should properly be considered in determining whether a greater harm will result in permitting one who is arrested to go free, or permitting the use of deadly force to apprehend him. Certainly one who uses a pistol to make good his escape has amply demonstrated that he is a sufficient danger to the public to warrant use of deadly force to apprehend him. So too one who has committed a crime which is not included among the seven crimes which warrant use of deadly force (See 2C:3-7(b)(2)(c)) might have a past record of violent anti-social behavior of which police are aware and which creates a serious public danger. Under the present formulation police could not look to this information in determining what degree of force to use in apprehending the individual; they would be limited to the force permitted only to arrest for the latest offense. While there is a strong reluctance to extend the use of deadly force, the countervailing considerations of public safety appear to warrant its use under the circumstances here outlined. Hence, it is submitted that the Code should be modified to take account of such factors as are contained in the New York Code.

Section 2C:3-9(b) provides that when the actor is reckless or negligent in believing there is a need to use force against another, he may still avail himself of the justification provisions to reduce the grade of the offense to one for which recklessness or negligence suffices to establish culpability. This provision is not consistent with the general requirement of this chapter that the actor behave reasonably. It provides a windfall for one who fails to conform his conduct to prescribed standards and has a negative effect on deterring the illegal use of force. Hence it should not be adopted.

CHAPTER 4 - RESPONSIBILITY

In this chapter the Proposed Bill attempts to comprehensively deal with those situations in which it is considered that an accused cannot fairly be held criminally responsible for his actions. In doing so, it excuses mentally incompetent defendants from trial and, while abolishing insanity as a specific, separate defense, nevertheless provides for a post-trial procedure to determine the mental condition of those convicted by a jury of the charged offense, as well as the post-trial disposition of those individuals found to be mentally ill at the time of the offense. Section 2C:4-11 provides for exclusive jurisdiction over juveniles under 16 years old in the Juvenile and Domestic Relations Court, and creates a system of concurrent criminal and juvenile jurisdiction for those offenders who are either 16 or 17 years old.[40] Thus, the Proposed Bill collects in a single chapter all of the provisions which would prevent the imposition of criminal liability not because of the defendant's actions, but because of the type of person he is.

Under the Proposed Bill, substantial changes are made in both the trial and sentencing procedures of defendants heretofore considered insane. At the trial, the defense of insanity is abolished. No defendant, otherwise guilty, would

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40 Section 2C:4-11 codifies our present law in this area, and needs no further comment by this Office. See N.J.S.A. 2A:4-14 et seq.; Johnson v. State, 18 N.J. 422 (1955); State v. Monahan, 15 N.J. 104 (1954).

be excused of criminal liability because he did not know right from wrong. Rather, the chief issue for trial is whether he is guilty at all, i.e., has the State proven beyond a reasonable doubt all elements of the offense, including that the accused possessed the requisite mental state at the time of the commission of the crime. The jury, then, must be instructed to compare defendant's state of mind, regardless of its origin, against the mental element required to convict. In order to fully consider whether he possessed the requisite mental element at the time of the offense, psychiatric testimony as to his capacity or lack thereof to form the requisite state of mind must be admissible as circumstantial evidence of the presence or absence of mens rea. The application of this evidentiary rule (Section 2C:4-2a) establishes the constitutionality of the abolition of the defense of insanity, because the accused is given a full opportunity to establish his mental disability as an excusing condition for otherwise anti-social conduct; in fact, the State is required to disprove this "defense" beyond a reasonable doubt. This provision of the Proposed Bill, in effect, adopts the previous recommendation of this Office; moreover, since it codifies doctrines well established in our case law, it should be enacted as written. See State v. Sikora, 44 N.J. 453 (1965); State v. DiPaulo, 34 N.J. 279, 294-295 (1961).

Specific provisions of the Proposed Bill deal expressly with the commitment of an individual who has been

convicted of the offense charged against him. Section 2C:4-8. Following such conviction, the court may order a psychiatric examination of the defendant. If the court determines that the defendant, at the time of the offense, suffered from a mental disease or defect substantially impairing his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, it shall not impose sentence. Rather, the court shall either unconditionally release the defendant, conditionally release him under appropriate supervision, or commit him for an indeterminate term to an appropriate institution. However, the institutional term in the latter instance shall not exceed the maximum term of imprisonment which the law provides for the offense.

This Office is in substantial agreement with the above provision. While the court may order a psychiatric examination of the defendant, such an examination cannot entail institutionalization absent a finding of dangerousness. Once having determined that the defendant suffered from a mental disease or defect, the Bill provides for release or commitment consistent with the principles enunciated in State v. Krol, 68 N.J. 236 (1975) and State v. Carter, 64 N.J. 382 (1974). With respect to the maximum period of commitment, the maximum terms provided for by law are so long now that it is unlikely that a defendant would still be dangerous upon release; if he were, civil commitment procedures would be available. However, the State recommends a provision providing that if the defendant is to be released following the maximum period of commitment, the State and court be given 90 days notice in order to determine whether civil commitment proceedings should be instituted.

However, this Office disagrees with the new standard for determining criminal responsibility which abandons the traditional M'Naghton rule. In addition to revising the language to accord with modern usage, the Bill's standard broadens the cognitive test of M'Naghton and adopts a volitional capacity test as well. The term "defect" is added to "mental disease" in order to ensure that congenital and traumatic conditions as well as disease are included. While this Office does not object to the inclusion of the term "defect," it submits that the treatment of traumatic and congenital conditions will be similar under either the Proposed Bill or our present M'Naghton rule. The chief distinction between the Bill and the present law lies with the adoption of a volitional standard in addition to the cognitive one embodied in the present law: not only will an accused who cannot comprehend the nature of his actions or morality be exculpated, but also will he who, although knowing an act is wrong, commits it because he cannot control himself. Our Supreme Court has rejected the use of any jury charge phrased in terms of "irresistible impulse" because no foundation in scientific fact has established that it will serve the basic end of jurisprudence, i.e., the protection of society from grievous anti-social acts. State v. Lucas, 30 N.J. 37, 72 (1959). This Office adheres to this reasoning, and submits that to exculpate individuals who commit serious anti-social acts knowing their wrongfulness would be to abandon social sanctions on those people who require them most.

In the event that the Legislature chooses to enact the volitional capacity test, this Office believes that it is essential that a "caveat paragraph" also be enacted.[41] Its purpose is to preclude the habitual criminal who has no other significant symptom of mental illness. In practice, this section has served to exclude mere personality disorders, such as psychopathy, from being considered mental illness sufficient in seriousness to require the submission of the issue to the court. Our Supreme Court in State v. Sikora, supra, held that personality disorders were not "diseases of the mind" under the M'Naghton rule. Thus, by enacting the caveat paragraph, the Legislature would clearly express an intention that such individuals should not be held blameless merely because they "cannot help but follow a life of crime," and would limit the volitional capacity test to reasonable cases.

The Proposed Bill also provides for the release of those individuals committed by reason of disease or defect. Section 2C:4-9. The provision is generally satisfactory since it is consistent with the holding in State v. Krol, supra, concerning modification of institutionalization orders.

The Proposed Bill provides for a psychiatric examination of a defendant whenever there is reason to doubt his fitness

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41 This caveat provision would provide that, "as used in this Chapter, the terms 'mental disease or defect' do not include abnormality manifested only by repeated criminal or other repeated, wrongful conduct."

to proceed. Section 2C:4-5. As such, it reflects the procedure presently contained in N.J.S.A. 2A:163-2. If necessary, the court may order him committed to a suitable institution for purpose of the examination for a period not to exceed 30 days. However, the authority vested in the court to commit the defendant for observation, absent a finding of dangerousness, would appear to be constitutionally defective. See Greenwood v. United States, 350 U.S. 366 (1956), requiring a finding of dangerousness before an individual could be committed after being found incompetent to stand trial. Although commitment under the Proposed Bill applies prior to a determination of incompetency, the constitutional safeguard requiring a finding of dangerousness would appear to apply in this situation as well. Consequently, this Office cannot recommend the 30-day commitment provision absent a finding of dangerousness.

The Proposed Bill establishes the framework within which the issue of a defendant's competency to stand trial is determined. Section 2C:4-6. If the court determines that the defendant lacks the capacity to proceed to trial, the proceeding is suspended and the dangerousness of the defendant must be determined; if not found to be dangerous he shall be released; if found to be dangerous he shall be placed in an appropriate institution. However, any institutionalization can only be for that period of time necessary to determine whether it is substantially probable that the defendant could regain his competence in the foreseeable

future. If he has not regained his competence within 12 months, the court shall dismiss the charges and either release him or commit him to an appropriate institution pursuant to civil commitment provisions.

This Office is in substantial agreement with the above provisions. As previously noted, despite having found a defendant incapable of standing trial, the court cannot institutionalize such a person absent a finding of dangerousness. Moreover, Jackson v. Indiana, 406 U.S. 715, 733 (1972), indicates that due process may be violated by indefinitely retaining pending criminal charges against an incompetent; in fact, several courts have specifically found a violation of both due process and the right to a speedy trial caused by a delay in trial occasioned by an accused's incapacity. See e.g., United States ex rel. Little v. Toomey, 477 F.2d 767 (7 Cir. 1973), cert. den. 414 U.S. 846 (1973); United States v. Jackson, 306 F.Supp. 4 (N.D. Cal. 1969). While the particular facts of each case would determine whether an accused's constitutional rights were violated when pending criminal complaints became stale because of incompetence, the Bill's provision establishing a maximum commitment period of 12 months after which pending charges must be dismissed would prevent any possible constitutional violation. Nevertheless, this Office recommends that, rather than expressly defining a time period, the facts of each particular case govern the length of institutionalization, while indicating to trial courts

that they should be ever sensitive to prejudice accruing to an accused by the delay in trying the charge against him. In any event, the central issue to be determined during the defendant's commitment is whether he will regain competence in the foreseeable future; if there is not a substantial probability of attaining competence, continued commitment would violate the principle enunciated in Jackson.

If the court determines that the defendant has not regained his competence, it may either institute civil commitment proceedings or release him, dependent upon a finding of the defendant's dangerousness. If it is not substantially probable that the defendant will regain his competence in the foreseeable future, the court may dismiss the charge and either discharge him or institutionalize him pursuant to civil commitment provisions.

This Office is in substantial agreement with this provision of the Proposed Bill as remedying a serious defect presently embodied in N.J.S.A. 2A:163-2 and case law. At present, when a court determines that a defendant will not regain his competence in the future, the court hears and determines the issue of sanity at the time of the offense, despite the defendant's inability to assist in his defense due to continued incompetence. Aponte v. State, 29 N.J. 278 (1959); Farmer v. State, 42 N.J. 579 (1964). The Proposed Bill changes this, requiring a dismissal of charges and a civil commitment of the defendant if appropriate due to a finding of dangerousness. As such, it serves to prevent any possible constitutional objection to a defendant's commitment.

Section 2C:4-10 embodies the view that expert knowledge of the mental condition of an individual acquired through court-ordered examination or treatment should be fully available in evidence in any proceeding where his mental condition may properly be in issue. Accordingly, to safeguard the individual's rights and to effectuate the feeling of confidence essential for effective psychiatric diagnosis and treatment, the provision prevents a defendant's statements made for this purpose from being placed into evidence on any other issue. This Office substantially agrees with the substance of the provision, which reflects current case law on the subject. State v. Whitlow, 45 N.J. 3, 15-17 (1965); State v. Lucas, supra. See also State v. Obstein, 52 N.J. 516 (1968). However, a question exists over whether a defendant's statement should and could be utilized for impeachment purposes against the defendant.

CHAPTER 5 - INCHOATE CRIMES

Section 2C:5-1 codifies the law of criminal attempt. Currently the definition of this crime is found exclusively in the case law:

> An attempt to commit a crime is an act done with intent to commit it beyond mere preparation but falling short of its actual commission.
>
> The overt act or acts must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself.
> *** State v. O'Leary, 31 N.J.Super. 411, 417 (App.Div. 1954).[42]

In place of this "probable desistance" test, the Code lists three circumstances which constitute a criminal attempt. The most significant provision is paragraph (a)(3) which adopts the "substantial step" test.[43]

The problem under the existing law has been the question of when preparation ceases and commission of the attempt begins. In the Code the basic question becomes whether a particular act is "a substantial step" in the course of conduct which the defendant plans to culminate in the

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42 See also State v. Schwartzbach, 84 N.J.L. 268 (E. & A. 1913); State v. Welek, 10 N.J. 355 (1952); State v. Moretti, 52 N.J. 182 (1968); State v. Thyfault, 121 N.J.Super. 487 (App.Div. 1972).

43
> Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in the course of conduct planned to culminate in his commission of the crime.

commission of the crime. 2C:5-1(a)(3). Thus, while the terminology has changed, it does not make the inquiry easier; courts must still make essentially the same determination based on the facts of each case.

While conceptually, this new test is deemed satisfactory, there is a serious deficiency in the manner in which this provision is drafted. In its present form 2C:5-1(1), in its entirety, provides:

> b. Conduct which may be held substantial step under subsection a. (3). Conduct shall not be held to constitute a substantial step under subsection a. (3) of this section unless it is strongly corroborative of the actor's criminal purpose.

No other guideline is provided as to the type of conduct in question.

However, the prior draft of this provision was far more comprehensive and clearly preferable to the present version. In addition to the above quoted provision, the prior draft listed seven categories of conduct which, as a matter of law, were deemed sufficient to withstand a motion for judgment of acquittal.[44]

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44 The prior draft provided as follows:

> b. Conduct Which May Be Held Substantial Step Under Subsection a(3). Conduct shall not be held to constitute a substantial step under subsection a(3) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

This listing had the salutory effect of providing concrete examples of the type of conduct intended to fall within the purview of the statute. The provision as it presently exists contains only highly abstract language which provides little meaningful guidance.

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44 (Cont'd)

> (1) lying in wait, searching for or following the contemplated victim of the crime;
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> (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
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> (3) reconnoitering the place contemplated for the commission of the crime;
>
> (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
>
> (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
>
> (7) soliciting an agent, whether or not innocent, to engage in specific conduct which would constitute an element of the crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

Also, the deleted portion of the statute makes it clear that the attempt statute covers certain highly dangerous conduct which, on general principles of the law of attempt, might be held insufficient to constitute the crime.[45]

Finally, the attempt provision follows existing law in our State by rejecting the defense of impossibility, whether factual or legal. See State v. Moretti, supra. Again it is felt that this is the proper result since the fortuitous circumstance that the consequence sought could actually not occur in no way detracts from the culpability of the defendant. In sum, the Code's treatment of the law of attempt is generally satisfactory except insofar as it deletes the listing of the seven items contained in the earlier draft.

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45 For example the Commentary states that this provision would overrule cases such as People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (Ct. App. 1927). In that case defendant and his confederates, all armed, were driving through the streets of an area of New York searching for one Rao, a payroll clerk, whom they planned to rob of about $1200. They were not able to find their victim and their suspicious activities attracted the police who apprehended them after a period of surveillance. The Court of Appeals reversed the conviction of attempted robbery on grounds that the defendants' acts constituted mere preparation.

It seems clear that such conduct should be punished as an attempt. The defendants' criminal intent was plain and they had taken all steps within their power to commit the crime. The Code quite properly holds this to be an attempt. See 2C:5-1(b)(1).

However, the renunciation provision, 2C:5-1(d), bears further comment.[46] Initially it should be noted that some have questioned the advisability of such a provision altogether on grounds that, "[k]nowledge that criminal endeavors can be undone with impunity may encourage preliminary steps that would not be undertaken if liability inevitably attached to every abortive criminal undertaking that proceeded beyond preparation." Commentary at p.125. And conceptually there is some question whether remorse on the part of the defendant after he has taken sufficient

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46 This Section provides:

> When the actor's conduct would otherwise constitute an attempt under subsection a(2) or (3) of this section, it is an affirmative defense which he must prove by a preponderance of the evidence that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.
>
> Within the meaning of this Chapter, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim. Renunciation is also not complete if mere abandonment is insufficient to accomplish avoidance of the offense in which case the defendant must have taken further and affirmative steps that prevented the commission thereof.

steps to complete a criminal attempt, should excuse the crime. With completed substantive crimes it does not. But on the other hand with inchoate crimes such as attempt the actual injury, i.e. the crime attempted, has not yet occurred, so there is a basis for distinguishing them. Also, the general common law rule is that neither voluntary nor involuntary abandonment is a defense.[47] The analagous doctrine of withdrawal in the law of conspiracy, is likewise rejected as a defense to that crime.[48] See Abbate v. United States, 247 F.2d 410, 413 (5 Cir. 1947), aff'd 359 U.S. 187 (1959). Further, in the related area of aiding and abetting, New Jersey cases reject the defense of termination of complicity (i.e. renunciation) and require the defendant to 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). Thus

47 See I Wharton's Criminal Law §226 (12th ed. 1932); Perkins on Criminal Law 510 (1957). But see People v. Von Hecht, 133 Cal.App.2d 25, 283 P.2d 764 (1955); Weaver v. State, 112 Ga. 550, 42 S.E. 745 (1902); and Le Barron v. State, 32 Wis. 294, 145 N.W.2d 79 (1966).

48 It may, however, have other consequences as to the withdrawing conspirator, such as starting the running of the statute of limitations as to his participation in the conspiracy (Hyde v. United States, 222 U.S. 347, 396 (1912)); preventing attribution to him of those substantive crimes committed after his withdrawal (Glazerman v. United States, 421 F.2d 547 (10 Cir. 1970), cert. den. 398 U.S. 928 (1970)); and preventing admission into evidence against him the declarations of other conspirators made after his withdrawal (United States v. Keenan, 267 F.2d 118, 126 (7 Cir. 1959); United States v. Augeci, 310 F.2d 817, 839 (2 Cir. 1962)).

in permitting this defense the Code departs radically from existing law.

Nevertheless, this Office is not opposed in principle to the defense of renunciation. Imposition of a criminal sanction on one who voluntarily abandons his criminal efforts probably serves no useful purpose. Also, it might be argued that the threat of punishment even after abandonment would tend to discourage one from desisting in the crime. Stated otherwise, if he is to be punished anyway, a defendant will have less incentive to stop short of consummating the offense. Furthermore, since the completed crime in fact did not occur, the public's interest in retribution is slight. Thus, on balance, it is felt the defense of renunciation serves a useful purpose and should be included in the Code.

Section 2C:5-2 codifies the law of conspiracy and makes several noteworthy changes in the existing law.[49] The

49 Under existing law conspiracy may be prosecuted either as a common law or statutory offense. See N.J.S.A. 2A:85-1 and N.J.S.A. 2A:98-1, respectively. Also conspiracies directed at public bidding may be prosecuted under N.J.S.A. 2A:98-3 and 4 and narcotics conspiracies under N.J.S.A. 24:21-24. The Code defines conspiracy as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

most serious shortcoming in the Code's treatment of this area is the requirement that the conspiratorial objective must be a crime. Presently, the law in our State holds that:

> It is not requisite, in order to constitute a conspiracy at common law, that the acts agreed to be done be such as would be criminal if done; it is enough if the acts agreed to be done, although not criminal, be wrongful, i.e., amount to a civil wrong. *** The gist of the offense of conspiracy lies, not in doing the act, nor effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. The offense depends on the unlawful agreement and not on the acts which follow it .... State v. Carbone, 10 N.J. 329, 337 (1952).

This is in accordance with the overwhelming weight of authority throughout the country.[50] It is submitted that this rule should be continued and that its modification by the Code is not in the public interest. By eliminating criminal sanctions against conspiracies having as their object a broad variety of civil wrongs such as business torts, tortious interference with contract, price fixing, consumer frauds, certain offenses against the public health and welfare, malicious prosecution, perversion of the voting laws, etc., may be criminally punished.[51]

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50 See Model Penal Code, Tent. Draft No. 10 (1960); App. B to §5.03 at 162-167, for a complete table of conspiracy statutes.

51 See e.g. N.J.S.A. 2A:98-1; State v. Western Union Telegraph Co., 13 N.J.Super. 172 (Cty.Ct. 1951), aff'd 12 N.J. 468 (1953), appeal dismissed 346 U.S. 869 (1954); State v. O'Brien, 136 N.J.L. 118 (Sup.Ct. 1947); State v. Ellenstein, 121 N.J.L. 304 (E. & A. 1938); State v. Continental Purchasing Co., 110 N.J.L. 257 (Sup.Ct. 1938), aff'd 121 N.J.L. 76 (E. & A. 1938); State v. Bienstock, 78 N.J.L. 256 (Sup.Ct. 1909); State v. Loog, 13 N.J.Misc. 536

Under the code provisions, however, none of these objectives would be sufficient to render a conspiracy criminal.

Furthermore, under the Code, conspiracies formed for the commission of disorderly persons offenses would not be criminal. Since numerous offenses which are now crimes are down-graded to disorderly persons offenses in the Code, this would further serve to emasculate the law of conspiracy. For example, certain false swearing, usury, and larceny offenses would be disorderly persons offenses under the Code. See 2C:20-2(6)(3); 2C:28-3; 2C:21-19. Conspiracy to commit any of these offenses would no longer be a crime. It is submitted that the underlying rationale of the law of conspiracy -- i.e. recognition of the greater danger to society from unlawful group activity -- militates against adoption of the Code proposal. So long as a group engages in unlawful conduct of any sort, whether the conduct is civilly or criminally wrong, there is a danger to society beyond that which arises from the conduct of a single individual. The offense of conspiracy as presently formulated in the Code fails to take acocunt of this fact and should be modified.

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51 (Cont'd)
(Sup.Ct. 1935), aff'd 117 N.J.L. 442 (E. & A. 1936); State v. Hickling, 41 N.J.L. 208 (Sup.Ct. 1879); Patterson v. State, 62 N.J.L. 82 (Sup.Ct. 1898); State v. Minch, 10 N.J.Misc. 881 (Sup.Ct. 1932); Board of Education Borough of Union Beach v. New Jersey Education Association, 53 N.J. 209 (1965); State v. Naglee, 44 N.J. 209 (1965), rev'd on other grounds 385 U.S. 493 (1966); State v. Nugent, 77 N.J.L. 84 (Sup.Ct. 1909).

In Section 2C:5-4(b), the Code has attempted to alleviate the widely disparate sentencing provisions for inchoate crimes. That section provides that the court may impose a sentence for a crime or offense of a lower grade or degree, or in extreme cases, it may dismiss the entire prosecution. A similar provision with general applicability (2C:43-11) has been deleted from the Code upon the recommentation of this Office. It is strongly urged that Section 2C:5-4(b) likewise be deleted from the Code. As this section applies to conspiracy, it is especially offensive since it would allow one who has engaged in a conspiracy to escape the consequences of that crime if it is later found that the conspiracy was inherently unlikely to result or culminate in the commission of a crime, or that a particular defendant was peripherally related to the main unlawful enterprise. See also, Comment on De Minimus Infractions, 2C:2-11. These "mitigating" factors do not serve the purpose of deterrence and are not in the public interest. Rather the degree of culpability of a given individual is a factor which traditionally has, and will continue to be, considered by the court in sentencing a defendant for the particular crime he has committed. Rationally it does not serve to work on expurgation of the crime altogether or to lessen its degree. Thus, it is submitted that the mitigation provision, as it presently exists, should be deleted.

SUBTITLE II - DEFINITION OF SPECIFIC OFFENSES

CHAPTER 11 - HOMICIDE

The proposed Code alters both the structure and substance of current homicide laws. At present, homicide constitutes either first or second degree murder or manslaughter. Murder is defined as an unlawful homicide distinguished by an element of "malice." State v. Brown, 22 N.J. 405 (1950). Pursuant to N.J.S.A. 2A:113-2, first degree murder encompasses four situations:

> (1) Murder by means of poison, lying in wait, or willful, deliberate, and premeditated killing.
>
> (2) Murder committed while perpetrating the crime of arson, burglary, kidnapping, rape, robbery or sodomy.
>
> (3) Murder committed while resisting arrest or effecting or assisting an escape.
>
> (4) Murder of a law enforcement officer acting in the execution of his duties, or a person assisting such officer.

The penalty for first degree murder is life imprisonment. N.J.S.A. 2A:113-4. (At the time of this writing, capital punishment is not a viable sentencing alternative in New Jersey. See State v. Funicello, 60 N.J. 60 (1972)).

Second degree murder is a rather amorphous concept, consisting of those murders which do not rise to the level of a first degree offense. N.J.S.A. 2A:113-2. The punishment for this crime is incarceration for no more than 30 years. N.J.S.A. 2A:113-4. Manslaughter, which is not defined by the existing statute, has been characterized as "the unlawful killing of another without malice, either express or implied,

which may be either voluntary, upon a sudden heat of passion, or involuntary, but in the commission of some unlawful act." State v. Brown, supra, at 411. Manslaughter is punishable by a fine not to exceed $1,000, or by imprisonment for not more than ten years, or both. N.J.S.A. 2A:113-5.

The Code divides criminal homicide into three separate offenses: murder, manslaughter, and negligent homicide. 2C:11-2(b). Murder, a crime of the first degree, encompasses any homicide committed "purposely," "knowingly," or during the commission of certain enumerated felonies. 2C:11-3(a)(1), (2), (3). This offense encompasses both first and second degree murder under present law. A person convicted of murder may be sentenced either to a term of 30 years, of which 15 years must be served before parole may be granted, or to a maximum term of 30 years.

The Code replaces the terms of art traditionally used by our courts in describing the requisite mental condition of the defendant. First degree murder is now defined in terms of "willful, deliberate and premeditated" conduct. State v. Washington, 60 N.J. 170 (1972). Although the Code implies that conceptually the terms "purpose" and "knowledge" were intended to comply with the definition of first and second degree murder, it is apparent that they are not synonymous with the traditional concepts. The description of a mental state is not an easy task. It may be questioned whether terms of art, which have been carefully refined by the judiciary, should be replaced with standards heretofore alien to the law of homicide. The same rationale applies to the term "malice," which has also

been eliminated from the Code.

The traditional concept of felony-murder in New Jersey has also been altered. Although it retains provisions similar to present laws,the offense has been diluted by the inclusion of an affirmative defense allowing the defendant to prove that he did not cause the death, was not armed with a deadly weapon, did not have reasonable ground to believe that any other participant was so armed, and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious injury. 2C:11-3(a)(3)(a),(b),(c),(d).

The availability of this affirmative defense is inconsistent with the accepted doctrine that an aider and abettor is guilty as a principal. Furthermore, the restrictive aspect of the proposed felony-murder provision is in direct contravention with the expansion of liability in this area by our courts. See e.g., State v. Kress, 105 N.J. Super. 514 (Law Div. 1967); State v. McKeiver, 89 N.J.Super. 52 (Law Div. 1965). This concept, which arose from the common law, has never been weighed in terms of the actual predictability of the homicidal risk. Rather, its purpose was to deter those who might entertain the thought of committing dangerous felonies. The concept has been applied strictly against those who insist upon creating the risks inherently attendant upon the commission of such crimes. Thus, it is preferable that the traditional codification of the felony-murder rule be retained without the inclusion of the affirmative defense now incorporated in Chapter 11.

One previously ill-defined aspect of the felony-murder doctrine is clarified by the Code by expressly providing that the death of a participant in the felony will not sustain an ensuing charge of felony murder. 2C:11-3(a)(3). The courts in this jurisdiction have reached diverse results in considering this issue under the current legislation. See State v. Canola, 135 N.J.Super. 224, 234-36 (App.Div. 1975) (defendant is guilty of felony-murder due to killing of coparticipant by victim of armed robbery); State v. Burton, 130 N.J.Super. 174, 181 (Law Div. 1974) (liability for felony-murder arises from deaths of coparticipants in gun battle with police during armed robbery); State v. Suit, 129 N.J.Super. 336, 349-50 (Law Div. 1974) (slaying of coparticipant by victim of armed robbery does not constitute felony-murder under N.J.S.A. 2A:113-1). The decision to exclude the death of a coparticipant from the scope of the felony-murder provision is a rational extension of the philosophy underlying this age-old doctrine. The concept is explicitly designed to penalize the endangerment of innocent persons arising from the determination of the perpetrators to impose their unlawful will upon some element of the community. It therefore seems entirely consistent to consider that voluntary participants in the offense assume the risk of any deleterious effects which result from the incident.

Manslaughter, a crime of the second degree, is a homicide committed "recklessly" or "in the heat of passion resulting from a reasonable provocation." 2C:11-4. The presently existing rule encompassing voluntary manslaughter is

based upon an identically phrased "heat of passion" concept which has been well-refined by our courts. See e.g., State v. King, 37 N.J. 285, 299 (1962). This segment of the manslaughter provision remains a viable tool, and is properly included in the new Code.

"Recklessness" is defined in 2C:2-2(b)(3) as a conscious disregard of a substantial and unjustifiable risk, constituting "a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." On the other hand, Section 2C:11-5 creates a crime of the fourth degree labeled "negligent homicide," which is defined in terms of a failure to perceive a risk, constituting "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." 2C:2-2(b)(4).

The juxtaposition of the terms "reckless" and "negligent" in these two provisions is an unnecessarily confusing attempt to designate two entirely different offenses. The distinction between the two concepts is not readily apparent, and the somewhat convoluted definitions in Chapter 2 are not entirely illuminating. The possibility of confusion between these offenses is enhanced by the current use of the term "reckless" in definitions of criminal negligence. State v. Weiner, 41 N.J. 21, 26 (1963). There is no apparent reason why the established offenses of voluntary and involuntary manslaughter should not be substituted for Sections 11-4 and 11-5 of the Code. Those crimes seem to effectuate the underlying goals of the new provisions without linguistic complications. Moreover, the

traditional concepts already have been crystalized by our courts, thereby facilitating implementation of the laws. See State v. Bonano, 59 N.J. 515, 523 (1972).

The last provision in Chapter 11 creates an offense of purposefully aiding suicide. 2C:11-6. If the aider's conduct actually causes a suicide or an attempted suicide, a crime of the second degree occurs, otherwise the assistance constitutes a fourth degree offense. This provision is closely related to the highly sensitive and volatile legal area involving mercy killing and the question of an individual's right to die. Although exercise of sentencing discretion may prevent extreme injustice in particularly tragic cases, perhaps the gradation of these offenses should be reevaluated in light of the probable reluctance of juries to convict persons of wrongdoing under circumstances eliciting popular sympathy.

The Code includes no specific provision concerning vehicular homicide. Existing legislation penalizes "any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willfull or wanton disregard of the rights or safety of others...." N.J.S.A. 2A:113-9. This offense is punishable by a fine of not more than $1,000 and/or imprisonment for a maximum of three years. N.J.S.A. 2A:85 7. The Code apparently would place the prosecution of such offenses under Section 2C:11-5, which makes "negligent homicide," a crime of the fourth degree carrying a penalty of up to 18 months imprisonment. Section 11-5 covers inadvertent acts which should have been recognized as a "gross deviation" from a reasonable standard of care. Thus, behavior committed

while the actor is too intoxicated to form the requisite mens rea for an intentional homicide, would nevertheless violate this Section. It does appear, however, that under certain circumstances a manslaughter charge could be sustained. For example, a defendant who drives to a bar to spend the evening drinking, knowing full well that he will become intoxicated, is voluntarily choosing to operate a motor vehicle while under the influence of alcohol. Thus, he perceives the risk of driving while impaired but elects to disregard it.

It should also be noted that the Code eliminates the special sanction currently imposed for killing a law enforcement officer acting in the execution of his duty. N.J.S.A. 2A:113-2. This omission could be rectified by a provision requiring the imposition of the more severe of the two sentence, alternatives established by 2C:11-3(b) in such situations. Thus, law enforcement officials would be protected by the deterrent effect of a mandatory minimum sentence of 15 years imprisonment.

CHAPTER 12 - ASSAULT; RECKLESS ENDANGERING; THREATS

This chapter integrates and simplifies the presently disjointed series of statutory offenses prohibiting assault, battery, aggravated assault, mayhem, and similar conduct.[52] The new Code delineates two broad categories of assault:

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52 The various statutes supplanted by this chapter of the Code are: N.J.S.A. 2A:148-6, 90-1 through 4, 125-1, 99-1, 101-1, 129-1, 170-26 and 170-27.

(a) simple assault is a disorderly persons offense unless committed in a fight commenced by mutual assent, in which case it is a petty disorderly persons offense; and (b) aggravated assault encompasses numerous provisions, ranging in severity from crimes of the second degree to offenses of the fourth degree. Basically, simple assault is couched in terms of attempted or actual infliction of bodily injury, while aggravated assault involves serious bodily injury, as well as all assaults upon uniformed law enforcement officers while on duty.

One substantial change from the existing law is especially noteworthy. Currently, the slightest touching or offensive contact constitutes a battery. State v. Maier, 13 N.J. 325 (1953). The Code eliminates this rule, finding that "mere offensive touching is not sufficiently serious to be made criminal, except in the case of sexual assaults...." Commentary, p. 175.

The Code has further streamlined the present law by excising the offense of assault with the intent to commit another serious crime, e.g., murder or rape. N.J.S.A. 2A:148-6, 90-2, 90-3, 125-1. Such offenses are treated as attempts to commit the substantive crime and for the most part are graded as crimes of the second degree. 2C:5-4a.

The Code also assimilates various New Jersey statutes into an offense entitled "terroristic threats," which makes it a crime of the third degree for one to threaten to commit any crime of violence with the purpose to terrorize another, or to cause evacuation of a building, or, in general, to cause public inconvenience by terror or alarm. 2C:12-3. The scope of

this provision is confined to actions calculated to cause serious alarm for one's personal safety, as may arise from letters or anonymous telephone calls threatening death, kidnapping or the like. It is not meant to treat such offenses as extortion and bribery which are dealt with elsewhere in the Code. However, the term "public inconvenience" might be considered unduly broad and thus be the subject of constitutional objections.

CHAPTER 13 - KIDNAPPING AND RELATED OFFENSES: COERCION

2C:13-1 - KIDNAPPING

2C:13-2 - CRIMINAL RESTRAINT

2C:13-3 - FALSE IMPRISONMENT

2C:13-4 - INTERFERENCE WITH CUSTODY

2C:13-5 - CRIMINAL COERCION

Under present law, false imprisonment is defined as the unlawful detention of a person. Earl v. Winne, 14 N.J. 119 (1953). Kidnapping has been held to be the most aggravated species of false imprisonment, elevated from false imprisonment by the element of asportation. State v. Dunlap, 61 N.J.Super. 582 (App.Div.1960), cert. den. 368 U.S. 903 (1961).

Over the years, as our courts have become more and more concerned for the safety of the victim, the asportation requirement has been construed to be satisfied by the most minimal movement, including that incidental to defendant's commission of another crime. State v. Hampton,

61 N.J. 250,275 (1972). The Code takes this gradual evolution to its logical conclusion by eliminating the element of asportation and focusing on the nature and purpose of the confinement, and the danger to the victim.

Thus, an individual is guilty of kidnapping if he unlawfully removes another from where he is found or unlawfully confines another for the purpose of holding that person for ransom, using him as a shield or hostage, facilitating the commission of a crime, inflicting bodily injury upon or terrorizing the victim, or interfering with the performance of a governmental function. 2C:13-1. Since asportation is no longer required, kidnapping will apply to situations where an individual is seized as a hostage (e.g. during a bank robbery, or prison riot), but not moved from the site.

If an individual restrains another in circumstances exposing the other to risk of bodily injury, or holds another in a condition of involuntary servitude, he commits the crime of criminal restraint. 2C:13-2. Finally, if the offender merely restrains another, intentionally, so as to interfere substantially with his liberty, he is guilty of false imprisonment.

The penalties reflect the shift in emphasis to the safety of the victim. A first degree penalty is assigned to the crime of kidnapping unless the offender voluntarily releases his victim unharmed and in a safe place prior to apprehension, in which case a second degree

penalty is incurred. This provision, therefore, provides an incentive for the kidnapper to treat the victim well and to release him uninjured. Criminal restraint is a crime of the third degree, while false imprisonment is a disorderly persons offense. Thus, the Code delineates three crimes in descending order of seriousness premised upon the danger to the victim and the danger to the community.

The Code proscribes the interference with custody of minors and is designed to supplement the protection afforded by the previously discussed sections. 2C:13-4(a). As noted in the Commentary at 188, "[t]he interest protected is not freedom from physical danger or terrorization by abduction, since that is covered by Section 2C:13-1, but rather the maintenance of parental custody against all unlawful interruption, even when the child itself is a willing, undeceived participant in the attack on this interest of its parents."

An individual is prohibited from knowingly taking or enticing a child under the age of 18 from the custody of its parent or guardian. If the child is over 14 and is taken away with his consent and without any purpose to commit a crime against or with the child, there is no violation. Similarly if the actor believed that his action was necessary to protect the child from danger, the crime has not been committed.

A parent who takes his child while engaged in a custody battle with the other parent, has committed a disorderly persons offense. If the perpetrator is not a parent and acted with the knowledge that his conduct would cause serious alarm for the child's safety, it is a crime of the fourth degree.[53]

While the above discussed provisions penalize actual, physical restraints upon the freedom of an individual, 2C:13-5 is aimed at psychic forms of restraint. Under this provision, a person is guilty of coercion if with intent to unlawfully restrict another's freedom to engage or refrain from engaging in conduct, he threatens to inflict bodily injury, to expose a damaging secret, to accuse the other baselessly of an offense, or to do some other harmful act. Included within this provision is a section, 2C:13-5a (4), which essentially codifies common law extortion, i.e., a public official coercing an individual by threatening to take or withhold official action. However, it is a defense if the actor believed that the information he threatened to reveal was true or if he acted in good faith. This section is a companion to 2C:20-5, Theft by Extortion, which proscribes the obtaining of another's property by use of the same types of threats set forth in 2C:13-5.

It is suggested that 2C:13-5(b), the penalty section of this provision, be redrafted. It appears to

53 See State v. Stocksdale, __ N.J.Super. __ (Cty.Ct.1976) discussing the problem of applying our present kidnapping law to custody disputes.

distinguish between simple coercion (a fourth degree offense), and coercion when the underlying threat is to commit a crime of more than the fourth degree (a third degree penalty). However, the present wording is unclear.

CHAPTER 14 - SEXUAL OFFENSES

The Code decriminalizes all sexual practices not involving force, adult corruption of minors, or public offenses. Thus currently existing prohibitions against adultery (N.J.S.A. 2A:88-1) and fornication (N.J.S.A. 2A:110-1) are eliminated. See State v. Saunders, 130 N.J.Super. 234 (Law Div. 1974) which is presently pending before the Appellate Division. Similarly, the proposed provisions[54] dealing with sodomy (currently regulated by N.J.S.A. 2A:143-1) and oral sexual acts (now apparently encompassed by the private lewdness statute, N.J.S.A. 2A:115-2) are limited to exclude prosecution of all such activities involving consenting adults and occurring in private. This major revision of the law is a necessary and appropriate reflection of the now widely held belief that sexual practices conducted in private by or between consenting adults do not constitute a threat to the secular interests of society.

Initially, it must be emphasized that this chapter differs from present laws in numerous aspects. Currently, N.J.S.A. 2A:138-1 prohibits the "carnal knowledge of a woman forcibly against her will."[55] This statute defines rape as the actual penetration of the sexual organ of the female by the sexual

54 2C:14-1 and 2, discussed in detail infra.

55 N.J.S.A. 2A:138-1 also penalizes carnal knowledge of a woman while she is under the influence of any narcotic drug, as well as carnal abuse, whether consensual or forced, of a female under the age of 12 (30 year maximum penalty) or between the ages of 12 and 16 (15 year maximum penalty).

organ of the male. State v. Bono, 128 N.J.Super. 254, 259 (App.Div. 1974). The offense is a high misdemeanor punishable by a maximum fine of $5,000 and/or a maximum prison term of 30 years. N.J.S.A. 2A:143-1 defines sodomy as an "infamous crime against nature committed with man or beast," and makes the offense a high misdemeanor carrying possible penalties of a $5,000 fine and/or a 20 year prison term. In actuality, this provision prohibits heterosexual and homosexual acts of intercourse per anum, whether forced or consensual. Conduct of married couples is excluded from the scope of this law. State v. Lair, 62 N.J. 388 (1973). In accordance with the common law practice, penetration is considered an element of a sodomy offense. State v. Morrison, 25 N.J.Super. 534, 537 (Cty.Ct. 1953). The lewdness statute, N.J.S.A. 2A:115-1, prohibiting open acts of public indecency or private acts of carnal indecency with another, creates a misdemeanor punishable by a fine of up to $1,000 and/or imprisonment for not more than 3 years. N.J.S.A. 2A:85-7. Acts of oral genital contact, whether forced or consensual, are currently prosecuted under this provision. State v. DeLellis, ___ N.J.Super. ___ (App.Div. 1975); State v. Bono, 128 N.J.Super. 254, 259 (App.Div. 1974). (But see State v. O'Halloran and Carnuccio, Docket No. A-1294-73 (App.Div., March 14, 1975), Fritz, J.A.D. dissenting, appeal pending before Supreme Court, Docket No. 11,449, argued on February 9, 1976). Otherwise, the offense is limited to episodes of indecent exposure and incidents tending to impair the morals of minors. State v. Dorsey, 64 N.J. 428 (1964).

With the exceptions of private consensual conduct, the Code attempts to cover the majority of these offenses in the rape and sodomy provisions with corresponding categories of aggravated and simple acts, all essentially restricted to incidents involving parties not married to each other. Section 2C:14-1 defines rape in terms of sexual intercourse including "intercourse per os or per anum with some penetration, however slight." Section 2C:14-2 describes sodomy and related offenses as "deviate sexual conduct" which "includes sexual intercourse per os or per anum," without any penetration requirement. Finally, Section 2C:14-4 creates a disorderly persons offense of sexual assault, which under certain circumstances constitutes a "touching of the human genitals, pubic region, or female breast of another person."

The adequacy of these definitions appears questionable both on an individual basis and when viewed as an aggregate scheme. For example, the rape provision fails to define sexual intercourse in terms of ordinary coition. In addition, the definition of rape has been so broadened that this single section, 2C:14-1, will encompass many of the offenses now prosecuted under three separate statutes, N.J.S.A. 2A:115-1, 138-1 and 143-1. It appears likely that the average citizen, as well as many prosecutors, will balk at prosecuting as "rape" acts traditionally labeled "sodomy" or merely "lewdness." Moreover, the conduct to be proscribed under Section 2C:14-2, which omits a penetration requirement, is not readily distinguishable from the "sexual contact" prohibited by 2C:14-4.

Additional difficulties arise from a consideration of the proposed gradation of the various offenses contained in Chapter 14. Subsections (a) of both the rape and sodomy provisions create an aggravated offense in terms of a submission compelled "by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping...."[56] Aggravated rape or sodomy are crimes of the first degree carrying penalties of from 8 to 10 years imprisonment, whenever a serious bodily injury occurs, or if the victim was not a voluntary social companion of the actor at the time of the event and "had not previously permitted him sexual liberties." Otherwise, the offenses are crimes of the second degree, bearing punishments of from 5 to 8 years.

Subsections (b) of the rape and sodomy provisions articulate a simple offense of the third degree differing from the aggravated provisions principally in that submission is compelled "by any threat that would prevent resistance by a person of ordinary resolution."[57] The 1971 comments to the Code indicate that the "threats" envisioned by this section include various acts of emotional and pecuniary blackmail occupying a shadow area between coercion and bargain.

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56 An aggravated rape also occurs either if the victim's ability to resist was substantially impaired due to the unknowing consumption of a drug or intoxicant administered by the perpetrator if the victim was unconscious; or if she was less than 12 years old.

57 Subsection (b) also prohibits consensual intercourse with an individual known to be incapable of appraising the nature of the actor's conduct due to a mental disease or defect. (cont'd)

The policy reasons behind these gradations of offenses appear somewhat obscure. The ultimate harm to be penalized is the coerced submission of an individual to unwanted sexual activities. Once it appears that valid consent was lacking, the method utilized to obtain the submission has little relevance to the injury suffered. An additional injury, such as grievous bodily harm, should sustain an individual charge of atrocious assault and battery or murder. Cf. State v. Hundley, 134 N.J.Super. 228 (App.Div. 1975). It certainly makes no sense to substantially mitigate the degree of the offense merely because the perpetrator was able to achieve his end by utilizing one kind of leverage rather than another.

Additional problems arise because the language used to delineate the artificial distinctions among types of rape and sodomy is often so ambiguous that it provides unworkable guidelines. For example, the difference between the "force" required by 2C:14-1(a)(1) to prove an aggravated rape and the "threat" designated to constitute a simple rape under 2C:14-1(b)(1) is extremely unclear. In addition, the provision designating an aggravated rape of the first degree if the victim was not the perpetrator's "voluntary social companion" and had not previously permitted him "sexual liberties" is hopelessly vague.

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57 (cont'd) Similarly, simple rape occurs if the victim is unaware that a sexual act is being committed, for example, under the guise of a medical examination. This offense may also arise if the woman submits because of a mistaken belief that the actor is her spouse. It should be noted in this regard that the statute contains an apparently erroneous reference to "his" spouse in Section b(3), but the obvious intent is to penalize intercourse conducted with knowledge that the woman mistakenly believes the actor to be her husband.

The reliance on the imprecise concept of "sexual liberties" is particularly curious. The purpose of this provision is, apparently, to build certain presumptions of consent into the body of the statute. This is an unnecessary and unwarranted precaution since evidence of voluntary association and prior sexual conduct with the accused are merely factors to be considered concerning the allegedly forcible nature of the sexual conduct. In this context it is interesting to note that evidence of the complainant's prior sexual conduct with the accused has long been allowed in rape prosecutions in this State. State v. Steele, 92 N.J.Super. 498, 505 (App. Div. 1966); State v. Rubertone, 89 N.J.L. 285 (E. & A. 1916). See also Assembly Bill No. 1576.

The marital status of the parties is another circumstance which is more appropriately an evidentiary factor concerning the issue of force. The Code improvidently exempts married individuals from the forcible rape and sodomy laws.[58] As the provisions now stand, a husband who severely beats his wife to force her unwilling submission to his sexual demands would

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58 At common law, a man was considered incapable of raping his wife. State v. Blackwell, 241 Ore. 528, 407 P.2d 617 (1965). Although the current New Jersey statute does not specifically exempt spouses from the purview of the rape law, nevertheless, the single case to discuss this issue expressed in dictum the view that the status of marriage to the complainant constitutes a complete defense to a criminal charge of rape. State v. Faas, 39 N.J.Super. 306, 308 (Cty.Ct. 1956), aff'd sub nom. Application of Faas, 42 N.J.Super. 31 (App.Div. 1956), cert. den. 353 U.S. 940 (1957). However, a man in Essex County was recently indicted for raping his estranged wife under circumstances including eyewitnesses and physical injuries which plainly negate any inference of consent. This couple was apparently legally separated and would fall within the provision of 2C:14-5(b) holding the marital exclusion inoperative regarding "spouses

be immune from prosecution for rape in spite of independently verifiable physical evidence that the intercourse was not consensual. Thus, this blanket exemption would have the anomalous result of bestowing upon a husband the legal right to force his wife's acquiescence to his sexual demands. If an assault and battery charge is the only legal recourse, a husband who beats his wife may then sexually abuse her with impunity. Surely, the difficulty of satisfying the burden of proof required to establish force in situations of rape accusations involving spouses is sufficiently great to preclude the feared abuse of rape laws by disgruntled wives. In the absence of vivid proofs of resistance, it is certain that prosecutors will be reluctant to prosecute, and juries will be averse to convicting spouses for sexual offenses against their mates.

The attempt to include a spousal exemption provision in Chapter 14 also suffers from several other linguistic and conceptual problems. Section 2C:14-5(b) extends the exclusion to "persons living as man and wife, regardless of the legal status of their relationship." It is doubtful that the doctrine of "living as man and wife," without more specific definition, can be applied in a sufficiently equitable and predictable manner to avoid constitutional problems of equal protection and due notice. In essence, this provision attempts to reinstitute a doctrine of common law marriage without any articulable standards.

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58 (Cont'd)
living apart in a state of legal separation or for a period of more than 18 months." Nevertheless, it is difficult to justify the preclusion of a rape prosecution in a situation exhibiting the same facts merely without the element of separation.

The Code consolidates all crimes involving sexual offenses against minors. 2C:14-3. New Jersey's carnal abuse and sodomy statutes now cover these crimes. N.J.S.A. 2A:138-1 makes carnal abuse by a male over 16 of a girl under 12 punishable by a maximum 30 year prison term, while carnal abuse by a male over 16 of a girl between 12 and 16 is punishable by a maximum 15 year term. N.J.S.A. 2A:143-2 imposes a maximum penalty of 30 years in prison for sodomy with a child under 16.

The proposed section forbids the proscribed activities if the actor (1) is at least 4 years older than the other person, who is less than 16, or (2) is a guardian of the other individual, who is less than 18, or (3) possesses supervisory or disciplinary authority over the other person while the latter is in custody of law or detained in a hospital or institution. Subsection (b) makes all violations of (a)(1) crimes of the third degree bearing penalties of 3 to 5 years imprisonment, while offenses under (a)(2) and (3) are crimes of the fourth degree warranting a maximum penalty of 18 months incarceration. The provisions of 14-3 appear to adequately reflect the special problems involving sexual conduct of immature minors. However, the section attempting to deal with persons uniquely subject to the supervision or to the discipline of others without any reference to consent is too broad. A distinction ought to be made between cases in which custodians utilize their authority to coerce the submission of persons under their jurisdiction, and those cases in which institutionalized individuals freely and competently seek sexual relations with available males.

CHAPTER 17 - ARSON AND RELATED OFFENSES

The Code, in Chapter 17, consolidates a variety of statutes dealing primarily with harm to property. By coordinating and grading these offenses according to the degree of danger to life and property and the intent of the actor, the Code substantially improves the present ad hoc treatment of these crimes.

Arson, which includes the setting of fires and causing of explosions, has three gradations of culpability. "Aggravated Arson" is a crime of the second degree when the actor intentionally places another in danger of bodily injury by fire or explosion, destroys a building or occupied structure of another, or destroys such property with the intent to collect insurance in circumstances recklessly placing a person in danger of bodily injury. 2C:17-1(a). However, if the actor's intent is merely reckless, than the arson is of the third degree 2C:17-1(b). It is to be noted that even if the fire or explosion is for the purpose of collecting insurance, it remains a third degree offense provided that no person has been recklessly placed in danger of bodily injury.

The least culpable form of arson occurs when one omits to report or control a "dangerous fire" which he has either lawfully set or when there is a duty to act. This is a crime of the fourth degree, 2C:17-1(c), and is in conformity with existing law.

The Code's specific proscription against conduct causing or risking widespread injury or damage presents a new concept in our penal law and deserves scrutiny. 2C:17-2. At the outset, it should be noted that this provision is somewhat superfluous. Much of the conduct and resulting harm covered by this section is already included in other specific provisions, e.g. murder, manslaughter, negligent homicide and arson. Nevertheless, the provisions of this section are inclusive and offer an additional measure of protection to the public heretofore not specifically enumerated.

Pursuant to this section it is a second degree crime to purposefully cause an explosion, fire, flood, avalanche, collapse of a building, release of poison gas, radioactive material or other destructive substances, or to otherwise cause widespread injury or damage. 2C:17-2a. Widespread injury or damage means bodily injury to 10 or more people, or damage to 10 or more habitations, or to a building which would normally house 50 or more people at the time of the offense. A person who recklessly causes widespread harm commits a third degree crime, while a person who recklessly creates a risk of such harm commits a fourth degree crime, even if no harm results. This distinction is obviously supportable premised on the view that causing harm is the greater evil to be detered.

Lastly, section 2C:17-2d makes it a crime of the fourth degree not to prevent or mitigate widespread harm if one has a duty to do so, or if the offender committed or assented to the act causing or threatening the harm.

CHAPTER 18 - BURGLARY AND CRIMINAL TRESPASS

Burglary and criminal trespass are defined by the Code in Sections 2C:18-2 and 2C:18-3. Common law burglary was limited to a breaking and entering of a dwelling house at night with the specific intention of committing a felony therein. See State v. Butler, 27 N.J. 560 (1958); State v. Hauptman, 115 N.J.L. 412 (E. & A.1935). Our Legislature has greatly expanded the crime of burglary. "Now it may be committed by entry alone, in day as well as night, and with intent to commit many more crimes." Commentary, p.209. See N.J.S.A2A:94-1 (breaking and entering or entering); N.J.S.A2A:94-1 (use of high explosives); N.J.S.A.2A:170-3 (presence in or near buildings with intent to steal). The Code, for the most part, retains the desirable aspects of the present offense while discarding those features which have caused serious problems. Briefly, the Code departs from present law in several respects.

The designation of the premises protected by the Code's burglary law is more restrictive than under present law. 2C:18-1. The definition of "occupied structure" in Section 2C:18-1 alters the present statute, N.J.S.A.2A:94-1, which makes as the subject of breaking or entering "any building, structure, room, ship, vessel, car, vehicle, or airplane." The Code adds the requirement that the premises, other than a building, be adapted for overnight accomodations or for the carrying on of business. Nevertheless, the offense

has been broadened to include as a purpose of the entry, the commission of "any offense", therein, rather than those set forth by the more restrictive provisions of N.J.S.A. 2A:94-2. Lastly, the proposed revision expands the offense of burglary to include not only the unauthorized entry, but the surrepitious remaining in a building or occupied structure for the purpose of committing an offense. This latter inclusion is desirable since the evils inherent in the two modes of entry are indistinguishable with regard to the ultimate intended result.

The Code's grading of burglary offenses to second and third degree crimes is unlike our present law. 2C:18-2(b). The infliction of injury or being armed raises the gravity of the offense to the second degree. Otherwise, it is a third degree crime. However, while the penalties seem adequate, one flaw is that there is no distinction in gradation with regard to the ultimate offense intended by the perpetrator. Thus, one who enters with intent to rape and one who enters with intent to commit larceny are treated alike.

The most serious flaw in this section is the restriction prohibiting duplicate convictions for the burglary and for the intended offense. This is a vast departure from present law and is most unfortunate. State v. Byra, 128 N.J.L. 429 (Sup.Ct.1942). According to the Commentary, the provision "is designed to prevent the abusive practice of imposing consecutive sentences for burglary and for the actual theft." Commentary, p.211. This provision rewards

the criminal who completes the intended offense by absolving him from prosecution for either the burglary or the underlying crime. Crimes committed within the structure clearly represent independent public harms, and thus, multiple prosecutions and enhanced penalties should not be excluded.

The Code also limits the offense to one who enters with the intent to commit a crime therein. The limitation that the crime be committed on the premises may be unduly restrictive. As one commentator has aptly observed:

> Some definitions of burglary, after listing the elements mentioned above, add...[the term] "therein." This wording emphasizes the necessary casual relation between the burglarious intent and the forced entrance, but seems to inject an unnecessary limitation. While it would not be a burglary to break into another's dwelling at night merely to rest in preparation for a felony to be perpetrated elsewhere it would be burglary, if the purpose was to use the building as a place of concealment from which to shoot an enemy as he passed by on the street, although under well-recognized rules the situs of such a murder would be in the street at the point where the bullet hit the victim and not the place inside the house from which the shot was fired. Hence burglary was committed where it was necessary to break into the building to reach the property to be stolen, although such property was not actually within the building itself; and also where the purpose was to commit a sexual offense in the seclusion available on the roof, which could be reached only by going through the house. See Perkins, Criminal Law, pp.212-213, and 216, footnote 7 (2d Ed.1969).

According to the Commentary, the term "therein" was included to make it clear that the mere purpose to commit

criminal trespass by intrusion into the premises does not satisfy the criminal purpose requirement for burglary. The Code should be amended to expressly state this limitation and to delete the word "therein."

The Code establishes certain defenses to the offense of burglary. If, at the time of entry, the premises are open to the public, or if the defendant is licensed or privileged to enter, or if the building or structure is abandoned, there is no burglary. The gist of the burglary offense under the statute is an unlawful intrusion, or entry without privilege, into occupied structures by potentially dangerous individuals.

The Code depicts unlawful entries made other than for the purpose of committing crimes as "criminal trespass". In this regard, Section 2C:18-3, declares it a crime of the fourth degree to enter or surreptitiously remain in a dwelling. It is a disorderly persons offense to so enter or remain in any other building or occupied structure. This provision consolidates into a comprehensive statutory enactment a number of existing disorderly persons offenses dealing with trespassing. See, e.g., N.J.S.A2A:170-31, 31.1, 33, 34, 58, 59. The affirmative defenses set forth in this section with respect to premises open to the public parallel those contained in the burglary section.

CHAPTER 19 - ROBBERY

The offense of robbery has been redefined by the Code to include a broader range of violent thefts than those encompassed by the current law, N.J.S.A.2A:141-1. 2C:19-1. Robbery is presently defined as the forcible taking of money, goods or chattels from the person or presence of the victim by violence or by putting him in fear. The fear must be a "reasonable apprehension of bodily injury." State v. Cottone, 52 N.J.Super. 36 (App.Div.1958).

The Code expands the offense by including those who in the course of a theft, injure "another," threaten "another," or purposely puts him in fear of immediate bodily injury, or commits or threatens immediately to commit any crime of the first or second degree. Most robberies involve violence or the threat of it directed at the person being robbed. Under the Code's formulation, the law would apply not only where property is taken from the person put in fear, but also where it is taken from a third person who is not the recipient of the threat. Thus, a person holding a hostage while demanding money from another not present would be a robber.

The Code designates as robbery any violence employed "in the course of committing theft." This expands the present law by defining it to include immediate flight following the theft. This change in the law is not novel, having been adopted in many jurisdictions. Employment of force during any phase of the crime, including flight, demonstrates that

the offender posits a danger to society, which must be proscribed.

The robbery provision of the Code consolidates the offenses of assault with intent to rob and assault with an offensive weapon. See, N.J.S.A.2A:90-2 and 3. These crimes were intended to circumvent the asportation element traditionally required for robbery and to thus provide for enhanced penalties. The Code now defines robbery to include an attempted theft accompanied by the enumerated types of assaults.

Robbery is a second degree crime under the Code. 2C:19-1(b). It is raised to the first degree if in the course of the theft a homicide is attempted by the actor, or if he purposely inflicts or attempts to inflict serious bodily injury, or if he is armed with, uses or threatens use of a deadly weapon. It may be questioned whether "serious bodily injury" should be defined so that results do not vary from case to case. The Code at present neglects to define this phrase.

The changes in the robbery law are an appropriate response to the problem of violent "street crimes." By placing primary emphasis on the actual or threatened harm to the individual, the Code properly seeks to deter the injury and intimidation normally inherent in such encounters. The gist of robbery should be the actual or potential violence entailed, regardless of its role in accomplishing the theft. The Code's innovations in this area, therefore, are worthy of serious consideration.

CHAPTER 20 - THEFT AND RELATED OFFENSES

The revisions of the law of theft are quite extensive. Moreover, the grading of theft offenses ranges from a second degree crime to a disorderly persons offense. 2C:20-2.[59]

Theft by unlawful taking or disposition is divided into movable and immovable property provisions. 2C:20-3. The movable property category includes the taking or exercise of unlawful control. This section replaces the common law larceny requirements of "caption" and "asportation", as well as a great variety of current legislative terms. For immovable property, such as realty, the crime is the unlawful transfer of any interest of another to benefit the actor or another not entitled to such interest.

The theft section is very comprehensive in scope and covers many areas due to the broad definitions of property found in Section 2C:20-1. As noted, by the Commentary:

> The crime here defined may be committed in many ways, i.e., by a stranger acting by stealth or snatching from the presence or even the grasp of the owner, or by a person entrusted with the property as agent bailee, trustee, fiduciary, or otherwise. Thus offenses which formerly

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Second Degree - Theft by extortion.
Third Degree - Theft
- a. of amount over $500.
- b. of a firearm, automobile or airplane
- c. of a controlled dangerous substance
- d. from person of victim
- e. involving breach of fiduciary obligation
- f. by threat not amounting to extortion
- g. of a public record

Fourth Degree - All other thefts not named above
Disorderly Person - less than $200 and not designated above.

> fell into such categories as larceny, embezzlement and fraudulent conversion are dealt with here. In contrast to most existing embezzlement legislation there is no effort to spell out the various relations of trust which can lead to liability. It is immaterial what relation the thief has to the owner or to the property.

Theft by deception, replaces several provisions now found in N.JS.A.2A:111. 2C:20-4. The culpability required is that one "purposely" act so as to obtain property by deception. This replaces the present standard of acting "knowingly or designedly with intent to cheat or defraud." The Commentary correctly indicates that this continues a high standard of proof as to the requisite mens rea, while at the same time simplifying the elements.

There are three types of deception embraced by Section 2C:20-4. The first is "creating or reinforcing a false impression." This replaces more specific language found in N.J.S.A.2A:111-1. "It is the falsity of the impression purposely created or reinforced, rather than of any particular representation made by the actor, which is determinative." Commentary, p.224. The second type of deception is preventing another from acquiring information which would affect his judgment. The third category is failing to correct a false impression when the deceiver created that impression or a fiduciary relationship to the victim. The latter two situations involve a form of nondisclosure. Passive nondisclosure is generally not a crime. However, when coupled with one of the forms of deception specified above, criminal sanctions attach.

Theft by extortion, Section 2C:20-5, consolidates various provisions of existing law. Both extortion and loansharking are treated by this section. The proposed statutes codifies existing statutory and case law. It differs from existing law in minor ways. For example, under Section 2C:20-5(f), the threat to withhold testimony with respect to another's legal claim or defense is included. There is apparently no corresponding statute presently in existence.

Theft by extortion generally involves some form of coercion rather than deception. The coercion need not be express but rather may be implied by surrounding circumstances. All offenses specified are subject to the affirmative defense that the property obtained was honestly claimed as restitution, indemnification for harm done or as lawful compensation for property services.

Section 2C:20-6 places an affirmative duty on one who innocently receives or finds property, either unintended for his receipt or excessive in amount or nature, to make reasonable efforts to return the property to the proper owner. This statute presently has no counter-part in our laws.

The section governing receiving stolen property thoroughly integrates the acts presently included in N.J.S.A. 2A:139-1 to 4. 2C:20-7. The Commentary emphasizes that, "one who is found in possession of recently stolen goods may be either the thief or the receiver; but if the prosecution can prove the requisite thieving state of mind it makes little difference whether the jury infers that the defendant took

directly from the owner or acquired from the thief." Id. at p.232. Present law requires knowledge that the goods were stolen. Under the Code either knowledge or a belief that the goods were "probably" stolen suffices for conviction. Knowledge or belief is presumed, in certain circumstances, each of which are valid indicators that the actor was not an innocent bystander. See 2C:20-7(b).

The offense of "Theft of Services" is a new addition to the criminal law. 2C:20-8. Previously such activity would have been prosecuted under our false pretenses statute as obtaining any gain, benefit, advantage, or other thing of value with intent to cheat or defraud. N.J.S.A.2A:111-1. The Code, however, is more specific in its definition of the offense, and therefore, is an improvement on current law.

CHAPTER 21 - FORGERY AND FRAUDULENT PRACTICES

The crimes of forgery and related offenses are defined in Section 2C:21-1. Forgery is an unauthorized alteration of any writing of another with knowledge or purpose to defraud or to injure. "Any writing" is no longer limited to documents of a legal or evidentiary character, although the nature of the document forged may affect the grade of the crime. "Any writing" means "printing or any other method of recording any information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege or identification." This definition makes punishable not only the harms caused by fraud, but also

those caused by injuring the purported author in any way, for example, by misrepresentation, lost repute, etc. This definition also obviates the need for a separate counterfeiting statute.

Forgery is a third degree crime if the forgery is of government instruments or of securities. Otherwise forgery is a fourth degree crime. Possession of forgery devices is a third degree crime. The possession offense applies to the maker as well as the possessor of any such device. 2C:21-1(c). It should be noted that the existing penalties for many of the current forgery offenses, including counterfeiting, have been reduced by the Code. At present such crimes are punishable as high misdemeanors with terms up to 7 years and fines up to $2,000.

The Code comprehensively deals with offenses involving public and private records. Section 2C:21-3(a) makes it a third degree crime if one, with a purpose to deceive or injure anyone, destroys any document for which the law provides public recording. If one offers an instrument for public filing, knowing it to have false information, it is a disorderly persons offense. The section proscribes falsifying or tampering with records, and consolidates a number of statutes dealing with certain aspects of these crimes. N.J.S.A.2A:91-3 to 8, N.J.S.A.2A:111-9 to 12, 39, N.J.S.A.2A:119-4, N.J.S.A. 2A:122-3, 47:3-29. 2C:21-4. The Code departs from existing law in distinguishing between business or financial records and private, nonbusiness records.

It is a disorderly persons offense to knowingly and fraudulently pass a "bad" check. 2C:21-5. No restriction on the amount of the instrument is included. Under present law, if the check exceeds $200, it is a misdemeanor, punishable by one year imprisonment. Otherwise, it is a disorderly persons offense. See N.J.S.A.2A:111-15 through 17; N.J.S.A. 2A:170-50.5 through 50.6. The rationale for the Code's generally lighter treatment of the offense is the fact that if the money is obtained, the offender may be prosecuted for the more serious crime of theft by deception. Commentary, p.242. However, it is submitted that it is reasonable to punish according to the amount of the check. Therefore, if the check exceeds $200, the offense should be designated a crime of the fourth degree. Cf., State v. Covington, 59 N.J. 536 (1971).

Presently, a certificate of protest issued pursuant to a bad check constitutes presumptive evidence of the passer's knowledge of insufficient funds. State v. Pollack, 43 N.J. 34 (1964). In those cases where payment is refused for lack of funds, the Code restricts the presumption, giving the passer ten days to honor the checks before the presumption attaches. The presumption also exists if the issuer had no account with the drawee when the check or order was issued.

Section 2C:21-6, dealing with credit cards, makes knowing, improper use of them a disorderly persons offense. Earlier versions of the Code provided that the crime was one of the third degree. The penalty now fixed by the Code fails

to take into account the value of the goods or services obtained. However, it is conceivable that certain use of credit cards may be prosecuted as forgery under 2C:21-1. See State v. Gledhill, 67 N.J. 565 (1975).

Certain specified deceptive business practices are proscribed by Section 2C:21-7. The Code is more precise than present law as to what practices are prohibited.[60] In a broad attack on business frauds, the drafters have made it unnecessary to prove that the defendant actually obtained property by his deception. The rationale is that it should not be necessary to call angry consumers to testify against the defendant. Most of the forbidden practices may be uncovered by governmental inspectors. It would be undersirable to compel the public to await consummated cheating before holding the defendant responsible. Commentary, p.244. The Code incriminates fraudulent practices and places less emphasis upon the loss accruing to the consumer.

This section also relaxes the traditional requirement of guilty knowledge. The mere use and possession of false weights and measures, or the sale or offer for sale of adulterated or mislabeled items is sufficient for conviction under the Code. As noted in the Commentary;

> ...The professional generally has reason and opportunity to know whether his weights are false, his goods adulterated or mislabeled,

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60 Some deceptive business practices are now prosecuted under N.J.S.A.2A:108-1 through 8; 2A:111-22 through 24; 2A:111-32; 2A:150-1; 2A:170-42 and 2A:170-72.

> his financial statements and public advertising accurate. And it is more important that he be put to proof that he was unaware, since falsity of his measure is likely to victimize numerous customers. Commentary, p.244.

It is an affirmative defense if the defendant proves by a preponderance of the evidence that his conduct was not "knowingly or recklessly deceptive."

Misconduct by a corporate official is taken from a provision of the New York Code. 2C:21-9. See also N.J.S.A. 2A:111-12 and 13. It makes it a crime of the fourth degree for a director or officer of a stock corporation to act otherwise than in accordance with law in declaring dividends, discounting notes, repurchasing shares, etc. The question arises whether "in accordance with law" refers to state or federal statutory law, administrative regulations, or the internal private law of the corporation itself. This ambiguity should be specified.

Section 2C:21-10, commercial bribery and breach of duty to act disinterestedly, consolidates a series of unrelated statutes in our present law. See N.J.S.A.2A:91-1, 2; N.J.S.A.2A:93-7 to 9; N.J.S.A.2A:170-88 to 91. This section generalizes from existing legislation dealing with "commercial bribery", usually of agents or fiduciaries, and extends that principle to managers of any public or private institution or corporation, including labor organizations. Subsection (a) requires a conscious disregard of a known duty of fidelity before the crime is committed. Subsection (b) deals with a breach of duty by those in the business

of making disinterested comment, suggestion or selection, e.g. critics. Subsection (c) makes the giver of the bribe equally guilty as the receiver.

The proscription against rigging publicily exhibited contests, expands existing law on the subject, N.J.S.A2A:93-10 to 14, by including nonsporting events and by including any form of corrupt interference, such as by administering drugs to an athlete. 2C:21-11. Liability is extended to participants in the staged contest.

The beneficial factors devolving from the new Code provisions on forgery and fraudulent practices are that generally the offenses set forth therein have been simplified and consolidated into a comprehensive regulatory scheme.

CHAPTER 24 - OFFENSES AGAINST THE FAMILY, CHILDREN AND INCOMPETENTS

The Code's drafter's have generally sought to protect familial institutions by broadening the reach of criminal provisions in some sections and by reducing the degree of the offenses, thus decreasing the corresponding penalities for minor breaches of the peace. Technical anachronisms based upon common law concepts of marriage and the family have been eliminated.

Section 2C:24-1, penalizing bigamy, reflects a substantial change in attitude toward this crime. The new law emphasizes the actor's state of mind in determining when criminal liability should attach. For example under the present law (N.J.S.A.2A:92-1), an individual who could show that his first marriage was void, even though at the time he entered the second marriage he was unaware of this fact, would escape criminal liability. N.J.S.A.2A:92-1(d). Yet, an individual who married under the genuine but mistaken belief that his first marriage had been dissolved would, nevertheless, fall within the proscription of the statute. Thus, the actor's good faith beliefs are all but irrelevant.

To effect a shift in emphasis, the Code has altered the defenses to the crime to take into consideration defendant's reasonable belief. Under N.J.S.A.2A:92-1, a defendant could escape liability if he could prove that; (a) his spouse had remained outside the United States continuously for a period of five years or, (b) his spouse had absented himself or herself

continuously for five years and defendant was unaware that the spouse was still alive or, (c) defendant had obtained a valid decree of divorce, or (d) his former marriage has been or shall be declared void and of no effect. Code provision 2C:24-1 defines the following defenses: (a) the defendant believed that the prior spouse is dead, (b) the defendant and the spouse have been living apart for five consecutive years throughout which defendant had no knowledge that his spouse was alive, (c) a court has entered a judgment purporting to terminate or annul any prior marriage and defendant is unaware that the judgment is invalid, or (d) the actor reasonably believed that he is legally eligible to remarry. (emphasis supplied). It is evident from even a cursory examination of this provision that the primary focus of the new law is the actor's intent and belief.

The Commentary to the Code focuses on the alteration in the introductory language of the provision. Present law speaks of "any person who, having a husband or wife living, marries another... ." N.J.S.A.2A:92-1. The Code alters this language to read, "A married person is guilty of bigamy...if he contracts or purports to contract another marriage... ." According to the Commentary the purpose of this change is "to include persons who underwent a previous void marriage..." since such people demonstrate by their behavior "a dangerous disposition to plural marriage." Commentary at p.250. If this is the intent of this change, the wording is not sufficiently clear to convey this import.

Moreover, it is not clear that such a change is desirable, either legally or socially. Both marriage and bigamy are legal concepts requiring the existence of certain juristic prerequisites before either may legally be effectuated. The result is that certain marriages are deemed -- should any of these prerequisites be left unmet -- to be a legal nullity from their very inception. Thus, as bigamy is defined in terms of marriage, its existence has traditionally, and logically, been dependent upon the existence of a valid marriage. It, therefore, follows that in a legalistic sense, the absence of a valid marriage properly renders the crime of bigamy a legal impossibility.

Section 2C:24-1(a)(4), provides a defense for "the actor [who] reasonably believes that he is legally eligible to remarry." This "good faith" provision does not reflect the majority view throughout the country,[61] and would on its face appear to be in derogation of prevailing case law in New Jersey which provides for strict liability. See State v. De Meo, 30 N.J. 1,14 (1955). However it must be noted that the court in DeMeo observed:

> "...we expressly withheld determination as to the availability 'in situations not before us' (1 N.J.Super. at 214) of a defense to a bigamy prosecution resting upon the defendant's honest belief, reasonably entertained, that he was legally free to remarry in New Jersey." Id. at 14.

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[61] See Commentary at 254.

This language, despite its being dictum, might certainly be construed as a forerunner to the Code. It certainly represents an enlightened approach more in keeping with current thought.[62]

Finally, the Code substantially reduces the penalty for bigamy. Whereas the present law makes bigamy a high misdemeanor, the Code schedules it as a crime of the fourth degree punishable by up to eighteen months in prison. Such a reduction of the penalty constitutes a welcome change.

Section 2C:24-3 initially proscribed abortion. That provision has been deleted. Prior reviews of this section had been hampered by the lack of a decision in the then pending cases of Roe v. Wade and Doe v.Bolton.

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[62] In response to the comment by the Division of Law Revision of the Legislative Services Agency (July 2, 1974), i.e.:

> "The proposed Code and the commentaries do not take into account that this section would increase the number of situations in which a person could be declared to be not guilty of bigamy although both the bigamous marriage relationships may continue to exist. If a man who has two wives is found to be not guilty of bigamy, the result will be that unless one of the wives chooses to act, he may have two apparently valid marriages. He will be able to have two wives and two families free from any interference from the authorities."

It is suggested that in view of the narrowly defined group involved, i.e., those charged with bigamy who successfully defend on the basis of §4.(a), and considering the available alternative of a divorce action by the parties involved, the problem -- one having an inordinate impact on the poor and uneducated -- may be better handled outside of the criminal justice system.

However, the subsequent United States Supreme Court opinions in these cases [reported in 410 U.S. 413, and 410 U.S. 179 (1973) respectively] left no doubt that the constitutional right of privacy in a physician--patient relationship is paramount to New Jersey's right to proscribe abortions by a licensed physician during the first six months of pregnancy. Thus, there was no basis upon which the Code could set regulatory standards in this area, and this section was properly deleted.

However, it nonetheless remains clear that the State has retained its right and obligation to proscribe abortional acts by lay persons in order to protect the health and welfare of its citizens. It is therefore recommended that an appropriately limited proposal be included in the Code to fill this void. See State v. Norfleet, 67 N.J. 268 (1975) and e.g. Senate Bill 508.

Section 2C:24-14, endangering the welfare of a child, provides fourth degree penalties for any individual who, having the legal responsibility for the care of a child, causes him such harm as would place him within the definition of "abused or neglected" as codified in N.J.S.A.9:6-8.21. This provision is evidently designed to supplement the very comprehensive civil treatment of the child abuse problem outlined in N.J.S.A.9:6-8.8 et seq. Examined in conjunction with the scheme constructed by

N.J.S.A. 9:6-8.8 et seq., this provision adequately provides the State with an additional tool to combat this growing problem. It should not, however, be forgotten that in cases in which children have sustained serious injury the offender should be charged with one of the more serious crimes against the person (e.g., aggravated assault) which carries a more severe sentence.

Section 2C:24-5 proscribes willful nonsupport. Under this section a person is liable to fourth degree penalties if he willfully fails to provide support to a spouse, child, or other dependent. Three conditions are required before liability can be imposed: (1) the defendant must have the ability to provide support; (2) he must know that he is obligated to provide support; and (3) the failure to provide must be persistent. This latter requirement constitutes a substantial modification of existing law which only requires "willful" default. See N.J.S.A.2A:100-1 and 2. According to the Commentary, "exemplary punishment is of doubtful efficacy in complex family situations where many forces, psychic, social, and economic may combine to excuse if not justify, the behavior." Commentary, p.260. This observation is undoubtedly true, but does not justify such a modification of our present statutory scheme. The term "persistent" connotes not only willfulness, but also an abject refusal. Such an ambiguous term places a most difficult burden on prosecutorial authorities and should be deleted.

The discretion conferred on prosecutors at present obviates the danger of a stringent and unjust application of such a statute.

This provision also departs from the present statutory offenses by providing that a duty of support is owed to the "spouse, child or other dependent." (emphasis supplied). In the past, only men were statutorily required to support their spouses and children. The Code extends this obligation to women. While this change may have only limited application, its intent is salutary and reflects recent developments in the law and society requiring that women be accorded both equal rights and equal responsibilities as men.

With regard to the sentence imposed for a violation of 2C:24-5, the immediate question is one of determining the purpose of the statute. It would appear the statute is designed to ensure the maintenance of support and thereby protect the family unit. However, an incarcerated defendant, in the vast majority of cases, is unable to raise the money. Section 2C:62-1 recognizes this problem and has an alternative remedy which the court can utilize. However, 2C:62-1 is worded in terms of the duty of a husband to pay sums of money to the wife, and does not impose a reciprocal duty on the wife. In view of the non-discriminatory language of 2C:24-5, there should be a corresponding change in the language of 2C:62-1.

Section 2C:24-6 proscribes unlawful adoptions. This provision prohibits individuals from placing or offering to place children, for the purposes of adoption, except if the placement is with the child's sibling, grandparent, aunt or uncle, legal guardian, or an individual who has been approved by law for such purpose. Additionally, section 2C:24-6 penalizes anyone, other than a licensed agency, who receives any pecuniary benefit from placing a child for adoption.

While the language has been changed to some extent, there appears to be little or no difference between the effect of this section and that of N.J.S.A.2A:96-6 and N.J.S.A. 2A:96-7.

Section 2C:24-7 involves endangering the welfare of an incompetent person. A person who knowingly acts in a manner likely to injure the physical mental or moral well-being of an individual, who because of a mental defect, is unable to care for himself is guilty of a disorderly persons offense. While the purpose of this provision is laudatory, the language is subject to serious question. The broad generalizations and ambiguous terms contained herein constitute a fatal defect, e.g., "in a manner likely...to be injurious to the physical mental or moral welfare...of a person unable to care for himself...because of mental disease or defect."

Assuming that the statute could be written so as to be sufficiently specific, it is recommended that the penalty also be revised. Under section 2C:24-4, a person who endangers the welfare of a child is liable as a fourth degree offender. One who endangers the welfare of an adult who, because of a mental defect, is at least as equally unable to protect himself as a child should incur the same penalty.

CHAPTER 27 - BRIBERY AND CORRUPT INFLUENCE

Section 2C:27-2 is the codification of the offense of bribery. Of course, New Jersey has always recognized such a crime as part of its common law. See e.g. State v. Ellis, 33 N.J.L. 102 (Sup.Ct.1869) and N.J.S.A.2A:85-1. Further, a number of statutes have been enacted which extend the common law offense to various additional types of official and unofficial conduct, or which increase the penalty imposed for certain types of bribery. See N.J.S.A.2A:93-1 to 14. Therefore, the present inquiry must be whether the proposed codification materially alters the scope of the existing law, and, if so, whether that alteration is desirable.

Initially, this office is of the opinion that section 2C:27-2 is basically a sound proposal with a number of particularly appealing features. First, the scope of the proposal includes any "public servant" who is the intended or actual recipient of a bribe. In section 2C:27-1, "public servant" is defined to include not only a public officer but any employee of government. Specifically included in this definition are judges, legislators and anyone participating in the governmental process such as a juror, advisor, consultant, or otherwise. Thus, the proposal would reach those officials traditionally covered by the common law offense (see State v. Begyn, 34 N.J. 35,43 (1961)), those specifically named in N.J.S.A.2A:93-1 to 4, and a class of public employees not heretofore included. Moreover, the proposed section also applies to party "officials" and "voters".

A "party official" is defined in 2C:27-1 as anyone who holds an elective or appointive post in a political party, which post involves some responsibility for directing or conducting party affairs. While a "voter" is not defined, it would appear to refer to anyone who votes in a matter of concern. However, it is preferable that this term be specifically defined. This office believes that the extended coverage provided by the proposed section as to the types of officials and individuals who may be bribed is clearly desirable. The public must be served faithfully by all who participate in government, either as employees, office holders, or political leaders.

A second laudatory aspect of this proposal is that it resolves any question as to whether the mere solicitation of a bribe by a public servant constitutes an offense. See State v. Begyn, supra at 48. A public servant should be prohibited from initiating such corrupt behavior and the present proposal would establish that prohibition.

Another important feature of the proposed section is that it extends to bribe offers which seek to affect ministerial actions as well as the exercise of discretion. Stated otherwise, it is clear that a public servant should not be permitted to accept a fee or reward in exchange for his failure to perform a duty of his position or for his conduct in violation of a certain duty. The Code specifically provides that such behavior would constitute bribery, regardless of the fact that the public servant had no lawful discretion in the matter.

Finally, 2C:27-2 wisely provides that the offense of bribery is committed even if the public servant is not, in fact, qualified or authorized to act in the desired manner. This comports with existing law. State v. Ellis, supra. Moreover, it does not appear that the prosecution would have to prove that the public servant had "apparent authority" to act as desired. This office believes that this is an appropriate formulation. If the parties involved were willing to act under the assumption that the public servant could further the desired goal, that fact should be dispositive.

In its analysis of this section, the Division of Law Revision expressed considerable concern that the section, if enacted, might be interpreted as a strict liability offense, i.e., one which does not require any criminal intent or mens rea. As the Division noted, statutes found to be reiterative of common law offenses are traditionally interpreted to require all of the elements which were involved in the proof of the crime. Thus, a statute proscribing a bribery offense would presumably require an element of mens rea, usually characterized as a corrupt motive or bad faith. See State v. Begyn, supra; cf. State v. Winne, 12 N.J. 152 (1953). However, the Division of Law Revision seemed to fear that the Code Provisions would not receive this interpretive presumption and might be construed to eschew any intent requirement.

This office understands the Division's concern in this matter, but feels that it is unwarranted. The Code expressly provides that the rule of interpretation for any section is that a criminal intent is presumptively required. 2C:2-2(c)(3). Moreover, a reading of the bribery section itself demonstrates that it would be impossible to construe it as a strict liability offense. The offense is committed only if the benefit is offered or accepted for consideration as a particular exercise of discretion or for violation of a "known legal duty." Evidently, proof of the crime would require proof of the reason for which the benefit was offered or accepted. This would necessarily require proof that the officer or recipient knew and understood the benefit to be

tendered for such a purpose. Hence, a general criminal intent, and knowledge of all the required elements would be necessary. State v. Lamberston, 110 N.J.Super. 137 (App.Div.1970).

Despite the foregoing, this office finds the proposed section to be seriously flawed. The first questionable feature of the section relates to the fact that it attempts to differentiate between bribery involving any public servant and that which touches official discretion in judicial or administrative proceedings. Section 2C:27-2(a) and (b). This distinction is made for the purpose of requiring that a "pecuniary benefit" must be offered or received in the majority of cases, but a mere "benefit" is necessary for bribes related to judicial and administrative actions. This office strongly opposes this variation. If a "benefit" is sufficiently attractive to be the subject of a bribe offer or acceptance, then it should not matter in the eyes of the law whether the benefit is capable of easy translation into pecuniary terms. Thus, the "pecuniary benefit" requirement should be abandoned. However, there may be another purpose for retaining the present categorization. The existing law imposes a more severe penalty on judges, magistrates and legislators than it does on other classes of bribe recipients. N.J.S.A.2A:93-1 and 2. In view of the extreme sensitivity of judicial, legislative and quasi-judicial administrative proceedings and the importance of public confidence in such processes, it may well serve a legitimate purpose to maintain

greater sanctions in cases that reach those procedures. Therefore, this office recommends that the penalties be graded to reflect these policies and values.

The next criticism of section 2C:27-2 concerns that last paragraph. That paragraph is presumably intended to remove as a defense the fact that offerer or briber acted under the effect of extortionate or coercive behavior on the part of the public official or his agents. However, if that is the purpose of the proviso, such intent is not reflected in the language. Rather, as presently worded, the section is totally unintelligible. To cure the problem, the words "solicited, accepted or agreed to accept a benefit" should be changed to "offered, conferred or agreed to confer a benefit." The reason for the change is that the recipient of a bribe could not possibly claim in defense that the bribe was made because of the coercive conduct brought to bear on the briber.

Beyond a logical inconsistency of the final paragraph of 2C:27-2 as written, there is some question as to whether or not there should be a statutory immunity granted to an individual who pays the bribe demanded by the public official, where the coerced individual later voluntarily informs the police of the offense and cooperates to secure the successful prosecution of the official. Currently, the law recognizes such an immunity for certain types of bribery offenses. N.J.S.A.2A:93-3. Further, the Division

of Law Revision posits that it may be unrealistic to require that the individual advise the authorities rather than comply with the demand, if there are extraordinary circumstances brought to bear upon the individual by the official or his agents. Nevertheless, this office insists that no automatic immunity should be recognized in such cases. Instead, it is believed that in the vast majority of cases the individual who is subject to a bribe demand or solicitation would be able to advise the police before making any payment without being subject to grave physical danger. In the rare instance where the individual is so pressured that he may not reasonably be expected to refuse to make the payment, it seems clear that there would be no culpability under this section. The reason that no liability would attach in the latter case is that the payment would not be consideration for the future conduct of the official. Rather, it would be the act of a bullied victim, no more criminal than the submission of an individual to the orders of an armed robber.

Stated otherwise, if the circumstances are sufficiently threatening, the individual would be provided with a complete defense. Further, the policy in favor of prosecuting the venal official, rather than the frightened individual, as well as the good faith of the prosecutor, would provide further assurance that unwilling victims would not be prosecuted under 2C:27-2. It is therefore the recommendation of this office that the last paragraph of 2C:27-2 be deleted. It serves no purpose and might needlessly confuse the law.

Finally, the existing statutory law has expanded the extent of bribery to cover the conduct of certain non-public officials. Most notably, labor officials, foremen, and participants in sporting events are subject to penalties similar to those provided for public officers. N.J.S.A.2A:93-7, 8, 10 to 14. This office recommends that these laws be retained and that they be added to the Code.

The following section in this chapter would create a class of offenses which are not expressly treated by existing law. Section 2C:27-3 is, in effect, a variation of the bribery prohibition. Its purpose is to prevent persons from subjecting public servants to undue influence by reason of threatened harm, as opposed to promised benefits. As with bribery, the present section is divided into several categories which depend upon the type of official action involved. Specifically, the first subsection relates to threats of "unlawful harm" with the purpose of influencing the exercise of discretion by any public servant, party official or voter. The second category concerns threats of any type of harm to influence the action of a public servant with regard to a judicial or administrative proceeding. The third subsection proscribes threatening harm to any public servant to procure the violation of a "known legal duty." The fourth and last classification prohibits privately addressing any entreaty or argument to a public servant in order to influence

the outcome of an administrative or judicial proceeding on the basis of considerations other than those authorized by law.

As noted, there are currently no parallel provisions explicitly prohibiting such conduct. Attempts to influence judges or magistrates in judicial proceedings could be treated as obstruction of justice under the common law. State v. Cassatly, 93 N.J.Super. 111 (App.Div.1966). With regard to intimidation of jurors, there is now a statute which proscribes such activity. N.J.S.A.2A:103-1. Also, there may be instances where the common law and the statutory crimes of extortion apply to threats against a public servant. State v. Morrisey, 11 N.J.Super. 298 (App.Div.1951); N.J.S.A.2A:105-3,4,5. However, such patchwork applications are obviously unsatisfactory. Therefore, this office generally supports the adoption of this section. Nevertheless, some discussion of the proposal is required.

The first two subcategories of 2C:27-3 differentiate between "unlawful harm" and any other type of threatened harm. The purpose of this variance is to prevent undue restrictions on legitimate pressures in the political and governmental arena. In order to avoid restraints upon protected pressure activities, many of which would have overtones of free speech and expression, the drafters proscribe only threats of "unlawful harm" to influence the conduct of public servants. In contrast, threats of any type of harm to influence a judicial or administrative

decision are prohibited. Clearly, the judgment has been made that there can be no legitimate pressure brought to bear on such decisions. While this office is willing to accept that judgment, it is not completely satisfied with the "unlawful harm" requirement for the majority of cases. Since there is no definition in the Code of "unlawful", one may question whether this attempted classification will pass muster against claims of vagueness. Unfortunately, there does not appear to be any clear cut formulation which will prohibit all unwanted conduct without infringing on protected rights. Therefore, it appears that the present wording of subsections (1) and (2) is an acceptable compromise.

The differentiation of judicial and administrative proceedings from other official action is also relevant to the sentencing provisions in 2C:27-3. Generally, a crime under this section is a fourth degree offense. However, if the threat made was to commit a crime or to influence a judicial or administrative decision, the crime is elevated to that of the third degree. The drafters obviously believe that society is peculiarly interested in assuring the impartiality of judicial and quasi-judicial action. Therefore, this concern is reflected in a higher penalty. Of course, if the harm threatened to secure any official action is itself a serious offense, the actor is more culpable and deserves more treatment. Further, such conduct as threatening to kill or to kidnap would presumably be separately punishable under other sections of the Code. Therefore, the penalty scheme appears to be adequate.

Under subsection 2C:27-3(a)(4), a person is prohibited from privately addressing arguments to one involved in a decision in a judicial or administrative case. While this prescription might otherwise run afoul of the First Amendment right to free speech and expression, it is believed that such overbreath problems are successfully avoided by the qualification that the argument be addressed privately and that the intent be to influence the official to decide the case for non-lawful reasons. The remainder of 2C:27-3 is acceptable.

The next section in Chapter 27, 2C:27-4, prohibits a person from soliciting, accepting or agreeing to accept a pecuniary benefit as compensation for past action as a public servant. While it would appear that such activity would constitute common law misconduct in office (under N.J.S.A.2A:85-1) where the solicitation, acceptance or agreement were undertaken at a time when the person was yet a public official, there is currently no provision made for such conduct by a former public servant. Since the Code would abolish common law crimes, there is a real need for this proposed section. This office recommends only slight revisions to the section as it is presently worded.

As the Commentary prepared by the New Jersey Criminal Law Revision Commission noted, the solicitation of rewards for past official action not only corrodes the integrity of public servants but also impliedly requests

future payments for continued favorable consideration of the payor. Because of this two fold corrupting effect, this office believes that this offense is a serious one and should be treated accordingly. It must be remembered that the commission of this offense requires that the public servant have acted favorably to the party solicited either in the exercise of discretion or by violating a known duty. Therefore, the offense established by this section should be punished at least as severely as a bribery offense. As written, a violation of 2C:27-4 by the receiver or payor is a crime of the fourth degree. It is suggested that this also be upgraded to a third degree offense.

There does not appear to be any problem with the breadth of 2C:27-4. As with bribery, the requirement that the payment of the benefit be made as compensation for past actions would necessarily require that there be a mens rea element. See Section 2C:2-2(c)(3). Therefore, any objection that the proposed section would unduly inhibit such lawful activities as campaign fund raising would not be well taken. Compare United States v. Brewster, 506 F.2d 62 (D.C.Cir.1974).

Two other points of dissatisfaction with this section must be noted. Unlike the bribery section, 2C:27-4 applies only to the conduct of "public servants" and not to "party officials" or "voters". It is difficult to understand why this line is drawn. Certainly, the State has a compelling interest in promoting the fairness with which political

parties are run and in preventing a voter from exercising his franchise in the expectation that a particular choice will be rewarded. This interest is no less strong where the solicitation or offer of a reward occurs after the conduct in question than when it occurs before. Thus, this office would amend the section to extend it to party officials and voters.

Lastly, 2C:27-4 employs the term "pecuniary benefit" to describe the compensation paid for the past conduct. This office is again unable to discern a reason why it should be a requirement that the benefit be easily converted into monetary terms. Here, as with bribery, if the recipient or the offeror believes that a certain benefit is fit compensation for the past acts, then the law should be satisfied. It is the persuasive and corrupting impact of the benefit, not its nature or amount, that is important. The parties themselves are the best judges of what would suffice to compensate for the completed act and, implicitly, to induce future favorable action. Whether that compensation is "pecuniary" or not should be irrelevant. It is recommended that the word "pecuniary" be deleted from this section.

Section 2C:27-5 declares that it is a fourth degree offense for any person to unlawfully harm another in retaliation for the unlawful service by the latter as a public servant. This office believes that such a provision is warranted to establish a criminal penalty for those unlawful retaliatory acts which are not otherwise punishable.

Because of the existence of other criminal sections which proscribe various types of unlawful harms, it is felt that the present gradation of this offense, as a fourth degree crime is adequate. However, we would prefer to see the coverage of this provision extended to "party officials". The State has an interest in protecting the honest and conscientious activities of political officers and leaders. To allow reprisals against such individuals would seriously undermine free expression and association in political matters. Otherwise, this section is adequate.

The next offense defined by Chapter 27 prohibits the giving of gifts to public servants by persons within the jurisdiction of the recipient. The section is divided into four classes which depend upon the nature of the public servant and the type of official authority involved. The exceptions provide that there will be no liability if the public servant was entitled to the benefit as a lawful fee, if the benefit was bestowed for reasons of kinship or other personal reasons independent of the official status of the recipient, or if the benefit is so trivial as not to present a real risk of undermining official impartiality.

It should be noted that we would again reject the necessity of showing a "pecuniary benefit" for the same reasons expressed above in relation to other sections. Additionally, the provision should make no exceptions for "trivial" benefits. So long as the motivation for the gift is the status of the public servant, it should be proscribed.

The possible harshness of this approach is mitigated by the fact that a fourth degree offense gives a sentencing court a great deal of flexibility. In fact, no custodial term is required. Section 2C:43-6. Further, it is believed that the good sense of prosecutors will prevent abusive actions under the recommended provision.

Section 2C:27-7 represents an effort by the drafters to prevent one of the most blatent evasions of the bribery and corruption laws. It appears that a common device for such evasion is to contract with a public servant for services and consultation on a matter which will later come before the public servant in his official capacity. Of course, this same result can be achieved if the public servant is offered a generous payment for goods or property, or if the consultation fees are paid for services rendered on matters other than the one which is later to come before him. The drafters recognize this fact. See Commentary at 268. Nevertheless, it does appear that such an obvious conflict of interest situation as is described by the proposed section should be prohibited.

It must be emphasized that, if the purpose of any payment is to influence the decision or action of a public servant, then the form of that payment, whether direct or indirect, should be of no legal consequence. See State v. Smagula, 39 N.J.Super. 187 (App.Div.1956). Presumably, the form of a particular corrupt transaction will not prevent

the State from prosecuting under an appropriate section of the Code which prohibits its substance. Thus, 2C:27-7 is not strictly necessary, but would have the effect of deterring one of the most clearly abusive practices.

The second paragraph of 2C:27-7 declares that it is a fourth degree offense for anyone to offer, confer or agree to confer compensation as prohibited in the first paragraph of that section. Notably, an individual would not be guilty under the second paragraph unless it were shown that he knew his actions to be unlawful. This highly unusual requirement is undoubtedly intended to protect those lay persons who in good faith consult attorneys or other professionals who are also public servants. See Commentary act 269. While we are generally opposed to such an extraordinary element of scienter, it does appear that unfairness may result if no protection is extended to those who innocently seek professional advice from persons who are also public servants. This office would propose that it be required that the persons who pay the compensation must know of the recipient's position as a public servant and must know also that his official authority touches the subject matter involved. In addition, it should be required that the compensation be paid corruptly, i.e., non-innocently or in bad faith, with the intent to gain favor from the official in the matter involved. This middle ground would prevent prosecution of the nonculpable individual without holding the State to the extreme burden

of proving knowledge of illegality. However, there should be a presumption that the compensation was not paid innocently if it is shown that the public servant is not engaged in an ongoing business which continuously offers service to the public, e.g., as an attorney. Surely, the danger of unfair prosecution of an innocent lay person would diminish sharply with a public servant who is specially employed by a particular business or interest group.

The final section in Chapter 27 attempts to curb the practice of making payments to individuals in return for their influence in securing the approval (or disapproval) of appointments or advancements in public service or the approval of the grant of a government benefit to any individual or for any transaction. Section 2C:27-8 is important because it extends the coverage of the criminal law to the undesirable practice of influence peddling, which might not be otherwise proscribed. Thus, the section does not require that the recipient or solicitor of the benefit be a public servant. Further, the recipient or solicitor need have no official authority or control over the matter, but must only trade his influence over others in return for the forbidden compensation. Current New Jersey law has a similar provision which prohibits even a private citizen from accepting a payment in return for efforts to influence governmental action. N.J.S.A.2A:93-6; State v. Ferro, 128 N.J.Super. 353 (App.Div.1974). Thus, the proposed section would in large part continue a desirable aspect of existing statutory law. Moreover, subsection (b)

would extend the coverage to include payments for the exercise of any "special influence" upon a public servant. There is no limitation placed upon the purpose for which such influence may be sought. Overbreadth problems appear to be avoided by the fact that "special influence" is defined to be influence apart from the merits of the transaction. Also of assistance is the requirement that the benefit be paid to the recipient as compensation for the non-meritorious facet of the influence to be exerted. Thus, it does not appear that such legitimate professional activities as are continuously carried out by attorneys and lobbyists would be hampered by this section.

Both the recipient and the offeror of a benefit condemned by 2C:27-8 are subject to fourth degree penalties. At present, such statutes as N.J.S.A.2A:93-1 and 2 establish a high misdemeanor for attempting to purchase favor or influence in a judicial or legislative matter. This raises the question whether there should be higher penalties provided where the benefit is paid for influence in these particularly delicate areas. It is our belief that such higher penalties, both monetary and custodial, should be provided where the purchased influence is intended to distort the judicial process or where it is intended to prevent the efficient investigation of crime, the apprehension of a criminal or the prosecution of a criminal offense. Further, the present proposal employs the term "pecuniary benefit" in describing the unlawful compensation to be paid. As indicated earlier there seems to be no reason to make this

largely imaginary, but potentially troublesome, distinction between a mere benefit and a pecuniary one. With these modifications, the section under discussion appears acceptable.

Prior to this final revision of the Code, Chapter 27 contained a final provision, 2C:27-9, which imposed an obligation on public servants to report to the proper authorities any offer of a benefit which is unlawful under the terms of this Chapter. It is submitted that the high degree of trust reposed in public servants more than justifies imposition of an affirmative reporting obligation and that this section should not, therefore, have been deleted.

However, a public servant should not be subjected to possible prosecution for mere negligence or ignorance. Thus, it should be made clear that an offense is committed only where the official "purposely" fails to report an unlawful offer of benefit. In this way, it would be necessary for the State to prove that the official was aware of this offer and of its unlawful nature, but chose to withhold it from the proper authorities. Surely, it is not unreasonable to require this much of our public servants. Further, in view of the fact that several sections of Chapter 27 apply to "party officials" as well as to public servants, it appears anomalous to restrict the reporting requirement to public servants only. Therefore, party officials should also be required to report offers of compensation which are unlawful by the times of this chapter.

CHAPTER 28 PERJURY AND OTHER FALSIFICATION IN OFFICIAL MATTERS

The elements of the offense of perjury under the Code are (1) a false statement, known to be false, (2) made under oath, and (3) material to the matter at issue. This definition is essentially the same as that presently proscribed in N.J.S.A.2A:131-1, 2 and 3. The penalty incurred is one of the third degree. If the falsification is made under oath, but is not material to the issue, or is not made in an official proceeding, the offense committed is merely false swearing. Additionally, an individual is guilty of false swearing if he makes a false statement under oath or equivalent affirmation when he does not believe the statement to be true. False swearing is a crime of the fourth degree if the act was done with intent to mislead a public servant in the performance of his official duties; otherwise it is a disorderly persons offense.

Under both provisions, a defect or irregularity in the administering of the oath provides no defense to either crime. Moreover, the actor's good faith belief that his statement's are not material is no defense to a charge of perjury.

These provisions substantially reflect current law, though in a more clear and concise formulation, and appear to be satisfactory. The only significant departure

from present law made by the Code in this area is the allowance of a defense of retraction. Under the Code, if the actor retracts his falsification prior to the termination of the proceeding or matter in which it is made, he escapes liability. This defense was specifically rejected by our Supreme Court in State v. Kowalczyk, 3 N.J. 51 (1949).

While such a provision has a salutory effect in that it provides an incentive for a witness to correct a misstatement before a final decision is made, it may also encourage a witness to initially give false information knowing full well that if he is "caught in a lie", he can escape liability by merely recanting. The Code Commentary, at 275-276, suggests that this defect may be remedied by requiring that the retraction be made prior to the discovery of the falsehood. This office concurs in this suggestion.

Under the Code, as well as under present statutes, to prove the crime of perjury, the State must demonstrate that the allegedly perjured testimony is actually false. With regard to false swearing, it is only necessary that the prosecution show that the defendant made two contradictory statements. Section 2C:28-2(d). State v. Kowalczyk, supra; N.J.S.A.2A:131-1. It is suggested that this method of proof be extended to the crime of perjury as well.

Finally, it is recommended that the Code requirement that the testimony of a single witness be supported by corroborative evidence be deleted. At present, New Jersey law requires such corroboration only in prosecutions for

perjury. State v. Caporale, 16 N.J. 373 (1954). Inasmuch as no such requirement exists for more serious charges, e.g., attempted murder or rape, it is difficult to understand why the Code should demand such proof in regard to perjury or false swearing.

Section 2C:28-3 involves unsworn falsifications to authorities. It creates a disorderly persons offense for written statements which the author does not believe are true if made pursuant to a form which notes that false statements made therein are punishable.

A petty disorderly offense is defined by 2C:28-3 (b) to penalize false statements, made with intent to mislead a public servant, which do not come within 2C:28-3(a). Additionally, an individual incurs liability under this provisions if he purposely creates a false impression by omitting information from a written statement, submits or invites reliance upon any writing he knows to be forged or altered, or submits or invites reliance upon any sample or other object he knows to be false. Section 2C:28-3(b)(2),(3), and (4).

The above provisions depart from current law in that they do not require that the statements be made under oath. Compare N.J.S.A.2A:131-6. These provisions should, however, also be extended to include oral, as well as written statements. Any statement made with the purpose of misleading a public official in the performance of his duties is equally undesirable and should be proscribed.

Sections 2C:28-1(c) through (3) of the perjury provisions (regarding irregularities, retraction, and corroboration) also apply to 2C:28-3. The previous discussion of these subsections, supra, is incorporated by reference here with one exception. It is suggested that if 2C:28-3 is extended to include oral statements. the corroboration requirement be retained as to verbal falsification only.

Section 2C:28-4 proscribes false reports to law enforcement officers. An individual who knowingly provides a law enforcement officer with false information intended to incriminate another is guilty of a crime of the fourth degree. Other fictitious reports to law enforcement agencies constitute disorderly persons offenses. This provision essentially restates current law. See N.J.S.A.2A:148-22.1.

Section 2C:28-5(a) prohibits an individual, who believes that an official proceeding or investigation is about to be instituted, from attempting to induce a witness to testify falsely, withhold testimony, elude legal process, or absent himself from a proceeding to which he has been legally summoned. If force, threats, deception, or offer of pecuniary benefit is utilized the offense is one of the third degree; otherwise it is a fourth degree offense. A witness who solicits or accepts any benefit to do any of the acts specified in subsections a(1) through (4)

commits a crime of the third degree. Section 2C:28-5(c). Section 2C:28-5(b) penalizes, as a fourth degree offense the harming by unlawful act of an individual because of his services as a witness or informant.

This provision encompasses several offenses presently contained within common law bribery, contempt or obstruction of justice. See State v. Begyn, 34 N.J. 35 (1961); In re Jeck, 26 N.J.Super. 514 (App.Div.1953); State v. Cassatly 93 N.J.Super. 111 (App.Div.1966).

Section 2C:28-6 involves tampering with or fabricating physical evidence. This section specifically defines a crime which is presently contained within the broader crimes of contempt and/or obstruction of justice. An individual comes within the prohibition of this section if, knowing that an official investigation or proceeding is pending he alters, destroys or conceals any document or object with the intent to impair its verity or availability, or he fabricates or supplies a document or object knowing it to be false in order to mislead those conducting the proceeding.

Section 2C:28-7 proscribes tampering with public records or information. This section codifies an offense presently contained within several New Jersey statutes: N.J.S.A.2A:109-1 (forgery), N.J.S.A.2A:122-3 (malicious destruction of written records), and N.J.S.A.2A:136-9 (stealing and

altering records). It proscribes intentional destruction, alteration or removal of governmental records, and knowing entry of false information in such records. The penalty varies as to the intent of the actor: it is a crime of the third degree if committed with intent to defraud or injure; otherwise it is a disorderly persons offense.

Section 2C:28-8 proscribes impersonating a public servant. An individual who falsely pretends to hold a public position with intent to induce another to submit to or rely upon such authority is guilty of a disorderly persons offense. As noted in the Commentary to the Code at 280, under current New Jersey law, the State need prove only that the defendant engaged in a false pretense of official status. No proof of a specific intent to induce submission to official authority is required. It is recommended that the Code provision be revised to eliminate this specific intent. Impersonating a public official creates a significant threat to orderly government and to public confidence in governmental officers regardless of the intent of the impersonator. Moreover in view of the relatively lenient penalty prescribed for this violation, the deletion of the specific intent requirement would not be unjust.

CHAPTER 29 - OBSTRUCTING GOVERNMENTAL OPERATIONS; ESCAPE

Section 2C:29-1 proscribes obstructing the administration of law or other governmental function and Section 2C:29-2 proscribes resisting arrest.

At present, the crimes defined by 2C:29-1, 2C:29-2, and portions of 2C:29-3 are not contained within specific statutes. Rather they are prosecuted by means of N.J.S.A.2A:85-1 which provides that all crimes which were indictable misdemeanors at common law and which are not expressly enumerated in the statutes still constitute misdemeanors.

Under the common law, it was a crime to do any act which prevented, hampered, impeded, or hindered the due course of public justice. State v. Cassatly, 93 N.J.Super. 111,118 (App.Div.1966); 1 Burdick, Law of Crimes §3283, p.409(1946). The term "obstruction of justice" therefore defined a broad category of crime embracing such specific offenses as resisting arrest, tampering with evidence, attempting to influence a juror, intimidating a witness, and interference with service of process. Perkins, Criminal Law, 494-495 (1957).

Section 2C:29-1 provides that a person who intentionally impairs or perverts the administration of law or other governmental function or attempts to prevent a public servant from performing an official function by means of any independently unlawful act (e.g., force, intimidation) is guilty of a disorderly persons offense. This provision does not apply to flight by a person charged with a crime, refusal to submit to arrest or any means of avoiding compliance with the law without affirmative interference with governmental functions.

Such a factor should be weighed in sentencing rather than in establishing the criminality of certain conduct.

Under Section 2C:29-3, the person who aids an accused is guilty of a crime of one grade less than the offense the accused allegedly committed. The Code endeavors to specify the types of aid prohibited. Included in the list of prohibited aid is the volunteering of false information to a law enforcement officer, harboring or concealing the person sought, providing weapons, transportation, money or other means to avoid capture, or suppresses evidence which might and in the discovery or apprehension of such person, warns the person sought of impending discovery.

Section 2C:29-4 concerns compounding a crime. A person is guilty of a crime of the fourth degree if he accepts or agrees to accept any pecuniary benefit in consideration of concealing the commission or suspected commission of a crime. A person similarly commits a crime of the fourth degree for conferring or agreeing to confer such benefit.

The common law offense of "compounding" and its statutory replacement (N.J.S.A.2A:97-1) penalize agreements based upon a consideration to refrain from giving information to law enforcement authorities concerning a crime. The Code excludes from the purview of the statute the situation where a victim of a crime agrees to drop prosecution if the

offender restores property belonging to the victim or pays damage for the harm the victim has suffered. The common law and the current statute make no such exception. Restoration of or indemnification for the loss is the only governing standard in the proposed section. It should also be noted that the Code has no concealing or misprision statute. Thus, mere failure to report a crime is insufficient to render anyone criminally liable. Specific affirmative acts are required to be proven in order to be held responsible.

Section 2C:29-5 involves escape. The Code follows prevailing law in defining escape as an individual's unlawfully removing himself from official detention, or failing to return to official detention following temporary leave. See N.J.S.A.2A:104-6. This provision makes clear that it is not intended to extend to individuals on probation or parole. The Code does, however, effect a change as to the criminal responsibility on the part of custodial officials. Under current law, such an official could be penalized for permitting an escape even though there is only showing of simple negligence. The Code would require that criminal responsibility be imposed only in those situations where the official knowingly or recklessly caused or facilitated the escape. See Section 2C:29-5(b).

Additionally, this provision does not allow an escapee to defend on the grounds that his detention was brought about through an irregularity or without lawful jurisdiction unless th escape involved no substantial risk of harm to persons or property or the detaining authority did not act in good faith. It is suggested that these exceptions be deleted as contrary to the societal policy against "self-help". If an individual is illegally detained, the law provides many procedures for challenging the detention and/or resolving that controversy. Allowing incercerated individuals to "take the law into their own hands" by escaping undermines our concept of orderly resolution of controversies by prescribed legal procedures. Compare, State v. Koonce, 89 N.J.Super. 169 (App.Div.1965), wherein the Court held that an individual may not resist an illegal arrest, but must submit and challenge the arrest by the appropriate legal procedures.

Section 2C:29-6 penalizes an individual who knowingly supplies an inmate with a weapon or other object which is usefull for escape. An inmate is similarly penalized for procuring or possessing such an implement. If the object is a weapon, the offense is one of the third degree. Any other implement results in the application of a fourth degree penalty.

Section 2C:29-7 proscribes bail jumping. This provision penalizes an intentional failure to appear on the part of an individual set at liberty by court order, upon condition that he subsequently appear. The scope of this provision is not limited to situations where the individual is out on bail, but it does not extend to parole, probation, or suspended sentence situations.

The severity of the sentence for failing to appear is contingent upon the seriousness of the crime charged, e.g., if he failed to appear to answer a charge of a fourth degree crime, he incurs a fourth degree penalty.

CHAPTER 30 - MISCONDUCT IN OFFICE; ABUSE OF OFFICE

Section 2C:30-1 proscribes official oppression. This section encompasses individuals who, acting or purporting to act in an official capacity, and knowing that their conduct is illegal subjects another to various specified forms of mistreatment (e.g., arrest, search, dispossession, lien) or who denies or impedes another in the exercise of any right or privilege. The penalty imposed is one of the fourth degree.

The conduct proscribed by this section currently falls within the ambit of misconduct in office, which as a common law indictable crime, has been incorporated into our statutory scheme by N.J.S.A.2A:85-1. Common law misconduct in office has been defined as "corrupt misbehavior

by an officer in the exercise of his duties or while acting under color of his office." Perkins, Criminal Law, 413 (1957); State v. Begyn, 35,49 (1961). The question then arose as to the meaning of "under color of his office." In State v. Silverstein, 41 N.J. 203 (1963), a sheriff was indicted for misconduct arising out of an abuse of the bail bond system. The defendant argued that inasmuch as a sheriff had no legal authority to accept bail, he could not be charged with misconduct in office. The Supreme Court rejected this argument stating,

> "when a public officer undertakes or assumes to perform certain public duties by virtue of his office and as if incident to his office, and he willfully engages in unlawful behavior which violates the duties undertaken or assumed, he will not be heard to say that such duties were not required by, or incidental to, his office, but were assigned by law to some other public office not held by him. [41 N.J. at 208]."

The Code provision circumvents this problem by utilization of the phrase "purporting to act in an official capacity." (emphasis supplied).

Section 2C:30-2 proscribes official misconduct. Under the Code, a public servant commits misconduct in office when in order to secure a benefit for himself or another, or to deprive another of a benefit, he:

> (a) knowingly does an act related to his office, but not an authorized exercise of his function, or commits such act in an unauthorized manner or,
>
> (b) knowingly refrains from performing a duty which imposed by law or which is inherent in the nature of his office.

Violation of this section results in a penalty of the fourth degree.

This provision essentially reiterates the common law offense with one unfortunate exception. Whereas the present law criminalizes violations by a public servant of his prescribed duties, the Code would render those violations criminal only when the act or omission was coupled with an attempt to obtain a benefit or to injure some individual. Thus the public official who out of sheer laziness fails to perform his duties escapes all liability.

It is therefore recommended that the phrase "with purpose to obtain a benefit for himself or another or to injure another or to deprive another of benefit "be eliminated, and that the broader common law formulation be adopted. Such a change would be more in keeping with the remainder of the Code which generally increases the protection of the public against abuses by public officers.

Section 2C:30-3 proscribes speculating or wagering on official action or information. This provision creates a specific statutory offense for the misuse of confidential knowledge obtained as a result of holding public office, or for speculating on the basis of official action which the individual is in a position to influence. This offense is a crime of the fourth degree. This provision has no equivalent in current New Jersey law.

Section 2C:30-3 is satisfactory as written. However, as the Code Commentary notes, at p.292, an official who has an investment, antedating his public service, would under this section be permitted to sell his holdings in anticipation of adverse developments of which he has "inside" knowledge. The Commentary suggests that this problem could be remedied by means of administrative regulations regarding the extent to which public officials may upon taking office retain holdings in fields subject to action of their governmental units. This suggestion should be implemented.

CHAPTER 33 - OFFENSES AGAINST PUBLIC ORDER, HEALTH AND DECENCY

Section 2C:33-2 provides that an individual is guilty of a petty disorderly persons offense if with the purpose of causing public inconvenience or alarm, or if acting so recklessly as to create a risk thereof, he engages in fighting, threatening or violent behavior, or causing a hazardous condition by an act which serves no legitimate purpose of the actor. Additionally, an individual incurs liability if in a public place, with intent to offend a listener or in reckless disregard of the probablity of doing so, he addresses the hearer in coarse, or abusive language.

The riot provision, Section 2C:33-1(a), a crime of the fourth degree, is dependent in part upon 2C:33-2.

It provides that an individual is guilty of rioting if he participates with four or more others in any disorderly conduct with intent to facilitate the commission of a crime, to coerce official action, or when armed with a deadly weapon. When four or more persons engaged in disorderly conduct knowingly fail to obey an order to disperse, they are guilty of a disorderly persons offense. 2C:33-1(b).

The portions of these two provisions aimed at offensive language, as presently written, present significant First Amendment free speech problems. In over-ruling similarly worded state statutes, the United States Supreme Court has held that the States may constitutionally prohibit only those abusive epithets which constitute "fighting words," i.e., words which when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent reaction. Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); State v. Rosenfeld, 62 N.J. 594 (1973). Accordingly, Sections 2C:33-1 and 2C:33-2 should be revised to conform to the standard enunciated in these recent decisions.

CHAPTER 34 - PUBLIC INDECENCY

Section 2C:34-1 creates a disorderly persons offense of open lewdness proscribing the commission "in a place exposed to public view ... [of] any flagrantly lewd and offensive act which he knows or reasonably expects is likely to be observed by members of the public who would be affronted or alarmed." Public lewdness is currently prosecuted under N.J.S.A. 2A:115-1, which prohibits "open lewdness or a notorious act of public indecency, grossly scandalous and tending to debauch the morals and manners of the people...." The elements of this offense include "an act which is indecent, is open and notorious and tends to debauch the morals and manners of the people." State v. Beckett, 56 N.J. 267 (1970). The perpetrator must intend that his conduct be seen. State v. Beckett, supra.

The Code obviously attempts to refine certain aspects of the public indecency offense. As discussed with reference to Chapter 14, unlike the current law in this area, Section 34-1 is not designed to proscribe private sexual acts. Moreover, the public behavior prohibited by the Code is limited to flagrantly lewd acts committed for the "purpose of arousing or gratifying the sexual desire of the actor or of any other person," rather than the more general "indecency" penalized by existing laws. See State v. Beckett, supra (defendant masturbated in his car and was observed by a passer by); State v. Griffin, 19 N.J.Super. 581 (App.Div. 1952) (defendant exposed himself and performed self-flagellation in a park); State v.

Buffano, 5 N.J.Super. 255 (App.Div. 1949) (defendant exposed himself in a movie theater); Van Houten v. State, 46 N.J.L. 16 (Sup.Ct. 1884) (defendant urinated in public view).

Rather than characterizing the location of the act as a "public place," Section 34-1 specifies only that the conduct be "exposed to public view." Even this latter phrase appears unnecessarily redundant in light of the additional proposed requirement that the perpetrator know or reasonably expect that observation by a member of the public is likely.

The requirement that the individuals likely to view the act respond with "affront or alarm" also may present problems. It is unclear whether or not any member of the general public may be assumed to react "with affront or alarm" to acts of open lewdness, or whether some additional proof must be adduced by the prosecution. It would seem difficult, at best, for the State to establish personalized reaction of the specific viewer reasonably "likely" to observe a given act.

Section 2C:34-2(a) classifies prostitution as a disorderly persons offenses. The present law defines prostitution as "the giving or receiving of the body for sexual intercourse for hire, and the giving or receiving of the body for indiscriminate sexual intercourse without hire." N.J.S.A. 2A:133-1.[63] The Code eliminates reference to noncommercial

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63 Within the current legislative scheme, soliciting unlawful sexual or indecent acts may also be prosecuted under N.J.S.A. 2A:170-5. See State v. Adams, 77 N.J.Super. 232 (App. Div. 1962). This is a disorderly persons offense, while N.J.S.A. 2A:133-2 penalizes prostitution and related offenses as misdemeanors.

indiscriminate sexual activity. However, the scope of the proposed statute is broadened by the inclusion of homosexual and other deviate sexual relations.

Offenses related to the promotion of prostitution are established in Section 2C:34-2(b), and are penalized more severely than the act itself. Procuring, pandering, transporting, and other activities auxiliary to prostitution, now constituting separate offenses, are integrated in the Code under a single "umbrella" provision prohibiting the promotion of prosiitution in gradations of degrees.[64] See N.J.S.A. 2A:113-2 through 12. Section 2C:34-2(d) provides that any person, other than a prostitute's minor child or legal dependent incapable of self-support, who is supported in substantial part by the proceeds of prostitution is presumed to be knowingly promoting prostitution in violation of 2C:34-2(b). Finally, the proposed Code penalizes the patron of a prostitute as a disorderly person. 2C:34-2(e).

This section appears to implement the legislative purpose of discouraging commercial promiscuity and its attendant dangers, including the spread of disease, the impetus to corrupt law enforcement officials, and the incentive to coerce and exploit women. At the same time, reduction of the penalty for being

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64 Procuring offenses are crimes of the fourth degree unless they involve keeping a business or house of prostitution; procuring an inmate for a house or a place in a house for a prospective inmate; encouraging or purposely causing another to become or remain a prostitute; compelling another to engage in or promote prostitution;promoting prostitution of a child under 16, regardless of the actor's knowledge of the child's age; promoting prostitution of the actor's spouse, child, ward, or other person for whose care he is responsible. All of the enumerated activities are crimes of the third degree.

a prostitute to the level of a disorderly persons offense reflects the change in public attitudes toward regulation of private sexual activity. The statutory imposition of equal treatment of both prostitute and patron also constitutes a laudable attempt to combat the problem of commercialized sexual activity on a rational basis.

The Code eliminates all private obscenity offenses involving adults. See N.J.S.A. 2A:115-2. Therefore, for example, proprietors and operators of movie theatres may not be prosecuted for the showing of obscene films to an audience of consenting adults. This change appropriately reflects the increasing public tolerance for such material, as well as the need to reallocate law enforcement resources to more critical areas. However, two aspects concerning the promotion of obscenity still require government regulation. They are exposure of children under the age of 16 to obscene material and films, and the public communication of obscenity. This strictly limited scheme for regulating obscenity has been impliedly approved by the United States Supreme Court, which cautioned that legislation may not over-broadly proscribe for adults materials only deemed harmful for minors, merely to protect the latter group. See e.g., Erznoznik v. Jacksonville, ___ U.S. ___, 95 S.Ct. 2268 (1975). Consequently, the Court intimated that "state and local authorities might well consider whether their objectives in this area would be ... served by laws aiming specifically at preventing distribution of objectionable material to children...." Jacobellis v. Ohio, 378 U.S. 186, 195 (1964).

Sections 2C:34-4(b) and (c) prohibit the knowing

commercial exposure of obscenity, including sale of material and admission to films, to persons aged 16 and under. Section 2C:34(a) contains detailed definitions of "obscene material" and"knowledge."[65] Subsection (d) creates a presumption of knowledge of both the character of the material and the age of

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65 This section provides:

> ... a. Definitions for purposes of this section:
> (1) "Obscene material" means any description, narrative account or depiction of a specified anatomical area or specified sexual activity contained in, or consisting of, a picture or other representation, publication, sound recording or film, which by means of posing, composition, format or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the area or activity.
> (2) "Obscene film" means any motion picture film or preview or trailer to a film, not including newsreels portraying actual current events or pictorial news of the day, in which a scene, taken by itself.
> (a) Depicts a specified anatomical area or specified sexual activity, or the simulation of a specified sexual activity or verbalization concerning a specified sexual activity; and
> (b) Emits sensuality sufficient, in terms of the duration and impact of the depiction, to appeal to prurient interest.
> (3)"Specified anatomical area" means:
> (a) Less than completely and opaquely covered human genitals, pubic region, buttock or female breasts below a point immediately above the top of the areola; or
> (b) Human male genitals in a discernibly turgid state, even if covered.
> (4) "Specified sexual activity" means:
> (a) Human genitals in a state of sexual stimulation or arousal; or
> (b) Any act of human masturbation, sexual intercourse or deviate sexual intercourse; or

the purchaser, arising from the commission of the act.

It is an affirmative defense to prosecution under (b) and (c) that the purchaser falsely represented in writing that he was 16 or older, that the appearance of this person would lead an individual of ordinary prudence to believe him to be age 16 or over, and that the act in question was committed in good faith relying upon such written representation and appearance and on the reasonable belief that he actually was age 16 or over. 2C:34-4(e). Defendant must prove each of the three elements of this defense by a preponderance of the evidence.

This section of the Code appears quite similar to parallel provisions of the existing statutes. N.J.S.A. 2A:115-1.8; 2A:115-2.6. The age of the juvenile is changed from 18 to 16, and the definitions in the Code are somewhat more detailed than those in N.J.S.A. 2A:115-1.7. The severity of the offense is lowered from a misdemeanor carrying a possible penalty of three years imprisonment to a crime of the fourth degree with a maximum punishment of 18 months incarceration. The affirmative defense will remain intact, as will the presumption of knowledge, although the terms of the presumption are more clearly described in the proposed legislation. The Code omits two additional sections of the present act, the statements of

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65 (Cont'd)

> (c) Fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttock or female breast.
> (5) "Knowingly" means:
> (a) Having knowledge of the character and content of the material or film described herein; or
> (b) Having failed to exercise reasonable inspection which would disclose its character and content.

legislative finding (N.J.S.A. 2A:115-1.6; 115-2.1), and the severability clauses. (N.J.S.A. 2A:115-1.11; 115-2.9).

Section 34-4 appears to provide an adequate tool for regulating the exposure of juveniles to obscene material and films. A constitutional problem may arise in the future if the United States Supreme Court decides to require the application of the three-pronged adult standard articulated in Miller v. California, 413 U.S. 15 (1973),[66] to statutes precluding dissemination

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66 Miller articulates the following guidelines for determining obscenity in situations involving adults:

> (a) [W]hether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,....
>
> (b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
>
> (c) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. Miller v. California, supra, 94 S.Ct. at 2615.

The present general definition of obscenity in New Jersey emanates from State v. DeSantis, 65 N.J. 462 (1974), in which the Supreme Court construed Section 2A:115-2 to define the term as material depicting or describing certain specific sexual conduct in a patently offensive way, "that to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest in such matters; and that the material, taken as a whole, lacks serious literary, artistic, political or scientific value." Id. at 472. This generalized definition designed to comly with the Miller standards is not incorporated into the proposed Code. The provisions of 2C:34-4(a), while articulating a very specific definition of the offense, nevertheless do not include all three prongs of the Miller test, since no mention is made of the possibility of redeeming "literary, artistic, political or scientific value."

of obscenity to juveniles. This issue is currently without a definitive answer, although relevant cases seem to indicate that a broader standard of obscenity for minors is acceptable. Erznoznik v. Jacksonville, supra; Ginsburg v. New York, 390 U.S. 629, 639, n. 6 (1968).

Section 2C:34-5 prohibits the public communication of materials defined as "obscene" in 2C:34-4. Public communication is described as the knowing exhibition or display of these materials in such a manner that it may be readily perceived by unaided senses from a public street, recreation area, or shopping center.

In light of the recent opinion in Erznoznik v. Jacksonville, supra, this section may present some significant constitutional problems. Prior to this decision, it was believed that the state could, consonant with First Amendment free speech protections, more stringently restrict the types of materials which could legally be displayed when the manner of exhibition was "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." Redrup v. New York, 386 U.S. 767, 769 (1967). Rabe v. Washington, 405 U.S. 313, 316 (1972).

Erznoznik appears to have abandoned this approach, shifting the burden to the viewer to "avert his eyes" if the materials being exhibited are offensive. 95 S.Ct. at 2273. The full impact of this case, however, is difficult to assess since the decision turned upon the overbreadth of the statute at issue. That municipal ordinance prohibited the showing at

a "drive-in" movie visible from the street of any movie containing nudity. One justification offered by the city for the necessity of this regulation was to protect minors from inadvertent exposure to such materials. The Court appeared to recognize the State's right to control public displays so as to safeguard minors who might otherwise be exposed, but indicated that the present ordinance was broader than would be permissible. Id. at 2274. Thus it would seem that a narrowly drawn statute aimed at prohibiting the public display of "sexually explicit nudity" as opposed to mere nudity,[67] might pass constitutional muster under the rationale of protecting minors. Therefore, section 2C:34-5 should be reevaluated and rewritten in accordance with these principles.

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67 As examples of mere nudity the court listed, "a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous." Id. at 2275.

CHAPTER 37 - GAMBLING OFFENSES

The proposed gambling statute is directed against major gambling enterprises and the persons who play key roles in them. It attempts to eliminate from the purview of the law those persons whose association with a gambling enterprise appears to be minor. Gambling laws should be limited to those whose activities are regular and systematic and operate as a business. Social gambling activities cannot be subjected to effective societal control, and, in any event, the public's interest in halting such activities is relatively unimportant when compared with the efforts that must be made to control the area. A gambling law which is directed at major operations allows law enforcement agencies to direct their resources at more serious offenses.

The proposed gambling provisions, while directed at the desirable goal of attacking major gambling enterprises fails to recognize the role played by persons in the lower echelons of a gambling operation. Furthermore, the proposed law, in its attempt to concentrate on major offenders, speaks in such broad terms that it would seriously hamper the State in attacking major gambling enterprises. These facts will become apparent as the specific provisions of this Chapter are analyzed.

Sections 2C:37-1(a),(b),(e),(f),(h),(i) and (j) defines contest of chance, gambling, gambling device, slot machine, lottery, policy and gambling resort. The proposed law defines

terms as they are generally understood and are adequate.

Subsection (c) of 2C:37-1 defines "player" as a person who gambles and is not entitled to receive any profit therefrom other than his personal winnings and without otherwise rendering any material assistance to the gambling enterprise. Section 2C:37-2 provides that a player cannot commit the offense of promoting gambling. This constitutes a radical change in the law, since at present all persons engaging in gambling activities are criminally liable. The wisdom of the proposed law is open to question. It is clear that no gambling operation can exist without the players. The Code appears to take a naive approach in assuming that major gambling enterprises can be effectively controlled by directing the law at major figures in such operations. This assumption would be accurate if such persons were all convicted and their enterprises eliminated. This is, of course, unrealistic. It is thus necessary to make players criminally liable if they gamble in other than in a merely social game. Naturally, however, the penalty for player participants should be less than for the operators.

Subsection (c) also provides that those who participate in a "social game" and do not receive any profit other than arranging the game, permitting use of premises therefore or furnishing equipment are not criminally liable. The decriminalization of "friendly" games of chance has much to recommend it. Such

activities are difficult to control, the societal interest in prohibiting such gambling is relatively minimal and the limited resources of law enforcement agencies demand that they be concentrated on serious anti-social behavior.

The proposed gambling law does not define "social game" and should do so. It should be defined as a game wherein no person other than the participants receives any profit therefrom and the participants can profit only by receiving personal gambling winnings.

Section 2C:37-1(g) defines bookmaking as "advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcome of future contingent events." The goal of this provision is to decriminalize the acceptance of bets from personal acquaintances, rather than as part of a regular gambling enterprise. However, the definition of bookmaking in the proposed statute is too broad and could lead to great difficulty in successfully prosecuting professional bookmakers. For example, a professional bookmaker who knew all of those who placed bets with him could claim that he took the bets in a "personal fashion", rather than as a business. The vagueness of the term "business" could contribute to such a defense. It is therefore suggested that the proposed law be modified so as to make unlawful the acceptance of bets on a regular systematic basis for the purpose of

making a profit. However, the statute should specify that this not include occasional wagers between individuals.

Section 2C:37-2 defines "promoting gambling" as accepting or receiving money from any person pursuant to an understanding whereby he participates or will participate in the proceeds of gambling activity or materially aids any gambling activity. There is no problem with this definition. After defining the offense, the proposed Code introduces a novel approach to the penalty aspect of this offense. It grades the penalties in accordance with the extent of a defendant's involvement in gambling. Thus, a person who receives or accepts more than five bets totalling more than $1,000 in any one day, or receives money or written records from a person other than a player whose gambling activities are represented by such, or who receives, in any one day, more than $100 played in a gambling enterprise is subject to a fine of not more than $25,000.

The proposed statute further provides that a bookmaker who accepts three or more bets in any two week period may be fined a maximum of $15,000. Any other person who violates this statute is guilty of a disorderly persons offense and may be fined no more than $10,000.

It is apparent that the purpose of the foregoing penalty scheme is to differentiate between major gamblers and

those whose gambling activities is social in nature. However, in distinguishing between major and minor offenders, the drafters overlooked the problem of proof. Law enforcement authorities may have clear proof that a person or persons are conducting major gambling enterprises without being able to prove how many bets were accepted each day. It is therefore recommended that the proposed provisions, which require proof as to the number of bets accepted or the amount of money received, be amended to provide that where the State proves those elements, the person convicted be subject to a prison term as well as a mandatory fine. If the statute does not provide for possible prison terms, the fines will amount to nothing more than licenses to gamble.

As for those cases where the State is unable to prove the number of bets accepted or their amounts, it should be recognized that because of the difficulty of proof, persons involved in major gambling operations may fall under the less stringent provision. It is therefore recommended that, at the very least, there be a minimum mandatory fine of $10,000 and a maximum of $25,000. Preferably, however, possible prison terms should be provided for under the provision in question. It is recognized that imprisonment is not an appropriate sanction for persons who are involved in gambling activity on a small level. However, because individuals who are involved in major gambling enterprises may, for the reasons

heretofore described, fall under this provision, sentencing judges should be given the discretion to impose prison terms.

Section 2C:37-3 makes it an offense to possess gambling records. The definition of this offense is essentially similar to that in the present law. However, the proposed Code gives the person charged with this offense a defense not presently available under New Jersey law. The proposed statute provides that it is a defense to a prosecution under this section that the gambling record possessed by the defendant represented his own "plays, bets or chances" in a number not exceeding ten. As discussed earlier, major gambling operations cannot be effectively controlled if the "small" people, upon whose patronage the enterprises must rely, are ignored. For this reason, the proposed defense should be limited. It should provide that the possession of personal gambling records, reflecting bets, chances or plays not exceeding ten should be a disorderly persons offense and subject a defendant to a fine of not more than $1,000.

Section 2C:37-3, like 2C:37-2, grades the penalties in accordance with the degree of an individual's involvement with the offense. A maximum fine of $25,000 is prescribed for those who possess gambling records representing more than five bets totaling more than $1,000 or, where the records of a lottery are involved, they represent more than one hundred

plays or chances therein. Otherwise, the maximum fine is $10,000. This provision is not subject to the same criticism as was directed at 2C:37-2 with respect to the difficulties of proof. Those involved in gambling enterprises need to keep proper records for their own purposes. Therefore, the contents of gambling records will probably accurately reflect the extent of the gambling operations at a particular point in time. However, the proposed penalty provisions suffer from the same infirmity as do the similar proposals contained in 2C:37-2. It is therefore suggested that the penalty aspect of 2C:37-3 be amended in accordance with our recommendations as to 2C:37-2.

Section 2C:37-4 prohibits the maintenance of a gambling resort. The proposed statute substantially changes present law. Under the proposed Code, a person would be guilty of the offense only if a person having substantial authoritative control over premises which are being used with his knowledge for purposes of gambling activity, allows such to occur and accepts or receives remuneration pursuant to an agreement whereby he will participate in the proceeds of the gambling activity on the premises. Under present law, an individual may be guilty of maintaining a gambling resort irrespective of whether he profits therefrom. N.J.S.A.2A:112-3; State v. Sachs, 69 N.J.Super. 566, 574 (App.Div. 1961). The proposed statute is apparently directed not merely at persons who profit from

the maintenance of a gambling resort, but who are more closely connected with the gambling enterprise, for it does not make it an offense for one to draw a fixed fee in return for providing premises for gambling activities. There is no reason for limiting criminal liability to those persons who provide gambling facilities in exchange for a portion of the gambling proceeds. It should definitely be extended to those who receive a fixed fee. Moreover, there is no reason to make all persons, except those who engage in "social games," criminally liable. It is likely that all persons who maintain gambling resorts benefit thereby.

Section 2C:37-4 also differs from existing law in that it requires gambling activity to occur on the premises provided before a defendant can be held liable. Presently, maintaining a place with the intent that it be utilized as a gambling resort is a crime. State v. Puryear, 94 N.J.Super. 125, 130 (App.Div. 1966), rev'd on other grounds 52 N.J. 81 (1968). The law should be directed at this initial step in the criminal enterprise and the proposed law should be amended accordingly.

Section 2C:37-5 provides that an article in a publication of general circulation reporting that a sporting event occurred is admissible in evidence. Although the Rules of Evidence have been adopted by the Supreme Court in exercise of its rule-making power under the State Constitution, N.J.Const., Art. VI, §2, par. 3,

rules of evidence have both procedural and substative aspects, Busik v. Levine, 63 N.J. 351, 374 (1973), (Hall, J., concurring in result). The Legislature has the ultimate authority with respect to rules governing the admission of evidence. See N.J.S.A.2A:84A-37. Furthermore, a newspaper's report as to the date of a sporting event is trustworthy and does not present a problem of unfairness.

Section 2C:37-6 provides that that the operation of a lottery is not lawful merely because the lottery is not illegal under the laws of the jurisdiction where it is conducted.

Section 2C:37-7 makes every person except a player guilty of a disorderly persons offense if he manufactures, sells transports, places or possesses or conducts any transaction designed to affect ownership, custody or use of a slot machine or, believing that it is to be used for the purpose of gambling, any other gambling device.

Section 2C:37-8 provides that all offenses under this Chapter shall be prosecuted in the County Court. This provision would preclude municipal courts from trying disorderly persons offenses under this Chapter. Presently, municipal courts have jurisdiction over disorderly persons offenses. N.J.S.A.2A:8-21. It would be better not to burden the County Courts with offenses which may involve minor offenders. Municipal courts should therefore have jurisdiction to try disorderly persons offenses under this Chapter.

CHAPTERS 39 AND 58 - CONTROL OF FIREARMS AND OTHER DANGEROUS WEAPONS

CHAPTER 39 - FIREARMS, OTHER DANGEROUS WEAPONS

The underlying purpose of the recommended provisions of the proposed penal code relating to the control of dangerous weapons is to restrict the acquisition and possession of firearms as well as to severely curtail the possession of dangerous instruments.

The definitional section of Chapter 39 contains various provisions which should be modified or deleted. Subsection (a) of 2C:39-1 takes the definition of antique firearm from N.J.S.A.2A:151-18. The term is defined as "any firearm which is incapable of being fired or discharged, or which does not fire fixed ammunition, or which was manufactured before 1898 for which cartridge ammunition is not commercially available, and is possessed as a curiosity or ornament or for its historical significance or value." The present definition has led to ligitation with respect to whether replicas of antique firearms are comprehended within the term "antique." Service Armament Co. v. Hyland, 131 N.J.Super. 38 (App.Div. 1974), certif. granted, 67 N.J. 80 (1975). In the initial draft of Chapter 39, the framers apparently recognized the problem because they included a provision which stated that "the term [antique firearms] includes a replica of an antique weapon if, but only if, such

replica is incapable of being fired or discharged." The drafters of the proposed Code omitted this portion of the definition from its final draft. It should be restored to the statute. Section 2C:39-6(d) exempts from the licensing provisions of the law antique firearms which "are unloaded or are being fired for the purposes of exhibition or demonstration at an authorized target range or in such other manner as has been approved in writing by the chief law enforcement officer of the municipality in which the exhibition or demonstration is held. It would appear that the reason underlying the exemption for antique firearms is that such weapons are possessed primarily by collectors of antique guns and their availability is circumscribed by their rarity and their high price. Replicas of antique firearms on the other hand, are readily available in very large quantities and are relatively inexpensive. Moreover, they are capable of inflicting injury and death in the same manner as are modern firearms. Although the term antique firearm is limited to guns which are possessed "as a curiosity or ornament or for its historical significance value," a person purchasing such a weapon apparently can obtain it merely by representing that he intends to possess it as a curiosity or ornament or for its historical value. Thus, unless it is clearly set forth that the exemption for antique firearms does not include replicas of such weapons, persons unfit to possess firearms and those intent upon criminal activity may obtain such

readily available lethal firearms without the safeguards inherent in the licensing process.

While on the subject of antique firearms, it should be noted that the exemption provided by the proposed statute is an improvement over the present law. N.J.S.A.2A:151-18 exempts all antique firearms from the provisions of the Gun Control Law, irrespective of the manner in which such weapons are possessed. Section 2C:39-6(d) logically limits the exemption for such guns. If an individual possesses an antique firearm for its historical significance or as a curiosity or ornament, there is no reason for it to be loaded unless it is being fired as part of an exhibition or demonstration, and then only at an authorized target range.

"Destructive device" is defined as "any device, instrument or object designed to explode or produce uncontrolled combustion." Subsection (c). This category is intended to include explosive devices which do not fit the definition of explosives. A criticism which can be directed to this subsection relates to the fact that the term "destructive device" is said to exclude devices "manufactured for the purpose of illumination, distress signaling, line-throwing, safety or similar purposes." There can be no doubt that such devices, although generally utilized in a legitimate manner, can be used by criminal elements and can cause serious damage, injury and even death. It is therefore suggested that the exception in question be modified so that an accomodation

can be reached between the interests of those who must possess such devices for safety purposes and the interest of the public in being protected against the use of such devices in a criminal manner. Consequently, the exception ought to be modified so that the term destructive device include any instrument manufactured for the purpose of illumination, distress signaling, line-throwing, safety or similar purposes unless the possession of such an instrument has a lawful purpose. Alternatively, it is suggested that the exception be framed in such a manner so that the term "destructive device" include the aforementioned instruments if they are possessed for an unlawful purpose.

Both the Gun Control Law of 1966 and the Code except from the definition of "explosive" small arms ammunition and explosives in the form prescribed by the United States Pharmacopoeia. It is recommended that only those who are authorized to sell firearms be permitted to deal in ammunition. In addition, it should be unlawful for any person other than one who is licensed to possess firearms to purchase ammunition. At present, any person may purchase or sell small arms ammunition. Thus, persons who possess firearms illegally can easily obtain small arms ammunition. If the sale and possession of small arms ammunition were regulated, as recommended, the acquisition of small arms ammunition by persons who possess firearms illegally would be curtailed. With regard to the provision excluding explosives

in the form prescribed by the United States Pharmacopoeia, it is recommended that such explosives be included within the definition of explosives if they are possessed for an unlawful purpose. It is also suggested that sellers of such explosives be required to keep a record of the sales they make and the persons who purchase them.

Subsection (r) defines weapon as "anything capable of lethal use or of inflicting serious bodily injury." The subsection adds that the term includes firearms which are not loaded or are lacking a component to render them immediately operable and comprehends components which can be readily assembled into a weapon. This is an important provision which takes into account the fact that parts of a firearm, although not operable at a particular moment in time, may readily become a lethal weapon by the addition of component parts. This is an improvement over the language of the present Act which, by its terms, appears to include within its provisions only weapons which are immediately operable. Although this language deficiency may have been cured by the decision in State v. Morgan, 121 N.J.Super. 217 (App.Div. 1972),[68] it is not clear whether Morgan extends to any situation where a gun may readily be rendered operable, particularly if the firearm is not loaded.

68 There, the Court held that where the firing pin of a revolver had been filed down, and in order for the gun to be fired it would have been necessary to insert a thin piece of metal or paper between the pin and the cartridge and the revolver contained live ammunition, the gun was operable as required by N.J.S.A.2A:151-1.

Section 39-2(a) provides that the possession of firearms, weapons, destructive devices, silencers, and explosives in an automobile raises a presumption that the weapons are in the possession of the occupant or occupants of the car. However, when it is found on the person of one of the occupants or when it is found out of view in the glove compartment or other depository, it shall be presumed to be in the possession of the occupant who owns it or has authority to operate the vehicle, unless it is a stolen automobile. In addition, when the vehicle is a taxi cab and a firearm is found in the passenger portion of the taxi, it is presumed to be in the possession of all of the passengers. This provision is similar to one that exists in the present law. N.J.S.A.2A:151-7 provides that the presence of a firearm, grenade or explosive in a vehicle is presumptive evidence of possession by all persons occupying the vehicle at the same time. Our Supreme Court has held that this statute gives the jury the right to reasonably infer that the occupants of an automobile all had possession of the firearm, provided such an inference is supported by the evidence, State v. Humphreys, 54 N.J. 406 (1969). Section 2C:39-2 attempts to catalog the cases where inferences should be permitted and against who such inferences should apply. It is submitted that this cannot be done by statute. Whether the evidence justifies an inference that a person or persons were in possession of weapons found in an automobile is a question which can only be resolved by a jury

which must look to the facts and circumstances of each case. It is therefore suggested that a statute be enacted that employs the Humphreys approach.

Section 2C:39-2 (b) provides that

> When the legality of a person's conduct under this Chapter depends on his possession of a license or permit or on his having registered with or given notice to a particular person or agency, it shall be presumed that he does not possess such a license or permit or has not registered or given the required notice, until he establishes the contrary.

On its face, this provision would appear to shift the burden of proof to a defendant by presuming him guilty of having failed to take the necessary steps to legalize his conduct. It is likely that the drafters of this statute attempted to codify the holding in State v. Hock, 54 N.J. 526 (1969), cert. den. 399 U.S. 930 (1970). In Hock, the Court held that the State was not required to make an affirmative showing that a defendant did not possess a gun permit in order to secure a conviction for possessing a gun without a permit. It is suggested that 2C:39-2(b) be redrafted to provide that in a prosecution for failing to comply with the requirements of this Chapter, the State need not prove that the defendant failed to comply and that compliance is an affirmative defense.

Section 2C:39-3(e) prohibits the possession of certain weapons, such as gravity knives, blackjacks, daggers, and metal

knuckles "without any explainable lawful purpose." The phrase "explainable lawful purpose" is vague. It clearly gives a defendant an undeserved advantage. A defendant charged with violating this provision could assert that he possessed such weapons for the purpose of defending himself against possible attack. It may be that a jury would not believe the defendant in many, if not most cases. However, it presents unnecessary problems. A better approach would be to prohibit the possession of such weapons under all circumstances. Whatever limited lawful use these weapons may have is outweighed by the strong countervailing consideration of protecting the public from attack by persons possessing such instruments.

Section 2C:39-6(a) exempts law enforcement officers, military personnel and civilian employees of the United States who are authorized to carry firearms in the performance of their official duties from the provisions of 2C:39-5. It should be noted that prosecutor's investigators, who are not explicitly exempted by N.J.S.A.2A:151-41 from the provisions of the Gun Control Law, are specifically mentioned in 2C:39-6(a)(4).

Section 2C:39-6(f)(2) and (3)(a) exempts from the licensing provisions of subsections (c) and (d) of 2C:39-5 persons carrying firearms or knives in the woods, fields or waters of this state, or in transit to any of the enumerated places, for the purpose of hunting or fishing, provided the weapon carried is legal and appropriate for such purposes and

the possessor has a hunting or fishing license. This provision is similar to N.J.S.A.2A:151-42(b) and (c). In State v. Repp & Stiles, ___ N.J. ___ (decided January 27, 1976), the State argued that a person possessing a purchaser identification card was authorized to carry his rifle or shotgun only in the places and under the circumstances enunciated in N.J.S.A.2A:151-42. The Court rejected the argument, holding that an individual may engage in the activities specified in N.J.S.A.2A:151-42 without obtaining a purchaser identification card. The Court noted that it is "perhaps ... unwise to permit persons to carry or possess a rifle or shotgun ... subject only to the obtaining of an identification card. However, this is a matter for legislative consideration." (Slip opinion, at 11-12). It is therefore recommended that in addition to requiring persons who wish to purchase and possess rifles and shotguns to obtain purchaser identification cards, that the statute should specify that one may not carry shotguns or rifles at any place within the State unless the person who does so is in possession of a purchaser identification card.

Section 2C:39-6(g) requires that when a statute authorizes an individual to carry a weapon without obtaining a license therefor, the weapon must be carried unloaded, contained in a closed compartment or securely tied package, and the course of travel must not include unnecessary deviations.

This section provides for appropriate safeguards to assure, as far as is possible, that weapons transported under the circumstances described will be carried with safety. It is recommended that there be added a provision which would require all persons who carry firearms to do so in such a manner as to assure that they do not come into the possession of persons other than the licensee. If the firearms are carried in an automobile and and the owner leaves the gun in the vehicle, he should be required to lock the automobile or the compartment into which he places it. Similarly, if a licensee leaves a firearm in his home, he should be required to place it in a locked compartment and hold the key on his person. The foregoing would make it more difficult for unlicensed persons to obtain firearms belonging to another.

Section 2C:39-10(a) makes it a crime of the fourth degree for one to violate the regulatory provisions of Chapter 58. Section 2C:39-10(b) provides that an individual is a disorderly person if he fails to notify law enforcement officials that he has come into the possession of an explosive, destructive device or ammunition therefor which may be dangerous and is not used for commercial purposes. Section 2C:39-10(c) makes a person guilty of a crime of the third degree if he makes false representations in applying for a license to acquire, possess or carry firearms.

Section 2C:30-11 makes it unlawful for a pawnbroker to sell, offer for sale, lend or give away any weapon, destructive

device or explosive. The statute also prohibits the use of a handgun, rifle or shotgun as sevurity for a loan.

Section 2C:39-12 is a new provision, not found in our present law. It provides that an individual who voluntarily surrenders any object or instrument which he possesses illegally under this act will not be prosecuted for illegal possession of the object or instrument if charges have not been made or complaints filed for the unlawful possession of the weapon. This provision should encourage persons who possess weapons illegally but who wish to dispose of them to surrender them. The public has a greater interest in reducing the number of weapons possessed by individuals unlawfully than it has in prosecuting those who possess such instruments, particularly when such persons are willing to surrender them.

CHAPTER 58 - FIREARM LICENSING

Section 2C:58-1 requires manufacturers, wholesale dealers of firearms and agents of wholesale dealers to register with the superintendent of the State Police. The provisions of the proposed Code are essentailly identical to present existing law.[69] Under both the present and proposed enactments, the superintendent of the State Police is given the authority to promulgate standards and qualifications and may refuse to register applicants if he is not satisfied that such registration will not endanger the public health, safety or welfare. The proposed statute also gives persons aggrieved by the refusal of the superintendent to register them a right to appeal. Finally, it requires manufacturers and wholesale dealers to keep a detailed record of each firearm.

Finally, the statute requires that the retailer shall keep detailed records with respect to the sale of handguns and shall deliver copies of his record to local law enforcement officials within five days of the sale. It is proposed that the same record keeping requirements be imposed with respect to the sale of rifles and shotguns. Although the use of handguns may be utilized more often than rifles or shotguns in the commission of crimes, the fact remains that the latter firearms

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69 N.J.S.A.2A:151-19 to 23.

do constitute a threat to the safety of the public. Law enforcement officials ought to have a record of sales of such weapons available to them.

Section 2C:58-3 imposes the requirement of a permit upon those who wish to purchase handguns while those who wish to purchase rifles and shotguns must obtain a purchaser identification card and sign a written certification that they are qualified to hold the required card. Persons of good character may not be denied the requisite license. However, a person who has been convicted of a crime of violence, burglary or theft, an individual who is drug dependent, is confined to an institution for a mental disorder, who is an alcoholic or "an habitual drunkard," who suffers from a disease which would make it unsafe for him to handle firearms, a person under eighteen or anyone whose possession of a firearm would not be interest of the public health, safety and welfare must be denied permission to purchase firearms.

The proposed standards of eligibility for obtaining the required license for the possession of firearms differs from the present law in several respects. Under N.J.S.A.2A:151-33, permission to purchase a gun must be denied to a person who has been convicted of any crime, rather than the offenses enumerated in the proposed statute. It is perferable that persons convicted of any crime be denied a permit or purchaser

identification card. The public interest is served by restricting the availability of firearms. The public interest in being protected against those who might use firearms unlawfully dictates that such weapons be denied to those who have indicated a disregard for the law and who may be considered more likely to commit other offenses, including those involving firearms.

Section 2C:58-4 deals with permits to carry handguns. In addition to meeting the criteria of eligibility set forth in 2C:58-3, an applicant for a permit to carry a handgun must demonstrate that he is "thoroughly familiar" with the safe handling and use of handguns and that he has a justifiable need to carry a handgun. This is a reiteration of present law. N.J.S.A.2A:151-44. It recognizes the undesirability of allowing persons to carry firearms while at the same time recognizing that a person should be given an opportunity to demonstrate his need to carry a firearm. This represents a logical accomodation of competing interests.

Section 2C:58-7 requires persons who become possessors of any explosive, destructive device or ammunition therefor which may be dangerous and is not possessed for any lawful commercial purpose of other purpose in connection with which the use of explosives is authorized to notify police authorities that the same is in his possession. The police may inspect the ammunition, explosive or destructive device and, if found to be dangerous, the police may process it so as to remove its

dangerous character or destroy it, if necessary. The proposal also provides that if a police officer has reasonable cause to believe that a person possesses any of the aforementioned devices or ammunition, he may seize it under a proper search warrant.

Section 2C:58-8 provides that injuries arising from the use of a weapon should be reported to the police by the physician consulted or the person in charge of a hospital or other institution where the case is presented for treatment.

Section 2C:58-11 provides for the forfeiture of weapons which are possessed illegally. Chapter 64 of the proposed Code provides for the forfeiture of contraband. The purpose of Chapter 64 is to provide a uniform statute dealing with all forms of contraband. Section 2C:64-1(a)1 specifically designates as contraband firearms which are unlawfully possessed, carried, acquired or used. There is thus no need for 2C:58-11. It can lead only to confusion.

CHAPTER 64 - FORFEITURE OF CONTRABAND

At present, confiscation and forfeiture provisions are diffused throughout New Jersey law. For example, N.J.S.A.24:21-35 permits forfeiture of controlled dangerous substances. N.J.S.A.54:40A-32 allows the State to confiscate vehicles or vessels utilized for transporting untaxed cigarettes. N.J.S.A.2A:152-7 to N.J.S.A.2A:152-11 sets forth forfeiture procedures for gambling paraphernalia. N.J.S.A.2A:151-16 provides for the forfeiture of firearms which are possessed illegally. The purpose of Chapter 64 is to provide a uniform scheme for the confiscation and forfeiture of contraband.

The proposed statute creates four categories of contraband. Section 2C:64(a)(1) designates as prima facie contraband controlled dangerous substances, firearms which are unlawfully possessed, acquired or used, illegally possessed gambling devices and untaxed cigarettes. Section 2C:64-1(a) (2) declares that property which has been, or is intended to be, utilized in furtherance of any unlawful activity is subject to forfeiture. In addition, 2C:64-1(a)(3) designates as contraband property which has been, or is intended to be, utilized in furtherance of an unlawful activity, such as conveyances intended to facilitate the perpetration of illegal acts, or buildings or premises maintained for the purpose of committing criminal offenses. The latter two provisions are essentially codifications of

existing case law. See Krug v. Board of Chosen Freeholders, 3 N.J.Super. 22 (App.Div. 1949).

Finally, proceeds of illegal activities are declared contraband. This includes money or property obtained as a result of the sale of prima facie contraband and the proceeds of illegal gambling, prostitution, bribery and extortion. This statute is particularly needed, as it places the State's right to the proceeds on a solid legal basis. At the present time, the State can retain proceeds of illegal enterprises, but only because the individual from whom it is seized does not have a remedy for its return. In State v. Sherry, 46 N.J. 172 (1965), the Court stated that the judiciary will not assist a wrongdoer by ordering that money which was obtained as a result of an illegal activity be returned. Consequently, it held that the county could retain money it had seized from defendant, which the latter had obtained as payment for performing an illegal abortion. The proposal specifies that such money is contraband. Under such a statute, courts would not be required to engage in the fiction that they permit the State to retain the money only because they will not assist the wrongdoer. Furthermore, such a statutory provision would also give the State priority over any federal tax lien on the proceeds of illegal activities. In New Jersey v. Kaiser, 476 F.2d 610 (3 Cir. 1973), the court held that certain money seized in a raid on premises in which a gambling operation

was conducted belonged to the United States, by virtue of a tax lien, because money which represented the profits or product of gambling was not forfeitable under New Jersey law. See also Stapleton v. $2,438,110, 454 F.2d 1210, 1222 (3 Cir. 1972), (Adams, J. concurring). A statutory declaration that profits of illegal activities are forfeited to the State would be effective against tax claims of the United States because, for tax purposes, property rights are determined by State law. Aquilino v. United States, 363 U.S. 509, 512 (1960); Farley v. $168,400.97, 55 N.J. 31,36 (1969).

Section 2C:64-1(a)(4) also adds a proviso that "an individual who can demonstrate that ... money or property [seized under this section] was his, may recover such money or property." This provision is unclear. It would appear that its purpose is to protect the innocent person whose money comes into the possession of an individual as a result of the latter's criminal activity. Thus, a victim of a theft could reclaim the money or property. It would seem that this would be clearly understood and need not be specified by statute. However, if it is desired that there be left absolutely no doubt in this regard, then the proviso should be amended to read: Provided that any person who did not willingly participate or aid in the commission of an offense may recover such money or property if he can demonstrate that the money or property

belongs to him and that he was neither a participant, nor did he assist, in the commission of the offense.

Section 2C:64-1(b) provides that seizure of contraband should be made pursuant to a warrant unless the article to be seized is prima facie contraband, poses an immediate threat to the public health, safety or welfare or is otherwise consistent with constitutional requirements. The provision allowing seizure of prima facie contraband should be amended so that such seizures be permitted only when the articles are in plain view of the officer wishing to make the seizure.[70]

Section 2C:64-2 provides that upon the seizure of prima facie contraband, the seizing officer shall seek a judicial declaration that the article has been forfeited to the State. A court could declare such articles forfeited to the State unless it has reason to believe that the property was possessed or utilized in a legal manner or that the owner of the article in question had no knowledge of its illegal possession or use. This provision should be amended so that no judicial proceeding need be initiated in the case of controlled dangerous substances and gambling devices. The proposed provision places an unnecessary burden on law enforcement authorities. These articles are inherently dangerous to the public health and

[70] See Harris v. United States, 390 U.S. 234 (1968).

morals and may be declared contraband and destroyed without a hearing. Spagnuolo v. Bonnet, 16 N.J. 546, 557 (1954). Insofar as firearms and cigarettes are concerned, the procedure established by this proposed statute is in conflict with R.4:70-1 et seq., which sets forth the procedure to be employed when the State seeks the forfeiture of chattels. Article VI, Section II, paragraph 3 of the New Jersey Constitution charges the Supreme Court with the responsibility for making rules governing the practice and procedure in the courts of the State. A statute cannot conflict with a court Rule governing a procedure to be employed.[71] Consequently, the proposed statute should conform to R.4:70-1 et seq.

Section 2C:64-3 provides for the forfeiture of property other than prima facie contraband. The procedure set forth in the proposed statute, while similar to the proceedings prescribed by R.4:70-1 et seq., conflict with the Rule and should be amended to conform with R.4:70-1 et seq. Thus, the procedure for the forfeiture of all property, except controlled dangerous substances and gambling devices, should conform to R.4:70-1 et seq. As discussed earlier, gambling devices and controlled dangerous substances may be disposed of without a hearing.

Section 2C:64-3(f) provides that any person with an interest in seized property other than an individual who is being

[71] Winberry v. Salisbury, 5 N.J. 240, 247-255 (1950).

prosecuted in connection with seizure of the property may secure its release pending the forfeiture proceeding unless the article is dangerous to the public health, safety or welfare or the seizing officer can demonstrate that the property will probably be lost or destroyed. This proposed statute endeavors to strike a balance between the interest of the State in assuring that probable contraband is not lost to it and the interest of a possibly innocent owner of seized property who may require its use while the forfeiture proceeding is pending. It is suggested that a provision be added to this statute requiring an individual who wishes to secure release of a seized article to post bond in the amount of the value of the seized item. This will more adequately protect the State, since it may be difficult to prove that property which a person seeks to release will probably be lost or destroyed. If bond is posted, the State is then protected against loss or destruction.

The foregoing statute will not be operable if the article seized is evidence in a criminal prosecution. Section 2C:64-4(a) provides that nothing in this Chapter shall impair the right of the State to retain evidence pending a criminal prosecution. However, in order to assure that 2C:64-3(f) is properly construed, it should be amended to state explicitly that no person can secure release of a seized item if it is being held as evidence in a criminal prosecution.

Section 2C:64-4(b) codifies case law by providing that the fact that a prosecution involving prima facie contraband terminates without a conviction does not preclude forfeiture proceedings against the property. This should be amended to include all property, not only prima facie contraband. It is well settled that acquittal on a criminal charge connected with the seizure of alleged contraband does not preclude a forfeiture action. The difference in burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. Moreover, criminal intent must usually be proven in a criminal prosecution, but not in a forfeiture proceeding. One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Helvering v. Mitchell, 303 U.S. 391 (1938); State v. Rodriguez, 130 N.J.Super. 57 (App.Div. 1974).

Furthermore, if a criminal prosecution is aborted by suppression of the alleged contraband because of an illegal search and seizure, a forfeiture action may still be maintained. Illegally seized evidence may not be introduced, in a forfeiture proceeding, to prove that an article is contraband. However, if its contraband nature can be proven by other evidence or if the item is itself contraband, a forfeiture can be effected. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Farley v. $168,400.97, supra, at 48-50; State v. Sherry, supra, at 177-78.

Section 2C:64-4(c) provides that if a defendant is convicted of the illegal possession, use or sale of prima facie contraband, the article which is the subject matter of the conviction shall be forfeited upon the entry of judgment, subject to the property interests of innocent persons, which is provided for in 2C:64-5. This proposed statute codifies the obvious. Clearly, in the situations dealt with by 2C:64-4(c) there is no need to institute a separate forfeiture proceeding.

Section 2C:64-5 protects those persons who have an interest in property seized under this Chapter but had neither a connection with criminal activity which gave rise to the property's contraband nor knowledge that the property was being utilized illegally. Such persons' rights cannot be affected by a forfeiture.

Section 2C:64-6 provides that forfeited property which can serve no lawful purpose must be destroyed. Other articles may be placed at the disposal of a public agency or charitable institution which needs the item or may be sold, with the proceeds going to the State.

Section 2C:64-7 states that title to forfeited property vested in the State when the article was utilized illegally or, in the case of proceeds, when received. As indicated earlier, this would give the State's claim to the money or property priority over tax claims of the United States.

Finally, 2C:64-8 seeks to protect those persons who could not with due diligence have discovered that property which they owned was seized as contraband. The proposed statute allows such persons to file a claim for return of their money or property within three years of the seizure.

SUBTITLE III-SENTENCING PROVISIONS

Subtitle Three deals with an area one commentator has termed a "wasteland in the law."[72] At present, sentences imposed on convicted offenders are all too often influenced by factors wholly unrelated to the purposes of the criminal law.[73] Moreover, even when a sentencing judge confines himself to the proper considerations, the unstructured nature of the decision-making process may produce widely disparate results, explainable only by the individual judge's predilections.[74]

This inherent potential for abuse and inequitable results has been universally deplored.[75] Indeed, our Supreme Court has noted that "grievous inequities in sentences destroy a prisoner's sense of having been justly

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[72] Frankel, Lawlessness in Sentencing, 41 Cinn. L. Rev. 1, 50 (1972).

[73] See Comment, Discretion in Felony Sentencing--A Study of Influencing Factors, 48 Wash. L. Rev. 857 (1973); Gaudet, St. John, and Harris, Individual Differences in the Sentencing Tendencies of Judges, 23 J. Crim. L., C. & P.S. 811 (1933).

[74] See Rubin, Disparity and Equality of Sentences--A Constitutional Challenge, 40 F.R.D. 55 (1966). See also United States v. Daniels, 446 F. 2d 967 (6th Cir. 1971) in which the Court of Appeals condemned a district court judge's practice of automatically imposing the maximum term of imprisonment in all selective service cases.

[75] See, e.g., Coburn, Disparity in Sentences and Appellate Review of Sentencing, 25 Rutgers L. Rev. 207 (1971); Frankel, supra note 1; Kadish, Legal Norm in the Police and Sentencing Processes, 75 Harv. L. Rev. 904 (1962); Rubin, supra note 3; Tappan, Sentencing Under the Model Penal Code, 23 Law and Contemp. Prob. 528 (1958); Wechsler, Sentencing, Correction, and the Model Penal Code, 109 U. Pa. L. Rev. 465 (1961).

dealt with, as well as the public's confidence in the even-handed justice of our system."[76] In confronting these problems, Subtitle Three proposes several changes in existing law.

A. Gradation Of Crimes

Initially, the Code proposes four gradations of crimes and two levels of disorderly person offenses. Section 2C:1-14. These categories are designed to reflect a rational evaluation of the gravity of each crime individually and in relation to other classes of offenses. The current classifications of high misdemeanor (N.J.S.A. 2A:85-6) and misdemeanor (N.J.S.A. 2A:85-7) are abandoned in favor of designating crimes as first, second, third, or fourth degree. Section 2C:43-1. Similarly, disorderly persons infractions (N.J.S.A. 2A:169-4) are subdivided to include a new grouping denominated as petty disorderly persons offenses. Section 2C:1-14 (b).

B. Reduction Of Maximum Terms of Imprisonment

In conjunction with these new gradations, the Code restructures the authorized penalties.[77] Generally,

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[76] State v. Hicks, 54 N.J. 390, 391 (1969). See also Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L. J. 1453, 1459 (1960).

[77] For a complete outline of the authorized penalties, see the attached chart.

the maximum periods of incarceration are decreased in comparison to the present law.[78] The rationale for this action is that "[i]n most cases, the public would be better served by shorter, rather than longer, sentences and by a serious attempt to reintegrate the offender into the society to which he will ultimately return no matter how long his sentence."[79] This view is supported by the American Bar Association[80] and the President's Commission on Law Enforcement and Administration of Justice.[81]

Indeed, the notion that long prison terms may be counterproductive is not novel. Overcrowded correctional

[78] At the same time, the maximum fines are increased to allow greater flexibility with financial penalties. Section 2C:43-3. Corporate defendants are subject to fines of up to three times the maximum amount authorized for individuals in recognition of the fact that this is the sole sanction available short of the drastic measure of charter revocation. Section 2C:43-4.

[79] Final Report of the New Jersey Criminal Law Revision Commission, Vol. II: Commentary, p.311 (1971) [hereinafter cited as Commentary].

[80] A.B.A. Standards Relating to Sentencing Alternatives and Procedures, §2.1 and comments. (Approved Draft 1968) [hereinafter cited as A.B.A. Sentencing Standards].

[81] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 142-43 (1967). [hereinafter cited as The Challenge of Crime in a Free Society].

facilities are strained by offenders serving lengthy sentences which may cause officials to grant parole prematurely. Additionally, extended periods of incarceration frequently impede efforts toward rehabilitation by fostering anti-social attitudes. For these reasons, the ordinary terms of imprisonment specified by section 2C:43-6 are somewhat less than those authorized by the present law.[82]

C. Partial Abolition Of Minimum Sentences

Another change proposed by the Code is the virtual abolition of minimum sentences. In the usual case, the sentencing judge will impose a custodial term simply by stating a specific number of years to be served instead of the existing practice of setting forth both a minimum and maximum term. See N.J.S.A. 2A:164-17. In effect, the court pronounces only the outside limit of the defendant's incarceration, leaving

[82] Section 2C:43-6 (a) specifies a eight to fifteen year maximum for first degree crimes other than murder, a five to eight year maximum for second degree crimes, a three to five year maximum for third degree crimes, and an eighteen month maximum for fourth degree crimes.

Our statutes presently contain only two general penalties; up to seven years for a high misdemeanor and three years for a misdemeanor N.J.S.A.2A:85-6 and 2A:85-7. However, a range of penalties are authorized by statutes defining the offenses. For example; first degree murder is punishable by life imprisonment (N.J.S.A. 2A:113-4), a sanction not available under the Code. Compare also robbery (15 year maximum, N.J.S.A. 2A:141-1), rape (30 year maximum, N.J.S.A. 2A:138-1), sodomy (20 year maximum, N.J.S.A. 2A:143-1) and kidnapping (30 year minimum, N.J.S.A. 2A:118-1). Under the Code, all of these offenses share a 15 year maximum except murder which may be punished by a 30 year maximum. See 2C:11-3; 2C:13-1; 2C:14-1; 2C:14-2; 2C:19-1.

the question of a release date to the parole board.[83]

When the defendant has been convicted of a first or second degree crime or is given an extended term, however, the court may set a minimum sentence of up to one-half of the maximum. Until this minimum term has been served, the defendant is not eligible for parole. Sections 2C:43-6 (b); 2C:43-7 (b). This provision is intended to safeguard against the premature release of serious offenders and to provide what has been termed "community reassurance."[84] Thus, when a sentencing judge ascertains that the public interest requires a definite period of incarceration,[85] a minimum sentence may be imposed pursuant to these sections.

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83 While the Code itself does not contain any provisions governing parole, this subject is dealt with in a separate bill, A-3467, which will be discussed infra.

84 Professor Herbert Wechsler, one of the drafters of the Model Penal Code, has observed that "[c]ases will arise...where a sentence with a maximum alone will not afford the community the reassurance it should have." Wechsler, supra note 4, at 476. See also A.B.A. Sentencing Standards, Comment to §3.2 (c), p.155.

85 This determination is subject to appellate review along with any other sentencing decision. Section 2C:44-7. The Code thus retains the present system of appellate scrutiny of sentencing actions. See R.2:10-3; State v. Spinks, 66 N.J. 568 (1975); State v. Johnson, 67 N.J. Super. 414 (App. Div. 1961).

D. Extended Terms Of Imprisonment

Another method of insuring restraint of serious offenders is offered by the provisions governing the imposition of extended terms of imprisonment. Sections 2C:43-7 and 2C:44-3. This form of enhanced punishment is available only upon conviction of a first, second, or third degree crime and upon a finding by the court of one of the following grounds:

> a. The defendant is a persistent offender. A persistent offender is a person who is 21 years of age or over, who has been convicted of a crime involving the infliction, or attempted or threatened infliction of serious bodily injury and who has at least twice previously been sentenced as an adult for such a crime to a custodial term and where one of those prior offenses was committed within the 5 years preceding the commission of the offense for which the offender is now being sentenced.
>
> b. The defendant is a professional criminal. A professional criminal is a person who committed an offense as part of a continuing criminal activity in concert with five or more persons, and was in a management or supervisory position or gave legal, accounting or other managerial counsel.
>
> c. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything or pecuniary value the amount of which was unrelated to the proceeds of the crime or he procured the commission of the offense by payment or promise of payment of anything of pecuniary value. Section 2C:44-3.

As is readily apparent, subsection a is inadequate in situations where the defendant perpetrates another crime after being released from imprisonment for five years or more. The requirement that a prior offense must

have been committed within the five years preceding the latest crime clearly does not take into account the fact that the defendant may have been incarcerated during this period. Thus, a hardened recidivist may be ineligible for an extended term for the illogical reason that he committed no crime while imprisoned. A change should therefore be made so that the five year period does not apply to time spent in prison.

In addition to this problem, it would appear that subsection a would have a much narrower application than the existing statutes.[86] To qualify as a prior conviction for purposes of an extended term, the previous crime must have involved "the infliction of serious bodily injury" and must have resulted in a sentence of imprisonment. Section 2C:44-3 (a). Excluded from this provision are recidivists committing such crimes as burglary, usury, theft, forgery, possessory weapons offenses, fraud, and other serious property offenses.

It would thus appear that a policy decision has been made to confine the use of extended terms to those who repeatedly commit violent crimes. However, other species of persistent offenders may be equally deserving of lengthy sentences from a penological standpoint.

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[86] The present statutes, N.J.S.A. 2A:85-8, 2A:85-9, and 2A:85-12, designate the requisite prior convictions as high misdemeanors without further description.

Considering that the imposition of an extended term is discretionary with the sentencing judge,[87] and is subject to appellate review,[88] subsection a may therefore unduly constrict the availability of this sentencing alternative.

With respect to the overall operation of extended term sentencing, two other difficulties are worthy of mention. Firstly, several of the criteria originally proposed by the Law Revision Commission have not been retained in the Assembly bill. These include such categories as dangerous, mentally abnormal individuals, multiple offenders, and armed criminals. See Section 2C:44-3 (c), (d) and (e) as reported by the Law Revision Commission. It might well be desirable to enact some or all of these provisions, particularly the section dealing with crimes committed with a deadly weapon. Cf. N.J.S.A. 2A:151-5 which outlines additional penalties for armed criminals.

Aside from the perhaps unduly narrow scope of extended term sentencing, the Code is also deficient in failing to establish the standard of proof required. Section 2C:44-6 (e) provides that a hearing shall be

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[87] The pertinent section, 2C:44-3, specifies that "the court may sentence a person...to an extended term of imprisonment...." (emphasis added).

[88] See Section 2C:44-7; note 13, supra.

held after conviction with written notice to the defendant of the proposed ground for extended imprisonment. The accused is entitled to present evidence at the hearing to controvert the extended term criteria alleged. Undoubtedly, the State has the burden of proving the ground proposed,[89] but the Code is silent as to whether the proof must be beyond a reasonable doubt or merely by a preponderance. The latter standard is endorsed by the A.B.A. Sentencing Standards, §5.5 (b) (iv). However, such a standard might be subject to constitutional attack. An amendment should therefore be recommended to incorporate the reasonable doubt standard of proof.

E. Parole Provisions

Section 2C:43-9 (a) requires that every inmate released from incarceration shall be subject to parole supervision. In order to accomplish this goal, a parole term is added to all sentences of imprisonment imposed upon convictions of crimes of the fourth degree or higher. This term is one year for crimes of the first, second, and third degrees and six months for crimes of the fourth degree.

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89 Cf. State v. Kunz, 55 N.J. 128 (1969) (State has burden of proving challenged statements in presentence report); State v. Horne, 56 N.J. 372 (1970) (State has burden of proving contested portions of diagnostic report in sex offender proceedings).

The exact function of this period of parole is unclear. Subsection b indicates that the duration of parole is governed by the separate term only when the offender is released at the expiration of his maximum period of imprisonment. Thus, for example, a one year term of parole would apply to a defendant sentenced to five years imprisonment when he is not released until he has served the entire period. When the prisoner is paroled before the expiration of his maximum, however, the length of time to be served on parole is uncertain. Parole supervision in this instance could be deemed to last for the balance of the imprisonment portion of the sentence either with or without the addition of the parole term. In other words, a prisoner released after serving two years of a five year sentence could be construed to be on parole for either three years (the balance of the sentence) or four years (the balance of the sentence plus the parole term).

A similar ambiguity exists with regard to the possible length of recommitment upon a revocation of parole. Subsection c states that any period of recommitment or subsequent reparole "shall not exceed the original sentence determined from the date of conviction." Since every sentence of imprisonment automatically includes a parole term, it is unclear whether this provision refers to only the imprisonment portion of the sentence or to the total of the imprisonment and parole portions. A

clarification of these drafting problems would consequently seem necessary.

Additionally, the relatively short period allocated for parole supervision may be inadequate for the avowed purpose of reintegrating the offender into society. One year in all probability reflects an overly optimistic evaluation of the transitional process from incarceration to unconditional release. As orginally drafted by the Law Revision Commission, the Code provided a more realistic range of parole terms: one year for convictions of fourth degree crimes, two years for reformatory sentences, and five years for all other sentences. See Section 2C:43-9 in the Report of the Law Revision Commission.

One final aspect of this section is worthy of note. At present, a parolee may be recommitted for any period up to the maximum of his sentence computed as of his release date. In other words, time served on parole is not credited against the defendant's sentence if he is reincarcerated for a violation of parole conditions. Section 2C:43-9 (c) alters this practice and counts parole time as part of the original sentence for purposes of calculating the permissible length of recommitment. One criticism of this change is that it may tend to decrease the parolee's incentive to comply with conditions of parole as the possible length of recommitment grows shorter. The drafters' rejoinder to this is essentially that it is unfair to ignore time successfully spent on parole. The proposed change therefore "serves the

[offender's] sense of justice" and may be "a constructive influence upon correction." Commentary, p.322. Moreover, if the parole violation consists of a new offense, the defendant may be committed for a lengthy period upon conviction. If, on the other hand, the violation is merely a technical breach of parole conditions, it is appropriate that only a short period of recommitment be available when the defendant has successfully completed the bulk of his parole term. Ibid.

In conjunction with the above Code provisions concerning parole, a separate bill, A-3467, has been introduced in the Assembly dealing with this subject. The original proposal by the Law Revision Commission of immediate parole eligibility has been rejected by the drafters of A-3467. Instead, this bill creates a presumption in favor of release at an inmate's primary eligibility date.

This date is computed by subtracting credits for commutation time from any judicial or statutory mandatory minimum term or from one third of the maximum sentence. At this date, the inmate "shall be released...unless [he] has engaged in conduct indictable in nature or...there is a substantial likelihood that the inmate will commit a crime...if released...." A-3467, §6 (c).

In addition to this standard method for release, the bill provides for the parole at any time of inmates not serving mandatory minimums or life sentences upon the successful completion of a course of education, training, or other approved activity. A-3467, §10. Such programs must be approved in advance by the parole board and must

be entered into through a formal agreement between the board, the superintendent of the prison and the inmate.

With respect to parole violators, the bill provides that recommitment may not exceed one year unless the violation consists of a new offense, in which case the inmate is required to serve the longer of either six months or one half of the balance of his sentence. A-3467, §17 (b) and (c). In computing the balance remaining on a sentence, A-3467 concurs with the Code and takes into account time served on parole prior to the violation. See sections 17 (c) and 18.

In general, it may be observed that several positive innovations are introduced by the parole provisions of the Code and A-3467. The emphasis upon aiding the inmate's transition from imprisonment to complete freedom is particularly sound. Nevertheless, some of these proposals are not entirely free from doubt and thus require careful consideration before enactment may be recommended.

F. Probation and Supervisory Treatment Proposals

One of the most controversial aspects of the Code is the presumption against the imprisonment of a convicted offender. Section 2C:44-1 (a) provides as follows:

> the court shall deal with a person who has been convicted of an offense without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

> (1) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;
>
> (2) The defendant is in need of correctional treatment that can be provided only in an institution;
>
> (3) A lesser sentence will depreciate the seriousness of the defendant's crime because it involved a breach of the public trust under chapters 27 and 30; or
>
> (4) The offense is characteristic of organized criminal activity.

The Law Revision Commission offered the explanation that this presumption was designed to overcome the usually automatic sentencing response of incarceration. Commentary, p. 324. Thus, the Code contemplates a custodial sentence only when protection of the public is found to be imperative because of the presence of one of the four enumerated factors. A contrary presumption of imprisonment may be invoked by legislative decree in statutes defining first or second degree crimes or by statutes outside the Code providing for mandatory sentences for the equivalent of a first or second degree crime. Section 2C:44-1 (d). Plainly, probation is intended to be the general rule with incarceration as the exception.

The wisdom of any general sentencing presumption, however, is certainly open to question. The myriad factors associated with decision-making in this area are exceedingly ill-adapted to any type of legislatively mandated result. More particularly, a presumption in favor of nonimprisonment would tend to encourage disrespect for the criminal justice system. The deterrent function

of sentencing may be diminished to the extent that a potential offender believes himself to be "entitled" to probation. Additionally, public support of the system may be undermined by a perception of undue leniency towards convicted criminals.

Finally, it should be noted that an erroneous granting of probation cannot be corrected whereas an unwarranted sentence of imprisonment can. A trial judge may reconsider and reduce, but not increase, a sentence. R.3:21-10; State v. Matlack, 49 N.J. 491 (1967). Similarly, an appellate tribunal may modify a "manifestly excessive" sentence but no authority exists for increasing an unduly lenient sanction. State v. Johnson, 67 N.J. Super. 414 (App. Div. 1961); R. 2:3-1 and R. 2:10-3. Furthermore, an overly harsh sentence may be mitigated to some extent by the parole board. See A-3467, §10. In sum, it is believed that the presumption against imprisonment is both unwarranted and unwise.

Despite objections to the presumption, the articulation of factors suggesting the need for imprisonment is a valuable aid in formulating a rational sentencing policy. Coupled with the enumeration of possible grounds for probation contained in subsection b, this statutory codification will greatly assist judges in stating reasons for sentences imposed as required both by R. 3:21-4 (e) and section 2C:43-2 (d) of the Code. A more coherent body of sentencing precedents may well result as appellate review shifts from merely scrutinizing a result to evaluating the lower court's reasoning as well. Moreover,

an expressed factual rationale may also promote better informed decision-making by corrections officials. For these reasons, as well as to enhance the offender's sense of having been justly dealt with, the requirement of a statement of reasons and the enumeration of suggested sentencing criteria offer a sound approach.[90]

However, an unfortunate proviso is contained in subsection c to the effect that "[a] guilty plea by a defendant or a failure to so plead shall not be considered in withholding or imposing a sentence of imprisonment." It is generally recognized that an acknowledgement of guilt and a willingness to accept the consequences are vital steps in the rehabilitative process. State v. Poteet, 61 N.J. 493 (1972). This provision would therefore bar consideration of an extremely pertinent factor and should be deleted.

Sections 2C:43-12 and 2C:43-13 create a mechanism for supervisory treatment similar to one currently in operation by virtue of R. 3:28. In both versions, a defendant may be channeled out of the regular criminal process prior to trial and referred to rehabilitative

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90 Cf. Monks v. New Jersey State Parole Board, 58 N.J. 238 (1971) requiring the parole board to state its reasons for denying parole. See also A.B.A. Sentencing Standards, §5.6 and comments; Frankel, supra note 1, at 9-14; Coburn, supra note 4, at 232-33. Robinson, The Defendant Needs to Know, 26 Fed. Prob. 3 (December 1962); Thomas, Stating Reasons for Decisions, reprinted in Vol. 2 of Radzinowicz and Wolfgang, Crime and Justice 671, 674 (1971).

programs approved by the Supreme Court. Successful completion of the assigned program results in a dismissal of the pending charge. If, on the other hand, the accused violates any condition of supervisory treatment (called pretrial intervention by R.3:28), the case may proceed to trial if the court finds this course warranted.

Under the Code's version of this diversionary mechanism, a person accused of his second crime of violence is ineligible. Section 2C:43-12 (b). The Supreme Court has not incorporated such a limitation but both programs require the consent of the prosecutor before a defendant may be accepted. Section 2C:43-12 (a); R.3:28 (b).

The screening function performed by these procedures is highly beneficial to both society and the individual offender. Judicial resources are conserved to be better allocated to more serious offenders. Defendants offering the best prospects for rehabilitation are spared the stigma of criminal conviction and are promptly diverted into an appropriate program. Indeed, these obvious benefits have been recognized by the Legislature through the enactment of the conditional discharge provisions of the Controlled Dangerous Substances Act. N.J.S.A. 24:21-27. Consequently, it appears that the Code's provisions for supervisory treatment may be strongly endorsed.

It should be noted, however, that the permissible period of treatment may be too short. Section 2C:43-13 (d) designates one year as the usual maximum with three years

allowed in cases involving crimes of violence. Along the same lines, the length of probation imposed upon regular convictions for crimes of the fourth degree and disorderly persons offenses may also be too short. Section 2C:45-2 specifies that probation may be imposed for up to the maximum period allowed for the offense or for five years, whichever is less. For fourth degree crimes, therefore, probation is limited to eighteen months or less. With respect to disorderly persons and petty disorderly persons, the permissible period is only six months and thirty days respectively. At present, a disorderly persons conviction may result in up to three years probation, N.J.S.A. 2A:169-46, while all other crimes may be subject to probation for a maximum of five years. N.J.S.A. 2A:168-1. Although an overly long period of probationary supervision may be counterproductive in individual cases, the statutes should recognize a sufficiently high maximum to ensure adequate control and to reform the offender. If it appears that a probationary term is too long in a particular case, the court is free to discharge the defendant sooner. Section 2C:45-2 (a). An upward revision of these probationary and supervisory treatment terms would therefore be desirable.

On final observation should be made concerning this subject. Section 2C:45-3 (b) states that a probation violation may result in imprisonment only if the defendant has been convicted of another offense or if his continued liberty entails "excessive risk that he will commit another

offense." It is submitted that these grounds are too narrow. If the probationer ignores his obligations or refuses to cooperate, the court should be authorized to do more than merely admonish him and alter the terms of continued probation. Cf. State v. Moretti, 50 N.J. Super. 223 (App. Div. 1958). Accordingly, an additional ground should be incorporated in this section to deal with the offender who willfully refuses to cooperate in efforts at rehabilitation.

G. Miscellaneous Provisions

Several other provisions of the Code merit comment. Section 2C:43-2 (e) is as follows:

> The court shall retain jurisdiction over the defendant and may, on its own motion or on motion of the prosecutor, the defendant or the Commissioner of Institutions and Agencies, modify the sentence originally imposed, except that the term of imprisonment or supervision shall not be increased by such resentencing and the court shall not be required to hear more than one such motion a year.

At present, modification of sentences is governed by R. 3:21-10, which sets time limitations for the making of such motions.[91] Only three exceptions are stated for

[91] Within 60 days of the trial court's judgment or within 20 days of the appellate court's judgment on appeal, a motion for modification may be made. The court thereafter has 15 days in which to reduce or change the sentence. R. 3:21-10 (a).

relief from the general rule. A motion for modification may be made at any time: (1) to change a custodial sentence so the defendant may enter a drug or alcohol rehabilitation program; (2) to permit the release of an ill or infirm defendant; or, (3) for other good cause shown upon the joint application of the defendant and the prosecutor.

Clearly, the unlimited availability of such motions under the Code conflicts with the carefully drafted provisions of R. 3:21-10. If this area can be considered practice and procedure, the legislative intrusion into the exclusive province of the Supreme Court is a nullity. Winberry v. Salisbury, 5 N.J. 240 (1950).

Moreover, this section undermines the finality of judgments which is undoubtedly the rationale for the time limitations of R. 3:21-10. Additionally, the practice proposed by the Code usurps the function of the paroling authorities. In effect, the trial court is permitted to ignore a decision of the parole board and substitute its own opinion concerning the defendant's suitability for release. For these reasons, section 2C:43-2 (e) should not be enacted.

Another difficulty arises with the Code's definition of "loss" for purposes of restitution to the victims of crime. Section 2C:43-3 (e) indicates that "loss" means "the amount of value separated from the victim." This provision may exclude such items as medical and other "out of pocket" expenses which are not, strictly speaking "separated from the victim." It

may therefore be desirable to expand the definition of includable elements of restitution.

H. Overall Impact Of Subtitle Three

Enactment of he Code's sentencing provisions would effect several major changes on the existing practices. Commitments under the Sex Offender Act, N.J.S.A. 2A:164-3 et. seq., are abolished. Section 2C:98-2. Youthful offender sentencing is apparently no longer limited to individuals who have not previously been confined in the State Prison and the age limit is lowered to 26. Section 2C:43-5; N.J.S.A. 30:4-147. Mandatory sentences fixed by statute are abrogated. Thus, since the Code's classifications and sentencing provisions apply to offenses defined outside the Code, section 2C:1-14, legislatively mandated penalties for such violations as drunken driving, N.J.S.A. 39:4-50, may be implicitly repealed.

Generally, it seems that judicial discretion is constricted in certain respects. In imposing a sentence of imprisonment, the court must either set a definite term within the statutory range or grant probation with or without a 90 day period of incarceration. This contrast is most vividly demonstrated by the attached chart of the authorized penalties. A defendant convicted of a first degree crime such as robbery, kidnapping, rape, or sodomy must be sentenced to a term of at least eight years. No lesser term may be designated other than the 90 days imprisonment permissible with a probationary

sentence. While this gap is less pronounced for lower degree crimes, it is still present.

From this penalty structure, it may be surmised that judicial discretion concerning the severity of the institutional mode of disposition is intended to be greatly diminshed. The court, of course, retains the same freedom of chosing whether the offender is to be incarcerated, placed on probation, fined, or ordered to make restitution, but once imprisonment is selected, the term must be designated from a relatively limited range.

Several advantages may flow from this structure. Sentencing disparity will be reduced among defendants convicted of offenses of the same degree. Additionally, deterrence may be enhanced as the consequences of conviction become more certain.

It should be noted, however, that the authorized penalties were orginally drafted on the premise that the defendant would be immediately eligible for parole. Thus, if a sentence proved to be unduly harsh in an individual case, the parole board could remedy the problem through earlier release. To some extent, therefore, the fixed penalties of the original Code were intended to partially substitute parole board discretion for judcial discretion.

Accordingly, one of the difficult issues posed by the Code and the parole bill is whether there is an

appropriate balance between judical authority to fix sentences and administrative power to release offenders. Unless the policy of individualizing sentences is to be abandoned, some outlet must be provided in order to allow for the wide range or variables which affect sentencing and paroling decisions. Whether the Code has achieved this balance is certainly open to question. The virtually limitless range of opinions in this area render a definite answer impossible.

SENTENCES AUTHORIZED BY
THE PROPOSED CODE

Crime	Imprisonment - Extended	Imprisonment - Ordinary	Split Sentences (2C:45-1(e))	Probation (2C:45-2)	Restitution/ Fine (2C:43-3)
First degree* (murder)	between 30 and 50 years	up to 30 years	90 days imprisment/5 years probation	up to 5 years probation	up to $15,000 or double the gain or loss
First degree* (other)	between 15 and 30 years	between 8 and 15 years	90 days imprisonment/5 years probation	up to 5 years probation	up to $15,000 or double the gain or loss
Second degree*	between 8 and 15 years	between 5 and 8 years	90 days imprisonment/5 years probation	up to 5 years probation	up to $15,000 or double the gain or loss
Third degree*	between 5 and 8 years	between 3 and 5 years	90 days imprisonment/5 years probation	up to 5 years probation	up to $7,500 or double the gain or loss
Fourth degree**	not available	up to 18 months	90 days imprisonment/18 months probation	up to 18 months probation	up to $7,500 or double the gain or loss
Disorderly person	not available	up to 6 months	90 days imprisonment/6 months probation	up to 6 months probation	up to $1,000 or double the gain or loss
Petty disorderly person	not available	up to 30 days	not available	up to 30 days probation probation	up to $500 or double the gain loss

* A parole term of one year is added to sentences of imprisonment for these crimes. 2C:43-9(b).
**The parole term for fourth degree crimes is sex months. 2C:43-9(b).

GRADATION OF CRIMES UNDER

THE PROPOSED CODE

First Degree 8-15 years

2C:11-3(b)	Murder (specific sentence up to 30 years)
13-1(b)	Kidnapping*
14-1(a)	Aggravated Rape*
14-2(a)	Aggravated Sodomy*
19-1	Robbery*

Second Degree 5-8 years

2C:5-4(a)	Attempt to commit first degree crime, conspiracy to commit first degree crime
2C:11-4(b)	Manslaughter
2C:12-1(b)(1)	Aggravated Assault*
13-1	Kidnapping (victim released unharmed)*
14-1(a)	Aggravated Rape*
14-2(a)	Aggravated Sodomy*
17-1(a)	Aggravated Arson*
17-2(a)	Causing Widespread Injury*
18-2	Burglary*
19-1	Robbery*
20-2	Theft*
21-19(a)	Usury*
21-19(b)	Business of Criminal Usury

Third Degree 3-5 years

12-1(b)(2)	Aggravated Assault*
12-1(b)5	Aggravated Assault*
12-2(a)	Reckless Endangering*
12-3	Terroristic Threats
13-2	Criminal Restraint
13-5	Criminal Coercion*
14-1(b)	Rape*
14-2(b)	Sodomy*
14-3(a)(1)	Corruption of Minor and Seduction (Stat. Rape)*
14-4(e)	Sexual Assault*
17-1(b)	Arson*
17-2(b)	Causing Widespread Injury*
17-3	Criminal Mischief*
18-2	Burglary*
20-2	Theft*
21-1	Forgery/Possession of Forgery Devices*

(Cont'd)

* These offenses have multiple gradations and thus are included in more than one category.

Third Degree (Cont'd)

21-3(a)	Fraud Relating to Public Records
21-4(b)	Issuing False Financial Statement
21-15	Misapplication of Entrusted Property
21-19(a)	Usury*
21-19(c)	Possession of Usurious Loan Records
24-6(b)	Unlawful Adoption*
27-2	Bribery
27-3	Threats to Influence an Official
27-4	Compensation for Past Official Behavior
28-1	Perjury
28-5(a)	Tampering with Witnesses*
28-5(c)	Witness Taking Bribe
28-7	Tampering with Public Records with Intent to Defraud*
29-3	Hindering Apprehension or Prosecution*
29-5	Escape*
29-6(a)	Implements for Escape*
29-7	Bail Jumping*
34-2(b)	Promoting Prostitution*
37-2	Promoting Gambling*
37-3	Possession of Gambling Records*
37-4(a)	Maintenance of a Gambling Resort*
39-3(a)	Possession of Destructive Device
39-3(b)	Possession of Sawed-Off Shotgun
39-4(a)	Possession of Firearm with Purpose to Use Unlawfully
39-4(c)	Possession of Explosives with Purpose to Use Unlawfully
39-4(d)	Possession of Destructive Device with Purpose to Use Unlawfully
39-5(a)	Possession of Machine Gun Without License
39-5(b)	Possession of Handgun Without Permit
39-5(c)	Possession of Rifle/Shotgun Without Permit
39-5(e)	Possession of Firearm in Educational Institution
39-9(a)	Manufacturing Machine Gun
39-9(b)	Manufacturing Sawed-Off Shotgun
39-9(e)	Defacing Firearm
39-10(c)	False Information in Firearm Application

Fourth Degree up to 18 months

2C:5-5	Manufacturing Burglar Tools
2C:11-5	Negligent Homicide
2C:11-6	Aiding Suicide
12-1(b)(4)	Aggravated Assault*
12-1(b)(5)	Aggravated Assault*
12-1(b)(3)	Aggravated Assault*

(Cont'd)

* These offenses have multiple gradations and thus are included in more than one category.

Fourth Degree (Cont'd)

12-2(b)	Reckless Endangering*
13-4(a)	Interference with Custody*
13-4(b)	Interference with Custody (committed persons)
13-5	Criminal Coercion*
14-3(a)(2)&(3)	Corruption of Minor/Seduction*
14-4(f)&(g)	Sexual Assault*
17-1(c)	Failure to Report Fire
17-2(c)	Risking Widespread Injury
17-2(d)	Failure to Prevent Widespread Injury
17-3	Criminal Mischief*
18-2	Burglary*
18-3(a)	Trespass in Dwelling
20-2	Theft*
21-1	Forgery*
21-2	Criminal Simulation
21-4(a)	Falsifying Records
21-7	Deceptive Business Practice*
21-9	Misconduct by Corporate Official
21-10(a)	Commercial Bribery
21-10(b)	Failure to Act Disinterestedly
21-11	Rigging Public Contest
21-13	Fraud in Insolvency
21-14	Receiving Deposits in Failing Financial Institution
21-16	Securing Execution of Documents by Deception
21-19(f)	Offer to Act as Debt Adjuster
24-4	Endangering Welfare of Children
24-5	Willful Nonsupport
24-6(a)	Unlawful Adoption*
27-5	Retaliation for Past Official Action
27-6	Gifts to Public Servants
27-7	Compensating Public Servant for Assisting Private Interests
27-8	Selling Political Endorsement
28-2(a)	False Swearing*
28-4(a)	False Report to Law Enforcement Authorities*
28-5(a)	Tampering with Witnesses*
28-5(b)	Retaliation Against Witnesses
28-6	Tampering with Evidence
29-2	Resisting Arrest
29-3	Hindering Apprehension or Prosecution*
29-4	Compounding
29-5	Escape*
29-6(a)	Implements for Escape*
29-7	Bail Jumping*
30-1	Official Oppression
30-2	Official Misconduct
30-3	Speculating or Wagering on Official Action
33-1(a)	Riot

(Cont'd)

* These offenses have multiple gradations and thus are included in more than one category.

Fourth Degree (Cont'd)

33-3	False Public Alarm
34-2(b)	Promoting Prostitution*
34-4(b)	Sale of Obscene Material to Minor
34-4(c)	Admitting Minor to Exhibition of Obscene Film
34-5(b)	Public Communication of Obscenity
37-2	Promoting Gambling*
39-3(c)	Possession of Firearm Silencer
39-3(d)	Possession of Defaced Firearm
39-3(e)	Possession of Weapon
39-3(f)	Possession of Dum-Dum Bullet
39-4(b)	Possession of Weapon with Intent to Use Unlawfully
39-5	Possession of Weapon
39-9(c)	Manufacturing Firearm Silencer
39-9(d)	Manufacturing Weapons
39-10(a)	Violation of Regulatory Provisions Relating to Firearms
39-11(a)	Pawnbroker Selling Weapon

Disorderly Person up to 6 months

2C:5-5	Possession of Burglar Tools
2C:12-1	Simple Assault*
13-3	False Imprisonment
13-4	Interference with Custody*
14-2(c)	Sexual Contact with Dead
14-4	Sexual Assault*
17-3	Criminal Mischief*
17-4(a)	Endangering Pipes
17-5	Failure to Report Damage to Pipes
18-3(a)	Trespass
20-2	Theft*
21-3(b)	Offering False Instrument for Filing
21-5	Bad Checks
21-6	Credit Card Misuse
21-7	Deceptive Business Practice*
21-8	Misrepresenting Mileage of Motor Vehicle
21-11(c)	Failure to Report Solicitation for Rigging
21-12	Defrauding Secured Creditors
21-17	Wrongful Impersonating
21-19	Usury*
21-19(d)	Unlawful Collection Practices
21-19(e)	False Statement of Credit Terms
24-1	Bigamy
24-7	Endangering Welfare of Incompetent
28-2(b)	False Swearing*
28-3(a)	Unsworn Falsification to Authorities*

(Cont'd)

* These offenses have multiple gradations and thus are included in more than one category.

Disorderly Person (Cont'd)

28-4(b)	False Report to Law Enforcement Authorities*
28-7	Tampering with Public Records*
28-8	Impersonating Public Servant
29-1	Obstructing Administration of Law
29-3	Hindering Apprehension or Prosecution*
29-7	Bail Jumping*
33-1(b)	Failure to Disperse
33-8	Disrupting Meetings
33-9	Desecration of Venerated Objects
33-10	Cruelty to Animals
33-12	Maintaining a Nuisance
33-14	Interference with Transportation
34-1	Open Lewdness
34-2(a)	Prostitution
34-2(e)	Patronizing Prostitutes
37-2	Promoting Gambling*
37-3	Possession of Gambling Records*
37-4(b)	Maintenance of a Gambling Resort*
37-7	Possession of a Gambling Device
39-10(b)	Violation of Notification Provisions
39-11(b)	Loaning Money on Firearm
40-1	Creating a Hazard
40-2	Refusing to Yield Party Line

Petty Disorderly Person up to 30 days

2C:12-1	Assault (in fight or scuffle)*
18-3(b)	Defiant Trespassing
20-10(b)	Riding in Stolen Means of Conveyance
21-18	Slugs
28-3(b)	Unsworn Falsification to Authorities*
29-6(b)	Providing Contraband to Inmate
29-7	Bail Jumping*
33-2(a)	Disorderly Conduct-Violent Behavior
33-2(b)	Disorderly Conduct-Offensive Language
33-4	Harassment
33-7	Obstructing Highways
33-13	Smoking in Public Conveyances
33-15	Cutting in line
34-6	Diseased Person Having Sexual Intercourse

* These offenses have multiple gradations and thus are included in more than one category.

CHAPTER 51 - EXPUNGEMENT

The Code attempts to provide a comprehensive scheme for the sealing or expunging of criminal records and convictions. 2C:51-4. The purpose of any such scheme is to limit the disabilities and handicaps inherent in a criminal record so that individuals who show promise for a productive and law-abiding future will not be unduly hampered by their past encounters with the criminal justice system. Quite obviously, a great number of competing values and considerations must be assessed in arriving at a satisfactory system for the annullment or destruction of criminal records. The desire of law enforcement agencies for maximum information conflicts with the individual's need to be free of the obstacles associated with a criminal history. Society in general has a clear interest in the effective investigation and prevention of criminal offenses. However, society must be equally concerned that unfairly burdening a well-motivated individual with a criminal record may actually discourage that person from seeking to lead a useful and beneficial life. Thus, a delicate compromise must be sought. The Division of Criminal Justice is currently involved in the preparation of a proposal which would effect that compromise. Because of the subtle and complex variations that may develop between the Division's model and the present Code proposal, no criticisms of the latter provisions will be attempted here. Rather, the Code's scheme will merely be described without comment. It should be noted, however, that the Code appears to contain a number of technical

deficiencies which alone would require that it be subjected to further scrutiny. It is, therefore, recommended that final consideration and appraisal of this section should be reserved.

In subsection (a), the proposal treats records of all criminal proceedings which have terminated without a conviction, either in dismissal or acquittal. A person who is the subject of such records may petition the court in whose jurisdiction the arrest occurred, and request that the records be "expunged," i.e., destroyed, obliterated or erased. This petition may be filed at any time after the acquittal, dismissal or other discharge without conviction. The court is obliged to notify the Attorney General, the county prosecutor and any other law enforcement agencies involved in the arrest. At the subsequent hearing on the petition, the court must grant the request for expungement unless a "compelling public interest" to deny the petition is shown by "substantial and convincing evidence." If granted, all records, including fingerprints, are to be destroyed and the petitioner is entitled to treat the arrest and charges as though they had not occurred. Any law enforcement agency solicited about the matter must also respond as though the arrest had never occurred.

Subsection (b) deals with persons who have been "found guilty of an offense." A reading of the entire subsection reveals that it is designed to apply only to individuals convicted of disorderly persons offenses. The subsection provides that such an individual must wait at least one year after completion of his sentence before he may petition for expungement. The petition is to be filed with the county court, and

and the court is, in turn, to notify the county prosecutor, the chief of police of the municipality when the offense occurred and the municipal court judge, if the conviction was entered in municipal court. The Attorney General is not listed as one of the persons to be noticed. At the hearing, the county court is to grant the request unless a "material objection" is made or a "reason appears to the contrary." If the order is denied, the petitioner is accorded a right to appeal and the State bears the burden of proof on the appeal. If five years have elapsed since the termination of an individual's sentence for a disorderly persons offense, the court must grant a request for expungement unless the petitioner has committed a subsequent offense.

Subsection (c) concerns those persons who have been convicted of a "crime or offense". These persons can not have their records expunged but may seek to have the information "annulled" and "sealed." This process involves physically sealing and segregating the criminal records and strictly limiting access to the information. As with expungement, the individual would be permitted to treat the conviction as though it did not exist and would be subject to no legal disabilities as a result thereof. An application for sealing may be made at any time after the individual has completed any sentence, probation or parole. However, the proposal does not indicate who should be noticed of the application. Also, no standards for the court's decision to grant or deny the petition are established, although the court is obliged to declare the reasons for its decision in writing. Again, a denial of the petition gives rise to a right of appeal with the burden placed on the State.

If the petition for sealing is filed two years or more after the discharge from sentence on the conviction, the court must grant the request unless the individual has been subsequently convicted of another offense. If the petition is granted, all State agencies in possession of the information are to respect the order and seal their records. The information in their records is to be released only under the following circumstances: (1) on inquiry from a court of law, (2) on inquiry from an agency preparing a presentence report, (3) on inquiry from a law enforcement agency in connection with a criminal investigation or prospective employment of the individual, and (4) on inquiry from an agency considering employment of the individual in a position directly affecting "national security," other than regular military service.

As noted, we recommend that no action be taken on this section until the Attorney General's Office completes its own proposal. At such time, detailed comparisons may be more easily made. In any event, the present proposal is technically unsatisfactory and should be rejected in its present form.

SCHEDULE OF MAJOR PROVISIONS OF THE CODE

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
Territorial Applicability, Prosecution In Another Jurisdiction	2C:1-3(f)	Court may dismiss prosecution where a defendant is being prosecuted in another jurisdiction for same conduct
Classes of Offenses	2C:1-4	Offenses reclassified as crimes (punishable by six months imprisonment) and disorderly persons offenses (all other offenses)
Abolition of Common Law Crimes	2C:1-5	All offenses are defined by statute
Limitation on Dismissals	2C:1-7	Prohibits dismissal as a result of plea negotiations of first or second degree offense involving use of firearms
Method of Prosecution When Conduct Constitutes More Than One Offense	2C:1-8(a)(2)	Prosecution not permitted for both conspiracy and resulting substantive offense
Former Prosecution in Other Jurisdiction	2C:1-11	Conviction of a Federal Crime bars trial in State Court for crime arising from same conduct
General Requirements of Culpability	2C:2-2	Culpability defined as "purposely," "knowingly," "recklessly" and "negligently."
Ignorance or Mistake	2C:2-4(c)	Mistake of law permitted as a defense.
Liability for Conduct of Another	2C:2-6(c)	Conspirator not liable for substantive offenses committed in furtherance of conspiracy, unless additional requirements of complicity met
De Minimus Infractions	2C:2-11	Court empowered to dismiss de minimus offenses and State has right to appeal

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
Entrapment	2C:2-12	"Subjective" test of entrapment replaced with "Objective" standard
General Principals of Justification	2C:3 to 11	General Principals of Justification codified
Insanity Defense Abolished	2C:4-1	Abolishes insanity as a specific, separate defense at trial, although a post-trial procedure is provided to determine the mental condition of those convicted of the charged offense, as well as a post-trial disposition procedure governing such individuals found to be mentally ill at the time of the offense
Psychiatric Examination of Defendant with Respect to Fitness to Proceed	2C:4-5	Provides for a competency hearing as presently embodied in N.J.S.A.2A:163-2.
Determination of Fitness to Proceed	2C:4-6	Establishes the procedure through which the issue of a defendant's competency to stand trial is determined, and the procedure to be utilized upon a determination of incompetence. If an individual is found to lack competence, then dependant upon a finding of dangerousness, the court either commits or releases the individual.
Commitment of a Person by Reason of Mental Disease or Defect	2C:4-8	Governs the commitment of an individual who has been convicted of the offense charged against him. Following such conviction, a psychiatric examination of the defendant may be conducted. If the court determines that at the time of the offense the defendant suffered from a mental disease or defect which impaired his capacity to appreciate the wrongfullness of his conduct or to conform his conduct to (Cont'd)

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
		legal requirements, no sentence shall be imposed. Rather, dependent upon a finding of dangerousness, the court shall either unconditionally or conditionally release him, or commit him for an indeterminate term to an appropriate mental institution.
Release of Persons Committed By Reason of Mental Disease or Defect	2C:4-9	Embodies the present law for the release of those individuals committed by reason of mental disease or defect whenever dangerousness no longer exists.
Homicide	2C:11-2 2C:11-3 2C:11-4	The Code attempts a major revision of existing laws, eliminating degrees of murder and introducing an affirmative defense to felony murder.
Assault	2C:12-1	All existing assault and battery offenses are reorganized into a unified scheme of simple and aggravated assault; mere battery no longer constitutes an offense. The category of assaults with various feloneous intents is merged into provisions prohibiting attempts of individual offenses.
Kidnapping	2C:13-1	Eliminates entirely the element of asportation.
Sexual Offenses (including rape, sodomy and private lewdness)	2C:14-1 2C:14-2 2C:14-4	This section redesigns the present scheme of sexual offenses, decriminalizing all private sexual activity between consenting adults.
Arson	2C:17-1	Consolidates numerous offenses and grades the penalty partly according to the kind of property destroyed and partly according to danger to the person; expands arson to include exploding as well as burning.

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
Causing or Risking Widespread Injury or Damage	2C:17-2	New concept relating to harm to 10 or more people or habitations,or to large buildings; generalizes from a few current ad hoc provisions dealing with specific dangers.
Criminal Mischief	2C:17-3	Replaces numerous provisions dealing with various kinds of malicious mischief that harms or threatens harm to property.
Burglary and Other Criminal Intrusion	2C:18-2	Restricts protected premises to "buildings and occupied structures." Expands present law by criminalizing unprivileged entry for purpose of committing "any offense." Restricts duplicate convictions for burglary and for the offense intended to be committed within the structures.
Robbery	2C:19-1	Proscribes broader range of violent thefts, such as when violence is used to escape and when property is not taken from the person or presence of the victim, but from a third party. Incorporates crimes of attempted robbery and assault with intent to rob. Penalty is graded according to aggravating circumstances.
Consolidation of Theft Offenses	2C:20-2	Consolidates into one offense numerous distinct property crimes such as larceny, embezzlement, cheating, extortion, blackmail, etc. Eliminates rule that a defendant charged with one theft offense cannot be convicted by proof of another theft offense.
Theft by Unlawful Taking or Disposition	2C:20-3	Eliminates common law larceny requirement of asportation.

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
Receiving Stolen Property	2C:20-7	Expands the mental states sufficient for conviction from knowledge that property was stolen to knowledge or belief that it was probably stolen.
Forgery and Related Offenses	2C:21-1	Broadens coverage of the crime by including "anywriting," thereby removing any limitation of forgery to legal or evidentiary writings. Punishes not only forgeries which defraud a victim, but also those which harm his good name, misrepresent his views, conduct or character.
Bad Checks	2C:21-5	Restricts presumption of knowledge of lack of funds, giving passer 10 days after notice of refused payment to honor checks before presumption exists. Eliminates rule that issuance of certificate of protest is presumptive evidence of knowledge of lack of funds.
Commercial Bribery and Breach of Duty to Act Disinterestedly	2C:21-10	Estends extant laws dealing with "commercial bribery" of agents and fiduciaries to include managers of any public or private institutions, corporation or labor union.
Bigamy	2C:24-1	Eliminates strict liability; provides defense of good faith belief that defendant was free to remarry.
Compensation for Past Official Behavior	2C:27-4	Present law permits penalty only for officeholder who accepts compensation while in office; new provision would penalize compensation deferred until after official leaves office.
Perjury	2C:28-1	Permits a defense of retraction of the perjured statement prior to the conclusion of the proceedings in which statement was made.

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
False Swearing	2C:28-2	Permits retraction defense; requires that testimony of a single witness be corroborated.
Hindering of Apprehension	2C:29-3	No need to first prove the guilt of the individual whom defendant has aided.
Official Misconduct	2C:30-2	Alters the common law to penalize misconduct only when the violation of duty was committed for a benefit to himself, or to injure another.
Public Indecency	2C:34-1	The Code attempts to limit public indecency to flagrantly lewd acts committed in front of persons reasonably likely to be affronted or alarmed.
Prostitution	2C:34-2	This offense is lowered from misdemeanor to disorderly persons offense, and scope of prohibition is extended to include patron as well as prostitute.
Obscenity	2C:34-4	The regulation of obscenity is now limited solely to situations involving minors and open public communication of obscenity. Thus, the display of sexually explicit films to adults will no longer be prohibited in this State.
Gambling: Player	2C:37-1(c)	Introduces concept of "player" into gambling law. Defined as one who gambles without receiving any profit other than personal winnings and does not otherwise render material assistance to a gambling operation. Also, one who engages in a social game.
Gambling: Bookmaking	2C:37-1(g)	Changes present law by excluding from the definition of bookmaking the acceptance of bets in a casual or personal fashion.

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
Promoting Gambling	2C:37-2(a)1 2C:37-2(a)2	Decriminilizes gambling, other than bookmaking, by players
Promoting Gambling	2C:37-2(b)	Grades the penalties for promoting gambling in accordance with the number of bets taken in a particular period of time and the dollar amount involved. Also eliminates possible prison penalties. Establishes maximum fines for violations.
Possession of Gambling Records: Defenses	2C:37-3(b)(1)	Establishes a new defense for Possession of Gambling Records. If the records represent the defendant's own bets in a number not exceeding ten, it is a complete defense.
Maintenance of a Gambling Resort	2C:37-4	Requires gambling resort to be used for gambling. Changes present law under which maintaining a gambling resort is an offense if the person maintaining it intends that it be used for gambling. Also, a person is liable only if he receives remuneration for maintaining a gambling resort, pursuant to an agreement to participate in the proceeds of gambling activity on the premises.
Gambling Offenses: Presumption	2C:37-5	Changes rules of evidence by admitting publications regarding sporting events to prove the occurrence of such event. Such report is presumptive proof.
Lottery Offenses: No Defenses	2C:37-6	It is not a defense to a lottery prosecution that the lottery is conducted in a jurisdiction where it is legal.
Gambling Offenses: Jurisdiction	2C:37-8	Only County Court has jurisdiction to hear offenses under this chapter.

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
Firearms: Presumptions	2C:39-2(a)	Presently, weapon found in sutomobile is presumed to be in possession of all occupants. New statute creates exceptions. If the weapon is in enclosed depository and vehicle is not stolen, presumed to be in possession of occupant who owns or has authority to operate vehicle.
Voluntary Surrender	2C:39-12	New provision not existing under present law. Allows persons to escape criminal prosecution for illegal possession of firearms if the weapons are surrendered prior to filing of charges of unlawful possession.
Antique Firearms	2C:39-6(d)	Limits present total exemption of antique firearms from provisions of Gun Control Law by providing that such guns are exempt only if unloaded or are being fired for exhibition or demonstration purposes at an authorized place.
Degrees of Crimes	2C:43-1	Crimes are classified as first, second, third and fourth degree. Offenses are either disorderly persons or petty disorderly persons.
Authorized Dispositions	2C:43-2	Except for the Controlled Dangerous Substances Act, all convicted offenders must be sentenced in accordance with the Code, which generally reduces the maximum terms of imprisonment and authorizes fines, restitution, probation and pretrial supervisory treatment.

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
Imprisonment -- Ordinary Terms	2C:43-6 2C:43-8	For first degree crimes other than murder, the court selects a definite term of between 8 and 15 years. For the second degree crimes the range is 5 to 8 years; for the third degree crimes, 3 to 5 years; for the fourth degree crimes, up to 18 months. Disorderly persons and petty disorderly persons are punishable by maximums of 6 months and 30 days respectively.
Imprisonment -- Extended Terms	2C:43-7 2C:44-3	Certain classes of offenders convicted of first, second or third degree crimes may be subject to the following terms: first degree, between 15 and 30 years; second degree, between 8 and 15 years; third degree, between 5 and 8 years.
Minimum Sentences	2C:43-6 2C:43-7	Judicially imposed minimum sentences are generally abolished except for convictions of a first or second degree crime and sentences under the extended term section.
Supervisory Treatment	2C:43-12 2C:43-13	With the consent of the prosecutor, the court may refer a defendant before trial to a rehabilitative program approved by the Supreme Court. Successful completion of the program will result in dismissal of the pending charges.
Presumption Against Imprisonment	2C:44-1	The court is required to refrain from incarcerating convicted offenders unless it finds that the defendant will commit another crime while on probation, he needs institutional treatment, a lesser sentence will depreciate the seriousness of the crime, or the offense is characteristic of organized crime.

TITLE OF SECTION	CODE SECTION NUMBER	COMMENT
Expungement and Sealing of Criminal Records	2C:51-4	Allows an individual to petition for expungement of records of arrest which did not result in conviction. Permits petition for expungement of records of disorderly persons convictions one year after completion of any sentence. More serious convictions may not be expunged but may by "sealed" and "annulled" on petition of individual made anytime after completion of sentence. Presumption is in favor of expungement or sealing in all cases.
Purchase of Firearms: Who May Obtain	2C:58-3(c)	Limits the disqualification for obtaining licenses to acquire and possess firearms to persons convicted of crimes of violence, theft and burglary. At present, persons convicted of any crime are disqualified.
Limited Licenses to Carry Firearms by Minors	2C:58-6	Requires minors to acquire licenses to carry firearms. Carrying of firearms by licensed minors must be under proper supervision. At present, supervised minors need not be licensed.