REPORT ON

THE PROPOSED NEW JERSEY PENAL CODE,

ESSEX COUNTY PROSECUTOR'S OFFICE

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THE NEW JERSEY PENAL CODE

A. Introduction

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. 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." The articulated objective of the enabling legislation was "to revise and codify the law in a logical, clear and concise manner." N.J.S. 1:19-4.

Pursuant to its legislative mandate, the Commission issued its final report in October 1971 and recommended the enactment of a comprehensive code. The efforts of the commission were in keeping with similar public organizations in other jurisdictions where codes have been enacted. Most notable in this context are the recent revisions of codes in California and New York.

The purpose of this report is to describe some of the major changes in our law contained in the proposed code. More specifically, attention is centered about certain provisions which must receive the scrutiny of all prosecutorial agencies.

Before discussing the substantive aspects pertaining to the Commission's report, it would be well to review the underlying purposes and objectives which any codification or revision of our criminal law must embody. The most obvious purpose of enacting a code is to provide a single comprehensive source of research concerning all problems relating to the criminal law. Such an effort would inure to the benefit of laymen as well as attorneys. Unfortunately, the Commission has failed to some extent in this endeavor. While Section 2C:1-5 abolishes all common law crimes, defenses which are not specifically included in the Code have been retained. See Section 2C:2-5. The Commission has stated "there may be unusual defenses which should be retained if appropriate in a particular situation" and "we would not wish to exclude them by implication." Commentary, The New Jersey Penal Code, p. 55. The failure of the Commission to abolish defenses not enumerated in the Code is inexplicable, particularly in light of its rejection of common law offenses, and constitutes a serious defect which should be rectified.

Another purpose of a criminal code is to define and clarify the elements of all offenses. Ideally, a layman should be able to read and understand the

law without consulting an attorney. To some extent the Commission has deleted ambiguous verbiage and its efforts in this regard should be lauded. Conversely, in many instances the Code contains unclear language which, unfortunately, has been substituted for phrases with well recognized legal definitions. A case in point is Section 2C:11-3 which abolishes the well settled mens rea elements of murder and employs the terms "purposely" and "knowingly" in their stead. Rather than obliterating centuries of judicial decisions which have served to mold and define conduct deemed criminal, the Commission should have codified existing case law. Instead, the Code, in many instances, has planted the seeds of discord which can only result in a future needlessly beclouded by litigation.

A comprehensive code presents an opportunity to modernize our system of criminal justice in order to make it a viable instrument of public policy. The much maligned principle of stare decisis has, as its basic purpose, the effect of molding the law in accordance with current trends and thought. The law consists of a system of rewards and punishments which, to some extent, defines moralistic values and, in turn, is defined by them. As society's values

change, the law must also be modified. Unfortunately, the principle of stare decisis has left many anachronistic common law principles extant. Thus, the enactment of a code affords the opportunity to alter, modify and evaluate. The Commission should be commended because of its efforts to modernize the law. Nevertheless, the code does not address itself to two important areas of problems, both of which are of vital concern to law enforcement personnel. First, the Controlled Dangerous Substance Act must be reevaluated and, perhaps, revised. Narcotics and other related substances constitute the most important problem presently confronting prosecutors and police in every county in the State. The failure of the Commission to concern itself with this problem must be rectified. Second, the Commission did not address itself to the problem of penal corrections. In essence, the Code contains a presumption against incarceration. This presumption can only be justified upon the ground that our penal institutions are unable to rehabilitate persons convicted of crimes. Unfortunately, that is probably the case at present. Nevertheless, the presumption against incarceration begs the question for persons convicted of crimes remain in the same environment which led them to offend the law. Thus, it is not

enough to say that first offenders, for example, should ordinarily be subject to probationary supervision, without defining in the clearest of terms the nature and extent of supervisory controls and what other alternatives exist. Correction reform is evidentally being considered by a separate commission. That commission's report and recommendations will have a vital impact on the question of the desirability of many provisions contained in the proposed code now under consideration.

No discussion of the Code would be complete without a consideration of the extent to which plea bargaining is permitted. In a larger sense, a code must distinguish between public injuries which are of great magnitude and criminal offenses which are less of a threat to society. For example, the Code abandons the high misdemeanor -- misdemeanor distinction; i.e. in other states and in the common law, the misdemeanor -- felony division. In its stead, the Code creates four degrees of crimes relating to the culpability of the offender, and two classifications of disorderly persons offenses. The greater range of offenses will probably enhance the prospects of plea bargaining, thereby permitting a prosecutor to concentrate his efforts on major crimes. While an accused may decide to maintain his innocence

and hope that a jury will find him guilty of a lesser included offense, more than likely, he will plead to a greater degree of the crime and be assured of a lesser sentence. The prospects of entering into negotiations as to a possible plea of guilty are seriously diminished, however, because of three provisions contained in the proposed code. Under the code, a trial judge may dismiss an indictment on his own motion without the consent of a prosecutor. The de minimis infractions rule is, perhaps, the most discouraging feature. See Section 2C:2-11. The code also abolishes decisional law to the effect that a County Court judge may not instruct a jury as to disorderly persons violations as a lesser included offense. See State v. McGrath, 17 N.J. 41, 44-50 (1954). An accused's motivation to plead to a disorderly persons violation would be substantially diluted by the proposed modification of our law. Finally, the code permits a trial judge to sentence an offender as if he had been convicted of a lesser included offense contrary to a verdict of a jury. These provisions constitute an unwarranted intrusion into an area normally reserved to a prosecutor and a jury and substantially decrease the possibility of fair plea bargaining. Suffice it to say at this point that a prosecutor must be given greater freedom to plea

bargain and, to the extent that the code fails to accomplish this objective, the public interest has not been well served.

The proposed code must be evaluated in light of the four objectives previously described. That certain provisions are criticized in this report does not detract from the essential purpose of the Commission: i.e. to formulate a clear and concise body of criminal law having relevance to the values and needs of an urban state. Nevertheless, this report concerns primarily those provisions in the code which should be modified.

B. Grading of Offenses and Sentencing

Under the proposed code, there are five grades of offenses; capital crimes and crimes in the first, second, third and fourth degrees. The designation given to an offense is necessarily a value judgment of what mens rea in combination with a specific act merits criminal sanctions and what sentencing is appropriate. In short, the Commission has quite properly attempted to delineate the seriousness of an offense depending upon the offender's moral culpability. This, in turn, depends upon the purpose of the offender in committing the crime and upon the extent to which the public has been injured.

The theme of the Code in regard to sentencing is innovative. Before consideration of a particular defendant's character is given, the Code makes several bold assertions. First, it is the philosophy of the Code that shorter sentences are more apt to better serve the public interest than longer sentences. Second, the first release of all offenders at or before the expiration of their sentences should trigger a parole phase to aid the offenders in the transition from prison life to freedom. Third, if long sentences are imposed, they are purely discretionary with the courts. Fourth, a presumption exists in favor of probation or a suspended sentence rather than imprisonment. And fifth, no mandatory sentences of imprisonment should exist, and at most, certain crimes may by definition include a presumption of imprisonment due to their heinous nature.

To implement the above, some provisions are adopted which are not acceptable to prosecutorial authorities. For example, strenuous objection is made to the adoption of Section 2C:43-11. This section allows the court, after a conviction is obtained, to sentence the offender as if the conviction were obtained for a lesser included offense. The Code would in effect shift the exercise of plea

bargaining from the agencies of prosecution to the judiciary. Surely most defendants would be unwilling to plead guilty before trial when they could take their chance on acquittal or subsequent conviction with a downgraded result as to judgment and sentencing. It is submitted that such a provision would unnecessarily clog our courts and stifle a legitimate area of prosecutorial discretion.

Judicial discretion in sentencing is directly related to the Code's provision concerning "de minimis infractions" contained in Section 2C:2-11. Section 2C:2-11 reflects the view that prosecutorial authorities are incapable of securing proper dismissals and, therefore, the courts should be given authority to dismiss a prosecution even over the objection of a prosecutor. Law enforcement personnel must take strong exception to such a view. The court cannot, and should not, have the information upon which the State determined to prosecute a defendant when it decides to dismiss a "de minimis" prosecution. For example, a prosecutor may know the defendant's prior background and conduct in the particular area. The court, at trial, will not. Furthermore, if a prosecutor abuses his discretion

by failing to seek an indictment, a defendant may still be indicted by a successor during the period of limitations. If a court, however, dismisses a prosecution, it is questionable whether that decision may be appealed or whether defendant must go forever free. At best, Section 2C:1-8(a)(3) may be applicable, which could afford some check on the court's otherwise unbridled discretion.[1] At worst, a further prosecution is barred automatically.

Reference should be made to Article III, paragraph 1 of the New Jersey Constitution which provides that the "powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial." Under this provision, "no person . . . belonging to . . . one branch" may exercise "any of the powers properly belonging to either of the others." While Sections 2C:43-11 and 2C:2-11 do not expressly violate this constitutional mandate, they do constitute an unwarranted intrusion in an area ordinarily considered to be in the discretion of a prosecutor or a jury. See

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1 This provision states a prosecution will not be barred if prior prosectuion was terminated for sufficient legal reason or manifest or absolute or overriding necessity.

In re Friedland, 59 N.J. 209, 220 (1971). In State v. Winne, 12 N.J. 152, 174 (1953), our Supreme Court stated:

> A county prosecutor within the orbit of his discretion inevitably has various choices of action and even inaction. This discretion applies as much to the seeking of indictments from the grand jury as it does to prosecuting or recommending a nolle proseque after the indictment has been found, but he must at all times act in good faith and exercise all reasonable and lawful diligence in every phase of his work.

All prosecutors must deplore the backlog of cases presently pending in our County Courts. Nevertheless, the decisions of prosecutors to seek or not to seek indictments can hardly be said to have caused this unhappy situation. Surely, a court should not have the power to overrule a decision of a prosecutor in this context. The two described provisions would not serve the public interest.

The primary duty of a prosecutor is to protect the public for "the first right of the individual" is to be free from attack. State v. Bisaccia, 59 N.J. 43, 45 (1971). That is the reason for government, "as the preamble to the Federal Constitution plainly says." Id. To destroy a prosecutor's obligation to respond to his public mandate, in the guise of clearing our congested court calendars,

is to deprive the public of its right to be protected. The de minimis infraction rule, which depends upon the subjective and individualistic notions of fairness of each member of the judiciary, is neither desirable nor proper. So, too, Section 2C:43-11 relating to sentencing for lesser included offenses does not serve the public interest and improperly invades the decisons of juries. It has been stated that courts "are ambivalent in thier estimate of the intelligence of the layman, summoning one line of cases and then another to support the varying mood of their decisions." State v. Hawthorne, 49 N.J. 130, 147 (1967) (concurring opinion). It depends upon "whether one views the jury as composed of twelve men of average intelligence or of twelve men of average ignorance." Note, 35 Brooklyn S. Rev. 139, 140 (1968). One thing is certain, however. Members of the judiciary and attorneys for the prosecution and the defense are not necessarily clothed with a superior ability to determine factual issues. Such questions are properly within the jury's domain. Once a jury determines that an offense has been committed, its verdict is entitled to respect. A judge's discretion with regard to sentencing is sufficiently broad, perhaps

overly broad under the proposed code, to prevent miscarriages of justice. The courts should not be given even greater authority to sentence an offender as if he had been convicted of a lesser included offense in derogation of a factual finding of a jury.

Once a conviction has been obtained, there are several possible types of sentences that could be given under Section 2C:43-2 (excluding capital offenses and offenses under the Controlled Dangerous Substances Act). They include payment of a fine or restitution or both; probation with or without imprisonment; imprisonment; or a combination of either a fine, restitution and probation or a fine, restitution and imprisonment. Where imprisonment is provided, the courts will not fix a maximum and a minimum period for confinement. Rather, the courts would be required to specify under Section 2C:43-6 a period of maximum imprisonment. Then, under Section 2C:43-9, where a first release is involved the sentence of imprisonment automatically includes a separate parole term (five years, unless the crime is of the fourth degree or the offender is sentenced under Section 2C:43-5). According to the Commentary, "The theory of parole is not . . . that it is an act of leniency by the Board but rather that a period of supervised constitutional release is a rationally necessary

intermediate stage between institutionalization and full restoration to the free community, a stage that is both helpful to the individual and necessary for community protection."

The above described concept of parole is not disputed. In fact, where parole is instituted regardless of whether a full sentence is served or not, it is to be a commended procedure as an added protection both to society and to the individual. What is disputed, however, is the basic conjunctive philosophy of the inappropriateness of imprisonment. That is to say, the added protection of parole does not offset the possibility that emphasis on non-custodial punishment will preclude a necessary deterrent factor in sentencing. Before a presumption against imprisonment is accepted and before a mandate to reduce a sentence for credit for time served on parole prior to its revocation are accepted, careful consideration must be given to whether society's and the individual's interest are fairly balanced in this new penal formulation.

When custodial sentence is imposed, the period of confinement may be extended under 2C:44-3 in the discretion of the court if the defendant is a persistent offender, a professional criminal, a dangerous,

mentally abnormal person, or a multiple offender, all as defined in the Code.

Needless to say, these are variations from the present law. Under N.J.S. 2A:151-5, dealing with an additional sentence for armed criminals, an additional sentence is mandatory (although presumably sentence could be suspended in the discretion of the court or be made to run concurrently). Further, under the Habitual Offender's Law, N.J.S. 2A:85-8 to 13, to initiate additional punishment, a high misdemeanor preceded by either a high misdemeanor or misdemeanor in needed. The standard in the proposed Code is more stringent by requiring at least two prior convictions of crimes. It is interesting to note that under the Code (contra present law), if a crime is committed in another jurisdiction, the grade of conviction for that offense is to be determined by its characterization in the jurisidiction of its commission. Moreover, under Section 2C:44-49 if a crime is committed in New Jersey but no conviction has yet been obtained, defendant may request to plead to such offense so that a prosecution will then be barred and sentencing may be considered pursuant to the multiple offender statute. However, since the Court, as previously noted, may be given authority to downgrade offenses, the question may properly be posed as to whether it

may exercise that power in this situation. And if so, the propriety of Section 2C:43-11 is even more dubious than previously supposed.

This very cursory review of some new sentencing provisions is not meant to be exhaustive or totally critical. There are many fine proposals such as Section 2C:43-3, depriving an offender of pecuniary gain derived from his offense and fining him an additional amount equal to that gain. But, it is felt that some of the proposals are not satisfactory to agencies of prosecution. At the very least, more discussion and more time are needed for an evaluation of the many new provisions, including the grading of offenses.

In passing, it is the prosecutor's position that it is desirable for there to be a disorderly persons (or petty disorderly persons) offense for every crime defined in order to facilitate the operation of plea-bargaining. Yet, from a study of the crimes specified, there appear to be some crimes without corresponding disorderly persons statutes.

Offenses With No Corresponding Disorderly Persons Statute

1. Manufacture or possession of Burglar's tools (2C:5-5).
2. Murder (2C:11-3).

3. Bigamy (2C:24-1).

4. Bribery and Corrupt Influence (2C:27-2, et seq.).

5. Misconduct in Office (2C:30-1 et seq).

6. Violation of Privacy (2C:33-12).

7. Promoting Prostitution (2C:34-2).
(Possible downgrad 2C:34-2(e)).

8. Using Child in Connection With Drugs (2C:35-1).

9. Gaming (2C:37-1).

10. Possession of Dangerous Weapon (2C:39-3).

11. Manufacture, Transport, etc. (2C:39-4).

Obviously, many of the above listed offenses are of such a serious nature as to preclude the possibility of a corresponding disorderly persons offense. Others, however, are not so limited.

As previously noted, the use of narcotics and other related substances forms the primary problem confronting law enforcement officers in this State. Drugs have permeated all levels of our society and the ramifications of our present regulatory statutes cannot be estimated. Many of our nations youth are growing up believing that our system of law is something to be distrusted rather than respected. The failure of law enforcement officials and others to scientifically determine the true physical and psychological effects of various substances has only added to this problem. The rigidity of our laws de. ing with drugs also must be condemned. That is not

to say that drugs or any particular drug should be legalized or that persons should be given free license to use harmful substances. The Controlled Dangerous Substances Act has done much to alleviate the problem by making sanctions generally correspond to the moral culpability of the offender. Nevertheless, the enactment of a code presents an opportunity for further study and evaluation. The range of offenses included in the disorderly persons category should be expanded with respect to certain use of drug offenses. This would give a prosecutor a greater freedom to plea bargain, tend to assist the courts in clearing congested calendars, and give an infrequent user or first time offender another chance.[2]

C. Mental Responsibility

Before discussing the concept of mental responsibility as set forth in the proposed code, it would be well to review the present status of our law

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2 For example, under certain circumstances, a person found in possession of small quantitites of heroin for his own use should be subject to the Disorderly Persons Act as well as a criminal statute. A prosecutor would be given discretion as to whether to seek an indictment or charge the defendant with a disorderly persons violation.

relating to the issue. Testimony regarding mental competency falls within four categories, (1) the insanity defense: (2) competency to stand trial; (3) commitment to a mental institution; and (4) mental stability relating to punishment in capital cases.

The defense of insanity receives its legal definition in New Jersey from the M'Naghten rule which states that a defendant is not criminally liable for an act where

> ". . . at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong . . ." State v. Lucas, 30 N.J. 37, 68 (1959).

See also State v. Trantino, 44 N.J. 358, 367 (1965), cert. den. 382 U.S. 993 (1966), rehear. den. 383 U.S. 922 (1966); State v. DiPaolo, 34 N.J. 279 (1961); Aponte v. State, 30 N.J. 441, 450 (1959); State v. Maik, ___ N.J. ____, (1972).[3]

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3 Even if evidence of the accused's mental condition at the time of the offense does not establish the defense, it still bears on the element of his intent while committing the offense, e.g. as between first and second degree murder. State v. McAllister, 41 N.J. 342, 352-354 (1964); State v. King, 37 N.J. 285, 300 (1962); DiPaolo, supra, 34 N.J. at 294-297.

The propriety of a judicial commitment to a mental institution is tested by whether or not the party is "dangerous to himself or to others" Aponte, supra, 30 N.J. at 450, or a "hazard" unable to "fend for" himself. State v. Caralluzzo, 49 N.J. 152, 156 (1967).

As to the issue of a possible death sentence, while there is no standard by which a jury is to be guided, the defense may present all "background evidence within reasonable limitations", State v. Mount, 30 N.J. 195, 218 (1959), including "the complete psychiatric picture unrestrained by the M'Naghten concept." DiPaolo, supra, 34 N.J. at 291.

A defendant's competency to be tried depends upon another standard.

> The test [of legal competency to stand trial] in terms of mental incapacity generally is whether the defendant's 'mental condition is such that he is unable to comprehend his position, to consult intelligently with counsel and plan his defense.' State v. Lucas, 30 N.J. 37, 72 (1959)." State v. Pacheco, 54 N.J. 579 (1969), aff'g o.b. 106 N.J. Super. 173, 178 (App. Div. 1969). (Brackets added).

See also State v. Sinclair, 49 N.J. 525, 549 (1967); Caralluzzo, supra, 49 N.J. at 155 (1967); Aponte, supra, 30 N.J. at 450; State v. Hale, 116 N.J. Super. 106 (Law Div. August 23, 1971).

In assessing medical testimony on these varying issues of mental capacity, it is well to consider the views expressed in the concurring opinion in State v. Lucas, 30 N.J. 37, 84 (1959), where it was said that:

> ". . . [T]here is an irreconcilable conflict between the present thesis of the criminal law and the thesis I find implicit in the psychiatric view of man. 30 N.J" 30 N.J. at 83; ". . .[T]hey move in opposite directions." Id.at 84. The thrust

The thrust of the psychiatric thesis, it was explained, is "to disregard all concepts of insanity as a defense . . . and to deal with all transgressors as unfortunate mortals," Id. at 84, while criminal law has as its focus the "'concurrence of an evil-meaning mind with an evil-doing hand.'" Id. at 82. The point here being made is that under our present law it must be the legal rather then the psychiatric standard of culpability that controls the disposition of issues because the security of society may not be made to

depend upon "a science which can produce such conflicting estimates of probable human behavior." Id. at 86.

That legal insanity may differ from psychiatric principles relating to mental illness may appear unrealistic and unnecessary at first blush. Upon reflection, however, the distinction has obvious relevance for the criminal law is not to cure but to protect. Thus, a theoretical division must be made between psychological responsibility and legal responsibility; the latter term connoting accountability for conduct rather than the psychological reasons underlying it.

A small minority of jurisdictions have failed to distinguish between mental responsibility in a psychological sense and legal accountability. They have adopted what has been called the Durham test; i.e. whether the criminal conduct was the product of a mental disease. Our courts have thus far rejected this approach at least with respect to the defense of insanity.

The proposed Penal Code does not adopt the Durham rule, but does seek to broaden the definition of legal insanity. Section 2C:4-1 sets forth a new test for determining criminal responsibility. That test is whether or not at the time of conduct the actor lacked substantial and adequate capacity as a result of mental disease or defect either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. The proposal expands the cognition factor from requiring mere "knowledge" to requiring "appreciation" of the criminal act. The mental faculty need not be "totally" impaired but rather "substantially" impaired. In effect, the proposed statute would include the impairment of volitional capacity as a defense to a criminal charge, whereas M'Naghten allows only the absence of the ability to reason as a defense.

The thrust of M'Naghten's rule did not restrain courts from accepting a complete psychiatric picture of the defendant. Rather such information was brought to bear on the degree of punishment rather than on the intitial determination of insanity. Under M'Naghten criminal responsibility of the offender was judged on his conscious rather than unconscious level, thereby preserving the concept

of mens rea. Under M'Naghten, there was a selection of those mentally disabled persons whose punishments would aid and protect society because they were able to make a rational choice between right and wrong, State v. DiPaolo, 34 N.J. 291 (1961); State v. Sikora, 44 N.J. 457 (1965).

The two tests cannot be viewed in a vacuum. The practical import for the State is that if the new test is adopted under Section 2C:4-8, the acquitted defendant must be committed to an appropriate institution. The State's concern is to see that those who commit offenses upon society are not set free to perform the same activity again, regardless of the mental condition under which they labored. Section 2C:4-8 purports to serve this protective function. It provides for the mandatory commitment of one acquitted on the ground of insanity. The commitment is to be continued upon a finding of "dangerousness". The defendant is committed to the custody of the Commissioner of Institutions and Agencies, for cure and treatment. Before release can be obtained, whether conditionally or not, defendant must submit to an independent examination by two physicians. Then the court may accept the

physicians' reports or require a hearing on the matter. The Court has exclusive power to release, discharge or transfer defendant and may recommit him within a five year period.[3]

The provisions described above were apparently made to alleviate the criticism that a withdrawal from the M'Naghten standard would in effect withdraw this entire area from legal consideration to solely psychiatric consideration. See State v. Sikora, 44 N.J. 453, 473-479 (1965); State v. Lucas, 30 N.J. 37, 82-88 (1959).

The stakes involved in choosing between standards by which criminal responsibility is to be determined are clearly and concisely set forth in the Commentary to the Proposed New Jersey Penal Code (at 95).

> What is involved is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction where a punitive correctional disposition is appropriate and will be used and those in which a medical custodial disposition is the only kind that the law should allow.

It is submitted that the M'Naghten rule did in fact distinguish between these types of offenders

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3 A recent decision of the Supreme Court of the United States may well have broad raminfications as to the nature and type of hearing required. See Humphrey v. Cody, ____ U.S. ____ (1972).

The question then becomes which standard more efficiently will succeed in drawing the line. The new test can only add to our difficulties in determining legal insanity.

One point of further inquiry in this area is that of burden of proof. Section 2C:4-3 in effect places the burden of proof on the State to disprove beyond a reasonable doubt defendant's affirmative defense of insanity. Under the present law, the burden of going forward with evidence and the burden of proof both rest upon the defense. See State v. Cordasco, 2 N.J. 189 (1949). Even if the new standard of insanity is accepted there is no logical necessity for shifting the burden of proof to the State. Without some compelling reason otherwise, this provision should be rejected.

The code appears to adopt past case law with respect to the issue of medical testimony relating to the mens rea element of an offense. Such testimony is admissible to disclose an inability to have a "purpose" which is an element of the offense. Section 2C:4-2. Similarly, the test for determining competency to stand trial as set forth in the code does not differ from present law. Finally, evidence relating to background, phsychological

stability and the psychiatric prospects for rehibilitation may be admitted by an accused in a capital case. This conforms to past precedent. See Section 2C:4-2(b).

D. The Doctrine of Preemption

The power to define offenses constitutes one of the most basic obligations of government. To some extent, this power has been delegated to local governmental units. See, for example, N.J.S. 40:48-1 and N.J.S. 40:48-2. Since local governments are creatures of the state, their legislative powers are necessarily restricted. Thus, "a municipality may not exert the delegated police powers in terms which conflict with a State statute, and hence a municpality may not deal with a subject if the Legislature intends its own action . . . to be exclusive and theretofor to bar municipal legislation." State v. Ulesky, 54 N.J. 26, 29 (1969).

Under the proposed code, local governmental units may not enact any ordinance conflicting with any provision or policy of it.[5] This calls for

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5 Section 2C:1-56.7 provides as follows:

> d. Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce 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.

a value determination that something omitted by the code was excluded for a policy reason rather than by sheer inadvertence. Local lawmakers should not be burdened by such a nebulous instruction. Moreover, since the prohibition is so broad it is arguable that all ordinances directed at criminal activity would be unenforceable. It is not at all clear that such preemption is advisable or intended by the State legislature.

E. Doctrine of Collateral Estoppel and Double Jeopardy

Sections 2C:1-7 to 2C:1-10 concern the problems of double jeopardy, collateral estoppel and mandatory joinder. Since the decision of the Supreme Court of the United States in Ashe v. Swenson, 397 U.S. 436 (1970), it is abundantly clear that the doctrine of double jeopardy and collateral estoppel are of constitutional moment and are applicable to the states by reason of the Fourteenth Amendment. Since this is the case, the Commission has attempted to codify existing constitutional principles with little elaboration. The United States Supreme Court has not as of this time provided clear standards to guide prosecutorial authorities in the application

of these principles. For this reason, the Commission has been forced to include language in the Code which was "intentionally" designed "not to be overly specific." Commentary, The New Jersey Penal Code, p. 24.

Obviously, the techincal principles relating to double jeopardy and collateral estoppel are beyond the scope of this report. The law at present in this regard is in a state of flux and precise standards of application are impossible to define. Perhaps, for this reason, our Supreme Court has declined to establish definite guidelines or rules, but instead has looked to "underlying policies rather than technisms" in an attempt to give "primary consideration . . . to factors of fairness and fulfillment of reasonable expectations" in the light of constitutional goals. State v. Currie, 41 N.J. 531, 538-45 (1964).

In attempting to define the proper limits of the doctrines of collateral estoppel and double jeopardy, two important and conflicting societal values must be considered. First, "no one currently questions the great worth of the constitutional safeguard against double jeopardy" since it "justly assures that the State with its great resources will not be

permitted to harass and oppress the individual by multiple prosecution or punishment for the same offense." Id. at 538. Conversely, patent evidence of guilt should not be suppressed merely because the State has made a good faith error in failing to properly define the limits of criminal conduct in drafting an indictment. Any attempt to formulate a comprehensive body of law relating to double jeopardy and collateral estoppel must give some emphasis to both of these values.

Section 2C:1-7(a) provides that a person whose conduct violates more than one provision of the law may be prosecuted for each offense. However, under the following rules, only one conviction may result from such a multiple prosecution: (1) a jury may not convict a defendant of an offense and a lesser included offense (see State v. Riley, 28 N.J. 188 (1958); State v. Jones, 94 N.J. Super. 137 (App. Div. 1967)); (2) an accused may not be convicted of a conspiracy to commit an offense and the substantive offense (Contra. State v. Oats, 32 N.J. Super. 435 (App. Div. 1954)); (3) the code prohibits the conviction of two offenses which require inconsistent findings of fact (See State v. Bell, 55 N.J. 239 (1970); (4) an accused may not be convicted under both a specific and a general

statute (See State v. Hill, 44 N.J. Super. 110 (App. Div. 1957)); (5) the code prohibits the carving up of an uninterrupted single and integrated course of conduct.

Of great importance to law enforcement personnel is the proposed change in our law relating to convictions of a conspiracy to commit an offense and the substantive offense. Under present law, an accused may be charged with and convicted of conspiracy and the substantive offense. See State v. Oats, supra; State v. Chevenoek, 127 N.J.S. 476 (S. Ct. 1942). The fact that a conspiracy involves more than than one person and, for that reason, results in a greater danger to the public mandates that separate convictions be permitted. With certain exceptions, the Code prohibits such multiple prosecutions and, in so doing, obliterates centuries of well recognized and well reasoned decisions.

The Code's prohibition against convictions under both a general and a specific statute should not go unnoticed. Quite obviously, a single act may be covered by two separate statutes designed to prevent separate public harms. Thus, the Appellate Division has had occasion to uphold multiple convictions for breaking and entry and possession of

burglary tools. See State v. Craig, 49 N.J. Super. 276 (App. Div. 1958). Similarly, our Supreme Court recently held the crime of threatening a police officer's life does not merge with assault and battery upon a law enforcement officer. State v. Montague, 55 N.J. 387 (1970). The Code may have the effect of cancelling these well reasoned decisions.

Finally, subsection 5 prohibits multiple prosecutions of "a continuing course of" uninterrupted conduct and would overrule such decisions as State v. Juliano, 52 N.J. 232 (1968), which permitted multiple bookmaking convictions for each day of bookmaking. See Commentary, New Jersey Penal Code, p. 20. Juliano represents the majority view throughout the country and should retain its vitality.

The Code contains a mandatory joinder provision which has no present counterpart in our rules of practice. Section 2C:1-7(b) prohibits the State from bringing separate trials for multiple offenses "based on the same conduct or arising from the same criminal episode" if such offenses are known to the appropriate law enforcement officials "at the time of the commencement of the first trial and are within the jurisdiction and venue of a single court." Adoption of the Code's standards, the same conduct or criminal episode test, would be a significant

change in New Jersey law. As previously noted, our Supreme Court has expressly declined to provide such an all-inclusive standard. Moreover, the test contained in the Code appears to be much more stringent than prior judicial formulations of guidelines which are to be applied. See State v. Mowser, 92 N.J.L. 474 (E & A 1919) (the "same transaction" test); State v. Hoag, 21 N.J. 496 (1956), aff'd 356 U.S. 464 (1968) (the "same evidence" test); State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833) (the "included offense" test). The tests contained in the Code are as ambiguous as previously enunciated standards and add nothing of value to this confused area of the law.

As noted in the Introduction to this report, one of the most serious deficiencies in the Code relates to Section 2C:1-7(d) which overrules State v. McGrath, 17 N.J. 41 (1954) and permits a jury to convict a defendant of a disorderly persons offense as a lesser included charge. This provision impinges upon the prosecutor's ability to engage in plea bargaining. One other objection should be noted. By providing various grades of offenses, the Code may have the effect of facilitating compromise verdicts. This danger, while real, is offset by the benefits of having a large number of criminal offenses embracing the same overt act where punishment , in

part, depends upon the mental state of the perpetrator. Nevertheless, adding disorderly persons offenses to the range of lesser included charges enhances the prospect of compromise verdicts so as to outweigh the benefits attendent to the grading of offenses. Moreover, trial judges would be in a quandry in determining whether to instruct a jury as to the elements of a disorderly person offense. To be safe, a judge might well decide to so charge a jury in a case in which such instructions would be unwarranted. Appeal upon appeal would follow a decision not to charge a jury as to a disorderly persons violation. Subsection I should, thus, be deleted.

The remainder of the provisions contained in the code do not alter or modify existing law with one important exception. Section 2C:1-10 overrules the "two sovereigns" rule adopted by our Supreme Court in State v. Cooper, 54 N.J. 330 (1969). The separate sovereignties principle permits multiple prosecutions by different jurisdictions relating to the same criminal event. First given currency by the Supreme Court of the United States, in United States v. Lanza, 260 U.S. 377 (1922), the theory rejects the concept that double jeopardy

applies as between two sovereigns. The Code overrules Cooper and provides in pertinent part:

> When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in a court of general jurisdiction in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:
>
> a. The first prosecution resulted in an acquittal or in a conviction as defined in Section 2C:1-8 and the subsequent prosecution is based on the same conduct, unless (1) 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 offense is intended to prevent a substantially different harm or evil or (2) the offense for which the defendant is subsequently prosecuted is intended to prevent a substantially more serious harm or evil than the offense of which he was formerly convicted or acquitted or (3) the second offense was not consummated when the former trial began; or
>
> b. The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order of judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

At first blush, the "two sovereigns" rule would appear to be unjust. Nevertheless, two separate jurisdictions may well have equal interest in punishing conduct detrimental to its citizens. Moreover, the Code's rejection of the rule offers some defendants a convenient opportunity to shop for a forum more advantageous to his interests. For example, an accused may well decide to plead guilty to an offense in the State of New York in order to preclude the possiblity that he would subject to a stiffer sentence based upon a criminal charge in New Jersey. For this reason, it is urged that the "two sovereigns" rule be retained.

F. Substantive Offenses

The Code was intended to be a comprehensive document defining each and every aspect of our system of criminal justice. Quite obviously, it would be impossible and beyond the scope of this report to review each substantive offense contained in the Code. An attempt has been made, however, to highlight some of the more important provisions, primarily those which, to a greater or lesser degree, would serve to modify existing law.

At the outset, it would be well to comment upon the excellent manner in which the Commission has organized those provisions in the Code relating to the elements of substantive offenses. All statutory offenses are contained in a single subtitle divided into five parts. Criminal offenses are placed in the following divisions: (1) offenses involving danger to the person; (2) offenses against property; (3) offenses against the family; (4) offenses against public administration; (5) offenses against public order, health and decency. Each part is then subdivided into chapters and then substantive offenses. Even a layman would be able to find specific provisions with relative ease.

1 Offenses Involving Danger To The Person

(a) Homicide - Before discussing the proposed changes contained in the Code relating to unlawful homicide, reference should be made to our present statutory scheme. At present, murder is defined as an unlawful homicide accompanied by malice. See State v. Brown, 22 N.J. 405 (1950). An unlawful homicide not accompanied by malice is defined as manslaughter. Murder is divided into two degrees depending in part upon the state of mind of the

perpetrator. Murder in the first degree presently involves 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 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.

Second degree murder is a homicide accompanied by malice not proven to be first degree murder and is "thus a residuary category". Commentary, The New Jersey Penal Code, p. 153.

Under the proposed code, murder is a crime of the first degree and, under some circumstances, warrants the imposition of a capital penalty. Section 2C:11-3. One important modification of our law concerns the deletion of the term "malice" in defining murder. Prevailing New Jersey case law defines "malice aforethought" as including an intention to cause the death of, or grevious bodily harm to, any person,

or knowledge that the act which causes death will probably cause the death of, or grevious bodily harm to some person. See State v. Gardner, 51 N.J. 444, 459 (1968); State v. Mulero, 51 N.J. 224, 229 (1965). In addition, N.J.S. 2A:113-1 specifically provides for the inclusion of the felony-murder doctrine and the killing of a peace officer. See also Bullock v. State, 65 N.J.S. 557, 573 (E & A 1900); State v. Butchey, 77 N.J.S. 640, 642 (E & A 1909). The code "places criminal homicides committed purposely or knowingly in the murder category." Commentary, The New Jersey Penal Code, p. 155. Also included in the murder category are "homicides committed recklessly under circumstances manifesting extreme indifference to the value of human life," and those which occur during the commission of certain enumerated felonies. Section 2C:11-3(a)(3) and (4).

The Code, by deleting the terms "willful, deliberate and premeditated," drastically alters existing law with respect to the crime of first degree murder. In their place, the Commission has substituted the terms "purposely, knowingly and recklessly. However, "only purposeful killings . . . subject the defendant to capital punishment."

Commentary, The New Jersey Penal Code, p. 155. The Commentary implies that the term "purposeful" encompasses the "willful, premeditated and deliberate" standard. Ibid.

The failure of the Commission to codify existing case law relating to the elements of "willful, premeditated and deliberate" is inexplicable and must be condemned. These terms have been the subject of careful judicial definition and their rejection by the Commission can only detract from the stability and predictability of our law. See, for example, State v. Washington, ___ N.J. ___ (1972). Moreover, the standards substituted in their stead are ambiguous and add nothing of value to the law of homicide.

The Commission has also greatly modified the felony-murder rule, but has provided for a capital penalty. Section 2C:11-3 provides that the commission of a homicide "in the course of and in furtherance of" certain enumerated common law felonies constitutes murder and subjects the offender to the risk of the death penalty. Nevertheless, the offense is modified by the following affirmative defenses:

> (a) did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
> (b) was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical

> injury and of a sort nor ordinarily carried in public places by law-abiding persons; and (c) had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

The policy underlying the restriction of the traditional felony-murder doctrine apparently is that the felon did not "foresee" a killing and should not, therefore, be criminally liable for its consequences. These affirmative defenses should be rejected. The felony-murder doctrine is deeply imbedded in our law and constituted a part of the common law of England long before the birth of this country. In its long history, no one has seriously considered "foreseeability" of the homicidal risk as being relevant. The traditional rule was formulated in recognition of the danger inherent in the commission of criminal acts. It was intended to act as a deterrant. Suffice it to say that what the actor foresees, compared to the deterrant effect of a strict felony-murder statute, is of very slight import.

The foreseeability of death or the "assumption of a homicidal risk" are not elements of felony-murder under existing law. See Commentary, The New Jersey

Penal Code, p. 157. As noted in the Commentary to the Code, New Jersey cases have tended to "broaden rather than restrict the rule." Ibid. Thus, a killing which occurs as part of the res gestae of a felony comes within the purview of N.J.S. 2A:113-2. State v. Artis, 57 N.J. 24 (1969); State v. Hauptman 115 N.J.S. 412 E & A 1935). Similarly, aiding and abetting falls within the felony-murder rule. See State v. Smith, 32 N.J. 501 (1960). So, too, the killing by a police officer of a person who was a bystandard subjects the felon to a first degree murder charge. State v. Kress, 105 N.J. Super. 514 (Law Div. 1969). The reason for the stringency of our law is obvious; to deter persons from committing dangerous felonies. The changes contained in the Code detract from this policy and should not be enacted into law.

As previously noted, prevailing law provides that a homicide committed while resisting arrest or effecting or assisting an escape constitutes murder in the first degree. The Code retains this rule but in a different way. Criminal escape is specifically enumerated as one of the crimes which could trigger felony-murder. Also, murder is defined (Section 2C:11-3a(4)) as homicide when committed while in "flight" after committing or

or attempting to commit a crime. The new code makes no specific mention of killing a judge, magistrate or officer of justice (compare N.J.S. 2A:113-1). It also makes no mention of "resisting arrest" in connection with murder, although other sections already discussed would presumably cover such a situation.

The Code limits capital punishment to "purposeful killings and to felony murders." Commentary, The New Jersey Penal Code, p. 170. Even as to these categories, a trial judge may direct a sentence of life imprisonment.[3] If a court refuses to impose

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3 b. Determination by Court or By Court and Jury. Unless the Court imposes sentence under Subsection a of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a crime of the first degree, to life imprisonment, or to death. The proceeding shall be conducted before the Court sitting with the jury which determined the defendant's guilt unless the Court has discharged that jury in which case a new jury shall be empanelled for that purpose. Even though the defendant may have entered a plea of guilty or may have waived trial by jury with respect to guilt, the separate proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections c and d of this Section.

3 (Cont) Any such evidence, not legally privileged, which the Court deems to have probative force may be received, regardless of its admissiblity under the exclusionary rules of evidence, provided that counsel be accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the jury and the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury recommends against the sentence of death or if the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose a sentence of life imprisonment or sentence for a crime of the first degree.

The jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections c and d and any other relevant facts but it shall not recommend sentence of death unless it finds, beyond a reasonable doubt, one of the aggravating circumstances enumerated in Subsection c and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also may inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

life imprisonment based upon the standards contained in the Code, a bifurcated trial on the issue of the death penalty is mandated. Contra: State v. Laws, 51 N.J. 494 (1968); State v. Reynolds, 41 N.J. 163 (1964). In such a case, evidence admissible solely on the issue of punishment is offered. See State v. Mount, 30 N.J. 195, 210 (1959). Although the Supreme Court of the United States has upheld a unitary trial (McGrath v. California, ___ U.S. ___ (1971)), the Commission has abandoned such a procedure based upon its "distrust" of the efficacy of a limiting instruction to the jury that background evidence should only be considered in determining the penalty. Commentary, The New Jersey Penal Code, p. 171.

The advantages and disadvantages of bifurcated trials have long been the subject of dispute. In general, a unitary trial is preferred. Wholly apart from the added time and expense inherent in the bifurcated trial procedure, serious evidentiary problems are presented. In essence, it is possible that a defendant would be seriously prejudiced by the broad expanse of the inquiry which would necessarily follow.

Another extremely important change in our law relating to the capital penalty concerns the

provision of definite standards to be employed in resolving the issue of whether the death sentence should be imposed. Our homicide statute and the cases decided under it have never provided standards upon which the jury is to resolve the death penalty issue. See State v. Laws, supra. The Supreme Court of the United States has only recently upheld capital punishment despite the lack of such standards to assist the jury in making such a determination. McGautha v. California, supra. While not constitutionally required, the advantages of providing guidelines are quite obvious. Life or death is the ultimate decision and no juror should be compelled to resolve the issue without definite standards to guide him. The Code provides such standards. Section 2C11-7(c)(1) to (8) and (d)(1) to (8) provide the following guidelines:

> c. Aggravating Circumstances.
>
> (1) The murder was commited by a convict under sentence of imprisonment.
> (2) The defendant was previously convicted of murder, manslaughter, robbery, aggravated rape, aggravated sodomy, kidnapping or other crime involving the use of violence to the person.
> (3) At the time the murder was committed the defendant also committed another murder.
> (4) The defendant knowingly created a great risk of death to many persons.

(5) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, aggravated rape, aggravated sodomy, aggravated arson, burglary or kidnapping.
(6) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
(7) The murder was committed for pecuniary gain.
(8) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

d. Mitigating Circumstances. Mitigating circumstances include, but are not limited to:

(1) The defendant has no significant history of prior criminal activity.
(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(3) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The murder was commmitted under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
(5) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
(6) The defendant acted under duress or under the domination of another person.
(7) At the time of the murder, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
(8) The youth of the defendant at the time of the crime.

The next grade of homicide is manslaughter. The manslaughter provision is an improvement in that it provides a statutory definition unlike the present law. But, substantively, it is quite different and perhaps objectionable.

Under the present law, as defined in our cases, manslaughter is a killing which occurs during the heat of passion resulting from reasonable provocation. The passion must be of such degree as to deprive the actor of his self control. Under Section 2C:11-4, manslaughter is homicide committed recklessly or under the influence of "extreme mental or emotional disturbance for which there is reasonable explanation or excuse." This section constitutes a radical and undesirable alteration of past precedent. The new provision is much broader in scope because whereas provocation was limited to an injustice committed on the actor by the victim, the mental or emotional disturbance reasonably or excusably caused, need not be the product of the victim's actions. Also significant, is that the reasonableness is to be determined from the actor's view.

The next grade of homicide is negligent homicide (Section 2C:11-5), which is a killing

under circumstances manifesting extreme indifference to the value of human life. This could include the present death by auto statute (Section 2A:113-9) but is much broader since it is not restricted to a specific conduit of crime. By definition, the code authors feel that accidental killing (misadventure) would be excluded from negligent homicide.

The last grading in this area is Section 2C:11-6, causing or aiding suicide. There appears to be no comparable provision in our present statutes which create a disorderly persons offense against one who attempts suicide. Previously, one who causes another to commit suicide could be prosecuted under first degree murder, as the commentary shows. This is sufficient to warrant some pause. A value judgment must be made as to whether or not one who purposely causes another to die but who succeeds in getting the victim to serve as his own insturment of death, deserves more lenient treatment than others who purposely cause death.

(b) Assaults, Reckless Endangering, Threats - The Code supplants the following existing statutory provisions:

> (a) Assaulting certain high government officials with intent to kill and with intent to show hostility to government or inciting or conspriring for such assault. High misdemeanor punishable by death or by life imprisonment. (N.J.S. 2A:148-6).

(b) Assault with intent to kill or to commit certain enumerated violent felonies. High misdemeanor punishable by imprisonment for 12 years. (N.J.S. 2A:90-2).
(c) Atrocious assault and battery by maiming and wounding. High misdemeanor. (N.J.S. 2A:90-1).
(d) Willful and malicious assault with an offensive weapon or by force with intent to rob. High misdemeanor. (N.J.S. 2A:90-3).
(e) Assault and battery upon law enforcement officers acting the performance of his duties; upon firemen while so acting; or upon rescue workers while so acting. High misdemeanor. (N.J.S. 2A:90-4).
(f) Mayhem: willfully and on purpose and from premeditated design or with intent to kill or maim cuts off or disables any limb or member of another. High misdemeanor. (N.J.S. 2A:125-1).
(g) Knowingly obstructing, assaulting or wounding a person serving court process or orders while so acting. Misdemeanor. (N.J.S. 2A:99-1).
(h) Challenging to a duel, accepting a challenge, knowingly bearing a challenge: engaging in a duel; acting as a second in a duel. Misdemeanor. (N.J.S. 2A:101-1).
(i) Interfering with, assaulting, or wounding newsmen while so acting. Misdemeanor. (N.J.S. 2A:129-1).
(j) Committing an assault or an assault and battery. Disorderly person (N.J.S. 2A:170-26).
(k) Fighting, attempting to fight, aiding and abetting a fight. Disorderly person. (N.J.S. 2A:170-27).

Many of these offenses are retained, but in another form, however.

The Code alters existing law as to simple assaults, which are defined as disorderly persons offenses unless committed in a fight or scuffle "entered into by mutual consent," which is included as a petty disorderly offense. Section 2C:12-1. Prevailing case law provides that actual injury is unnecessary; the slightest touching or offensive contact is a battery. See State v. Maier, 13 N.J. 235 (1953). The Code rejects this rule and requires an attempt to cause "bodily injury." Section 2C:12-1.

The Code eliminates present statutes making it a crime to commit an assault with the intention of committing another serious offense; i.e. murder, rape, etc. Instead, the Code treats such offenses as attempts, and for the most part grades them as crimes of the second degree.

In Section 2C:12-2, a new offense, "reckless endangering," has been created. This section establishes a general prohibition of recklessly engaging in conduct"which places or may place another person in danger of death or serious bodily injury." Commentary, New Jersey Penal Code, p. 179. Existing statutes which are more specific, such as reckless driving (N.J.S. 34:4-96), manufacture

or sale of golf balls containing acid (N.J.S. 2A:123-1), malicious tampering with railroads (N.J.S. 2A:137-1), and diseased persons having sexual intercourse (N.J.S 2A:170-6) would be abrogated. Under the Code, all such offenses would be disorderly persons violations, unless the element of extreme indifference to human life is proved, in which case the offense would be a crime of the fourth degree.

(c) Kidnapping - Under existing law, any forcible removal is sufficient to justify conviction regardless of distance or purpose. See, for example, State v. Kress, 105 N.J. Super. 514, 522 (Law. Div. 1969); State v. Dunlop, 61 N.J. Super. 582 (App. Div. 1960). Our present kidnapping staute provides for the possible imposition of the death penalty. N.J.S. 2A:118-1. Additionally, New Jersey has enacted abduction laws covering various forms of kidnapping with a less severe penalty.

Quite obviously, kidnapping is a most heinous crime. Nevertheless, the possible imposition of the death penalty regardless of the purpose of the abduction seems somewhat severe. The Code specifies that the abduction must be either to obtain a ransom or for the purpose of achieving certain enumerated unlawful goals. See Section 2C:13-1.

The offense is graded as a crime of the first degree "unless the actor voluntarily releases the victim unharmed and in a safe place prior to apprehension." Section 2C:13-1. Additionally, a person who restrains another exposing him to "the risk of serious bodily injury" or for the purpose of "involuntary servitude" is guilty of a crime of the third degree. Other less serious offenses such as false imprisonment (Section 2C:13-3), interference with the custody of a child (Section 2C:13-4) and criminal coercion (Section 2C:13-5) are also provided in the Code.

The rational grading of offenses in the Code must be lauded. Kidnapping was only a misdemeanor under the common law although it has become one of the most severely punished offenses. As noted by the Commission, "overbreadth is now the problem." Commentary, The New Jersey Penal Code, p. 181. Clearly, kidnapping in some forms constitutes one of the most heinous crimes known to man. But, as a general rule, the seriousness of the offense depends in part upon the mental intention of the perpetrator. Pecuniary gain and other unlawful purposes mandate that a severe penalty follow conviction. Coversely, a "lover's dispute" should not rise to the dignity of an indictable offense.

The statutory scheme provided in the Code notes these important distinctions. Nevertheless, reservations are entertained as to the lack of severity of penalty as to crimes of the greatest magnitude. Situations can be envisioned in which the death penalty should be retained. Recent "skyjackings" and political abductions evidence the serious risk attendent to various forms of abduction. It is therefore recommended that the death penalty be retained where the kidnapping is committed with an evil purpose, such as pecuniary benefit, rape or other serious bodily injury.

(d) Sexual Offenses - The Code finally obliterates many archaic laws regulating the sexual conduct of consenting adults. While government has an obvious duty to protect the health, safety welfare and morals of its citizens, there must be a zone of privacy beyond which its authority may not and should not extend. The Code was obviously formulated in recognition of this fact.

Despite these laudatory improvements, the Code contains many highly objectionable features. Section 2C:14-1 provides a comprehensive scheme relating to the crime of forcible rape. In essence aggravated rape consists of sexual penetration by

threat of serious bodily harm," and intercourse with an unconcious female or a female under the age of twelve. Additionally, intentional impairment of the will to resist by administering drugs or intoxicants is also defined as aggravated rape. Aggravated rape is a crime of the first degree if:

> (a) in the course thereof the actor inflicts serious bodily injury upon anyone, or (b) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties. Otherwise the offense is a crime of the second degree. Sexual intercourse includes intercourse per os or per anum with some penetration, however slight; emission is not required.

Rape is defined as a crime of the third degree and consists of penetration by "any threat that would prevent resistance by a woman of ordinary resolution," intercourse with a person suffering from a mental disease which "renders her incapable of appraising the nature of her conduct," and intercourse by virtue of a false pretense as to marital status. Suffice it to say that the first two categories of rape are sufficiently aggravated as to justify punishment as an offense of the first degree. "Threats of imminent death, serious bodily injury, and extreme pain" do not

exhaust the risks which a normal woman would refuse to undergo rather than submitting to sexual intercourse. It would certainly appear that a threat which "would prevent resistance by a woman of ordinary resolution" is of such a severe nature as to require and justify an enhanced penalty. In essence, the distinction drawn in the statute is unreasonable and is of little or no value. For the same reason, it is recommended that sexual intercourse with a mentally diseased female be considered a crime of the first degree. Again, the division made in the Code is meaningless.

Several of the Code's provisions relate to the age of the victim in determining penalty. For example, as previously noted, intercourse with a female less than twelve years of age constitutes aggravated rape. Similarly, a person having sexual contact with a person less than age twelve is guilty of a sexual assault under Section 2C:14-4. Provisions contained in Section 2C:14-3, relating to corruption of minors and seduction, depend upon various age classifications.

The question necessarily arises as to the effect of a mistake with regard to the victim's age. Section 2C:14-6(a) provides in pertinent part as follows:

> a. Mistake as to Age. Whenever in this Chapter the criminality of conduct depends on a child's being below the age of 12, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 12. When criminality depends on the child's being below a critical age other than 12, it is a defense for the actor to prove by a preponderance of evidence that he reasonably believed the child to be above the critical age.

This provision is in derogation of present law. In State v. Moore, 105 N.J. Super. 467 (App.Div. 1953) our Appellate Division specifically rejected this defense stating that "it is no defense that defendant did not know that the female was under the statutory age of consent." The Court went on to state "it is immaterial that the defendant in good faith believed that the female was above the prohibited age, that he exercised reasonable care to ascertain her age; that his belief, though erroneous was reasonable; or that the defendant had been misled by the appearance or statements of the female." Ibid.

Except for California (People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361 (S. Ct. 1964), the position taken by our courts is universally followed. The rationale of the majority view is that a person should act "at his peril that the female may in fact be under the age of consent." State v. Moore, supra.

Persons under certain age limits presumptively have not achieved a reasonable level of maturity and thus are legally incapable of consenting. Before indulging in adult sexual behavior, which may well have broad psychological effects, it is only reasonable to force the male to live up to his responsibilities. It is therefore recommended that the mistake in age defense be deleted.

The Commission, for some unexplained reason has adopted the doctrine of corroboration in sexual offense cases. At present, New Jersey does not require corroboration in rape and carnal abuse cases. State v. Garcia, 83 N.J. Super. 345 (App. Div. 1964); State v. Andolord, 108 N.J.L. 47 (S. Ct. 1931). Nor is corroboration required in prosecutions of indecent exposure and sodomy. State v. Fleckenstein, 60 N.J. Super. 399 (App. Div. 1960). For seduction, however, corroboration is required by statute. N.J.S. 2A:142-3.

It is inconceivable that the much maligned rule of corroboration is to be expanded by the Code, particularly in light of its sad history in other jurisdictions. Popular periodicals (New York Magazine, for example) have contained numerous articles noting the disparity of treatment given to women under the doctrine of corroboration.

Equally significant is the difficulty of obtaining convictions under the rule. Must a female be physically assaulted as well as sexually abused in order to convict a defendant? According to several judges in the State of New York, corroborative proof generally is of a physical nature; i.e. bruises, contusions, fractures. In the absence of such proof, they have charged, many patently guilty persons have gone free.

The rule of corroboration adds nothing of value to our present law. The danger of frivolous complaints by disappointed females is a factual not a legal problem and is best resolved by a jury. The corroborative evidence rule unreasonably discriminates against women and should be abolished, not extended.

2. Offenses Against Property

(a) Burglary and Other Criminal Intrusion - Section 2C:18-2 and 2C:18-3 relate to the crimes of burglary and criminal trespass. 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, The New Jersey Penal Code, p. 209. See also N.J.S. 2A:94-1 (breaking and entering or entering); N.J.S. 2A:94-2 (use of high explosives); N.J.S. 2A:170-3 (presence in or near buildings with intent to steal).

Citing the many "serious problems" which have resulted from the expansion of the crime, the Commission has attempted to limit its scope. Very briefly, the Code departs from present law in the following respects:

1. Under Section 2C:18-1, there will be a more restrictive designation of the premises protected by the Code's burglary law than under present law. The definition of "occupied structure" in Section 2C:18-1 is narrower than under the present statute, N.J.S. 2A:94-1, which makes as the subject of breaking or entering "any building, structure, room, ship, vessel, car vehicle, or airplane".

2, While the definition of the burglarious entry in the Code is substantially similar to our present statutes, the Code adds "surreptitious remaining" as an unprivileged entry, since the

danger inherent in the two are indistinguishable.

3. Unlike the present statute, N.J.S. 2A:94-1, the Code makes criminal and burglarious, a purpose to commit "any offense", thereby broadening the crime.

4. The Code's grading of burglary offenses, Section 2C:18-2(b), to second and third degree crimes is unlike our present statute. While the penalties are moderate, except in circumstances of special danger, there is no grading related to the gravity of the ultimate offense intended.

5. The provision in Section 2C:18-2(c) restricting duplicate convictions for burglary and for the intended offense departs from present law, State v. Byra, 128 N.J.L. 429 (Sup. Ct. 1942), and is most unfortunate. According to the Commission, the provision "is designed to prevent the abusive practice of imposing consecutive sentences for burglary and for the actual theft." Commentary, The New Jersey Penal Code, p. 211. Crimes committed within the structure may well represent independent public harms and, thus, multiple prosectuions and enhanced penalties should not be excluded.

6. The inclusion of the word "therein" in subsection (a) is an unnecessary and unwise limitation. "Some definitions of burglary, after listing

the elements mentioned above, add with intent and so forth "therein." This wording emphasizes the necessary causal 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 drafters of the Code should expressly so state in the proposed statute and 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 proposed code is an unlawful intrusion, or "entry without privilege," in occupied structures by dangerous characters. The Code expressly rejects the position of including any entry with criminal purpose.

As to the proposed section dealing with criminal trespass, Section 2C:18-3, making it a crime of the fourth degree to enter or surreptitiously remain in a dwelling, and otherwise a disorderly persons offense to so enter or remain in any building or occupied structure, this provision will consolidate a number of disorderly persons offenses dealing with trespassing, N.J.S. 2A:170-31, 31.1, 33, 34, 58, 59 into a comprehensive statutory enactment. The affirmative defenses in

subsection (c) in respect to premises open to the public parallel those contained in the burglary section.

The beneficial factors devolving from the new code provision on burglary are that the offense has been narrowed to something like the distinctive situation for which it was originally devised under the common law, i.e. invasion of premises under circumstances specially likely to terrorize occupants. Secondly, the grading provisions lend themselves to plea bargaining. And lastly, the Code makes criminal the burglarious purpose to commit "any offense" thereby broadening the crime.

(b) Robbery

Robbery as presently defined under N.J.S. 2A:141-1 is the forcible taking of money, goods, or chattels from the person of another by violence or by putting him in fear. Armed robbery (N.J.S. 2A:151-5) does not create a separate substantive offense but merely serves to aggravate the punishment in a conviction for robbery. Under present case law, the fear that needs to be generated is a "reasonable apprehension of bodily injury," State v. McDonald, 89 N.J.L. 421 (1916), or "apprehension

of danger in the victim (to) induce a man to part with his property," State v. Woodworth, 121 N.J.L. 78 (1938). The statute does not necessarily call for bodily fear although this is inferred. No where is there a requisite of serious bodily injury.

Yet, the Code (Section 2C:19-1) does require "serious bodily injury" or the threat in order for robbery to exist (except where a first or second degree crime is being committed). The meaning of the additional term is unclear, and the Commentary does not address itself to the problem. Assuming it to be an added element which makes the State's burden of proof heavier, it is objectionable.

(c) Thefts

Present law in this regard can be found under N.J.S. 2A:91-4 Banks and Financial Corporations; N.J.S. 2A:102-1 to 17 Embezzlement, etc.; N.J.S. 2A:105-1 to 5 Extortion; N.J.S. 2A:111-1 to 40 Frauds and Cheats; N.J.S. 2A:119-1 to 9 Larceny and Other Stealings; N.J.S. 2A:136-1 Public Records; N.J.S. 2A:170-20.8 to 9 Disorderly Persons; N.J.S. 2A:170-38 to 40 Trespassing; N.J.S. 2A:170-43 to 49 Frauds and Misrepresentation; N.J.S. 2A:170-55 to 64.2 Disorderly Acts re Public Utilities.

The revisions of law are quite extensive. Therefore, to present a coherent picture, the new law will be discussed systematically by provision and basic changes found therein from present law will be highlighted.

The grading of theft offenses ranges from a second degree crime to a disorderly persons (N.J.S. 2C:20-2):

2nd - Theft by extortion.

3rd - Theft of

a. amount exceeds $500.

b. property stolen is a firearm, automobile or airplane

c. property is controlled dangerous substance

d. person in business of buying or selling stolen property receives stolen property

e. from person of victim

f. breach of fiduciary obligation

g. by threat

h. of public record

4th - All other thefts $50 or over

Dis. Per. - less than $50

It should be noted at the outset that thefts of goods valued at less than $50 are defined as disorderly

persons offenses. It is submitted that this limit is entirely too small. Our County Court calendars are so heavily congested as to preclude relatively minor violations of the law from being considered as indictable offenses. Unfortunately, the crime rate has increased to such an extent that cases are now processed, not prosecuted, for there is little time for reflection. If our system is to provide speedy justice, relatively minor infractions must be prosecuted at the municipal court level. It is thus recommended that the $50 limit be raised to $200 to expand the jurisdiction of municipal courts in this area.

Theft by unlawful taking or disposition (Section 2C:20-3) is divided into movable and immovable property provisions. In the movable property category the crime is 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." Whereas in immovable property, such as realty, the crime is its transfer or transfer of any interest therein of another to benefit the actor or another not entitled to such interest.

This section is very comprehensive in scope and covers many areas due to the broad definitions of property found in Section 2C:20-1. As shown 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 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. (Emphasis added).

Section 2C:20-4, theft by deception, replaces several provisions now found in N.J.S. 2A:111. The standard imposed 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 claims this continues a high standard of proof as to the requisite mens rea. Again, the real import of this change of standard cannot be predicted. If no change is intended, the rewording may be unnecessary and unwise. The Commentary defines the new standard this way: "The actor must

intend to create the impression for the purpose of inducing the owner to part with its property."

There are four types of deception covered in Section 2C:20-4. The first is "creating or reinforcing a false impression". This replaces more specific language found in N.J.S. 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."

The second type of deception is preventing another from acquiring information which would affect his judgment, and the third type is failing to correct a false impression when the deceiver created that impression or is in a fiduciary relationship to the victim. The fourth type is failing to disclose a known lien or claim to one's grantee. These three situations all involve a form of nondisclosure. Passive nondisclosure generally is not a crime. It is only when that nondisclosure is coupled with one of the elements specified above that the Code provides criminal sanctions. The Commentary disclaims an attempt to sanction the taking advantage of a known mistake of an adversary. Yet, the language of Section 2C:20-4(b) could do just that depending on one's interpretation of "prevents". It is an open question but is

apparently beneficial from a prosecution standpoint.

The statute is restricted by two provisions:

> 1. The fact that a promise to perform was not fulfilled is not alone sufficient to show an original intention not to perform.
>
> 2. The term deceive does not include falsity having no pecuniary significance or "puffing" or exaggeration unlikely to deceive ordinary persons in group addressed.

The first restriction appears to be a codification of present case law, State v. Trypuc, 53 N.J. Super. 6, (App. Div. 1958); State v. Lamoreaux, 13 N.J. Super. 99 (App. Div. 1951). The second restriction was deemed necessary by Code authors because "materiality" is not a requisite of deception. Note: Materiality and reliance are not required under existing law.

The next provision relating to theft is contained in Section 2C:20-5, theft by extortion. The present law is found in N.J.S.2A:105-1 to 5, extortion, 2A:119A-1 to 4 loansharking and in case law, State v. Begyn, 34 N.J. 35 (1961). The proposed statute is self-explanatory. It differs from exisisting law in minor ways. For example, under Section 2C:20-5(d) 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. If anything, this provision seems very acceptable.

Theft by extortion generally involves some form of coercion rather than deception. The coercison 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 or indemnification for harm done in the circumstances or as lawful compensation for property or services."

Section 2C:20-6 creates 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 said property to the proper owner. An element of control over the property is required to make this provision operative. There appears to be no corresponding statute presently.

The receiving stolen property statute Section 2C:20-7 very thoroughly covers the subjects now included in N.J.S. 2A:139-1 to 4. 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." What is of great importance are the presumptions created by part b. This is much more beneficial to the prosecution than present law in one respect. The present presumption exists only if there is knowledge that the property was stolen. The Code adds a section that a presumption is raised if there is a belief that the property was "probably" stolen.

In another respect the code is more limited than our present law. Under b (1)(2) and (3), a person must be found in possession or control of property stolen from two or more persons on separate occasions, or he has received stolen property in another transaction within the preceding year, or the property received is for a consideration which is far below its reasonable value. The first two situations were never previously required. The last situation shifts the burden to the State. Previously defendant had to prove that the consideration for the goods was reasonable to destroy the presumption. Now the State would have to prove

a "far" disparity between the consideration for and the value of the goods in order to obtain benefit of the presumption. One other presumption exists as to "dealers", and there the standard is whether or not the dealer makes "reasonable inquiry" that the person offering the goods has rightful possession.

Section 2C:20-8, theft of services, is a new feature of the code. Previously such activity would have been prosecuted under N.J.S. 2A:111-1, obtaining any gain, benefit, advantage, or other thing of value with intent to cheat or defraud. The code however is more specific and certainly of value.

Section 2C:20-9 on misappropriating funds and Section 2C:20-10,unauthorized use or occupancy of motor vehicles,are fairly explicit. The latter does not greatly depart from existing law, (see 2A:170-38) and the former seems unobjectionable.

(d) Forgery and Fraudulent Practices

This deals with a variety of offenses now covered by existing statutes, N.J.S. 2A:109-1 to 12; N.J.S. 2A:111-25 to 27; and N.J.S. 2A:147-1. Section 2C:21-1 defines and grades the crime of forgery and related offenses and its definition

includes "any writing", broadening the coverage of the crime. The grading provisions of the Code are self-explanatory, turning upon the character of the forged documents. The Code continues to follow the broad definition of "falsity". See State v. Berko, 75 N.J. Super. 283 (App. Div. 1962). Subsection (c) makes it a crime of the third degree to possess forgery equipment or devices. Because of the broad definition of "writing" under the Code there is not separate provision as to counterfeiting.

Section 2C:21-2, criminal simulation, makes it a crime of the fourth degree to make or alter any object to give an appearance of value which it does not possess. This section is broader than existing law, N.J.S. 2A:111-23 and 24, and it is intended to cover "art" frauds.

Section 2C:21-3, frauds relating to public records and recordable insturments, parallels the existing law on stealing or fraudulent destruction of public documents, N.J.S.2A:119-4 and 5. Subsection (5) makes it a disorderly persons offense to knowingly offer for filing a false document. It relates to instruments containing false statements and differs from forgery in that only knowledge of falsity need be shown and not a purpose to defraud.

Section 2C:21-4, falsifying or tampering with records, consolidates a number of statutes dealing with certain aspects of these crimes, N.J.S. 2A:91-3 to 8, N.J.S. 2A:111-9 to 12, 39, N.J.S. 2A:119-4, N.J.S. 2A:122-3, 47:3-29. The Code departs from existing law in distinguishing between business and financial records and other (i.e. private, non-business) records. The Code also borrows the New York statutory provisions dealing with issuing false financial statements and incorporates it into Subsection (b).

Section 2C:21-5, bad checks, eliminates our current bad check statutes, N.J.S. 2A:111-15 to 17 (over $200), and makes it a disorderly persons offense to issue or pass a bad check regardless of amount. The Code's presumptions of knowledge are quite a bit more limited than under existing law. However, an important feature of Section 2C:21-5 is that it makes the presumption applicable in theft prosecutions as well as in prosecutions under the bad check statute itself.

It is recommended that the Code should retain and incorporate the provisions of present law into its bad check statute. Our present law makes the offense a misdemeanor if the check exceeds $200, punishable by one year. Otherwise it is a disorderly persons offense punishable by six months imprisonment.

The amount of the check should continue to be determinative as to whether it is a crime of the fourth degree or a disorderly persons offense under the Code. Cf. State v. Covington, ___ N.J. ____ (1972).

Section 2C:21-6, credit cards, would replace and parallel existing law upon the subject contained in N.J.S. 2A:111-40 to 51. The proposed grading of the offense to a crime of the third degree if the amount exceeds $500, otherwise a crime of the fourth degree, is consistent with the Code's other provisions in the theft sections.

Section 2C:21-7, deceptive business practices, consolidates a variety of presently unrelated provisions on the subject. See N.J.S 2A:108-1 to 8; N.J.S. 2A:111-22 to 24; N.J.S. 2A:150-1; N.J.S. 2A:170-42, 72. It is advantangeous to bring together the various categories of deceptive business practices in a single section for consistent treatment of common issues such as mens rea and punishment.

Section 2C:21-8, misrepresentation of mileage of motor vehicles, continues the existing law on the subject contained in N.J.S. 2A:170-50.1 to 50.3 because of the peculiar nature of the fraudulent practice.

Section 2C:21-9 misconduct by a corporate official, is taken from a provision of the New York Code. See also N.J.S. 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.

Section 2C:21-10, commercial bribery and breach of duty to act disinterestedly, consolidates a series of unrelated statutes of our present law. See N.J.S. 2A:91-1, 2; N.J.S. 2A:93-7 to 9; N.J.S. 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. Subsection (b) deals with breach of duty to act disinterestedly and the phrase "being engaged in the business of" confines the offense to professional critics, commercial rating agencies and the like, excluding individual

endorsements of products by athletes, actors and the like. Subsection (c) makes the giver of the bribe guilty as well as the receiver of it.

Section 2C:21-11, rigging publicly exhibited contest, expands existing law on the subject, N.J.S. 2A:93-10 to 14, not only by including non-sporting events, but by including any form of corrupt interference as by administering drugs to an athlete. Subsection (c) follows the rule of N.J.S. 2A:93-12 in requiring reporting of attempts to bribe or rig. Subsection (d) extends liability to participants in the staged contest. Application of the Section will sometimes call for distinguishing between a "contest" and a "spectacle" such as professional wrestling. The Code should list those "spectacles" to which the section does not apply.

Section 2C:21-12, defrauding secured creditors, parallels existing law on the subject. See N.J.S. 2A:111-20, 21.1; and N.J.S. 2A:122-2. This Section is necessary because the Code's provision dealing with theft are framed in terms of larceny or embezzlement of goods "of another". Section 2C:20-1(g) defines property "of another" so as to exclude from theft conduct of an owner in possession of property subject to a security interest. This Section requires a purpose to defraud and it does not provide any presumption of intent to defraud.

Section 2C:21-13, fraud in insolvency, parallels existing law on the subject, N.J.S.2A:111-18. It makes it a crime of the fourth degree to defraud unsecured creditors, by transferring debtor's property with a purpose to defeat or obstruct the creditor's claim.

Section 2C:21-14, receiving deposits in a failing financial institution, expands existing law on the subject, N.J.S. 2A:91-8; to include banks. Liability is limited to managerial personnel. Knowledge of the institution's precarious situation is required to be proved.

Section 2C:21-15, misapplication of entrusted property and property of government or financial institution departs from the existing law on the subject of entrusted public property. See N.J.S. 2A:135-3 to 5; N.J.S. 2A:102-1. The Code rejects the view that public officers should be liable for theft upon proof of no more than "unauthorized" disposition of entrusted property. As with entrusted private property, the Code requires a fraudulent intent to sustain a conviction.

Section 2C:21-16, securing execution of documents by deception, parallels existing law on the subject N.J.S. 2A:111-5. This section is limited to transaction of business or pecuniary significance,

consistently with the general scope of Chapter 21.

Section 2C:21-17, wrongful impersonating, consolidates a series of present statutes N.J.S 2A:111-18, 2A:116-1 to 3, 2A:170-19, dealing with private impersonations. The Code's provision on impersonation of public servants is contained in Section 2C:28-8.

Section 2C:21-18, slugs, is a new provision to our laws. It provides a petty disorderly persons offense for minor uses or possession of slugs. Such conduct may be forgery, theft or attempted theft if the circumstances warrant.

Finally, Section 2C:21-19, wrongful credit practices and related offenses, defines criminal usury and proscribes possession of usurious loan records, unlawful collection practices, making a false statement of credit terms and acting as a debt adjuster. This Section consolidates several provisions relating to the extension of credit and collection upon it and borrows heavily from the New York Code for some of its provisions.

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, and the grading of the offenses lends itself to plea bargaining.

3. Offenses Against The Family, Children And Incompetents

(a) Bigamy - The Code alters existing law in several respects. Firstly, it speaks in terms of a "married person" who "contracts or purports to contract" a subsequent marriage. According to the Commentary, this is intended to include persons who underwent a previous void marriage. Present statutory law speaks of a "person having a husband or wife." N.J.S. 2A:92-1, 2, 3. The effect of this language is to make a void marriage a nullity and prevent a prosecution for bigamy although a subsequent marriage is not made in good faith. The proposed modification is a welcome change. See Ystern v. Horter, 94 N.J. Eq. 135 (Ch. 1923). Secondly, and more significantly, the Code, in effect, eliminates application of the bigamy statute in cases of good faith ignorance by the actor of the existence of a valid first marriage. Thus, the following four situations are excepted from criminal liability:

(1) the actor believes that the prior spouse is dead;

(2) the actor and the prior spouse have been living apart for five consecutive years throughout which the prior spouse was not known by the actor to be alive;
(3) a Court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the actor does not know the judgment to be invalid; or
(4) the actor reasonably believes that he is legally eligible to remarry.

The above exceptions are in derogation of prevailing case law in this State. See State v. DeMeo, 20 N.J. 42 (1955). At present, strict criminal liability is imposed and ignorance is no excuse. The offense of bigamy was initially intended to preserve the legal sanctity of marriage. Values have changed to some extent, however, and it may well be advantageous to society as a whole to encourage remarriage after the death or prolonged absence of a spouse. The new divorce law recently enacted by our Legislature, to some extent, recognizes this fact. Thus, the Code proposes beneficial modifications of existing law more in keeping with current thought. These changes are welcome. 4

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4 This type of situation should be distinguished from the Code's provisions relating to ignorance of the law as a defense, which are criticized in this report. Ignorance of the law or of fact should not relieve an accused of criminal liability unless compelling societal interests mandate such a result. Remarriage following an extended absence or death of a spouse, as noted, may well promote the stability of the family. Thus, reasonable ignorance should excuse persons from criminal conviction.

(b) Incest - The Code expands existing law prohibiting incestuous conduct. In several cases, our courts had restricted application of the present incest statute to instances of proven sexual intercourse. See State v. Masnik, 125 N.J.L. 34 (E & A 1940), affirming 123 N.J.L. 355 (S. Ct. 1939). "The gist of the offense of incest" was said to be "sexual intercourse." State v. Columbus, 9 N.J. Misc. 512 (S. Ct. 1931).

As noted in the Commentary, under the proposed Code, marriage will support a conviction of incest. Marriage generally connotes the practice of sexual intercourse. Moreover, "such marriages should be deterred in any event." Commentary, The New Jersey Penal Code, p. 258.

The Code also requires that the defendant act knowingly. It would appear that persons should act at their peril. Specific intent should not be required.

(c) Abortion - The Commission has deemed it "inappropriate . . . to make any recommendations" as to changes in our present abortion law in light of the special commission which was created by concurrent resolution of the Legislature to study this problem. The Commission has stated, however,

that existing statutes "are entirely inadequate to reflect present-day standards." Commentary, The New Jersey Penal Code, p. 259.

Our present statute does not fit the needs of modern day living and is unduly vague (although not in a constitutional sense). The problem has been further confused by a recent decision of a three judge federal panel which has declared our statute unconstitutionally vague and in derogation of the Ninth Amendment's prohibition against invasion of privacy.[5] In essence, this decision overrules State v. Siciliano, 21 N.J. 249 (1956) which changed the common law rule requiring proof of a "quickened fetus"; i.e., movement. The federal decision holds that a woman has a right of privacy sufficient to permit a decision to have an abortion prior to feeling movement of the fetus. The State has taken steps to appeal the federal court's decision.[6]

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5 Young Women's Christian Association of Princeton, New Jersey, Ann Krasnoff, New Jersey Branch of Women's Internation League for Peace and Freedom, Anne Ivey, Marilyn Ressler, Esther S. Frankel, Michael A. Tricarico, M.D., Myra R. Zinke, M.D., Samuel Beslow, M.D., Jack L. Ward, M.D., Ellis J. Mischel, M.D., Sherwin H. Raymond, M.D., and Ralph Dean Cavalli, M.D. v. George F. Kugler, Jr., Attorney General of the State of New Jersey - Civil Action No. 204-70 (1972).

6 But see Eisenstadt v. Baird, ___ U.S. ___ (1972) (State may not prohibit distribution of contraceptives to unmarried individuals); See also Griswold v. Connecticut, 381 U.S. 479 (1965).

There is no question but that the State has an important interest in prohibiting certain types of abortion. Such a power clearly exists to protect the health, safety and morals of its citizens. Until the aforementioned legal issues are resolved, however, there can be no resolution of the problem.

(d) Persistent Non-Support - The Code changes existing law in several respects. New Jersey has adopted a "variation of the Uniform Desertion and Non-support Act" which embraces willful desertion by a husband or father (N.J.S. 2A:100-1) and non-support or desertion where the wife or child is destitute (N.J.S. 2A:100-2). See State v. Greenberg, 16 N.J. 568 (1964); State v. Morroe, 30 N.J. 160 (1960. The Code provides:

> A person commits a crime of the fourth degree if he persistently fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child or other dependent.

The Code "does not follow our law in providing that the crime occurs for either desertion or

non-support." Commentary, The New Jersey Penal Code, p. 261. Thus, mere desertion does not suffice.

The Code penalizes only "persistent" non-support. This constitutes an important modification of existing law which only requires "willful" default. According to the Commission, "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, The New Jersey Penal Code, p. 260. This is undoubtedly true, but does not justify modification of our present statutory scheme. The term "persistent" connotes not only wilfullness, 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 our statute.

4. Offenses Against Public Adminstration

(a) Bribery and Corrupt Influence - Bribery is now both a common law and statutory offense.

See N.J.S. 2A:85-1. "Statutes in the area have been interpreted as merely defining and fixing the punishment for bribery" and do not serve to abrogate application of the common law crime. Commentary, The New Jersey Penal Code, p. 262. See also State v. Begyn, 34 N.J. 35 (1961); State v. Ellis, 33 N.J.L. 102 (S. Ct. 1865). Common law bribery "consists in 'receiving' or offering an undue reward by or to any person . . . in a public office in order to influence his behavior . . . and incline him to act contrary to the known rules of honesty and integrity.'" State v. Begyn, supra.

As formerly noted, the Code abolishes all common law offenses. Thus, Section 2C:27-2, et. seq. is intended to be all-inclusive. In effect, the following statutes would be abrogated:

(b) Statutory Offenses of Bribery Involving Public Officials:

2A:93-1.	Bribery of judge or magistrate; accepting of bribe.
2A:93-2.	Bribery of legislators; acceptance by legislators or other persons
2A:93-3.	Exemption from prosecution under Section 2A:93-2 on giving testimony
2A:93-4.	Soliciting or receiving reward for official vote
2A:93-5.	Disqualification to hold office
2A:93-6.	Giving or accepting bribes in connection with government work, service, etc.
2A:103-1	Embracery
2A:103-2	Acceptance of reward by juror; disqualification
2A:105-1	Unlawful takings
2A:105-2	Public officer or employee, judge or magistrate taking fees in criminal cases

The Code broadens the category of persons subject to its application. Section 2C:27-1(g) embraces not only "public servants," but all public employees. The Commentary states that this includes political party figures. Commentary, The New Jersey Penal Code, p. 264. The Commentary also states that "the Code intends to include the activities of 'ministerial' public servants which would not fit the category of decision-making." Ibid. These changes are welcome.

Subsection (a) prohibits "unqualifiedly the giving or receiving of any pecuniary benefit to influence official or political discretion." Id. at 265. Non-pecuniary benefits "are penalized under subsection (b) only in connection with attempts to influence judicial and administrative proceedings." Id.

(b) Threats and Other Improper Influence In Official and Political Matters - The Code makes it a crime of the fourth degree to threaten or use improper influence in official and political matters. The offense is a crime of the third degree if "the actor threatened to commit a crime or made a threat with [the] purpose to influence a judicial

or administrative proceeding." Section 2C:27-3(b).

More specifically, the Code provides:

> A person commits an offense if he:
> (1) threatens unlawful harm to any person with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter;
> (2) threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding;
> (3) threatens harm to any public servant or party official with purpose to influence him to violate his known legal duty; or
> (4) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with purpose to influence the outcome on the basis of considerations other than those authorized by law.
> It is no defense to prosecution under this Section that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office or lacked jurisdiction, or for any other reason.

The acts forbidden by the Code are covered by the common law crime of obstructing justice. See State v. Caseatly, 93 N.J. Super. 111 (App. Div. 1966). Additionally, other present statutes are applicable. N.J.S. 2A:105-3, 4, 5; N.J.S. 2A:85-1 (common law extortion).

(c) Soliciting For Past Behavior - Section 2C: 27-4 provides as follows:

> A person commits a crime of the fourth degree if he solicits, accepts or agrees to accept any pecuniary benefit as compensation for having, as public servant, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion of his favor, or for having violated his duty. A person commits a crime of the fourth degree if he offers confers or agrees to confer compensation acceptance of which is prohibited by this Section.

At present "this conduct would fall within the common law crime of misconduct in office." See cases cited in Commentary, The New Jersey Penal Code, p. 267.

(d) Retaliation For Past Official Action - The statute prohibits retaliatory action for past official conduct. Probably, such conduct would be embraced within the common law offense of obstructing justice. Use of the term "unlawful act" should be noted, however, as being unduly ambiguous.

(e) Gifts to Public Offiicals - This section supplements our present Conflicts of Interest Law (N.J.S. 52:130-1 et. seq.) which establishes both

a forfeiture and a penalty. As pointed out in the Commentary (p. 268), this provision includes many of the acts proscribed by other existing New Jersey statutes.

Unfortunately, subsection (e) provides many ambiguous exceptions, which include the following:

> (1) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled, or
> (2) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or
> (3) trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

Subsections (2) and (3), relating to "benefits conferred on account of kinship or other personal, professional or business realtionships" and "trivial benefits . . . involving no substantial risk of undermining official impartiality" should be deleted.

(f) Failure To Report A Bribe Attempt - Section 2C:27-9 makes it a crime of the fourth degree to fail "to report an offer or attempt to offer" any "unlawful benefit." No comparable provision "now exists in our law." Commentary, The New Jersey Penal Code, p. 269. Again, the Commission has provided a welcome change.

(g) Perjury and Other Falsifications - Sections 2C:28-1, et. seq. concerns the subject of perjury and falsification in official matters. Subjects covered under Chapter 28 include perjury, false swearing, unsworn falsifications, false reports, tampering with or obstructing justice, and impersonating a public official. All of these crimes are presently embraced in N.J.S. 2A:131-1 et. seq.

Perjury is a crime of the third degree under the Code and requires that the misstatement be under oath in an official proceeding and material to the inquiry. A misstatement not under oath is at most a crime of the fourth degree under Section 2C:28-3 to 5. Even if the misstatement is under oath, it is a crime of the fourth degree absent some other element.

Section 2C:28-3(a) makes punishable an unsworn statement to a public official if an intent to mislead is present. Otherwise, such a crime constitutes a petty disorderly persons offense.

The Code specifically states that false statements of opinions, beliefs or states of mind are punishable. This is in accord with prevailing New Jersey law on the subject. See State v. Sullivan 25 N.J. Super. 484, 490 (App. Div. 1952), certif. denied, 13 N.J. 289 (1953).

Certain elements relating to the present crime of false swearing have been included in the Code's more serious perjury provision. Thus, under N.J.S. 2A:131-5, contradictory statements may be set forth in an indictment for false swearing and the State need only prove that one or the other is false to obtain a conviction. In subsection (e), the Commission has extended this rule to the crime of perjury. If this provision is enacted into law, prosecutions for perjury will be greatly facilitated. In determining whether the proposed rule is unjust, the purpose of our perjury statute must be considered. The public harm attributable to perjury concerns the act of deceit rather than its consequences. It is the act of lying under oath that has long been forbidden, regardless of the result. While it is true that the misstatement must be material, that element of the offense relates to the importance of the lie rather than its effect on the outcome. That being the case, it is not unjust to prosecute and punish a defendant who has deliberately lied in one of two statements regardless of which of the two consituted the unlawful deceit.

In general, the Commission should be commended for its work in the area of false statements. Prosecutions will be facilitated where warranted by the facts of the case. Some of the sentencing provisions may be questioned, however, as not being sufficiently severe. It should be emphasized that we are concerned with deliberate attempts to falsify before public offcials. Not only is the harm to the public a great one, but also the policy of deterring such offenses is of utmost importance.

(h) Obstructing Governmental Operations - Section 2C:29-1 "prohibits a broad range of behavior designed to impede or effect the lawful operation of government." Commentary, The New Jersey Penal Code, p. 280. Many of the crimes contained therein relate to the common law offense of obstructing justice and misconduct in office. Historically, obstructing justice was a misdemeanor and included any act which prevented, impeded or hindered "the due course of public justice." Perkins, Criminal Law, p. 422 (2d ed. 1957). As to the common law offense of misconduct in office, the preceding discussion included many of its elements. See also State v. Lally, 80 N.J. Super. 502 (App. Div.

1963); State v. Silverstein, 76 N.J. Super. 536 (App. Div. 1962), aff'd 41 N.J. 203 (1963).

Section 2C:29-1 relates to assaults on officials while engaged in the performance of their public duties. As pointed out in the Commentary, the prohibition speaks in terms of "interference." Thus, "the Section does not extend to a private altercation which happens to occur at a time when the victim is engaged in official duties." Commentary, The New Jersey Penal Code, pp. 281-82. The distinction is unfortunate since the injury to the public is equally acute regardless of the reason for the altercation.

Section 2C:29-1 also concerns attempts to prevent the convening of legislatures, courts or other tribunals. As noted in the Commentary, non-violent conduct is included.

Unfortunately, Section 2C:29-1 excepts from its prohibition "flight by a person charged with crime, refusal to submit to arrest," etc. According to the Commentary, "the adequate social measure [to prevent fleeing from arrest] is to authorize police to pursue and use force necessary to arrest." The problem is made moot in part by Section 2C:29-2

which makes it a crime of the fourth degree to "threaten, use physical force or violence", or create a "substantial risk of causing physical injury" by preventing a public official from effecting an arrest. This is true even if the arrest is unlawful as long as it is made "under color" of official authority. The Code thus adopts the principle of State v. Mulvihill, 57 N.J. 151 (1970) and State v. Koonce, 89 N.J. Super. 169 (App. Div. 1965). See also State v. Washington, 57 N.J. 160 (1970).

Section 2C:29-3 provides:

> A person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction, or punishment of another for an offense he:
>
> a. harbors or conceals the other;
> b. provides or aids in providing a weapon , money, tansportation, disquise or other means of avoiding discovery or apprehension of affecting escape;
> c. suppresses, by way of concealment or destruction, any evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence, which might aid in the discovery or apprehension of such person or in the lodging of a charge against him;
> d. warns the other of impending discovery or apprehension, except that this paragraph does not apply to a warning given in connection with an effort to bring another into compliance with the law;

e. prevents or obstructs, by means of force, intimidation or deception, any one from performing an act which might aid in the discovery or apprehension of such person or in the lodging of a charge against him;
f. aids such person to protect or expeditiously profit from an advantage derived from such crime; or
g. volunteers false information to law enforcement officer.

The offense is a crime of the third degree if the conduct which the actor knows has been charged or is liable to be charged against the person aided would constitute a crime of the second degree or greater. The offense is a crime of the fourth degree if such conduct would constitute a crime of the the third degree. Otherwise it is a disorderly persons offense.

This statute includes accessories after the fact which under the common law "rested on the notion that a person who helps an offender avoid justice becomes in some sense an accomplice in the original crime." Commentary, The New Jersey Penal Code, p. 283. According to the Commnetary, "modern legislation . . . rejects the earlier consequences of the 'acomplice' theory," and the Code does not adopt the common law rule. See N.J.S. 2A:85-2; State v. Sullivan, 77 N.J. Super. 81 (App. Div. 1962). Instead, the Code adopts the theory that hindering justice constitutes an obstruction of a governmental operation. Facilitating an escape, however, is included in a separate section (Section 2C:29-5).

Other offenses defined in Chapter 29 include compounding, escape, introduction of implements of escape in a detention facility, bail jumping, and unlawful possession of governmental communication devices.

(i) Misconduct In Office - Official misconduct is defined in three separate sections in the Code other than those previously discussed. Official oppression is presently covered under more specific statutes; i.e. N.J.S. 10:1-8 (discriminatory exclusion from jury service); N.J.S. 2A:106-1 (violating extradition procedures); N.J.S. 2A:135-12 (discriminatory administration of relief); N.J.S. 2A:135-13 (exploiting relief receipients). See also N.J.S. 2A:85-1; State v. Begyn, 34 N.J. 35 (1961).

Under the Code, official misconduct is made criminal only when the public servant's act or omission is coupled with an itnent to benefit or to injure some person. See Section 2C:30-2. The acitivity prohibited must relate to the actor's official functions.

In essence, the provisions relating to misconduct in office, those included in Chapter 29 as well as in other provisions, ably codify existing law or, in some cases, revise it in a generally beneficial manner. Most of the provisions are sufficiently clear so as to guide public officials and private persons. Except for the specific criticisms noted, this part of the statute should be enacted into law.

5. Offenses Against Public Order, Health And Decency

Most of the offenses contained in Part 5 of the Code are relatively minor in nature and will not be discussed in this report. Certain provisions must be ritcized, however, with respect to the ambiguity of the language employed. Section 2C:33-2, for example, provides that making "unreasonable noise" is a petty disorderly persons offense. Despite the fact that certain indecent utterances may be offensive to our sensibilities, use of the term "unreasonable, may well justify a court in declaring that provision unconstitutionally vague. The same objection should be noted as to the term "offensively coarse".[7]

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7 See Gooding v. Wolfson, 10 Criminal Law Rptr. 3137 (March 23, 1972).

Acts that may be offensive to one person may not offend the sensibilities of another. That is not to say that we are all constitutionally compelled to live a hairsbreath away from the gutter, but greater clarity and precision is necessary.

As formerly noted, our present laws relating to drugs and other substances should be revised to provide greater flexibility. This should be accomplished as soon as possible.

The Commission has not reviewed our gambling laws, since they provide "a field requiring special study and consideration." Commentary, New Jersey Penal Code, p. 308. Gambling constitutes one of the most important problems presently confronting law enforcement officers and resolution of the many issues involved must be one of our principle goals. In essence, the Commission has recommneded retention of existing laws until further study is completed. Commentary, The New Jersey Penal Code, p. 308. We concur in that view that one admonition; such study as is needed should be completed at the earliest possible time.

6. Firearms and Weapons

Chapter 39 of the proposed Code concerns the regulation of dangerous weapons (Section 2C:39-3, et seq.).

In general, the policy of prohibiting the indiscriminate dissemination of dangerous weapons is carried over into the proposed Code. Presumably, the decision of the Supreme Court of New Jersey in Siccardi v. New Jersey, 59 N.J. 33 (1971) would retain its efficacy and the right to carry firearms would be available only to security officers and law enforcement personnel.

Section 2C:39-3, relating to the possession of weapons and other dangerous instruments, is poorly drafted and should not be enacted into law. Subsection (g) makes it a crime of the fourth degree to "knowingly" possess "any firearm or weapon." Subsection (i) provides "any person who has in his possession any dagger, dangerous knife, dirk, razor, stilletto or any weapon with a purpose to use the same unlawfully against another is guilty of a crime of the fourth degree." Section 2C:39-1 defines "weapon" as "anything readily capable of lethaluse and possessed under circumstances not manifestly appropriate for lawful uses which it may have. . . ." The term includes "gravity knives, switchblade knives, billies, blackjacks bludgeons, metal knuckles, sandbags, sandclubs,

slingshots, cestus or similar bands studded with metal filings or razor blades imbedded in wood slivers." Presumably, under the proposed statutory scheme, the State would not be required to prove that the weapons specifically enumerated above are "readily capable of lethal use and "are possessed under circumstances not manifestly appropriate for lawful uses . . ." in order to present a prima facie case.

Nevertheless, a possible conflict exists with respect to subsections (g) and (i) as to the elements of the crime of illegal possession. Subsection (g) requires that the State prove that the accused "knowingly" possessed a weapon as defined above. Subsection (i) requires the State to prove another element, i.e. a purpose to use the weapon "unlawfully against another." Both subsections relate to crimes of the fourth degree. Since subsection (g) requires proof of knowledge of possession and subsection (i) does not contain the term "knowingly" perhaps, the Commission intended that if the State can prove a "purpose to use a weapon unlawfully, it need not prove knowledgable possession. Quite obviously, such a distinction makes no sense at all since proof of an unlawful purpose presumably

would include evidence that the accused "knowingly" possessed the weapon. One other possibility is that subsection (i) only relates to weapons falling into the general category of "knives", because it is entitled "knives with purpose to use".

In any event, it is clear that possession of certain weapons, such as stilletos, dirks and daggers, should be unlawful per se. The State should not be burdened with having to prove an unlawful purpose. On the other hand, possession of a "dangerous knife" or a "razor" could conceivably be for a lawful purpose and should not be prohibited per se. But see State v. Green, 115 N.J. Super. 13 (App. Div. 1971), certif. granted 59 N.J. 202 (1972). The State should be required to prove an unlawful purpose as to such weapons.

7. Inchoate Crimes

(a) General - Prosecutorial agencies should be in with many of the recommendations of the Commission in the area of inchoate crimes. One major disagreement exists concerning a matter previously discussed: The Commission's suggestion that an individual not be convicted for both conspiracy and the substantive offense or offenses

that are the subject matter of the criminal agreement. This is contrary to settled law in this State.

> 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, but in forming of the scheme or agreement between the parties. [citation omitted]. The offense depends on the unlawful agreement and not on the act which follows it; the latter is not evidence of the former [citations omitted]. The combination itself is vicious and gives the public an interest to interfere by indictment. State v. Carbone, 10 N.J. 329, 337 (1952). Accord: State v. Moretti, 52 N.J. 182, 186 (1968).

For these reasons it is important to keep the crime of conspiracy distinct not only from the substantive offense or offenses which the conspirators plot to commit but also from the other inchoate crimes of attempt and solicitation. We would therefore recommend that Section 2C:5-4c of the Code not be adopted in respect to the inchoate crime of conspiracy.

However, the same considerations do not mandate cumulative punishment for attempt and solicitation. We agree with the Commission that the crime of solicitation is perforce equivalent to the crime of attempt in many instances

and should for the sake of logic be so classified. See Sections 2C:5-1b(7) and 2C:5-1c. This change of course alters the New Jersey common law rule that a solicitor can never be guilty of an attempt because he does not personally intend to commit the offense. See State v. Blechman, 135 N.J.L. 99 (Sup. Ct. 1946).

(b) Attempt - Given the absence of a statutory definition of the offense of attempt (See N.J.S. 2A:85-5), we welcome the Commission's action in supplying one. We are especially pleased to note that the definition specifically rejects the defense of impossibility. Section 2C:5-1a(1). This, of course, merely codifies the case law in New Jersey. See State v. Moretti, 52 N.J. 182 (1968); State v. Meisch, 86 N.J. Super. 279 (App. Div. 1965), certif. denied, 44 N.J. 583 (1965).

We also commend the Commission's rejection of any stringent limitation on the ability to sustain an attempt conviction because extrinsic facts or the means chosen are "obviously" not designed to accomplish the end. The Commission cites the Model Penal Code which takes the position that the suitability of the means chosen may be relevant on the question of purpose, but given

a finding of purpose, a conviction should follow. We believe this a proper position and do not read the language in Marley v. State, 58 N.J.L. 207, 211 (Sup. Ct. 1894), which speaks of the need for "some adaptation, real or apparent, in the thing done to accomplish the thing intended," "as requiring a different result. Indeed the words "real or apparent" would appear to support the Model Penal Code's position.

We also note approvingly that the Commission has codified the "last proximate act" requirement as an alternative basis for liability for attempt. Section 2C:5-1a(2). This requirement states that the actor who has done all that he believes necessary to cause the particular result which is an element of the crime may be found guilty of attempt. It has long been recognized in New Jersey. See State v. Blechman, supra.

We are more reluctant to approve the Commission's suggestion that the "probable desistance" test be abandoned as a rule to distinguish attempt from mere preparation. The test as stated in the leading case on the subject requires that "[t]he 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. Schwarzbach, 84 N.J.L. 268 (E & A 1913). In its place the Commission recommends adoption of the Model Penal Code's approach to this problem which is to set forth two requirements in addition to the requisite criminal purpose. These requirements are: (1) the act must be "a substantial step in the course of conduct" planned to accomplish the criminal result, and (2) the act must be strongly corroborative" of criminal purpose in order for it to constitute such a substantial step. The Commission enumerates certain situations in which attempts may be found if the other requirements of liability are met: (1) lying in wait, searching or following; (2) enticement; (3) reconoitering; (4) unlawful entry; (5) possession of incriminatory materials; (6) materials at or near the place of the crime; and (7) soliciting agents, innocent or otherwise to commit a crime.

In our view, a common sense application of the probable desistance test would certainly cover most if not all of these situations. We candidly

acknowledge that these examples provide a helpful specificity, but that is in many instances already provided for by case law. More troublesome is the thought that this codified specificity, although attractive on its face, could limit the flexibility of the proposed test. All things considered, we are not eager to embrace this new test.

We are definitely opposed to allowing renunciation of criminal purpose as an affirmative defense to the offense of attempt. If an individual has proceeded far enough in a criminal endeavor so that the law may characterize his actions as criminal, it is ridiculous to allow that individual to defend the charge of attempt lodged against him by claiming that he has voluntarily abandoned his criminal purpose. The question is did he or did he not offend the criminal law by taking affirmative action to commit a criminal act. Under either the "probable desistance" test or the "substantial step" test proposed by the Commission, the State is required to offer detailed proof of criminal conduct. It is simply absurd to suggest that after this proof is made, there are important reasons to permit a defendant to escape punishment by claiming that he changed his mind. Indeed, the view that renunciation encourages desistance

in the final stages of attempt is certainly counterbalanced by the view that renunciation encourages the individual to commit his criminal actions in the first place, since he can always change his mind.

(c) Conspiracy - We have already noted our basic disagreement with the Commission's suggestion that conspiracy not be treated as an additional offense if other substantive or inchoate offenses are also charged. We also disagree with the Commission's recommendation that the offense of common law conspiracy be eliminated. This is an unwise departure from existing law. Our courts have long recognized that an individual may be indicted and convicted of common law conspiracy whenever there is "a confederacy of two or more persons wrongfully to prejudice another in his property, person, or character, or to injure public trade, or to affect public health, or to violate public policy, or to obstruct public justice, or to do any act in itself illegal." Johnson v. State, 26 N.J.L. 313, 321 (Sup. Ct. 1857), aff'd 29 N.J.L. 453 (E & A 1861). See also State v. Aircraft Supplies Inc., 45 N.J. Super. 110, 115

(Co. Ct. 1957). The common law rule thus permits conspiracies to be prosecuted as crimes, although their objective is not in itself criminal. See State v. Carbone, 10 N.J. 329 (1952) (civil wrong is sufficient to constitute a conspriacy). We believe this rule should continue to be recognized since there are many instances in which conspiratorial conduct is not proscribed as a penal offense but is a civil wrong of sufficient substance to merit deterrent action by law enforcement officials. Questionable practices of merchants toward consumers are some examples of such civil worngs which merit prosecutorial action.

At the same time we agree with the Commission that the statutory definition of conspiracy be broadened to include all criminal offenses and disorderly person offenses. In this manner the prosecutor would have the ability to anchor his charges against conspirators to specific offenses, as well as the option in unusual cases, where the circumstances dictate law enforcement action but no specific offense can be charged, to employ the common law conspiracy rule to bring malefactors to justice.

We also agree with the Commission's adoption of the Model Penal Code's unilateral view toward conspiracy whereby the failure to prosecute other co-conspirators or inconsistent dispositions or inconsistent verdicts in different trials of other co-conspirators, do not affect an individual conspirator's liability. Indeed, although New Jersey courts speak in traditional terms by defining conspiracy in terms of "an agreement between two or more persons," e.g. State v. Carroll, 51 N.J. 102 (1968), there are recent indications that our courts do apply a unilateral view of conspiracy. In State v. Goldman, 95 N.J. Super. 50 (App. Div. 1967), for example, the Court held that conviction of one conspirator after a dismissal of the indictment as to the only other conspirator did not prevent conviction of the first. A strict "bilateral" view would have led to a contrary result.

We also endorse the Commission's recommendations as to defining the scope of a conspiracy, i.e. if an individual conspirator has knowledge that a co-conspirator with whom he has dealt has also conspired with others, the individual conspirator is guilty of conspiring with those other persons regardless of whether he knows their identity.

Section 2C:5-2b. This provision codifies existing New Jersey law. See e.g. State v. Yormark, 117 N.J. Super. 315 (App. Div. 1971), certif. denied 60 N.J. (197).

We also agree with the Commission's analysis of the state of the law in respect to conspiracies involving multiple criminal objectives, but we feel compelled to add a caveat. Section 2C:5-2c states that "[i]f a person conspires to commit a number of offenses, he is guilty of only one conspiracy so long as such multiple offenses are the object of the same agreement or continuous conspiratorial relationship" (emphasis added). It is true that New Jersey case law does not permit the State to seek multiple convictions for the same conspiratorial conduct. See State v. Ferrante, 111 N.J. Super. 299, 303 (1970). However, if an individual conspires with different groups of co-conspirators for similar but distinct illegal ends, each agreement may be viewed as separate and punishable in itself where there is no evidence that the separate agreements are tied together as stages in the formation of one larger, all inclusive combination to achieve a single unlawful result. State v. Yormark, supra.

For reasons similar to those we stated above in discussing renunciation of purpose as an affirmative defense to attempt, we also reject the Commission's recommendation that conspirators have this defense available to them.

We generally agree with Section 2C:5-2f stating the time for the duration of the conspiracy and also with Section 2C:5-3 relating to incapacity, irresponsibility or immunity of a party to a conspriacy. We are satisfied that there provisions, and especially the latter, deny to a conspirator spurious defenses which might otherwise be available to him even though his individual culpability is clear.

We support the Commission's effort to put order in the widely disparate sentencing provisions for inchoate crimes. We therefore endorse their grading recommendations for these crimes, Section 2C:5-4a. However, we view Section 2C:5-4b "mitigation" as being both superfluous addition to and a poor restatement of, the permissible exercise of judicial discretion. We would therefore not endorse this section. We do not, of course, endorse Section 2C:5-4c. We believe our views on the

permissibility of separate convictions for conspiracy and other inchoate crimes is clear, and see no reason to restate them.

Our endorsement of Section 2C:5-5 punishing possession of burglar tools with knowledge of their potential use as a crime in the fourth degree is contingent upon our recommendations above in respect to the proper gradation of offenses and the elimination of the present system of gradation. See supra at 42.

G. Codification of Defenses

As previously noted, one of the essential objectives of a comprehensive code is to provide a single integrated source of research with respect to all aspects of our system of criminal justice. To some extent, this goal has been subverted by the Code's retention of common law defenses not specifically enumerated in its provisions. Section 2C:2-5.[8]

Nevertheless, the Commission has attempted to codify much existing law relating to defenses available to an accused. Certain affirmative defenses have been clarified. Others have been

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8 As previously noted, this Section is in sharp contrast to Section 2C:1-5 which abolishes all common law offenses.

completely revised. It would be impossible to review each and every provision relating to defenses and justification. Rather, an attempt has been made to highlight some of the more significant modifications contained in the Code. The defense of insanity has been previously discussed since it concerns the question of responsibility for criminal conduct. The remainder of this report relates to other defenses and forms of justification.

1. Use of Force In Self-Protection and Protection of Others

Section 2C:3-4, et seq. drastically alters existing law concerning self defense and defense of others. At present, the justification defenses are only available to an accused who has a belief in the need to use force which is both honest and reasonable. In State v. Bess, 53 N.J. 10, 16 (1968) and State v. Hipplewith, 33 N.J. 300, 316-17 (1960), our Supreme Court held that the test to be employed in resolving the issue of self defense is both subjective and objective. Subjectively the defendant must honestly believe that force is necessary in order to protect himself or others. Objectively,

this belief must be reasonable under all the circumstances existing at the time of the offense. If the defendant forms an honest but unreasonable belief in the need to use force for some justifiable purpose and, acting pursuant to that belief, kills another person, he is guilty of murder.

Section 2C:3-4 eliminates the objective test in determining the reasonableness of the defendant's perceptions. In other words, "the Code's treatment of this problem is to make justification defenses available whenever the defendant believes in the need to act and not to require a finding of reasonableness in the formation of that belief". Commentary, The New Jersey Penal Code, pp. 82-83.

Of similar import is the Code's elimination of the common law rule concerning the amount and degree of force which can be employed in protecting one's self or others. See State v. Fair, 45 N.J. 77 (1965); State v. Abbott, 36 N.J. 63(1961). The New Jersey cases now impose a standard of reasonableness both as to the need to use force and the amount of force necessary. Thus, if a defendant uses more force than appears reasonably

necessary, the justification of self defense is not applicable. Under the Code, the degree of force necessary with respect to the issue of self-protection depends upon the perceptions of the defendant. The reasonableness of the defendant's conduct is no longer an issue under the Code.

According to the Commentary, these changes have been recommended based upon its theory that "the defendant is entitled to have his actual belief submitted to and considered by the jury." Commentary, The New Jersey Penal Code, p. 83. The Commission has stated, "we trust the jury to use the reasonableness of the belief [as to the degree of force required] as a factor in determining its actuality." Ibid. "The Code allows the actor to evaluate the degree or amount of force necessary." Id. at 84.

There is one exception to the elimination of the objective standard. Section 2C:3-9(b) provides that the defendant's recklessness or negligence in arriving at his belief as to whether and what degree of force is necessary deprives him of the justification for the use of force where "recklessness or negligence . . . suffices to establish culpability". This exception is of minimal impact, since most

crimes included in the Code require specific intent such as "purpose" and "knowledge".

The proposed modifications of the traditional common law rule are clearly contrary to the public interest. The objective standard of reasonableness which has heretofore been applied by our courts should not be eliminated. To do so will have the effect of encouraging persons to take the law in their own hands. If the objective standard does nothing more, it serves to restrain persons from acting on their own beliefs since their perceptions will subsequently be reviewed by a jury. To eliminate the element of reasonableness is also to detract from the policy of restraint and deterrance.

The policy of deterrance is not the only reason for subjecting an accused's conduct to an objective standard of reasonableness. Harm to the public is no less great where the actor's conduct is based upon honest, but unreasonable, perceptions. In any event, citizens are injured by virtue of the unrestrained use of force. The imposition of an objective standard of reasonableness, both to the actor's perceptions and the degree of force employed, is, thus, not unfair and should be retained.[9]

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9 Also significant is the added burden of proof that would necessarily result.

2. Necessity and Other Justifications In General

The Commission has codified the common law rule that "conduct which would otherwise be an offense is justifiable by reason of necessity". However, Section 2C:3-2 goes on to state:

> Conduct which would otherwise be an offense is justifiable by reason of any defense of justification provided by law for which neither the Code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claim does not otherwise plainly appear.

This standard is so vague as to be meaningless. Clearly, Section 2C:3-2(b) does not serve to warn or inform the public as to the nature of conduct proscribed. The additional language causing the ambiguity should be deleted.

3. Execution of Public Duty

Section 2C:3-3 codifies the common law rule dealing with the execution of public duties of officers of the state, county and municipality.

4. Doctrine of Retreat and Use of Deadly Force

At present, the use of deadly force is not permitted unless the defendant believes that such force is necessary to protect himself against death or serious bodily harm. The Commission has codified prior case law in this respect and has clarified it to some extent in providing that deadly force cannot be employed when it has been provoked by reason of the defendant's own conduct.

The Commission has also codified the doctrine of retreat which provides that a defendant may not employ deadly force where he knows that he can retreat in complete safety without the necessity of employing such force. One need not retreat from his own dwelling, however.

5. Use of Force In Defense Of Premises or Personal Property

The Commission has codified the common law rule relating to the use of force in the defense of premises or personal property. The Commission has also clarified existing case law dealing with the use of deadly force. Section 2C:3-6 provides that deadly force may not be employed unless the defendant

believes (1) the person against whom the force is used is attempting to dispossess him from his dwelling, not under a claim of right or (2) the person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other criminal theft or property destruction. Section 2C:3-6(d) also provides that deadly force may not be used in defense of personal property.

6. Use of Force in Law Enforcement

In general the Commission has codified existing case law. The only addition, and probably a welcome one, concerns a limitation on the use of deadly force which may serve to injure innocent persons.

7. Ignorance or Mistake

Section 2C:2-4 drastically modifies existing defenses relating to ignorance or mistake of a fact or law. Under the common law rule a reasonable mistake of fact or law was a defense where it served to prove the lack of specific intent as an element in the criminal offense charged. The Code greatly extends the doctrine. See State v. Bess, 53 N.J. 10 (1968); State v. Fair, 45 N.J. 77 (1965); State v. Moore , 105 N.J. Super. 567 (App. Div. 1969); State v. Koettgen, 89 N.J.L. 678 (E & A 1916). But see State v. DeMeo, 20 N.J. 1 (1955).

More specifically, 2C:2-4 provides in pertinent part as follows:

> 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) he 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) he 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 in which a law abiding and prudent person would also conclude.
>
> The defendant must prove a defense arising under Subsection c of this Section by a preponderance of evidence.

This rule makes ignorance of the law and mistake of fact a complete defense even where specific intent is not an element of the crime. The Commission

has stated in this context:

> The manner of approaching this area in the Code is to equate the mistake of law to the mistake of fact. If the mistake, reasonable or unreasonable, negatives the culpability requirements of the criminal statute it is a defense regardless of what those requirements are. It would not be limited to 'specific intent' situations. This constitutes a material enlargement of the defense. Commentary, The New Jersey Penal Code, p. 54.

Moreover, in many cases, different trial courts and different panels of the Appellate Division will have diverse and often differing views with respect to legal questions. For example, some trial judges presently believe that a straight razor does not fall within the dangerous knife section of our statute. Others have held to the contrary. Under this Section of the Code, reliance upon a trial judge's decision, regardless of how erroneous it might be, would be a complete defense. This is contrary to present law. See State v. Western Union Telegraph Co., 12 N.J. 468 (1953); State v. Prusser, 127 N.J.L. 97 (S. Ct. 1941).

Another unwelcome and inexplicable change relates to situations in which the actor's mistake would not excuse him from complete criminal liability.

The Commission has explained this modification in the following manner:

> The second change is found in § 2C:2-4c. Mistake dogma is frequently stated as requireing that the mistake must be of such a nature as to make the conduct non-criminal. If it is not, the mistake does not excuse at all. When the defendant would be guilty of some offense under his view of the facts, it is possible to (a) find him guilty of the graver offense, (b) find him guilty of the lesser offense, i.e., the offense of which he would have been guilty were the facts as he believed them, (c) find him guilty of the greater offense but limit sentence to the lesser, or (d) find him guilty of an attempt to commit the lesser offense. The Code alleviates the existing rule by stating that the defendant cannot be found guilty of the greater offense which is negated by the mistake but can be convicted of the offense which would have been committed if the facts had been as he mistakenly believed them to be, i.e., the third alternative, above. MPC T.D. 4 pp. 17-137 (1955). Commentary, The New Jersey Penal Code, p. 53.

Again, the proposed modification is of no value.

8. Intoxication

The Commission has again codified the common law rule relating to self-induced intoxication. Pathological intoxication under the Code is a complete defense.

The Code containes a definition of pathological intoxication which, in general, conforms with the medical definition.

9. Consent

Section 2C:2-10 provides that the consent of a victim is a complete defense to a crime if the consent "negatives an element of the offense or precludes the infliction of harm or evil sought to be prevented by the law defining the offense". The vagueness of this new doctrine again conflicts with the objective of clarity as stated by the Commisssion in proposing the Code. While the same Section goes on to nullify the legal effect of consent by incompetents or infants, strong objections must be registered to its enactment. It should be noted that criminal conduct constitutes an injury to the public in general and not merely to its victim. The fact that a victim consents to the commission of a crime should in no way be considered.

Conclusion

The enabling statute providing for the formation of the New Jersey Criminal Law Revision Commission evidences an intent on the part of the Legislature

to "revise and codify" existing law. Conceptually, the proposed Code includes many welcome changes. For example, the grading of offenses more realistically relates punishment to the moral culpability of the offender and to the risk or danger to the public attendant to the criminal act proscribed. Equally significant, at least in the eyes of a prosecutor is the greater discretion given to downgrade offenses and to engage in plea bargaining which is directly attributable to the increased classifications of criminal conduct. Plea bargaining has become one of the most important weapons in a prosecutor's arsenal to combat crime. As noted recently by the Supreme Court of the United States (Santobello v. New York, _____ U.S. _____ (January, 1972), plea bargaining adds flexibility to the criminal system and permits a prosecutor to give greater attention to grave injuries to the public. To the extent that the proposed Code permits greater discretion on the part of prosecutorial agencies with regard to plea bargaining, the efforts of the Commission should be applauded.

Conversely, to the extent that the proposed Code divests a prosecutor of the ability to engage in plea bargaining, objections must be registered. As noted, each indictable offense should have a corresponding provision in the disorderly persons category. To

some extent, the Commission has failed in this endeavor. Also objectionable is Section 2C:43-11 which permits a court, after a conviction is obtained, to sentence an offender as if he were found guilty of a lesser included offense.

Two other provisions seriously impinge upon a prosecutor's freedom to engage in plea bargaining. Section 2C:1-7(d) coupled with Section 2C:1-7(e) authorize trial judges to instruct juries as to all lesser included offenses, including disorderly persons violations. Obviously, any motivation a defendant may have to plead to a lesser included offense may well be destroyed by these provisions.

Finally, the provision relating to "deminimis infractions" is highly objectionable. Courts should not be authorized to dismiss indictments where the State has the ability to prove the elements of the offenses charged. Flexibility in the criminal system and providing speedy trials are highly important values. No less significant, however, is the right of society to be protected from criminal acts. That is the reason for the existence of government and that object cannot be sacrificed in the guise of promoting "flexible" judicial administration.

As previously noted, the Commission has endeavored to reduce sentences and to afford greater discretion

as to the possibility of parole. Obviously, there must be a balancing of the right of each citizen to be protected from criminal attack and the right of a defendant and society to promote the prospect of rehabilitation. Most laudable is recent legislation designed to recompense victims of crimes. This, of course, is carried over into the proposed code.

One of the more debatable provisions in the proposed code is the alteration of the M'Naughton rule of insanity. The obvious design of the Code is to decrease a citizen's legal responsibility for the acts he commits, while at the same time, provide for commitment. A better solution is that advanced by most psychiatrists, psychologists and sociologists, which is to do away with the defense of insanity entirely and require separate proceedings to determine whether commitment to an institution is required and, if so, what institution best fits the offender's needs.

The Code, as it presently exists, contains many provisions, formerly noted, that are unworkable and contrary to the public interest. Hopefully, these provisions will be deleted. If nothing else, the proposed code has afforded all an opportunity to evaluate the needs of society and the rights of individuals in our criminal justice system. This process of

evaluation must be a continuing one. Additional efforts are required to make the Code a workable instrument of justice. It is, therefore, recommended that public hearings be conducted and that the arguments raised in this report and others be aired and subjected to public scrutiny.