NEW JERSEY CRIMINAL LAW
REVISION COMMISSION

Study Draft

Part II Definition of Specific Crimes

June, 1970

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

To the Commissioners:

The following is Part II of the Study Draft of a Penal Code for New Jersey. It covers the "Definition of Specific Offenses" and is built upon Part II of the Model Penal Code.

Part I of the Study Draft, covering the "General Part" of the substantive criminal law has already been distributed.

Part III of the Study Draft will consist of the following:

1. A continuation of the definitions of specific offenses to cover those crimes not included in Part II of the Model Penal Code but which are now found in the New Jersey statutes.

2. A study of the changes needed in existing law to "mesh" the Code with the New Jersey governmental structure. In particular, necessary changes in corrections law (Parts III and IV of the Model Penal Code), in the local government enabling legislation (as regards quasi-criminal municipal ordinances) and in the New Jersey Court Rules will be considered.

3. A draft of the "Findings and Conclusions" of the Commission as regards the need for a Code and the substance of its proposals.

4. A draft of "Tables of Disposition."

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

John G. Graham
Secretary

Newark, New Jersey
June, 1970

PART II. DEFINITION OF SPECIFIC CRIMES

OFFENSES AGAINST EXISTENCE OF STABILITY OF THE STATE

"This category of offenses, including treason, sedition, espionage and like crimes, was excluded from the scope of the Model Penal Code. These offenses are peculiarly the concern of the federal government. The Constitution itself defines treason: 'Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort....' Article III, Section 3; cf. Pennsylvania v. Nelson, 350 U.S. 497 (supersession of state sedition legislation by federal law). Also, the definition of offenses against the stability of the state is inevitably affected by special political considerations. These factors militated against the use of the Institute's limited resources to attempt to draft 'model' provisions in this area. However we provide at this point in the Plan of the Model Penal Code for an Article 200, where definitions of offenses against the existence or stability of the state may be incorporated." MPC, Proposed Official Draft 123 (1962)

* * * *

Article 200 Commentary

1. In redrafting the statutes in the area of crimes against the existence or stability of the State, there are three questions which must be answered: First, is the offense within the compentence of the States or has it been superceded by the Federal Government by enactment of a pervasive scheme of statutory enactments? Second, assuming the State legislature can act in some of these fields, is there a valid interest for it to do so? Third, in those areas where the State both can act and wants to, is the enactment drawn with sufficient precision not to infringe upon the First Amendment right of free speech?

Some of the legal problems surrounding the first and third questions are now discussed in more detail:

2. Federal Pre-emption. In Pennsylvania v. Nelson, 350 U.S. 497 (1956) the defendant was convicted of a violation of the Pennsylvania Sedition Act. The Supreme Court of Pennsylvania reversed the conviction holding that the state statute had been superseded by the Federal Smith Act. While the statute proscribed acts of sedition against both the government of the United States and of the State of Pennsylvania, only the former was proved at defendant's trial. The State brought the case to the Supreme Court of the United States which affirmed.

> "It should be said at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. The distinction between the two situations was clearly recognized by the court below. Nor does it limit the jurisdiction of the States where the Constitution and Congress have specifically given them concurrent jurisdiction, as was done under the Eighteenth Amendment and the Volstead Act. United States v. Lanza, 260 U.S. 377. Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power, as was done in Fox v. Ohio, 5 How. 410, and Gilbert v. Minnesota, 254 U.S. 325, relied upon by petitioner as authority herein. In neither of those cases did the state statute impinge on federal jurisdiction.
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> "Where, as in the instant case, Congress has not stated specifically whether a federal statute has occupied a field in which the States are otherwise free to legislate, different criteria have furnished touchstones for decision. Thus,
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> > '[t]his Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance;

> difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.' Hines v. Davidowitz, 312 U.S. 52, 67.

* * * *

"In this case, we think that each of several tests of supersession is met.

"First, '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' [The Court then examined the provisions of the Smith Act].

"We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law.

* * * *

"Second, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'

* * * *

Congress has devised an all-embracing program for resistance to the various forms of totalitarian aggression. Our external defenses have been strengthened, and a plan to protect against internal subversion has been made by it.

* * * *

Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem.

* * * *

"Third, enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program.

* * * *

> "Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of state Acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania is unassailable." (350 U.S. 500-509)

3. Freedom of Speech and Overbreadth. In drafting statutes in this field, it is important to keep in mind the problem of writing the statutes so that they are not constitutionally overbroad. Illustrative is Straut v. Calissi, 293 F. Supp. 1339 (D.N.J. 1968) holding N.J.S. 2A:148-22 unconstitutional on its face. The statute is one of our sedition statutes and is reproduced subsequently in this Commentary.

The Case was one for a declaratory judgment and was brought before a three-judge federal court. The plaintiffs alleged that the defendant--county prosecutor had threatened criminal prosecutions against persons advocating anti-war activities and speeches under the sedition statute. After finding that a "case or controversy" existed and that plaintiffs had standing, the Court reached the merits of the case:

> "The major thrust of defendant's response to plaintiffs' First Amendment challenge is that this court is compelled by the decision of the Supreme Court in Gilbert v. Minnesota to find N.J. Rev. Stat. §2A:148-22 constitutional. The petitioner in Gilbert had been indicted under a Minnesota statute substantially similar to the one at bar. In upholding the statute and rejecting petitioner's First Amendment arguments, the Court held that freedom of speech 'is not absolute, it is subject to restriction and limitation.' The United States then being at war with Germany, and attempting to recruit an army, the state's police power was considered to have been properly invoked to punish a speech the natural effects of which were to discourage enlistment and provoke a hostile reaction on the part of the speaker's auditors.

"It is defendant's contention that since Gilbert has never been specifically overruled, stare decisis dictates that the decision must here be followed. Such an approach, however, would not be in keeping with the reality of the present context. It is . . . more than merely arguable that the Court has sub silentio overruled the Gilbert holding. More important, however, has been the erosion of the constitutional precepts upon which the Gilbert decision rested. The Minnesota statute there, like the New Jersey statute here, proscribed the advocacy or teaching, by word of mouth at any place where more than five persons were assembled, or by any printed matter, that men should not enlist in the armed forces. The Gilbert Court failed to distinguish between advocacy of legal and illegal aims, or between that advocacy which amounts to the teaching of abstract doctrine and that which is aimed at stirring people to immediate, unlawful action. Even were this court to assume that the New Jersey statute covers only advocacy of illegal action, an assumption which would be totally unwarranted, there is no delineation on the face of the statute between abstract doctrine and incitement. On the contrary, the use of the word 'teaches' in section b clearly indicates that the statute covers speech which could not be considered to be criminal incitement.

"In addition, any assumption that the statute covers only advocacy of illegal action must be discarded, for its terms prohibit the advocacy of non-enlistment in the armed forces. Since it is certainly not a crime to choose not to volunteer one's services to the military, the statute prohibits the urging of lawful action. It is thus made a crime for a person to counsel five or more other persons that enlistment in the Army would not be in their best interests, and that immediate pursuit of another career would be more rewarding or serviceable. Even were this kind of urging to reach the stage of 'vigorous advocacy,' it must be remembered that 'abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.'

"Plaintiffs' activities, at least insofar as they are designed to encourage young people not to enlist in the service, fall squarely within the statute's coverage. To the extent that they are revealed in the complaint, affidavits and stipulation, these activities are protected under the First Amendment, for as the Supreme Court observed in Thomas v. Collins:

> '[T]he protection they [the Framers] sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts.'
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> "In light of more recent Supreme Court decisions which take such great pains to make the kinds of distinctions, vital in the First Amendment area, ignored in this statute, this court is compelled to hold N.J. Rev. Stat. §2A:148-22 unconstitutional on its face as being overly broad in its proscription of constitutionally protected expression. It follows that plaintiffs are entitled to a declaratory judgment to that effect. This disposition of the case makes it unnecessary to pass upon the other constitutional issues raised ty the plaintiffs. (293 F. Supp. 1343-1346)

4. Existing New Jersey Statutes. The New Jersey Statutes in the area of "Treason and Offenses Against the Government" are classified into five areas:

(1) Treason

2A:148-1. Treason; proof of treason; evidence upon trial

> Any person owing allegiance to this state who levies war against it, or adheres to its enemies or to the enemies of the United States by giving them or any of them any aid or comfort, and is convicted thereof on the testimony of 2 witnesses to the same overt act of the treason whereof he stands indicted, or on confession in open court, is guilty of treason and shall suffer death. Upon the trial of an indictment for treason, no evidence shall be received of any overt act of treason that is not expressly alleged in the indictment.

2A:148-2. Misprision of treason

> Any person having knowledge of the commission of treason, who conceals and does not, as soon as may be, disclose and make known the same to the governor of this state, or to a justice of the supreme court, or to a judge of the superior court or of a county court, or to a magistrate, is guilty of misprision of treason and punishable as for a high misdemeanor.

2A:148-3. Maintaining foreign authority

Any person owing allegiance to this state who, by speech, writing, open deed or act, advisedly and wittingly maintains and defends the authority or jurisdiction of a foreign power, potentate, republic, king, state or nation, in and over this state, or the people thereof, is guilty of a high misdemeanor.

2A:148-4. Conspiracy to invade other states of the union

Any person who, within this state, gets up or enters into any combination, organization or conspiracy, with the intent and purpose of making or attempting to make a hostile invasion of any other state or territory of the United States, or engages in plotting or contriving such an invasion, or knowingly furnishes any money, arms, ammunition or other means in aid of such object, or in any way knowingly and willfully aids, abets or counsels such a combination, organization, conspiracy or hostile invasion, is guilty of a high misdemeanor.

2A:148-5. Concealment; penalty

Any person having knowledge of the commission of any of the high misdemeanors stated in this article, who conceals and does not, as soon as may be, disclose and make known the same to an officer mentioned in section 2A:148-2 of this title, is guilty of a high misdemeanor.

(2) Assaulting High Executive Officers

2A:148-6. Assaulting president, vice president, governor or foreign ruler, with intent to kill; inciting assaults

Any person who assaults the president or vice president of the United States, or any official in the line of succession to the presidency of the United States, or the governor of this state, or the ruler, governor or other chief executive of any state, or heir apparent or heir presumptive to the throne of a foreign state, with intent to kill and with intent thereby to show his hostility or opposition to any and all government, or any person who incites, promotes, encourages or attempts any such assault, such assault not resulting in the death of such official, or any person who conspires to kill such official, is guilty of a high misdemeanor and shall suffer death unless the jury trying the case recommends the defendant to the mercy of the court, in which case the punishment shall be imprisonment for life.

(3) Anarchy

2A:148-7. Advocating anarchy

Any person who, in public or private, by speech, writing, printing or otherwise, advocates the subversion or destruction by force of any and all government, or attempts by speech, writing, printing or otherwise to incite or abet, promote or encourage hostility or opposition to any and all government, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

See State v. Scott, 86 N.J.L. 133 (Sup. Ct. 1914) (One who attacks in a newspaper the actions of the police in suppressing a strike, but does not attack the governmental system, or all government, is not guilty of a violation of this section).

2A:148-8. Becoming member of anarchistic society

Any person who becomes a member of, or attends or counsels or solicits any other person to attend a meeting or council of, an organization, society or order organized or formed for the purpose of inciting, abetting, promoting or encouraging hostility or opposition to, or the subversion or destruction by force of any and all government, or who in any manner aids, abets or encourages any such organization, society, order, council or meeting in the propagation or advocacy of such a purpose, is guilty of a high misdemeanor, and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

2A:148-9. Circulating printed matter inciting anarchy

If any person, organization, society or order brings, introduces or circulates, or aids, assists or is instrumental in bringing, introducing or circulating within this state any printed or written paper, pamphlet, book or circular with intent to incite, promote or encourage hostility or opposition to, or the subversion or destruction of any and all government, such person or the members of such organization, society or order in any way responsible therefor, shall be guilty of a high misdemeanor and punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

(4) Inciting Violence

2A:148-10. Inciting personal violence or destruction of property

Any person who, in public or private, by speech, writing, printing or otherwise, advocates, encourages, justifies, praises or incites:

a. The unlawful burning or destruction of public or private property; or

b. Assaults upon any of the armed forces of the United States, the national guard, or the police force of this or any other state or of any municipality; or

c. The killing or injuring of any class or body of persons, of of any individual--

Is guilty of a high misdemeanor.

This section was upheld over various attacks under the United States Constitution in Star v. Boyd, 86 N.J.L. 75 (Sup. Ct. 1914) affirmed 87 N.J.L. 328 (E. & A. 1915) and State v. Quinlan, 86 N.J.L. 120 (Sup. Ct. 1914) affirmed 87 N.J.L. 333 (E. & A. 1915).

2A:148-11. Publishing or circulating propaganda inciting personal violence or destruction of property

Any person who prints, publishes or circulates, or causes or assists the printing, publishing or circulating of any written or printed paper, book, pamphlet or circular containing any speech, article, or communication advocating, encouraging, justifying, praising, inciting or tending to incite:

a. The unlawful burning or destruction of public or private property; or

b. Assaults upon any of the armed forces of the United States, the national guard, or the police force of this or any other state or of any municipality; or

c. The killing or injuring of any class or body of persons, or of any individual--

Is guilty of a high misdemeanor.

(5) Insurrection or Sedition

2A:148-12. Inciting insurrection or sedition

Any person who incites an insurrection or sedition among any portion or class of the population of this state, or attempts by writing, speaking or otherwise, to incite such insurrection or sedition, is guilty of a high misdemeanor, and shall be punished by a fine of not more than $10,000, or by imprisonment for not more than 20 years, or both.

2A:148-13. Advocating subversion or destruction of state or federal government

Any person who advocates, in public or private, by speech, writing, printing or otherwise, the subversion or destruction by force of the government of the United States or of this state, or attempts by speech, writing, printing or otherwise, to incite or abet, promote or encourage the subversion or destruction by force of the government of the United States or of this state, is guilty of a high misdemeanor, and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 10 years, or both.

State v. Tachin, 92 N.J.L. 296 (Sup. Ct. 1919) affirmed 93 N.J.L. 485 (E. & A. 1920) which upheld this statute as applied to sedition against the federal government has clearly been overruled by Pennsylvania v. Nelson, supra. See also Colgan v. Sullivan, 94 N.J.L. 201 (1920).

2A:148-14. Attending meeting or joining society advocating destruction of state or federal government

Any person who becomes a member of, or attends or counsels or solicits any other person to attend a meeting or council of, an organization, society or order organized or formed for the purpose of inciting, abetting, promoting or encouraging the subversion or destruction by force of the government of the United States or of this state, or who in any manner aids, abets or encourages any such organization, society or order, council or meeting in the propagation or advocacy of such a purpose, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 10 years, or both.

2A:148-15. Printing or producing books, pamphlets, pictures, emblems, etc., inciting destruction of state or federal government

Any person who prints, writes, multigraphs, or otherwise makes or produces, or by any means sets out and makes legible, in any language:

a. Any book speech, article, circular or pamphlet which in any way, in any part thereof, incites, counsels, promotes, advocates or encourages the subversion or destruction by force of the government of the United States or of this state; or

b. Any constitution, by-laws, rules or record of the proceedings of any organization, association, society, order, club or meeting of 3 or more persons, which in any way incites, counsels, promotes, advocates or encourages the subversion or destruction by force of the government of the United States or of this state; or

c. Any picture, photograph, emblem, representation, sign, or token which in any way incites, counsels, promotes, advocates, encourages or symbolizes the subversion or destruction by force of the government of the United States or of this state--

Is guilty of a high misdemeanor.

2A:148-16. Selling, distributing or possessing books, pamphlets, pictures, emblems, etc., inciting destruction of state or federal government

Any person who utters, sells, gives away, circulates, distributes or exhibits to the view of another, or possesses with intent to utter, sell, give away, circulate, distribute or exhibit to the view of another:

a. Any book, speech, article, circular or pamphlet, made or produced in any manner or by any means set out and made legible, in any language, which in any way, in any part thereof, incites, counsels, promotes, advocates or encourages the subversion or destruction by force of the government of the United States or of this state; or

b. Any constitution, by-laws, rules or record of the proceedings of any organization, association, society, order, club or meeting of 3 or more persons, made or produced in any manner or by any means set out and made legible, in any language, which in any way, in any part thereof, incites, counsels, promotes, advocates or encourages the subversion or destruction by force of the government of the United States or of this state; or

c. Any picture, photograph, emblem, representation, sign or token, made or produced in any manner or by any means set out and made legible, which in any way incites, counsels,

promotes, advocates, encourages or symbolizes the subversion or destruction by force of the government of the United States or of this state--

Is guilty of a high misdemeanor.

2A:148-17. Letting rooms or buildings to organizations advocating destruction of state or federal government

Any owner, lessee, manager, agent or other person, who knowingly lets or hires out any building, structure, auditorium, hall or room, whether licensed or not, or any part thereof, to or for the use of any organization, association, society, order, club or meeting of 3 or more persons, the constitution, by-laws or rules of which in any way, or in any part thereof, incite,counsel, promote, advocate or encourage the subversion or destruction by force of the government of the United States or of this state, is guilty of a high misdemeanor.

2A:148-18. Hiring rooms or buildings for organizations advocating destruction of state or federal government

Any person who hires any building, structure, auditorium, hall or room whether licensed or not, or any part thereof, in the name of or for the use of any organization, association, society, order, club or meeting of 3 or more persons, the constitution, by-laws or rules of which in any way, or in any part thereof, incite, counsel, promote, advocate or encourage the subversion or destruction by force of the government of the United States or of this state, is guilty of a high misdemeanor.

2A:148-19. Allowing use of building by organization advocating destruction of state or federal government

Any owner, lessee, manager, or other person in control of any building, structure, auditorium, hall or room, whether licensed or not, or any part thereof, who, whether with or without a letting or a hiring for a consideration, knowingly suffers or permits any organization, association, society, order, club or meeting of 3 or more persons, the constitution, by-laws or rules of which in any way, or in any part thereof, incite, counsel, promote, advocate or encourage the subversion or destruction by force of the government of the United States or of this state, to occupy or to hold a meeting in said building, structure, auditorium, hall or room, or any part thereof, is guilty of a high misdemeanor.

2A:148-20. Displaying red flag or other emblem inciting destruction of government

Any person who, in public or private life, displays a red or black flag, or any ensign or sign bearing an inscription opposed to organized government, or the flag, emblem or insignia of any organization, society or order opposed to organized government, for the purpose of inciting, promoting or encouraging hostility or opposition to or subversion or destruction of any and all government, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

2A:148-21. Displaying flag, picture, etc., inciting destruction of state or federal government

Any person who exhibits or displays at any meeting of 3 or more persons, or at any parade, public or private, or in any public place, any flag, banner, emblem, picture, photograph, representation, sign or token, which in any way incites, counsels, promotes, advocates, encourages or symbolizes the subversion or destruction by force of any and all government, or of the government of the United States or of this state, is guilty of a high misdemeanor.

2A:148-22. Opposing enlistment; advocating noncooperation with federal government in carrying on war; citizen defined

Any person who:

a. Prints, publishes or circulates any book, newspaper, pamphlet or written or printed matter that advocates or attempts to advocate that persons should not enlist in any of the armed forces of the United States or of this state; or

b. Advocates or teaches, by word of mouth or otherwise, in any public place or at any meeting where more than 5 persons are assembled, that any person should not enlist in any of the armed forces of the United States or of this state; or

c. Advocates or teaches that the citizens of this state should not aid, abet or assist the United States in prosecuting or carrying on war with the enemies of the Unites States--

Is guilty of a high misdemeanor.

For the purposes of this section, a citizen of this state is defined to be any person within the confines of this state.

This Section was held unconstitutional on its face in Straut v. Calissi, supra. But see State v. DeFillipis, 15 N.J. Super. 7 (App. Div. 1951).

OFFENSES INVOLVING DANGER TO THE PERSON

ARTICLE 210. CRIMINAL HOMICIDE

§210.0 Definitions.

In Articles 210-213, unless a different meaning plainly is required:

(1) "human being" means a person who has been born and is alive;

(2) "bodily injury" means physical pain, illness or any impairment of physical condition;

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(4) "deadly weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is knows to be capable of producing death or serious bodily injury.

* * * *

§210.0 Commentary

1. The definition of "human being" set forth in Section 210.0(1) is the common-law definition and is the law of New Jersey. In essence, it excludes the killing of a fetus from homicide. See In Re Vince, 2 N.J. 443, 450 (1949); State v. Cooper, 22 N.J.L. 52 (Sup. Ct. 1849); State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858). It was adopted by the New York Code (§125.05) and by the Michigan Draft Code. This limitation upon the law of homicide has been rejected by an intermediate appellate court in California. In Keeler v. Superior Court for County of Amador, 80 Cal. Rptr. 865, P. 2d (Ct. App. 1969), defendant was charged with aggravated assault and with murder. The

allegation was that he had viciously beaten his divorced wife, who was pregnant by another man, and kicked her in the abdomen. This caused the death of the unborn child. Defendant sought dismissal of the murder charge. The Court of Appeal refused to do so holding that "a fetus which has reached the state of viability is a human being for the purpose of California's homicide statutes" 80 Cal. Rptr. at 869. Medical estimates of the pregnancy varied from 31 to 36 weeks. There was medical testimony that the child was viable, that is, to a reasonable medical certainty, premature separation from the mother at that stage would not have ended the child's life. The Court rejected the common-law rule that feticide is not homicide.

> "Such a rule tends to precipitate an artificial formalism of an esoteric discipline, achieving increasing alienation from the religious, moral and scientific ponderings which attended its inception. In juxtaposition to later-adopted abortion statutes, the common-law rule left a no-man's land between the prohibitions against homicide and abortion....
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> "Given normal development through the first seven months of intrauterine life, a premature infant is expected to live. To crystallize the 'born alive' doctrine of 17th century England as the law of 20th century America would run counter to the traditions and spirits of the common law....
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> "A rule recognizing the slaying of a viable fetus as homicide engenders no conflict with the abortion laws. Abortions, legal or illegal, almost invariably occur during the early stage of pregnancy....A fetus reaches the stage if viability only during the third trimester of pregnancy....
>
> "We are satisfied that a fetus which has reached the stage of viability is a human being for the purpose of California's homicide statutes." (80 Cal. Rptr. 867-869).

2. As to the definition of "bodily injury", see Lower v. Metropolitan Life Insurance Co., 10 N.J. Misc. 1236 (Sup. Ct. 1932);

Nuzzi v. United States Casting Co., 121 N.J.L. 249 (E. & A. 1938).

3. "Deadly weapon" is defined in State v. Cox, 128 N.J.L. 108, 112 (E. & A. 1942) ("A deadly weapon is one liable to produce death or great bodily injury; and, in case of doubt, the manner in which it is used may be considered in determining whether it takes that classification."); see also State v. Jones, 115 N.J.L. 257, 262 (E. & A. 1935).

4. The Proposed California Code in §1400 would adopt Section 210.0 in its entirety. California Penal Code Revision Project (Tentative Draft No. 2, 1968).

§210.1. Criminal Homicide.

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

(2) Criminal homicide is murder, manslaughter or negligent homicide.

* * * *

§210.1 Commentary

1. Part I of the Code performs a large part of the task of differentiating criminal from non-criminal homicides. General provisions are there set forth dealing with questions of culpability, causation, excuse and justification. At this point, there are two questions to be answered: (1) What kinds of culpability ought to suffice for liability? (2) What distinctions ought be drawn among those homicides made criminal for purpose of sentence?

2. As to the first question, it is clear that causing death purposely, knowingly or recklessly (See Section 2.02) must be sufficient to establish criminality. The Code also bases liability on negligence as well, "reflecting in this respect the generally prevailing law." MPC Tentative Draft No. 9, p. 25 (1959).

> "It is important to point out, however, that as 'negligently' is defined in Section 2.02(2)(d) more is required than the lack of reasonable care that may suffice for civil liability. While the inadvertent creation of risk may establish negligence, there must be 'substantial and unjustifiable risk' of causing death, of which the actor should be aware; and the risk must be 'of such a nature and degree that the actor's failure to perceive it' involves ['a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.']" (Id. at 25-26)

This is a change from the existing New Jersey law. In connection with the Commentary to Section 2.02(2)(d) it was concluded that there was no instances in New Jersey law basing criminal liability upon conduct

which would only be negligent, as defined in the Code. See page IB-18 and State v. Gooze, 14 N.J. Super. 277, at 282 (App. Div. 1951); State v. Williams, 29 N.J. 27 (1959); State v. Weiner, 41 N.J. 21, 25-26 (1963). These cases emphasize a requirement of a consciousness or awareness of risk-creation on defendant's part--an element explicitly eliminated from the definition of "negligently" under the Code. The issue is a serious one and will be considered in detail in connection with Section 210.4. It is important to have a degree of crime less than manslaughter to handle cases such as death by automobile--it is, however, questionable whether "negligently" should be sufficient to find guilt in those situations.

3. This Section has important implications, as drafted, for the felony-murder and misdemeanor-manslaughter rules:

> "In limiting criminal homicide to cases where death is caused purposely, knowingly, recklessly or negligently, with recklessness and negligence defined to require the creation of substantial and unjustifiable homicidal risk, the [Code] rejects the felony-murder and misdemeanor-manslaughter rules of existing law, insofar as they base liability on an unlawful act even though it entails no substantial risk of death. These rules are inconsistent with the general concepts of culpability which animate the Code, importing with respect to homicide, as distinguished from the underlying felony or misdemeanor, a form of strict liability to which we are opposed. Cf. Sections 2.02, 2.05....On the other hand, we recognize that the fact that a homicide occurs when the actor is engaged in criminal activity of the kind which generally threatens life justifies a presumption of recklessness and even of that extreme indifference to the value of human life that warrants conviction of murder. Such a presumption is created by Section 210.2(1)(b). It is, of course, rebuttable." (MPC Tentative Draft No. 9, pg. 26 (1959))

This issue is discussed below in connection with Section 210.2, defining murder.

4. This section has the effect of dealing with criminal homicide as a generic category and distinguishes the various forms

for purposes of sentence. This mode of organization is implicit in the existing statutory scheme in New Jersey but the point is obscured when murder or the degrees thereof and manslaughter are treated as separate crimes. MPC Tentative Draft No. 9, pg. 26 (1959). See State v. Brown, 22 N.J. 405, 412 (1956).

> "In differentiating among criminal homicides for purposes of sentence, the draft distinguishes among murder, manslaughter and negligent homicide, classified as felonies of the first, second and third degree respectively. The content of these categories and their differences from the similar categories of prevailing law are discussed in the Comments to [the appropriate] Sections. For jurisdictions which employ capital punishment, the [Code] proposes, in addition, the abandonment of the traditional distinction between first and second degree murder, deriving from the Pennsylvania reform of 1794, under which the determinants of capital or potentially capital murder are a deliberate and premeditated purpose to kill or enumerated felony-murders. The system advanced in substitution has for its main features: (1) the exclusion from the capital class of certain murders where a clear ground of mitigation is estalbished; (2) a specification of aggravating circumstances, at least one of which must be established before a capital sentence becomes possible; (3) a final discretionary determination by the Court, or alternatively by the jury, based upon a balancing of all the aggravating and mitigating circumstances that appear; (4) a supplementary proceeding, after conviction of murder, to determine whether sentence of death should be imposed....
>
> "The plan reflects the imposing difficulty felt by every agency that has reviewed the law of homicide in formulating a finite rule to differentiate the cases where capital punishment should and should not be employed. The solution of the difficulty, insofar as it is soluble at all, inheres we submit in acknowledging the multiplicity of factors that have bearing on the issue. This is, in any case, the theory of the [Code]." (MPC Tentative Draft No. 9, pg. 28 (1959)

5. Summary of Existing New Jersey Law. In New Jersey, under the existing statutes, all unlawful[1] homicides are classified as murders or as manslaughters.

Murders are unlawful homicides accompanied by the state of mind known as "malice aforethought." State v. Brown, 22 N.J. 405, 411 (1956); State v. Williams, 29 N.J. 27, 36 (1959); State v. Gardner, 51 N.J. 444, 458 (1968). Under our cases, "malice" is defined as at common law but has been supplemented by N.J.S. 2A:113-1. State v. Gardner, supra; State v. Paris, 8 N.J. Super. 383 (L. Div. 1959). The most frequent statement of the definition of malice is that given by Sir James Stephen in his Digest of the Criminal Law:

> "Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated.
>
> (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;
>
> (b) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) an intent to commit any felony whatever;
>
> (d) an intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person

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1. N.J.S. 2A:113-6 defines when a homicide is not criminal:
"Any person who kills another by misadventure, or in his or her own defense, or in the defense of his or her husband, wife, parent, child, brother, sister, master, mistress or servant, or who kills any person attempting to commit arson, burglary, kidnapping, murder, rape, robbery or sodomy, is guiltless and shall be totally acquitted and discharged."
See State v. Gardner, 51 N.J. 444, 459 (1968). With the enactment of Part I of the Code, this Section should be eliminated.

> whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed...."

The first two parts of the definition were specifically quoted in the Gardner case as being our law.[2] The last two parts have been subjected to legislative revision in N.J.S. 2A:113-1, as follows:

> "If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery,sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, coroner, constable or other officer of justice, either civil or criminal, of this state, or a marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing is guilty of murder."

The first part of this statute sets forth the rule known as the felony-murder doctrine. See State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833). The statutory rule is more limited than the common-law rule in that only certain enumerated felonies are sufficient to support a murder conviction. The felonies referred to are as defined at common law. State v. Butler, 27 N.J. 580, 588-89 (1958); State v. Hauptmann, 115 N.J.L. 412, 424 (E. & A. 1935). The scope of the New Jersey felony-murder rule will be discussed below in connection with section 210.2

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2. See also State v. Mulero, 51 N.J. 224, 229 (1968); State v. Moynihan, 93 N.J.L. 253, 258 (E. & A. 1919); State v. Silverio, 79 N.J.L. 482, 488 (E. & A. 1910).

As to the second part of the statute, killing a peace officer, see Bullock v. State, 65 N.J.L. 557, 573 (E. & A. 1900) and State v. Butchey, 77 N.J.L. 640, 642 (E. & A. 1909).

Degrees of Murder. Assuming that malice is found[3] and that the defendant is thus guilty of murder, the New Jersey law then requires

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3. As to the so-called "presumption of malice," see State v. Gardner, 51 N.J. 444, 459 (1968)

> "Only when the essential elements of murder have been proved beyond a reasonable doubt does the presumption of murder in the second degree arise. This presumption is intended to favor the defendant and to underscore the burden of the State to prove three additional elements, i.e., premeditation deliberation and willfulness as defined in State v. DiPaolo, 34 N.J. 279, 295 (1961), beyond a reasonable doubt, in order to elevate the crime from second degree to first degree. The presumption has no rule whatever in determining whether (1) there was in fact an intent to kill or inflict grave bodily harm (the minimum requirement of murder) or (2) the homicide was justifiable or excusable, or (3) the homicide was no greater than manslaughter. The State's burden of proving, beyond a reasonable doubt that the homicide was murder includes the burden of so proving that the killing was not accidental, justified or excusable, or manslaughter. The State must bear this burden throughout the entire trial and the presumption comes into play only after the State has satisfied this mandate. It must, of course, be remembered in connection with the foregoing discussion that we are not here dealing with a felony-murder."
>
> In Gardner, the trial court has instructed the jury, in part, that: "The act of illegal killing being established, the presumption is that the offense is murder in the second degree....When the accused seeks to reduce the charge to manslaughter he must establish it to the satisfaction of the jury for the law presumes all homicides to be committed with malice aforethought and thus amounting to murder until the contrary appears from the circumstances of alleviation, excuse, or justification...." Id. at 456. The charge seemed to be in accord with the earlier New Jersey cases on the presumption of malice. The Supreme Court found the charge to be reversable error--in fact plain error, --holding that the "mere proof of a homicide in New Jersey does not give rise to a presumption that it is murder in any degree although at common law any homicide was presumed to be murder. As noted, to constitute murder, the killing must be unlawful and malicious." (Id. at 457-458) See also, State v. Bess, 53 N.J. 10 (1968).

a further determination of whether the murder is of the first degree or of the second degree. This determination is made solely for the purpose of determining the character of punishment. The degrees of murder do not constitute separate and disrinct crimes, but merely grades of the same offense. "Murder in either of the statutory degrees is murder at common law." State v. Brown, 22 N.J. 405, 412 (1956). Under the statute, the degrees of murders are defined as follows:

> "Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree." (N.J.S. 2A:113-2)

First degree murder can thus be proved by the State (see State v. Gardner, supra) in either of several ways. The most important is that of "willful, deliberate and premeditated killing." This was defined by our Supreme Court in State v. DiPaolo, 34 N.J. 279, 295 (1961), as follows:

> "The statutory language is actually an inverse statement of the natural sequence of the required mental operations....As settled by judicial construction, the first element is premeditation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word 'deliberate' does not here mean 'willful' or 'intentional' as the word is frequently used in daily parlance. Rather it imports 'deliberation' and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally, the word 'willful' signifies an intentional execution of the plan to kill which had been conceived and deliberated upon....

> "The three mental operations we have just described are matters of fact. The judiciary cannot bar evidence which rationally bears upon the factual inquiry the Legislature has ordered. The capacity of an individual to premeditate to deliberate, or to will to execute a homicidal design, or any deficiency in that capacity, may bear upon the question whether he in fact did so act. Hence, evidence of any defect deficiency, trait, condition, or illness which rationally bears upon the question whether those mental operations did in fact occur must be accepted.
>
> "No specific period of time is required (to conceive the intent and carry it into execution deliberately and with premeditation) but if the time is sufficient to fully and clearly conceive the design to kill and purposely and deliberately execute it, the requirements of our statute are satisfied. State v. Pierce, 4 N.J. 252, 267-68 (1950). See also State v. Cordasco, 2 N.J. 189 (1949) accord State v. Coleman, 46 N.J. 16 (1965); State v. Agnew, 10 N.J.L.J. 165 (O. & T. 1887).

The second way in which first degree murder may be proved is through a second application of the felony-murder rule: the same intent to commit a felony which makes a killing murder also makes it first-degree murder.

Second degree murder is thus a residual category. Those murders not proven by the State to be of the first degree are second degree. N.J.S. 2A:113-2. State v. Gardner, supra.

Punishment for murder. Once the jury has determined whether the murder is in the first or second degree, the punishment of the offender is controlled by N.J.S. 2A:113-4:

> "Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.
>
> "Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years."

The jury's role in this determination is discussed in connection with Section 210.6.[4]

Manslaughter. The New Jersey statute does not define manslaughter. N.J.S. 2A:113-5 merely provides that:

> "Any person who commits the crime of manslaughter shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 10 years, or both."

Thus, manslaughter is defined as at common-law. That body of law divided manslaughters into two categories.

> "Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary, upon a sudden heart, or involuntary, but in the commission of some unlawful act." State v. Brown, 22 N.J. 405, 411 (1956).

Voluntary Manslaughter. Voluntary manslaughter is an intentional killing in which the malice which would otherwise exist is dissipated by a reasonable provocation, i.e., "a passion which effectively deprives the killer of the mastery of his understanding and which is acted upon before a time sufficient to permit reason to resume its sway has passed." State v. King, 37 N.J. 285, 300 (1962); State v. Guido, 40 N.J. 191, 209 (1963); State v. Fair, 45 N.J. 77, 96 (1965). This test is an objective one--it is not related to subjective feelings of the defendant alone. State v. McAllister, 41 N.J. 342, 352 (1964

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4. N.J.S. 2A:113-3 controls guilty pleas in murder cases.

> "In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment such plea is offered, it shall be disregarded, and the plea of not guilty entered, and jury, duly impaneled, shall try the case.
>
> "Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree."

This provision is discussed in connection with Section 210.6.

Involuntary Manslaughter. At common law, involuntary manslaughter is an unintentional homicide, committed without excuse and under circumstances not manifesting or implying malice.

> "The absence of an intent to kill or to inflict great bodily harm distinguishes involuntary manslaughter from voluntary manslaughter. It is distinguished from murder in that there is no malice, either express or implied...." Clark & Marshall, Crimes §10.12, pg. 710 (7th Ed. 1967)

The crime may take three forms. It may be committed through malfeasance which is the committing of an unintentional homicide in the doing of a criminal act not amounting to a felony, nor naturally tending to cause death or great bodily harm. This is the misdemeanor--manslaughter rule. See State v. Reitze, 86 N.J.L. 407 (Sup. Ct. 1914) Involuntary manslaughter may also be committed through misfeasance which is an unintentional killing by gross negligence in the doing of a lawful act. See State v. Blaine, 104 N.J.L. 325, 327-328 (E. & A. 1928); State v. Weiner, 41 N.J. 21 (1963) ("Negligence, to be criminal, must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to cause death.") Finally, the crime can be committed through nonfeasance, i.e., the unintentional killing of another by omission to perform a legal duty owing to him, under circumstances showing inexcusable negligence, or failure to exercise reasonable diligence. See State v. O'Brien, 32 N.J.L. 169 (Sup. Ct. 1867); State v. Ireland, 126 N.J.L. 444 (Sup. Ct. 1941) appeal dismissed 127 N.J.L. 558 (E. & A. 1942). See generally, Clark & Marshall, Crimes, §10.12, pp. 711-714 (7th Ed. 1967).

At present there are two "special homicide statutes in New Jersey:

> (1) "Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, is guilty of a misdemeanor...." (N.J.S. 2A:113-9)
>
> (2) "Any person, who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman,... uses any...means whatever, is guilty of a high misdemeanor. If, as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5,000 or by imprisonment for not more than 15 years, or both."

The Drafters of the Code believe such special statutes to be "archaic and unnecessary." They are eliminated from the Code "which is deliberately designed to deal with homicide by principles of general application." MPC Tentative Draft No. 9, pg. 28 (1959)

6. The reference to "causation" in Subsection (1) is defined in Section 2.03 which includes provisions for "transferred intent" which are particularly important to homicides. See State v. Zelichowski, 52 N.J. 377, 380 n. 2 (1968).

7. Other State Laws.

(a) California's Proposed Code (§1410) adopts this Section in its entirety. New York combines its abortion law with it:

> §125.00 Homicide defined.
>
> Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree.

Michigan's Proposed Code (§2001) retains degrees of murder and, therefore, reads somewhat differently:

> Sec. 2001. The following definitions are applicable in this chapter unless the context otherwise requires:
> (a) "Homicide" means conduct which causes the death of a person under circumstances constituting murder in the first or second degree, manslaughter, or criminally negligent homicide.

Section 210.2 Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping for felonious escape.

(2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

* * * *

§210.2 Commentary

1. This Section undertakes the major task of delineating the criminal homicides that may be denominated murder, with the specific result of establishing them as first-degree felonies and, subject to the further requirement of Section 210.6, the possibility of the death sentence if it is to be retained.

2. Purpose or Knowledge. The Code places criminal homicides committed purposely or knowingly in the murder category:

> "Subject to the mitigation based on provocation under Section 210.3(1)(b), on which we propose some relaxation in the rigor of prevailing law, we think it clear that homicides committed purposely or knowingly belong in this ultimate category. If the actor willingly or knowingly takes life, without substantial provocation (and, of course, without excuse or justification), we do not think it useful to attempt a further legal grading for purpose of sentence of imprisonment. The problem of capital punishment is dealt with separately in Section 210.6." (MPC Tentative Draft No. 9, pg. 28 (1959)).

Homicides committed purposely or knowingly would clearly fall into the murder category under existing law. As quoted previously, State v.

Gardner, 51 N.J. 444, at 458 (1968) holds that malice is established by proof that the defendant had:

> "(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not."

While this definition encompasses more than what would be purposely or knowingly taking life under the Code, it clearly encompasses at least that much.

3. Recklessness Manifesting Extreme Indifference. Intention or purpose to take life or cause grievous bodily harm is not, however, required to prove malice. A lesser culpability will suffice. This was described by Stephen and adopted by our Supreme Court as

> "knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused." (State v. Gardner, supra.)

The Code carries this basic judgment forward although in a somewhat more precise fashion:

> "Paragraph (1)(b) reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished for this purpose from homicides committed purposely or knowingly. Recklessness, as defined in Section 2.02, presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness should be assimilated to purpose or knowledge. The conception that the draft employs is that of extreme indifference to the value of human life. The significance of purpose or knowledge is that, cases of provocation apart, it demonstrates precisely such indifference. Whether recklessness is so extreme that it demonstrates similar indifference is not a question that, in our view, can be further

clarified; it must be left directly to the trier of the facts. If recklessness exists but is not so extreme, the homicide is manslaughter under Section 210.3(1)(a).

"The presumption of extreme recklessness when the actor is engaged in the commission of specified felonies, which is advanced as a reasonable substitute for the felony-murder rule of the existing law, is discussed later...

"Insofar as the [Code] includes within the murder category cases of homicide caused by extreme recklessness, though without purpose to kill or even injure, it reflects both the common law and much explicit statutory treatment usually cast in terms of conduct evidencing a 'depraved heart regardless of human life' or some similar words.

* * * *

"Other formulations have been advanced by the commentators. Professor Moreland would include as murder unintentional killing 'by an act so extremely dangerous and disregardful of the lives and safety of others as to be wantonly disregardful of such interests according to the standard of the conduct of a reasonable man under the circumstances.' Moreland, Law of Homicide, 309 (1952). Professor Perkins suggests that these cases, in fact all murders, involve a 'man-endangering state of mind.' Perkins on Criminal Law, 38-40 (1957). It has also been propsoed that the line could be drawn between killing 'unintentionally by the commission of an act which is utterly disregardful of the consequences of that act,' and 'unintentionally by the commission of an act which is recklessly disregardful of the consequences of that act.' Comment, 48 N.W.U.L. Rev. 198, 218 (1953). An Illinois statute distinguishes between situations which naturally tend to destroy human life and those which probably might cause such a consequence. Ill. Rev. Stat. c. 38, §363 (1951).

"Given the Code definition of recklessness, we think the point involved is adequately put by asking whether the recklessness 'demonstrates extreme indifference to the value of human life' and that it would, as we have said, be undesirable to attempt a more specific formulation."
(MPC Tentative Draft No. 9, pp. 29-32 (1959)).

4. Purpose to Injure. The Code definition of murder accords no express significance to an intent to cause grievous bodily harm. Such a purpose establishes malice under our existing law. (State v. Gardner, supra; State v. Williams, 29 N.J. 27, 36 (1959) and such a killing would generally constitute second-degree murder. The Drafters gave this reason for their position.

> "We think, however, that such cases are more satisfactorily judged by the standards of recklessness and extreme recklessness as to causing death. In making that determination the fact that the actor's purpose was to injure is, of course, a relevant consideration, as also are the nature and the gravity of the injury intended or foreseen." (MPC Tentative Draft No. 9, pp. 32-33 (1959)).

5. Felony-Murder. As previously was noted, the Code advances a new approach to the problem of homicides occurring in the course of the commission of felonies:

> "Such homicides will only constitute murder if they are committed purposely or knowingly, or recklessly where the recklessness demonstrates extreme indifference to the value of human life, subject, however, to a presumption of such recklessness if the actor is committing robbery, rape by force or its equivalent, rape by intimidation, arson, burglary, kidnaping or felonious escape. If the presumption of extreme recklessness is rebutted, the homicide may still be adjudged reckless, in which event it constitutes manslaughter, as do all reckless homicides, whether the actor's conduct is otherwise felonious or not. See Section 210.3. Beyond this, we submit that the felony-murder doctrine, as a basis for establishing the criminality of homicide, should be abandoned." (Ibid.)

New Jersey now has a broad felony-murder rule. N.J.S. 2A:113-1 provides as follows:

> "If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act...then such person so killing is guilty of murder."

Further, under N.J.S. 2A:113-2, "murder which is... committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, is murder in the first degree." Thus, the intent to commit the felony not only makes the killing murder but also makes it first degree murder. Judicial interpretation of the scope of the rule has varied considerably among the states. Some courts have made no effort to qualify its application. MPC Tentative Draft No. 9, p. 36 (1959). Others have responded enumerated felonies suffice. Additionally, the definition of those felonies used is the more restrictive common-law definition. State v. Butler, 27 N.J. 560 (1958); State v. Hauptmann, 115 N.J.L. 412 (E. & A. 1935); State v. Burrell, 120 N.J.L. 277 (E. & A. 1938); State v. Lucas, 30 N.J. 37 (1959). In many ways, New Jersey's cases broaden rather than restrict the rule. See State v. Hauptmann, supra (res gestae); State v. Carlino, 98 N.J.L. 48, 54 (Sup. Ct. 1922); State v. Turco, 99 N.J.L. 46, 102 (E. & A. 1923); State v. Smith, 32 N.J. 501, 521 (1960) (aiding and abetting); State v. Rosania, 33 N.J. 267, 270 (1960); State v. McKeiver, 89 N.J. Super. 52, 55 (L. Div. 1965); State v. Kress, 105 N.J. Super. 514, 525 (L. Div. 1969) (Killing by a police officer of a person who was either a bystander or was being used by defendant as a shield is felony-murder as to defendant. A questionable precedent.)

Some jurisdictions have, by statute, modified or abandoned the rule. The Code's drafters summarize these as follows:

> "The Wisconsin Code of 1955 deals with the felony-murder problem by the following Section entitled third-degree murder:
>
> > "Whoever in the course of committing or attempting to commit a felony causes the death of another human being as a natural and probable consequence of the commission of or attempt to

commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony. Wis. Stat. Ann. §940.03 (West 1958).

"In Ohio the rule was abandoned initially by judicial decision and later by statute. A statute adopted in 1835 read as follows:

'That if any person shall purposely[,] and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison or causing the same to be done, kill another,--every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death.'

"The statute omitted the comma shown in brackets. However, Curwen's Laws of Ohio in Force 1854, added the comma. The Supreme Court, relying on the comma, held that the word 'purposely' modified the following clauses thereby adding the requirement of purpose to kill for first degree felony-murder. Robbins v. State, 8 Ohio St. 131 (1857); cf. State v. Farmer, 156 Ohio St. 214, 102 N.E.2d (1951). Subsequently the legislature adopted this construction. Ohio Rev. Stat. §6808 (Derby 1879). Since second degree murder also requires a purpose to kill, it would seem that all unintentional homicides that would be felony-murders in common law jurisdictions are manslaughter in Ohio. Ohio Rev. Code Ann. §2901.05, 2901.01 (Page 1958); Note, The Felony Murder Rule in Ohio, 17 Ohio St. L. J. 130 (1956).

"The felony-murder rule was abolished in England in 1957. Section 1 of the English Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, provides that a person who 'kills another in the course or furtherance of some other offense' shall not be guilty of murder unless his act was done 'with the same malice aforethought as is required for a killing to amount to murder when not done in the course or furtherance of another offense.' See Regina v. Vickers, [1957] 2 Q.B. 664. However, Section 5 provides that murders (as qualified by Section 1) in the course or furtherance of theft (which includes burglary and robbery) will still be capital. In other words the fact that the homicide occurs in the course of the specified felonies does not make it murder but if it is otherwise murder, the fact that it occurs in the course of the specified felonies makes it punishable by death." (MPC Tentative Draft No. 9 pp. 35-36 (1959)).

The position taken in the Code is then justified as follows:

> "Despite the generality of the rule in the United States and the frequency with which it is deemed applicable to even accidental homicide, principled argument in its defense is hard to find. Such argument as can be made reduces in essence to the explanation Holmes gave in The Common Law (pp. 58-59) for finding the law 'intelligible as it stands,' though he carefully withheld his own endorsement:
>
> > '. . . if experience shows, or is deemed by the lawmaker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the law-maker may consistently treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends.'
>
> "We know no basis in experience for thinking that homicides which the evidence makes accidental happen disproportionately often in connection with specific felonies. Indeed, so far as we have been able to gauge the indication of available statistics, the number of homicides occurring in the commission of such crimes as robbery, rape and burglary is lower than might be thought.
>
> * * * *
>
> It should be added that we have no way of knowing how many of the homicides [resulting in felony-murder convictions] were committed purposely, knowingly or recklessly and how many were negligent or accidental. The vice of the felony-murder rule is precisely that it makes the issue immaterial. We do know, however, that in Ohio where, as has been said above, first degree murder requires proof of purpose to kill, notwithstanding the commission of a felony, letters from prosecuting attorneys reflect no suggestion that juries are disposed to accept unfounded claims of accident. One of our correspondents said explicitly: 'I can think of no case where a jury has accepted such a claim unless it was justified.'

> "We are, in any case, entirely clear that it is indefensible to use the sanctions that the law employs to deal with murder, unless there is at least a finding that the actor's conduct manifested an extreme indifference to the value of human life. The fact that the actor was engaged in a crime of the kind that is included in the usual first degree felony-murder enumeration or was an accomplice in such crime will frequently justify such a finding. The probability is high enough, in our view, to warrant the presumption of extreme indifference that the draft creates. But liability depends, as we believe it should, upon the crucial finding. The result may not differ often under such a formulation from that which would be reached under the present rule. But what is more important is that a conviction on this basis rests upon sound ground.
>
> "Given a finding of extreme indifference, we think the fact that the actor was engaged in the commission of another crime of the kind enumerated has further relevancy to the issue of capital punishment in a jurisdiction where sentence of death may be imposed. Section 210.6(3)(e) so provides."

Retention or modification of the felony-murder rule is a major decision for the Commission.

6. Sentencing Provisions. Under Subsection (2), murder is a felony of the first degree. This is followed by a bracketed portion which takes account of the fact that a person convicted of murder may be sentenced to death, as provided in Section 201.6. If the decision is made to retain the death penalty, the bracketed material should be retained. Punishment for a first-degree felony is determined by Section 6.06. Under existing law, first-degree murders are punished by death or by life imprisonment, as determined by the jury. N.J.S. 2A:113-2. See State v. Reynolds, 41 N.J. 163, 187 (1963). Second degree murder is punished by imprisonment for up to 30 years, sentencing being by the court.

7. Other State Laws.

(a) New York:

§125.25 Murder
"A person is guilty of murder when:

1. With intent to cause the death of another person, he causes the death of such person or a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit burglary, robbery, kidnapping, arson,rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(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 not 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.

Murder is a class A felony.

(b) Illinois:

§9--1. Murder

(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Penalty.

A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1--7(c)(1) of this Code. 1961, July 28, Laws 1961, p. 1983, §9--1.

(c) Wisconsin:

940.01 First-degree murder

(1) Whoever causes the death of another human being with intent to kill that person or another shall be sentenced to life imprisonment.

(2) In this chapter "intent to kill" means the mental purpose to take the life of another human being.

940.02 Second-degree murder

Whoever causes the death of another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life, may be imprisoned not less than 5 nor more than 25 years.

940.03 Third-degree murder

Whoever in the course of committing or attempting to commit a felony causes the death of another human being as a natural and probable consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony.

(d) Michigan:

[Murder in the First Degree]
Sec. 2005. (1) A person commits the crime of murder in the first degree if:

(a) With intent to cause the death of a person other than himself, he causes the death of that person or of another person; or

(b) Acting either alone or with one or more persons, he commits or attempts to commit arson in the first degree, burglary in the first or second degree, rape in the first degree, robbery in any degree, or sodomy in the first degree, and in the course of and in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, he, or another participant if there be any, causes the death of a person other than one of the participants.

(2) A person does not commit murder in the first degree under subsection (1)(a) or murder in the second degree under section 2006 if he acts under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under circumstances as he believes them to be. The burden of injecting the issue of extreme mental or emotional disturbance is on the defendant, but this

does not shift the burden of proof. This subsection does not apply to a prosecution for or preclude a conviction of manslaughter or any other lesser crime.

(3) A person does not commit murder in the first degree under subsection (1)(a) if his conduct consists of causing or aiding, without the use of duress or deception, another person to commit suicide. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(4) It is an affirmative defense to a charge of violating subparagraph 1(b) that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(c) 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 not ordinarily carried in public places by law-abiding persons; and

(d) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(e) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(5) Murder in the first degree is punishable by imprisonment not less than ten years to life.

[Murder in the Second Degree]

Sec. 2006. (1) A person commits the crime of murder in the second degree if:

(a) With intent to cause serious physical injury to a person other than himself, he causes the death of that person or of another person; or

(b) Under circumstances manifesting extreme indifference to the value of human life, he recklessly engages in conduct which creates a risk of death to a person other than himself, and thereby causes the death of another person.

(2) Murder in the second degree is a Class A felony.

(e) California:

Section 1415. Murder

(1) Except as provided in Section 1420, criminal homicide constitutes murder when:

(a) it is committed intentionally or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the defendant was engaged in or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit an armed robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary [while armed], aggravated kidnapping or felonious escape, in the furtherance of which he committed, or induced or aided another to commit, a dangerous act from which death resulted.

(2) The presumptions created by Subsection (1)(b) are presumptions affecting the burden of producing evidence.

(3) A person convicted or murder shall [may] be sentenced to life imprisonment [or death, as provided in Section 1416].

Section 210.3. Manslaughter.

(1) Criminal homicide constitutes manslaughter when:

(a) it is committed recklessly; or

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

(2) Manslaughter is a felony of the second degree.

* * * *

§210.3 Commentary

1. The existing New Jersey law on manslaughter was discussed previously in the Commentary to Section 210.1. Our statute merely defines the punishment for manslaughter (N.J.S. 2A:113-5) leaving its definition to the common law.

2. Departures from Prevailing Law in the Code. The Code reflects prevailing law and terminology insofar as it treats reckless homicide as manslaughter, relying on the definition of recklessness in Section 2.02. Thus, in State v. Weiner, 41 N.J. 21, 25-26 (1963), the Court held:

> "We must of course keep in mind that this is a criminal case. In a civil action for damages... * * * the test is ordinary negligence.... * * * But a criminal case is another matter. * * * [T]he test is not ordinary negligence--behavior of which men of the highest character are capable. Rather....:
>
> "'Negligence, to be criminal, must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to cause death.'
>
> See State v. Williams, 29 N.J. 27, 40 (1959); State v. Blaine, 104 N.J.L. 325, 327-328 (E. & A. 1928)."

The Code does not treat negligent homicides as manslaughter instead adopting the view that if they should be criminal at all they should

be treated as a separate category graded lower for sentence purposes. See Section 201.4 and MPC Tentative Draft No. 9, p. 40 (1959). The Code view is in accord with New Jersey law--negligence, as defined in the Code, would not suffice to find guilt because our cases require awareness of risk. See cases cited above and those cited in the Commentary to Section 2.02(2)(d). This is not the prevailing law elsewhere.

3. The second departure from existing law is abandonment of the misdemeanor-manslaughter rule:

> "There also is departure from existing norms in the abandonment of the conception that a homicide is ipso facto manslaughter if it resulted from an otherwise unlawful act, the misdemeanor-manslaughter analogue of the felony-murder rule. There must be a substantial and unjustifiable risk of homicide to establish either recklessness or negligence. See Section 2.02. Given such risk, the character of the actor's conduct is relevant, of course, in determining recklessness or negligence and its unlawfulness may warrant the conclusion that the risk created was unjustifiable; that is a matter to be dealt with by the courts in framing charges with respect to recklessness and negligence." (MPC Tentative Draft No. 9, pp. 40-41 (1959)).

See State v. Reitze, 86 N.J.L. 407 (Sup. Ct. 1914).

4. Finally, the class of cases which would otherwise be murder but may be reduced to manslaughter under the present law because the homicidal act occurred "in heat of passion" upon "adequate provocation" is substantially enlarged by paragraph (1)(b).

> "The [Code] reframes entirely the decisive question, asking whether the homicide was committed 'under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse' and adding that the 'reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.'

> "We thus treat on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance. We also introduce a larger element of subjectivity in the appraisal, though it is only the actor's 'situation' and 'the circumstances as he believes them to be,' not his scheme of moral values, that are thus to be considered. The ultimate test, however, is objective; there must be 'reasonable' explanation or excuse for the actor's disturbance. This is, we think, to state in fair and realistic terms the criteria by which men do and should appraise the mitigating import of mental or emotional distress when it is a factor in so grave a crime as homicide. The major difficulty with the criterion of premeditation and deliberation as a decisive test is, indeed, that taken seriously it would rest decision on the fact of the disturbance, without attention to its cause; that probably is why it is so generally nullified in practice." (MPC Tentative Draft No. 9, pg. 41 (1959)).

The existing New Jersey law on these matters is found in State v. King, 37 N.J. 285, 299 (1962); State v. Wynn, 21 N.J. 264 (1956); State v. Guido, 40 N.J. 191, 209 (1963); and State v. McAllister, 41 N.J. 342, 353 (1964). In State v. King, the issue was whether the trial court properly charged that words alone could not constitute sufficient provocation to reduce a killing to manslaughter:

> "Defendant, admitting that this charge is in the approved language of the common law and accepted and recognized as the law of this State, seeks to have this court expunge so much thereof as would result in making the proof of insulting and contemptuous behavior alone, unaccompanied by a physical contact, a sufficient ground to reduce the crime from murder to manslaughter.
>
> * * * *
>
> "The reduction of the homicide from murder to manslaughter by provocation is a two-stage proceeding in England, (1) the provocation must be so gross as to cause the ordinary reasonable man to lose his self control and to use violence with fatal results, and (2) the defendant must in fact have been deprived of his self control under the

stress of such provocation and must have committed the crime while so deprived....Coincident with the development of the law in England, the law was similarly developed in this State, although our cases have not expressed this principle in identical fashion. However, we have on a case by case basis established that to reduce the crime from murder to manslaughter it must appear that the killing occurred during the heat of a passion resulting from a reasonable provocation, a passion which effectively deprived the killer of the mastery of his understanding, a passion which was acted upon before a time sufficient to permit reason to resume its sway had passed. * * * In England, mere words, however insulting or reproachful, do not constitute provocation. Perkins, Criminal Law 49 (1957). The inadequacy of insulting words alone as productive of a passion sufficient to reduce the crime to manslaughter has also been upheld in this State. * * * In effect, the principles just enunciated represent the 'reasonable man' test of the English law, albeit in less precise fashion. The conclusion to be gleaned from a reading of our cases is that the English formalized test is a proper statement of our view of the law.

"We perceive no reason under the facts here present, including the nature of the alleged insulting remarks, the setting in which they were uttered, and the time lapse between the utterance thereof and the commission of the homicide, to consider whether the law as it now exists should be broadened.

"Additionally, defendant argues that in any event, if this court determines to adhere to the law as it now exists, the trial court committed error in its charge by failing to instruct the jury as to the effect of the testimony that Mickey 'pushed' into defendant on one occasion. It must be remembered that this incident occurred before defendant first left the tavern and some 15 to 20 minutes before the shooting. Also, the 'pushing' incident, when considered in context with the balance of the testimony and as impliedly admitted by Finn, was no more than a bump. This act of the deceased was insufficient to constitute a physical provocation, a 'sudden provocation, and a provocation sufficient to arouse the passions of an ordinary man beyond the power of his control.' Nor was it 'immediately followed by a counter blow which proved fatal.'

We find no error... (37 N.J. at 299-302)

In the Guido case, the Court considered the problem of defining the "suddenness" required by the formulation found in the King opinion:

> "Here defendant did not point to any specific event as the provocative one. Rather she claimed a course of ill treatment and oppression which closed in upon her so completely that her own death appeared for a while to be the only way out. Within that course of conduct were incidents which could have constituted provocation but none in fact had evoked a homicidal response when it occurred. As indicated above, the conventional statement would exclude a claim of manslaughter if the elapsed time were sufficient for a reasonable man to cool off. Thus, assuming defendant did experience a burst of emotion which overwhelmed her reason, the question is whether a course of conduct such as we have described can legally suffice as provocation.
>
> "Homicides are divided into categories to the end that the authorized punishment will reflect the magnitude of the wrong. In the nature of the subject, these categories cannot be perfectly designed, and so a particular set of facts falling within the definition of second-degree murder may be thought less culpable than a factual pattern within the category manslaughter. Nonetheless the sentence may match the offense and the offender, since although the maximum term for second-degree is 30 years and for manslaughter 10 years, N.J.S. 2A:113-4 and 5, a lesser sentence may be ordered upon a verdict in the higher degree.
>
> "Hence the question is not whether there are circumstances of mitigating quality but whether, in the light of our statutory scheme,[4] the factual pattern comes fairly within the concept of manslaughter. We think it does. It seems to us that a course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue, should permit a finding of provocation. In taking this view, we merely acknowledge the undoubted capacity of events to accumulate a detonating force, no different from that of a single blow or injury. The question is simply one of fact, whether the accused did, because of such prolonged oppression and the prospect of its continuance, experience a sudden episode of emotional distress which overwhelmed her reason, and whether, if she did, she killed because of it and before there had passed time reasonably sufficient for her emotions to yield to reason.

> "Upon this view, we believe the testimony required the issue of manslaughter to be sent to the jury." (40 N.J. at 209-210)

Footnote four, accompanying the abcve passage reads as follows:

> "4. We note that the Model Penal Code §210.3 proposes that criminal homicide constitute manslaughter when:
>
> "(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.
>
> "But, as the comments in Tentative Draft No. 9 (May 8, 1959) reveal, the quoted conception of manslaughter is part of another approach to homicide in which there is no provision for degrees of murder and in which manslaughter is designed to include part of what our Legislature has called murder in the second degree."

5. Intent to Injure. Under prevailing law, in most jurisdictions, one who causes death by simple battery is guilty of manslaughter, however, improbable the fatal result, since the battery is an unlawful act. See MPC Tentative Draft No. 9, p. 44, n. 1 (1959). This is rejected by the Code:

> "Under the [Code] such cases will be manslaughter only if the actor is held reckless, which requires that he be aware of a substantial risk of causing death; absent such awareness, they may be negligent homicide, though even then substantial homicidal risk is necessary.
>
> "The reason is the fundamental one that has already been discussed. Whether the matter is viewed in relation to the just condemnation of the actor's conduct or in relation to deterrence or correction, and all are relevant perspectives, neither the terminology nor the sanctions appropriate for homicide may fairly be applied when the fatality is thus fortuitous. The actor's conduct is a crime and should be dealt with as such, but as a crime defined in reference to the specific evil it portends, e.g., bodily injury. The inequality involved in treating homicides as manslaughter, when they are accidental in the sense supposed, serves no proper purpose of the

penal law and is abusive in itself." (Ibid.)

No New Jersey cases were found on the point. Indications from what cases there are lead to the conclusion that New Jersey's causation doctrines would lead to the same result as the Code. See State v. Reitze, 86 N.J.L. 407 (Sup. Ct. 1914); Estell v. State, 51 N.J.L. 182 (Sup. Ct. 1889).

6. Recklessness as to Justification. A special case of homicide which has presented difficulty under present grading standards arises when the homicidal act was believed to be necessary for some justifying purpose, such as self-defense, but the grounds for such belief are deemed to be unreasonable. Given an intent to kill or to injure seriously, reduction of the homicide to manslaughter depends on a finding of legally adequate provocation. See Introductory Note to Article III, page IC-2 and State v. Bess, 53 N.J. 10, 16 (1968); State v. Fair, 45 N.J. 77, 92-93 (1965); cf., State v. Williams, 29 N.J. 27, 39 (1959). Some courts have recognized the harshness and indefensibility of this rule. MPC Tentative Draft No. 9, p. 45 (1959).

> "The justification provisions of Article 3 of the Code have been so framed that when the actor believes the force that he employs is necessary for any of the purposes which may establish a justification, his belief affords him a defense although it is erroneous, subject to the qualification of Section 3.09(2) that when 'the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force,' he may be convicted of 'an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.' ...These provisions assure that homicides in self-defense, defense of others, defense of property, effectuation of arrest or crime prevention, where the actor's belief in the necessity rests on unreasonable grounds, must be approached as crimes of recklessness or negligence, if they are crimes at all. Such homicides, accordingly, are manslaughter at most under the draft--whether or not there was intent to kill.

> "It should be added, however, that such a mitigation only will occur where the actor's erroneous belief involved error of fact; error of penal law, such as the belief that deadly force is justifiable to prevent trespass, is declared to be immaterial by Section 3.09(1). In such cases the offense is murder if the actor kills purposely or knowingly, unless there is mental or emotional disturbance deemed to rest on reasonable explanation or excuse within the meaning of paragraph (1)(b) of this Section. It is, however, clear that fright or terror is an emotional disturbance contemplated by this formulation.... Absent such disturbance, we are not persuaded that an aberrational belief in the legitimacy of resort to deadly force should suffice to reduce to manslaughter, though we agree, of course, that motive is a relevant consideration if capital punishment is drawn in issue, as Section 201.6(4)(d) provides." (Ibid.)

7. Mental or Emotional Disturbance. The objective nature of the present test for provocation was emphasized by the decision in State v. McAllister, supra. In that case, the defendant argued that it was error for the trial court to refuse to charge that the defendant's severe mental and emotional defects could be considered on the question of mitigation from murder to manslaughter where the stimulus was less provoking than that necessary for a person not suffering from such defects:

> "The answer to defendant's argument as it relates to manslaughter, is found in our test for the mitigation of a homicide from murder to manslaughter. [After quoting the test from the King case, the court continued:]
>
> "The distinction between the reasons for the admissibility of evidence concerning a defendant's mental capacity in connection with a murder charge and the inadmissibility thereof in connection with a manslaughter charge are aptly expressed in Weihofen and Overholser, Mental Disorder Affecting the Degree of Crime, 56 Yale L. J. 959 (1947), at p. 969:
>
> "'The murder-manslaughter distinction has a wholly different history and is based on wholly different criteria from those involved in

> distinguishing degrees of murder. The former is of common law, the latter statutory; the former involves an objective test, the latter subjective. The provocation which at common law reduces a homicide to manslaughter must be such as is calculated to produce hot blood or passion in a reasonable man, an average man of ordinary self-control. Unless it meets this objective standard of reasonableness, the subjective fact of passion does not make the killing manslaughter. Such factors as mental abnormality or intoxication are therefore irrelevant, since the 'reasonable man' standard postulates a sane and sober man.'
>
> "Defendant's proffered thesis would make the criterion entirely a subjective test of the actual effect of the action of the deceased upon the mind of the particular defendant charged with his homicide. The application of the 'ordinary man' test as the objective standard against which to measure the subjective fact of passion, makes defendant's suggested individual subjective test inappropriate. Such a norm presupposes an 'ordinary man', which expression by its very nature contemplates a person without 'serious mental and emotional defects.' (41 N.J. at 252-254)

The Code rejects this:

> "Paragraph (1)(b) widens, ...the class of homicides which may be reduced from murder to manslaughter under existing law because they are committed when the actor suffers from extreme emotional disturbance, the 'heat of passion' of the common law.
>
> "In the first place, the [Code] does not confine the mitigation to cases of provocation in the ordinary meaning of the term, i.e., an injury, injustice or affront perpetrated by the deceased on the actor. While the traditional concept has been extended by some courts to cases where the actor was mistaken in believing that his victim was responsible for the provocative injury or even that the injury occurred, the extension hardly can go far enough to comprehend the actor provoked by A who strikes at B in blind distress. There may be difficulty also with the case where the actor is distressed by witnessing or learning of an injury to someone else or even by erroneous belief in its occurrence....Such excluded cases may, however, be among the strongest for the mitigation, since both the cause and the intensity of the actor's emotion may be relatively less indicative of depravity of character than a homicidal response to a blow....

By referring to 'extreme mental or emotional disturbance for which there is reasonable explanation or excuse' rather than to provocation, the [Code] avoids a merely arbitrary limitation on the nature of the antecedent circumstances that may justify a mitigation when the homicidal actor was in great distress.

"Secondly, the formulation sweeps away the rigid rules that have developed with respect to the sufficiency of particular types of provocation, such as the rule that words alone can never be enough. Given evidence of extreme mental or emotional disturbance, the question whether it is based on 'reasonable explanation or excuse' may be confronted, as we think it should be, in the light of all the circumstances in the case.

"Thirdly, and most importantly, the formulation seeks to qualify the rigorous objectivity of the prevailing law insofar as it judges the sufficiency of provocation by its effect on the reasonable man. To require, as the rule is sometimes stated, that the provocation be enough to make a reasonable man do as the defendant did is patently absurd; the reasonable man quite plainly does not kill....But even the correct and the more common statement of the rule, that the provocative circumstance must be sufficient to deprive a reasonable or an ordinary man of self-control, leaves much to be desired since it totally excludes any attention to the special situation of the actor. Not only is the actor's temperament deemed immaterial...or the fact that he was drunk, but, as the House of Lords has recently declared, 'infirmity of body or affliction of the mind' are both irrelevant....The same position holds respecting 'cooling time', which also must be judged by the time required for relief from tension by the hypothetical reasonable man.

* * * *

"Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the

> inference as to the actor's character that it is fair to draw upon the basis of his act. So too in such a situation...where lapse of time increased rather than diminished the extent of the outrage perpetrated on the actor, as he became aware that his disgrace was known, it was shocking in our view to hold this vital fact to be irrelevant.
>
> "We submit that the formulation in the [Code] affords sufficient flexibility to differentiate between those special factors in the actor's situation which should be deemed material for purposes of sentence and those which properly should be ignored. We say that there must be a 'reasonable explanation or excuse' for the extreme disturbance of the actor; and that the reasonableness of any explanation or excuse 'shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.' There will be room, of course, for interpretation of the breadth of meaning carried by the word 'situation', precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced." (MPC Tentative Draft No. 9, pp. 46-48 (1959)).

8. Grading of Manslaughter. The Code makes manslaughter a second-degree felony. (See Section 6.06) Under existing law, it is punishable by up to 10 years. N.J.S. 2A:113-5.

9. Statutory Definitions of Manslaughter. Most states either do not define manslaughter or they give a summary restatement of the common-law definition. MPC Tentative Draft No. 9, p. 42 (1959). Some states have redefined the crime and the Drafters summarized these provisions as follows:

> "Three states have embarked upon a more extensive statutory redefinition of the law of manslaughter. See La. Rev. Stats. §14:31 (West 1951); Tex. Pen. Code Art. 1201-1243 (Vernon 1948); Wis. Stats. Ann. §§940.05-.09 (1958).

"The Louisiana code reserves the manslaughter category for intentional homicides committed under provocation which would deprive an average person of self-control, and unintentional homicides where the actor was committing a felony other than certain serious felonies, resisting arrest, or committing a misdemeanor affecting the person. There is a separate crime called negligent homicide. Texas has a unique statute which defines homicide by negligence and then makes murder the catchall for other homicides which are neither justified nor excused. There are two degrees of negligent homicide: those committed in the performance of a lawful act, and those committed in the performance of a misdemeanor or a tort. Both require departure from the degree of care which would be exercised by a man of ordinary prudence, and an apparent danger of causing death.

"Wisconsin reserves the manslaughter category for unintentional homicides committed in the heat of passion; unnecessary homicides committed for a purpose that would justify, such as self-defense; and homicides committed under coercion of imminent death or necessity produced by pressure of natural physical forces (where many jurisdictions would recognize excuse or justification). Homicide by reckless conduct is a lesser offense, not denominated manslaughter as also are certain homicides caused by negligence. (Id. at 43-44).

10. Other State Codes.

(a) Michigan

Sec. 2010. (1) A person commits the crime of manslaughter if:

(a) He recklessly causes the death of another person; or

(b) He commits a criminal abortion, as defined in section 7015, on a female and thereby causes her death; or

(c) He intentionally causes or aids another person to commit suicide; or

(d) He causes the death of another person under the influence of extreme mental or emotional disturbance as defined in section 2005(2).

(2) Manslaughter is a Class B felony.

(b) New York:

§125.15 Manslaughter in the second degree

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person; or

2. He commits upon a female an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05; or

3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a class C felony.

§125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; or

3. He commits upon a female pregnant for more than twenty-four weeks an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05.

Manslaughter in the first degree is a class B felony.

(c) California: The Penal Code Revision Commission recommends adoption of Section 210.3.

(d) Wisconsin:

§940.05. Whoever causes the death of another human being under any of the following circumstances may be imprisoned not more than 10 years:

(1) Without intent to kill and while in the heat of passion; or

(2) Unnecessarily, in the exercise of his privilege of self-defense or defense of others or the privilege to prevent ot terminate the commission of a felony; or

(3) Because such person is coerced by threats made by someone other than his co-conspirator and which cause him reasonably to believe that his act is the only means of preventing imminent death to himself or another; or

(4) Because the pressure of natural physical forces causes such person reasonably to believe that his act is the only means of preventing imminent public disaster or imminent death to himself or another.

(e) Illinois:

§9--2. Voluntary Manslaughter

(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or
(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

(c) Penalty.

A person convicted of voluntary manslaughter shall be imprisoned in the penitentiary from one to 20 years.

§9--3. Involuntary Manslaughter and Reckless Homicide

(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.

(b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide.

(c) Penalty.

(1) A person convicted of involuntary manslaughter shall be imprisoned in the penitentiary from one to 10 years.

(2) A person convicted of reckless homicide shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or in the penitentiary from one to 5 years, or both fined and imprisoned.

Section 210.4. Negligent Homicide.

(1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) Negligent homicide is a felony of the third degree.

* * * *

§210.4 Commentary

1. Negligent Homicide Under Existing Law. This Section is addressed to homicides caused by negligence as distinguished from recklessness, the essence of the difference being that the reckless actor "consciously disregards" the homicidal risk created by his conduct while the negligent actor merely "should be aware" of the danger he creates. See Section 2.02(2) and the Commentary thereto at pages IB-12 to 18.

Inadvertance to risk is not a barrier to conviction of manslaughter in England and in most States and, in fact, if the risk is sufficiently great a conviction of murder is possible. MPC Tentative Draft No. 9, p. 50 (1959). It seems clear that, in New Jersey, this is not the case. The formulations of the culpability required both for involuntary manslaughter and under the death by automobile statute (N.J.S. 2A:113-9) demand awareness. As to involuntary manslaughter see: State v. Weiner, 41 N.J. 21, 25-26 (1963); State v. Williams, 29 N.J. 27 (1959); State v. Blaine, 104 N.J.L. 325 (E. & A. 1928). As to N.J.S. 2A:113-9 ("Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful and wanton disregard of the rights of safety or others is guilty of a misdemeanor....") As to death by automobile, see: State v. Oliver, 37 N.J. Super. 379 (App. Div. 1955); State v. Donley, 85 N.J. Super. 127 (App. Div. 1964);

In Re Lewis, 11 N.J. 217 (1953); State v. Diamond, 16 N.J. Super. 26 (App. Div. 1951); State v. Gooze, 14 N.J. Super. 277 (App. Div. 1951). The ambiguous formulations the statutes and cases in other jurisdictions are collected in MPC Tentative Draft No. 9, pp. 50-52 (1959).

2. The Policy of Liability. The Drafters of the Code recommend that negligence, i.e., culpability without awareness, suffice and that the crime be a felony in the third degree under Section 6.06:

> "It has been urged with strong conviction that inadvertent negligence is not a sufficient basis for a criminal conviction, both on the utilitarian ground that threatened sanctions cannot influence the inadvertent actor who, by hypothesis, does not perceive their relevancy...and on the ground that punishment should be reserved for cases that involve a moral fault which here is absent.... But as we have said in dealing with the problem generally, we are not persuaded that in condemning homicide by negligence the law is impotent to stimulate care that otherwise might not be taken or that an actor's failure to use his faculties may not be deemed a proper ground for condemnation.
>
> "The Code definition of negligence, applied to homicide, requires that the homicidal risk "be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct, the circumstances known to him, [involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation]. We think that justice is sufficiently safeguarded by insisting on substantial culpability or deviation; that these terms preclude the proper condemnation of inadvertent risk creation unless 'the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong.' They also serve and rightly we believe to convict conduct which is inadvertent as to risk only because the actor is insensitive to the interests and claims of other persons in society.
>
> "We recommend, therefore, that negligent homicide be made criminal. The distinction between advertence and inadvertence is, however, of such large importance generally in evaluating both the actor's conduct and his character...that we propose to treat such homicides as of a lower grade than manslaughter. In grading the offense as a third-

degree felony, the [Code] provides a sentence range considerably lower than prevailing law in states where manslaughter is now a single category but somewhat higher than the norm in states in which voluntary and involuntary manslaughter are distinguished for purposes of sentence. Given the ameliorative powers which the Code vests in the Court (e.g., Section 6.11, 7.01), we do not think the sanction is excessive.

"The problem has particular importance in relation to vehicular homicides, since it is inevitable that they will predominate in number.

* * * *

"In the United States, as well as elsewhere, it has been notoriously difficult to convict the negligent motorist of manslaughter. Facing the fact of jury nullification in such cases, many states have enacted special statutes dealing with vehicular homicide, reducing the grade of the offense and possible sentence on conviction below the levels otherwise obtaining for manslaughter by negligence.

* * * *

"While we appreciate the practical value of such special provisions for vehicular homicides, we think they are unnecessary as the Code is drawn. The separation from manslaughter is accomplished by treating negligent homicide as a distinct offense of lower grade. If the evidence does not make out a case of negligence, as negligence is defined in Section 2.02, we see no reason for creating liability for homicide, as distinguished from any traffic offense that is involved. If the evidence suffices to establish such a case, the offense is in our view too serious for proper treatment as a misdemeanor. And if conviction of a misdemenaor is all that is believed to be desirable or possible, a prosecution for reckless conduct under Section 201.11 or for a traffic offense should be sufficient. One of the objects of the [Code] is to avoid proliferation of offenses or distinctions with respect to sentence unsupported by principled rationale." (MPC Tentative Draft No. 9, pp. 52-54 (1959)).

3. Other State Codes

(a) New York:

§125.10 Criminally negligent homicide

A person is guilty of criminally negligent homicide

when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is a class E felony.

(b) California: The California Penal Code Revision Commission recommends adoption of Section 210.4.

(c) Michigan:

Sec. 2015. (1) A person commits the crime of criminally negligent homicide if:

(a) With criminal negligence he causes the death of another person, or

(b) He intentionally or recklessly causes the death of a person other than himself in the good faith but unreasonable belief that one or more grounds for justification exist under chapter 6.

(2) The jury may consider statutes regulating the actor's conduct in determining whether he is culpably negligent under subparagraph (1)(a).

(3) Criminally negligent homicide is a Class C felony.

(d) Wisconsin:

940.06 Homicide by reckless conduct

(1) Whoever causes the death of another human being by reckless conduct may be fined not more than $2,500 or imprisoned not more than 5 years or both.

(2) Reckless conduct consists of an act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another and a willingness to take known chances of perpetrating an injury. It is intended that this definition embraces all of the elements of what was heretofore known as gross negligence in the criminal law of Wisconsin.

940.07 Homicide resulting from negligent control of vicious animal

Whoever knowing the vicious propensities of any animal intentionally suffers it to go at large or keeps it without ordinary care, if such animal, while so at large or not confined, kills any human being who has taken all the precautions which the circumstances may permit to avoid such animal, may be fined not more than $2,500 or imprisoned not more than 5 years.

940.08 Homicide by negligent use of vehicle or weapon

(1) Whoever causes the death of another human being by a high degree of negligence in the operation or handling of a vehicle, firearm, airgun, or bow and arrow may be fined not more than $1,000 or imprisoned not more than one year in county jail or both.

(2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another.

940.09 Homicide by intoxicated user of vehicle or firearm

Whoever by the negligent operation or handling of a vehicle, firearm or airgun and while under the influence of an intoxicant causes the death of another may be fined not more than $2,500 or imrpisoned not more than 5 years or both. No person shall be convicted under this section except upon proof of causal negligence in addition to such operation or handling while under the influence of an intoxicant.

Section 210.5. Causing or Aiding Suicide.

(1) Causing Suicide as Criminal Homicide. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

(2) Aiding or Soliciting Suicide as an Independent Offense. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

* * * *

§210.5 Commentary

1. Attempted Suicide. The common law conceived of suicide as being a crime and this led to the treatment of attempted suicide as being a crime. See State v. Carney, 69 N.J.L. 478 (1903) (common-law crime). In 1957, our Legislature enacted a statute making attempted suicide a disorderly persons act violation. N.J.S. 2A:170-26.5. The Drafters recommend abolition of this rule. In their words,

> "This is not an area in which the penal law can be effective and that its intrusions in such tragedies is an abuse." (MPC Tentative Draft No. 9, p. 56 (1959).

The Commission should decide whether to recommend (1) adoption of the Code position, (2) retention of the present statute (with, perhaps, a prohibition against jail confinement) or (3) adoption of a replacement civil commitment-type proceeding. In the Secretary's opinion, the existing civil commitment statutes are sufficient for this purpose.

2. Causing Suicide. The purpose of Subsection (1) is to subject behavior which causes suicide to the penalty for murder or manslaughter, as the case may be. MPC Proposed Official Draft, p.127 (1962).

> "While such conduct has been held non-criminal upon the ground that suicide is not a crime, it also has been viewed as murder on the theory that the aider caused the death. Many states deal with the case specifically by statute, treating it as

> manslaughter or as a separate crime of comparable grade. In Switzerland the criminality of such behavior turns upon the presence of a selfish motive....
>
> "While there are attractions in this disposition in cases such as People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920); where a husband yielded to the urging of his incurably sick wife to provide her with the means of self-destruction, motives are too often mixed in situations of this kind to make the case compelling. We think, therefore, the wiser course is to maintain the prohibition and rely on mitigation in the sentence when the ground for it appears. The powers of the Court under the Code are adequate for such a purpose....[See Section 6.12] To facilitate such mitigation in cases where it is proper, we follow the legislation that treats the crime as a distinct offense, although the sanction we propose is the same as that for manslaughter. It should be added, however, that if a suicide is purposely caused by the force, duress or fraud of the actor, Subsection (1) of the Section is so framed that he may be found guilty of murder. This safeguard is essential, in our view, since it is obvious that flagrant murders may be perpetrated by deliberately forcing or coercing self-destruction." (MPC TEntative Draft No. 9, pp. 56-58 (1959)).

No New Jersey cases directly on point were found. State v. Meyers, 7 N.J. 465 (1951) was a case in which a defendant was convicted of first-degree murder for having forced his wife to jump into the Passaic River, where she drowned. The case was argued on a causation theory by the defense but does seem to be in accord with the Code.

3. Aiding or Soliciting Suicide. Under the Code, the special provision dealing with aiding or soliciting suicide (Subsection (2)) applies only if the actor goes no further than aid or solicitation; if he is himself the agent of the death, the crime is murder notwithstanding the consent or even the solicitation of the deceased. See Discussion of Subsection (1), supra. The Code is written so as to be clear that a causal relationship between the solicitation and the suicide appears. See MPC Proposed Final Draft pp. 127-128 (1962).

If the suicide occurs, or is attempted, under Subsection (2), the defendant is guilty of a felony of the second degree. In the opinion of the Drafters, proper cases warranting further reduction can be handled by sentence discretion or by guilt reduction under Section 6.12. MPC Tentative Draft No. 9, p. 58 (1962). In the case of a bare solicitation, the Code reduces guilt to a misdemeanor. If Section 5.02 (Solicitations) is not retained, the Commission should consider whether the solicitation provision in this Section should be eliminated.

4. Other State Codes

(a) Wisconsin:

940.12 Assisting suicide

Whoever with intent that another take his own life assists such person to commit suicide may be imprisoned not more than 10 years.

(b) Michigan:

[Promoting a Suicide Attempt]

Sec. 2120. (1) A person commits the crime of promoting a suicide attempt if he intentionally causes or aids another person to attempt suicide.

(2) A person who engages in conduct constituting the offense of promoting a suicide attempt may not be convicted of attempt to commit murder unless he causes or aids the suicide attempt by the use of duress or deception.

(3) Promoting a suicide attempt is a Class C felony.

(c) New York:

§120.30 Promoting a suicide attempt

A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide.

Promoting a suicide attempt is a class E felony.

Section 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

In the 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 Subsection (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel

is 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 Court, except that when the proceeding is conducted before the Court sitting with a jury, 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 is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) 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 shall 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.

Alternative formulation of Subsection (2):

(2) Determination by Court. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court, in accordance with Section 7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, 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 (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is 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 Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

(3) Aggravating Circumstances.

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) 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, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances.

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] 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.

(h) The youth of the defendant at the time of the crime.

* * * *

§210.6 Commentary

1. The Problem of Capital Punishment. Under existing law, the death penalty may be imposed in New Jersey for murder in the first degree (N.J.S. 2A:113-4), kidnapping for ransom (N.J.S. 2A:118-1), treason (N.J.S. 2A:148-1) and assault on certain high governmental officials (N.J.S. 2A:148-6).

The Drafters of the Code present the issue of retention or abolition of the death penalty in this manner.

> "The data with respect to the actual employment of the penalty of death is brought together in the monograph prepared by Professor Thosten Sellin, together with statistical material bearing on the relationship, if any, between capital punishment and homicide rates. See The Death Penalty, [Appendix to Tentative Draft No. 9 (1959)]. It is a fair appraisal of this data that judgment of death is executed in a trivial fraction of the cases in which it might legally be imposed; and that there is no quantitative evidence that either its availability or its execution has noticeable influence upon the frequency of murder. This conclusion is not surprising when it is remembered that murders are, upon the whole, either crimes of passion, in which a calculus of consequences has small psychological reality, or crimes of such depravity that the actor reveals himself as doubtfully within the reach of influences that might be especially inhibitory in the case of an ordinary man. There is, therefore, room for substantial doubt that any solid case can be maintained for the death penalty, as it is employed in the United States, as a deterrent to murder. The social need for grievous condemnation of the act can be met, as it is met in abolition states, without resorting to capital punishment.
>
> "Apart from the efficacy of the death penalty as a deterrent, its possible imposition has, we believe, a discernible and baneful effect on the administration of criminal justice. A trial where life is at stake becomes inevitably a morbid and sensational affair, fraught with risk that public sympathy will be aroused for the defendant without reference to guilt or innocence of the crime charged. In the rare cases where capital sentence is imposed, this unwholesome influence carries through the period preceding execution, reaching a climax when sentence is carried out.

"The special sentiment associated with judgment of death is reflected also in the courts, lending added weight to claims of error in the trial and multiplying and protracting the appellate processes, including post-conviction remedies developed during recent years. As astute and realistic an observer as Mr. Justice Jackson, observed to the Reporter shortly prior to his death that he opposed capital punishment because of its deleterious effects on the judicial process and stated tnat he would appear and urge the Institute to favor abolition.

"Beyond these considerations, it is obvious that capital punishment is the most difficult of sanctions to administer with even rough equality. A rigid legislative definition of capital murders has proved unworkable in practice, given the infinite variety of homicides and possible mitigating factors. A discretionary system thus becomes inevitable, with equally inevitable differences in judgment depending on the individuals involved and other accidents of time and place. Yet most dramatically when life is at stake, equality is, as it is generally felt to be, a most important element of justice.

"Finally, there is the point that erroneous convictions are inevitable and beyond correction in the light of newly discovered evidence when a capital sentence has been executed.

"These are the major arguments against capital punishment for murder. The arguments upon the other side may well begin with doubting the conclusiveness of the statistical data as determinative of the deterrent efficacy of the threat of death as punishment, given the weight that such a threat appears to have on introspection. Homicide rates per 100,000 of population may be too crude an instrument to reflect all the cases where the threat has been effective; and it may be regarded as sufficient to justify the means that some innocent lives may be preserved.

"Many would argue, further, that it is appropriate for a society to express its condemnation of murder by associating the offense with the highest sanction that the law can use, however much considerations of humanity should temper the exaction of the penalty when there are extenuations. And some communities may still have cause to fear the greater evil of resort to private violence as reprisal, if the law excludes the possibility that the murderer may lose his life. The problem of equality, to which

> attention has been drawn, will not appear to all to be dispositive, it may be thought enough that the capital penalty is merited in any case in which it actually is imposed.
>
> * * * *
>
> "Even if the Institute should take a position on the question and should favor abolition, it is clear that many jurisdictions will retain sentence of death for some forms of murder in the years to come. Hence, on any hypothesis, it is essential that the Model Code address itself to the problem presented in such jurisdictions. Two questions must be faced upon this score. (1) In what cases should capital punishment be possible? (2) What agency and what procedure should determine whether the sentence of death shall be imposed? Section 201.6 embodies the solutions that we recommend.

Ultimately, the Institute decided that it could not be influential on the resolution of the issue of retention or abolition and, for that reason, took no position on the issue. MPC Proposed Official Draft, p. (1) (1962).

2. About five years ago, a New Jersey Legislative Commission to Study Capital Punishment by a seven to two vote recommended retention of the death penalty. The majority and dissenting reports of that Commission follow this Commentary as an Appendix. See also Bedau, Death Sentences in New Jersey, 19 Rutgers L. Rev. (1964).

3. The following is a compilation of the statutes of the death penalty in other jurisdictions as of the time of this Draft:

(a) Thirty-six states, the District of Columbia and the Federal Government retain the death penalty. The States are:

Alabama
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
Florida
Kansas
Kentucky
Louisiana
Maryland
Massachusetts
Mississippi
Missouri
Montana
North Carolina
Ohio
Oklahoma
Pennsylvania
South Carolina
South Dakota
Tennessee
Texas

Georgia	Nebraska	Utah
Idaho	Nevada	Virginia
Illinois	New Hampshire	Washington
Indiana	New Jersey	Wyoming

(b) Five States retain it only in certain narrow situations:

New York: Maintains the death penalty for persons killing a peace officer acting in the line of duty and for convicts under life sentence who kill a guard or inmate.

Vermont: Retains the penalty for killing prison personnel or for an unrelated second offense.

New Mexico: Same as New York, and also for a second capital felony if it is committed after due deliberation.

Rhode Island and North Dakota: Only if the murder was committed while under a life sentence for murder.

(c) Nine States have no death penalty. These are:

Alaska	Maine	Oregon
Hawaii	Michigan	West Virginia
Iowa	Minnesota	Wisconsin

4. Capital Murder under New Jersey Law. Following the Pennsylvania Model, murder in New Jersey is divided into two degrees. This was done as part of an early reform to mitigate the death penalty. The aggravated form, first degree is murder which is:

> "Perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting...." N.J.S. 2A:113-2.

See State v. DiPaolo, 34 N.J. 279, 294 (1961); State v. Mansino, 77 N.J.L. 644 (E. & A. 1909). Only such murders are capital.

In addition to this grading, a second form of mitigation is written into our statute, i.e., jury discretion. Under N.J.S. 2A:113-4, the death penalty is only to be imposed if the jury does not recommend life imprisonment:

> "Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed."

See State v. Laws, 51 N.J. 494 (1968); State v. Forcella, 52 N.J. 263 (1968); State v. Reynolds, 41 N.J. 163 (1964).

Grading and discretion as instruments of mitigation in other jurisdictions are collected in MPC Tentative Draft No. 9, pp. 65-68 (1959).

5. The Problem of Grading and Discretion. The Drafters recommend replacement of the existing structure of grading and discretion with an entirely new set of standards:

> "The [Code] rejects the usual determinants of capital murder in the states where the degree division is employed. The reason is that we are thoroughly convinced that neither premeditation and deliberation nor the fact that the homicide occurred in the commission of a felony included in the typical enumeration provide criteria which include all homicides that arguably should be dealt with by the highest sanction or exclude all homicides that should not be. The delimitation therefore is unsatisfactory. It is at once too narrow and too broad.
>
> "It is too broad, as we have said, insofar as felony-murder includes unintentional homicides caused by conduct which creates small risk of fatal injury or which are even truly accidental. We do not think there is a case for a death sentence unless a homicide has been committed purposely or knowingly or with recklessness so great as to manifest extreme or callous indifference to the value of human life. On the other hand, the present delimitation is, in our view, too narrow insofar as it excludes cases of wholly wanton recklessness not involving an enumerated felony, such as derailing of a train

without purpose to kill; cases of homicide on momentary impulse without any reasonable cause, which may manifest exceptional depravity; and cases where the aggravation inheres mainly in the actor's background or situation, as when he is a convict or has a record of resort to violence.

"The inadequacy of the premeditation and deliberation test has been felt by the courts which almost universally have held that the criterion reduces to no more than a requirement of an intent to kill. Neither calmness in the formulation of a homicidal purpose nor a substantial time between resolution and action is generally held to be essential.

* * * *

"We would submit that the deliberation standard ought to exclude from the capital category cases where the homicide is committed under the influence of an extreme mental or emotional disturbance produced by causes which give rise to proper sympathy for the defendant. But insofar as this is the objective to be sought, it is accomplished by the [Code] in the provision for a reduction to manslaughter under Section 201.3(1)(b) in cases of 'extreme mental or emotional disturbance for which there is a reasonable explanation or excuses'--a method we consider better than re-definition of deliberation and a grading we consider right when such a finding may be made....Given such mental or emotional disturbance resting on such cause, we think it plain that the case for a mitigated sentence does not depend on a distinction between impulse and deliberation; the very fact of long internal struggle may be evidence that the actor's homicidal impulse was deeply aberrational, far more the product of extraordinary circumstances than a true reflection of the actor's normal character, as, for example, in the case of mercy killings, suicide pacts, many infanticides and cases where a provocation gains in its explosive power as the actor broods about his injury....And apart from such disturbance of the actor, we think it no less clear that some purely impulsive murders may present no extenuating circumstance. As Stephen put it long ago (3 History of the Criminal Law [1883] p. 94): 'As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. A, passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton

barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural as 'aforethought' in 'malice aforethought', but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word. The same point was made by the Home Office before the Royal Commission on Capital Punishment, as follows: 'Among the worst murders are some which are not premeditated, such as murders committed in connection with rape, or murders committed by criminals who are interrupted in some felonious enterprise and use violence without premeditation, but with a reckless disregard of the consequences to human life....There are also many murders where the killing is clearly intentional, unlawful and unaccompanied by any mitigating circumstances, but where there is no evidence to show whether there was or was not premeditation.' See Minutes of Evidence p. 12; Report pp. 174-175.

"For the foregoing reasons, we deem ourselves constrained to reject the determinants of first degree murder suggested by existing law. The question then is whether it is possible to construct a more satisfactory delineation of the class of murders to which the capital sanction ought to be confined insofar as it is used at all.

"We have attempted, first, to ask ourselves what we believe to be the simpler question: whether there are any cases in the murder category in which we are clear that a death sentence never ought to be imposed.

* * * *

"We agree...with the Royal Commission on Capital Punishment that 'there are not in fact two classes of murder but an infinite variety of offenses which shade off by degrees from the most atrocious to the most excusable' and that 'the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula....' Report p. 174. We think, however, that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed against each other when they are presented in a concrete case. Such circumstances are enumerated in Subsection (1)(e) and Subsections (3) and (4).

"Such an enumeration is desirable, we submit, if only as guide lines to the exercise of sound discretion by the court or jury, as the case may be.

* * * *

"Under Subsection (1)(a) the Court is directed to sentence for a first degree felony, without conducting any further proceeding, if it is satisfied that none of the aggravating circumstances was established by the evidence at the trial or will be established if a further proceeding on the issue of the death sentence should be initiated. Thus if no aggravating circumstance appears in the evidence and the prosecuting attorney does not propose to prove one in the subsequent proceeding, sentence of imprisonment will be imposed. The Court also is instructed by Subsection (1)(b) to impose sentence for a first degree felony if it is satisfied that the evidence at the trial established substantial mitigating circumstances which call for some leniency in the sentence; or, under (1)(c), if the defendant, with the consent of the prosecuting attorney, has been permitted by the Court to plead guilty to the charge as a first degree felony; or, under (1)(e), if the Court is satisfied that the defendant's physical or mental condition warrants the exercise of clemency; or, under (1)(f) if the Court considers that the evidence, though sufficient to support the verdict, does not foreclose all doubt respecting the defendant's guilt." (MPC Tentative Draft No. 9, pp. 68-73 (1959)).

6. The Court or Jury as the Organ of Discretion. If a sentence of imprisonment is not imposed by the Court under Subsection (1), a further proceeding must be initiated to determine whether or not sentence of death should be imposed. The Code went through extensive revision before the Institute decided to set forth alternative procedures under Subsection (2). The preferred alternative would place the issue in the hands of either the Court or the Court with a jury and would require that the Court and the jury both agree to the imposition of the death penalty. The bracketed alternative would place the issue solely in the hands of the Court. The factors in favor of Court, jury or concurrent decision were discussed by the Drafters as follows:

"If sentence of imprisonment is not imposed by the Court under Subsection (1), a further proceeding must be initiated to determine whether or not sentence of death should be imposed.

"As the Draft was submitted to the Advisory Committee, it followed prevailing law in vesting the discretionary judgment as to sentence in the jury, unless the trial of guilt was to the court, the defendant pleaded guilty or both the prosecution and defendant waive a jury on the sentence.

"There was much sentiment in the Advisory Committee for vesting the discretion in all cases in the Court, a preference supported by the Council by a vote of 9 to 6. The issue is presented to the Institute by the alternative formulations of Subsection (2).

"There are strong arguments in favor of the court, or even, as in Pennsylvania upon a guilty plea, for vesting the decision in a panel of the bench in multiple judge courts. Judicial determinations are likely to be less emotional or prejudiced than those of juries; the continuity of judicial personnel tends to promote equality in such decisions; the court might be persuaded to give reasons for determinations, further promoting their responsibility and rationality.

"The Reporter is persuaded nonetheless that it would be unwise to propose such a change in the prevailing practice. Many judges would inevitably resist such a new responsibility, as English judges have whenever the question has been posed. Many legislators would resist the change in the view that the decision of life and death ought to reflect community, not specialized judgment. These certain sources of objection ought not be invited without strong conviction that a great improvement is implicit in the change proposed. The Reporter does not hold such a conviction. As jury discretion operates in the United States, it produces, as Thorsten Sellin has shown, a relatively small proportion of capital conviction. Given the number of murders prosecuted annually, this bespeaks widespread reluctance to impose capital punishment, which further bespeaks a strict screening of the cases in which such a sentence has been sought. Moreover, there is a danger of unwarranted acquittals in cases that arouse a jury's sympathy, if the jury cannot eliminate all possibility that a death sentence will be imposed." (MPC Tentative Draft No. 9, pp. 73-74 (1959)).

Under our existing law, the decision is one which is left solely to the jury. N.J.S. 2A:113-4. But cf., State v. Laws, 51 N.J. 494 (1968).

7. The Separate Proceeding to Determine Sentence. The Code proposes establishment of a birfurcated trial on the issue of the death penalty. This is the case under both formulations of Subsection (2), i.e., both where the Court alone and the Court and the jury decide the issue. In New Jersey, the issue is determined as part of the jury's verdict (N.J.S. 2A:113-4) and evidence admissible solely on the issue of punishment is offered at trail with a limiting instruction. State v. Mount, 30 N.J. 195, 210 (1959); State v. Reynolds, 41 N.J. 163, 175 (1963). The Drafters strongly recommend a formal supplementary proceeding after trial to determine the capital punishment issue:

> "Systems providing for jury discretion with respect to capital punishment confront an inescapable dilemma if the jury is called upon to pass on sentence at the same time that it reaches a verdict as to guilt or innocence. Either the determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt.
>
> "There is no reason to insist upon a choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence. The obvious solution, proposed by the Royal Commission on Capital Punishment, is

> to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing sentence. See Section 7.07, Tentative Draft No. 2. It is the procedure that has long been followed in courts-martial in capital cases. It is the plan that California has recently adopted with results that we are told are eminently satisfactory. The system is adopted in the draft. Unless a capital sentence is precluded by Subsection (1), the Court is directed to conduct a separate proceeding after conviction of murder to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding will be before the Court alone or before the Court and jury, depending on which body has responsibility for making the determination, an issue we have previously noted and discussed." (MPC Tentative Draft No. 9, pp. 74-75 (1959)).

A subcommittee of the New Jersey Supreme Court's Advisory Committee on Criminal Procedure recently submitted a report on the Bifurcated Trial. That report is attached as an Appendix to this Section.

8. Background Evidence. Both formulations of Subsection (2) allow the admission of evidence relevant to sentence--so-called background evidence.

> "Whether the proceeding is before the Court or jury, the [Code] makes clear that 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 and mitigating circumstances enumerated in Sub-sections (3) and (4). It also provides that the exclusionary rules of evidence shall not apply. The prosecution thus may offer reports of investi-gation of the defendant, subject to a safeguard we believe to be important. The defendant's counsel should at least be granted a fair opportunity to rebut any hearsay statements, which would require

> only that he be seasonably informed of the factual contents and conclusions stated in any reports that will be used. This is the solution that the Code proposes for pre-sentence reports in general. See Section 7.07(5)...." (MPC Tentative Draft No. 9, pp. 75-76 (1959)).

Our law is in general accord. State v. Mount, supra; State v. Reynolds, supra. The Code does seem to change the existing practice in this State in allowing evidence to be admitted without regard to its legal admissibility.

9. Trial Jury or New Jury. Generally, the Code anticipates that the sentence hearing will be before the same jury that determined guilt.

> "If the proceeding is before a jury, it is contemplated that it ordinarily will be the jury that determined guilt; the evidence relating to the crime will thus not have to be repeated. We think, nowever, that it is desirable to recognize that good cause may be shown for empaneling a second jury and such power is conferred upon the Court, as in the California statute. There is an argument against such power in the Court which should be recognized, a juror's knowledge that he may not be in a position to control the verdict as to sentence may induce him to hold out against conviction, the elimination of this risk is, indeed, one of the virtues of the whole discretionary plan. If this is deemed, as it may be, a point entitled to controlling weignt, the provision for anotner jury ougnt to be eliminated. We think, however, that practice would so uniformly use the trial jury that the problem is largely theoretical." (MPC Tentative Draft No. 9, pg. 76 (1959)).

10. Argument on Death Penalty. The Code explicitly allows botn the prosecution and tne defense to make argument for and against sentence of death. "No effort is made to prescribe a limitation on tne arguments that may be made in the view that this is not a problem that will yield to any legislative formulation, the Court must be relied upon to assure that decencies prevail." Ibid. See State v. v. Reynolds, 41 N.J. 163 (1964).

11. Standard for Imposition of Capital Punishment. Our cases give no standard to the jury and this accords with the majority of cases in other states. See State v. Bunk, 4 N.J. 461 (1950), Petition of Ernst, 294 F.2d 556 (3 Cir. 1961); State v. Forcella, 52 N.J. 263 (1968); State v. Johnson, 34 N.J. 212 (1961). The Code would change this:

> "We think the jury should be told that it may not decide that sentence of death shall be imposed unless it finds that there was an aggravating circumstance specified in Subsection (3) and further that there were no substantial mitigating circumstances but that the judgment otherwise is witnin its discretion." (MPC Tentative Draft No. 9, pg. 77 (1959)).

12. Jury Instruction on Parole. The Code would allow the jury to be told about parole possibilities:

> "We also think it ought to be informed about the nature of the sentence of imprisonment that is the alternative to deatn, including the possibilities with respect to parole. The arguments in favor of such information are, of course, that a decision presupposes an awareness of alternatives; and that the jury necessarily will speculate about the matter if it is not so informed. The instruction will, moreover, give the Court an opportunity to put the matter in its proper light, not merely stating that there is a legal power to parole, but also noting that the parole system permits the retention as well as the release of the prisoner upon the basis of a reconsideration of his future by a competent tribunal years after the commission of the crime, when time and the correctional experience may have effected fundamental changes in his personality." (Id. at 77-78).

This is a change from existing law. Under State v. White, 27 N.J. 158 (1958), the jury is to be instructed that this issue is not of concern to them and they are to ignore it. See also State v. Laws, 50 N.J. 159, 186 (1967).

13. The Requirement of Jury Agreement and of Unanimity under Main Subsection (2). Existing New Jersey law is that the jury must be

unanimous on both guilt and on the death penalty. State v. Reynolds, 41 N.J. 163, 187 (1963) overruling State v. Bunk, 4 N.J. 461 (1950) and State v. Tune, 17 N.J. 100 (1954). The Code is in accord:

> "The [Code] proposes...that the jury be required to agree whether or not sentence of death should be imposed. This respects the tradition that a jury verdict in a criminal matter ought to be unanimous. It has the further virtue, however, which must have weighed impressively with many legislators, of reducing the danger that one or two jurors may hold out against conviction of the crime because of opposition to the punishment. The bifurcated hearing system may enlarge that risk, as we have previously noted, insofar as a different jury is at least theoretically possible. The risk ought not to be further enlarged. More than this, however, we believe that sentence of death is so enormous and exceptional a disposition in our time in the United States that it should not be passed upon the judgment of a jury unless the case is clear enough to produce unanimity.
>
> "If the jury is unable to agree, there is a question whether the Court should be empowered to submit the issue to a second jury, as the California statute provides. We think that one submission ought to be enough and that if there is disagreement the Court should terminate the matter by imposing sentence of imprisonment." (MPC Tentative Draft No. 9, pp. 78-79 (1959)).

14. The Alternative to the Death Penalty. The Code does not recommend authorization of a sentence greater than that for a felony of the first degree in the event the court and the jury reject the death penalty:

> "The final question on the [Code] concerns the alternative to a sentence of death upon a conviction of murder. In most states under prevailing law that alternative is stated as a flat sentence of imprisonment for life, though...release upon parole or commutation in such cases is not the exception but the rule....The strong tendency of present law is to make prisoners under sentence of life imprisonment eligible for parole and, while the median period of their retention varies from state to state, it was ten years in California in 1957....

In the federal system, life termers are eligible for parole after serving fifteen years (see 18 U.S.C. §4202). In states in which sentence of death has been abolished, there is parole eligibility, except perhaps in Michigan, arising after periods which range from 13-1/2 to 15, 20 or even 30 years....

"We believe that there is no necessity for the construction of a separate category of life sentence, different from the life maximum that otherwise is set for first degree felonies, carrying a minimum which the Court may fix at up to ten years. The reason is quite simply that we are entirely confident that there are murder cases in which a supervised release after ten years is quite appropriate, as there are cases where retention for much longer time or even for the prisoner's whole life must be envisaged. In keeping with the theory of the correctional provisions of the Code, we are content to leave that question to the Board of Parole, which will be influenced by the offender's crime as well as its appraisal of his character.

"The only argument against this course that must be weighed is that in cases that arouse strong feelings, the jury may be influenced in favor of death sentence by the knowledge that the prisoner may serve no longer than ten years. Against this, however, are the strong objections raised to longer minima in previous consideration of the Code's correctional provisions; the danger that a longer minimum will be employed in cases where it is unnecessary, as is now the case in many jurisdictions; and, finally, the special difficulty posed to the correctional authorities in dealing with the prisoner who is without incentive to improve. On balance, we believe the stronger case lies with foregoing any special form of sentence.

"We take the same position with respect to the alternative to be employed in a state that renounces the death sentence. Should it be thought essential, however, to differentiate between murder as a felony of first degree and murder carrying a flat life sentence, Section 201.6 can be readily adapted to this end. (Ibid.)

15. Other State Codes.

(a) California:

[Section 1416. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(1) When a defendant is found guilty of murder, the court shall impose a sentence of imprisonment for the term prescribed by Section 205(1) if the defendant was under the age of eighteen at the time of the commission of the crime, or if the murder did not fall into one or more of the categories listed in Subsection (2) of this section. In any case, the court, in its sole discretion may sentence the defendant to imprisonment if it feels that the death sentence is inappropriate.

(2) Death penalty. The death penalty may be imposed only if the murder falls into one or more of the following categories:

(a) murder of a peace officer acting in the performance of his duties or a person assisting a peace officer so acting; or

(b) murder by a convict while incarcerated under sentence of imprisonment for murder, or whose term for a felony in the first degree has been fixed at life imprisonment by the Adult Parole Authority; or

(c) murder for compensation or promised compensation.

(3) Determination by Court or by Court or Jury.

(a) Unless the court imposes life imprisonment under Subsection (1) of this section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced to life imprisonment or death. The proceeding shall be conducted before a jury unless the prosecuting attorney and the defendant, with the approval of the court, waive a jury. If there has been a jury trial on the issue of guilt, it shall be conducted before the court sitting with that jury or, if the court for good cause shown discharges that jury, with a new jury empaneled for the separate proceeding. Otherwise, it shall be conducted with a jury empaneled for that purpose.

(b) In the proceeding, evidence may be presented by either party as to any matter relevant to sentence, including, but not limited to, the nature and circumstances of the crime, defendant's character, background, history, and mental and physical condition. Evidence concerning parole

and pardon practices, policies and experience shall be inadmissible. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death. Such argument may include comment on the relevance of the death penalty as a deterrent of crime and the presence or absence of aggravating or mitigating factors. The court shall 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 or pardon, if the jury verdict is against sentence of death.

(c) After conclusion of the proceeding, the determination whether sentence of death shall be imposed shall be in the discretion of the court. When the proceeding is conducted before the court sitting with a jury, 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 is unable to agree upon a unanimous verdict, the court shall impose a sentence of life imprisonment.]

(b) New York:

§125.30 Murder; sentence

1. When a defendant has been convicted by a jury verdict of murder as defined in subdivision one or two of section 125.25, the court shall, as promptly as practicable, conduct a further proceeding, pursuant to section 125.35, in order to determine whether the defendant shall be sentenced to death in lieu of being sentenced to the term of imprisonment for a class A felony prescribed in section 70.00, if it is satisfied that:

(a) Either:

(i) the victim of the crime was a peace officer who was killed in the course of performing his official duties, or

(ii) at the time of the commission of the crime the defendant was confined in a state prison or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life,

or having escaped from such confinement or custody the defendant was in immediate flight therefrom; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime; and

(c) There are no substantial mitigating circumstances which render sentence of death unwarranted.

2. If the court conducts such a further proceeding with respect to a sentence, the jury verdict of murder recorded upon the minutes shall not be subject to jury reconsideration therein.

§125.35 Murder; proceeding to determine sentence; appeal

1. Any further proceeding authorized by section 125.30 with respect to a sentence for murder shall be conducted in the manner provided in this section.

2. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.

3. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

4. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the maximum and possible minimum terms of imprisonment and to the possible release on parole of a person sentenced to a term of imprisonment for a class A felony.

5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If

the jury report unanimous agreement on the imposition of the sentence of imprisonment, the court shall discharge the jury and shall impose such sentence. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence of imprisonment.

6. On an appeal by the defendant where the judgment is of death, the court of appeals, if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of imprisonment.

Report of the Commission Appointed to Study Capital Punishment Pursuant to Joint Resolution No. 7, P. L. 1964

Senate Joint Resolution No. 3, was introduced January 20, 1964 which would establish a commission to study capital punishment in the State of New Jersey, to be made up of nine members, three to be appointed by the President of the Senate, three by the Speaker of the General Assembly, and three by the Governor. This joint resolution was signed as Joint Resolution No. 7 by the Governor of the State of New Jersey on May 5, 1964. The Commission organized on June 1st of this year.

Work was immediately commenced on the gathering of facts and materials concerning capital punishment. The Commission received a large number of articles and reports from the American League to Abolish Capital Punishment. It also had the benefit of the hearings held before a Committee of the Assembly in 1957 and 1958. Moreover, it requested its staff, composed of Counsel to the Commission and a Research Assistant, to gather the most significant literature on the subject and on the issues contained within the subject so that as much as possible would be available to the Commission prior to the first public hearing. A bibliography, which is included in the Appendix to this Report, was prepared containing some 31 pages of references to the applicable literature. The literature was either read by members of the Commission or was briefed for the Commission. Throughout the period of the Commission's existence it received and reviewed reports which were prepared by its Counsel and literally thousands of pages of printed matter. Because many arguments and issues have been repetitively covered previously, the Commission decided that they need not be restated.

Public hearings were held on July 10, 1964 and July 24, 1964. Invitations to speak were extended to leading authorities throughout the country, including State Attorneys General, Wardens of well-known Institutions, the Director of the F.B.I., Police Officials, Criminologists, Religious Leaders, Sociologists, Judges, Prosecutors and a number of other persons generally interested in the retention or abolition of capital punishment. Newspaper articles advised the public of these hearings in advance and at the hearings themselves all persons present were advised that they would have the opportunity to speak and give their views. A total of 20 persons testified orally. In addition statements were submitted formally and informally, including letters, on both sides of the issue, from well over 100 persons. There have been printed the transcripts of the hearings, a number of statements and other relevant matter.

Specifically concerning New Jersey, there was a substantial amount of literature available, including reports going back to the mid-19th Century by other Commissions appointed to study the subject, a leading analysis on the make-up of those convicted of homicides in New Jersey, "Frankel 1000 Murderers", various analyses prepared by the New Jersey Parole Board, an article by Wolf analyzing Jury sentencing in capital cases, 1937 to 1961, an article by Hugo Bedau on the Abolition Program in New Jersey, contained in his 1964 anthology on "The Death Penalty in America" and an article by Mr. Bedau, over 150 pages in length, covering "Death Sentences in New Jersey, 1907-1960".

This New Jersey source of information was used in conjunction with the other literature on the subject of capital punishment throughout the United States and elsewhere in the world. The Commission had the benefit of the study of the Royal Commission appointed by Parliment, the Commission of the Canadian Parliament, and studies by committees and commissions of the States of Maryland, Pennsylvania, Ohio, Massachusetts and California. The Commission attempted to go beyond a mere analysis of statistical information concerning homicide rates and attempted to analyze capital punishment on many levels, including the religious, moral, penal, deterrent, protective, psychiatric, medical and sociological aspects of punishments for murder. Specifically as well, the Commission sought to make a judgment on the frequently claimed discrimination concerning the death penalty based upon legal counsel, race, wealth and intelligence level.

The Commission is convinced that it has fairly reviewed and diligently analyzed positions taken on each issue included within the larger subject of capital punishment. The issues themselves have been stated on many occasions as fully as possible. Each member of the Commission has considered the problem with care and has searched his conscience before coming to any conclusion.

Conclusion

At the present time New Jersey and the remainder of the Nation are suffering a greater incidence of crime than at any time for which records have been kept. All areas of crime are up substantially from the 1940's and the 1950's. While the rate of criminal homicides has not risen to the same extent as certain crimes involving property, it nonethe-less has not only numerically risen sharply, but is at its highest rate per 100,000 since the gang wars of the 1930's. The rate of aggravated assaults, very frequently with a deadly weapon, has risen far more sharply. The Commission can only conclude that the high number of aggravated assaults in any year creates a reservoir of potential criminal homicides, the only saving grace being better communication and better medical care.

The great increase of crime in this State has coincided with a greater tendency to emphasize the rehabilitation factor in criminology as against the punishment or retributive and deterrent aspects of criminology. The Commission cannot conclude that easing the lot of the murderer will cause less crime or fewer criminal homicides.

This Commission has an obligation to the people of the State of New Jersey. Our citizens deserve the maximum degree of protection from injury both to their persons and to their property. In case of doubt as to which method will create the most likely optimum of protection, this Commission is bound to retain the type of punishment which throughout history has proved to be the most severe.

As with any issue which touches the conscience and which involves both justice and mercy, as well as very significant religious aspects, there have been sharp conflicts in the opinions expressed both in the hearings before the Commission and in the literature examined by it. It seems clear that those who seek the abolition of capital punishment are concerned with the saving of the lives of those convicted of the crimes in question. Secondarily, they are concerned with the possible brutalizing effect of executions upon the populace as a whole. Yet most, if not all of those seeking abolition, would, the Commission is certain, retain the death penalty if they were satisfied that it would save innocent lives. One abolitionist witness thought that the saving of a single life would not be enough. The Commission, however, in its obligation to the people of this State, is not justified in gambling the life of a single citizen.

The Commission is convinced that capital punishment does deter some potential murderers from committing capital crimes. More particularly, it is believed that the deterrence is most significant in the area of felony murder and in the area of a truly premeditated crime. While the statistical information presently available does not indicate a significant difference in the homicide rates between abolition states and capital punishment states, even when adjoining, this statistical information was admittedly not restricted to capital crimes, did not include the incidence of felony murders, the relationship of aggravated assaults to homicides, or the relationship of Police woundings. Those presenting only raw homicide figures admitted that these were as yet the best available, and for the purpose of further analysis they would like to have available the additional information set forth above. On the other hand, those most intimately concerned with law enforcement gave evidence and their conclusions that capital punishment is a deterrent in some cases.

No punishment would be a deterrent for a crime of passion, or a crime committed by one who is insane. Those are not the persons who generally receive the death penalty. An examination of the crimes by the 14 persons presently awaiting execution in New Jersey, included at page 108A of the second hearing, makes it abundantly clear that this is so.

At this stage of our knowledge of the human mind and of its inter-action with our society, no one has yet been able to assign a definite reason for crime in each case, for rate of crime, for the proper punishment of crime, and for the deterrent effect of any particular type of punishment. In fact, it appears at the hearings that the very concept of punishment of crime was a matter for serious study.

It has at times been suggested that there is discrimination in the execution of persons based upon wealth, legal counsel, race and intellectual attainment. From all the information studied by the Commission so far as it affects the State of New Jersey, and from similar information found for a number of States which have made studies, the Commission believes that the intellectual attainment of persons sentenced to death and executed is a rough cross-section of that of the Prison population at large. This is not surprising since a large number of murderers have previously committed other criminal offenses. Mr. Bedau found in his recent article on death sentences in New Jersey, 1907-1960, that 78% of those sentenced to death whose record could be checked were found to have at least one prior conviction. There is presently awaiting execution in New Jersey a person previously convicted of another criminal homicide. Since the persons convicted of murder are similar in other ways to the prison population, it is not surprising that there are few wealthy men executed. There are also few wealthy men who commit murder in the course of a felony.

Insofar as legal counsel is concerned, it is true that nine out of the fourteen men presently awaiting execution in New Jersey were represented by assigned counsel. However, it is the decided opinion of the Commission that assigned counsel in capital cases in New Jersey are of the highest level that the Bar of this State has to offer. The Courts select assigned counsel in those cases with extreme care to assure the best defense and will select only the most competent counsel available.

The claim has also been made that there is discrimination in the execution of Negros. The most recent study on the question by Mr. Bedau, however, finds that race does not emerge as a statistically significant factor in the final disposition of death sentence in New Jersey.

It appears that witnesses for both retention and abolition were dissatisfied with the present penalty provision involving life imprisonment. The parole statutes of New Jersey permit a person sentenced to life imprisonment, including one whose death sentence is commuted, to be eligible for parole as early as 14 years, 8 months after sentence. The choice of penalties before a Jury in first degree murder cases therefore is that of death or imprisonment for as little as 14 years. The possibility of early parole for a murderer, the Commission believes, is rather well known by the public. It is the Commission's concept that the death penalty should be, and normally is, meted out only for the most heinous and aggravated type of murder, but there is a possibility of excessive use of the death penalty as long as a Jury is not given an adequate alternative for a somewhat less shocking crime. It is only by increasing the absolute meaning of life imprisonment that an adequate alternative could be presented. We therefore recommend that the Legislature give consideration to amending the laws concerning life imprisonment to provide that life imprisonment means imprisonment without the possibility of parole. If this requirement be considered unacceptable by the Legislature, we suggest as an alternative that the life imprisonment penalty be increased so that no one sentenced to life imprisonment will be eligible for parole for a period of at least 30 years, against which minimum time no credits of any kind would be permitted.

The recommendation on life imprisonment will in the first instance make more efficient the administration of justice in first degree murder cases. Moreover, we feel it also may provide a safe testing ground where the deterrent effect of the death penalty will not be lost while a true life sentence could become the standard penalty given by a Jury. If present society is as adamant against the death penalty as those seeking abolition claim, this certainly would be the case.

The Commission recommends the retention of capital punishment. It also recommends that, after the absolute life sentence provision is in effect for a period of time sufficient to create a body of facts and information, there be a thorough review of the subject of capital punishment to determine whether new conclusions are appropriate.

William F. Tompkins
Harold A. Price
Charles R. Erdman, Jr.
Adrian M. Foley, Jr.
John C. Giordano
William G. Van Note
William A. Wachenfeld

MINORITY REPORT

We cannot agree with our colleagues on the Commission to Study Capital Punishment that capital punishment should be retained in its present form and that life imprisonment should be made absolute without the possibility of parole.

After listening to the many witnesses who testified at the public hearings and reading much of the material which is available for study in relation to capital punishment, it is our conviction that a strengthened life imprisonment should be substituted for the sanction of capital punishment. Life imprisonment should mean that a minimum of thirty years is to be served before possibility of parole and that no convicted murderer should be paroled even then unless thorough psychiatric examinations prove that he is capable of returning to society.

It is our belief that there are two ways, at least, to approach the problem of capital punishment:

1. We may assume that minimal morality requires society to demonstrate some social need before it affirmatively takes the life of an individual by a premeditated, planned, official act.
2. We may assume that the death penalty is completely unrelated to morality, but should be imposed only if demonstrable benefit exceeds the detriment, if any be shown.

In relating to the first suggested analysis, it appears to us that of the various methods the criminal law utilizes to achieve control through punishment, the difference between the death penalty and life imprisonment can only be in deterrence. Certainly neither aims at reformation. Nor should incapacitation be considered. The state, in the case of life imprisonment, has the power to incarcerate the convict for his entire life. The percentage of crime in prisons or by escapees is negligible. The fact that the power to imprison for life may be negated by parole does not justify consideration. A man should not be put to death today because some official board may make a mistake eighteen or thirty years in the future. The experience with paroled murderers compares very favorably with experience with other parolees in terms of recidivism.

Furthermore, the men who need to be deterred most are the organized criminals. But Professor Sellin testified: "Defenders of the death penalty would probably feel that if anybody deserved this punishment, it will be the hired killer in organized crime. It's a well-established fact that such murderers enjoy almost complete immunity, that the instances in which even a conviction has been secured are extremely rare, and that deterrence plays no role in this connection. . . .

"As a matter of fact, the nature and frequency of murder has no connection with the death penalty but is dependent on social, political and economic conditions and the character of populations."

So, unless there is an appreciable demonstration that the death penalty is a more effective deterrent penalty than life, death is unwarranted under the first analysis. Retribution, of course, cannot be considered as a legitimate goal of criminal law unless satisfying such an impulse is necessary to prevent self-help—i.e., lynching. Sellin, in his testimony at the hearings, adequately demonstrates there is no such need in the United States. Furthermore, the imposition of death is more than retribution—few murderers have ever killed with such calculated coldness or with such forewarning to the victim with concommitant suffering through anticipation as occurs when the state executes a convicted murderer.

On the issue of deterrence, the difficulties of comparative statistics are well known. Nonetheless, the conclusion of the Royal Crown Commission in Great Britain, after years of study, that the incidence of murder in a particular jurisdiction depends upon something other than the death penalty is difficult to rebut. If the burden is placed upon persons desiring to impose the additional sanction—and it seems to us that only people not sentenced to death can contend that life imprisonment is worse—they fail on the empirical data.

Such a failure is consistent with common sense. It is the rare, perhaps non-existent, case where the potential killer would find the difference between the two significant if, before he acted, he seriously weighed the difference assuming his capture. Both are sufficiently severe to control, if either will, in such cases.

Actually, most killings are perpetrated under circumstances of pressure which preclude such rational evaluations. It could be argued that conditioning operates subconsciously to deter the would-be murderer. However, society's revulsion at the act is sufficiently demonstrated by life imprisonment. Contrary to what some exponents of capital punishment seem to believe, we are considering severe sanctions rather than giving the killer an accolade.

The major religious faiths oppose capital punishment and agree that a life term is more in accord with our Judeo-Christian tradition. Thus, Rabbi Freedman testified: "It seems to me that the general tenor of the Judeo-Christian temperament and its religious traditions is one which inherently considers the value of mercy, pity, peace and love, infinitely superior, infinitely more meaningful and more lasting in terms of mankind's development."

If we consider the second analysis, that the death penalty is completely unrelated to morality but should be imposed only if demonstrable benefit exceeds the detriment, it appears to us that we should reach the same conclusions that are found under the first analysis.

Even if we were to assume either that: (1) deterrence were proved; or (2) that the question of deterrence could not be definitively answered and the burden were upon people desiring the abolition of capital punishment—i.e., a change of the legal status quo, death would still be undesirable if disadvantages outweigh supposed advantages. A number of disadvantages seem apparent:

(1) The use of "jury discretion" in determining who receives the death penalty means that we have no identifiable standards for choosing which murderers will be put to death. The choice of the few who ultimately are executed depends upon such possible vagaries as the ability of the lawyer, the trial tactics (i.e., whether he is after an acquittal or is trying only to avoid the death penalty), the predilections of the jury members, the race and wealth of the defendant, the way the mass media have treated the crime, and many others. Such an irrational method of choice regarding the infliction of death has little to commend it.

(2) As indicated above, the issue of punishment may well overshadow the question of guilt at the trial. The focusing of emotions in capital cases makes it difficult to obtain a climate of calm deliberation and dignity essential to judicial determination and makes error a likelihood.

(3) The death penalty necessarily leads to reversals, abuse of appeal and post-conviction process and disrespect for the law and the Courts. Appellate Courts, by the nature of the sanction, must resolve doubtful questions in favor of the condemned man; they must allow continuing resort to legal process as long, at least, as arguments advanced are not frivolous; they must use a disproportionate amount of valuable and and expensive time in deciding such issues. In this respect, the courts represent accurately society's ambivalence to the penalty. The result is the anomaly of a Chessman or a Smith, the current problem in New Jersey.

(4) Although less obvious, the English experience demonstrated that the death penalty made the populace callous. The same effect is avoided in degree, at least, by limiting its imposition and the secretiveness of its application. However, there is no reason to believe that the execution does not have serious emotional effects upon people associated with it.

(5) The death penalty is not a proven deterrent. Thus, Table XVI on page 293 of Sutherland's, "Principles of Criminology," clearly show "that the states which have abolished the death penalty generally have slightly lower homicide rates than the adjoining states which have retained the death penalty."

Also, as Austin MacCormack pointed out: "How could anybody expect deterrence with as few executions as we have today? For the last three years in the United States we have executed 56 [1960], 42 [1961], 47 [1962]". In 1963 it was 21.

(6) We believe a strengthened "life term" in place of the death penalty will provide equity for all segments of our society. Whereas the professional killer has least to fear from the death penalty, the poor and the illiterate have most to fear. In the pamphlet titled "37 Questions on Capital Punishment" we may read: "Since 1907 there have been over 7000 homicides in New Jersey of which 40% resulted in some sort of conviction. In 1960 there were 164 murders and non-negligent manslaughters in the State; and in 1961, there were 1953. However from 1956 through 1962 there were but two executions, and since 1907, only 243 persons have been sentenced to death. Thus only one murderer is sentenced to death for every 30 murders. 160 were finally executed since the electric chair was installed, [in 1907] and most of them were ignorant and uneducated, of average or inferior mentality, emotionally unstable, poor and unskilled. Many were immigrants and 33% were Negroes. No woman has been executed since 1867, although two have been sentenced to death in recent decades . . ."

(7) We have asked what does society gain by the death of another human being? His destruction places his potential talents beyond society's use. This seems wasteful. Regarding the danger of such a criminal taking another life since he may be paroled after twenty-five or thirty years, there is the wise judgment of Professor Sellin: "Prisoners serving life sentences for murder do not constitute a special threat to the safety of other prisoners, or to the prison staff. They are, as a rule, among the best-behaved prisoners and if paroled, they are least likely to violate parole by the commission of a new crime. In the few cases where such a violation occurs, the crime is usually not a very serious one. A repeated homicide is almost unheard of. It does occasionally occur, and publicity about it may sometimes fool the reader. In the last several decades, for instance, only one case occurred in Pennsylvania, where a man convicted and sentenced to death for murder received a commutation for life, was later paroled and again convicted of murder in the first degree. However, in neither case did he actually murder anybody. He participated unarmed in a robbery during which a person was killed, and this brought him his first conviction. After parole, under similar circumstances, he again took part in a robbery. Prisoners on parole who commit murder, and there are some, have usually been serving sentences for burglary, robbery, or other offenses."

If all, or a substantial number of the above disadvantages are accurate, any supposed advantage is outweighed.

It is noted that the death penalty has undergone an evolution throughout history in a continuous narrowing of its use. From the imposition of the death penalty upon a group of persons, many of whom were in no way connected with the act of murder, the death penalty where in use has been generally limited to those associated with the act of taking another's life. A further step in the evolution was

demonstrated by the limitation of the use of the sanction of capital punishment only in certain very heinous murders. A great many countries in Western Europe and a number of states within this country have abolished its use even in those limited areas.

The following appears from a summary of History of the Death Penalty in New Jersey, prepared by the Commission Counsel:

> "From 1796 until 1907 the death penalty in New Jersey consisted of hanging. (Paterson's Laws, Act of March 18, 1796). In 1906, to take effect in 1907, electrocution was substituted (L. 1906, Ch. 79, now N.J.S. 2A:165). The first execution took place under the new law on December 11, 1907. Since then some 243 execution sentences received have resulted in 160 electrocutions, 65 commutations, 4 deaths pending execution, and 14 in prison awaiting results of appeals (Ashby report, June 2, 1964). 66% thus were executed.
>
> "All death sentences and executions during the period from 1907 have resulted from murder convictions. Murder, however, is only one of four capital crimes in New Jersey. The others are treason (N.J.S. 2A:148–1); since 1902 assault on high executive officials of a government (N.J.S. 2A:148–6); since 1933, Kidnapping for ransom (N.J.S. 2A:118–1).
>
> "Murder has, since 1796, consisted of two kinds of killing: (a) willful, deliberate and premeditated killing and (b) felony murder, which is any killing committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery and sodomy (N.J.S. 2A:113–2). Both types of murder in 1839 were declared to be murder in the first degree and punishable by death. (P.L. 1839, p. 147). The felony of kidnapping was not added to the felony category in felony murders until 1952. No one has been sentenced to death for felony murder in arson or kidnapping; well over 90% of the felony murders where death was the sentence resulted from burglary or robbery. Of the 14 presently under sentence of death, 12 or possibly 13 were guilty of murder while commiting a felony. Of some 232 murderers in the recent New Jersey study by Bedau sentenced in the first instance to death, 105 had committed felony murder, 93 non-felony murder, and 34 were unknown. Thus those at present under sentence of death are much more heavily weighted toward felony murder, generally considered an aggravated offense.
>
> "Until 1916 New Jersey was a mandatory death penalty state, but in that year, over the veto of the Governor, the legislature modified the penalty for first degree murder to be death unless the jury at the rendering of the verdict should recommend imprisonment at hard labor for life. (L. 1916, Ch. 270, p. 576). In 1919

because of certain technical difficulties the law was modified and clarified as well as adding that in the event of the jury recommending life, that penalty and no greater would be imposed. (L. 1919, Ch. 134, p. 303) (N.J.S. 2A:113–4). Kidnapping for ransom also bears a discretionary death penalty. (N.J.S. 2A:167–1). Treason maintains its mandatory death penalty, (N.J.S. 2A:148–1)."

Perhaps this evolution is best demonstrated by a listing of the seven major trends which are leading to a *de facto* abolition of the death penalty:

"Hartung in 'Trends in the Use of Capital Punishment,' Annals (1952), p. 8, lists some seven major trends:

1. There has been a trend to abolish it completely.
2. There has been a tendency to reduce the number of capital offenses. In England in 1780 there were 350 capital crimes. Today in the United States there are 7.
3. There has been a tendency to make the death penalty permissive rather than mandatory. In 1918, 12 states had mandatory death penalties, in 1952 there was only 1.
4. There has been a trend to reduce the number of executions. In the early 1930's they averaged about 170 a year. In 1962 there were 47.
5. There is a tendency toward selective enforcement, biased against Negroes, the poor and less educated men. As Lawes wrote in 'Twenty Thousand Years in Sing Sing' (1932), p. 302 of the 150 he escorted to the death chamber the prisoners were all alike in one respect, 'All were poor, and most of them friendless.'
6. There has been a trend away from capital punishing in the presence of the public; public executions existed in several American states until the 1930's.
7. There has been a trend toward relatively swift and painless methods of execution. Those who seek abolition spare no erudition when describing past barbaric customers of inflicting pain and destroying the body. Some of these can be found in a leading abolition book, 'Reflections on Hanging' by Koestler (1957)."

It is our conclusion that the State of New Jersey, through its legislative representatives, should take the following actions:

1. The abolition of capital punishment by the removal of that sanction from the statutes listed in the previous summary History of the Death Penalty in New Jersey;

2. That there be a substitution in those statutes of a strengthened life imprisonment sanction for an absolute term of not less than thirty years; and
3. If the legislative representatives have not been able to take the recommended action within the next succeeding legislative year, that a referendum concerning the abolition of capital punishment be submitted to the people of New Jersey.

MONSIGNOR SALVATORE J. ADAMO
MALCOLM D. TALBOTT

REPORT OF THE SUPREME COURT'S

SUBCOMMITTEE ON BIFURCATED TRIALS IN MURDER CASES

OF THE

COMMITTEE ON CRIMINAL PROCEDURE

The Committee was requested to study the subject of bifurcated trial procedure in murder cases in considerable depth and to ascertain how in fact the procedure is operating, and its practical problems and advantages in those jurisdictions which have already adopted it.

The subject of bifurcated trials was discussed in State v. Mount, 30 N.J. 195 (1959). Justice Jacobs speaking for the majority said:

> "The ***indicate general agreement that such practice of having a separate proceeding is best calculated to protect the interests of both the state and the defendant, but further legislation would seemingly be required to enable its adoption in New Jersey." At p. 218.

Thereafter this subject received the court's attention in State v. Laws and State v. Washington, 51 N.J. 494 (1968).

Justice Jacobs writing for the majority said:

> "Whether bifurcation should be adopted for the future is something which need not be dwelt upon here, for the subject patently calls for thorough study including examination of the actual experiences to date in the several states which have such proceedings. The results of such study and examination will undoubtedly warrant presentation in regular course at a forthcoming judicial conference."

Justice Proctor in a concurring opinion noted that:

> "Although I see much to commend the adoption of such a procedure [bifurcated trial] for this State, I would reserve decision on the matter. In my opinion, such a drastic innovation is not a fit subject for adoption in the decision of an appeal, but rather should be adopted, if at all, as a formal rule of law after thorough deliberation outside the context of a specific case. This deliberation should include consideration whether legislation would be needed to effect the change. Accordingly, I request that we place the question on the agenda of the next judicial conference."

Justice Francis in his dissent urged that the bifurcated trial practice in capital cases be adopted commencing with Laws and Washington, supra.

Subsequent to Laws and Washington, Chief Justice Weintraub in State v. Forcella, 52 N.J. 263,(1968) observed that:

> "A few States use the bifurcated trial, so that the subject of punishment may be heard after the jury has decided upon guilt. Some defendants may well fare better under that plan. But if there were a separate hearing on punishment, the one-way street we now have would likely be opened to the State too, and for many defendants that would be devastating. We have serious doubts as to whether the bifurcated trial would not worsen the lot of defendants as a group, and for that reason, wholly apart from the question whether our statute is so phrased as to permit bifurcation, we have been reluctant to act until some hard facts are available. If the prosecutor were now free to offer everything relevant to punishment at the trial of guilt, defendants might well gain from bifurcation, but, as we have said, that is not our scene, and it is in the light of what we have that we hesitate to change without some clear evidence that the bifurcated trial would be an improvement here." p. 289

The Committee has met and the following material was furnished to each of the members:

1. State statutes relating to bifurcated trials (California, Connecticut, Pennsylvania and New York)
2. Model Charges (California)
3. American Law Institute Model Penal Code, Sec. 201.6 and Sec. 210.6
4. The Two-Trial System in Capital Cases, 39 N.Y.U. L. Rev. 50 (1964)
5. The California Penalty Trial, 52 Calif. L.R. 386 (1964)
6. Amicus curiae brief in Frady v. U.S.

As pointed out by Justice Francis in his dissenting opinion in Laws, there are variations in the procedural aspects of the penalty stage of the trial in the four States which have adopted the bifurcated trial procedure. (Cal. Conn. New York, Penn.)

CALIFORNIA

Ralph N. Kleps, Administrative Director of the California Courts, advised that his office does not have any statistical study concerning the experiences of bifurcated trials in murder cases in California nor did he have sufficient information as to express an opinion concerning the subject.

It appears that the lack of any information available from the Administrative office is due to the fact that legislation pertaining to dual trials did not have "much to do" with the judicial council. In other words the statutory enactments in California were legislatively conceived and the Judiciary had little or nothing to do with it.

Judge William B. Keene, Presiding Judge, Criminal Division, Superior Court, Los Angeles, Cal. stated that his experience has been "good" with bifurcated trials. Under the California Code there could be a trifurcated trial, (1) guilt, (2) sanity and (3) penalty.

In California a defendant is permitted to introduce psychiatric and like testimony as to defendant's alleged "diminished capacity". As a result of the nature of the guilt trial there is very little to be added to the trial before the same jury when the penalty issue is presented. Therefore the penalty hearing is a very short proceeding.

Judge Keene stated that the Sirhan trial was a good example of the manner in which a case is tried as to guilt and then penalty.

The Judge also said that in its inception the bifurcated trial practice was bothersome but that it has worked out through experience. It is interesting to note that Judge Keene was a Prosecutor as well as defense counsel before becoming a Judge. As Prosecutor he preferred trying the entire case at the same time, but as defense counsel he preferred the bifurcated trial. He offered the opinion that a survey of the Judges in California would disclose a recommendation in favor of the bifurcated trial in murder cases.

Judge Folger Emerson, Presiding Criminal Judge of the Superior Court at Oakland, California was Prosecutor for 20 years before becoming a Judge. As a Prosecutor he did not "care for" the bifurcated trial procedure. He had no firm opinion as to the advantages or disadvantages of a split verdict trial. He did express an opinion that defendants like the bifurcated trial and that prosecutors do not like it. His personal opinion is that it

does not make any difference whether there is one trial or a bifurcated trial. We also discussed the possible trifucated trial where the same jury would determine (1) guilt (diminished capacity principle admissible), (2) not guilty as a result of insanity and (3) punishment.

CONNECTICUT

Justice John P. Cotter is the Chief Court Administrator of the Connecticut Supreme Court.

The bifurcated trial in murder cases has been in effect in Connecticut for a number of years. There is no statistical or formal study information available on the subject of bifurcated trials. The Committee did receive a memorandum of the State's Attorney for Hartford County who has prosecuted "several" first degree murder cases. His memorandums refer to the Connecticut statutes and then observes that:

> "The practice adopted in this State in murder penalty trials has been that the State's attorney merely requests that the evidence heard by the jury concerning the facts of the murder be made a part of the trial regarding penalty and then by agreement he offers the defendant's prior record. The defendant then offers evidence of the background of the defendant which has been treated as similar to a presentence report, that is, hearsay, opinions and other material not strictly admissible has been received on that issue. This practice has been a modification of the explicit statutory provisions of Section 1045A, Penal Law Book 39, McKinney's New York Statutes. That statute explicitly waives the rules of evidence except relevancy for penalty trials. However, that portion of the New York statutes allowing consideration of parole possibility has not been followed by those judges giving charges in Connecticut."

In our state the question of a jury considering the effect of parole has been answered in State v. White, 27 N.J. 158 (1958), and State v. Laws and Washington, 52 N.J. 263, (1968).

NEW YORK

Richard Denzer, who is Executive Director of the Temporary Commission on the Revision of Penal Law in New York stated that bifurcated trials are not operating at all with the virtual abolition of capital punishment in New York, with the exception of the killing of a peace officer or a killing in prison or attempt to escape by a lifer in prison. The effective date of the dual system was 1963. In 1965 the virtual abolition of capital punishment permitted only one year experience as to bifurcated trials generally, and this is too short a time to arrive at any conclusion as to the pros and cons of such procedure. From information gathered from various sources Mr. Denzer said that the defendants through their attorneys complained that the separate trial as to penalty is prejudicial to the defendant because it permits too much background information against him. He related a conversation he had with an Assistant D.A. who informed him that as a result of a dual trial there are more death verdicts than the one trial procedure. In other words, it was the Assistant D.A's. opinion that split trials militate in favor of the State. It is interesting to note that according to Mr. Denzer the American Civil Liberties Union and other civil rights organizations are against the two trial procedure as being a "step backward". These organizations and others are against capital punishment. It appears that the question of bifurcated trials is inextricably interwoven with the

overall question as to whether capital punishment should be abolished. Apparently in New York the split verdict statute was enacted as an intermediate step before final consideration of the abolition of capital punishment.

The Judicial Council of the State of New York does not have any material "requested by the Committee". It was suggested that we communicate with Judge Domenick L. Gabrielli, "who may have some relevant information". We communicated with Judge Domenick L. Gabrielli, App. Div. 3rd Dept. Bath, New York. The Judge advised that while he had knowledge of the practice and procedure of bifurcated trials he did not have enough personal experience with the practice to furnish us with "hard facts". However, he did express the opinion that he is personally in favor of the split verdict practice. He suggested that we communicate with those who have had more trial experience in a county such as New York County.

Judge Sarafite was contacted but unfortunately he has not gone into the matter "in depth", and suggested that we confer with Mr. Vincent Dermody who is the Chief of the Homicide Bureau of New York County.

Mr. Vincent Dermody, associated with District Attorney Frank Hogan, is Chief of the Homicide Bureau of New York County. We learned from Mr. Dermody that the New York legislature adopted the bifurcated trial procedure in 1963. In 1965 capital punishment was abolished with the exception of murder of a peace officer while performing official duties and secondly a person who commits murder who is under life sentence in prison and in an attempt to escape.

In 1967 the New York Penal Law was changed so that persons under 18 could not be given a death penalty even if they murdered a peace officer or police official while performing official duties. He cited a hypothetical case of a boy, 17½ years of age, going into a police station "mowing down" all the police officials and under the new law he could only get a life sentence.

Mr. Dermody has been trying criminal cases for 26 years. He tried the first case under the 1963 bifurcated procedure. A defendant was found guilty of first degree murder and then at the penalty trial he was given the death penalty. In New York exclusionary evidence as to guilt is admissible at the punishment trial. As he said, all evidence barriers are let down with the exception of privilege. He also tried a murder case involving killing of a police plainclothesman. In this case there was a verdict of guilty in the first degree and at the punishment trial the jury returned a verdict of life.

We were informed that in New York the trial judge has discretionary power as to whether the matter of punishment should be submitted to the jury for determination. If the Judge passes sentence he cannot impose the death sentence.

Based upon his experience Mr. Dermody believes that the bifurcated trial is a fair method of determining guilt and sentence. He agreed in response to a question that bifurcated trials are and will be few and far between because of the abolition of capital punishment other than in the cases heretofore mentioned.

PENNSYLVANIA

A letter addressed to the Administrative Offices of the Court of Common Pleas in Pittsburgh, Pennsylvania elicited the information from the Administrator that Judge Loran L. Lewis was "our most knowledgeable Judge on criminal procedures". Judge Lewis was contacted. He stated that bifurcated trials have been in existence for approximately ten years in Pennsylvania. He expressed an opinion that bifurcated trials worked very well. After there has been a verdict of guilty of first degree the trial proceeds before the same jury as to punishment. The punishment trial is confined to the taking of testimony and that is not "very much". It usually includes the State putting in the past criminal record of the defendant and the defendant introducing all of his background evidence. The court delivers a charge which is very short. Judge Lewis is of the opinion that bifurcated trials are fair to both the State and the defendant.

NEW JERSEY

The Committee made a survey of the twenty-one Prosecutors, results of which are as follows:

In how many capital cases has the Prosecutor requested the death penalty since the promulgation of the Administrative Directive in Re Waiver of Death Penalty?	In how many of such cases did the jury bring in a death penalty; life; acquittal; other?	Opinion regarding bifurcated trials in capital cases
65	21 - Death 13 - Life 9 - Acquittal 22 - Other	12 - Pro 6 - Con 3 - No opinion

Attached to this report is a detailed breakdown of the above information.

The amicus brief filed by Prof. Anthony G. Amsterdam in Frady v. U.S., 121 U.S. App. D.C. 78, 348 F2d 84 (D.C. Cir.) cert. denied, 382 U.S. 909 (1965), strongly supports the split-verdict procedure. He contends that there is no reason to insist upon a choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence. He urges that, "admission of penalty evidence at trial of the issue of guilt to a jury unnecessarily protracts and complicates the trial. The standard for evaluation of evidence going to guilt, requiring satisfaction of the jury beyond a reasonable doubt, is different from that for evaluation of penalty matters, which lie in the jury's discretion. At a single-verdict trial, the judge must charge on both aspects of the case, and the jury must perform separate functions, governed by separate sets of legal concepts, at the same sitting. Charges on the guilt issue alone in first degree murder cases tend to be long and complex enough; the introduction of contemporaneous instructions for the evaluation of different evidentiary matters, premised on a wholly different set of concepts, threatens to submerge both the reasonable doubt standard and the jury in confusion".

The Death Penalty Cases, 56 Calif. L.R. 1270 (1968) is in reality an amicus curiae brief in support of the petitioners in the California Death Penalty cases. The brief was submitted in behalf of its authors by Prof. Michael E. Smith, University of California School of Law, Berkeley. This brief was supported by organizations who are opposed to capital punishment such as the

NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent. The summary of their position of trials which permit death as a penalty is contained in the "Summary" (p. 1363):

> "The fact that execution takes the life of a criminal who might otherwise spend the rest of his life in jail, and is in any event civilly dead, does not relieve the state of its burden of demonstrating that legitimate and compelling governmental interests can be served only by capital punishment. A capital criminal's chances of parole or even restoration of citizenship--but for the death penalty--might be better than those of felons guilty of less serious offenses. All felons have fundamental rights to be free of cruel and unusual punishment, to have access to the courts to seek collateral relief, and to be free of unreasonable infringement of the freedom of religion. A workable approach to the eighth amendment would focus on that amendment as a condemnation of retribution, and would bar the death penalty as cruel and unusual punishment. The real possibility that grounds for collateral relief might arise at a time when they become meaningless solely because the convict has been executed provides the basis for an argument that no state can provide due process to a criminal defendant without permitting him access to the courts for the remainder of his natural life. In any case, it is clear that execution infringes fundamental rights of capital felons, and therefore may not be imposed without the demonstration of a compelling state interest which can only be served by execution. Since no state can meet such a burden, capital punishment violates substantive due process."

Therefore, it is no surprise to find that the Law Review article is contemptuous of the split-verdict procedure in murder trials and summarizes the position as follows: (p. 1423)

"Analysis of the argument, evidence and jury instructions typical in California penalty trials compels the conclusion that a death verdict can be returned only by a jury which disregarded instructions, which acted with utter irrationality, or which determined that the defendant should die solely for considerations of retribution. Argument and evidence strongly suggest that most death verdicts are the result of the latter consideration. In any case, a death verdict must always be inconsistent with California law, because that law requires that the jury's determination be rational and that retribution be deemed an illegitimate penal objective.

Because argument, evidence, and jury instructions in California penalty trials ensure that a death verdict cannot be the result of considerations relating to proper penal objectives, California cannot justify its failure to provide standards to guide the trier of fact in the selection of punishment. California concedes that almost any consideration may decide the fate of a defendant convicted of a capital crime, the concession demonstrates that a defendant may be condemned because of his race or religion.

It follows that California penalty trials deny capital defendants the basic rights of procedural due process: the right to be free of burdens unless imposed in accordance with valid laws which carry understandable meanings and legal standards that courts must enforce."

The evaluation of the split-verdict trial procedure in murder cases in Calif. is projected in 52 Calif. L.R. p. 386, 406:

"An ultimate evaluation of the separate trial procedure for determining punishment inevitably will be tainted by attitudes toward the death penalty. Assuming, however, the retention of the death penalty as an alternative in certain classes of offenses, the separation of the determination of punishment from the determination of guilt is a first step in implementing the goal of imposing a socially useful punishment in each case. The separate trial procedure advances two goals. The first is avoiding prejudice to the defendant on the issue of guilt, since evidence relevant solely to punishment will not be allowed until guilt has been established.

> Secondly, an extensive inquiry into the defendant's background and character and the circumstances of his crime provides a basis for an informed selection of penalty. Standing alone, these results would seem to recommend the separate trial procedure to legislators and judges concerned with effective administration of the death penalty.
>
> On the other hand, the separate trial procedure, with the jury as the organ of discretion, accentuates the theoretical and practical difficulties of establishing an enlightened sentencing scheme. When the legislature does not purport to resolve certain fundamental questions--such as the proper basis (if any) for differentiating between offenders potentially subject to the death penalty--that task falls to the courts. The active role of the California Supreme Court has been directed at what the penalty proceeding should not encompass. The court has ruled that appraisal of the relative turpitude of an individual defendant should not be influenced by such matters as the unproven (and perhaps unprovable) proposition that the death penalty is a superior deterrent to crime, or by speculation as to what an expert body might do if in the future it must decide whether or not to parole the defendant. While such limitations seem necessary, what remains as the grounds for decision is uncertain. Perhaps it may be no more than a visceral reaction of the jury to the defendant. This may be the only solution, and possibly the one contemplated by the legislature. Unfortunately, it does not lend itself to the formation of concrete rules or standards by which an adversary penalty proceeding may be conducted."

This Committee has received and is in possession of the Penal Code of the four States which have adopted the bifurcated trial procedure in murder cases. Model charges which are used by Judges in the penalty phase of the bifurcated trial have been received and are in the file of the Committee.

The Committee was not requested to express an opinion concerning the adoption of the bifurcated trial procedure and, therefore has refrained from making any recommendations.

Respectfully submitted for the Committee,

JAMES ROSEN
CHAIRMAN

Dated: May 1, 1969

County	Death Penalty	Result: Death Penalty, life, acquittal, other	Favorable	Opinion re bifurcated trials
Atlantic	2	Death Penalty -2	Yes	Issue of guilt should be separated from issues arising out of penalty phase of proceedings. Too many conflicting and collateral issues arise out of the penalty phase which becloud the issue of guilt or innocense. If issue of guilt is divorced from issue of penalty, it will permit each jury to arrive at a better assessment of issues involved without being concerned with the correlative issue of penalty when assessing guilty or guilt when assessing penalty.
Bergen	4	Death Penalty -3 Life - 1	Yes	We should have bifurcated trials in capital cases.
Burlington	5	Death - 1 Life - 0 Acquittal - 4	Yes	Desirable to have bifurcated trials in capital cases as it would benefit the State and be fair to defendant.
Camden	4	1 - Murder 2d degree 3 - Murder 1st degree recommendation of mercy		
Cape May	0	0	No	Prefers present system. However, there is merit to suggestion about bifurcated trials in capital cases. Believes it has worked well elsewhere.
Cumberland	0	0	No	
Gloucester	0	0	Yes	In favor.
Essex	16	Death - 5 Life - 2 (first degree) 2d degree murder - 6 Manslaughter - 1 Not guilty - 2	Yes	Has advantages and disadvantages but, on balance, the bifurcated trial is desirable.

County	Death Penalty	Result: Death Penalty, life, acquittal, other	Favorable	Opinion re bifurcated trials
Hudson	6	Life - 1 Other 5 defendants pleaded to 2d degree murder after commencement of trial	Yes	Would provide best method for reaching a fair verdict and also avoiding errors which would result in reversals.
Hunterdon	0	0		
Mercer	1	During course of trial, defendant retracted his not guilty plea and pled to indictment.	Yes	It seems merely a question of time until such a procedure will be necessary if capital punishment is to be preserved.
Middlesex	0	0	No	Prefers that the case as to guilt and penalty be tried at one time.
Monmouth	4	2 - 1st degree - Death 1 - 2d degree conviction 1 - acquittal	Yes	In favor of bifurcated trials in capital cases.
Ocean	3	1 - Death 2 - Life 1 - Acquittal 1 - 2d degree 1 - Pled non vult to 2d degree 2 - Pled guilty to manslaughter	Yes	In favor.
Morris	1	1 - Mistrial, rescheduled.		No opinion.
Passaic	7	0 - Death 5 - Life 1 - Acquittal 4 - Other	Yes	In favor.

County	Death Penalty	Result: Death Penalty, life, acquittal, other	Favorable	Opinion re bifurcated trials
Salem	0	0	Yes	In favor.
Somerset	7	2 - Death 4 - Non vult 1 - Murder in 1st degree with recommendation of mercy.	No	Opposed. The facts would demonstrate the guilt of the defendant are the very same facts which a prosecutor will use as the basis for his demanding the death penalty.
Sussex	0	0	No	Believe the Prosecutor should express his opinion at the beginning of the trial as to whether or not he is seeking a death penalty and that the case should be tried as one complete case.
Union	5	5 - Death	No	Such procedure is too involved and both issues are so intertwined that the consumption of time may not be justified.
Warren	0	0	Yes.	In favor.

ARTICLE 211. ASSAULT; RECKLESS ENDANGERING; THREATS

Section 211.0. Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

* * * *

§211.0 Commentary

See Commentary to Section 210.0.

Section 211.1. Assault.

(1) Simple Assault. A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:

(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

* * * *

§211.1 Commentary

1. Scope. This Section is designed to cover the area now known in the law as assault, battery, aggravated assault, mayhem, etc. The term "assault" is intended to replace all of these terms. It includes within its definition those attempts which unsuccessful efforts to inflict bodily injury. MPC Proposed Official Draft, p. 135 (1962).

2. Existing New Jersey Law. Our statutes contain a series of provisions dealing with the offenses in this area. All of these will be replaced by this, or this and other, Sections of the Code. In descending order of seriousness, as judged by the potential sentence,

the statutes are as follows:

(a) Assaulting certain high governmental officials with intent to kill and with intent to show hostility to government or inciting or conspiring 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 in 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)

Similar statutory grading schemes exist in other jurisdictions. See MPC Tentative Draft No. 9, pp. 81, 132-140 (1959).

3. Bodily Injury. The offenses created by this Section require attempting to cause, causing or attempting to put in fear of bodily injury or serious bodily injury. Under the definitions,

Sections 211.0 and 210.0, this means at least physical pain, illness or impairment of physical condition. At common law, actual injury was unnecessary; the slightest touching or offensive contact was a battery; State v. Maier, 13 N.J. 235 (1953); Central R. Co. of New Jersey v. Simandl, 124 N.J. Eq. 207 (Sup. Ct. 1938); State v. Staw, 97 N.J.L. 349 (E. & A. 1922); Lynch v. Commonwealth, 131 Va. 762, 109 S.E. 427 (1921). The Disorderly Persons Act provision speaks merely of an "assault or an assault and battery" and no cases were found on whether, under that statute, actual injury must be found. State v. Maier, 13 N.J. 235 (1953) does, however, hold that N.J.S. 2A:170-26, the Disorderly Persons provision, covers that which was previously a common-law crime. In any event, the Code rejects this provision:

> "We submit that offensive touching is not sufficiently serious to be made criminal, except in the case of sexual assaults as provided in Section 213.4."

4. Assaults with Intent to Commit Another Crime. The Code eliminates from the assault section the crimes which are characterized by an assault with the purpose of committing another serious crime such as murder, rape, etc. In New Jersey, these would be N.J.S. 2A:148-6, N.J.S. 2A:90-2, N.J.S. 2A:90-3 and, in part N.J.S. 2A:125-1, all of which were all previously described. Instead of treating them as assaults, the Code treats them as attempts to commit the substantive crime and, for the most part, grades them as felonies of the second degree. Section 5.05(1).

This causes no problem with regard to gradation which is generally equivalent to existing law except for assaults upon high executive officials with intent to kill and to show hostility to government under N.J.S. 2A:148-6. This is now a capital or life

imprisonment offense and would be downgraded to a ten-year-maximum offense. If this is believed inappropriate, a special provision dealing with gradation of such offense should be added to Section 5.05(1).

5. Simple Assault: Section 211.1(1). The crime of simple assault may be committed in any of four ways:

6. Attempting to Cause Bodily Injury to Another: Section 211.1(1)(a). Under this Section, it is provided that simple assault may be committed purposely, knowingly or recklessly. There is no question as to the first two. As to recklessness, however, there may be some question:

> "There is some difference of opinion as to whether reckless injuring can be prosecuted under existing battery statutes. Most courts hold that it can. Some say that the necessary intent to injure can be inferred from the recklessness.... Others are more candid and hold that recklessness replaces intent....In addition, there are statutes in many states dealing with various sorts of reckless or negligent conduct on an ad hoc basis. See...These statutes can be applied both in the case of actual injuries and potential injuries." (MPC Tentative Draft No. 9, pg. 84 (1959))

New Jersey's cases are not entirely clear. State v. Stan, 97 N.J.L. 349 (E. & A. 1922) and other early cases speak simply of the need for the State to prove "an intent to inflict such injury." Further, State v. Schutte, 87 N.J.L. 15 (Sup. Ct. 1915) affirmed 88 N.J.L. 396 (E. & A. 1916) specifically disclaims the sufficiency of negligence for the crime. "Both the willful wrongdoing that constitutes malice in the law and also an intention to inflict injury are of the essence of a criminal assault...." A more recent case, State v. Chiarello, 69 N.J. Super. 479 (App. Div. 1961) speaks of assault as requiring proof of guilty intent or negligence. As used in our cases, the term "negligence" can be roughly equated with the Code's term "reckless." Cf., State v. Maier, 13 N.J. 235 (1953) and State v. Schutte, 87 N.J.L. 15 (Sup. Ct. 1915) affirmed 88 N.J.L. 396 (E. & A. 1916)

8. Negligently Causing Bodily Injury with a Deadly Weapon: Section 211.1(1)(b).

> "Subsection (1)(b) makes negligently causing bodily injury to others with a deadly weapon an offense. Under the gradation provision this would be a misdemeanor. Few existing codes contain general provisions dealing with reckless or negligent injuring. The new Wisconsin Code contains a provision making it an offense to cause 'great bodily harm to another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life.' Another Section makes it a misdemeanor to cause bodily injury by a high degree of negligence in the handling of a firearm, airgun, or bow and arrow. Under the Louisiana Code 'negligent injuring' is a misdemeanor." (MPC Tentative Draft No. 9, pg. 84 (1959)).

This is not now an offense in New Jersey. To come within our present Disorderly Persons Act provision, the use of the deadly weapon have to be under circumstances allowing an inference of recklessness (as defined in the Code). While no cases were found so holding, this is gleaned from the many cases emphasizing a need to prove awareness in order to find criminal liability. State v. Weiner, 41 N.J. 21 (1963); State v. Williams, 29 N.J. 27 (1959); State v. Gooze, 14 N.J. Super. 277 (App. Div. 1951).

9. Attempting by Physical Menace to Put in Fear of Imminent Bodily Injury: Section 211.1(1)(c). It is simple assault for a defendant to attempt, by physical menace to put another in fear of imminent serious bodily injury. This is our law. State v. Maier, 13 N.J. 235 (1953); Francisco v. State, 24 N.J.L. 30 (Sup. Ct. 1853) New Jersey law is in accord with the Code on the situation where the defendant has no intent to injure; i.e., such constitutes as assault. State v. Seifert, 85 N.J.L. 104 (Sup. Ct. 1913) affirmed 86 N.J.L. 706 (E. & A. 1914). No New Jersey cases were found on the conditional assault problem. Again, the Code finds liability.

10. Gradation of Simple Assault. In general, simple assault is a misdemeanor. It is now a violation of the Disorderly Persons Act. In the event there is a fight or scuffle by mutual consent (Section 2.11), the offense is downgraded to a petty misdemeanor. This is a variation from existing law. Under N.J.S. 2A:170-27, fighting is equated with assault and battery.

The question of whether simple assaults upon law enforcement officers should continue to be treated more seriously than other simple assaults (N.J.S. 2A:90-4) is considered in connection with the gradation of aggravated assaults.

11. Aggravated Assault: Section 211.1(2). The crime of aggravated assault can be committed in any of four ways:

12. Attempting to Cause Serious Bodily Injury: Section 211.1(2)(a). Attempting to cause serious bodily injury to another is an aggravated assault. "Serious bodily injury" is defined in Section 210.0 as

> "Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member."

Presently, this offense would be punished either under the atrocious assault and battery provision (N.J.S. 2A:90-1) or one of the statutes outlawing assaults with intent to commit certain other crimes (N.J.S. 2A:90-2 (kill, burglary, kidnapping, rape, robbery, sodomy or carnal abuse) or N.J.S. 2A:90-3 (robbery with force)) or as an attempt, under N.J.S. 2A:85-5, to commit some other crime (e.g., mayhem).

13. Causing Serious Bodily Injury: Section 211.1(2)(a). Causing serious bodily injury to another is aggravated assault when done with any of three culpabilities: "purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the

value of human life."

This is equivalent to our crimes of mayhem and atrocious assault and battery. N.J.S. 2A:125-1 and 2A:90-1. This latter crime has been defined by our Supreme Court as follows:

> "The question presented by this appeal was only tangentially considered in the very recent case of State v. Riley, 28 N.J. 188 (1958). There, the decision turned upon whether a 'wounding' as the word is used in N.J.S. 2A:90-1, necessarily required a breaking of the victim's skin. Here, the question facing us is whether or not the injuries inflicted were sufficiently serious so that when considered in conjunction with the manner of the assault the defendant's offense can properly be classified as atrocious assault and battery, within the meaning of the statute upon which the indictment was based.
>
> "In the Riley case we pointed out that atrocious assault and battery was defined in State v. Capawanna, 118 N.J.L. 429, 432 (Sup. Ct. 1937), affirmed p. c. 119 N.J.L. 337 (E. & A. 1938), as 'an assault and battery that is savagely brutal or outrageously or inhumanly cruel or violent,' and that similarly in State v. Maier, supra, this court distinguished atrocious assault and battery from other types of aggravated assault and battery on the ground that N.J.S. 2A:90-1 penalized the 'vicious act' of the defendant rather than his evil purpose, N.J.S. 2A:90-2, or his use of offensive weapons or threats of violence, N.J.S. 2A:90-3.
>
> "Again, in State v. McGrath, 17 N.J. 41, 49 (1954), in discussing the difference between simple assault and battery and atrocious assault and battery, this court stressed the nature, or brutal quality, of the defendant's act as an important element.
>
> "These cases make it quite clear that to constitute an atrocious assault and battery the assault must be savagely brutal or outrageously or inhumanly cruel or violent and that the nature of the attack is of paramount importance in determining whether the crime has been committed. The kind and severity of the injuries inflicted is another factor to be taken into consideration.
>
> "Although we decided in the Riley case, supra, that it would be impractical to endeavor to spell out a precise rule which would, in futuro, automatically decipher the difference on all occasions between

simple assault and battery and atrocious assault and battery no matter what the facts might be, we definitely concluded that we would not accept the highly arbitrary rule that a 'wounding' must necessarily entail a breaking of the skin.

"The defendant, by his waiver of a jury trial, voluntarily entrusted the determination of the evidential facts and their legitimately derivative inferences to the trial judge, and the record before us discloses ample evidence justifying the judge's conclusion that this was an 'outrageous, wanton, wilful attack upon this girl.'

* * * *

"The defendant's attack was savagely brutal within the meaning of the statute in question, but, having thus decided, the inquiry still remains as to whether or not the injuries inflicted were sufficiently severe or substantial to satisfy the statutory definition of atrocious assault and battery.

* * * *

"In Galin v. State, 18 Ga. App. 9, 89 S.E. 345 (Ga. App. Ct. 1916), the court construed 'wound' to include 'injuries of every kind which affect the body, whether they are cuts, lacerations, fractures, or bruises,'....

"To warrant a conviction of atrocious assault and battery, the injuries inflicted need not be permanent but they must nevertheless be substantial rather than superficial and should be considered in conjunction with the character of the assault made." (State v. Edwards, 28 N.J. 292, 296-299 (1959)).

14. Attempting to Cause Bodily Injury with a Deadly Weapon: Section 211.1(2)(b). It is also aggravated assault to attempt to cause bodily injury to another with a deadly weapon. "Deadly weapon" is defined in Section 210.0. This is now covered by part of N.J.S. 2A:90-3 which provides that

> "Any person who willfully and maliciously assaults another with an offensive weapon or instrument... is guilty of a high misdemeanor."

See State v. Jackson, 90 N.J. Super. 306 (App. Div. 1966)

15. Causing Bodily Injury with a Deadly Weapon: Section 211.1(2)(b). Purposely or knowingly (Section 2.02) causing bodily injury to another person with a deadly weapon is the fourth way in which the crime of aggravated assault may be committed. This should be distinguished from negligently causing such injury, which, under Section 211.1(1)(b) is simple assault and also distinguished from causing serious bodily injury under Section 211.2(2)(a). The use of the deadly weapon with a serious culpability gives reason for treatment as a more serious offense even with a less substantial injury.

Such an offense would now be treated as either an attempted murder (N.J.S. 2A:85-5), an assault with intent to kill (N.J.S. 2A:90-2) or an atrocious assault and battery (N.J.S. 2A:90-1). Under the Riley and Edwards cases supra, the crime of atrocious assault and battery would be established because of the viciousness of the mens rea even with a less serious wounding.

16. Gradation of Aggravated Assaults. The Code now grades Aggravated Assaults whereas in earlier drafts it did not:

> "The substantive change is in the last sentence of the section. Formerly, all aggravated assaults were felonies of the second degree, and there was no category of assault between the second degree felony (10 year maximum) and the misdemeanor (one year maximum) covered by Subsection (1). It is now provided that assaults falling within paragraph (b) of Subsection (2) be classified as felonies of the third degree (five year maximum). These are assaults with a deadly weapon where it does not appear that there was intent to do serious harm or the type of recklessness referred to in paragraph (a). It would be unnecessarily harsh, for example, to subject a person to ten years maximum imprisonment for a mere attempt to inflict minor injury with a knife or club. In particular circumstances the use of such implements would often support an inference of purpose or recklessness leading to a second degree conviction; and use of a firearm to shoot at the victim would almost certainly lead to that conclusion. But a judgment as to the seriousness of the actor's ill-will should not follow

> automatically from classification of the implement he employs, when the imposition of very heavy sentences is the issue." (MPC Proposed Final Draft, pg. 135, (1962)).

The Commission should consider whether this is appropriate.

Our statutes now upgrade certain simple assaults to the same level of seriousness as Atrocious Assaults and Batteries. N.J.S. 2A:90-4 provides as follows:

> "Any person who commits an assault and battery upon:
>
> a. Any State, county or municipal police officer, or any public school law enforcement officer, or any other law enforcement officer, acting in the performance of his duties while in uniform or exhibiting evidence of his authority; or
>
> b. Any paid or volunteer fireman acting in the performance of his duties while in uniform, or while riding in or upon a fire engine, hook and ladder truck or other fire-fighting apparatus or equipment, or while actively engaged in abating or quelling a fire, or while otherwise clearly identifiable as being engaged in the performance of the duties of a fireman; or
>
> c. Any member of an ambulance, rescue, first-aid, or emergency squad or corps; or any physician, nurse, medical assistant, or employee of a hospital, clinic, or ambulance service; acting in the performance of his duties while in uniform; or while wearing an armband or other clearly visible identification indicating his status as a person engaged in emergency, first-aid, or medical services; or while riding in or upon, or entering or leaving, any clearly identifiable ambulance or other emergency vehicle--
>
> Is guilty of a high misdemeanor."

See State v. Grant, 102 N.J. Super. 164 (App. Div. 1968). The Commission should decide whether to continue this policy. If so, a separate class of aggravated assault should be created and a decision should be made whether it should be a felony of the second or third degree.

It should similarly be decided whether to retain a separate category of offense and grade of offense for assaults upon newsmen (N.J.S. 2A:129-1) and persons serving court orders or process (N.J.S. 2A:99-1).

The Commission should decide whether it is necessary to retain the dueling statute. If so, it should be inserted at this point.

17. Other State Codes.

(a) New York:

§120.10 Assault in the first degree

A person is guilty of assault in the first degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or

2. With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or

3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person; or

4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

Assault in the first degree is a class C felony.

§120.05 Assault in the second degree

A person is guilty of assault in the second degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or

2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or

3. With intent to prevent a peace officer from performing a lawful duty, he causes physical injury to such peace officer; or

4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same.

6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants.

Assault in the second degree is a class D felony.

§120.00 Assault in the third degree

A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

2. He recklessly causes physical injury to another person; or

3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

(b) Michigan:

[Assault in the First Degree]

Sec. 2101. (1) A person commits the crime of assault in the first degree if:

(a) With intent to cause serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon or a dangerous instrument; or

(b) With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such an injury to any person; or

(c) Under circumstances manifesting extreme indifference to the value of human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person; or

(d) In the course of and in furtherance of the commission or attempted commission of arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, or sodomy in the first degree, of of immediate flight therefrom, he intentionally or recklessly causes serious physical injury to another person who is not a participant in the commission of the crime.

(2) Assault in the first degree is a Class B felony.

[Assault in the Second Degree]

Sec. 2102. (1) A person commits the crime of assault in the second degree if:

(a) With intent to cause serious physical injury to another person, he causes serious physical injury to any person; or

(b) With intent to cause physical injury to another person, he causes physical injury to any person by means of a deadly weapon or a dangerous instrument; or

(c) With intent to prevent a peace officer from performing a lawful duty, he causes physical injury to any person; or

(d) He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(e) For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness, or other physical or mental impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the intended harm.

(2) Assault in the second degree is a Class C felony.

[Assault in the Third Degree]

Sec. 2103. (1) A person commits the crime of assault in the third degree if:

(a) With intent to cause physical injury to another person, he causes physical injury to any person; or

(b) He recklessly causes physical injury to another person; or

(c) With criminal negligence he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

(2) Assault in the third degree is a Class A misdemeanor.

(c) Illinois:

§12--1. Assault

(a) A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery.

(b) Penalty.

A person convicted of assault shall be fined not to exceed $500.

§12--2. Aggravated Assault

(a) A person commits an aggravated assault, when, in committing an assault, he:

(1) Uses a deadly weapon; or

(2) Is hooded, robed or masked, in such manner as to conceal his identity; or

(3) Knows the individual assaulted to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes.

(4) Knows the individual assaulted to be a supervisor, director, instructor or other person employed in any park district and such supervisor, director, instructor or other employee is upon the grounds of the park or grounds adjacent thereto, or is in any part of a building used for park purposes.

(b) Penalty.

A person convicted of aggravated assault shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

§12--3. Battery

(a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

(b) Penalty.

A person convicted of battery shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both.

§12--4. Aggravated Battery

(a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 10 years.

(b) A person who, in committing a battery, either:

(1) Uses a deadly weapon; or

(2) Is hooded, robed or masked, in such manner as to conceal his identity; or

(3) Knows the individual harmed to be a teacher or other person employed in any school and such teacher or other employee is upon the grounds of a school or grounds adjacent thereto, or is in any part of a building used for school purposes; or

(4) Knows the individual harmed to be a supervisor, director, instructor or other person employed in any park district and such supervisor, director, instructor or other employee is upon the grounds of the park or grounds adjacent thereto, or is in any part of a building used for park purposes; commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years.

(c) A person who administers to an individual or causes him to take, without his consent or by threat or deception, and for other than medical purposes, any intoxicating, poisonous, stupefying, narcotic or anesthetic substance commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years.

(d) Wisconsin:

940.20 Battery

Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another may be fined not more than $200 or imprisoned not more than 6 months or both.

940.22 Aggravated battery

Whoever intentionally causes great bodily harm to another may be fined not more than $2,500 or imprisoned not more than 5 years or both.

940.21 Mayhem

Whoever, with intent to disable or disfigure another, cuts or mutilates the tongue, eye, ear, nose, lip, limb or other bodily member of another, may be fined not more than $5,000 or imprisoned not more than 15 years or both.

946.43 Assaults by prisoners

Any prisoner in a state prison who intentionally does any of the following may be imprisoned not more than 10 years;

(1) Places an officer or employe of that prison or a visitor therein in apprehension of an immediate battery likely to cause death or great bodily harm; or

(2) Causes bodily harm to an officer or employe of that prison or a visitor therein without his consent; or

(3) Confines or restrains an officer or employe of that prison or a visitor therein without his consent.

Section 211.2. Recklessly Endangering Another Person.

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

* * * *

§211.2 Commentary

1. This Section creates a new misdemeanor known as "reckless conduct." Under existing law. reckless conduct which creates a risk of death or of great bodily harm is treated on an ad hoc basis. This is true both in New Jersey and elsewhere. MPC Tentative Draft No. 9, p. 86 (1959). The reckless driving statute is the most familiar. N.J.S. 39:4-96 Additionally, however, the following statutes in New Jersey make various forms of reckless conduct either a crime or a violation of the Disorderly Persons Act:

(a) Misdemeanors: N.J.S. 2A:123-1 (Manufacture or sale of golf balls containing acid); N.J.S. 2A:128-1 (False lights to endanger vessel); N.J.S. 2A:128-3 (Carrying more than 30 persons on sailboats); N.J.S. 2A:128-4 (Opening floodgates and other obstruction to navigation); N.J.S. 2A:132-1 (False alarms or messages over police radio); N.J.S. 2A:137-1 (Malicious tampering with railroads).

(b) Disorderly Persons Act Violations: N.J.S. 2A:170-6 (Diseased person having sexual intercourse); N.J.S. 2A:170-9 (Giving false alarm); N.J.S. 2A:170-13 (Driving horse while intoxicated); N.J.S. 2A:170-16 (Use of mercury in hats); N.J.S. 2A:170-60 (Shooting or throwing things at trains); N.J.S. 2A:170-66 (Moving warning signs); N.J.S. 2A:170-25.2 (Discarding icebox); N.J.S. 2A:170-54.2 (Offer or gift of

harmful food to children); N.J.S. 2A:170-69.4 (Blasting near gas pipes); N.J.S. 2A:170-69 (Interfering with life-saving).

Other statutes, outside of Title 2A, also forbid various kinds of reckless conduct. See, e.g., N.J.S. 5:3-21.3 (Outdoor theatres-fires).

2. The Code consolidates and generalizes the principle found in these statutes:

> "Common to all of these statutes is a legislative judgment that the specified conduct entails a serious risk to life or limb, a risk out of proportion to the possible utility of the conduct. In effect, they are ad hoc reckless conduct statutes.
>
> "[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. It does not require any particular person to be actually placed in danger, but deals with potential risks, as well as cases where a specific person actually is within the zone of danger. A section so drawn is obviously applicable to all specific situations of reckless conduct which have arisen in the past, as well as new situations which will arise in the future. For example, this statute would apply to persons who leave uncovered wells or abandon refrigerators in areas where children play. The nearest approach to this in any existing American statute is found in Wisconsin Criminal Code §941.30, which creates a felony and requires 'conduct imminently dangerous to another and evincing a depraved mind, regardless of human life.' A more satisfactory formulation is found in an earlier draft of that Section which read as follows: 'Whoever endangers another's safety by reckless conduct may be fined not more than $1,000 or imprisoned not more than one year in the county jail or both.' Wis. Laws 1953, c. 623 §341.30.
>
> "In the Indian Penal Code it is provided: 'Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment...for a term which may extend to three months, or with fine..., or with both.' §336. (MPC Tentative Draft No. 9, pp. 86-87 (1959))

3. The Section establishes a special rule as to firearms: both recklessness and danger are presumed where a person knowingly points a firearm at or in the direction of another, without regard to the actor's belief as to whether the gun is loaded. The early drafts of the Code specified that pointing a firearm at another or exhibiting a deadly weapon "in a rude, angry, or threatening manner" should be a misdemeanor whether or not it was reckless. This was justified as follows:

> "Subsections (1)(b) and (c) prohibit particular conduct, the pointing of firearms, and the drawing or exhibiting of any deadly weapon in a rude, angry, or threatening manner. A specific prohibition of such conduct is deemed to be desirable to avoid any possibility that it might be held not to be within the purview of Subsection (1)(a). 'Deadly weapon' is defined in Section 201.60. We leave open whether the prohibition of Subsection (1)(b) should extend to unloaded weapons. Subsection (1)(c) is patterned upon California Penal Code §417 (Deering 1959), which reads as follows:
>
> > "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, or any other deadly weapon whatsoever, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses the same in any fight or quarrel is guilty of a misdemeanor." (Ibid.)

The change to the present position was explained as follows:

> "The present draft requires proof of recklessness, but supplies a presumption of recklessness and danger in the case of pointing firearms. For example, the pointing of an unloaded gun at another in the course of a drama should not be criminal. As for rude or threatening exhibition of deadly weapons, this behavior is adequately dealt with in other sections concerned with threats (Section 211.3 below) and disorderly conduct (Section 250.2, below). See also provisions as to possessing firearms for criminal purpose. Section 5.06. (MPC Proposed Official Draft, pg. 136 (1962).

4. Other State Codes

(a) New York:

§120.25 Reckless endangerment in the first degree

A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.

Reckless endangerment in the first degree is a class D felony.

§120.20 Reckless endangerment in the second degree

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Reckless endangerment in the second degree is a class A misdemeanor.

(b) Michigan:

[Reckless Endangerment]

Sec. 2115. (1) A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(2) Reckless endangerment is a Class A misdemeanor.

(c) Illinois:

§12--5. Reckless Conduct

(a) A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful.

(b) Penalty.

A person convicted of reckless conduct shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

(d) Wisconsin:

940.23 Injury by conduct regardless of life

Whoever causes great bodily harm to another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life, may be imprisoned not more than 10 years.

940.24 Injury by negligent use of weapon

(1) Whoever causes bodily harm to another by a high degree of negligence in the operation or handling of a firearm, airgun, or bow and arrow, may be fined not more than $1,000 or imprisoned not more than one year or both.

(2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another.

Section 211.3. Terroristic Threats.

A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

* * * *

§211.3 Commentary

1. This Section is directed against those who employ threats in circumstances more serious than would be covered by petty offenses like disorderly conduct or breach of the peace. The Code deals in other Sections with other serious situations such as intimidation to obtain property to which the actor is not entitled or to coerce official behavior. Further, coercion, an offense designed to deal with interferences with freedom of action. is treated as a separate offense in Section 212.5. Originally, these were treated as one offense. Terroristic Threats were separated out and treated as more serious offenses for this reason:

> "Where, as in the present section, the object is to prevent serious alarm for personal safety, such as may arise from letters or anonymous telephone calls threatening death, kidnapping or bombing, the class of threats can be narrowly defined, and the gravity of the offense can be related both to the seriousness of the threat and the disturbing character of the psychological result intended or risked by the actor. Moreover, in the case of terroristic threats there is no occasion to exempt from criminal liability on the ground of the actor's possibly benign ultimate purpose, as is appropriate in connection with the offense of coercion." (MPC Proposed Official Draft, pg. 136 (1962)).

2. New Jersey now has several statutes dealing with various aspects of terroristic threats. These are: N.J.S. 2A:113-8 ("Any person who...threatens to take or procure the life of any person is guilty of a high misdemeanor, and shall be punished by...imprisonment

for not more than 15 years...."; See State v. Gibbs, 134 N.J.L. 366 (1946); N.J.S. 2A:105-3 ("Any person who knowingly sends or delivers any letter...threatening to injure, maim, wound, kill or murder any person, or to burn, destroy, or injure his property, or to do any civil injury to any person or to his property, though no money or other valuable thing be demanded is guilty of a misdemeanor"); N.J.S. 2A:118-2 ("Any person who threatens to kidnap...any [person], or threatens...to send or carry such [person] to any other point within this state, or into another state..., or who threatens ...to force, persuade, or entice a child within the age of 14 years of age to leave its father, mother or guardian..., or to secrete or conceal the child, or who procures any such act to be done, is guilty of a high misdemeanor and shall be punished by imprisonment for a term of not more than 30 years....") See also N.J.S. 2A:148-10 (Inciting personal violence or destruction of property) and N.J.S. 2A:148-11 (Publishing propaganda doing same) Such conduct might also come with either N.J.S. 2A:170-29 (Offensive language), N.J.S. 2A:170-28 (Disturbing assemblies) or N.J.S. 2A:170-9 (Giving false alarm).

3. The scope of the Code provision was explained by the Drafters as follows:

> "Section 211.3 is limited to threats to commit a criminal offense. This is narrower than the range of threats specified in legislation dealing with intimidation of public officials or extortion of property.
>
> * * * *
>
> "The Section also deals with threats made merely to 'terrorize'. Existing law has only limited provision for these non-coercive threats. A handful of states penalize the sending of threatening letters. In Texas, the threat may be either oral or written, but it must be 'seriously made' and not 'merely idle with no intention of executing

the same. Under the Indian Penal Code non-coercive threats are punishable only if made 'with intent to cause alarm.' The federal code makes it a felony to threaten death or bodily harm to the President by mail 'or otherwise.'

"In drafting legislation penalizing threats, we would not wish to authorize grave sanctions against the kind of verbal threat which expresses transitory anger rather than settled purpose to carry out the threat or to terrorize the other person. The requirement, in some current statutes, that the threat be in writing is probably designed to draw this line between serious and trivial threats. But it seems clear that some threats are serious and meant to be taken so even though not made in writing. For example, persistent telephone threats or even a single verbal threat might be made in such terms or circumstances as to support the inference that the actor intended to terrorize.... Accordingly, Section 211.3 permits punishment of such threats even though not written. On the other hand we have not gone as far as the Indian Code, which speaks in terms of intent to alarm. This seems too loose, inasmuch as every threat intentionally communicated to the victim may be said to involve some purpose to alarm." (MPC Tentative Draft No. 11, pp. 8-9 (1961).

4. Other State Codes

(a) New York:

§120.15 Menacing

A person is guilty of menacing when, by physical menance, he intentionally places or attempts to place another person in fear of imminent serious physical injury.

Menacing is a class B misdemeanor.

ARTICLE 212. KIDNAPPING AND RELATED OFFENSES; COERCION

Section 212.0. Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

* * * *

§212.0 Commentary

See Commentary to Section 210.0.

Section 212.1. Kidnapping.

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:

(a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function.

Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.

* * * *

§212.1 Commentary

1. Background and Rationale. Kidnapping, which was only a misdemeanor at common law, has become in modern legislation one of the most severely punished offenses. MPC Tentative Draft No. 11, pg. 11 (1960). Overbreadth is now the problem:

> "The central problem of legislative reform in this field is to devise a proper system of grading to discriminate between simple false imprisonment and the more terrifying and dangerous abductions for ransom or other felonious purpose. In particular, provision for the death penalty must be consistent with general policy in this regard embodied in sections dealing with murder and attempted murder." (Ibid.)

2. Existing New Jersey Law. Our present kidnapping statute is quite typical:

> "Any person who kidnaps or steals or forcibly takes away a man, woman or child, and sends or carries, or with intent to send or carry, such man, woman, or child to any other point within this state, or into another state, territory or country, or forces, persuades or entices a child within the age of 14 years to leave its father, mother or guardian, or other person intrusted with its care, and secretes or conceals the child, or who procures any such act to be done, is guilty of a

high misdemeanor, and shall be punished by imprisonment for life, or for such other term of not less than 30 years as the court deems proper.

"Any person who kidnaps or steals or forcibly takes away a man, woman or child, as aforesaid and demands for the return of such man, woman or child, money or any thing of value, is likewise guilty of a high misdemeanor, and upon conviction shall suffer death, unless the jury by their verdict, and as part thereof, upon and after consideration of all the evidence, recommends imprisonment for life, in which case this and no greater punishment shall be imposed." (N.J.S. 2A:118-1)

See generally, State v. Gibbs, 79 N.J. Super. 315 (App. Div. 1963)

Additionally, several abduction laws cover various forms of kidnapping behavior:

2A:86-1. Abduction and marriage or defilement of female

Any person who takes a female unlawfully against her will, and marries her or causes or procures her to be married to another, either with or without her consent, or defiles or causes her to be defiled, and any person who receives her knowing her to have been so taken against her will, is guilty of a high misdemeanor and shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 12 years, or both.

2A:86-2. Abduction with intent to compel marriage or defilement

Any person who takes or detains a female against her will, with intent to compel her by force, threats, persuasion, menace or duress, to marry him or to marry any other person, or to be defiled, is guilty of a high misdemeanor.

2A:86-3. Abduction of female under 18 for purpose of marriage or carnal abuse

Any person who conveys or takes away an unmarried female, under the age of 18 years, with or without her consent, from the possession, custody or governance and against the will of her father, mother, guardian or other person having her lawful custody, with intent to marry or carnally abuse her, or to use her for immoral purposes, or to cause or procure her to be carnally abused or used for

> immoral purposes by another, is guilty of a misdemeanor; and if he marries her, without the consent of her father, mother, guardian or other person having her legal custody, he is guilty of a high misdemeanor.

See generally, State v. Johnson, 67 N.J. Super. 414 (App. Div. 1961).

Finally, the common-law crime of false imprisonment is indictable under N.J.S. 2A:85-1 and is punishable as a misdemeanor (unless the Disorderly Persons Act statute on assaults and batteries was interpreted as supplanting that crime, cf., State v. Maier, 13 N.J. 235 (1953); State v. McGrath, 17 N.J. 41 (1955)).

3. The basic policy questions were discussed by the Drafters in this manner:

> "In quest of a rationale of kidnapping, we may turn back to consider the original scope of the offense. A distinctive feature of the original common law offense was the requirement that the victim be sent out of the country, a requirement echoed in American legislation that speaks of taking out of the state, or county. A very substantial displacement was contemplated, one that was significant not only because of distance and difficulties of repatriation, but especially because the victim was removed beyond the reach of English law and effective aid of his associates. Various circumstances and forces led to an expansion of the original concept. It would soon be apparent that distance and isolation could be achieved within the realm, and that even distance was not essential to isolating a victim from the law and his friends, e.g., by 'secret' confinement in the immediate vicinity.
>
> "Another explanation of the expansion of kidnapping may well be the same defects in the law of attempt which played a part in the growth of arson and burglary, namely, immunity from punishment up to the 'last act' before completion, and minor penalties even then. Thus, a brigand who carried off a merchant meaning to rob or kill him in some hide-away, or a thug who abducted a female meaning to rape her, might escape with minor punishment if the enterprise was frustrated at an early stage. But in a mature system of penal law, not so closely tied to retribution and equation of punishment to harm actually inflicted, attempts carry penalties commensurate with the harm intended, and become

punishable at preparatory stages as soon as it is seen that the offender is seriously committed to the criminal enterprise. See Section 5.01. It now becomes possible to restrict the scope of artificial 'substantive' crimes like burglary and kidnapping, which are significant chiefly as attempts to commit a variety of other offenses but carry penalties appropriate to the most atrocious of the possible objectives of the offender. And it is desirable to restrict the scope of kidnapping, as an alternative or cumulative treatment of behavior whose chief significance is robbery or rape, because the broad scope of this overlapping offense has given rise to serious injustice, as well as to distortion of criminal statistics.

"Examples of abusive prosecution for kidnapping are common. Among the worst is use of this means to secure a death sentence or life imprisonment for behavior that amounts in substance to robbery or rape, in a jurisdiction where these offenses are not subject to such penalties. The criminologically non-significant circumstance that the victim was detained or moved incident to the crime determines whether the offender lives or dies.

* * * *

"The blame cannot be placed exclusively at the door of the prosecutor for choosing to indict for kidnapping. When an especially outrageous crime is committed there will always be public clamor for the extreme penalty which the laws permit, and it is asking too much of public officials and juries to resist such pressures. Rather, it is precisely the obligation of penal legislators to minimize opportunities for such injustice by clearly and rationally restricting discretion to punish. 'Demands for high penalties, e.g., in aggravated cases of rape, should be satisfied by appropriate provision in the rape legislation itself.

"A valid justification for retaining kidnapping as a serious offense still exists, notwithstanding adequate provision has been made for attempts to commit other grave crimes. In the first place, if the offense is properly defined so as to be limited to substantial isolation of the victim from his normal environment, it reaches a form of terrifying and dangerous aggression not otherwise adequately punished. Such behavior needs to be penalized at least as false imprisonment, since it does not clearly fall within the ambit of sections dealing with bodily harm. But a misdemeanor penalty for

> false imprisonment, may not be proportionate to the gravity of the behavior considered as a whole. Thus, removal or confinement to facilitate a petty theft or to administer a beating would, apart from Section 212.1, authorize no more than two or three years imprisonment, even if the defendant had done this on a number of occasions, e.g., to maintain gang discipline. A disposition to violence or theft in an actor who takes the trouble to set the scene so that he will have a relatively free hand to deal with his isolated victim is obviously more likely to lead to more dangerous consequences. A final reason for retaining kidnapping as a distinct offense, and for making it a first degree felony under some circumstances, is that an isolated victim may be killed and disposed of in such a way as to make proof of murder impossible, although the fact of abduction with criminal purpose is clear.
>
> "It is necessary, therefore, to define an aggravated offense of kidnapping which shall consist of removal or confinement involving substantial isolation of the victim where the duration of the isolation, the intention of the kidnapper, or other circumstances, makes the behavior specially terrifying and dangerous. (MPC Tentative Draft No. 11, pp. 11-15 (1960)).

The problems discussed above have been recognized by our Courts. In State v. Johnson, 67 N.J. Super. 414 (App. Div. 1961), Judge Gaulkin dealt with the definitional problems in our kidnapping statute in two contexts: First, the problem of the overlap, between the kidnapping statute and the abduction statutes:

> "...we conclude that the abduction and kidnapping statutes merely overlap and that the prosecution has the right to elect under which statute it will procede where the facts fit both...However, the mandatory minimum of 30 years for kidnapping places upon the prosecution the moral obligation not to indict under this statute unless the crime, warrants such severe punishment. Note, for example, that the taking of a child by one parent from the custody of the other may be kidnapping." (67 N.J. Super. at 422-423)

Second, the problem of the fractionalization, both by the prosecutor and the sentencing court, of that which is essentially a single criminal episode. (Id. at 423-424; 432-434).

4. Nature of Required Removal of Confinement. Under existing law, any forcible removal is sufficient to justify conviction. Thus, in State v. Kress, 105 N.J. Super. 514, 522 (L. Div. 1969), forcing a person to lead the way out of a bank, during a robbery was said to come within N.J.S. 2A:118-1. "It is the fact, not the distance of forcible removal, which constitutes kidnapping." The Court relied upon State v. Dunlap, 61 N.J. Super. 582 (App. Div. 1960) for authority and upon People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001 (Sup. Ct. 1951). See also Ex Parte Kelsey, 4 N.J. Misc. 678 (Sup. Ct. 1926).

This position is emphatically rejected by the Code which requires removal for a "substantial distance":

> "Although the nub of the kidnapping offense envisioned in the preceding Comment is substantial 'isolation' of the victim, we encountered difficulty in our effort to define the offense completely in terms of isolation. A draft which was debated by the Council of the Institute provided that a person should be guilty of kidnapping:
>
> "'if he removes another to a place where he is isolated from the protection of law or the aid of others...'
>
> "Some found this objectionable because it might be construed as requiring proof that the victim had actually reached the isolated place where the kidnapper meant to hold him, whereas it was felt that the crime should be complete, for example, when the victim had been forced or decoyed out of his house and into the car of the kidnapper. Accordingly the Section was recast in terms of removing the victim 'from' his regular haunts, instead of 'to' a place of isolation. This eliminates the absurdity of prosecuting for kidnapping in cases where the victim is forced into his own home to open the safe, or to the back of his store in the course of a robbery. For situations where the victim is seized elsewhere than in his residence or place of business, the section requires removal 'a substantial distance from the vicinity' of seizure. By using the word 'vicinity' rather than 'place' and by requiring substantial removal, the section makes clear the purpose to preclude kidnapping convictions based on trivial changes of location having no bearing on the evil at hand." (MPC Tentative Draft No. 11, pp. 15-16 (1960)).

This view has now been adopted by judicial decision in People v. Daniels, 80 Cal. Rptr. 897, 459 P.2d 225 (Sup. Ct. 1969) which may be read as either overruling or severely limiting the Chessman case. "Merely incidental" movements to other crimes are, under Daniels, no longer kidnappings.

The Code provides for kidnapping by detention as well as removal:

> "The Section defines kidnapping to include certain cases where the victim is not moved at all. These are cases where the victim is held in a place of isolation for a substantial period. Thus, a man might be seized in his own summer home in the mountains and held there for ransom. Conceivably one's own apartment in a city might in rare cases be regarded as a 'place of isolation,' if detention is under circumstances which make discovery or rescue unlikely. Confinement in a place of isolation is required to be for a substantial period in order to avoid application of the kidnapping law to detentions merely incidental to rape and other crimes of violence." (Id. at 16).

As is true under existing law (State v. Gibbs, 79 N.J. Super. 315 (App. Div. 1963), the confinement or removal must be "unlawful," i.e., "accomplished by force, threat or deception." Further, as is true with our present law, kidnapping of a child may be accomplished by force, or by persuasion or enticement:

> "In addition, removal or confinement of a child under 14 is made unlawful even with its consent, where the actor has one of the nefarious purposes listed in subsection (1). This covers not only behavior which current legislation often designates as 'enticing' or 'inveigling', but also cases where no more is proved than that defendant 'took' the child, perhaps at the child's request. The critical age below which the child's consent is nugatory varies from 10 to 21 in current legislation. The age should be low enough so that the taking itself imports some wrong. On this analysis, the line should be drawn just below the age of adolescence when youngsters often begin to exercise some judgment of their own as to choice of comrades and range of independent wandering.

> "Legally privileged removals and confinements, e.g., by policemen or jailors, would not be punishable as kidnapping, even if some prosecutor were prepared to prove that the policeman's purpose was one of those specified in subsection (1), in view of Section 3.03 of the General Part of the Code, which makes all conduct 'justifiable' when required or authorized by law. Even in the case of illegal arrest, there could be no prosecution for kidnapping absent one of the purposes specified in subsection (1). Under the general principles of culpability in this Code, the actor who claims that he thought himself legally privileged to remove or confine cannot be convicted without proof that he was at least reckless in this regard." (Id. at 16-17)

5. Kidnapping Purposes. New Jersey's statute is practically limitless as to the purpose for which the defendant acted, merely stating that he must have the "intent to send or carry such [person] to any other point within this state, or into another state, territory or country...." This type of definition is criticized by the Drafters of the Code:

> "The irrationalities of present kidnapping law... are largely the result of combining very comprehensive definitions of kidnapping purposes with very high penalties appropriate to kidnapping for ransom with serious injury or death of the victim. Two courses are open to correct this situation. One would be to restrict kidnapping to the ransom situation. The other would be to cover a variety of purposes but curtail the penalty for most kidnapping. For reasons stated [below], we have sharply cut down the ordinary maximum sentence for kidnapping, retaining within the first degree felony classification only the case where the victim is not returned alive. It thus becomes a matter of less consequence that our kidnapping purposes are broadly defined.
>
> "Nevertheless we think it important to specify the dangerous purposes which should serve to distinguish even second degree kidnapping from lesser offenses of illegal detention. Thus, the list of purposes in subsection (1) would exclude from kidnapping: cases where a parent out of affection takes his child away from the other parent or lawful custodian; detention for purposes of prosecution or treatment; driving an unwilling acquaintance about the country-side to compel him or her to listen to proposals of business or love.

Moreover, while our proposal would permit kidnapping conviction of a fleeing felon who commandeers a car and compels the owner to drive him away, it does so by explicit provision of clause (b) of subsection (1). This would not authorize conviction, for example, of a young man who compelled or tricked another into driving him somewhere merely for the sake of the ride.

"The remaining purpose clauses of subsection (1) are designed to specify other terrifying and dangerous removals and confinements. Thus, clause (c) covers vengeful or sadistic abductions accompanied by threats of torture, death, or other severely frightening experience. Clause (d) raises to the aggravated felony level certain interferences with political and governmental functions which might otherwise be misdemeanors or felonies of the third degree, e.g., abduction of witnesses, candidates, party leaders, officials, voters.

"It should be emphasized that every extension of kidnapping for ransom depends for its justification on the strict definition of remove and confine, the moderation of the basic penalty here proposed, and the provisions of this Code restricting cumulation of punishments. In any other circumstances, it might be desirable to confine kidnapping to seizure for ransom." (Id. at 17-18)

6. Grading and Punishment. Ordinary kidnapping is, under the Code, a second degree felony:

"The basic reason for grading ordinary kidnapping as a second degree felony, despite the much higher level of punishment currently provided, is to avoid disproportion in penalties between this offense and such felonies as robbery, rape, and burglary, especially where the removal or confinement is a relatively minor incident to the other offense. As pointed out in Comment 1, we seek to obviate resort to prosecution for kidnapping as a means of imposing exceptional sanctions on some robbers and rapists who are distinguished from others only by a criminologically insignificant movement or detention of the victim. The present section does provide for additional punishment where significant movement or detention of the victim serves to differentiate the behavior of the offender. Thus, if the actor does substantially isolate the victim, as required by subsection (1), he can be prosecuted both for the kidnapping and for the other offense. If the other offense is a felony,

> he will be a 'multiple offender,' subject to an 'extended sentence' up to 15 years. See Sections 6.07 and 7.03. Requiring separate charges compels the agencies of justice to focus on the issue whether there was a substantial removal or confinement significantly differentiating the defendant's behavior." (Id. at 18-19)

Under our present statute, the "upgrading" criteria is that in kidnapping, the defendant "demands for the return of such [person] money or anything of value." The Code makes kidnapping a first-degree felony when the defendant does not voluntary release the victim alive and in a safe place prior to trial.

> "The prime question is when kidnapping should be a first degree felony. Current statutes give the clue in their provisions for the extreme penalty where bodily harm is inflicted on the victim, or mitigating where the victim is released or returned alive or without injury. It seems to us that the main justification for treating kidnapping as seriously as murder or aggravated rape is the likelihood of a victim disappearing permanently during a kidnapping, without possibility of proving murder. Accordingly, we propose to maximize the kidnapper's incentive to return the victim alive, by making first degree penalties apply only when the victim is not "released alive in a safe place." For cases where the victim is returned to his friends, even with substantial injury, the maximum 'extended sentence' of 15 years should suffice as a deterrent. Our grading also affords some incentive to the kidnapper to avoid even the 15 year penalty by returning the victim unharmed or not seriously hurt, since minor harm amounting to no more than the misdemeanor of bodily injury under Section 211.1 would not lead to an extended sentence, leaving the offender subject only to the ordinary second degree maximum of 10 years. Certainly those formulations which authorize extreme penalties unless the victim is 'liberated unharmed' are unsatisfactory both because they require that no harm whatever shall have been done to the victim, and because they refer to the moment of liberation without regard to the circumstances, which may be such as to make serious harm or death quite likely." (Id. at 19-20)

The Code does not make kidnapping a capital offense. If the Commission recommends retention of the death penalty for murder, the issue should be faced whether it should also be retained for all or some forms of kidnapping. If so, the penalty-decision process should be meshed into Section 210.6.

7. Other State Codes.

(a) New York:

§135.25 Kidnapping in the first degree

A person is guilty of kidnapping in the first degree when he abducts another person and when:

1. His intent is to compel a third person to pay or deliver money or property as ransom, or to engage in other particular conduct, or to refrain from engaging in particular conduct; or

2. He restrains the person abducted for a period of more than twelve hours with intent to:

(a) Inflict physical injury upon him or violate or abuse him sexually; or

(b) Accomplish or advance the commission of a felony; or

(c) Terrorize him or a third person; or

(d) Interfere with the performance of a governmental or political function; or

3. The person abducted dies during the abduction or before he is able to return or to be returned to safety. Such death shall be presumed, in a case where such person was less than sixteen years old or an incompetent person at the time of the abduction, from evidence that his parents, guardians or other lawful custodians did not see or hear from him following the termination of the abduction and prior to trial and received no reliable information during such period persuasively indicating that he was alive. In all other cases, such death shall be presumed from evidence that a person whom the person abducted would have been extremely likely to visit or communicate with during the specified period were he alive and free to do so did not see or hear from him during such period and received no reliable information during such period persuasively indicating that he was alive.

Kidnapping in the first degree is a class A felony.

§135.20 Kidnapping in the second degree

A person is guilty of kidnapping in the second degree when he abducts another person.

Kidnapping in the second degree is a class B felony.

§135.30 Kidnapping; defense

In any prosecution for kidnapping, it is an affirmative defense that (a) the defendant was a relative of the person abducted, and (b) his sole purpose was to assume control of such person.

(b) Connecticut:

§94. Kidnapping in the first degree

A person is guilty of kidnapping in the first degree when he abducts another person and when:

1. His intent is to compel a third person to pay or deliver money or property as ransom, or to engage in other particular conduct, or to refrain from engaging in particular conduct; or

2. He restrains the person abducted with intent to:

(a) inflict physical injury upon him or violate or abuse him sexually; or

(b) accomplish or advance the commission of a felony; or

(c) terrorize him or a third person; or

(d) interfere with the performance of a governmental function; or

3. The person abducted dies during the abduction or before he is able to return or to be returned to safety. Such death shall be presumed, in a case where such person was less than sixteen years old or an incompetent person at the time of the abduction, from evidence that his parents, guardians or other lawful custodians did not see or hear from him following the termination of the abduction and prior to trial and received no reliable information during such period persuasively indicating that he was alive. In all other cases, such death shall be presumed from evidence that a person whom the person abducted would have been extremely likely to visit or communicate with during the specified period were he alive and free to do so did not see or hear from him during such period and received no reliable information during such period persuasively indicating that he was alive.

§95. Kidnapping in the first degree; punishment; plea of guilty

1. Kidnapping in the first degree is punishable as a class A felony unless the death sentence is imposed as provided by section 48.

2. When the court and the state's attorney consent, a person indicted for kidnapping in the first degree may plead guilty thereto, in which case the court shall sentence him as for a class A felony.

3. When a defendant has been found guilty after trial of kidnapping in the first degree, the court shall discharge the jury if there be one, and shall sentence the defendant as for a class A felony if it is satisfied (a) that the person kidnapped has been voluntarily returned alive or voluntarily released alive under circumstances enabling him to return to safety without substantial risk of death, or (b) that the sentence of death is not warranted because of substantial mitigating circumstances.

§96. Kidnapping in the first degree; proceeding to determine sentence; appeal

1. When a defendant has been found guilty after trial of kidnapping in the first degree, unless the court sentences the defendant as for a class A felony as provided in subsection 2 or 3 of section 95, it shall thereupon conduct a proceeding to determine whether the defendant should be sentenced as for a class A felony or to death. Such proceeding shall be conducted in the manner prescribed in section 48 for determination of the penalty for murder, and all the provisions of said section 48 relating to procedure and to determination and imposition of sentence, appeal, remand and resentence are here applicable.

§97. Kidnapping in the second degree

A person is guilty of kidnapping in the second degree when he abducts another person.

Kidnapping in the second degree is a class B felony.

(c) Michigan:

[Kidnaping in the First Degree]

Sec. 2210. (1) A person commits the crime of kidnaping in the first degree if he intentionally abducts another person with intent to:

(a) Hold him for ransom or reward; or

(b) Use him as a shield or hostage; or

(c) Facilitate the commission of any felony or flight thereafter; or

(d) Inflict physical injury upon him, or to violate or abuse him sexually; or

(e) Terrorize him or a third person; or

(f) Interfere with the performance of any governmental or political function.

(2) A person does not commit a crime under subsection (1) if he voluntarily releases the victim, alive and not suffering from serious physical injury, in a safe place prior to trial. The burden of injecting the issue of voluntary safe release is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for or preclude a conviction of kidnaping in the second degree or any other crime.

(3) Kidnaping in the first degree is a Class A felony.

[Kidnaping in the Second Degree]

Sec. 2211. (1) A person commits the crime of kidnaping in the second degree if he intentionally abducts another person.

(2) A person does not commit a crime under this section if (1) the abduction is not coupled with intent to use or to threaten to use deadly physical force, (b) the actor is a relative of the person abducted, and (c) his sole purpose is to assume control of that person. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(3) Kidnaping in the second degree is a Class B felony.

(d) Wisconsin:

940.31 Kidnapping

(1) Whoever does any of the following may be imprisoned not more than 15 years:

(a) By force or threat of imminent force carries another from one place to another without

his consent and with interest to cause him to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his will; or

(b) By force or threat of imminent force seizes or confines another without his consent and with intent to cause him to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his will; or

(c) By deceit induces another to go from one place to another with intent to cause him to be secretly confined or imprisoned or to be carried out of this state or to be held to service against his will.

(2) Whoever violates subsection (1) with intent to cause another to transfer property in order to obtain the release of the victim shall be sentenced to life imprisonment; but if his victim is released without permanent physical injury prior to the time the first witness is sworn at the trial the defendant may be imprisoned not more than 30 years.

Section 212.2. Felonious Restraint.

A person commits a felony of the third degree if he knowingly:

(a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(b) holds another in a condition of involuntary servitude.

* * * *

§212.2 Commentary

1. This Section provides penalties intermediate between those for kidnapping and false imprisonment, where the illegal restraint involves involuntary servitude or risk of serious bodily harm.

> "The Thirteenth Amendment to the Federal Constitution provides that 'neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been convicted, shall exist in the United States...' To enforce this, Congress enacted provisions presently found in 18 U.S.C. §§1581 et seq. making it a felony to hold or return a person 'to a condition of peonage,' or to kidnap, carry away or hold a person to be 'sold into involuntary servitude, or held as a slave.' Approximately the same result is reached in many kidnapping laws which include slavery or involuntary servitude among the purposes of kidnapping. The same result cannot be fully accomplished under our kidnapping proposal in Section 212.1, since a person may be held in slavery or peonage more or less openly and in his accustomed haunts. Also, in view of the fact that the victim is not isolated, in danger of death, nor necessarily terrorized, classification of this offense as a felony of the third degree seems adequately severe." (MPC Tentative Draft No. 11, pg. 21 (1960)).

2. The only equivalent in New Jersey law is found in some sections of our Prostitution laws, i.e., N.J.S. 2A:113-3, 4, 5, 6, 10 and 12, which are concerned with involuntary placings of women in houses of prostitution.

Section 212.3. False Imprisonment.

A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

* * * *

§212.3 Commentary

1. False imprisonment was a misdemeanor at common-law and, as such was indictable under N.J.S. 2A:85-1. With the enactment of N.J.S. 2A:170-26, it seems likely that the common law has now been supplanted and is punishable as an assault or an assault and battery under the Disorderly Persons Act. State v. Maier, 13 N.J. 235 (1953); State v. McGrath, 17 N.J. 41 (1955).

2. The common-law offense is probably broader than the Code provision:

> "[This] section is limited to 'substantial' interference with liberty. It is not intended to make criminal every detention that might lead to a civil suit for false imprisonment. For example, a brief detention of a suspected thief by the victim who seeks to question the detainee or recover his property, would not violate this section.
>
> "If the behavior is designed to extort some concession from the victim or another, it may also violate Section 211.3--Threats. If it constitutes also official oppression Section 243.1 will come into play. These and similar combinations of misdemeanors give rise to the possibility of convicting of 'multiple offenses,' in which case the maximum penalty rises to three years. Sections 6.09 and 7.04." (MPC Tentative Draft No. 11, pg. 22 (1960)).

3. Other State Codes

(a) New York

§135.10 Unlawful imprisonment in the first degree

> A person is guilty of unlawful imprisonment in the first degree when he restrains another person under circumstances which expose the latter to a risk of serious physical injury.

§135.05 Unlawful imprisonment in the second degree

A person is guilty of unlawful imprisonment in the second degree when he restrains another person.

Unlawful imprisonment in the second degree is a class A misdemeanor.

§135.15 Unlawful imprisonment; defense

In any prosecution for unlawful imprisonment, it is an affirmative defense that (a) the person restrained was a child less than sixteen years old, and (b) the defendant was a relative of such child, and (c) his sole purpose was to assume control of such child.

(b) Connecticut: Sections 98 and 99 are the same as Sections 135.10 and 135.05 of the New York Code.

(c) Michigan:

[Unlawful Imprisonment in the First Degree]

Sec. 2205. (1) A person commits the crime of unlawful imprisonment in the first degree if he knowingly restrains another person under circumstances which expose the latter to risk of serious physical injury.

(2) Unlawful imprisonment in the first degree is a Class A misdemeanor.

[Unlawful Imprisonment in the Second Degree]

Sec. 2206. (1) A person commits the crime of unlawful imprisonment in the second degree if he knowingly restrains another person.

(2) A person does not commit a crime under this section if (a) the person restrained is a child less than 16 years old, (b) the actor is a relative of the child, and (c) his sole purpose is to assume control of the child. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(3) Unlawful imprisonment in the second degree is a Class B misdemeanor.

(d) Wisconsin:

940.30 False imprisonment

Whoever intentionally confines or restrains another without his consent and with knowledge that he has no lawful authority to do so may be fined not more than $1,000 or imprisoned not more than 2 years or both.

Section 212.4. Interference with Custody.

(1) Custody of Children. A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so. It is an affirmative defense that:

(a) the actor believed that his action was necessary to preserve the child from danger to its welfare; or

(b) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child.

Proof that the child was below the critical age gives rise to a presumption that the actor knew the child's age or acted in reckless disregard thereof. The offense is a misdemeanor unless the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the child's safety, or in reckless disregard of a likelihood of causing such alarm, in which case the offense is a felony of the third degree.

(2) Custody of Committed Persons. A person is guilty of a misdemeanor if he knowingly or recklessly takes or entices any committed person away from lawful custody when he is not privileged to do so. "Committed person" means, in addition to anyone committed under judicial warrant, any orphan, neglected or delinquent child, mentally defective or insane person, or other dependent or incompetent person entrusted to another's custody by or through a recognized social agency or otherwise by authority of law.

* * * *

§212.4 Commentary

1. Custody of Children. New Jersey's statutes do not now provide a special category of offense dealing with interference with child custody. Presumably, it would come within the kidnapping, abduction or assault and battery provisions. See State v. Johnson, 67 N.J. Super. 414, 423 (App. Div. 1961). A special provision applies to abduction of girls under 18:

2A:86-3. Abduction of female under 18 for purpose of marriage or carnal abuse

Any person who conveys or takes away an unmarried female, under the age of 18 years, with or without her consent, from the possession, custody or governance and against the will of her

> father, mother, guardian or other person having her lawful custody, with intent to marry or carnally abuse her, or to use her for immoral purposes, or to cause or procure her to be carnally abused or used for immoral purposes by another, is guilty of a misdemeanor; and if he marries her, without the consent of her father, mother, guardian or other person having her legal custody, he is guilty of a high misdemeanor.

The Drafters of the Code treat interference with the custody of children as a separate offense:

> "Violation of lawful custody, especially of children, requires special legislation, notwithstanding its similarity in some respects to kidnapping. The interest protected is not freedom from physical danger or terrorization by abduction, since that is covered by Section 212.1, but rather the maintenance of parental custody against all unlawful interruption, even when the child itself is a willing, undeceived participant in the attack on this interest of its parent. The problem is further distinguishable from kidnapping by the fact that the offender here will often be a parent or other person favorably disposed toward the child. One should be especially cautious in providing penal sanctions applicable to estranged parents struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings. Despite these distinctive aspects of child-stealing and the existence of special provisions on the subject in most jurisdictions, the problem is frequently blanketed in with kidnapping, or the penalties and exceptions do not adequately reflect the special circumstances.
>
> "The age of 18 is selected as the limit of parental interest in custody, to be protected by criminal law, since this is the age at which children are completing high school education and beginning to move out into the relative independence of self-support or higher education. But we recognize in subsection (1)(b) that at least from the age of 14 there may be cases where the child itself is principally responsible for a determination to leave home, so that it is unfair to punish a companion who merely fell in with the child's plan.
>
> "The present section replaces a proposal on Interference with Lawful Custody, which was considered by the Advisory Committee and Council in 1956 and 1957 prior to our formulations on kidnapping. That draft

> undertook to distinguish between significant and insignificant interference with lawful custody by limiting the offense to removals 'for so extended a period as would be likely to substantially supplant the custodian's authority over the child.' The Council found this language cumbersome. The idea is adequately conveyed by defining the offense as a taking from custody, which connotes a substantial interference with parental control, as distinguished from mere physical removal from the parental premises for a brief period. Such brief removals for immoral or criminal purposes are properly treated under the heading of prostitution, statutory rape, or attempt to commit a designated offense." (MPC Tentative Draft No. 11, pp. 23-24 (1960)).

2. Custody of Committed Persons. A separate provision establishes the standard as to interferences with the custody of committed persons:

> "Subsection (2) prohibits interference with non-parental custody of 'committed persons'. This is defined to include persons sent to foster homes, private hospitals, and the like, even though no formal judicial commitment has been made. We have avoided any attempt to make the section a criminal sanction for all the rules of the institution, leading to such absurdities as are found in N.Y. Penal Law §1250a, which makes it an offense not only to take or entice away, but also to promise to provide a home for, or to marry, an inmate of any public charitable institution."

N.J.S. 2A:104-9 now makes a misdemeanor of aiding or abetting "the escape or elopement of an inmate confined in any public institution in this State." Cf., the escape statutes, N.J.S. 2A:104-1 et. seq.

3. Other State Codes

(a) New York:

§135.50 Custodial interference in the first degree

> A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree under circumstances which expose the person taken or enticed from lawful custody to a risk that his safety will be endangered or his health materially impaired.
>
> Custodial interference in the first degree is a class E felony.

§135.45 Custodial interference in the second degree

A person is guilty of custodial interference in the second degree when:

1. Being a relative of a child less than sixteen years old, intending to hold such child permanently or for a protracted period, and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian; or

2. Knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution.

Custodial interference in the second degree is a class A misdemeanor.

§135.55 Substitution of children

A person is guilty of substitution of children when, having been temporarily entrusted with a child less than one year old and intending to deceive a parent, guardian or other lawful custodian of such child, he substitutes, produces or returns to such parent, guardian or custodian a child other than the one entrusted.

Substitution of children is a class E felony.

(b) Connecticut:

§100. Custodial interference in the first degree

A person is guilty of custodial interference in the first degree when he commits the crime of custodial interference in the second degree (a) under circumstances which expose the person taken or enticed from lawful custody to a risk that his safety will be endangered or his health materially impaired, or (b) and he takes or entices the child or person out of this state.

Custodial interference in the first degree is a class D felony.

§101. [Same as New York §135.45]

§102. [Same as New York §135.55]

(c) Michigan:

[Custodial Interference]

Sec. 2215. (1) A person commits the crime of custodial interference if, knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or other person entrusted by authority of law to the custody of another person or institution.

(2) A person does not commit a crime under this section if (a) the person taken or enticed is a child less than 16 years old, (b) the actor is a relative of the child, and (c) his sole purpose is to assume control of the child. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(3) Custodial interference is a Class A misdemeanor.

Section 212.5. Criminal Coercion.

(1) Offense Defined. A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:

(a) commit any criminal offense; or

(b) accuse anyone of a criminal offense; or

(c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(d) take or withhold action as an official, or cause an official to take or withhold action.

It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

(2) Grading. Criminal coercion is a misdemeanor unless the threat is to commit a felony or the actor's purpose is felonious, in which cases the offense is a felony of the third degree.

* * * *

§212.5 Commentary

1. This is one of a series of provisions designed to deal with various forms of coercive behavior. Elsewhere in the Code, extortion of money, coercion of official behavior and threats designed to induce terror are treated as criminal. Here, coercive behavior designed to interfere with one's freedom of action is outlawed. New Jersey now has no general provision in this field. N.J.S. 2A:105-3 outlaws sending or delivering of writings threatening to do any "civil injury" to any person. Presumably, some aspects of the behavior outlawed by this Section would fall within its terms. See also N.J.S. 2A:105-5 (Loansharking).

2. The basic difference between this Section and Section 211.3, Terroristic Threats, is that here the prosecution will have to show that the coercion was not for "benign purposes." For example, threats designed to deter the "victim" from continuing to take narcotics or from gambling away his fortune would not be criminal under the present section. MPC Proposed Official Draft, p. 141 (1962).

3. Grading. Subsection (2) is designed to prevent inconsistency between this Section and the grading provided elsewhere for certain offenses partaking of the nature of coercion. For example, extortion of petty sums is only a misdemeanor under Section 223.1(2)(b); it should therefore not be possible to prosecute it as a felony under the present Section. (Ibid.)

4. Other State Codes.

(a) New York:

§135.65 Coercion in the first degree

A person is guilty of coercion in the first degree when he commits the crime of coercion in the second degree, and when:

1. He commits such crime by instilling in the victim a fear that he will cause physical injury to a person or cause damage to property; or

2. He thereby compels or induces the victim to:

(a) Commit or attempt to commit a felony; or

(b) Cause or attempt to cause physical injury to a person; or

(c) Violate his duty as a public servant.

Coercion in the first degree is a class D felony.

§135.60 Coercion in the second degree

A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

1. Cause physical injury to a person; or

2. Cause damage to property; or

3. Engage in other conduct constituting a crime; or

4. Accuse some person of a crime or cause criminal charges to be instituted against him; or

5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or

7. Testify or provide information of withhold testimony or information with respect to another's legal claim or defense; or

8. Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Coercion in the second degree is a class A misdemeanor.

§135.70 Coercion; no defense

The crimes of (a) coercion and attempt to commit coercion, and (b) bribe receiving by a labor official as defined in section 180.20, and bribe receiving as defined in section 200.05, are not mutually exclusive, and it is no defense to a prosecution for coercion or an attempt to commit coercion that, by reason of the same conduct, the defendant also committed one of such specified crimes of bribe receiving.

§135.75 Coercion; defense

In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

(b) Connecticut:

§202. Coercion

1. A person is guilty of coercion when he compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

(a) commit any criminal offense; or

(b) accuse anyone of a criminal offense; or

(c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(d) take or withhold action as an official, or cause an official to take or withhold action.

It is an affirmative defense to prosecution based on paragraphs (b), (c), or (d) that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other qualified.

2. Criminal coercion is a class A misdemeanor unless the threat is to commit a felony, in which case the offense is a class D felony.

(c) Michigan:

[Coercion]

Sec. 2125. (1) A person commits the crime of coercion if he compels or induces a person to engage in conduct that the latter has a legal right to abstain from engaging in, or to abstain from engaging

in conduct in which he has a legal right to engage, by instilling in him through use of a threat a fear that, if the demand is not complied with, the actor or another will bring about the harm threatened.

(2) "Threat" as used in this section includes:

(a) threatening the imminent use of force against any person who is present at the time; and

(b) threats as defined in section 3201(1).

(3) The actor does not commit coercion by instilling in a person a fear that he or another person will be charged with a crime, if the actor honestly believes the threatened charge to be true and his sole purpose is to compel or induce the person to take reasonable action to correct the wrong which is the subject of the threatened charge. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(4) Coercion is a class A misdemeanor.

§3201 Definitions (1) "Threat" means a menace, however communicated, to:

(i) Cause physical harm in the future to the person threatened or to any other person; or

(ii) Cause damage to property; or

(iii) Subject the person threatened or any other person to physical confinement or restraint; or

(iv) Engage in other conduct constituting a crime; or

(v) Accuse any person of a crime or cause criminal charges to be instituted against any person; or

(vi) Expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule; or

(vii) Reveal any information sought to be concealed by the person threatened; or

(viii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(ix) Take action as an official against anyone or anything, or withhold official action, or cause such action or withholding; or

(x) Bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(xi) Do any other act which would not in itself substantially benefit the actor but which is calculated to harm substantially another person with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships.

(d) Wisconsin:

943.30 Threats to injure or accuse of crime

Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse another of any crime or offense, or to do any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade or another, with intent to extract money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will or omit to do any lawful act may be fined not more than $2,000 or imprisoned not more than 5 years or both.

ARTICLE 213. SEXUAL OFFENSES

Introductory Note

1. As originally drafted, the Code contained a provision outlawing "Illicit Cohabitation or Intercourse."

> [A person who cohabits or has sexual intercourse with a person of the opposite sex other than his spouse commits a misdemeanor if:
>
> (a) The behavior is open and notorious; or
>
> (b) The couple are adoptive parent and child or are related by affinity in a degree that would make the relationship incestuous under Section [230.2] if they were blood relatives.
>
> Cohabit means to live together under the representation or appearance of being married.]

This provision had been approved by the Advisory Committee but the Council voted to delete it thus removing adultery and fornication entirely from the area of criminality. The Section is reproduced here to put the issue before the Commission.

2. Existing New Jersey Law. Under our present statutes, both Adultery and Fornication are crimes:

> 2A:118-1. Adultery; punishment
>
> Any person who commits adultery is guilty of a misdemeanor.
>
> 2A:110-1. Fornication
>
> Any person who commits fornication is guilty of a misdemeanor, and shall be punished by a fine of not more than $50, or by imprisonment for not more than 6 months, or both.

The difference between the two depends upon the marital status of the woman. Application of Smith, 71 F. Supp. 968 (D. N.J. 1947); State v. Lash, 16 N.J.L. 380 (1838); See State v. Catalano, 30 N.J. Super. 343 (1954); State v. Sharp, 75 N.J.L. 201 (1907) affirmed 76 N.J.L. 576.

3. The Comments set forth below for the Commission's consideration review the factors which led the Advisory Committee to confine criminality to the relatively narrow scope of the above Section. These same considerations, in the judgment of the Council, required the conclusion that even a narrowly defined criminal liability would do more harm than good.

"Background and Recommendation Against Punishing Illicit Sexual Relations Except When Open and Notorious or Quasi-Incestuous

"Sexual intercourse outside the bounds of lawful matrimony is widely, but not universally, criminal in the United States. The law is directly traceable to Biblical and other religious sources. The offenses were for centuries within the sole competence of ecclesiastical courts. Punishment by the civil law was undertaken in England only under Cromwell's 17th Century theocratic government, and was abandoned there after the Restoration. The Puritans of New England, who used the authority of church and state to reenforce each other, and who were particularly preoccupied with suppression of sins of the flesh, also undertook to punish sexual misbehavior. On the other hand, even in the Bible itself, there are indications that judgments in spiritual matters were for God rather than for the secular authorities.

"At the present time 11 of the 48 states have no fornication statute, and only 18 punish a single act of intercourse between unmarried persons (four of these by fine alone). The rest of the states require either a continuous or an 'open and notorious' relationship, or both. Fornication is not criminal in England, or generally speaking, in the rest of the world. If a married person is involved, the number of American states punishing a single act of illicit intercourse rises to 30 (four of these by fine alone).

* * * *

"American penal laws against illicit intercourse are generally unenforced. This is particularly remarkable in view of the fact that thousands of cases of adultery are made a matter of judicial record in divorce proceedings,....There is some indication that these laws, like other dead letter statutes, may lend themselves to discriminatory enforcement, e.g., where the parties involved are of different races, or where a political figure is involved.

* * * *

The reporters for the Louisiana Criminal Code of 1942 prepared an article on adultery which was rejected by the Council of the Louisiana State Law Institute. Its advisory committee was 'virtually unanimous' against it, on the grounds that

> 'to make such conduct a crime will do more harm than good, in that it will not prevent illicit and promiscuous relations by faithless husbands or wives, and the prosecutions will rarely occur except in blackmail or semi-blackmail situations.'

Another ground of opposition was that impossibility of enforcement would tend to bring the law into disrepute. Prosecutors report that criminal complaints are generally filed as a lever to secure favorable divorce settlements, and that the complaints are almost always withdrawn or abandoned before the case can come to trial. Even if the case is successfully prosecuted, a sentence of imprisonment is imposed only in exceptional circumstances,....

"The reluctance to prosecute finds some justification in evidence that a large proportion of the population is guilty at one time or another of this breach of sexual mores. Kinsey reports that one-half of the married males and one-fourth of the married females commit at least one adulterous act during married life, and one of every six of the females who had never had such relations wanted or would consider having them....Adulterous relationships are often idealized in literary representations, and are revealed in the intimate biographies of prominent and respected figures.

"Pre-marital intercourse is also very common and widely tolerated, so that prosecution for this offense is rare. Criminal complaints are frequently filed solely as a means of compelling the putative father to provide support for the mother and child. A substantial number of convictions of fornication occur in the course of rape prosecutions, where the possibility of conviction of the lesser offense offers an opportunity for prosecution and defense to bargain for a plea of guilty, or for a jury to reach a compromise verdict when there is reason to believe that the woman may have consented.

"The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the

government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences. Apart from the question of constitutionality which might be raised against legislation avowedly commanding adherence to a particular religious or moral tenet, it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.

"Turning to possible secular aims of provisions punishing illicit intercourse, we have to consider (1) promotion and preservation of the institution of marriage, (2) prevention of disturbances of the peace provoked by seduction of female relatives, (3) prevention of behavior which, being carried out in public, not only contravenes the morals of others, but openly and provocatively flouts their standards, (4) prevention of illegitimacy, a hardship upon the child and the community, and (5) prevention of disease.

"Prevention of pre-marital intercourse appears to have an insubstantial relation to promotion or preservation of the institution of matrimony. Conceivably, reservation of the pleasures of sex for post-nuptial occasions might be an incentive to early marriage. But our society has tended to postpone the time of marriage not only by economic pressures but by positive legislations. Punishing fornication cannot, therefore, be justified on the ground that it hurries people into matrimony.

"Extra-marital relations by spouses would appear to present a more substantial threat to the family. Adultery is almost universally a ground for divorce, perhaps testifying to the widespread belief that a discovered infidelity is incompatible with the continuance of a normal family. However, arguments from the divorce situation must be carefully scrutinized. The law of divorce gives too much evidence of being influenced by penal notions to permit us to be guided by it in revising the penal law....It is notorious that in jurisdictions where adultery is the only legal ground of divorce, fictitious adulteries are staged. Finally, Kinsey reports that in an appreciable number of cases an experiment in adultery tends to confirm rather than disrupt the marriage. Despite the qualifications necessitated by the preceding observations, it probably remains true that if we could suppress adulterous activity more spouses could be penned within their initial marital commitments. However,

existing criminal law has been notably unsuccessful in stamping out adultery, and it is unlikely that anyone will ever launch a program of enforcement on a scale sufficient to make criminal penalties a significant risk in philandery.

"Adulteries and 'seductions' lead on occasion to violence by affronted spouses, parents and others. Should they be punished on this account? The short answer to this is the previous observation that the criminal law is not and will not be enforced to an extent sufficient to suppress these provocations. The philanderer does his business in defiance of threats much more real than that of a rarely invoked penal law, viz. the possibility of exposure and disgrace or of physical assault by cuckold or enraged relatives. In some areas the privately administered death penalty for adultery might be said to be the legislatively preferred remedy. On the other hand, the fact that provocation by adultery is generally treated only as a mitigating circumstance rather than a justification of assault or murder may indicate a legislative judgment that ordinary people restrain the impulse to violence on such occasions. If the laws against assault and murder can be relied on to deter these aggressions, there is no need to retain dead-letter adultery and fornication statutes for this purpose.

"Reserved for later discussion is the question whether some selected categories of illicit intercourse may possess unusual potentialities of causing violence, warranting special deterrent efforts.

"At common law and in half a dozen American states as well as in some foreign codes, the circumstance that the illicit relationship is open and notorious serves to make the behavior criminal. The flagrant affront to commonly held notions of morality, the special likelihood of provoking violent resentment from publicly discomfitted relatives, and the increased probability that a spouse will be moved to seek a divorce under these circumstances provide a rational basis for singling out open and notorious misbehavior for punishment. Nevertheless it will remain a matter for judgment whether to enact a special adultery provision for this or to leave these cases to be handled with all other instances of public lewdness.

"Prevention of illegitimacy and disease is certainly a legitimate object of legislation. However, laws against illicit cohabitation are ill

> designed for these purposes. Bastardy is rare compared to the frequency of illicit intercourse. One might expect the liability to be restricted to cases where the undesirable result materialized; yet no statute is so drafted, and some groups in the population might prefer no criminal law in this area, rather than a criminal law which might appear to provide incentive to abortion or the use of contraceptives. As for venereal disease, this problem is clearly not soluble by adultery and fornication laws that do not discriminate between healthy and diseased actors, nor, on the one hand, individuals involved in a forbidden love episode and, on the other hand, the Don Juan or prostitute.
>
> "In sum, the major issue of policy in this field is whether to abandon criminal law altogether as a device for regulating voluntary heterosexual behavior, or to attempt to restrict the liability to certain classes of behavior involving an identifiable secular evil which can be effectively controlled by penal law. [This] Section represents an effort to identify certain categories of illicit intercourse which the Code might reasonably undertake to punish.
>
> "The text creates a single offense of illicit cohabitation or intercourse, following the pattern presently found in 12 states which punish adultery and fornication in a single statutory section without distinction." (MPC Tentative Draft No. 4, pp. 204-210 (1955)).

4. Comments on the Section Outlawing "Illicit Cohabitation or Intercourse." If the Commission is to accept the intermediate provision originally suggested by the Drafters of the Code, the following Comments become relevant. No equivalent provision is now found in New Jersey in view of our total adultery and fornication ban. (N.J.S. 2A:88-1 and 2A:110-1).

(a) Cohabit

> "The forbidden activity is defined to include cohabiting as well as sexual intercourse in order to relieve the prosecution of the burden of proving a particular copulation when the parties are found living together under circumstances that plainly point to a continuous sexual relationship between them. This also makes irrelevant the precise character of the sexual activity engaged in, i.e., whether it is normal intercourse or a deviate form of gratification." (Id. at 210)

(b) Knowledge that Intercourse is Illicit or Recklessness.

"Although the Section does not explicitly require knowledge or recklessness, this would be essential under the terms of Sections 2.02(3) and 2.04....The effect is to enlarge the defense of mistake beyond its scope in present law, particularly to excuse the defendant who acts as a result of mistake of law regarding his own or his partner's marital status....Criminal prosecution for illicit intercourse is at best a crude device for dealing with the problem of migratory divorce. It makes the legitimacy of a family arrangement turn on nice questions of constitutional law and of facts as to behavior and intention in a distant state. The issue can arise many years and several marriages after the dubious foreign divorce. A state that does wish to employ criminal sanctions to preserve its exclusive jurisdiction over divorce of its domiciliaries would do better to provide a penalty expressly applicable to its citizens seeking divorce elsewhere, with such exceptions as seem warranted. This would at least start the statute of limitations running at the time of the vulnerable divorce rather than years later when someone suddenly realizes that a divorcee is cohabiting with his second spouse. Such a statute would also absolve non-domiciliaries, who may become entangled in present bigamy and adultery laws.

"The question of limiting liability to cases of known invalidity of the marriage arises in connection with marriages, whether in the domiciliary state or abroad, that are declared 'void' by incest and miscegenation statutes. It can also arise under laws restraining persons from marrying during a period immediately following interlocutory divorce decree or from marrying a named correspondent." (Id. at 210-211)

(c) Open and Notorious.

"Under the common law, illicit sexual relations were punishable only if they took place under such circumstances as to constitute a public nuisance. Most of the existing legislation makes no such requirement, but eight states do restrict punishment of fornication to situations of 'open' or 'notorious' or 'open and notorious' cohabitation; and four states similarly circumscribe adultery.

"Judicial opinions dealing with the question in this country state the legislative objective to be prevention of debasement of public morals by indecent example. If the setting of a public bad example is the gist of the offense, it would appear to be advisable to specify that the relation be 'notorious' as well as 'open.' A couple might be 'openly' living together, but so manage the affair that their neighbors suppose them to be married; thus there is no affront to public morals. On the other hand, a surreptitious affair might be made 'notorious' by gossips, who may be said to be more responsible than the parties for turning a private indiscretion into a public scandal. The requirement of notoriety, as construed by the courts, does not impose a heavy burden of proof; a few neighbors and relatives who know the true facts will suffice. Some decisions appear to read the separate requirement of notoriety out of the statute by interpreting it as meaning only known as opposed to secret cohabitation, without regard to whether the cohabitation is recognized as illicit."

(d) Quasi-Incestuous Intercourse.

"If the policy choice is to punish some aggravated classes of illicit sexual relations, in lieu of broad penal provisions against fornication, the situations covered by paragraph (b)...might be regarded as such a class. Thus intercourse with a daughter-in-law, step-daughter, brother-in-law, uncle by marriage and other close relatives by affinity would be forbidden. Many states have extended their incest laws to include illicit intercourse between such relatives; and it is probably that the failure of other states to do likewise is attributable in part to the availability of adultery and fornication provisions. Although it remains questionable how useful the criminal law can be in this area, it is not unreasonable to characterize these as especially serious infractions in respect of the likelihood of disrupting families and fomenting violent reactions. In addition, there would appear to be a special element of unregeneracy in the betrayal not only of prevailing mores but also of intra-family loyalties. Furthermore, whether or not criminal penalties should actually be imposed in every case, the inclusion of penal provisions may afford the opportunity for other social agencies to be brought in for the solution of a critical family situation.

(e) Continuing Relationships.

"We have considered and rejected the idea of including habitual or protracted relationships as a punishable category under Section 207.1. There is wide recognition in existing law of distinction between isolated or sporadic non-marital sexual incidents and enduring illicit liaisons. This appears in the minority of adultery laws and the majority of fornication laws requiring that the parties 'live in a state of' adultery or fornication or 'habitually' engage in intercourse, or 'cohabit.' Sometimes, the thought is expressed in a prohibition of 'habitual' intercourse, where the legislators desired to include within the crime not only those who 'live together' in a state of adultery or fornication, but also those who conduct a continuing affair without establishing themselves in a common abode.

The enduring affair is properly regarded as a graver threat to the home and family than the occasional or transitory infidelity which Kinsey found in half the married men's lives. But the difficulty in defining the situation is formidable. Moreover, even so narrowly defined, the adultery law would still in all probability be substantially unenforced or invoked principally for purposes of private vengeance or extortion, remote from the promotion of sound family life. Also, if we undertake to punish this, or indeed any, kind of adultery, we must consider possible excuses about which American opinion would probably be in violent disagreement. Finally, if we undertake to punish mistress-keeping, we can hardly overlook the at least equally offensive and dangerous character--the Don Juan or Lothario referred to in the following comment.

(f) Promiscuous Intercourse.

"Promiscuity might have been singled out as a specially significant aspect of illicit sexual activity since it may indicate special psychological problems in the actor. Yet only the prostitution laws (a subject to be covered elsewhere in this Code) presently reach promiscuous sexuality. Statutes dealing with 'habitual' intercourse do not apply since they apparently relate to relations between the same couple. A few legislatures may have had the point in mind providing increased penalties for successive convictions of fornication.

"An attempt to punish 'promiscuous' sexuality would not only present the difficulty of defining that concept, but would also involve us at this point with the problem of criminal liability of prostitutes and their customers, questions to be dealt with elsewhere.

(g) Behavior Causing Divorce or Crime Against Spouse.

"The German and Swiss Penal Codes among others punish infidelity when it leads to divorce. By a parity of reasoning one might wish to punish infidelity when it leads to the commission of crimes against a spouse, e.g. murder to make possible a marriage between the actor and his paramour. We have rejected proposals of this sort. The 'causes' of divorce are too complex to make a fair test for criminal liability. In addition such provisions would sharpen the paradox in the present spectacle of innumerable divorces being granted for adultery against defendants who are almost never prosecuted. Of course, this paradox would disappear if a legislature or the judiciary were willing to make prosecution mandatory against defendants divorced on the ground of adultery. This seems unlikely. The legislative decision to limit criminal liability for adultery to cases where divorce results would function simply as indirect repeal. Frank repeal would appear preferable. As for the cases where crime seems to result from infidelity, it is too much to expect that one who is not deterred from murder, by the greatest threat the law can make, will refrain from illicit intercourse on account of a contingent and much milder penalty.

(h) Defenses.

"It is remarkable that present American criminal legislation against adultery recognizes no excuse or justification, although in civil divorce proceedings condonation, connivance and recrimination would be defenses. The Brazilian Penal Code of 1940 bans prosecution for adultery where the spouses have been judicially separated or where the complaining spouse consented to or pardoned the offense. Punishment may be withheld if the spouses had ceased living together or if the complainant had been guilty of a marital offense, e.g., adultery, desertion, attempted murder of the accused spouse. The Italian Penal Code provides a defense for the wife if the husband induced her to commit adultery, and a defense to either spouse who commits adultery only after having previously secured a decree of judicial separation or having been unjustly deserted. It also provides that punishment shall be reduced if the parties are separated for other reasons, as where the separation was by mutual consent or was caused by the adulterous spouse.

> "It appears useless and unfair to provide criminal punishment for adulteries committed after the relevant marriage has already failed, the parties living apart although the legal bond has not yet been dissolved. Even where they are living together it seems harsh to punish one for adultery where the other had connived or given extreme provocation as by adultery, cruelty, or denial of sexual relations. Yet we must hesitate to thrust upon criminal courts the task of determining the original or primary blame for a marital dispute that eventuates in adultery. These difficulties lead rather to accentuating the doubts as to the advisability of making adultery a crime.

(i) Punishment. Under existing New Jersey law, adultery is punishable for up to three years and fornication for up to six months. The Code recommends that Illicit Intercourse be punishable as a misdemeanor.

5. Diseased Persons Having Sexual Intercourse. New Jersey now has a provision of the Disorderly Persons Act (N.J.S. 2A:170-6) dealing with the special problem of diseased persons having sexual intercourse:

> "Any person who, knowing that he or she is infected with a venereal disease such as chancroid, gonorrhoea, syphilis or any of the varieties or stages of such diseased, has sexual intercourse, is a disorderly person.

If this provision is to be retained, it should be included in this Article.

6. Other State Codes

(a) New York:

§255.17 Adultery

> A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse.
>
> Adultery is a class B misdemeanor.

§255.30 Adultery and incest; corroboration

> A person shall not be convicted of adultery or incest of an attempt to commit either such crime

upon the uncorroborated testimony of the other party to the adulterous or incestuous act or attempted act.

(b) Connecticut:

§82 [Adultery]

Any married person is guilty of adultery when he engages in sexual intercourse with any person other than his spouse.

Adultery is a class A misdemeanor.

(c) Illinois:

§11--8. Fornication

(a) Any person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious.

(b) Penalty.

A person convicted of fornication shall be fined not to exceed $200 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both.

§11--7. Adultery

(a) Any person who cohabits or has sexual intercourse with another not his spouse commits adultery, if the behavior is open and notorious, and

(1) The person is married and the other person involved in such intercourse is not his spouse; or

(2) The person is not married and knows that the other person involved in such intercourse is married.

(b) Penalty.

A person convicted of adultery shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

(d) Wisconsin:

944.15 Fornication

Whoever has sexual intercourse with a person not his spouse may be fined not more than $200 or imprisoned not more than 6 months or both.

944.16 Adultery

Either of the following may be fined not more than $1,000 or imprisoned not more than 3 years or both:

(1) A married person who has sexual intercourse with a person not his spouse; or

(2) A person who has sexual intercourse with a person who is married to another.

Section 213.0 Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

* * * *

§213.0 Commentary

1. See Commentary to Section 210.0.

2. In the final draft of the Code, the definitions of "sexual intercourse" and "deviate sexual intercourse" are to be transposed here from Sections 213.1(1) and 213.2(1).

3. The following are the definitions found in the New York Code:

"130.00 Sex offenses; definitions of terms

The following definitions are applicable to this article:

1. 'Sexual intercourse' has its ordinary meaning and occurs upon any penetration, however slight.

2. 'Deviate sexual intercourse' means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

3. 'Sexual contact' means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party.

4. 'Female' means any female person who is not married to the actor.

5. 'Mentally defective' means that a person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct.

6. 'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.

7. 'Physically helpless' means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

8. 'Forcible compulsion'means physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped."

Connecticut is the same (§66), as is Michigan (§2301).

California adopts (1)(2) and (3). (§1600).

Section 213.1. Rape and Related Offenses.

(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) 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, in which cases the offense is a felony of the first degree. Sexual intercourse includes intercourse per os or per anum, with some penetration however slight; emission is not required.

(2) Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

* * * *

§213.1 Commentary

1. Present New Jersey Law. Rape and carnal abuse are now made high misdemeanors by N.J.S. 2A:138-1:

> "Any person who has carnal knowledge of a woman forcibly against her will, or while she is under the influence of any narcotic drug, or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child under the age of 12 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 30 years, or both; or who, being of the age of 16 or over,

> unlawfully and carnally abuses a woman-child of the age of 12 years or over, but under the age of 16 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

See also N.J.S. 2A:138-2 (sexual intercourse with a female in an institution; 3 year penalty)

2. Background and General Scheme of Code Section 213.1:

> "It is everywhere regarded as a serious offense for a male to have intercourse with a female other than his wife by means of force, threats, or certain forms of fundamental deception. The chief problems are (i) to decide and express what shall be the minimum amount of coercion or deception to be included here, i.e., drawing the line between rape-seduction, on the one hand, and illicit intercourse on the other; and (ii) to devise a grading system that distributes the entire group of offenses rationally over the range of available punishments. The latter problem is especially important because: (1) the upper ranges of punishment include life imprisonment and even death; (2) the offense is typically committed in privacy, so that conviction often rests on little more than the testimony of the complainant; (3) the central issue is likely to be the question of consent on the part of the female, a subtle psychological problem in view of social and religious pressures upon the woman to conceive of herself as victim rather than collaborator; and (4) the offender's threat to society is difficult to evaluate.
>
> "We know very little about 'rapists' as a class, if indeed they constitute a single group. The intelligence of sex offenders is reported to be average, but the I. Q. of rapists falls below that level. Rape is most often committed by males between the ages of sixteen and thirty; and forcible rape especially is the crime of younger men. Among possible motivations for forcible rape Karpman has suggested: (a) the male need for female resistance to achieve potency, (b) sadism, masochism or narcissism, (c) male hostility to the female and compensatory force to overcome feelings of sexual inadequacy, (d) overdevelopment of normal male aggressiveness, (e) aggressive criminality based upon a desire to pillage and plunder with rape as merely another act of plunder. Recidivism in statutory and forcible rape is said to be negligible in comparison with other offenses. The grouping of statutory and forcible rapists together in attempts to characterize 'the rapist' makes available statistics of little use in

identifying the offender who merits the ultimate sanction.

"At present a few states make no distinction in punishment between various categories of the offense. In a second group of states, rape is normally divided into two classes. The highest, typically punishable by death or life imprisonment, generally includes rape by force or without consent and consensual relations with very young girls. The second class is usually confined to intercourse with young girls who are above the critical age prescribed by the first degree section. A triple classification is encountered in a third and more numerous group of states. The additional category may be derived from a triple age classification for cases of consensual intercourse with young girls,...or it may develop from a separate categorization of the offense when committed by fraudulently impersonating the woman's husband, or by administering drugs or narcotics with the consent of the female. Special treatment of the case of wards or females in custody (as in subsection 3(c) of the text) may also result in a three degree breakdown. The new Wisconsin Code has four punishment categories ranging from a five year maximum for intercourse with a child under 18 to a thirty year maximum if the child is under 12, or if intercourse is accomplished by violence which overcomes 'utmost resistance' on the part of the female, or by threats of bodily harm or pain. In category two is placed intercourse with a female under 15, with a maximum penalty of fifteen years. The third class is designated 'intercourse without consent' and includes intercourse obtained by deception or with knowledge on the part of the male of some mental deficiency, stupor, or abnormal condition which makes real consent impossible. This class is punishable by imprisonment for not more than ten years.

"The classification proposed in the text is based on the following rationale: the extreme punishment of first degree felony is reserved for situations which are the most brutal or shocking, evincing the most dangerous aberration of character and threat to public security, and which also provide some objective support for the complainant's testimony of non-consent. The remaining offenses embraced in common law rape or the usual statutory first degree are classified as second degree felonies. Subsection (2)...delineates certain categories in which it appears desirable and safe to set even lower limits on punishment. While there are few statistics on punishments actually imposed following convictions of rape, those available indicate a judicial tendency to follow the pattern proposed by the text rather than to apply the extreme sanctions permitted by present statutes.

> "Ploscowe comments upon the good sense of courts, prosecutors, and juries in their attempts to mitigate the harshness of the rape statutes, and suggests that the older law which '...limited the fact situations [in rape]...to those which were heinous in character,' was more realistic and more easily enforced. He recommends that the core of our modern rape law consist in '...brutal violations of women against their will and the abnormality inherent in sex play with young children." (MPC Tentative Draft No. 4, pp. 241-243 (1953)).

3. Section 213: Liability of Males. The substantive offense is written in terms of male aggression. The Code rejects the position of some jurisdictions which designate female aggression as rape.

> "It seems more realistic to regard this as a problem of corruption of morals, rather than sexual aggression. Restricting primary liability to males does not, however, preclude liability of a female who aids a male offender to ravish a female. (Ibid.)

4. Carnal Knowledge. Sexual intercouse is defined as including abnormal intercourse by the mouth or anus as well as normal copulation. In this respect, it is broader than prevailing legislation in New Jersey and elsewhere. See State v. Auld, 135 N.J.L. 293 (1947); State v. Sorge, 123 N.J.L. 532 (Sup. Ct. 1940) affirmed 125 N.J.L. 445 (E. & A. 1941). Such acts would, however, fall within existing sodomy legislation.

> "From the point of view of the woman who is attacked, these deviate forms of aggression would usually be equally shocking and abhorrent. The policy of the rape laws excluding the sexual relations of married people from review in criminal proceedings would also appear to be applicable. (MPC Tentative Draft No. 4, pg. 244 (1953)).

5. Penetration. The rape cases in New Jersey and in other states require proof of some actual penetration into the female sex organ "however slight" in order for the crime to exist. State v. Orlando, 119 N.J.L. 175 (1937); State v. Riley, 49 N.J. Super. 570 (1958) affirmed in part 28 N.J. 188 (1958). Such is not true for carnal abuse in New Jersey. Contact, without penetration, is sufficient. State v. Hummer, 73 N.J.L. 714, 718 (E. & A. 1906);

State v. MacLean, 135 N.J.L. 491 (Sup. Ct. 1947); State v. LeFante, 14 N.J. 584, 593 (1954). The Code requires penetration for all offenses under Section 213.1:

> "The chief issue which has arisen in defining the behavior to be treated as rape is whether to require proof of something more than 'slight penetration' of the outer female genitalia. It is settled law that the crime can be completed without orgasm or complete penetration of the male organ into the vagina. Predominantly the present statutes call for 'actual penetration' or 'any penetration however slight.' Under either formula it is held that the slightest penetration of the outer part of the female genitalia is sufficient; it need not be shown that the male organ reached the vagina. The reasoning behind this is said to be that the essence of the offense is the outrage to the person and feelings of the female,...The rule of 'slightest penetration' has been criticized by Ploscowe, as punishing attempt rather than the completed offense. He also points out that giving this scope to the crime of rape makes it cover activity quite outside the common understanding of sexual intercourse, viz., a kind of sexual foreplay that some females engage in voluntarily who would strenuously resist any effort to penetrate the vagina. Under the 'any penetration' rule there is no legal obstacle to convicting a man of raping a woman who, nevertheless, remains a 'virgin' in the sense that her hymen is intact. This legal paradox would be largely resolved by requiring proof of penetration beyond the hymen. However, even the stricter rule would not preclude conviction where the victim's hymen has not been broken, since some membranes are sufficiently elastic or have natural openings large enough to permit penetration without rupture.
>
> "The text adheres to the 'any penetration' rule of present law, in part because our lower scale of penalties makes this more tolerable, and in part because of the greater reliance which can be placed on the verity of complaining witness' testimony where the issue is whether there was any penetration rather than how much." (MPC Tentative Draft No. 4, pg. 245 (1953)).

6. Female not the Wife. See Section 213.6(2). Knowledge that the victim was not his wife is required:

> "Under the general provisions of this Code there could be liability for rape unless the accused knew

> that the victim was not his wife or was reckless in this regard. Some such requirement seems important particularly in cases where rape liability can be imposed for consensual relations, e.g., with girls below the age of 16. A man who married a young girl, without knowing that she was already married to another, might find himself charged with statutory rape for sleeping with his supposed wife. The question is not often explicitly dealt with in present law; but the new Wisconsin Code, for example, specifies that the man must know that the woman is not his wife." (Id. at 246)

7. Gradation of the Offense: Rape: Section 213.1(1).

Subsection (1) is designed to limit narrowly the occasions for imposing the extreme penalty for rape. Four situations distinguish Rape from the lesser offense which is denominated as "Gross Sexual Imposition." Rape, in turn, is then gradated into two categories for punishment purposes. The situations which are made the most serious offense, Rape, are said to be:

> "...restricted to cases where the victim suffers serious physical injury or where in effect she is attacked by a stranger. These circumstances mark the most brutal assaults, and, in addition, furnish some objective indication in support of the complainant's testimony that she did not consent. The community's sense of insecurity (and consequently the demand for retributive justice) is especially sharp in relation to the character who lurks on the highway or alley to assault whatever woman passes, or who commits rape in the course of burglary." (Id. at 246)

8. Rape: Compusion by Force or Threat: Section 213.1(1)(a).

This Section covers the classic rape case where the woman is overpowered by violence or the threat of it. Our statute requires that the act be "forcibly against her will" and, under our cases, resistance must be "in good faith and without pretense, with active determination." State v. Terry, 89 N.J. Super. 445 (App. Div. 1965). It need not be as in many states, "to the utmost." The Code uses the term "compelled to submit" to express the thought now found in our Terry case.

> "It avoids a possible ambiguity of the 'utmost' phrase, which might be construed as calling for some showing that the woman was physically incapable of additional struggle against her assailant. Where additional struggle would obviously be useless and dangerous, the failure to struggle should not absolve the accused." (MPC Tentative Draft No. 4, pp. 246-247 (1953)).

Our cases do not detail whether or not the fear must be reasonably grounded. They simply speak of force or compelling fear. State v. Harris, 70 N.J. Super. 9 (App. Div. 1961); State v. Terry, supra. In most states, the fear must be reasonably grounded. The Code rejects this.

> "The test adopts the minority view in imposing liability where the woman submits out of 'fear' of violence, without requiring that the fear be reasonably grounded. One who takes advantage of a woman's unreasonable fears of violence should not escape punishment any more than the swindler who cheats gullible people by false statements which they should have found incredible. The majority rule is probably related to the extreme penalties which follow a rape conviction under present law; with so much at stake legislators and judges were reluctant to permit a jury to convict on a woman's testimony that she was frightened into submission in circumstances where most women would not have been intimidated." (MPC Tentative Draft No. 4, p. 247 (1953)).

Subsection (1)(a) introduces an innovation in extending the range of threats to include threats of serious bodily injury to anyone. The general objective is to reach all "compelling" threats. Present law furnishes little guide, other than as to threat of physical harm to the female herself.

9. Rape: Non-resistance Due to Drugs, Intoxicants, Etc.: Section 213.1(1)(b). Where graded, current rape statutes generally put these situations in the gravest category of the offense and ordinarily require as does the Code that the substance be administered by or with the privity of the defendant. While no New Jersey cases

were found, decisions in jurisdictions with non-particularized statutes, as ours, indicate that if, in fact, the woman is unconscious, she is incapable of giving consent. Defendant will, therefore, be guilty of rape even if he did not bring about the unconscious condition, but merely took advantage of it. (See Ibid.)

> "The recommendation in subsection (1)(b) is that cases in which the victim is drugged or intoxicated shall be treated as equivalent to forceful rape only where the defendant undermined the judgment and will of the victim by, for example, surreptitiously administering drugs. Where the defendant deliberately employs such means the victim need not be rendered completely unconscious.

10. Rape: Female Unconscious: Section 213.1(1)(c). The same policies leading to the inclusion of subsection (b) in the rape category do so here; it is an unequivocal powerlessness to resist.

11. Rape: Female Less than 10 years: Section 213.1(1)(d). This is the carnal abuse provision equivalent to our N.J.S. 2A:138-1 except that the age is lowered to 10 instead of 12. As to females between 10 and 16, see Section 213.3 (Corruption of Minors and Seduction)

12. Rape: Gradation. Rape is a second degree felony except in two situations. If serious bodily injury is done to any person or if the victim was not a voluntary social companion of the defendant, it is upgraded to a first degree felony.

13. Gross Sexual Imposition: Section 213.1(2). The Code defines a lesser offense, a third degree felony, for less offensive forms of involuntary sexual intercourse:

14. Gross Sexual Imposition by Threats: Section 213.1(2)(a). Threats of a form less than that described for Section 213.1(1)(a) suffice for this crime:

"As the gravity of the threat diminishes, the situation gradually changes from one where compulsion overwhelms the will of the victim to a situation where she can make a deliberate choice to avoid some alternative evil. The man may threaten to disclose an illicit affair, to foreclose the mortgage on her parents' farm, to cause her to lose her job, or to deprive her of a valued possession. The situation may move into a shadow area between coercion and bargain. A bargain for gain is not within the present section; but subsection 2(a) is designed to reach all situations of actual compulsion, i.e., where the female's submission is determined by fear of harm, with an objective test of the efficiency of the coercive element." (MPC Tentative Draft No. 4, pg. 247 (1953)).

15. Gross Sexual Imposition: Mental Deficiency of the Victim: Section 213.1(2)(b).

"The common law judges brought intercourse with mental defectives within the definition of rape by an extraordinary interpretation virtually disregarding the ordinary requirement of force. They said that in cases involving insane or unconscious women the force required to penetrate the woman would suffice to convict of rape. The person who has non-violent intercourse with mental defectives remains subject to extreme rape penalties today in England, and in a majority of American states. We recommend distributing this class of cases between [rape and gross sexual imposition] depending on the degree of impairment of the victim's mentality. The behavior does not lead to a general sense of insecurity in the community, as does the forceful rape, and the harm done is not as great, if outrage to the feelings of the victim be regarded as the essential evil against which we legislate.

"The difficult problem is to define the degree of mental deficiency or impairment which shall bring the statute into play. Among the tests articulated by the courts are (1) whether the woman was capable of expressing any judgment on the matter, a rule practically requiring unconsciousness, (2) ability to comprehend the moral nature of the act, and (3) ability to understand the character and probable consequences of intercourse. Statutes often specify that the degree of impairment must be such as to render the victim 'incapable of giving consent.' Any formulation in terms of capacity to give legal

> consent is rejected here because it provides no meaningful guide to decision. The test of 'stupor' or 'unconsciousness of the nature of the act' would seem to require an almost complete loss of contact with reality or ability to direct one's behavior, whereas the real damage can be done long before the victim is reduced to such a vegetable state. On the other hand, care must be taken to avoid imposing liability for rape in cases where, for example, the woman might be possible to argue that she would not have consented had she been completely sober, and that in this sense, her resistance was prevented." (Id. at 249-250)

After some problems the present Section 213.1(2)(b) was arrived at:

> "Subsection (2)(b) is a much-narrowed version of a provision which evoked considerable resistance at the 1955 meeting, and which the Reporters agreed to reconsider. The earlier version would have made it a felony for a man to have intercourse with a woman if he knew that she submitted because of 'substantially complete incapacity to appraise or control' her own conduct because of mental illness, intoxication, etc. There was a somewhat complicated clause designed to exclude situations where intercourse occurred following joint indulgence in drugs or liquor. The revised draft limits criminality to situations of known mental disease or defect so serious as to render the woman 'incapable of appraising the nature of her own conduct.' Conditions affecting only the woman's capacity to'control' herself sexually will not involve criminal liability. Also, by specifying that the woman must lack capacity to appraise 'the nature' of her conduct, we make it clear that we are not talking about appraisals involving value judgments or consideration of remote consequences of the immediate acts. The typical case that remains within the revised clause would be the case of intercourse with a woman known to the defendant to be manifestly and seriously deranged. (MPC Proposed Official Draft, pg. 144 (1962))

16. Gross Sexual Imposition: Fraud: Section 213.1(2)(c).

Cases where the victim did not know a sexual act was being committed or where she mistakenly thought the actor was her husband are included here as gross sexual imposition.

> "Female Unaware That a Sex Act Is Being Committed.
>
> "Two classes of cases have developed out of the doctor-patient relationship, which is the primary concern of paragraph (c) of subsection (2). In one

situation the doctor has intercourse with a female patient who has been led to believe that she must submit to intercourse as necessary treatment. In such a situation, courts have found the necessary element of 'force' to be lacking and have refused to sustain a conviction of rape. This would be reached under paragraph (a) of subsection (2) if the doctor's representations as to the consequences of her refusal to submit reached the proportions of intimidation.

"In the other situation, the doctor has intercourse under the pretense of making a digital or instrumental manipulation for therapeutic reasons, or of making an examination or performing an operation. In this type of case defendant has been held guilty of rape on the theory that there could be no consent when the woman was unaware that a sexual act was taking place. The requirement of force is bypassed, as in the case of intercourse with idiots, with the observation that in such cases, the force necessary to accomplish penetration is sufficient. There is legislation in a number of jurisdictions classifying this as first degree rape; but we classify it as third degree rape because, although the woman does not 'consent,' the intercourse is not against her will. The physical danger of forceful ravishment is not present. We are dealing with an aggravated form of intercourse by trick or deception, i.e.,seduction a kind of activity that most women can prevent, and that can be deterred by lesser sanctions.

"Misrepresentation That Intercourse is Marital

"Subsection (2)(c) of the text covers another form of aggravated 'seduction' where the woman submits believing that the intercourse is with her husband. Three situations are covered: (i) where the defendant impersonates the husband; (ii) where the defendant induces his victim to go through a marriage ceremony be deceiving her as to his eligibility, e.g., where he knows his marriage is bigamous; and (iii) where the defendant stages a mock marriage in reliance on which the female engages in intercourse with him. Present rape legislation very often treats impersonation of the husband like forceful rape, with the severest of penalties. The second class is usually punished as bigamy. The sham marriage is rarely punishable as rape. No sufficient reason appears for distinguishing between the various types of misrepresentation that intercourse is marital. The new Wisconsin Code apparently encompasses all of them within the language of its provision: If the woman submits because of a belief induced by the actor '...that the intercourse is marital..." (MPC Tentative Draft No. 4, pp. 255-257 (1953))

17. Other State Codes.

(a) New York:

§130.20 Sexual misconduct

A person is guilty of sexual misconduct when:

1. Being a male he engages in sexual intercourse with a female without her consent; or

2. He engages in deviate sexual intercourse with another person without the latter's consent; or

3. He engages in sexual conduct with an animal or a human dead body.

Sexual misconduct is a class A misdemeanor.

§130.25 Rape in the third degree.

A male is guilty of rape in the third degree when:

1. He engages in sexual intercourse with a female who is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Being twenty-one years old or more, he engages in sexual intercourse with a female less than seventeen years old.

Rape in the third degree is a class E felony.

§130.30 Rape in the second degree

A male is guilty of rape in the second degree when, being eighteen years old or more, he engages in sexual intercourse with a female less than fourteen years old.

Rape in the second degree is a class D felony.

§130.35 Rape in the first degree

A male is guilty of rape in the first degree when he engages in sexual intercourse with a female:

1. By forcible compulsion; or

2. Who is incapable of consent by reason of being physically helpless; or

3. Who is less than eleven years old.

Rape in the first degree is a class B felony.

§130.05 Sex offenses; lack of consent

1. Whether or not specifically stated, it is an element of every offense defined in this article, except the offense of consensual sodomy, that the sexual act was committed without consent of the victim.

2. Lack of consent results from:

(a) Forcible compulsion; or

(b) Incapacity to consent; or

(c) Where the offense charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

3. A person is deemed incapable of consent when he is:

(a) less than seventeen years old; or

(b) mentally defective; or

(c) mentally incapacitated; or

(d) physically helpless.

(b) Michigan:

(Same as New York)

(c) Connecticut:

§71. [Sexual misconduct in the first degree]

A person is guilty of sexual misconduct in the first degree when he has sexual intercourse with another person, or engages in deviate sexual intercourse with another person or causes another person to engage in deviate sexual intercourse, and

(a) the other person is less than twenty-one years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(b) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual misconduct in the first degree is a class D felony.

§72. [Sexual misconduct in the second degree]

(Same as New York §130.20)

§73. [Rape in the first degree]

A male is guilty of rape in the first degree when he engages in sexual intercourse with a female:

(1) by forcible compulsion, but it shall be an affirmative defense to prosecution under this subsection that the female had previously with consent engaged in sexual intercourse with the actor; or

(2) who is incapable of consent by reason of being physically helpless; or

(3) who is less than fourteen years of age.

Rape in the first degree is a class B felony.

§74. [Rape in the second degree]

A male is guilty of rape in the second degree when he engages in sexual intercourse with a female by forcible compulsion.

Rape in the second degree is a class C felony.

§75. [Rape in the third degree]

A male is guilty of rape in the third degree when:

(1) he engages in sexual intercourse with a female who is incapable of consent by reason of some factor other than being less than sixteen years old; or

(2) being nineteen years old or more, he engages in sexual intercourse with a female less than sixteen years old.

Rape in the third degree is a class D felony.

(d) Illinois:

§11--1. Rape

(a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape. Intercourse by force and against her will includes, but is not limited to, any intercourse which occurs in the following situations:

(1) Where the female is unconscious; or

(2) Where the female is so mentally deranged or deficient that she cannot give effective consent to intercourse.

(b) Sexual intercourse occurs when there is any penetration of the female sex organ by the male sex organ.

(c) Penalty.

A person convicted of rape shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than 4 years.

(e) California:

Section 1601. Aggravated Rape

A male who has sexual intercourse with a female not his wife is guilty of aggravated rape if:

(1) he compels her to submit by force or by threat of imminent death, serious bodily injury or kidnapping, to be inflicted on her or on any other person; or

(2) the female is less than fourteen years old.

Aggravated rape is a felony of the first degree if in the course thereof the actor inflicts serious bodily injury on his victim or if his conduct violates both Subsection (1) and Subsection (2) of this section. Otherwise, aggravated rape is a felony of the second degree.

Section 1602. Rape

A male who has sexual intercourse with female not his wife commits rape if:

(1) he knows the female is unconscious; or

(2) he has substantially impaired her power to appraise or control her conduct by administering without her knowledge drugs or similar means for the purpose of preventing resistance; or

(3) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(4) he knows that she is unaware of the sexual nature of the act being committed upon her; or

(5) he compels her to submit by any threat that he knows would be likely to prevent resistance by a woman of ordinary resolution.

Rape is a felony of the third degree.

(f) Wisconsin:

944.01 Rape

(1) Any male who has sexual intercourse with a female he knows is not his wife, by force and against her will, may be imprisoned not more than 30 years.

(2) In this section the phrase "by force and against her will" means either that her utmost resistance is overcome or prevented by physical violence or that her will to resist is overcome by threats of imminent physical violence likely to cause great bodily harm.

944.02 Sexual intercourse without consent

Any male who has sexual intercourse under any of the following circumstances with a female he knows is not his wife may be imprisoned not more than 15 years:

(1) If she is incapable of resisting or consenting because of stupor or abnormal condition of the mind and he knows of her incapacity; or

(2) If she is mentally ill, mentally infirm or mentally deficient and he knows of her incapacity; or

(3) If she submits because she is deceived as to the nature of the act or because she believes that the intercourse is marital and this deception or belief is intentionally induced by him.

944.10 Sexual intercourse with a child

Any male sho has sexual intercourse with a female he knows is not his wife may be penalized as follows:

(1) If the female is under the age of 18, fined not more than $1,000 or imprisoned not more than 5 years or both; or

(2) If the female is under the age of 16, and the male is 18 years of age or over, imprisoned not more than 15 years; or

(3) If the female is under the age of 12, and the male is 18 years of age or over, imprisoned not more than 30 years.

Section 213.2. Deviate Sexual Intercourse by Force or Imposition.

(1) By Force or Its Equivalent. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if:

(a) he compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the other person is unconscious; or

(d) the other person is less than 10 years old.

Deviate sexual intercourse means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

(2) By Other Imposition. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(a) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(b) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(c) he knows that the other person submits because he is unaware that a sexual act is being committed upon him.

* * * *

§213.2 Commentary

1. Present New Jersey Law. Deviate sexual intercourse--sodomy--is now a high misdemeanor punishable by imprisonment for up to 20 years:

2A:143-1. Sodomy; punishment

> Sodomy, or the infamous crime against nature, committed with man or beast, is a high misdemeanor, and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 20 years, or both.

As interpreted by our courts, this crime includes anal intercourse and bestiality, but it does not include fellatio or cunnilingus. State v. Morrison, 25 N.J. Super. 534 (Co. Ct. 1953, per Francis, J.); State v. Pitman, 98 N.J.L. 626, affirmed 99 N.J.L. 527. This is contrary to the law in most states and reaches the odd situation that the practice of male homosexuality is a serious crime but lesbianism is not an offense. (Mouth genital contact may, however, by punished as lewd and lascivious behavior under N.J.S. 2A:115-2. State v. Morrison, supra.) Emission is not required. State v. Taylor, 46 N.J. 316 (1966).

2. Consentual Sodomy Between Adults. After much discussion, the American Law Institute arrived at the conclusion that private homosexuality between consenting adults not involving force, imposition or corruption of the young should not be an offense. The discussion of the issue was as follows:

> "The following comments were written in support of Section [213.2] as proposed by the Reporters and unanimously approved by the Advisory Committee, i.e., excluding consensual relations between adults from criminal punishment. The Council of the Institute, at its March 1955 meeting, voted in favor of criminal punishment. Some members believe that the Reporters' position is the rational one but that it would be totally unacceptable to American legislatures and would prejudice acceptance of the Code generally. Other members of Council oppose the position of the Reporters and the Advisory Committee on the ground that sodomy is a cause or symptom of moral decay in a society and should be repressed by law. Subsection (4) of Section 207.5 was accordingly revised to reflect the Council's position and to raise the issue for discussion by the Institute.
>
> (1) Background and General Recommendation.
>
> "The sexual impulse finds expression in a variety of ways other than heterosexual copulation. Substantial numbers of males and females find themselves drawn to members of their own sex. In both homosexual and heterosexual relationships, gratification may be

sought and bestowed digitally, orally, or by the anus. There may be no human partner, as in copulation with animals or corpses, or in masturbation. Some individuals obtain sexual satisfaction from exposing themselves indecently, from wearing clothes of the opposite sex, or from contact with objects of symbolic sexual significance, e.g., a shoe or an undergarment. Heterosexual copulation must also be considered deviate, when accomplished by force or with a child, especially when these circumstances appear to be essential to the actor's gratification. Superficially non-sexual offenses such as larceny, burglary, or arson may have an avowed or unconscious sexual aspect, just as, for that matter, approved behavior, including successful pursuit of art, literature, money, or fame, may be bound up with sexual drives. It is generally agreed, also, that an isolated episode of deviate sexuality may have no important significance with respect to the character of the actor, being the result of a chance encounter, curiosity, or experiment.

"In varying degrees deviate sexuality has been regarded with intense aversion in nearly all times and civilizations, and subject to condemnation by religious interdict or severe secular punishment. Depending on the environment and education of the analyst, deviate sexuality may be attributed to spiritual illness (sin), to improper early psychic influences, or to congenital and hereditary defect. Those who have studied the problem most are in such disagreement as to cause and the possibility of cure that a law-maker must proceed cautiously in decreeing drastic measures, whether with the aim of deterrence, incapacitation, or therapy. Evidence does not support the hypothesis that this generation suffers from a special 'wave' of serious sex offenses, or that sex offenders in general tend to recidivism, or that sex offenders of one type tend to progress to other more serious sex offenses or to violent aggressions, or that sex offenders of all varieties can be rationally treated as a single group, whether for statistical purposes, punishment, or therapy. Therefore the so-called sex psychopath laws, which have been adopted in fifteen states, are seriously questionable insofar as they prescribe or permit long or indefinite sentences until 'cure', especially where the commitment is or may be to a purely custodial institution, or where finances or scientific personnel are unavailable or inadequate for a realistic program of study and treatment. On the other hand, provision must be and generally is made by other laws for the commitment of mentally deranged and dangerous persons. The difficulty with many of the sex psychopath laws is that they permit too ready an inference of public

danger from relatively minor episodes of deviate sexuality. This danger probably exists also in the general commitment statutes which often contain broad definitions of mental illness that could easily comprehend the 'sex psychopath.' The reform of this legislation, however, goes beyond the present boundaries of the Penal Code project. A related question is whether deviate sex offenses require a special test of criminal responsibility, e.g., to take account of 'irresistible impulse' or violations 'caused by' mental illness. Except to observe that a test of knowledge of right and wrong is clearly inadequate for some of these cases, we leave the matter to be resolved in the General Part of this Code. There it might be provided, for example, in addition to the extended sentence initially imposed in habitual and psychopathological cases, that no prisoner should be discharged at the end of his term if it is established that he would perpetrate dangerous aggressions.

"Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the following grounds. No harm to the secular interests of the community is involved in a typical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities. It has been so recognized in a recent report by a group of Anglican clergy, with medical and legal advisers, calling upon the British Government to reexamine its harsh sodomy law. The distinction between civil and religious responsibilities in this area is reflected in the penal codes of such predominantly Catholic countries as France, Italy, Mexico and Uruguay, none of which attempt to punish private misbehavior of this sort. The Penal Codes of Denmark, Sweden and Switzerland also stay out of this area. On the other hand, the German Code of 1871, still in force, contains broad and severe provisions directed particularly against male homosexuality.

"As in the case of illicit heterosexual relations, existing law is substantially unenforced, and there is no prospect of real enforcement except against cases of violence, corruption of minors and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interest of blackmailers. Existence of the criminal threat probably deters some people from seeking psychiatric or other assistance for their emotional problems; certainly conviction and imprisonment are not conducive to cures. Further, there is the fundamental question of the protection to which every individual is

> entitled against state interference in his personal affairs when he is not hurting others. Lastly, the practicalities of police administration must be considered. Funds and personnel for police work are limited, and it would appear to be poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved. Even the necessary utilization of police in cases involving minors or public solicitation raises special problems of police morale, because of the entrapment practices that enforcement seems to require, and the temptation to bribery and extortion.
>
> "At the present time only New York has a statute which, like our proposal, treats deviate sexuality with primary emphasis on the aggression, grading the offense in a manner quite similar to rape. But even there consensual relations between adults remains a misdemeanor, and intercourse with an animal, bird or corpse continues to carry as high as life imprisonment." (MPC Tentative Draft No. 4, pp. 276-279 (1953)).

The Commission should decide whether to accept the Code's judgment not to punish deviate sexual relations between consenting adults. If not, the language found in an earlier draft of the Code might be used to include it.

> "A person who engages in an act of deviate sexual intercourse...commits a misdemeanor."

3. Deviate Sexual Intercourse. As defined by the Code, the definition seems to be quite limited as to the acts it encompasses. An earlier draft read as follows:

> "Deviate Sexual Intercourse means penetration by the male sex organ into any opening of the body of a human being or animal, other than carnal knowledge [as defined in the Rape Section] any sexual penetration of the vulva or anus of a female by another female or by an animal."

4. Grading According to Degree of Compulsion. The same distinctions used to grade Rape and Gross Sexual Imposition (Section 213.1) are used to grade this offense. See commentary to Section 213.1, supra.

5. Other State Codes.

(a) New York:

§130.38 Consensual sodomy

A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

Consensual sodomy is a class B misdemeanor.

§130.40 Sodomy in the third degree

A person is guilty of sodomy in the third degree when:

1. He engages in deviate sexual intercourse with a person who is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Being twenty-one years old or more, he engages in deviate sexual intercourse with a person less than seventeen years old.

Sodomy in the third degree is a class E felony.

§130.45 Sodomy in the second degree

A person is guilty of sodomy in the second degree when, being eighteen years old or more, he engages in deviate sexual intercourse with another person less than fourteen years old.

Sodomy in the second degree is a class D felony.

§130.50 sodomy in the first degree

A person is guilty of sodomy in the first degree when he engages in deviate sexual intercourse with another person:

1. By forcible compulsion; or

2. Who is incapable of consent by reason of being physically helpless; or

3. Who is less than eleven years old.

Sodomy in the first degree is a class B felony.

(b) Michigan:

(Same as New York without §130.38)

(c) Connecticut:

§76. [Deviate sexual intercourse in the first degree]

A person is guilty of deviate sexual intercourse in the first degree when he engages in deviate sexual intercourse with another person or causes another person to engage in deviate sexual intercourse:

(1) by forcible compulsion, but it shall be affirmative defense to prosecution under this subsection that the other person had previously with consent engaged in deviate sexual intercourse with the actor; or

(2) who is incapable of consent by reason of being physically helpless; or

(3) who is less than fourteen years old.

Deviate sexual intercourse in the first degree is a class B felony.

§77. [Deviate sexual intercourse in the second degree]

A person is guilty of deviate sexual intercourse in the second degree when he engages in deviate sexual intercourse with another person or causes another person to engage in deviate sexual intercourse by forcible compulsion.

Deviate sexual intercourse in the second degree is a class C felony.

§78. [Deviate sexual intercourse in the third degree]

A person is guilty of deviate sexual intercourse in the third degree when he engages in deviate sexual intercourse with another person or causes another person to engage in deviate sexual intercourse, and

(1) the other person is incapable of consent by reason of some factor other than being less than sixteen years old or

(2) he is nineteen years old or more and the other person is less than sixteen years old.

Deviate sexual intercourse in the third degree is a class D felony.

(d) Illinois:

§11--2. Deviate Sexual Conduct

"Deviate Sexual Conduct", for the purpose of this Article, means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.

§11--3. Deviate Sexual Assault

(a) Any person of the age of 14 years and upwards who, by force or threat of force, compels any other person to perform or submit to any act of deviate sexual conduct commits deviate sexual assault.

(b) Penalty.

A person convicted of deviate sexual assault shall be imprisoned in the penitentiary from 4 to 14 years.

(e) California:

Section 1603. Aggravated Sodomy

A person who has deviate sexual intercourse with another person, whether of the same or the opposite sex, not his spouse commits aggravated sodomy if:

(1) he compels the other person to submit by force or by threat of imminent death, serious bodily injury, or kidnapping to be inflicted on him or on any other person; or

(2) the other person is less than fourteen years old.

Aggravated sodomy is a felony of the first degree if in the course thereof the actor inflicts serious bodily injury on his victim or if his conduct violates both Subsection (1) and Subsection (2) of this section. Otherwise, aggravated sodomy is a felony of the second degree.

Section 1604. Sodomy

A person who has deviate sexual intercourse with another person, whether of the same or the opposite sex, not his spouse commits sodomy if:

(1) he knows the other person is unconscious; or

(2) he has substantially impaired the other person's power to appraise or control his conduct by administering without his knowledge drugs or similar means for the purpose of preventing resistance; or

(3) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(4) he knows that the other person is unaware of the sexual nature of the act being committed upon him; or

(5) he compels the other person to submit by any threat that he knows would be likely to prevent resistance by a person of ordinary resolution.

Sodomy is a felony of the third degree.

(f) Wisconsin:

944.17 Sexual perversion

Whoever does either of the following may be fined not more than $500 or imprisoned not more than 5 years or both:

(1) Commits an abnormal act of sexual gratification involving the sex organ of one person and the mouth or anus of another; or

(2) Commits an act of sexual gratification involving his sex organ and the sex organ, mouth or anus of an animal.

Section 213.3. Corruption of Minors and Seduction.

(1) Offense Defined. A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:

(a) the other person is less than [16] years old and the actor is at least [4] years older than the other person; or

(b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or

(d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

(2) Grading. An offense under paragraph (a) of subsection (1) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor.

* * * *

§213.3 Commentary

1. This provision consolidates all crimes involving sexual offenses against minors, both as to ordinary heterosexual relations and deviate relations, except when such acts are done against girls under the age of 10. These latter continue to be treated as Rape and Deviate Sexual Intercourse, graded as higher offenses, under Sections 213.1(1)(d) and 213.2(1)(d).

The Section forbids sexual intercourse, deviate sexual intercourse or causing another to engage in the latter in any of four situations:

2. Under-age Females; Age Disparity: Section 213.3(1)(a). The "age of consent" is set at 16 years and the defendant must be more than four years older than the girl.

New Jersey's carnal abuse statute and a section of our sodomy law now cover these crimes:

"2A:138-1. Rape and carnal abuse; penalty

"Any person who...being of the age of 16 or over, unlawfully and carnally abuses a woman-child under the age of 12 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 30 years, or both; or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child of the age of 12 years or over, but under the age of 16 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

"2A:143-2. Sodomy with children under 16

"Any person who commits sodomy, or the infamous crime against nature, with a child under the age of 16 years, is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 30 years."

These ages--10 years for the greater offense and 16 for this-- are justified in this way:

"Special treatment of consensual intercourse with a child is warranted not only because the immature require protection and to prevent the outrage to parental and community feelings, but also because an adult male's proclivity for sex relations with children is a recognized symptom of mental aberration, called pedophilia. On the other hand, statistics of arrest and conviction do not demonstrate unusual recidivism such as one might expect of mentally ill offenders. Moreover, a single instance of sexual relations with a child does not establish mental aberration. Another factor to be considered is that extremely young victims may not make competent witnesses.

"There appear to be three significant categories involving the age of the female: (1) prepuberty victims with a considerable probability of aberration in the male aggressor, (2) the period of puberty, when the girl arrives at physical capacity to engage in intercourse, but remains seriously deficient in comprehension of the social, psychological, emotional and even physical significance of sexuality, so that it is still realistic to regard her as victimized, and (3) the period of

later adolescence when the chief significance of the behavior is its contravention of the moral standards of the community. This last category is reserved for separate treatment in sections dealing with sexual corruption of minors. The critical periods selected in the text are those where the female is under 10 years old and where she is between 10 and 16. Despite the indication that 12 is the commonest age for the onset of puberty, it seems wise to go well outside the average or modal age, and it is known that significant numbers of girls enter the period of sexual awakening as early as the tenth year. Substantially all will have completed the transition by the end of the fifteenth year." (MPC Tentative Draft No. 4, p. 253 (1953)

Further, the youth of the male is given significance by requiring that he be at least four years older than the female:

"Present statutes frequently give effect to the youth of the male. A common pattern is to require that the male be above the age which is critical for the female.

* * * *

"The rationale of statutory rape is victimization of immaturity. It seems necessary, therefore, to recognize that immature males may themselves be victims of adolescence rather than engaged in exploitation of others' inexperience. It is assumed for the present purpose that boys under 17 will not be subject to ordinary penal treatment under this code, so that no express exemption of this class is required in this section. The most convenient way to give effect to the victimization rationale is to require a substantial age differential in favor of the male. Thus, a youth who had relations with a 12 year old would have to be at least 17; where the girl was just under 16, the boy would have to be 21, to come within subsection (2)(d). Certainly, existing statutory provisions under which the rape label is applied to sexual experimentation by a girl just under and a boy just over 16 seem harsh and unreasonable." (Ibid.)

3. Guardians and Persons Responsible for Welfare: Section 213.3(1)(b).

"Subsection (1)(b) has been revised so that only guardians and others responsible for supervising the young, e.g., probation officers, camp supervisors, may be penalized. The previous draft reached anyone

> responsible for 'care, treatment, protection, or education,' a formula which, upon reconsideration, seemed too broad in its possible impact on doctor-patient and teacher-student relationships." (MPC Proposed Official Draft, pg. 147 (1962)).

4. Intercourse with Women in Custody of Some Authority: Section 213.3(1)(c). Where women are in custody, coercion and abuse of authority can easily be present. On the other hand, it must be recognized that institutionalized women may freely and competently seek sexual relations with available males, whether casual visitors, fellow-inmates, or members of the custodial group. The prevention of such intercourse may be a proper objective of the criminal law, but it is entirely too undiscriminating to lump all such cases together for the severe punishment appropriate to forceful rape. (MPC Tentative Draft, No. 4, pg. 259 (1953)). That is the policy now pursued by our law:

> "2A:138-2. Carnal knowledge of inmates of homes or institutions for feeble-minded or mentally ill
>
> "Any person who has carnal knowledge of a female inmate of any home or institution for feeble-minded or mentally ill females, or of any home or training school for the feeble-minded, with or without her consent, is guilty of a misdemeanor."

The provision in the Code is now limited to personnel having "supervisory or disciplinary authority" over the victim. In an earlier draft, any person "associated" with the institution would have been covered. This change was made to eliminate those situations not involving presumptive abuse of custodial authority. MPC Proposed Official Draft, pg. 147 (1962)

5. Seduction: Section 213.3(1)(d). The crime of Seduction is now defined by two New Jersey Statutes:

> "2A:142-1. Seduction of single female by married man
>
> Any married man who has sexual intercourse with a single female of good repute for chastity, by representation that he is a single man, or under promise of marriage, she thereby becoming pregnant, is guilty of a high misdemeanor.

"2A:142-2. Seduction of single female by single man; marriage of female

"Any single man over the age of 18 years who, under promise of marriage, has sexual intercourse with a single female of good repute for chastity, under the age of 21 years, she thereby becoming pregnant, is guilty of a high misdemeanor.

"If the offender marries the female at any time before sentence, the sentence shall be suspended and he shall be discharged from custody; and if he marries the female after sentence, he shall be discharged from imprisonment."

See State v. Hall, 85 N.J. Super. 312 (1964) modified 87 N.J. Super. 480 (App. Div. 1965); State v. Slattery, 74 N.J.L. 241 (1907).

(a) General Considerations. Presently, there is a wide divergence in American legislation as to what, if any, forms of fraudulent procurement of extra-marital intercourse shall be criminal:

"At first blush, it would appear obviously desirable to punish the practice of deception where an innocent girl is induced to engage in extra-marital intercourse. Both deception and extra-marital intercourse are undesirable, and it may be asked why the law should punish a man for defrauding a girl of a few dollars but not for defrauding her of her virtue. Further reflection, however, discloses significant criminologic distinctions, which must lead to caution in punishing deception for sexual gain. Whatever may have been the case in preceding generations, the present generation would hardly be unanimous in the view that intercourse is a favor granted by the female only in exchange for a quid pro quo. A substantial body of present opinion would regard intercourse as a matter of mutual gratification, an expression as much of the female's libido as the male's. To the extent that this is the case, it would rarely be true that the female 'yields' completely or predominantly on account of the deception. Furthermore, deception appears to play quite a different role in seduction than in property fraud. In the typical case of property fraud, the deception is likely to relate to the monetary value of what the victim receives in exchange for what he gives up. Deception in love, on the other hand, is typically directed at arousing emotions: flattery, professions of undying love, wearing better clothes than one's purse justifies, even promises of matrimony, may

> have this quality of expressing or seeking to evoke affection or passion rather than a proffer of a quid pro quo that the suitor intends to withhold. It must be noted that a certain amount of mutual or self-deception of this character is common among swains and lovers. It is significant also that one kind of deception that would be undisputably criminal in a business transaction viz. misrepresentation of an article transferred to the victim, would be clearly insufficient in amorous transactions. To the extent of the foregoing, deception in love does not betoken the same depravity and deviation from social norms as deception in business, and is less likely to deprive the victim of anything she really wants to keep.
>
> "Moreover, the penal legislator must recognize that in such an area courts and juries will have unusual difficulty in distinguishing with sufficient certainty between vicious instances of victimization by fraud and superficially similar cases in which an angry and disappointed woman testifies to words or innuendoes of promise. Considerations of this character have led to widespread legislation abolishing civil actions for breach-of-promise and seduction, one of the main grounds being that it was primarily an instrument of blackmail. On the other hand, it may be possible to pick out for punishment some specially aggravated forms of seduction, and it may be advantageous to do so, if only to hold out the prospect of some legal recourse to outraged families that may otherwise resort to violence. The legislator's objective, therefore, must be to confine the criminal law to cases of deception where there is unusual likelihood of serious imposition." (MPC Tentative Draft No. 4, pp. 256-257 (1953)).

(b) Promise of Marriage. Most states, like New Jersey, limit the crime of seduction to intercourse "under promise of marriage." See N.J.S. 2A:142-1 and 2; State v. Hall, supra and State v. Slattery, supra. This limitation is continued in the Code.

> "It is generally held that the promise must be unconditional; for example, a promise to marry if the girl should become pregnant is insufficient. The state must show that the promise was the inducement to yield. The mere fact that such a promise preceded intercourse does not establish the necessary causal relationship; otherwise all intercourse between betrothed persons would be criminal. It has even been held that the crime is not committed if the girl

yields partly through fear or lust. Under the text, it will be necessary to show that the promise was so significant that intercourse would not have been permitted without it; but the prosecution should not be defeated merely by an acknowledgment that the victim experienced ardor or fright also. The fact that the defendant was married, and that the woman knew it will not bar prosecution except as it tends to establish that the woman may not have relied on the promise of marriage. However, the woman's knowledge that the man was married is sometimes made an absolute defense."

* * * *

"The text is unique in requiring that the promise of marriage be made in bad faith, thus adhering to our general policy of punishing imposition rather than private immorality. The provision will also help to differentiate the case of pre-marital intercourse between engaged couples from the case of the Lothario who may be deceiving a series of girls with false promises of marriage." (MPC Tentative Draft No. 4, pp. 257-259 (1953)).

(c) Pregnancy as a Prerequisite of Seduction Prosecution.

New Jersey is alone in requiring that the woman become pregnant as a result of the seduction. The Code rejects this view:

"New Jersey's statute is the only one requiring that the woman become pregnant as a result of the seduction. Such a requirement could have the following significance: (1) it might represent the judgment that this, rather than the imposition, is the real harm against which the legislator desires to proceed; (2) pregnancy might be regarded as providing physical corroboration, in part, of the prosecutrix' story; (3) it may tend to conform the legal definition to the realities of actual prosecution, i.e., that seduction complaints are seldom filed unless there is a pregnancy and refusal of the father to marry and support. Restriction of the offense to this situation, therefore, might make the Code more truly represent the living law, avoiding the creation of a broader nominal liability which is not enforced or within which operates an erratic enforcement policy according to individual bias.

With regard to the first factor above, as has been already stated, the policy objective of the present section is to prevent imposition in sexual dealing. A discrimination between two equally

> deceitful seducers on the basis of the 'accident' of pregnancy can hardly be justified, if the legislative intent is to prevent the deceit. The evidentiary value of pregnancy (point 2, above) would not justify the requirement, in view of the independent requirement of corroboration.... Moreover, the chief issue in the prosecution is likely to be deception, as to which the pregnancy furnishes no clue.
>
> "The third argument above has considerable merit if, in fact, prosecution is generally confined to pregnancy cases. But if that is the case, it may be an argument for complete elimination of the seduction offense, since it would appear to be little more than an instrument for enforcing civil support claims. The matter of criminal liability for nonsupport must be considered apart from the subject of fraudulent seduction, since the obligation to support illegitimate offspring ought not to be affected by the question of whether the father deceived the mother." (Id. at 260-261).

(d) Marriage as a Bar to Prosecution. Contrary to prevailing law (see N.J.S. 2A:142-2, second paragraph, and State v. Hall, supra (marriage to another)) the Code does not make marriage a defense to criminal seduction.

> "The rational significance of marriage as a bar to prosecution for seduction might be that: (1) it indicates good faith in the promise of marriage ....or (2) it indicates a reformation of the defendant's character and a willingness to assume his responsibilities; or (3) regardless of good faith of the original promise, society should not wreck an incipient marriage by jailing the husband (cf. the New Jersey statute,...or (4) the community desires to give the seducer a penal incentive to marry the girl. Furthermore, it is probable that only in the rarest cases will a complaint be filed or prosecuted after marriage, so that the consideration that the law should accurately represent our real determination to punish becomes applicable. Against the foregoing it may be urged that marriage between the victim and victimizer under threat of prosecution is very likely to work out badly and therefore should not be encouraged by law, particularly if the legitimacy of a child is not at stake. As on so many other questions of penal law, definitive studies of the impact of the law are lacking.

"The situation in which the law is likely to be invoked must be considered. Regardless of what the law provides, the bulk of the seduction cases will be settled by marriage or otherwise, without being brought to the attention of the authorities. The complaints coming to the authorities will, then, consist of (1) a group of 'first reaction' protests from parents, most of which should be referred to social agencies for resolution, or which will be withdrawn in a short time after private settlement; (2) a group of cases where the defendant persistently refuses to acknowledge responsibility or make amends; and (3) a small group of cases in which there has been a marriage, probably under duress, which has already collapsed. None of these situations calls for a legal nudge toward matrimony as the solution. Classes (2) and (3) had best go before a tribunal for a determination of guilt or innocence plus a discretionary disposition or probation. The objective of conforming the law to the actual enforcement operation contemplated can be achieved by express recognition of this offense as one resting on complaint of the injured person." (MPC Tentative Draft No. 4, pp. 259-260 (1953)).

6. Gradation. See Section 213.3(2).

7. Other State Codes.

(a) Illinois:

§11--4. Indecent Liberties with a Child

(a) Any person of the age of 17 years and upwards who performs or submits to any of the following acts with a child under the age of 16 commits indecent liberties with a child:

(1) Any act of sexual intercourse; or

(2) Any act of deviate sexual conduct; or

(3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both.

(b) It shall be an affirmative defense to indecent liberties with a child that:

(1) The accused reasonably believed the child was of the age of 16 or upwards at the time of the act giving rise to the charge; or

(2) The child is a prostitute; or

(3) The child has previously been married.

(c) Penalty.

A person convicted of indecent liberties with a child shall be imprisoned in the penitentiary from 4 to 20 years.

§11--5. Contributing to the Sexual Delinquency of a Child

(a) Any person of the age of 14 years and upwards who performs or submits to any of the following acts with any person under the age of 18 contributes to the sexual delinquency of a child:

(1) Any act of sexual intercourse; or

(2) Any act of deviate sexual conduct; or

(3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both; or

(4) Any lewd act done in the presence of the child with the intent to arouse or to satisfy the sexual desires of either the person or the child or both.

(b) It shall not be a defense to contributing to the sexual delinquency of a child that the accused reasonably believed the child to be of the age of 18 or upwards.

(c) Penalty.

A person convicted of contributing to the sexual delinquency of a child shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

§11--6. Indecent Solicitation of a Child

(a) Any person of the age of 17 years and upwards who (1) solicits a child under the age of 13 to do any act, which if done would be an indecent liberty with a child or an act of contributing to the sexual delinquency of a child; or (2) lures or attempts to lure any child under the age of 13 into a motor vehicle with the intent to commit an indecent act, commits indecent solicitation of a child.

(b) It shall not be a defense to indecent solicitation of a child that the accused reasonably believed the child to be of the age of 13 years and upwards.

(c) Penalty.

A person convicted of indecent solicitation of a child shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

(b) California:

Section 1605. Corruption of Minors

A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with a person, whether of the same or the opposite sex, not his spouse is guilty of a felony of the third degree if the other person is less than eighteen years old and the actor is not less than three years older than the other person.

Section 1606. Custodial Imposition

A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with a person, whether of the same or the opposite sex, not his spouse is guilty of a felony of the third degree if the other person is in custody of law or detained by authority of law in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

(c) Wisconsin:

944.11 Indecent behavior with a child

Any of the following may be fined not more than $500 or imprisoned not more than 10 years or both:

(1) Any male who takes indecent liberties with a female under the age of 16; or

(2) Whoever takes indecent liberties with the privates of any person under the age of 18; or

(3) Whoever consents to the indecent use of his own privates by any person under the age of 18.

944.12 Enticing a child for immoral purpose

Any person 18 years of age or over, who, with intent to commit a crime against sexual morality, persuades or entices any child under 18 years of age into any vehicle, building, room or secluded place may be * * * imprisoned not more than * * * 10 years * * *.

Section 213.4. Sexual Assault.

A person who has sexual contact with another not his spouse, or causes such other to have sexual contact is guilty of sexual assault, a misdemeanor, if:

(1) he knows that the contact is offensive to the other person or

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct; or

(3) he knows that the other person is unaware that a sexual act is being committed; or

(4) the other person is less than 10 years old; or

(5) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(6) the other person is less than 16 years old and the actor is at least four years older than the other person; or

(7) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(8) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual contact is any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

* * * *

S213.4 Commentary

1. Introduction. This Section deals with acts of sexual aggression which do not involve the peculiarly resented element of "penetration." Presently, these acts would be treated under a variety of statutes, e.g., assault, carnal abuse (See State v. McLean, 135 N.J.L. 491 (1947); Application of Faas, 42 N.J. Super. 31 (1956)), lewdness or indecency, impairing the morals of a minor, etc.

2. "Sexual Contact". "Sexual Contact" is defined as

> "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire."

Notice that an actual touching is required. See MPC Tentative Draft No. 4, pp. 292-293 (1953).

3. Consent. Originally, the Section required that the act be done with "no consent." This was eliminated as establishing "too strict a standard of criminality, considering the frequency with which tentative sexual advances are made without explicit assurance of consent." MPC Proposed Official Draft, pg. 149 (1962).

4. The acts and the relationships under which touchings are made criminal are found in Subsections (1) through (8) and parallel the categories found in Sections 213.1, 213.2, and 213.3.

5. Other State Codes.

(a) New York

§ 130.55 Sexual abuse in the third degree

A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent; except that in any prosecution under this section, it is an affirmative defense that (a) such other person's lack of consent was due solely to incapacity to consent by reason of being less than seventeen years old, and (b) such other person was more than fourteen years old, and (c) the defendant was less than five years older than such other person.

Sexual abuse in the third degree is a class B misdemeanor.

§ 130.60 Sexual abuse in the second degree

A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is:

1. Incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Less than fourteen years old.

Sexual abuse in the second degree is a class A misdemeanor.

§ 130.65 Sexual abuse in the first degree

A person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact:

1. By forcible compulsion; or

2. When the other person is incapable of consent by reason of being physically helpless; or

3. When the other person is less than eleven years old.

Sexual abuse in the first degree is a class D felony.

(b) Michigan: Same as New York

(c) Connecticut

§ 79. Sexual contact in the first degree

(Same as New York § 130.65)

§ 80. Sexual contact in the second degree

A person is guilty of sexual contact in the second degree when he subjects another person to sexual contact and when such other person is:

(1) incapable of consent by reason of some factor other than being less than sixteen years old; or

(2) less than fourteen years old.

Sexual contact in the second degree is a class D felony.

§ 81. Sexual contact in the third degree

(Same as New York § 130.55)

(d) California

Section 1607. Sexual Midconduct

A person who intentionally subjects another person, whether of the same or the opposite sex, not his spouse to any sexual contact is guilty of sexual misconduct if:

(1) the other person does not consent to the contact; or

(2) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of the contact involved; or

(3) he knows that the other person is unaware that a sexual act is being committed; or

(4) he has substantially impaired the other person's power to appraise or control his conduct by administering without his knowledge drugs or similar means to prevent resistance; or

(5) the other person is less than fourteen years old; or

(6) the other person is less than eighteen years old and the actor is not less than three years older than the other person; or

(7) the other person is in custody of law or detained by authority of law in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Section 1608. Grading of Sexual Misconduct

(1) Sexual misconduct is a felony of the first degree if the victim is less than fourteen years old and the actor compels the victim to submit by force or by threat of imminent death, serious bodily injury or kidnapping to be inflicted on anyone.

(2) Sexual misconduct is a felony of the second degree if in the course thereof the actor inflicts serious bodily injury on his victim.

(3) Sexual misconduct is a felony of the third degree if the victim is less than fourteen years old.

(4) Sexual misconduct is otherwise a misdemeanor.

Section 213.5. Indecent Exposure.

A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.

* * * *

§213.5 Commentary

1. Lewd or indecent behavior is now punishable under N.J.S. 2A:115-1 which provides as follows:

> "Any person who commits open lewdness or a notorious act of public indecency, grossly scandalous and tending to debauch the morals and manners of the people, or in private commits an act of lewdness or carnal indecency with another, grossly scandalous and tending to debauch the morals and manners of the people, is guilty of a misdemeanor."

As construed by our cases, this provision includes the offense of Indecent Exposure. The general offense of Open Lewdness will be covered in Section 250.1 of the Code. Indecent Exposure is treated at this point:

> "The special case of genital exposure for sexual gratification is punishable more severely than ordinary open lewdness, since the behavior amounts to, or at least is often taken as, threatening sexual aggression. For the same reason this offense is placed in the article of the Code dealing with other types of sexual aggression, whereas open lewdness is included in the article that encompasses obscenity and prostitution." (MPC Tentative Draft No. 13, pg. 82 (1961))

2. Our cases now require that the act be done "in public." The most recent case holds that the exposure must actually be seen by someone (State v. Buffano, 5 N.J. Super. 255 (App. Div. 1949) although an earlier case it was indicated that this was not necessary (Van Houten v. State, 46 N.J.L. 16 (Sup. Ct. 1883)). See also State v. Toohey, 6 N.J. Super. 97 (App. Div. 1950). The Code abandons the idea of being "in public" and instead requires that the act be "under circumstances in which he knows his conduct is likely to cause affront or alarm."

3. Other State Codes

(a) Michigan

Indecent Exposure

Sec. 2325. (1) A person commits the crime of indecent exposure if, with intent to arouse or gratify sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.

(2) Indecent exposure is a Class C. misdemeanor.

(b) California

Section 1609. Indecent Exposure.

A person commits a misdemeanor if, for the purpose of arousing or gratifying the sexual desire of any person, including the actor, he exposes his genitals or performs any other lewd act under circumstances in which his conduct is likely to be observed by any person who would be offended or alarmed.

Section 213.6. Provisions Generally Applicable to Article 213.

(1) Mistake as to Age. Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

(2) Spouse Relationships. Whenever in this Article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.

(3) Sexually Promiscuous Complainants. It is a defense to prosecution under Section 213.3 and paragraphs (6), (7) and (8) of Section 213.4 for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

(4) Prompt Complaint. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within 3 months of its occurrence or, where the alleged victim was less than 16 years old or otherwise incompetent to make complaint, within 3 months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

(5) Testimony of Complainants. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

* * * *

§213.6 Commentary

1. Mistake as to Age: Section 213.6(1). It is generally held under present law that even a reasonable mistake as to the age of the girl does not exculpate or mitigate a sex offense. MPC Tentative Draft No. 4, pg. 253 (1953). Such is the law in New Jersey. In State v. Moore, 105 N.J. Super. 467 (App. Div. 1969) defendant was charged with carnal abuse of a girl who was 14 years

of age. The sole argument made on defendant's behalf on the appeal was that the trial court should have recognized as a defense that the accused reasonably believed that the prosecutrix was above the age of 16 years. The jury had been instructed that the defendant's mistaken belief of the girl's age could not be considered as a defense.

In 1 Wharton, Criminal Law (1957), §321, it is stated:

> "It is no defense that the defendant did not know that the female was under the statutory age of consent. It is immaterial that the defendant in good faith believed that the female was above the prohibited age, that he had 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.
>
> The defendant acts at his peril that the female may in fact be under the age of consent. The fact that the defendant cannot assert as a defense his bona fide belief in the victim's age does not make unconstitutional the statutes under consideration."

We subscribe to that view.

> Our statute, N.J.S. 2A:138-1, provides in pertinent part: ... Statute omitted . It is noteworthy that the words "willfully," "Intentionally," "knowingly," or words of similar import are absent from the above-quoted provision of our statute.
>
> Except for a recent California decision, People v. Hernandez, 61 Cal. 2d 529, 39 Ca. Rptr. 361, 393 P. 2d 673, 8 A.L.R. 3d 1092 (Sup. Ct. 1964), it has been the universally accepted view of the courts of this country that defendant's knowledge of the age of the woman is not an essential element of the crime of statutory rape and that, therefore, "it was no defense that the accused reasonably believed her to be of the age of consent." 8 A.L.R. 3d 1100, 1102 (1966).

* * * *

> In 2 Schlosser, New Jersey Criminal Laws (1953), §2091, the author states:
>
> "In a prosecution for carnal abuse it is no defense that the accused did not know that the girl was under the age of consent or that from her appearance he believe her to be older than sixteen years of age."
>
> State v. Koettgen, 89 N.J.L. 678 (E. & A. 1916), indicates that where the Legislature has specified a particular age as the assence of an enactment, it is age in fact, not in reasonable belief or appearance, that is dispositive. Reference in support therof was made in Koettgen, at p. 683, to Reg. v. Robins,

1 C & K. 456, 47 E.C.L. 456, where it was held that it was no defense that the prisoner did not know that the girl was under sixteen, or that from her appearance he might have thought she was of greater age. The "age of the prosecutrix is the distinguishing ingredient of the crime of carnal abuse * * *." State v. Lefante, 12 N.J. 505, 513 (1953).

Defendant urges upon us that "in to-day's sexually oriented and educated society * * * it is absurd to continue to apply the statutory rape standard as if you were dealing with a ten year old." He adds that the statute fixing the age of "unconstitutionally arbitrary and irrational." We do not agree with the latter contention, preferring to rely upon the long and practically universal acceptance proscribing sexual intercourse with a female over 12 and less than 16 years of age. The crime has been defined by the Legislature in terms which negate any element of criminal intent on the part of the actor. It is for that body, not the courts, to change the law, if it chooses to subscribe to a more liberal pattern of sex behavior with young females.

"Within reasonable limitations, the Legislature has the power and the right to designate the mere doing of an act as a crime, even in the absence of the mens rea which was a necessary prerequisite at common law." Morss v. Forbes 24 N.J. 341, 358 (1957). Our Legislature has done so with that portion of N.J.S. 2A:138-1 involved in the instant case. It could amend the statute to require knowledge or a criminal intent, but it has not expressed any such legislative intent, despite the long held view by almost all courts of the meaning of similar statutes as not requiring criminal intent. California has seen fit to modify its law, as indicated by People v. Hernandez, supra, 39 Cal. Rptr. 361, 393 P. 2d 673. where the element "criminal intent" is deemed essential for conviction. New Jersey has not.

The Code, in this Subsection, abandons this rule in part:

"Ploscoew Sex and the Law (1951) has severely criticized this legislative and judicial attitude in cases where the girl is over 10 years old, on two grounds: (1) over the age of 10, the sexual act begins to lose its abnormality and physical danger to the victim; (2) bona-fide mistakes in age can be made more easily by men who are not essentially dangerous where the girl is physically more developed. He recommends that a reasonable belief that the girl was above the age of consent be permitted as a defense to the charge of "statutory rape."

"Paragraph (d) of subsection (1) follows existing law in denying the defense of mistake as to age, when the victim is in fact under 10, for the reason that any error that is at all likely to be made would still have the young girl victim far below the age for sexual pursuit by normal males. Under (2)(d) the actor escapes even third degree liability if he reasonably believed the girl to be over 16. Pursuit of females who appear to be over 16 betokens no abnormality but only a defiance of

religious and social conventions which appear to be fairly widely disregarded." (MPC Tentative Draft No. 4 pg. 253 (1953)).

Section 68(b) of the Connecticut Code provides as follows:

> When the alleged victim's age is an element of an offense under sections 67 to 91, inclusive, of this act, it shall be an affirmative defense that the actor reasonably believed the alleged victim to be above the specified age, except when the alleged victim is less than fourteen years of age.

Section 1600(4) of the California Code provides as follows:

> (4) Whenever in this chapter the criminality of conduct depends on a child's being below the age of fourteen, it is no defense that the actor reasonably believed the child to be fourteen or older. Whenever in this chapter the criminality of conduct depends on a child's being below a specified age older than fourteen it is an affirmative defense that the actor reasonably believed the child to be of that age or above.

2. Spouse Relationships: Section 213.6(2).

(a) Definition of "Spouses". Two problems are covered in this area by the Code. Where the definition of an offense excludes conduct with a spouse, the exclusion includes persons "living as man and wife" regardless of the legal status of their relationship. The substantial possibility of consent is said to justify this position. MPC Tentative Draft No. 4, pg. 245 (1953). No New Jersey cases were found.

Along the same lines, this exclusion from the definition of spouse is inoperative where they are living apart under a decree of judicial separation. In Rex. v. Clarke 1949 33 Cr. App. Rep. 216, 2 All. E.R. 448, it was held that a judicial separation order containing a non-cohabitation provision revoked the marital consent of the wife making the husband liable for rape. Mere filing a divorce petition is not, however, sufficient. Regina v. Miller, 1954 2 W.L.R. 138 (1953). The Code accepts this view

> "Under the proposed statute a rape prosecution is not possible where the spouses have been living apart without benefit of a judicial order. We take this position because of the substantial possibility of consent in the resumption of sexual relations in this situation, coupled with the special danger of fabricated accusations. (MPC Tentative Draft No. 4, pg. 254 (1953)).

Again, no New Jersey cases were found. This section is adopted in Connecticut §68(c) and in California (§1600(5)).

(b) Spouse as Accomplice. Even though a spouse or a woman is excluded from liability by a particular section of this article, the spouse or the woman may be convicted as an accomplice in a sexual act

> "which he or she causes another person, not within the exception, to perform."

This is our law. State v. Jackson, 65 N.J.L. 105 (Sup. Ct. 1921); State v. Goldfarb, 96 N.J.L. 71 (Sup. Ct. 1921). See cases collected in Commentary to Section 206, pg. IB-56. See MPC Tentative Draft No. 4, pg. 254 (1953).

3. Sexually Promiscuous Complainants: Section 213.6(3).

This Section establishes a limited rule as to the prior chastity of the victim in sex offense cases. It follows existing law, in New Jersey and elsewhere, that the promiscuity of the victim is not a defense to charges of rape. See MPC Tentative Draft No. 4, pg. 254 (1953); 2 Schlosser Criminal Laws of New Jersey §2081. Such evidence may be admissible, however, for some other purpose, i.e., to show consent (O'Blenis v. State, 47 N.J.L. 279 (Sup. Ct. 1885)) or to show that defendant is not the father of a child born to the girl. (State v. Rubertone, 89 N.J.L. 285 (E & A 1916); State v. Ward, 101 N.J.L. 275 (Sup. Ct. 1925).

However, the section does establish such a rule as to "carnal abuse" cases where the girl more than 10 years old. In this regard, it changes our law. See 2 Schlosser, supra, §2046; State v. Rubertone; supra; State v. Ward, supra. The justification given is as follows:

> "Inquiries of this character may be justified in cases involving older adolescent girls where the essence of the offense is the defendant's corruption of innocent but capable females. If, however, we proceed on the hypothesis that girls under 16 lack capacity for judgment in this area, it is something of a farce to inquire into their virtue. Previous sexual experience in this situation might well betoken previous victimization,

> which should not be a defense to a subsequent victimizer. However, one can envision cases of precocious 14 year old girls and even prostitutes of this age who might themselves be the victimizers. Accordingly the draft while rejecting the concepts of "virtue," "chastity" or "good repute" permits the defense that the girl has engaged in promiscuous sex relations. It is believed that in the rare instance of prostitution or promiscuity in girls under 10, the aberration evidenced by the male in his desire for gratification with the child, is a sufficient menace to the community to warrant the penalty irrespective of the abnormal sex habits of the girl." (MPC Tentative Draft No. 4, pg. 254 (1953)).

Thirdly, it follows our law in making such a defense applicable to seduction (Section 213.4.(d)) except that we now look to reputation for chastity rather than the fact of it. (NJS 2A:142-1 and 2: "of good repute for chastity").

As applied to Section 213.3 in its entirety, however, the provision of Subsection (3) may go too far. The special relationships of Subsections(1)(b) and (c) of Section 213.3 might not appropriately be subject to this defense. As now drafted, they are. The Commission should decide whether to exclude them.

The defense also applies to those types of sexual assault (Section 213.4) related to the crimes found in Section 213.3.

4. Prompt Complaint. At common law, a strong, but not conclusive presumption against a woman was raised by her failing to complain of rape within a reasonable time after the fact. MPC Tentative Draft No. 4, pg. 264 (1953). In the absence of a statute, failure to make prompt complaint is admissible to repel a suggestion that the complainant was insincere. See, e.g., State v. Balles, 47 N.J. 331 (1966); State v. Gambutti, 36 N.J. Super. 219 (1955). No special statute of limitations exists in this state, however, as it does in some others, as to rape cases. This provision of the Code establishes such a rule:

> The specific requirement that the offense be brought to the attention of the public authorities within six months is an innovation in Anglo-American law. A prosecutor would, however, hesitate to institute prosecution on a stale complaint. The possibility that pregnancy might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing

> the offense to the attention of the authorities, are sufficient grounds for setting some time limit upon the right to complain. Likewise, the dangers of blackmail or psychopathy of the complainant make objective standards imperative. A specific possibility of extension of time is made in the case of young children and incompetents for the obvious reason that if such individuals, under our rationale, do not possess the judgment and capacity necessary to become willing participants in an act of sexual intercourse, their deficiency may also blind them to the need for complaint. Fear of parental anger or confusion as to the significance of the act might well encourage silence in this situation. Hence the six month period for complaint does not begin to run, for such individuals, until after a competent person specially interested in the victim learns of the offense. (MPC Tentative Draft No. 4, pg. 264 (1953)).

This Section was adopted in Connecticut.

5. Testimony of Complainants: Subsection 213.6(5).

New Jersey now does not require corroboration in rape and carnal abuse cases. State v. Garcia, 83 N.J. Super. 345 (1964); State v. Andolord, 108 N.J.L. 47 (1931). For seduction, however, a statutory provision specifically requires corroboration:

> 2A:142-3. Evidence of female must be corroborated
>
> No conviction shall be had under this chapter unless the evidence of the female is corroborated to the extent required in case of an indictment for perjury.

See State v. Brown, 65 N.J.L. 687 (Sup. Ct., 1902) affirmed 65 N.J.L. 687 (E & A 1903); State v. Carlone, 109 N.J.L. 208 (1932); Zabriskie v. State, 43 N.J.L. 640 (1881). Neither sodomy nor indecent exposure now require corroboration. State v. Fleckenstein, 60 N.J. Super. 399 (App. Div. 1960).

This Subsection requires corroboration for all felony prosecutions under this Article.

The drafters discussed the policy question in this way:

> Wigmore disapproves of corroboration requirements on the ground that they are unnecessary because (1) jurors are naturally suspicous of such complaints, and (2) the purpose of the rule is already attained by the court's power to set aside a verdict for insufficient evidence. This, he says, is being done in jurisdictions having no statutory rule upon the same evidence which

would not be sufficient in jurisdictions having the statutory rule of corroboration. The most important issue raised by the differences among present laws is whether corroboration in seduction cases shall be required only of the promise of marriage...or of all the material elements of the offense.... For example, New York's statute says the testimony of the woman must be supported by other evidence, but decisions have held this to require corroboration of the promise of marriage and the intercourse only; there is no need for corroboration that the girl is single or that she is chaste. Sometimes under the statutes which require corroboration without further specification, the language of the opinions suggests that what is desired is not so much independent evidence of particular elements of the offense, but rather a basis for believing that the "testimony given by the woman...is worthy of credit and belief." A common formulation with regard to corroboration of the promise of marriage is that the circumstances must be such as usually accompany the relationship of engaged couples.

The text requires corroboration, but does not attempt to particularize as to its nature. A general caution to the authorities against convicting on the bare testimony of the prosecutrix may be desirable in view of the probable special psychological involvement, conscious or unconscious, of judges and jurors in sex offenses charged against others. The only rational alternative would be to require corroboration as to every element of the crime, since there is no reason to believe that complainant is more likely to lie or deceive herself on one point rather than another. A requirement as broad as that would impose an impracticable burden on the prosecutor, especially considering that the offense under subsection 3(a) requires proof that the defendant did not intend to perform his promise, and is otherwise narrowly circumscribed and lightly punished. (MPC Tentative Draft No. 4, pg. 263 (1953)).

Ultimately, they raised some question about their own proposal.

In Subsection (5)...the corrobation requirement has been limited to felony prosecutions, and a sentence has been added to require special caution as to complainant testimony, whether in felony or misdemeanor cases. Corroboration requirements are presently common in seduction statutes, occasionally encountered in rape statutes, not usual in legislation dealing with sodomy or indecent exposure. A uniform policy on all sex offenses has a prima facie validity; but Wigmore's attack on any such requirement gives one pause in extending it to new areas. In addition, it has been argued that a rigid requirement of corroboration would virtually preclude prosecutions in typical cases of minor sexual assault in dark theaters and crowded subways. MPC Proposed Official Draft, pg. 151 (1962).

The New York Code adopts the corroboration requirement:

§ 130.15 Sex offenses; corroboration

A person shall not be convicted of any offense defined in this article, or of an attempt to commit the same, solely on the uncorroborated testimony of the alleged victim. This section shall not apply to the offense of sexual abuse in the third degree.

Section 230.6(5) is adopted in Connecticut, §69.

6. Knowledge of Incapacity to Consent. The New York Code also includes a general provision making an affirmative defense as to knowledge of incapacity of the victim to consent:

> § 130.10 Sex offenses; defense
>
> In any prosecution under this article in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent.

OFFENSES AGAINST PROPERTY

ARTICLE 220. ARSON, CRIMINAL MISCHIEF, AND OTHER PROPERTY DESTRUCTION

Section 220.1. Arson and Related Offenses.

(1) Arson. A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of:

(a) destroying a building or occupied structure of another; or

(b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss. It shall be an affirmative defense to prosecution under this paragraph that the actor's conduct did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury.

(2) Reckless Burning or Exploding. A person commits a felony of the third degree if he purposely starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly:

(a) places another person in danger of death or bodily injury; or

(b) places a building or occupied structure of another in danger of damage or destruction.

(3) Failure to Control or Report Dangerous Fire. A person who knows that a fire is endangering life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when he can do so without substantial risk to himself, or to give a prompt fire alarm, commits a misdemeanor if:

(a) he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire; or

(b) the fire was started, albeit lawfully, by him or with his assent, or on property in his custody or control.

(4) Definitions. "Occupied structure" is defined in Section 221.0(1). Property is that of another, for the purposes of this section, if anyone other than the actor has a possessory or proprietory interest therein. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.

* * * *

1. Arson; Background and Rationale. The common law felony of arson was defined as willful and malicious burning of another's dwelling house or its adjacent structures. State v. Lucas, 30 N.J. 37 (1959); State v. Schenk, 100 N.J. Super. 122 (App. Div. 1968). MPC Tentative Draft No. 11, pg. 34 (1960). There has been a vast legislative development of the crime which has greatly expanded it. Our statutes provide as follows:

2A:89-1. Arson; punishment

Any person who willfully or maliciously burns or consents to the burning of a dwelling house, whether it be his own or that of another, or a structure that is a part of or belongs to or adjoins such dwelling house, or any other building, by means whereof a dwelling house shall be burnt, whether it be his own or that of another, is guilty of arson and shall be punished as for a high misdemeanor.

2A:89-2. Burning ships and buildings other than dwelling houses

Any person who willfully or maliciously burns or sets fire to with intent to burn:

a. Any building, whether it be his own or that of another, not a part of a dwelling house; or

b. Any ship or other vessel, vehicle, motor vehicle or aircraft, whether it be his own or that of another, or

c. Any church, meetinghouse, or public building--

Is guilty of a high misdemeanor.

2A:89-3. Setting fire to or burning property to defraud

Any person who willfully or maliciously sets fire to, or burns or consents to the setting fire to or burning, of any property insured against loss or damage by fire, with intent to prejudice or defraud the insurer thereof or any other person, is guilty of a high misdemeanor.

2A:89-4. Attempting to destroy buildings or contents of buildings with fire or explosives

Any person who willfully or maliciously places or throws in, into, upon, under, against or near any building, any fire or matches, or any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods or chattels, is guilty of a misdemeanor, whether or not any fire or explosion takes place, and whether or not any damage is caused.

2A:89-5. Burning or injuring property, crops, trees, fences or lumber

Any person who, with intent to injure another, willfully or maliciously sets fire to, burns, carries off, damages or destroys:

a. Any goods or chattels;

b. Any hay, grass, grain or vegetable of any kind, whether standing or cut down;

c. Any tree, sapling, plant, herbage, flower, shrub, or underbrush; or

d. Any fence, rail, inclosure, or any pile of wood, boards or other lumber--

Is guilty of a misdemeanor.

2A:89-6. Malicious burning of woods or cranberry bogs

Any person who willfully or maliciously sets fire to, burns or consents to the burning of any woods, marshes, cranberry bogs or meadows belonging to another, is guilty of a misdemeanor.

Most states have statutes which gradate the crime of arson according to varying criteria. The type of structure and the degree of danger to the community are the most frequent. As above set forth, our statutes have very limited grading in them. Further, in most states, the penalty for arson as applied to a dwelling is much more severe than in New Jersey. The Code scheme is explained as follows:

"...Section 220.1... grades the offense partly according to the kind of property destroyed or imperilled and partly according to danger to the

person. We are reluctant to rest entirely on danger to the person in view of the fact that almost any illegal or careless burning endangers life to some extent, as fire fighters and onlookers are drawn to the scene. To make any dangerous burning a second degree felony would be inconsistent with...Sections 211.1 and 211.2, reserving felony sanctions for cases where 'reckless' behavior results in actual serious bodily injury. On the other hand, we do not think it useful to go as far as New York does in grading arson with reference to various types of property burned, time of burning, presence of a human being in the burned structure, etc. Instead, we define a single class of more serious burning, viz. of a 'building or occupied structure.' Within this broad category, the treatment agencies can do better than the legislature in proportioning punishment to the actor's demonstrated indifference to human life and other variables in his personality and behavior.

"We have followed the example of recent codes which enlarge the concept of arson to include exploding as well as burning. The criminologic considerations are quite similar: likelihood of extensive property destruction accompanied by danger to life. Also explosions frequently lead to fires, just as fires sometimes cause explosions.

"As a second degree felony, arson will carry an ordinary maximum sentence of 10 years. Under the General Part of this Code, the maximum 'extended sentence' rises to 15 years for professional, psychopathic, multiple, or repeating offenders. Sections 6.07 and 7.03. If the arsonous behavior results in serious bodily injury, Section 211.1(2) applies, if the circumstances manifest 'extreme indifference to the value of human life.' The culprit found guilty of both arson and felonious bodily injury in one episode would be a multiple offender subject to the extended sentence. (MPC Tentative Draft No. 11, pp. 36-37 (1960)).

2. "Starts a Fire"; Purpose to Destroy or Defraud; Attempt and Preparation. Section 220.1(1) defines the most serious offense in terms of starting a fire or causing an explosion. Under it, the actor is guilty of arson even though the fire is extinguished before any significant damage is done. In effect, the attempt (as defined at common law) is punishable equally with the completed offense. With the enactment of Sections 5.01 and 5.05 of the Code, that which would have

been mere preparation at common law will be punishable as an attempt and will be penalized equally with the completed offense. Thus, the words "starts a fire or causes an explosion" serve merely to identify the kind of behavior which is the subject of this Section, not the point at which criminal liability begins or the line between lesser and graver offenses. As to present law, see State v. Heard, 105 N.J. Super. 172 (App. Div. 1969) (fireproof building; slight damage is sufficient under N.J.S. 2A:89-1.) and State v. Schenk, 100 N.J. Super. 122 (App. Div. 1968) (Actual burning necessary, as at common law under N.J.S. 2A:89-. Any charring, alteration or destruction is sufficient.)

The requirement of purpose to destroy, in clause (a) of subsection (1), makes it clear that the mere employment of fire with more limited purposes, e.g. use of an acetylene torch to detach metal fixtures from a structure, or to gain entry to a building or safe, does not fall within the second degree felony defined by subsection (1). See State v. Schenk, supra. It may, however, lead to liability for reckless burning under subsection (2). MPC Tentative Draft No. 11, pg. 38 (1960).

3. "Buildings or Occupied Structure." The definition is the same as that used for burglary. The intent is to limit it to substantial specially cherished property, whose burning would typically endanger life.

4. Property "of Another." Traditional arson law excepted burning one's own property and other lawful burning by specifying that the property be that "of another" or that the burning be "malicious." Kane v. Hibernia Mut. Ins. Co. 39 N.J.L. 697 (1877). Our statutes abandon the requirement that the property be that "of another" but retains the "malicious" requirement. State v. Midgeley, 15 N.J. 574 (1954); State v. Lentz, 92 N.J.L. 17 (1919).

> "The Model Penal Code avoids the word 'malicious,' because it has acquired an artificial and uncertain meaning, having been used to designate states of mind ranging from intent to recklessness or even gross negligence. Accordingly, it is necessary to retain the restriction of arson to property 'of another,' except where the culpability of the behavior rests on other factors, e.g., intent to defraud in clause (b) of subsection (1), or recklessness of the safety of persons in clause (a) of subsection (2).
>
> "To burn down a structure owned and occupied by the actor may or may not be recklessness in relation to other people's safety or valued property, depending on the isolation of the premises and the degree of care taken, but the actor's poor choice of means to get rid of his own property does not mark him as the same kind of dangerous character as one who burns his own building to defraud an insurer, or another's building to wreak vengeance.
>
> "The necessary distinction between destroying property of one's own and destroying others' property requires refinement of the notion of what is one's own. In the law of arson, property is that 'of another,' if someone other than the actor is the lawful occupant, notwithstanding that the actor may have title." (MPC Tentative Draft No. 11, pg. 39 (1960)).

5. Burning to Defraud. Special provision for this situation is common in present law, as in N.J.S. 2A:89-3, and is necessary in the Code which is otherwise confined to burning property "of another."

> "Arson for insurance is perhaps the most frequent and dangerous behavior in the field. Often the property involved is a stock of merchandise which would not be a building or structure within clause (a) of subsection (1), and any burning of the structure incidental to the destruction of the goods would not be purposeful as required by clause (a). Accordingly, clause (b) makes it a felony of the second degree to burn one's own property with purpose to collect insurance. The last sentence of clause (b) serves as a reminder to prosecutors and judges that the heavy penalties of arson are not intended for behavior which, while objectionable as part of a fraudulent scheme, has no element of general or personal danger. There is no reason to penalize the burning of an insured camera in a furnace more severely than any other form of destruction or concealment incidental to the filing of a fraudulent claim. On the other hand,

> where the fraudulent burning of one's own property entails the dangers typical of other arson, we believe it is properly graded in the most severely punished category of arson." (MPC Tentative Draft No. 11, pp. 29-40 (1960)).

6. Reckless Burning; Negligence; Fire Regulations. Subsection (2) makes reckless burning of property a felony of the third degree.

> "Considering that recklessness of personal safety, unaccompanied by actual injury, is punishable under this Code as a misdemeanor (Section 211.2), it would be hard to justify extreme severity here. Even if harm is actually caused, classification of the offense as a second degree felony seems excessive, for example, in the case of a workman who accidentally sets fire to a shop by taking unjustified risks with heating tools, electrical equipment, or explosives. Accordingly, subsection (2) proposes third degree penalties for reckless burning.
>
> "The question whether negligence, as distinguished from recklessness, should be penalized when fire is involved arises in view of the fact that a number of states do punish types of negligent burning. The question is especially important under this Code, because the recklessness offense defined in subsection (2) requires 'conscious disregard' of risk involving 'a gross deviation from proper standards of conduct.' Section 2.02(2)(c). The issue has been resolved by defining 'criminal mischief' in §220.3(1) to include negligent burning, with minimal penalties where no substantial harm is done.
>
> "Following the general standards of this Code, Section 220.1 is limited to behavior condemned by the common conscience of the community. The innumerable special statutes and regulations requiring observance of specified precautions against fire, or relating to the handling of explosives and other dangerous materials, belong outside the penal code in bodies of law such as housing codes, fire codes, forest codes. Any imprisonment sanctions should be moderate and ordinarily reserved for cases of willful defiance of public authority, or violation accompanied by manifest danger. (Id. at 40-41)

7. Failure to Control or Report a Fire. In general, the Code, in Section 2.01(3) follows existing law in restricting punishments of omissions to failure to perform a legally required act. An

earlier draft of the Code would have abandoned this in requiring a person to report or control a dangerous fire if he was in a peculiarly favorable position to do so without risk or inconvenience. It provided as follows as a clause (c) in subsection (3):

> "He knows that he is in a peculiarly favorable position to take such measures, without substantial risk or inconvenience."

Statutes of this sort exist in some states (Massachusetts and New York, for example). The Reporter of the Code favored it not only on general principle but also because it would facilitate prosecution where defendant, who may well have set the fire purposely, contends that he set it accidentally or merely discovered a blaze started by another. MPC Tentative Draft No. 11, pg. 41 (1960). The Commission should decide whether to include such a provision.

8. Other State Codes.

(a) New York:

§150.00 Arson; definition of term

> As used in this article, "building," in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall not be deemed a separate building.

§150.05 Arson in the third degree

> 1. A person is guilty of arson in the third degree when he recklessly damages a building by intentionally starting a fire or causing an explosion.
>
> 2. In any prosecution under this section, it is an affirmative defense that no person other than the defendant had a possessory or proprietary interest in the building.
>
> Arson in the third degree is a class E felony.

§150.10 Arson in the second degree

1. A person is guilty of arson in the second degree when he intentionally damages a building by starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building, or if other persons had such interests, all of them consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building.

Arson in the second degree is a class C felony.

§150.15 Arson in the first degree

A person is guilty of arson in the first degree when he intentionally damages a building by starting a fire or causing an explosion, and when (a) another person who is not a participant in the crime is present in such building at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility.

Arson in the first degree is a class B felony.

(b) Connecticut:

§113. [Arson in the first degree]

A person is guilty of arson in the first degree when, with intent to destroy or damage a building, he starts a fire or causes an explosion, and

(1) at the time, another person is present in such building or is so close to such building as to be in substantially the same danger as a person in such building would be, and

(2) the actor is either aware that a person is present in or close to such building, or his conduct manifests an indifference as to whether a person is present in or close to such building.

Arson in the first degree is a class B felony.

§114. [Arson in the second degree]

A person is guilty of arson in the second degree when he starts a fire or causes an explosion:

(1) with intent to destory or damage a building

(a) of another, or

(b) whether his own or another's, to collect insurance for such loss; and

(2) such act subjects another person to a substantial risk of bodily injury or another building to a substantial risk of destruction or damage.

Arson in the second degree is a class C felony.

§115. [Arson in the third degree]

A person is guilty of arson in the third degree if he recklessly causes destruction or damage to a building of another by intentionally starting a fire or causing an explosion.

Arson in the third degree is a class D felony.

§116. [Reckless burning]

A person is guilty of reckless burning if he intentionally starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly places a building of another in danger of destruction or damage.

Reckless burning is a class A misdemeanor.

(c) Michigan:

Substantially similar to Connecticut.

(d) Wisconsin:

941.11 Unsafe burning of buildings

Whoever does either of the following may be imprisoned not more than 5 years:

(1) Intentionally burns his own building under circumstances in which he should realize he is creating an unreasonable risk of death of great bodily harm to another or serious damage to another's property; or

(2) Intentionally burns a building of one who has consented to the destruction thereof but does so under circumstances in which he should realize he is creating an unreasonable risk of death or great bodily harm to another or serious damage to a third person's property.

941.10 Negligent handling of burning material

(1) Whoever handles burning material in a highly negligent manner may be fined not more than $200 or imprisoned not more than 6 months or both.

(2) Burning material is handled in a highly negligent manner if, under the circumstances, the person should realize that he creates an unreasonable risk and high probability of death or great bodily harm to another or serious damage to another's property.

943.02 Arson of buildings; damage of property by explosives

(1) Whoever does any of the following may be imprisoned not more than 15 years:

(a) By means of fire, intentionally damages any building of another without his consent; or

(b) By means of fire, intentionally damages any building with intent to defraud an insurer of that building; or

(c) By means of explosives, intentionally damages any property of another without his consent.

(2) In this section "building of another" means a building in which a person other than the actor has a legal or equitable interest which the actor has no right to defeat or impair, even though the actor may also have a legal or equitable interest in the building. Proof that the actor recovered or attempted to recover on a policy of insurance by reason of the fire is relevant but not essential to establish his intent to defraud the insurer.

§943.03 Arson of property other than building

Whoever, by means of fire, intentionally damages any property (other than a building) of another without his consent, may, if the property is of the value of $100 or more, be fined not more than $1,000 or imprisoned not more than 3 years or both.

943.04 Arson with intent to defraud

Whoever, by means of fire, damages any property (other than a building) with intent to defraud an insurer of that property may be fined not more than $1,000 or imprisoned not more than 5 years or both. Proof that the actor recovered or attempted to recover on a policy of insurance by reason of the fire is relevant but not essential to establish his intent to defraud the insurer.

943.05 Placing of combustible materials an attempt

Whoever places any combustible or explosive material or device in or near any property with intent to set fire to or blow up such property is guilty of an attempt to violate either s. 943.01, 943.02, 943.03 or 943.04, depending on the facts of the particular case.

(e) Illinois:

§20--1. Arson

A person commits arson when, by means of fire or explosive, he knowingly:

(a) Damages any real property, or any personal property having a value of $150 or more, of another without his consent; or

(b) With intent to defraud an insurer, damages any property or any personal property having a value of $150 or more.

Property "of another" means a building or other property, whether real or personal, in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender may also have an interest in the building or property.

Penalty.

A person convicted of arson shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than one year.

§21--1. Criminal Damage to Property

Whoever commits any of the following acts shall be fined not to exceed $500.00 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both or for the commission of any act enumerated in subsection (a) or (f) when the damage to property exceeds $150 may be imprisoned in the penitentiary for not more than five years or both fined and imprisoned:

(a) Knowingly damages any property of another without his consent; or

(b) Recklessly by means of fire or explosive damages property of another; or

(c) Knowingly starts a fire on the land of another without his consent; or

(d) Knowingly injures a domestic animal of another without his consent, or

(e) Knowingly deposits on the land or in the building of another, without his consent, any stink bomb or any offensive smelling compound and thereby intends to interfere with the use by another of the land or building.

(f) Damages any property, other than property described in Subsection 20--1(3), with intent to defraud an insurer.

Section 220.2. Causing or Risking Catastrophe.

(1) Causing Catastrophe. A person who causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance, or by any other means of causing potentially widespread injury or damage, commits a felony of the second degree if he does so purposely or knowingly, or a felony of the third degree if he does so recklessly.

(2) Risking Catastrophe. A person is guilty of a misdemeanor if he recklessly creates a risk of catastrophe in the employment of fire, explosives or other dangerous means listed in Subsection (1).

(3) Failure to Prevent Catastrophe. A person who knowingly or recklessly fails to take reasonable measures to prevent or mitigate a catastrophe commits a misdemeanor if:

(a) he knows that he is under an official, contractual or other legal duty to take such measures; or

(b) he did or assented to the act causing or threatening the catastrophe.

* * * *

§220.2 Commentary

1. This Section presents a new concept in American penal law. Our law now contains a few ad hoc provisions such as N.J.S. 2A:170-69.4 through 69.6 dealing with excavating near gas pipes and with use of explosives near gas pipes. See also N.J.S. 2A:88A-1 (Tampering with, damaging, or making improper adjustments to aircraft) and N.J.S. 2A:122-9 (Injuring fire alarm system; false alarms).

The Code generalizes these:

> "It is patterned on European legislation dealing with activity creating a 'common danger.' Fire, dealt with by the law of arson, is the prototype of forces which the ordinary man knows must be used with special caution because of the potential for wide devastation. Modern legislation puts explosion, flood, poison gas, and avalanche in the same category, and modern technological development alerts us to possibilities of catastrophe in mishandling radioactive material. (MPC Tentative Draft No. 11, pg. 52 (1960)).

2. Subsection (3), Failure to Prevent Catastrophe, was changed as in Subsection 220.1(3) as to creating a duty to report.

Section 220.3. Criminal Mischief.

(1) Offense Defined. A person is guilty of criminal mischief if he:

(a) damages tangible property of another purposely, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in Section 220.2(1); or

(b) purposely or recklessly tampers with tangible property of another so as to endanger person or property; or

(c) purposely or recklessly causes another to suffer pecuniary loss by deception or threat.

(2) Grading. Criminal mischief is a felony of the third degree if the actor purposely causes pecuniary loss in excess of $5,000, or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service. It is a misdemeanor if the actor purposely causes pecuniary loss in excess of $100, or a petty misdemeanor if he purposely or recklessly causes pecuniary loss in excess of $25. Otherwise criminal mischief is a violation.

* * * *

§220.3 Commentary

1. Damaging Property. This Section defines the behavior that is punishable because it harms or threatens to harm property.

> "Insofar as the section deals with purposeful unjustified actual harm to tangible property it corresponds to the traditional 'malicious mischief' offense. Beyond that, the section attempts to generalize a large mass of legislation punishing careless or unintentional harms to particular kinds of property and behavior which in the judgment of the legislature should be forbidden in order to avert risk of harm." (MPC Tentative Draft No. 2, pp. 126-127 (1954)).

Our Statutes now contain the "mass" of provisions referred to:

> 2A:122-1. Malicious destruction of or damage to property
>
> Any person who willfully or maliciously destroys, damages, injures or spoils any real or personal property of another, either of a public or private nature, for which no punishment is otherwise provided by statute, is guilty of a misdemeanor.
>
> See generally, State v. Tennison, 92 N.J. Super. 452 (App. Div.)

2A:122-2. Injuring or destroying mortgaged property after foreclosure proceedings begun

The owner in fee of any mortgaged premises, or any tenant under him, who willfully removes, tears down or destroys, or aids, counsels, procures or consents to the removing, tearing down or destroying of any dwelling, building or structure, erected upon the mortgaged premises, or any of the fencing thereon, or cuts down and removes the growing timber thereon, with the intent to cheat, wrong or defraud any person holding an encumbrance on such premises, after foreclosure proceedings have been commenced thereunder and process legally served upon such owner or tenant, without having first obtained the written consent of the plaintiff in such action, and of all other persons holding encumbrances against the mortgaged premises, or the consent of a court of competent jurisdiction, is guilty of a misdemeanor.

2A:122-4. Destroying boundary marks

Any person who willfully or maliciously:

a. Removes any monument of stone, wood or other durable material, erected to designate the corner or any other point in the boundary of a lot or tract of land, road or street; or

b. Defaces or alters the marks upon a tree, post or other monument, made for the purpose of designating any point, course or line in the boundary of a lot or tract of land, road or street; or

c. Cuts down or removes a tree upon which such marks are made for such purpose, with intent to destroy such marks--

Is guilty of a misdemeanor.

2A:122-5. Tapping, interfering with, or damaging sewers or sewerage works

Any person who, without the authority of the person, body or board in control of any main intercepting sewer, system of sewers, branches, sewerage plant and works and appurtenances, or otherwise, unlawfully breaks into, makes connection with, interferes with or willfully damages such main intercepting sewer, system of sewers, branches, sewer plant and works and appurtenances, or any part thereof, or a conduit, pipe, cock, machine or structure, or any thing appertaining to the works of a sewerage company, is guilty of a misdemeanor.

2A:122-6. Malicious injury to electric wires or plant

Any person who willfully or maliciously:

a. Cuts, breaks, throws down, destroys, injures or removes any battery, machinery, wire, cable, post, pole or other matter or thing, connected with, used by or forming a part of an electric plant or in the operation thereof, which has lawfully been erected or legally authorized to be erected and maintained; or

b. Prevents or obstructs, in any manner, the transmission of electric energy by an electric company by methods or means lawfully authorized--

Is guilty of a misdemeanor.

2A:122-7. Running water into mines or damaging or obstructing airways, shafts, etc.

Any person who, with intent to hinder or delay the working of any mine, clay pit or marl pit, willfully or maliciously:

a. Runs or conveys water into such mine or pit or subterraneous passage communicating therewith; or

b. Pulls down, fills up, or obstructs or damages with intent to destroy, obstruct or render useless, any airway, waterway, drain, pit, level or shaft of or belonging to such mine or pit--

Is guilty of a misdemeanor.

2A:122-8. Obstructing extinguishment of fires; hindering or obstructing fire apparatus

Any person who, during an alarm of fire, willfully hinders, prevents or deters, by any device whatsoever, a fireman or other person from going to or returning from the place where any building or other property is on fire, or from which an alarm proceeds, or from aiding and assisting in extinguishing the fire, or from rendering lawful assistance in abating or quelling such alarm of fire, if false, or willfully obstructs or hinders the passage of a fire engine, hook and ladder truck or other fire-fighting apparatus or equipment, in going to or from the place from which the alarm proceeds, or where the building or other property may be burning, is guilty of a misdemeanor.

2A:122-9. Injuring fire alarm system; false alarms

Any person who willfully or maliciously:

a. Destroys or injures any of the wires, posts,

machines, bells, boxes, locks or other apparatus of any fire alarm system of a municipality of this state, or

b. Interferes with such fire alarm system or any part thereof, with intent to create a false alarm; or

c. Obstructs the efficient operation of such fire alarm system, or any part thereof, or hinders or impedes any of the operations lawfully intended to be accomplished thereby--

Is guilty of a misdemeanor.

2A:122-10. Defacing, destroying or damaging buildings used for religious, charitable or educational purposes

Any person who defaces, destroys or damages any building, structure or place used for the purpose of public worship or for other religious purpose or for any charitable or educational purpose or any building or structure or place used in connection with such a building, structure or place and any person counseling or aiding any other person to deface, destroy or damage any such building, structure or place shall be guilty of a misdemeanor.

2A:122-12. Desecration or display of desecrated religious symbol

Any person who burns, defaces mutilates or otherwise desecrates a cross or other religious symbol, or displays such a burned, defaced, mutilated or desecrated cross or other religious symbol, or participates in, condones, urges or instigates the burning, defacing, mutilation or desecration of a cross or other religious symbol, with intent to intimidate any person or group of persons because of his or their race, color, creed or religion, or with intent to defame or expose a person to contempt, derision or obloquy because of his race, color, creed, or religion, or with intent to cause a breach of the peace or riot, is guilty of a misdemeanor.

2A:170-32. Removing or defacing posted notices against trespassing

Any person who willfully or maliciously removes, defaces or alters any notice posted pursuant to law and forbidding trespassing, with intent to destroy such notice, is a disorderly person, and shall be punished by a fine of not more than $50 or by imprisonment for not more than 30 days, or both.

2A:170-33. Unlawful dumping of junk on private property

Any person, firm or corporation that throws, drops, dumps on, tows to or otherwise places on open fields or other private property, without first obtaining the permission of the owner or person in possession of such property, any abandoned automobile, automobile parts, junk, paper, bottles, trash, garbage, refuse or debris of any nature is a disorderly person.

2A:170-35. Cutting, destroying, or removing trees or timber on land of another without owner's consent; exception

Any person who unlawfully cuts, fells, works up, carries away, boxes, bores, barks or destroys any tree, sapling, log or pole, standing or lying on any land to which such person has no legal right or title, without leave first had or obtained of the owner of the land for that purpose, is a disorderly person.

This section does not apply to any person who commits such an act by mistake or accident, or without intent to injure or defraud the owner thereof.

2A:170-36. Malicious injury to property

Any person who maliciously destroys, defaces, damages or injures property, may, where the damage does not exceed the sum of $200, be adjudged a disorderly person.

2A:170-37. Malicious mischief

Any person who willfully cuts any tree, shrub or vines upon, or removes any earth, gravel or sand from any land belonging to another person in this state, without his consent, or who willfully causes injury or damage to or destroys, any live stock, poultry, cultivated crop, orchard, fence, sign, signboard, notice or building, belonging to any other person, while on such person's land and without such person's consent, is a disorderly person.

2A:170-39. Poisoning domestic animals

Any person who places poison or poisoned food in or on any place, public or private, with the intention to injure or kill any domestic animal owned by another person, is a disorderly person.

2A:170-93. Injuries to or destruction of property by tenant

Any person who, being possessed of a dwelling house or other building, or part thereof, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, unlawfully and maliciously (1) pulls down or demolishes or begins to pull down or demolish the same or any part thereof, or (2) pulls down or severs from the freehold any fixture fixed in or to such dwelling house or building, or part thereof, is a disorderly person.

2. Tampering.

"Paragraph (b) [of Subsection] (1) relates to interference with another's property with purpose or risk of harm, although the property interfered with may not itself be damaged, as when an unauthorized person moves a railroad switch or sets a control lever in an industrial plant in such a way as to slow down operation. In existing law tampering offenses are typically limited to public utility property, vehicles, and particular situations like opening the gate of a corral to permit livestock to escape. Note that the offense cannot be stated as 'purposely or recklessly tampers', since the tampering itself must be intentional. The recklessness applies only to the harm which may follow. (MPC Tentative Draft No. 2, pg. 127 (1960)).

3. Purposeful or Reckless Infliction of Pecuniary Harm.

"No general provision corresponding to paragraph (c) is found in existing law. The paragraph is directed at such possibilities as (a) expensive 'practical jokes', e.g., sending a false telegram notifying the victim that his mother is dying in a distant city so that he spends several hundred dollars on a vain trip; (b) spitefully misinforming a neighboring farmer that local tests of seed variety X have been highly successful, so that he wastes money and a year's work planting that seed." (Ibid.)

4. Gradation. As in the case of theft, the offense is gradated according to amount of harm.

5. Other State Codes.

(a) New York:

§145.00 Criminal mischief in the third degree

A person is guilty of criminal mischief in the third degree when, having no right to do so nor any reasonable ground to believe that he has such right, he:

1. Intentionally damages property of another person; or

2. Recklessly damages property of another person in an amount exceeding two hundred fifty dollars.

Criminal mischief in the third degree is a class A misdemeanor.

§145.05 Criminal mischief in the second degree

A person is guilty of criminal mischief in the second degree when, with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person in an amount exceeding two hundred fifty dollars.

Criminal mischief in the second degree is a class E felony.

§145.10 Criminal mischief in the first degree

A person is guilty of criminal mischief in the first degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person:

1. In an amount exceeding one thousand five hundred dollars; or

2. By means of an explosive.

Criminal mischief in the first degree is a class D felony.

§145.15 Criminal tampering in the second degree

A person is guilty of criminal tampering in the second degree when, having no right to do so nor any reasonable ground to believe that he has such right, he:

1. Tampers with property of another person with intent to cause substantial inconvenience to such person or to a third person; or

2. Tampers or makes connection with property

of a gas, electric, sewer, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality or district; except that in any prosecution under this subdivision, it is an affirmative defense that the defendant did not engage in such conduct for a larcenous or otherwise unlawful or wrongful purpose.

Criminal tampering in the second degree is a class B misdemeanor.

§145.20 Criminal tampering in the first degree

A person is guilty of criminal tampering in the first degree when, with intent to cause a substantial interruption or impairment of a service rendered to the public, and having no right to do so nor any reasonable ground to believe that he has such right, he damages or tampers with property of a gas, electric, sewer, steam or water-works corporation, telephone or telegraph corporation, common carrier, or public utility operated by a municipality or district, and thereby causes such substantial interruption or impairment of service.

Criminal tampering in the first degree is a class D felony.

§145.25 Reckless endangerment of property

A person is guilty of reckless endangerment of property when he recklessly engages in conduct which creates a substantial risk of damage to the property of another person in an amount exceeding two hundred fifty dollars.

Reckless endangerment of property is a class B misdemeanor.

§145.30 Unlawfully posting advertisements

1. A person is guilty of unlawfully posting advertisements when, having no right to do so nor any reasonable ground to believe that he has such right, he posts, paints or otherwise affixes to the property of another person any advertisement, poster, notice or other matter designed to benefit a person other than the owner of the property.

2. Where such matter consists of a commercial advertisement, it shall be presumed that the vendor of the specified product, service or entertainment is a person who placed such advertisement or caused it to be placed upon the property.

Unlawfully posting advertisements is a violation.

(b) Connecticut: Criminal Mischief is substantially like New York. There is no Criminal Tampering provision.

(c) California:

Section 2804. Criminal Mischief

A person commits criminal mischief if:

(1) under circumstances not amounting to arson he damages or destroys property with the intention of defrauding an insurer, or

(2) he intentionally tampers with the property of another and thereby

(a) recklessly endangers human life; or

(b) recklessly causes or threatens a substantial interruption or impairment of any public utility service; or

(3) he intentionally damages the property of another.

Section 2805. Grading of Criminal Mischief

(1) A violation of Section 2804(2) is a third degree felony,

(2) Any other violation of Section 2804 is a third degree felony if the actor's conduct causes or is intended to cause pecuniary loss in excess of [$5,000], a misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss in excess of [$100], and a petty misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss in excess of [$25]. Otherwise, criminal mischief is an infraction.

(d) Michigan: Substantially like New York.

(e) Wisconsin:

943.01 Criminal damage to property

(1) Whoever intentionally causes damage to any physical property of another without his consent may be fined not more than $200 or imprisoned not more than 6 months or both.

(2) Any person violating sub. (1) may be fined not more than $1,000 or imprisoned not more than 3 years or both under the following circumstances:

(a) The property damaged is a vehicle or highway as defined in s. 941.03(2) and the damage is of a kind which is likely to cause injury to a person or further property damage; or

(b) The property damaged belongs to a public utility or common carrier and the damage is of a kind which is likely to impair the services of the public utility or common carrier.

(3) If the total property damaged in violation of this section is reduced in value by more than $1,000, the person may be fined not more than $1,000 or imprisoned not more than 5 years or both. For the purpcses of this subsection, property is reduced in value by the amount which it would cost either to repair or replace it, whichever is less.

(4) Where more than one item of property is damaged pursuant to a single intent and design, the damage to all the property may be prosecuted as a single crime.

(5) In any case of criminal damage involving more tnan one act of criminal damage but prosecuted as a single crime, it is sufficient to allege generally criminal damage to property committed between certain dates. On the trial, evidence may be given of any such criminal damage committed on or between the dates alleged.

ARTICLE 221. BURGLARY AND OTHER CRIMINAL INTRUSION

Section 221.0. Definitions.

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

(1) "occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.

(2) "night" means the period between thirty minutes past sunset and thirty minutes before sunrise.

* * * *

§221.0 Commentary

1. "Occupied Structure." This designation of the premises protected by burglary law (which is also incorporated into arson law) is narrower than current statutes which often extend to any structure or vehicle. This is true in New Jersey under 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." See State v. Butler, 27 N.J. 560 (1958) comparing this statute to the common-law offense.

> "By restricting the offense to buildings and occupied structures, we confine it to the intrusions which are typically most alarming and dangerous. Occupancy is to be distinguished from 'presence' of a person, which is an aggravating circumstance in about ten states, including New York. We reject this because the presence or absence of a person in a structure which is normally occupied will often be purely a matter of chance so far as the intruder is concerned. On the other hand, the intruder is ordinarily well able to judge whether the structure is a dwelling, store, factory, warehouse, or other place for the conduct of human affairs. It is unnecessary to prescribe that 'buildings' be 'occupied,' since buildings are generally employed by human beings in ways that amount to occupancy." (MPC Tentative Draft No. 11, pg. 58 (1960))

2. "Night."

> "The definition of 'night' has been added in

view of the introduction in Section 221.1(2) and 221.2(1) of grading based on commission of certain offenses at night. The considerations which are significant in this connection are that darkness facilitates commission of the offense, increases the alarm of the victims, and hampers identification of suspects. Such darkness does not occur at sunset, but at some time during the ensuing hour. Our selection of an interval of 30 minutes has support in some current legislation, including safety regulations under the motor vehicle codes and the Federal Aviation Act." (MPC Proposed Official Draft, pg. 156 (1962)).

3. Other State Codes.

(a) New York:

§140.00 Criminal trespass and burglary; definitions of terms

The following definitions are applicable to this article:

1. "Premises" includes the term "building," as defined herein, and any real property.

2. "Building" in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or an inclosed motor truck, or an inclosed motor truck trailer. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building.

3. "Dwelling" means a building which is usually occupied by a person lodging therein at night.

4. "Night" means the period between thirty minutes after sunset and thirty minutes before sunrise.

5. "Enter or remain unlawfully." A person "enters or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner.

(b) Connecticut:

§102. [Definitions]

(a) The following definitions are applicable to sections 103 to 119, inclusive, of this act:

(1) "building" in addition to its ordinary meaning, includes any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle, adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, such as, but not limited to separate apartments, offices or rented rooms, any unit not occupied by the actor is, in addition to being a part of such building, a separate building.

(2) "dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

(3) "night" means the period between thirty minutes after sunset and thirty minutes before sunrise.

(b) The following definition is applicable to sections 103 to 108, inclusive, of this act: A person "enters or remains unlawfully" in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the actor is not otherwise licensed or privileged to do so.

(c) Michigan: Substantially similar to Connecticut.

Section 221.1. Burglary.

(1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

(2) Grading. Burglary is a felony of the second degree if it is perpetrated in the dwelling of another at night, or if, in the course of committing the offense, the actor:

(a) purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or

(b) is armed with explosives or a deadly weapon.

Otherwise, burglary is a felony of the third degree. An act shall be deemed "in the course of committing" an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

(3) Multiple Convictions. A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.

* * * *

§221.1 Commentary

1. Background and Rationale. The core of the common law concept of burglary was breaking and entering a dwelling house at night with intent to commit a felony therein. See State v. Burrell, 120 N.J.L. 277 (E. & A. 1938); State v. Hauptmann, 115 N.J.L. 412 (E. & A. 1935); State v. Butler, 27 N.J. 560 (1958). The scope of the offense has been drastically enlarged by statute so that now it may be committed by entry alone, in day as well as night, and with intent to commit many more crimes:

2A:94-1. Breaking and entering or entering

> Any person who willfully or maliciously breaks and enters, or enters without breaking, any building, structure, room, ship, vessel, car, vehicle or airplane, with intent to kill, kidnap, rob, steal, commit rape, mayhem or battery, is guilty of a high misdemeanor.

2A:94-2. Use of high explosives in breaking or entering

Any person who willfully or maliciously breaks or enters any building, structure, room, ship, vessel, car, vehicle, airplane, vault or safe, with intent to kill, rob or steal, and who, for the purpose of effectuating such intent, uses or attempts to use any nitroglycerine, dynamite, powder or other high explosive, is guilty of a high misdemeanor, and shall be punished by a fine of not more than $5,000, or imprisonment for not more than 40 years, or both.

2A:170-3. Presence in or near buildings or other places with intent to steal

Any person who...is found in or near any premises used for dwelling, business or storage purposes, or in any place of public resort or assemblage for business, travel, worship, amusement or other lawful purpose, with intent to steal any goods or chattels, is a disorderly person."

This expansion of the crime of burglary has led to serious problems:

"Since every burglary is by hypothesis an attempt to commit some other crime, and since even the lower degrees of burglary are often punishable more severely than the crime which the actor was preparing to commit, the great expansion of burglary has introduced serious anomalies in prosecution and punishment. The prosecutor and the courts have it in their power to treat as burglary behavior which is distinguishable from theft on purely artificial grounds.

* * * *

"The chaotic burglary legislation is probably explicable as an effort to compensate for defects of traditional attempt law. The common law ordinarily did not punish a person who embarked on a course of criminal behavior unless he came very close to his goal; sometimes it is put that to be guilty of attempt the actor must do the final act which would accomplish his object but for the intervention of circumstances beyond his control....Moreover, penalties for attempt were disproportionately low as compared with the completed offense. Expansion of burglary provided a kind of solution for these problems. By making entry with criminal intent an independent substantive offense, the moment when the law could intervene was moved back, and severe penalties could be imposed.

> "The notable severity of burglary penalties is accounted for by the fact that the offense was originally confined to violent nighttime assault on a dwelling. The dwelling was and remains each man's castle, the final refuge from which he need not flee even if the alternative is to take the life of an assailant, the place of security for his most cherished possessions as well as his family. It is understandable that the offense should have been a capital felony at common law, and that the horror of the burglar carries over to some extent even when the offense is broadened.
>
> "But the Model Penal Code remedies the defects of common law attempt, moving the point of criminality well back into the area of preparation to commit crime, and it provides severe penalties for attempts to commit grave crimes. See Section 5.01. This raises a question as to the continued justification for maintaining a separate offense called burglary. [We] might ...make burglarious intrusion simply an element of aggravation in the grading of theft.
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> * * * *
>
> "If we were writing on a clean slate, the best solution might be to eliminate burglary as a distinct offense, as suggested above. But we are not writing on a clean slate. Centuries of history and a deeply embedded Anglo-American conception like burglary cannot easily be discarded. The needed reform must therefore take the direction of narrowing the offense to something like the distinctive situation for which it was originally devised: invasion of premises under circumstances specially likely to terrorize occupants. (MPC Tentative Draft No. 11, pp. 55-57 (1960)).

2. Unprivileged Entry. The definition of the burglarious entry in the Code takes a middle ground between the common law of "breaking" and the complete elimination of that requirement under our present statutes. (N.J.S. 2A:94-1 and 2; see State v. O'Leary, 31 N.J. Super. 411 (App. Div. 1954)). Even at common law the "breaking" had become little more than symbolic, requiring absurd distinctions. The core of the conception of breaking seems to have been, in the opinion of the Code's Drafters, "unlawful intrusion" or, as put in subsection (1), "entry without privilege."

> "At least this much of the concept of 'breaking' should be retained in order to exclude from burglary situations like the following: a servant enters his employer's house meaning to steal some silver, a shoplifter enters a department store during business hours to steal from the counters, a litigant enters the courthouse with intent to commit perjury; a fireman called to put out a fire resolves, as he breaks down the door of the burning house, to appropriate some of the householder's belongings. Such situations involve no intrusion, no element of aggravation of the crime which the actor proposed to carry out, and we therefore decline to follow those current statutes which purport to include any entry with criminal purpose.
>
> "A person is 'privileged' to enter, within the meaning of Section 221.1, if by license, custom or otherwise, the general public is invited or permitted to enter; and it is not intended that a proprietor of a store might enlarge the applicability of the burglary law by posting notices that shoplifters are not welcome. Furthermore, under the General Principles of this Code, a person who mistakenly supposed that he had a right to enter or remain in a building, would not be guilty of burglary, even if he entered or remained to commit a crime." (MPC Tentative Draft No. 11, pg. 58 (1960)).

After the original drafting, the Code was revised to add the language referring to "premises...open to the public." It was done to make it clear that entry into premises accessible to the public cannot be prosecuted as burglary even if the proprietor sought to restrict the implied license, for example, by posting notice at the door of a department store that loiterers and shoplifters are forbidden to enter. MPC Proposed Official Draft, pg. 157 (1962). Davis v. Hellwig, 21 N.J. 412, 418 (1956), appears to be inconsistent with this view of burglary.

3. Criminal Purpose. Unlike our law, the Code allows the burglarious intent for "any crime."

> "Three aspects of the proposed text make it permissible to broaden the burglarious intent to include 'any crime.' These are the restrictions of burglary to occupied structures or vehicles,

> the requirement of unlawful or intrusive entry, and the moderation of penalties except in circumstances of special danger. Absent these, burglary law would visit its special severity inappropriately on: a tramp who enters a deserted barn meaning to burn a plank for warmth, or a swindler who enters a store to sell worthless securities or pass a bad check.
>
> "To specify 'any crime' comports better with the realities of law enforcement. The burglar is often apprehended, if at all, in the process of entering, when it may be difficult to know more than that he is up to some mischief. Recognition of this is reflected in the rule that the specific criminal purpose need not be pleaded or proved with the same particularity in prosecuting burglary as in prosecuting the crime which the burglar had in mind....If there is reasonable doubt as to the criminal purpose of the intruder, it should be enough to convict him of criminal trespass under Section 221.2. Certainly intrusion for such innocent purposes as sleep, escape from inclement weatner, or to secure an interview, should not entail the possibility of felony penalties, based on a presumption of criminal intent." (MPC Tentative Draft No. 11, pp. 60-61 (1960).

See State v. Tassiello, 75 N.J. Super. 1, affirmed 39 N.J. 282 (1962).

The word "therein" was inserted in Subsection (1) 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. MPC Proposed Official Draft, pg. 157 (1962).

4. Grading of Burglary.

> "The gist of the burglary offense here envisioned is unlawful intrusion in occupied structures by dangerous characters. Since we do not view the offense as a means of penalizing early stage attempts to commit heinous offenses, we reject grading related to the gravity of the ultimate offense. It can be argued persuasively that burglary should be rated no more than a felony of the third degree, leaving it to prosecution for any other offense committed or attempted in the course of the burglary to establish the basis for any higher penalty that may be appropriate. Yet the force of the tradition which compelled us to preserve burglary as a separate offense, despite logical argument against it, also probably requires us to provide a continued opportunity to prosecute as a single aggravated offense of 'burglary' situations where the intrusion is in the dwelling at

night, or is accompanied by assault or other manifestation of special danger.

In view of the fact that existing burglary legislation usually carries very high maximum penalties, including death in a number of states, the Advisory Committee and Council gave consideration to a proposal to provide a narrow category of first degree (life imprisonment) burglary, e.g., where the burglar attempts to kill or seriously injure someone. It was concluded, however, that the first degree penalties already provided elsewhere for violent robbery and rape, together with the possibility of an extended sentence of 15 years where the burglar commits felonious bodily injury, provide an adequate range of treatment. It is noteworthy that 90% of convicted burglars sent to prison are released in less than 5 years, the median period of retention for the middle 80% being approximately 2 years. (MPC Tentative Draft No. 11, pg. 61 (1960)).

5. Duplicate Penalties. The provision in subsection (3) restricting duplicate convictions for burglary and for the offense which the burglar intended to carry out is designed to prevent the abusive practice of imposing consecutive sentences for burglary with intent to steal and for the actual theft. Such cumulation is irrational. Multiple sentencing is also controlled by Section 7.06.

6. Other State Codes.

(a) New York:

§140.20 Burglary in the third degree

A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

Burglary in the third degree is a class D felony.

§140.25 Burglary in the second degree

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the immediate use of a dangerous instrument, or

(d) Displays what appears to be a pistol, revolver or other firearm; or

2. The building is a dwelling and the entering or remaining occurs at night.

Burglary in the second degree is a class C felony.

§140.30 Burglary in the first degree

A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:

1. Is armed with explosives or a deadly weapon; or

2. Causes physical injury to any person who is not a participant in the crime; or

3. Uses or threatens the immediate use of a dangerous instrument; or

4. Displays what appears to be a pistol, revolver or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, burglary in the second degree, burglary in the third degree or any other crime.

Burglary in the first degree is a class B felony.

(b) Connecticut:

§103. [Burglary in the first degree]

(a) A person is guilty of burglary in the first degree when he enters or remains unlawfully in a building with intent to commit a crime therein and:

(1) he is armed with explosives or a deadly weapon or dangerous instrument, or

(2) in the course of committing the offense, he intentionally, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone.

(b) An act shall be deemed "in the course of committing" the offense if it occurs in an attempt to commit the offense or flight after the attempt or commission.

Burglary in the first degree is a class B felony.

§104. [Burglary in the second degree]

A person is guilty of burglary in the second degree when he enters or remains unlawfully in a dwelling at night with intent to commit a crime therein.

Burglary in the second degree is a class C felony.

§105. [Burglary in the third degree]

A person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein.

Burglary in the third degree is a class D felony.

§106. [Affirmative defense]

It shall be an affirmative defense to prosecution for burglary that the building was abandoned.

§107. [Multiple convictions]

A person may not be convicted both for burglary and for the offense which it was his intent to commit after the unlawful entry or remaining unless the additional offense constitutes a felony.

(c) Michigan:

[Burglary in the First Degree]

Sec. 2610. (1) A person commits the crime of

burglary in the first degree if he knowingly enters or remains unlawfully in a dwelling with intent to commit therein a crime against a person or property, and if, in effecting entry or while in the dwelling, or in immediate flight therefrom, he or another participant in the crime is armed with explosives or a deadly weapon.

(2) Burglary in the first degree is a Class A felony.

[Burglary in the Second Degree]

Sec. 2611. (1) A person commits the crime of burglary in the second degree if he knowingly enters or remains unlawfully in a building with intent to commit therein a crime against a person or property, and if either:

(a) In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime is armed with explosives or a deadly weapon, or

(b) The building is a dwelling and he enters or remains unlawfully therein.

(2) Burglary in the second degree is a Class B felony.

[Burglary in the Third Degree]

Sec. 2612. (1) A person commits the crime of burglary in the third degree if he knowingly enters or remains unlawfully in a building with intent to commit therein a crime against a person or property.

(2) Burglary in the third degree is a Class C felony.

(d) Wisconsin:

943.10 Burglary

(1) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony therein may be imprisoned not more than 10 years:

(a) Any building or dwelling; or

(b) An enclosed railroad car, or

(c) An enclosed portion of any ship or vessel; or

(d) A locked enclosed cargo portion of a truck or trailer; or

(e) A room within any of the above.

(2) Whoever violates sub. (1) under any of the following circumstances may be imprisoned not more than 20 years:

(a) While armed with a dangerous weapon; or

(b) While unarmed, but arms himself with a dangerous weapon while still in the burglarized enclosure; or

(c) While in the burglarized enclosure opens, or attempts to open, any depository by use of an explosive, or

(d) While in the burglarized enclosure commits a battery upon a person lawfully therein.

(3) For the purpose of this section, entry into a place during the time when it is open to the general public is with consent.

Section 221.2. Criminal Trespass.

(1) Buildings and Occupied Structures. A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof. An offense under this Subsection is a misdemeanor if it is committed in a dwelling at night. Otherwise it is a petty misdemeanor.

(2) Defiant Trespasser. A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

(a) actual communication to the actor; or

(b) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or

(c) fencing or other enclosure manifestly designed to exclude intruders.

An offense under this Subsection constitutes a petty misdemeanor if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a violation.

(3) Defenses. It is an affirmative defense to prosecution under this Section that:

(a) a building or occupied structure involved in an offense under Subsection (1) was abandoned; or

(b) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

(c) the actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain.

* * * *

§221.2 Commentary

1. Present New Jersey Law. This State now has a series of disorderly persons act offenses dealing with trespassing.

2A:170-31. Trespassing; penalty

> "Any person who trespasses on any lands, except fresh-meadow land over which the tide has ebbed and flowed continuously for 20 years or more, after being forbidden so to trespass by the owner, occupant, lessee or licensee thereof, or after

public notice on the part of the owner, occupant, lessee or licensee forbidding such trespassing, which notice has been conspicuously posted adjacent to the highway bounding on such lands or adjacent to a usual entry way thereto, is a disorderly person and shall be punished by a fine of not more than $50. See State v. Terwilliger, 49 N.J. Super. 149 (App. Div. 1958) and State v. Kirk, 84 N.J. Super. 151 affirmed 88 N.J. Super. 130.

"2A:170-34. Trespassing with horses and hounds

"Any person who runs hounds and horses upon or across the lands of another without first obtaining the consent of the owner or person in possession of such lands, is a disorderly person.

"2A:170-58. Jumping on or off trains

"Any person who, not being a passenger or employee, is found trespassing upon any car or train of any railroad, by jumping on or off any car or train on its arrival, stay or departure at or from any station or depot or on the passage of any such car or train over any part of such railroad, is a disorderly person.

"2A:170-59. Trespassing upon railroad premises or cars

"Any person who shall willfully enter into, intrude or otherwise trespass upon, the lands or premises of a railroad, or who shall willfully enter into or intrude upon a locomotive or railroad car, without invitation express or implied of the railroad, is a disorderly person. This act shall not be interpreted to interfere with lawful activities in connection with a labor dispute.

"2A:170-31.1 Peering into windows or other openings of dwelling places

"Any person who trespasses on private property and surreptitiously or sneakingly invades the privacy of another by peering into the windows or other openings of dwelling places located thereon for no lawful purpose shall be adjudged a disorderly person.

"2A:170-33. Unlawful dumping of junk on private property

"Any person, firm or corporation that throws, drops, dumps on, tows to or otherwise places on open fields or other private property, without first obtaining the permission of the owner or person in possession of such property, any abandoned automobile, automobile parts, junk, paper bottle, trash, garbage, refuse or debris of any nature is a disorderly person."

2. The Code's policy is to consolidate these into a comprehensive statutory enactment:

> "Some trespass involving no physical damage to the property calls for criminal sanctions. Not every treading on land of another should be an offense, and there is wide variation in existing legislation defining the trespasses which ought to be punishable.
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> * * * *
>
> The common thread that runs through all the diversity of this petty criminal legislation is the notion of intrusion: most people have no objection to strangers tramping through woodland or over pasture or open range, but a building is generally intended to keep out persons not licensed by the owner. A fence may be ambiguous: to keep livestock in or out, rather than to hinder passage of human beings. The theory of this Section is that where a landowner wishes to assert his right to exclude from open land and to have the backing of the criminal law, it is not too much to ask him to give notice. With regard to orchards, plowed land and the like, it is enough to punish purposeful or reckless damage...."

3. Affirmative Defenses: Subsection (3):

> "The affirmative defense provided in Subsection (3) in respect to premises open to the public parallels the conception of licensed entry which we have introduced in the burglary section. The primary objective is to exclude criminal prosecution for mere presence of a person in a place where the public generally is invited. Persons who become undesirable by virtue of disorderly conduct may of course be prosecuted for that offense. The Section is not intended to preclude resort by the occupant to civil remedies for trespass, including his privilege, whatever it may be, of barring entry or ejecting. In controversies such as have arisen in the 'sit-in' cases, the effect of the present proposal would be merely to make it explicitly an issue whether the conditions imposed on access to premises open to the public were 'lawful.' They might be unlawful by virtue of federal law relating to facilities of interstate transportation, statutory or common law requirements of non-discrimination in places to which the public resorts, or for other reason. (MPC Proposed Official Draft, pg. 159-160 (1960)).

4. Other State Codes.

(a) New York:

§140.05. Criminal trespass in the fourth degree

A person is guilty of criminal trespass in the fourth degree when he knowingly enters or remains unlawfully in or upon premises.

Criminal trespass in the fourth degree is a violation.

§140.10. Criminal trespass in the third degree

A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.

Criminal trespass in the third degree is a class B misdemeanor.

§140.15. Criminal trespass in the second degree

A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling.

Criminal trespass in the second degree is a class A misdemeanor.

§140.17. Criminal trespass in the first degree

A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a building, and when, in the course of committing such crime, he:

1. Possesses, or knows that another participant in the crime possesses, an explosive or a deadly weapon; or

2. Possesses a firearm, rifle or shotgun, as those terms are defined in section 265.00, and also possesses or has readily accessible a quantity of ammunition which is capable of being discharged from such firearm, rifle or shotgun; or

3. Knows that another participant in the crime possesses a firearm, rifle or shotgun under circumstances described in subdivision two.

Criminal trespass in the first degree is a class D felony.

(b) Connecticut:

§109. [Criminal trespass in the first degree]

A person is guilty of criminal trespass in the first degree when, knowing that he is not licensed or privileged to do so, he enters or remains in a building or any other premises after an order to leave or not to enter personally communicated to him by the owner of the premises or other authorized person.

Criminal trespass in the first degree is a class A misdemeanor.

§110. [Criminal trespass in the second degree]

A person is guilty of criminal trespass in the second degree when, knowing that he is not licensed or privileged to do so, he enters or remains in a building.

Criminal trespass in the second degree is a class B misdemeanor.

§111. [Criminal trespass in the third degree]

A person is guilty of criminal trespass in the third degree when, knowing that he is not licensed or privileged to do so, he enters or remains in premises which are posted in a manner prescribed by law or reasonably likely to come to the attention of intruders, or fenced or otherwise enclosed in a manner designed to exclude intruders, or which belong to the state and are appurtenant to any state institution.

Criminal trespass in the third degree is a class C misdemeanor.

§112. [Affirmative defenses]

It shall be an affirmative defense to prosecution for criminal trespass that:

(1) The building involved in the offense was abandoned; or

(2) The premises, at the time of the entry or remaining, were open to the public and the actor complied with all lawful conditions imposed on access to remaining in the premises; or

(3) The actor reasonably believed that the owner of the premises, or a person empowered to license access thereto, would have licensed him to enter or remain, or that he was licensed to do so.

(c) Michigan:

[Criminal Trespass in the First Degree]

Sec. 2605. (1) A person commits the crime of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a dwelling.

(2) Criminal trespass in the first degree is a Class B misdemeanor.

[Criminal Trespass in the Third Degree]

Sec. 2607. (1) A person commits the crime of criminal trespass in the third degree if he knowingly enters or remains unlawfully in or upon premises.

(2) Criminal trespass in the third degree is a violation.

[Criminal Trespass in the Second Degree]

Sec. 2606. (1) A person commits the crime of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises which are enclosed in a manner designed to exclude intruders or are fenced.

(2) Criminal trespass in the second degree is a Class C misdemeanor.

ARTICLE 222. ROBBERY

Section 222.1. Robbery.

(1) Robbery Defined. A person is guilty of robbery if, in the course of committing a theft, he:

(a) inflicts serious bodily injury upon another; or

(b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or

(c) commits or threatens immediately to commit any felony of the first or second degree.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

(2) Grading. Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury.

* * * *

§222.1 Commentary

1. Background and Rationale. Common law robbery was theft of property from the person or in the presence of the victim by force or by putting him in fear either of immediate bodily injury or of certain other grievous harms. State v. Cottone, 52 N.J. Super. 316 (App. Div. 1958) MPC Tentative Draft No. 11, pg. 68 (1960). See Note, A Rationale of the Law of Aggravated Theft, 54 Col. L. Rev. 84 (1954). The offense was a capital felony. Most states, like New Jersey, have eliminated the death penalty. Most have also introduced a grading scheme. See MPC Tentative Draft No. 11, pp. 68-69 (1960). New Jersey has not, but instead has a statute declaratory of the common law. State v. Cottone, supra):

"2A:141-1. Robbery; penalty

"Any person who forcibly takes from the person of another, money or personal goods and chattels,

> of any value whatever, by violence or putting him in fear, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

(It should be noted that N.J.S. 2A:151-5, frequently used in connection with this statute allows an additional penalty of imprisonment for being armed during the commission of the offense.)

Robbery then, consists of a combination of theft and actual or threatened injury. State v. McDonald, 91 N.J.L. 233 (1918). State v. Bowden, 62 N.J. Super. 339 (1960); State v. Hoag, 35 N.J. Super. 555 affirmed 21 N.J. 496 affirmed 356 U.S. 464, 78 S. Ct. 829. Each element of it consists, at least under the Code, of a separate offense. The Code rejects, however, the notion that it might be sufficient to prosecute for these crimes and to cumulate punishment where appropriate:

> "Many threats are not criminal, apart from special circumstances. For example, a threat (as distinguished from actual attempt) to punch someone in retaliation for a slight is generally not criminal. Only a minority of states provide misdemeanor penalties even for coercive threats, i.e., those designed to secure some non-pecuniary concession from the person threatened....Moreover, even if all threats were subject to minor penalties, e.g., as 'disorderly conduct,' the combination of penalties for a petty theft and a petty threat or minor violence by no means corresponds to the undesirability and danger of the offense. The violent petty thief operating in the streets and alleys of our big cities, the 'mugger,' is one of the main sources of insecurity and concern of the population. There is a special element of terror in this kind of depredation. The ordinary citizen feels himself able to guard against surreptitious larceny, embezzlement, or fraud, to some extent, by his own wits or caution. But he abhors robbers who menace him or his wife with violence against which he is helpless, just as he abhors burglars who penetrate the security of his home or shop. In proportion as the ordinary man fears and detests such behavior, the offender exhibits himself as seriously deviated from community norms, requiring more extensive incapacitation and retraining. In addition, the robber may be distinguished from the stealthy thief by the hardihood which enables him to carry out his purpose in the presence of his victim and over his opposition--obstacles which might deter ordinary sneak thieves. (MPC Tentative Draft No. 11, pg. 69 (1960)).

2. "In the Course of Committing Theft." This provision is unusual duly insofar as it makes classification of robbery depend in part on behavior after the theft has been accomplished in that it defines the term to include flight following the theft. This was not the common law rule but it has been adopted by statute or by decision in most jurisdictions. MPC Tentative Draft No. 11, pg. 70, n. 3 (1960).

> "The thief's willingness to use force against those who would restrain him in flight strongly suggests that he would have employed it to effect the theft had there been need for it. No rule-of-thumb is proposed to delimit the time and space of 'flight,' which should be interpreted in accordance with the rationale. The concept of 'fresh pursuit' will be helpful in suggesting realistic boundaries between the occasion of the theft and a later distinct occasion when the escaped thief is apprehended." (Ibid.)

See State v. Zupkowsky, 127 N.J.L. 218 (1941) (Felony murder during escape from robbery), State v. Gimbel, 107 N.J.L. 235 (1930) (Same).

3. Taking from the Person or in the Presence. This is the traditional basis for classifying theft as robbery. State v. Foro, 92 N.J. Super. 356 (1966); State v. Cottone, 52 N.J. Super. 316 (1958); State v. Butler, 27 N.J. 560 (1958). It is not made explicit in the Code but, according to the Drafters, "would ordinarily be a part of the case since the circumstances of violence imply presence of the victim." MPC Tentative Draft No. 11, pg. 70 (1960). In a few circumstances, nowever, the Code would apply where property is not taken from the person or presence: "For example, an offender might threaten to shoot the victim in order to compel him to telephone directions for the disposition of property located elsewhere."

4. Larceny from the Person. The question of whether theft from the person should be an aggravated offense, in the sense that it might be treated more seriously without regard to the pettyness of the

amount, will be considered in connection with Article 223. It is now so treated. N.J.S. 2A:119-1. It is not robbery, however, under the Code, "even though a certain amount of force not directed against the person, may be required to detach the property from its owner. MPC Tentative Draft No. 11, pg. 70 (1960).

5. Attempted Robbery; Assault with Intent to Rob. Common law larceny and robbery required asporation, however slight, and, therefore, the penalty for robbery was avoided if the crime was interrupted before the accused laid hold of the goods, or if it developed that the victim had no property to hand over. The Legislature deemed the penalties for attempt too mild in such case so the crime of assault with intent to rob and assault with an offensive weapon were devised. (N.J.S. 2A:90-2 and 2). There is no penological justification for treatment distinctions on this basis and, therefore, the Code makes it immaterial whether property is or is not obtained.

6. The Aggravating Circumstances; Grading.

> "The circumstances specified in subsection (1) are largely self-explanatory. It is the omission of other factors commonly used to raise theft to the level of robbery or even aggravated robbery that requires explanation. The factor of being 'armed with a deadly weapon,' so commonly used to aggravate robbery under present statutes, has been dropped in favor of the test in clause (b) of subsection (1), which requires threat or menace of serious bodily harm. Most cases of armed robbery will fall within this category. Only where the robber does not exhibit his weapon would clause (b) operate more narrowly than the armed robbery statutes. We have concluded that is the employment of a weapon that should be significant in the grading of threat, rather than the discovery, for example, of a switchblade knife in the culprit's pocket.
>
> "Clause (b) encompasses use of a toy pistol or unloaded gun, since such a device can be employed to threaten serious injury and may be effective to create fear of such injury. It has often been contended, usually unsuccessfully, that such objects are not 'dangerous' or 'deadly.' If, then, a weapon

be used to menace or recklessly injure, the offense will be a second degree felony; and if it be used to attempt to kill or seriously injure, the offense will be a first degree felony.

"We see no good reason to include use of an automobile among the factors which would raise to the level of a second degree felony a theft that would otherwise amount to no more than a felony of the third degree. * * * *

"A more difficult question is posed by the fairly common statutes penalizing with special severity robbery or burglary of banks or trains. * * * * It is difficult, if not impossible, to draft an acceptable legislative definition of this category of unusually tempting victims. This, plus the fact that most states get along without special laws on the subject, supports our judgment against making exceptional provision here.

"What appears to be a marked reduction of the typical maximum penalty for robbery to ten years is not as drastic as it seems, when account is taken of periods actually served by convicted robbers under existing high penalty laws. 90% of all convicted robbers are released after less than 8 years imprisonment, the median period of detention for the middle 80% being approximately 3 years. Under our Code, extended sentences up to 15 years can be imposed on persistent, professional, psychopathic, or multiple offenders. Section 7.04. Moreover, to take robbery beyond second degree is to move into the realm of life imprisonment, an extreme sanction reserved in this Code for murder, aggravated rape, and aggravated kidnapping. Even attempted murder is proposed to be classified as a felony of the second degree.

"This poses the interesting question why an attempt to kill in the context of a robbery should be a first degree felony, while an attempt to kill out of vengeance or to remove a rival in love or business would be only second degree. The justification lies in the considerations discussed in Comment 1: the severe and widespread insecurity generated by the bandit, indiscriminately assailing anyone who may be despoiled of property. In addition, we believe that the requirement here that the assault be 'in the commission of theft' has the effect of restricting the first degree penalty to a narrow class of attempted killings and injuries, viz., those which come close to accomplishment. This is in contrast to the ordinary broad reach of Section 5.01, which defines attempts to include many acts now regarded as mere preparation. (MPC Tentative Draft No. 11, pp. 71-72 (1960)).

7. Other State Codes.

(a) New York:

§160.00 Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

§160.05 Robbery in the third degree

A person is guilty of robbery in the third degree when he forcibly steals property.

Robbery in the third degree is a class D felony.

§160.10 Robbery in the second degree

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Displays what appears to be a pistol, revolver or other firearm.

Robbery in the second degree is a class C felony.

§160.15 Robbery in the first degree

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another

participant in the crime:

1. Causes serious physical injury to any person who is not a participant in the crime; or

2. Is armed with a deadly weapon; or

3. Uses or threatens the immediate use of a dangerous instrument; or

4. Displays what appears to be a pistol, revolver or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

Robbery in the first degree is a class B felony.

(b) Connecticut: Substantially similar to New York except (1) does not include the last two paragraphs of §160.15 (which were added in New York in 1969) nor paragraph (2)(a) of §160.10 (which was also added in 1969).

(c) Michigan:

[Definition of Terms]

Sec. 3301. (1) . . . .

(2) "In the course of committing a theft" embraces acts which occur in an attempt to commit or the commission of theft, or in flight after the attempt or commission.

[Robbery in the First Degree]

Sec. 3305. (1) A person commits the crime of robbery in the first degree if he violates section 3307 and is armed with a deadly weapon or dangerous instrument.

(2) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other

representation by the defendant that he is then and there so armed, is prima facie evidence under subparagraph (1) that he was so armed.

(3) Robbery in the first degree is a Class A felony.

[Robbery in the Second Degree]

Sec. 3306. (1) A person commits the crime of robbery in the second degree if he violates section 3307 and is aided by another person actually present.

(2) Robbery in the second degree is a Class B felony.

[Robbery in the Third Degree]

Sec. 3307. (1) A person commits the crime of robbery in the third degree if in the course of committing a theft he:

(a) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

(b) Threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

(2) Robbery in the third degree is a Class C felony.

[Claim of Right Not a Defense]

Sec. 3310. No person may submit in defense against a prosecution for robbery in any of its degrees that there was no theft because the taking was under a claim of right; claim of right is not a defense under this chapter.

(d) Wisconsin:

943.32 Robbery

(1) Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means may be imprisoned not more than 10 years:

(a) By using force agains the person of the owner with intent thereby to overcome his physical resistance or physical power of resistance to the taking or carrying away of the property; or

(b) By threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property.

(2) Whoever violates sub. (1) while armed with a dangerous weapon may be imprisoned not more than 30 years.

(3) In this section "owner" means a person in possession of property whether his possession is lawful or unlawful.

(e) Illinois:

§18--1. Robbery

(a) A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force.

(b) Penalty.

A person convicted of robbery shall be imprisoned in the penitentiary from one to 20 years.

§18--2. Armed Robbery

(a) A person commits armed robbery when he violates Section 18--1 while armed with a dangerous weapon.

(b) Penalty.

A person convicted of armed robbery shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than 2 years.