SECTION 3.07. USE OF FORCE IN LAW ENFORCEMENT.

(1) Use of Force Justifiable to Effect an Arrest. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) Limitations on the Use of Force.

(a) The use of force is not justifiable under this Section unless:

(i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(b) The use of deadly force is not justifiable under this Section unless:

(i) the arrest is for a felony; and

(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(iv) the actor believes that:

(1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(3) Use of Force to Prevent Escape from Custody. The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

(4) Use of Force by Private Person Assisting an Unlawful Arrest.

(a) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful,

provided that he does not believe the arrest is unlawful.

(b) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that (i) he believes the arrest is lawful, and (ii) the arrest would be lawful if the facts were as he believes them to be.

(5) Use of Force to Prevent Suicide or the Commission of a Crime.

(a) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily harm upon himself, committing or consummating the commission of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace, except that:

(i) any limitations imposed by the other provisions of this Article on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and

(ii) the use of deadly force is not in any event justifiable under this Subsection unless:

(1) the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(2) the actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.

(b) The justification afforded by this Subsection extends to use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

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§3.07 Commentary

1. This Section establishes the general justifiability of the

use of force which the actor believes is necessary to effect a lawful arrest. It is clear that such a privilege exists in New Jersey. Brown v. State, 62 N.J.L. 666, at 703 (E.&A. 1899) ("If the arrest was a lawful one the officer had the right to use force necessary to render the arrest effective."); Davis v. Hellwig, 21 N.J. 412 (1956); State v. Williams, 29 N.J. 27, 39 (1959); In Re Charge to the Essex County Grand Jury, 9 N.J.L.J. 167 (1886); Antwine v. Jones, 14 N.J. Super. 86 (App. Div. 1951); Noback v. Town of Montclair, 33 N.J. Super. 420 (Law Div. 1954); State v. Rogers, 105 N.J.L. 15, (Sup. Ct. 1928) affirmed o.b. 105 N.J.L. 654 (E.&A. 1929); Bullock v. State, 65 N.J.L. 557 (E.&A. 1900).

2. As is true with the other sections in this Article, the justifying principle is cast in terms of the actor's belief in the necessity, subject to §3.09. Under that provision, when the actor is reckless or negligent in forming his belief he may be prosecuted for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability. MPC Tentative Draft No. 8, p. 52 (1958). This position is the law in New Jersey today--at least, on the question of a police officer's use of excessive force in effectuating an arrest. In State v. Williams, 29 N.J. 27 (1959), the Supreme Court held that an officer may use that force which appears reasonably necessary, including deadly force, to overcome resistance by a person arrested. "Whether the force used exceeded the needs of the occasion is to be determined on the basis of the facts as they reasonably appeared to the officer at the time of the occurrence." 29 N.J. at 39. In order to find criminal liability, the force must exceed that which appears reasonably necessary by more than that which would be consistent with an honest error of judgment--the force "must be excessive to a point where some culpable attitude is evident....There should appear...'a wanton

abuse'". 29 N.J. at 41. And, if such an excess found the officer's privilege does not disappear, rather his abuse of privilege leads to a finding of manslaughter. 29 N.J. at 42. The Code would make this theory applicable to all elements of the officer's belief and, in fact, to all justification defenses. See discussion in the Introductory Note.

3. It should be noted that the general privilege as drafted, applies to police officers and private citizens alike. Subsequent sections impose qualifications upon the privilege of private citizens, particularly as to the right to use deadly force.

4. Recklessness or negligence apart, the justification holds under the Code, regardless of the legality of the arrest, so long as the actor believes in its legality, unless, his error is due to mistake of law. This latter limitation is found in §3.09(1). Thus, reasonable grounds to believe that the arrested person has committed an offense will suffice to insulate the actor from criminal liability, even though it may not for tort liability. This is in line with the general requirements for culpability found in §2.02.

5. The Code does not attempt to propose general formulations for a modern law of arrest. In New Jersey, the common law of arrest applies.

6. There are two limitations upon the use of any force to effect an arrest:

(a) The actor must make known his purpose, unless he believes the other person already knows it or it cannot reasonably be made known. The Drafters conceive of this as a part of necessity: if the person being arrested is not aware that he is being assaulted for arrest purposes, he may resist when he would otherwise submit. MPC Tentative Draft No. 8, p. 55 (1958). No New Jersey cases establishing such a requirement were found. Cf., Davis v. Hellwig, 21 N.J. 412 (1956)

(officer shouting "Halt" and "Stop"); Cf., N.J.S. 2A:90-4 (assault on a police officer displaying evidence of his authority).

(b) Section 3.07(2)(a)(ii) limits the use of force when an arrest is made under a warrant to cases where it is valid or the actor believes it to be. This is a necessary exception in line with §3.03(3)(a) because otherwise a mistake of law would not excuse. MPC Tentative Draft No. 8, p. 55 (1958).

7. Limitations on the Use of Deadly Force.

Paragraph (2)(b) establishes the Code's position on the use of deadly force to effect an arrest. The problem is narrower than the question when an officer or other person making an arrest is justified in using deadly force. The issue here is only when he is to be justified in using deadly force solely to effect the arrest. Frequently, issues of self-protection and protection-of-another arise during such encounters in which case there is no need to retreat (§3.04(2)(b)(iii)(2)) and the officer may use deadly force. Cf. State v. Williams, 29 N.J. 27 (1959). The problem arises most frequently in this form primarily in cases where the person sought to be arrested flees and the actor believes it necessary to shoot at him to prevent the escape. Ibid. MPC Tentative Draft No. 8, p. 56 (1958).

8. The Code would substantially change New Jersey law on the use of deadly force. Under our cases, the first distinction made is between fleeing and resisting offenders. As to a fleeing offender--which includes one who escapes after capture (State v. Williams, 29 N.J. 27, at 39 (1959))--a distinction is made between common law felons and misdemeanants. There is no right to use deadly force against (i.e., shoot at) a fleeing misdemeanant. Davis v. Hellwig, 21 N.J. 412, at 416 (1956); State v. Williams, 29 N.J. 27, at 37 (1959). If the officer

does so, intending to kill he is guilty of murder; if he intends to disable or frighten, he is guilty of manslaughter. State v. Williams, supra. As to a fleeing felon, however, if he has committed a felony and if there is no other way to stop him, a peace officer may shoot him. Davis v. Hellwig, 21 N.J. 412, 416 (1956). As to resisting offenders--and by "resisting" is meant only during the period of actual resistance (State v. Williams, supra, 29 N.J. at 38-39)--no distinction is drawn between misdemeanants and felons (Id. at 40). "The officer need not retreat but on the contrary may become the aggressor and use such force as is necessary to overcome the resistance. If such force unavoidably results in the death of the offender, the homicide is justified." Id. at 39; Bullock v. State, 65 N.J.L. 557, 572 (E.&A. 1900); Antwine v. Jones, 14 N.J. Super. 86, at 88 (App. Div. 1951). The officer's liability for excessive force was discussed previously. No New Jersey cases were found on the issue of arrests by private citizens.

9. The Drafters of the Code justify their position by an argument which may be summarized as follows:

(a) The distinction between felons and misdemeanants, for this purpose, is anachronistic--it having arisen at a time when almost all felonies were punishable by death. MPC Tentative Draft No. 8, p. 56 (1958). (b) Limitations upon the rule, such as that imposing strict liability, which were an attempt to limit the rule from its extreme breadth, have made it more irrational. Id. at 57. (c) In some jurisdictions, the right to use deadly force to effect an arrest is broader than the right to use deadly force to prevent the commission of a felony. (Such is true in New Jersey. Compare Davis and Williams, allowing deadly force to be used for any felony with N.J.S. 2A:113-6 which justifies homicide to prevent arson, burglary, kidnapping, murder, rape robbery or sodomy.) MPC Tentative Draft No. 8, p. 57 (1958).

(d) "As a result of these difficulties and the awareness that the reckless use of firearms by peace officers can create a social problem of no mean proportions, a number of attempts to alter and rationalize the existing rules relating to the use of deadly force in arrest situations." Id. at 58.

10. The Code provides:

(a) The use of force is, like existing law, limited to felonies. Unlike existing law, certain additional qualifications are imposed: (1) The use of deadly force is limited to peace officers and to those assisting them. (2) The Code recognizes that the public interest is poorly served if the use of deadly force creates a substantial risk of injury to innocent bystanders; and, accordingly, the privilege is withheld unless the actor believes there is no such risk. Cf., Davis v. Hellwig, 21 N.J. 412 (1956). (b) The officer believes either that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed. See MPC Tentative Draft No. 8, p. 59 (1958).

The Drafters' view is that the Code is, at the same time, sufficiently limiting upon the right of police to shoot to protect the public interest and sufficiently simple to be understood, applied and followed. Ibid.

11. The Code's position has been criticized. Professor Waite finds the power to arrest to be so essential to law enforcement that no such limitations as found in the Code are appropriate. MPC Tentative Draft No. 8, pp. 60-63 (1958). Professor Perkins agrees that there exists a strong need for legislative revision but finds that the Code goes too far. He suggests a limitation to certain enumerated felonies

or to felonies perpetrated or attempted by the use or threatened use of force. Perkins, Criminal Law 986 (2nd Ed. 1969). Several recent statutory enactments are set forth below.

12. Use of Force to Prevent Escapes from Custody.

Paragraph (3) deals with two distinct problems:

(a) It states explicitly the amount of force which may be used to prevent the escape of a person in custody after arrest and establishes the limit on that amount of force at the same force which could be used in effectuating that arrest in the first instance. MPC Tentative Draft No. 8, pp. 63-64 (1958). This is contrary to many authorities but it is close to the New Jersey position. State v. Williams, supra (29 N.J. at 39) in distinguishing between the rules applicable to fleeing and resisting offenders while being arrested, classifies an "escape from an arrest made or refusal to obey orders" with flight as opposed to resistance. This limits the amount of force which can be used by the officer to the rules applicable to arresting for the crime he is accused of committing. Attempted escape resulting in "physical resistance" is, however, governed by the rules applicable to resistance, i.e., the officer has the right to become the aggressor and make the arrest effective even to the point of using deadly force. Id. at 39.

(b) The paragraph also deals with the problem of escapes by persons in penal institutions and here the Code allows the use of deadly force if the custodian or guard believes that only such force can prevent the escape. "Persons in institutions are in a meaningful sense in the custody of the law and not of individuals; the social and psychological significance of an escape is very different in degree from flight from an arrest." MPC Tentative Draft No. 8, p. 64 (1958).

13. Paragraph (4) establishes standards applicable to private persons who are attempting to effect an unlawful arrest. Subsection (a) grants the same privilege which would be recognized if the arrest were valid in a situation where the private citizen was summoned by a peace officer to assist. This is justified on the ground that at common law and under modern legislation a peace officer has the power to summon aid to effect a lawful arrest. Being thus under a duty to assist, a private citizen, acting in good faith, should be protected. MPC Tentative Draft No. 8, p. 64 (1958). No New Jersey authorities on the power of an officer to compel assistance were found.

Subsection (b) deals with private citizens who are volunteers and establishes a more stringent standard of an affirmative belief in the lawfulness of his conduct and that the arrest would be lawful if the facts were as he believes them to be. MPC Tentative Draft No. 8, pp. 64-65 (1958).

14. Use of Force to Prevent Suicide or Commission of a Crime. The Code in §3.07(5) allows the use of force according to the actor's belief subject to the provision for recklessness or negligence in §3.09 (2). See Introductory Note. The Code limits the privilege according to the nature of the crime involved by the words "suicide, inflicting serious bodily harm upon himself, committing or consummating the commission of a crime involving or threatening bodily harm, damage to or loss or property or a breach of the peace." The existing New Jersey statute limits the justification for the use of deadly force to persons "attempting to commit arson, burglary, kidnapping, murder, rape, robbery or sodomy" (N.J.S. 2A:113-6). No New Jersey law on the right to use less than deadly force was found. The Code sets forth new law on the class of crimes for which force may be used. MPC Tentative Draft No. 8, p. 65, (1958). Having done so, the Code then imposes two qualifications upon

that general privilege to use force: (1) The limitations on the use of force in self-defense, protection of others, protection of property, the effectuation of arrest and prevention of escape in §§3.03--3.06 apply notwithstanding the criminality of the conduct against which force is used. §3.07(5)(a)(i). This prevents overlap and inconsistency between the defenses. New Jersey law is in accord. State v. Fair, 45 N.J. 77 at 92 overruling State v. Bonofiglio, 67 N.J.L. 239, at 241-242 (E.&A. 1901). (2) A limitation is imposed upon the use of deadly force to prevent commission of a crime which is, in substance, that the actor must believe that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm unless the crime is prevented and, further, that he believes that the use of such force creates no substantial risk of injury to innocent persons. This qualification is intended to parallel the proposals as to the justifiable use of deadly force to effect an arrest. MPC Tentative Draft No. 8, p. 66 (1958). The provision here is not, however, limited to force used by peace officers. While arrest is peculiarly the concern of the police, prevention of serious crime is the concern of everyone. It should be noted that the Code does not, in practical effect, preclude the use of deadly force in many situations where such force would now be justifiable under §§3.04--3.06. Thus deadly force may be employed if necessary to prevent a robbery provided that the victim is in danger of death or serious harm. The limitation does refer the justification for extreme force to peril of life or serious injury rather than the abstract concept of prevention of a felony.

As to §3.07(5)(a)(ii)(2) concerning the use of force in riots, New Jersey now has special legislation in this area. See N.J.S. 2A:126-1 to 7. The authority to act under it would be preserved by §3.03(1)(a)

including the use of deadly force under §3.03(b)(2). There is some question whether a riot situation which does not give rise to use of deadly force under §3.03 or §3.07 should justify the use of deadly force simply because it is a riot. The Code's drafters justify this provision on the basis that without the right to use firearms the police may be overwhelmed and rendered impotent by sheer weight of numbers. MPC Tentative Draft No. 8, p. 68 (1958).

15. Confinement is limited as in §3.04(3).

16. Other States:

(a) New York Penal Law §35.30

"1. Except as provided in subdivision two of this section, a peace officer is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary:

(a) to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offense, unless he knows that the arrest is unauthorized; or

(b) to defend himself or a third person from what he reasonably believes to be the use of imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

2. A peace officer is justified in using deadly physical force upon another person for a purpose specified in subdivision one of this section only when he reasonably believes that such is necessary:

(a) to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes (i) has committed or attempted to commit a felony involving the use or threatened use of deadly physical force, or (ii) is attempting to escape by the use of a deadly weapon, or (iii) otherwise indicates that he is likely to endanger human like or to inflict serious physical injury unless apprehended without delay; provided that nothing contained in this paragraph shall be deemed to constitute justification for reckless or criminally negligent conduct by such peace officer

amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

3. For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of physical force to make an arrest or to prevent an escape from custody. A peace officer who is effecting an arrest pursuant to a warrant is justified in using the physical force prescribed in subdivisions one and two of this section unless the warrant is invalid and is known by such officer to be invalid.

4. Except as provided in subdivision five of this section, a person who has been directed by a peace officer to assist such peace officer to effect an arrest or to prevent an escape from custody is justified in using physical force when and to the extent that he reasonably believes such to be necessary to carry out such peace officer's direction, unless he knows or believes that the arrest or prospective arrest is not or was not authorized.

5. A person who has been directed to assist a peace officer under circumstances specified in subdivision four of this section may use deadly physical force to effect an arrest or to prevent an escape from custody only when:

(a) he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) he is directed or authorized by such peace officer to use deadly physical force and does not know that, if such happens to be the case, the peace officer himself is not authorized to use deadly physical force under the circumstances.

6. A private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest or to prevent the escape from custody of an arrested person whom he reasonably believes to have committed an offense and who in fact has committed such offense; but he is justified in using deadly physical force for such purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

7. A guard or other peace officer employed in a detention facility, as that term is defined in section 205.00, is justified in using physical force when and to the extent that he reasonably believes it necessary to prevent the escape of a prisoner from such detention facility."

(b) Illinois Criminal Code of 1961:

"§7--5 (a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

(b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.

§7--6 (a) A private person who makes, or assists another private person in making a lawful arrest is justified in the use of any force which he would be justified in using if he were summoned or directed by a peace officer to make such arrest, except that he is justified in the use of force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another.

(b) A private person who is summoned or directed by a peace officer to assist in making an arrest which is unlawful, is justified in the use of any force which he would be justified in using if the arrest were lawful, unless he knows that the arrest is unlawful.

§7--9 (a) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were

(b) A guard or other peace officer is justified in the use of force, including force likely to cause death or great bodily harm, which he reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense."

SECTION 3.08. USE OF FORCE BY PERSONS WITH SPECIAL RESPONSIBILITY FOR CARE, DISCIPLINE OR SAFETY OF OTHERS.

The use of force upon or toward the person of another is justifiable if:

(1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation; or

(2) the actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:

(a) the actor believes that such force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor; and

(b) the degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under Subsection (1)(b) of this Section; or

(3) the actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person; and:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the incompetent person, including the prevention of his misconduct, or, when such incompetent person is in a hospital or other institution for his care and custody, for the maintenance of reasonable discipline in such institution; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme or unnecessary pain, mental distress, or humiliation; or

(4) the actor is a doctor or other therapist or a person assisting him at his direction; and:

(a) the force is used for the purpose of administering a recognized form of treatment which the actor believes to be adapted to promoting the physical or mental health of the patient; and

(b) the treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent or guardian or other person legally competent to consent in his behalf, or the treatment is administered in an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent; or

(5) the actor is a warden or other authorized official of a correctional institution, and:

(a) he believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution, unless his belief in the lawfulness of the rule or procedure sought to be enforced is erroneous and his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the administration of the institution; and

(b) the nature or degree of force used is not forbidden by Article 303 or 304 of the Code; and

(c) if deadly force is used, its use is otherwise justifiable under this Article; or

(6) the actor is a person responsible for the safety of a vessel or an aircraft or a person acting at his direction, and

(a) he believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order, unless his belief in the lawfulness of the order is erroneous and his error is due to ignorance or mistake as to the law defining his authority; and

(b) if deadly force is used, its use is otherwise justifiable under this Article; or

(7) the actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train or other carrier or in a place where others are assembled, and:

(a) he believes that the force used is necessary for such purpose; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, bodily harm, or extreme mental distress.

* * * *

§3.08 Commentary

1. This Section provides justifications for the use of force against another in a number of special situations which have in common that the person using force is vested with special responsibility for the care, discipline or safety of others.

2. Paragraph (1) deals with the parent or guardian of a minor or a person similarly responsible for his general care and supervision. As the justification is defined in the Code, its scope has two determinants: (1) that the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (2) that it is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or gross degradation. MPC Tentative Draft No. 8, p. 71 (1958). Notice that the Code does not look to the necessity for disciplinary action but to the appropriateness of it. Ibid. The Draft does not explicitly demand that the force be reasonable, but §3.09 (2) would control as to the negligent or reckless use of excessive force. See Introductory Note. Existing law recognizes a privilege for the exercise of domestic authority. Richardson v. State Board, 98 N.J.L. 690 (E & A 1923) (a parent may inflict "moderate correction such as is reasonable under the circumstances of the case" but if he goes beyond this he is guilty of assault and battery); Cf. State v. Pickles, 46 N.J. 542 (1966).

3. Paragraph (2) varies the standard in the case of teachers or other persons entrusted with care or supervision of a minor for a special purpose. Here the criterion should be, in the Drafter's opinion, the actor's

belief that the force is necessary to further the special purpose of his trust. MPC Tentative Draft No. 8, p. 72 (1958). N.J.S. 18A:6-1 now provides as to use of corporal punishment by teachers, as follows:

> "No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;
>
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
>
> (3) for the purpose of self-defense; and
>
> (4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section."

4. The Code includes a provision for use of force by persons caring for incompetents which parallels that for minors with some variations appropriate to the difference. Notice that use of force here is for the purpose of safeguarding or promoting the welfare of the incompetent or the institution. Protecting oneself or others from incompetence is covered in §§3.04-3.07.

5. The privilege granted to doctors and other therapists is to allow the use of force where consent (§2.11) cannot be obtained due to emergency, etc. Existing law is probably handled through the fiction of implied consent. MPC Tentative Draft No. 8, p. 74 (1958). No New Jersey cases were found.

6. Paragraph (5) allows force by wardens or other authorized officials of correctional institutions. No explicit statutory authority seems to exist in New Jersey at the present time. N.J.S. 30:4-4 gives a general power.

7. No New Jersey authorities establishing a privilege for officials of vessels and aircraft were found.

8. As to persons responsible for order or decorum, a comparable body of law exists in New Jersey, as in other States, as to railroad conductors, excluding disorderly or non-fare-paying passengers. N.J.S. 48:12-104; See Runyon v. Pennsylvania R. Co., 74 N.J.L. 225 (1908); Jardine v. Cornell, 50 N.J.L. 485 (1888). This provision generalizes that idea. MPC Tentative Draft No. 8, p. 75 (1958).

9. Other States. New York has substantially adopted §3.08 in §35.10 of its Code. Michigan's proposed revision and Connecticut's recent enactment do the same.

10. It may be appropriate to rewrite this Section to simply state a generalized principle that "force may be used by persons vested with special responsibility for the care, discipline or safety of others for the purpose of, and the extent necessary to further that responsibility but that deadly force may only be used to the extent permitted by §§3.03-3.07."

SECTION 3.09. MISTAKE OF LAW AS TO UNLAWFULNESS OF FORCE OR LEGALITY OF ARREST; RECKLESS OR NEGLIGENT USE OF OTHERWISE JUSTIFIABLE FORCE; RECKLESS OR NEGLIGENT INJURY OR RISK OF INJURY TO INNOCENT PERSONS.

(1) The justification afforded by Sections 3.04 to 3.07, inclusive, is unavailable when:

(a) the actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest which he endeavors to effect by force is erroneous; and

(b) his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but 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, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

* * * *

§3.09 Commentary

1. Paragraph (1) makes explicit that when the actor's belief in the unlawfulness of the force against which he employs protective force or in the legality of an arrest which he endeavors to effect is erroneous and the error is due to ignorance or mistake of penal law or the law of arrest or search, the mistake does not exculpate. See §2.02(9) and MPC Tentative Draft No. 8, p. 18 and p. 77. Implicit in this formulation is the rule that mistake of fact does exculpate, subject to the provision of Paragraph (2) as to recklessness or negligence. See §2.04 and 2.02(9). New Jersey law is in

accord on the first point, i.e., that ignorance of the penal law does not excuse (State v. Western Union Telegraph Co., 12 N.J. 468, 493 (1953)). But, at least as to a mistake made by an officer in shooting at one who is not, in fact, a felon, the Code would change what seems to be New Jersey law by allowing a reasonable error of fact to excuse. Davis v. Hellwig, 21 N.J. 412, 416 (1956).

2. Reckless or Negligent Use of Otherwise Justifiable Force. The provisions of this Article are drafted to make the actor's belief govern. Instead of having the justification be entirely destroyed by its abuse, the degree of guilt is mitigated by §3.09(2) to a lesser offense. See the discussion in the Introductory Note and in MPC Tentative Draft No. 8, pp. 77-80 (1958). See State v. Williams, 29 N.J. 27 (1959).

3. Reckless or Negligent Injury or Risk of Injury to Innocent Persons. Paragraph (3) deals with the case where the actor is justified in using force against the person towards whom the force is directed but is reckless or negligent toward innocent persons. Assuming some other section of this Article does not entirely preclude any justification (see §3.07(2)(b)(iii)), the person is guilty of a crime for which recklessness or negligence toward the third person suffices.

No such law exists in New Jersey. For tort purposes, risk to innocent persons is a factor in evaluating negligence. Davis v. Hellwig, 21 N.J. 412, 416 (1956).

4. Other States. As to §3.09(1) and (2), no comparable statutes have been adopted or proposed in other states. The general ignorance and mistake provisions apply to cover paragraph (1). Paragraph (2) is unnecessary under those Codes.because all of those Codes require reasonableness as the basis for justification defenses. As to paragraph (3), the Wisconsin Code has a similar provision in §939.48(3).

SECTION 3.10. JUSTIFICATION IN PROPERTY CRIMES.

Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which would establish a defense of privilege in a civil action based thereon, unless:

(1) the Code or the law defining the offense deals with the specific situation involved; or

(2) a legislative purpose to exclude the justification claimed otherwise plainly appears.

* * * *

§3.10 Commentary

1. Section 3.10 is addressed not to the use of force against the person but to conduct involving intrusion on or interference with property, i.e., to justification in property crimes. The Section is drafted on the view that in this area the penal law must on the whole accept and build upon the privileges recognized in the law of torts and property, except in those rare situations where a penal law departure from the civil law is made clear. This is proper because a penal law should not undertake to establish these property interests but rather to protect existing ones. MPC Tentative Draft No. 8, p. 1 (1958).

2. No New Jersey cases were found. The position is in accord with existing law. Williams, Criminal Law §231, p. 727 (2nd Ed. 1961); Prosser, Torts §21, p. 119 (3rd Ed. 1964). No provisions were found in other Codes.

SECTION 3.11. DEFINITIONS.

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

(1) "unlawful force" means force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth, or diplomatic status) not amounting to a privilege to use the force. Assent constitutes consent, within the meaning of this Section, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily harm.

(2) "deadly force" means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force;

(3) "dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging.

* * * *

§3.11 Commentary

1. Unlawful Force. The definition of unlawful force was discussed previously in connection with §3.04, self-protection.

2. Deadly Force. The first portion of the definition was specifically adopted in State v. Abbott, 36 N.J. 63, 71 (1961).

3. Dwelling. This term is defined for purposes of the retreat rule and specifically includes temporary dwellings. MPC Tentative Draft No. 8, p. 25 (1958).

ARTICLE 4. RESPONSIBILITY

SECTION 4.01. MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include abnormality manifested only by repeated criminal or otherwise antisocial conduct.

* * * *

§4.01 Commentary

1. Section 4.01 sets forth the Code's view on the very difficult task of establishing a test for responsibility, i.e,, "of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they are suffering from mental disease or defect when they acted as they did. What is involved specifically is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction, with resultant sanctions in which there is inescapably a punitive ingredient (however constructive we may attempt to make the process of correction) and modes of disposition in which that ingredient is absent, even though restraint be involved. To put the matter differently, the problem is to discriminate between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow". MPC Tentative Draft No. 4, p. 156 (1955). The above statement by the Drafters does not adequately set forth the very hard practical problem involved. Responsibility questions almost always arise in homicide cases and the responsibility test, as a practical matter, decides who shall be subject to the death penalty. See Weintraub, C.J. concurring in

2. The test of responsibility now in effect in New Jersey is the M'Naghten test. Under it, a defendant is not responsible for his acts if he

> "was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong." State v. Coleman, 46 N.J. 16, at 39 (1965).

See also State v. Lucas, 30 N.J. 37 (1959); State v. DiPaolo, 34 N.J. 279, 291 (1961); State v. Sikora, 44 N.J. 453, 470 (1965); State v. Cordasco, 2 N.J. 189 (1949). Lucas is a leading case in defense of, or, perhaps, apology for M'Naghten.

3. Absent the minimal elements of rationality, as expressed in the M'Naghten rule, condemnation and punishment are obviously unjust and futile. "They are unjust because the individual could not, by hypothesis, have employed reason to restrain the act; he did not and he could not know the facts essential to bring reason into play. On the same ground, they are futile." MPC Tentative Draft No. 4, p. 156 (1955).

> "Thus the attacks on the M'Naghten rule as an inept definition of insanity or as an arbitrary definition in terms of special symptoms are entirely misconceived. The rationale of the position is that these are cases in which reason can not operate and in which it is totally impossible for individuals to be deterred. Moreover, the category defined by the rule is so extreme that to the ordinary man the exculpation of the persons it encompasses bespeaks no weakness in the law." Ibid.

Our Supreme Court has made this same point:

> "Trite as it may sound to some, the law must distinguish between mental disease and character deformity. Critics of the M'Naghten rule of criminal responsibility fail or refuse to realize that its function is not merely to determine which individuals are suffering from mental disorder but also to select those of the mentally disabled whose punishment will aid and protect society because they are able to make rational choices between right and wrong." State v. Sikora, 44 N.J. 453, at 470 (1965).

4. Some jurisdictions have expanded M'Naghten to include cases where a mental disease produces an "irresistible impulse to do the forbidden act". This is a recognition that cognitive factors are not the only ones that preclude inhibition; that even though cognition still obtains, mental disorder may produce a total incapacity for self-control. MPC Tentative Draft No. 4, p. 157 (1955). New Jersey has rejected this variation. State v. Lucas, supra (30 N.J. at 72).

5. The issue for decision by the Commission is whether to recommend the retention of M'Naghten or to move toward one of the newer tests of responsibility.

6. The Code proceeds from the view that any effort to exclude non-deterrables from strictly penal sanctions must take account of the impairment of volitional capacity no less than of impairment of cognition. It finds the "irresistible impulse" variation of M'Naghten insufficient to do so because it "may be impliedly restricted to sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection." MPC Tentative Draft No. 4, p. 157 (1955).

7. Thus, Section 4.01 of the Code finds the proper question to be whether the defendant was without the capacity "either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Application of this standard calls fro distinction, as required by Sikora, between "incapacity, upon the one hand, and mere indisposition on the other." Id. at 157-158.

8. An alternative provision, which was rejected by The American Law Institute, would have stated the issue in a narrower and harder (from defendant's viewpoint) way: "It asks whether, in consequence of mental disease or defect, the threat of punishment

could not exercise a significant restraining influence upon him." Id. at 158. While this asks a legally appropriate question it was found to be "too difficult for psychiatric judgment". Ibid. See State v. Sikora, supra, and the discussion of the psychiatrist's testimony therein.

9. In addressing itself to impairment of cognitive capacity, M'Naghten demands that the impairment be complete: the actor must not know. The irresistible impulse criterion also presupposes a complete impairment of capacity for self-control. MPC Tentative Draft No. 4, p. 158 (1955). The Code rejects this total impairment concept:

> "The extremity of these conceptions is, we think, the point that poses largest difficulty to psychiatrists when called upon to aid in their administration. The schizophrenic, for example, is disoriented from reality; the disorientation is extreme; but it is rarely total. Most psychotics will respond to a command of someone in authority within the mental hospital; they thus have some capacity to conform to a norm. But this is very different from the question whether they have the capacity to conform to requirements that are not thus immediately symbolized by an attendant or policeman at the elbow. Nothing makes the inquiry into responsibility more unreal for the psychiatrist than limitation of the issue to some ultimate extreme of total incapacity, when clinical experience reveals only a graded scale with marks along the way....
>
> We think this difficulty can and must be met. The law must recognize that when there is no black and white it must content itself with different shades of gray. The [Code] accordingly, does not demand 'complete' impairment of capacity. It asks instead for 'substantial' impairment. This is all, we think, that candid witnesses, called on to infer the nature of the situation at a time that they did not observe, can ever confidently say, even when they know that a disorder was extreme." Ibid.

As finally drafted, the Code speaks only of "substantial capacity" without stating a principle as to how substantial it should be. An alternative, which was ultimately rejected by the Institute, would have asked whether the capacity of the defendant "was so substantially

impaired that he cannot justly be held responsible". This has the advantage of putting the justice of the defendant's case clearly and openly to the jury. It has the disadvantage of not confining the jury's inquiry to fact. MPC Tentative Draft No. 4, p. 159 (1955).

10. The Code rejects the rule of Durham v. United States, 214 F2d 862 (D.C. Cir. 1954), i.e.,

> "that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect".

Durham must be viewed as an important early step in the process of modernizing the concept of responsibility. Time and reflection have, however, shown that the test there set forth defers too much to the medical without sufficient weight being given to the moral and legal considerations. The problems inherent in the term "product" have proved the test, as originally formulated both unworkable and undesirable. The Lucas case is, in many ways, more a rejection of Durham than an affirmative defense of M'Naghten (30 N.J. at 71). Today no one argues for the adoption of Durham. Even in the District of Columbia, the Durham case has gone through a process of judicial revision and reformulation to make it closely approximate the Code test. See McDonald v. United States, 312 F2d 847 (D.C. Cir. 1962) (en banc); Washington v. United States, 390 F2d 444 (D.C. Cir. 1967). See United States v. Freeman, 357 F2d 606, 622 at 51 (2 Cir. 1966).

11. Paragraph (2) of Section 4.01 is designed to exclude from the concept of "mental disease or defect" the case of so-called "psychopathic personality". This position was explained by the Drafters:

> "The reason for the exclusion is that, as the Royal Commission put it, psychopathy 'is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it

impaired that he cannot justly be held responsible". This has the advantage of putting the justice of the defendant's case clearly and openly to the jury. It has the disadvantage of not confining the jury's inquiry to fact. MPC Tentative Draft No. 4, p. 159 (1955).

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> any explanation of the causes of the abnormality'. While it may not be feasible to formulate a definition of 'disease', there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established. Although British psychiatrists have agreed, on the whole, that psychopathy should not be called disease, there is considerable difference of opinion on the point in the United States. Yet it does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind." (MPC Tentative Draft No. 4, p. 159 (1955).

12. It is clear that the Drafters of the Code intend that the term "defect" should include feeblemindedness. This is not now the case under the M'Naghten rule. State v. Cordasco, 2 N.J. 189, 197 (1949). If the Code is not sufficiently explicit on this point, an addition of a term such as "feebleminded" or "suffering from a low mentality" should be considered. It is clear that, for purposes of fitness to proceed, the source of the inability, whether from disease or defect, is irrelevant if, in fact, the defendant meets the test. See State v. Caralluzzo, 49 N.J. 152 (1967).

13. Since the time the Code was promulgated in 1961, there has been a strong movement, both legislative and judicial, toward adoption of Section 4.01 or of a variation of it. Judicial adoption of the Code has been particularly strong among the United States Courts of Appeals. The Second, Fourth, Sixth, Seventh and Tenth circuits have all adopted §4.01(1). See United States v. Freeman, 357 F2d 606 (2 Cir. 1966) which collects the cases and sets forth the variations in the terminology adopted by the various courts of appeal. See also United States v. Smith, 404 F2d 720 (6 Cir. 1968). In United States v. Currens, 290 F2d 751 (3 Cir. 1961), the third Circuit Court of Appeals adopted the second branch of the Code test, i.e., substantial capacity to conform one's conduct to the requirements of

the law, but rejected the first, to appreciate the criminality of his conduct. Thus, Currens moved from a pure cognitive test under M'Naghten to a pure volition test.

As to the provision of §4.01(2) regarding psychopathic personalties, there has been more variation. Currens, one of the earliest cases, rejected that provision. That court refused to find psychopaths not to be insane as a matter of law because (1) "as the majority of experts use the term, a psychopath is very distinguishable from one who merely demonstrates recurrent criminal behavior" and (2) because of "the vagaries of the term itself". The Sixth Circuit in the Smith case took the same view. The Freeman case specifically approved §4.01(2) to "make it absolutely clear that mere recidivism or narcotics addiction will not of themselves justify acquittal." (357 F2d at 625)

14. Among the states, most of the change has come from State Legislatures. Illinois (§6-2) and Vermont (§13:4801) have specifically adopted §4.01(1). The same is true of Connecticut which has adopted both §4.01(1) and (2). (Penal Code §14). Michigan's Study Commission has proposed adoption of the Currens variation (§705). New York's statute reads as follows:

> "A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to know or appreciate either: (a) the nature and consequence of such conduct; or (b) that such conduct is wrong". New York Penal Law §1120.

Wisconsin is alone in having retained M'Naghten after its revision.

15. It should be noted that New York has changed the wording of the first part of §4.01(1) from "responsible for criminal conduct" to "criminally responsible". This is probably desirable in

that it does not assume conduct to be criminal which may not be because of the absence of responsibility.

16. In considering the adoption of §4.01, or a variant thereof, it is important to consider the proposed changes in both the manner of determining responsibility through a court-appointed expert (§4.05) and the provisions for mandatory commitment and court control over release (§4.08) found in this Article.

SECTION 4.02. EVIDENCE OF MENTAL DISEASE OR DEFECT ADMISSIBLE WHEN RELEVANT TO ELEMENT OF THE OFFENSE; [MENTAL DISEASE OR DEFECT IMPAIRING CAPACITY AS GROUND FOR MITIGATION OF PUNISHMENT IN CAPITAL CASES.

(1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

[(2) Whenever the jury or the Court is authorized to determine or to recommend whether or not the defendant shall be sentenced to death or imprisonment upon conviction, evidence that 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 is admissible in favor of sentence of imprisonment.]

* * * *

§4.02 Commentary

1. Paragraph (1) resolves an issue as to which there is a sharp division of authority throughout the country. Some jurisdictions decline to accord to evidence of mental disease or defect an admissibility co-extensive with its relevancy to prove or disprove a material state of mind. The Drafters of the Code see no justification for a limitation of this kind. "If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence." MPC Tentative Draft No. 7, p. 193 (1955).

2. New Jersey's cases on this problem partially accept the doctrine. In State v. DiPaolo, 34 N.J. 279 (1961) the Supreme Court held that psychiatric evidence pertaining to the defendant's mental capacity to act willfully, deliberately and with premeditation was admissible to prove whether, in fact, he performed those mental functions. The court wrote a very strong opinion in favor of admitting such evidence:

"Actually the question is simply whether there shall be excluded evidence which merely denies the existence of facts which the State must prove to establish that the murder was in the first degree.

****

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. 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. Such evidence could be excluded only upon the thesis that it is too unreliable for the courtroom, a thesis which would not square with the universal acceptance of medical and lay testimony upon the larger issue of whether there was a total lack of criminal responsibility." (34 N.J. at 294-295) (Emphasis in original).

State v. Sikora, 44 N.J. 453 (1965), followed the general rule of DiPaolo but restricted the type of psychiatric evidence admissible on the issue. This limitation was to admit only those types of psychiatric evidence which accept the basic view of man upon which our criminal law is built, i.e., that man has a free will, capable of choosing right from wrong, if he can see it. (44 N.J. 470).

The doctrine of paragraph (1) is broader than the question of the admissibility of evidence on the issue of wilfulness, deliberation and premeditation. The rule found therein would apply to any state of mind necessary to be proven to find the defendant guilty of the crime charged. The situation which has arisen most frequently, in addition to that discussed above, is the question of whether such evidence is admissible on the issue of malice. A line of California cases holds such evidence to be admissible to distinguish between murder and manslaughter, in the same way it is to distinguish first and second degree murder. See People v. Gorshen, 51 Cal 2d 716,

336 P 2d 492 (Sup. Ct. 1959); People v. Wells, 33 Cal. 2d 330, 202 P2d 53 (Sup. Ct. 1949); People v. Henderson, 60 Cal. 2d 482, 386 P2d 677 (Sup. Ct. 1963); People v. Conley, 64 Cal. 2d 310, 411 P2d 911 (Sup. Ct. 1966). In the Sikora case, our Supreme Court dealt with this line of cases which had been relied upon by the defendant. Mr. Justice Francis speaking for the Court, stated of those cases that

> "The statement of the basic principle involved does not differ from that enunciated in State v. DiPaolo...." (44 N.J. at 471).

It may well be reading too much into that passage to assume that the Court intended to adopt the principle that such evidence is admissible on the malice issue. It is, however, hard to find a rational basis for distinguishing the two from the point of view of the type of evidence which should be admissible to prove or disprove them. It is possible to distinguish them on the ground that one is a specific intent situation whereas the other is a case of a general intent. Were this the ground for distinction, the same line would be established as that followed in the intoxication cases. See, e.g., State v. Sinclair, 49 N.J. 525 (1967). Intoxication is, however, distinguishable because it is voluntary. Mental disease or defect affecting one's capacity to form a state of mind is not. Further, the language of DiPaolo seems to admit of no such limitation. In any case, the assumption has been that such evidence is not admissible in New Jersey to disprove malice--and this can probably be generalized to a rule that such evidence is now admissible in this State to disprove the existence of a specific intent but not a general mens rea. This is the line which the Michigan Commission has proposed, i.e., when it is "relevant to the issue of whether or not [the defendant] did or did not have a specific intent or purpose which is an element of the offense."

The Commission should decide whether to broaden the DiPaolo holding to the Code's position or follow what appears to be existing law by adopting the Michigan variation.

3. Paragraph (2) concerns the issue of the admissibility of psychiatric evidence on the issue of whether or not the death penalty should be imposed. The view taken is that substantial impairment of capacity, even though insufficient in degree to establish irresponsibility, should be regarded as a factor favorable to mitigation of capital punishment. It should only be included if capital punishment is retained. A provision of this kind is said, by the Drafters, to reduce the practical importance of the issue of responsibility, since that issue is always most acute when capital punishment is involved. MPC Tentative Draft No. 4, p. 193 (1955). See also State v. Lucas, supra. This provision is, in effect a supplement to §2.10.6(2) concerning the admissibility of evidence at a hearing to determine whether to impose the death penalty.

Our cases admit such "background" evidence. State v. Mount, 30 N.J. 195, 218 (1959); State v. Sikora, 44 N.J. 453, 472 (1965) (citing the Code). State v. Reynolds, 41 N.J. 163, at 177 (1963) holds that when the defendant offers "background" evidence under Mount, the State may, within reasonable bounds, rebut that evidence. If Reynolds is to be retained, the Commission should consider whether it is necessary to re-write this Section to admit evidence offered by the defendant, in favor of a sentence of imprisonment and, after the defendant has done so, by the State, in opposition thereto.

SECTION 4.03. MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY IS AFFIRMATIVE DEFENSE; REQUIREMENT OF NOTICE; FORM OF VERDICT AND JUDGMENT WHEN FINDING OF IRRESPONSIBILITY IS MADE.

(1) Mental disease or defect excluding responsibility is an affirmative defense.

(2) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the Court may for good cause permit, files a written notice of his purpose to rely on such defense.

(3) When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and judgment shall so state.

* * * *

§4.03 Commentary

1. Burden of Proof. Paragraph (1) on the issue of the burden of proof makes mental disease or defect excluding responsibility an affirmative defense. See §1.13(2) which establishes that when evidence supporting an affirmative defense has been adduced, the defense must be disproved beyond a reasonable doubt.

2. An alternative formulation was presented to the American Law Institute which would have added the words "which the defendant must prove by a preponderance of evidence". MPC Tentative Draft No. 7, p. 28, p. 193 (1955). This was rejected by the Institute. MPC Proposed Official Draft, p. 68 (1961).

3. The States are about evenly divided on this issue. See MPC Tentative Draft No. 7, p. 193 (1957). In New Jersey, the rule is established that the burden of going forward with evidence to support the defense and the burden of proof both rest upon the defense. State v. Cordasco, 2 N.J. 189 (1949); State v. Selfo, 58 N.J. Super. 472 (App. Div. 1959); State v. Molnar, 133 N.J.L. 327 (E.&A. 1945). Notwithstanding that the burden of proof has

procedural overtones it seems to be appropriately dealt with in a substantive code. Cf., N.J. Rules of Evidence 1(4) and (5).

4. Among the recent revisions, Michigan's Proposed Code in §720, would adopt the Code's view. Prior state statutes are collected in MPC Tentative Draft No. 7, p. 194 (1955).

5. Notice of Insanity Defense. The Code, in paragraph (2) requires that the defense give written notice of an intent to rely upon the defense of lack of responsibility. Many states had such a requirement at the time the Code was drafted. MPC Tentative Draft No. 7, p. 194 (1955). It has been proposed for addition in California Penal Code Revision Project §532 (1967). It has been adopted in Wisconsin. §957.27(2).

A New Jersey Court Rule provides as follows on this issue:

"Rule 3:12. NOTICE OF DEFENSE OF INSANITY

> If the defendant intends to claim insanity or mental infirmity either as a defense, as affecting the degree of the crime charged, or as a matter which should be considered by the jury in determining the penalty, he shall serve a notice of such intention upon the prosecuting attorney when he enters his plea or within 30 days thereafter. For good cause shown, the court may extend the time for service of the notice or make such other order as the interest of justice requires. If the defendant fails to comply with this rule the court may take such action as the interest of justice requires."

This was adopted pursuant to the Supreme Court's decision in State v. Whitlow, 45 N.J. 3, at 22, n. 3 (1965), that such a provision was both appropriate and not in violation of the privilege against self-incrimination. Notice that our rule does not exclude evidence as would the Code, but gives discretion as to the appropriate remedy to the court.

The matter is clearly procedural and is appropriately dealt with by Court Rule. It should be eliminated from the Code of New Jersey.

6. The Drafters of the Code considered adding a provision which would give the trial judge the power to raise the defense of lack of responsibility in a proper case, where the defendant refuses to permit counsel to do so. They considered this "desirable" but eliminated it as being "too great an interference with the conduct of the defense". MPC Tentative Draft No. 7, p. 194, (1955). They propose that the defendant's refusal to allow the issue to be raised could be considered as a factor in determining the issue of fitness to proceed. Ibid.

7. Form of Verdict. The Code, in paragraph (3) of this section requires that when a defendant is acquitted on grounds of lack of responsibility, the verdict and judgment shall so state. This is now the law both in New Jersey and under the new state Codes. See. R. 3:19-2.

> "If a defendant interposes the defense of insanity... the jury, if it acquits the defendant, shall find specially in accordance with N.J.S. 2A:163-3."

The statute cited in the above rule establishes the procedure for jury determination of whether commitment is to take place. In this regard, it is discussed in connection with §4.08. See State v. Vigliano 43 N.J. 44 (1964).

SECTION 4.04. MENTAL DISEASE OR DEFECT EXCLUDING FITNESS TO PROCEED.

No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

* * * *

§4.04 Commentary

1. The criterion of fitness to proceed set forth in this section is according to the Code's Drafters "universally accepted in existing law". MPC Tentative Draft No. 4, p. 194 (1955). Our existing statute, N.J.S. 2A:163-2, speaks in terms of "insanity" but it has been judicially interpreted, in this context, to refer to the defendant's capacity to stand trial. (Aponte v. State, 30 N.J. 450 (1959); State v. Coleman, 46 N.J. 16 (1965). As defined by our cases,

> "An accused under a criminal indictment is unfit to stand trial if he has a condition of mental illness or retardation which prevents him from comprehending his position and from consulting intelligently with counsel in the preparation of his defense." State v. Caralluzzo, 49 N.J. 152, at 155 (1967).

See also State v. Lucas, 30 N.J. 37, 72 (1959); State v. Sinclair, 49 N.J. 525 (1967); State v. Gibson, 15 N.J. 384 (1954). Aponte v. State, supra, distinguishes the test here from that used in civil commitment.

Disposition of persons found unfit to stand trial is covered in §4.06.

2. The Drafters of the Code make the point that the examination on this issue should really be directed to this issue--and not to the responsibility question. Too frequently, they state if the defendant is believed by the examiner to be psychotic, he will simply find the defendant to be unable to stand trial. MPC Tentative

[illegible] (1955). This effectively eliminates the defendant's

right to a trial.

3. Wisconsin (§957.11(1) and (2)), Michigan (§767.27a) and Illinois (§104-1) all have very similar provisions. California has a provision which defines with somewhat more precision the standard. This was thought to "be helpful in obtaining precision in expert testimony at the hearing on the issue".

> "A person can neither be proceeded against nor sentenced after conviction while he is incompetent as defined in this section:
>
> (1) A defendant is incompetent to be proceeded against in a criminal action, if, as a result of mental illness, disease or defect, he is unable (a) to understand the nature of the proceedings, (b) to assist and cooperate with his counsel, (c) to follow the evidence, or (d) to participate in his defense." California Penal Code Revision Project §533 (Draft 1968).

SECTION 4.05. PSYCHIATRIC EXAMINATION OF DEFENDANT WITH RESPECT TO MENTAL DISEASE OR DEFECT.

(1) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the court shall appoint at least one qualified psychiatrist or shall request the Superintendent of the _____ Hospital to designate at least one qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding sixty days or such longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(2) In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(3) The report of the examination shall include the following: (a) a description of the nature of the examination; (b) a diagnosis of the mental condition of the defendant; (c) if the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense; (d) when a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the extent, if any, to which 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 at the time of the criminal conduct charged; and (e) when directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

If the examination can not be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of the mental disease or defect.

The report of the examination shall be filed in [triplicate] with the clerk of the Court, who shall cause copies to be delivered to the district attorney and to counsel for the defendant.

* * * *

§4.05 Commentary

1. This section establishes a procedure for a psychiatric examination with respect to any issue which may arise upon which testimony of the defendant's psychiatric condition may be relevant.

Many states now have statutory authorization for psychiatric examination of the defendant by court-appointed experts or by the staff of a public hospital. See citations in MPC Tentative Draft No.4, p. 195 (1955) and in State v. Whitlow, 45 N.J. 3, at 11, n. 1 (1965). As pointed out in the Whitlow case, New Jersey has a statutory procedure to determine the sanity of a person under confinement under which an examination may be ordered (N.J.S. 2A:163-2) but that only comes into play when the physician's certificates required by the civil commitment statutes are filed. (N.J.S. 30:4-27 to 30). When such a procedure is not instituted and the defendant simply informs the court or the prosecutor of an intent to rely in some way upon psychiatric evidence,

> "The court has power to have medical experts examine for the state or for the defendant, if he is indigent, and to report their findings to the party engaging them." (45 N.J. at 15)

It is important to point out, however, that this power, set forth in Whitlow, is to appoint medical experts to examine on behalf of one of the parties. While, under existing law, the parties may, by agreement, "authorize the court to select one or more impartial doctors to examine", there is nothing to require this. State v. Whitlow, (45 N.J. at 20). The procedure under the Code would be to have an examination by one or more impartial experts:

> "Paragraph (1) contains alternative methods for designating examining psychiatric experts, thus being adapted to the varying conditions within a particular jurisdiction, and also retaining in the court the power to select experts of its own choosing even where such experts might be designated by the superintendent of a nearby public hospital." MPC Tentative Draft No. 4, p. 196 (1955).

In the Whitlow case, Mr. Justice Francis pointed out the desirability of a procedure such as that found in the Code as a tool for eliminating "as much as possible of the so-called battle of experts at a hearing or trial." (45 N.J. at 20)

2. Under the Code, it is the defendant's having given notice of an intention to rely upon the defense of insanity or there being reason to believe that he is unfit to proceed or that his mental state will otherwise become an issue which brings into being the Court's power to require an examination. The same is true under existing law. In State v. Whitlow, 45 N.J. 3 (1965), it was the fact that defense counsel had had his client examined and had given notice of an intent to prove his client unfit to proceed and insane which gave the State the right to an examination. In State v. Obstein, 52 N.J. 516 (1968), the fact that the defendant had not been examined and had not given any indication of an intent to put his mental state into issue in any form precluded the State from obtaining an order for an examination.

3. The constitutionality of a provision such as that found in the Code requiring examination by court-appointed experts who may be called to testify is well established. MPC Tentative Draft No. 4, p. 196 (1955); State v. Whitlow, supra.

4. Paragraph (1) further provides for commitment to a mental facility for a period of up to sixty days, or longer if the court so orders, for the examination. In the Whitlow case, the Court stated that a provision such as that found in the Code and in the statutes of several states "would serve the cause of justice in criminal cases when the insanity defense is interposed". (45 N.J. at 24). In the absence of such legislation, the case establishes inherent power to commit to a proper state institution for a temporary period of observation and study, at least where the defendant refuses to cooperate with the State's psychiatrist and his attorney has given notice of an intent to rely upon the defense of insanity.

5. The final provision of paragraph (1) sets forth that a "qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination". This is to assure the defendant opportunity for an adequate psychiatric examination by an expert of his choice and is thought to be a device which would help avoid the battle of experts. MPC Tentative Draft No. 4, p. 196 (1957). Whitlow holds that when the State's psychiatrist is examining the defendant, the defense psychiatrist has the right to be present. (45 N.J. at 21). Further, under Whitlow, in limited circumstances, defense counsel may be permitted to observe the examination. (45 N.J. at 28)

6. Paragraph (2) clarifies the question of what methods may be used in the examination. It is said that most state statutes are silent on this point. MPC Tentative Draft No. 4, p. 196 (1955). No New Jersey authorities were found.

7. Paragraph (3) deals with the contents of the psychiatric report. Generally, statutes give the examining physician little guidance in this area. Thus, there is little assurance the report will be adequate. MPC Tentative Draft No. 4, pp. 196-197 (1955). In Whitlow, the Court pointed out the need to give guidance to the experts in this area:

> "For future guidance we suggest that such an order more specifically define the twofold scope of the examination, i.e., (1) to determine whether defendant is suffering from a mental illness or condition which prevents him from comprehending his position and from consulting intelligently with counsel in the preparation of his defense, and (2) to determine whether defendant at the time of commission of the crime was suffering from a mental illness which under established principles of law would warrant acquittal or justify conviction of a lesser degree of crime." (45 N.J. at 9).

Neither the Code nor Whitlow instruct the experts to inquire about "background" evidence.

8. The Whitlow case specifically establishes that the expert may inquire into the events surrounding the crime charged, if that is necessary for his examination. (45 N.J. at 16). See also State v. Obstein, 52 N.J. 516, 527 (1968). The Code does not address itself to the point.

9. The Code deals with the situation of the defendant's refusal to cooperate simply by instructing the examining physician to so report when that occurs. Both State v. Whitlow, supra; and State v. Obstein, supra, address themselves to affirmative coercive techniques to persuade the defendant to cooperate. Agreement by the prosecution and defense to one mutually-acceptable expert is one manner of approach. (45 N.J. at 20). Others include commitment for observation (45 N.J. at 23-24) and exclusion or limitation of the defense psychiatrist's testimony (45 N.J. at 25). Finally, after first expressing doubts in Whitlow (45 N.J. at 23), the Court held in Obstein that the state's psychiatrists could testify before the jury to the defendant's refusal to cooperate. (52 N.J. at 529). Inclusion of a provision to use some or all of these techniques to overcome uncooperativeness would be appropriate. The Code now has no such provision.

10. Under the Code, the report of the expert is distributed to all parties. Such is true under our discovery rules. R.3:13-3(a)(4).

11. California's study has recommended adoption of most of the Code's provisions with the addition that each party is allowed to choose an expert. Further, those experts may retain any help they need. Wisconsin permits commitment for examination and study as does the Code.

SECTION 4.06. DETERMINATION OF FITNESS TO PROCEED; EFFECT OF FINDING OF UNFITNESS; PROCEEDINGS IF FITNESS IS REGAINED; [POST-COMMITMENT HEARING.

(1) When the defendant's fitness to proceed is drawn in question, the issue may be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed pursuant to Section 4.05, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and cross-examine the psychiatrist who joined in the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in Subsection (3). [Subsections (3) and (4)] of this section, and the court shall commit him to the custody of the commissioner of Mental Hygiene [Public Health or Correction] to be placed in an appropriate institution of the Department of Mental Hygiene [Public Health or Correction] for so long as such unfitness shall endure. When the court, on its own motion or upon the application of the Commissioner of Mental Hygiene [Public Health or Correction] or the prosecuting attorney, determines after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceedings shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged, or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant to be committed to an appropriate institution of the Department of Mental Hygiene [Public Health].

(3) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

[Alternative: (3) At any time within ninety days after commitment as provided in Subsection (2) of this Section, or at any later time with permission of the court granted for good cause, the defendant or his counsel or the Commissioner of Mental Hygiene [Public Health or Correction] may apply for a special post-commitment hearing. If the application is made by or on behalf of a defendant not represented by counsel, he shall be afforded a reasonable opportunity to obtain counsel, and if he lacks funds to do so, counsel shall be assigned by the court. The application shall be granted only if the counsel for the defendant satisfies the court by affidavit or otherwise that as an attorney he has reasonable grounds for a good faith belief that his client has, on the facts and the law, a defense to the charge other than mental disease or defect excluding responsibility.

(4) If the motion for a special post-commitment hearing is granted, the hearing shall be by the court without a jury. No evidence shall be offered at the hearing by either party on the issue of mental disease or defect as a defense to, or in mitigation of, the crime charged. After hearing, the court may in an appropriate case quash the indictment or other charge, or find it to be defective or insufficient, or determine that it is not proved beyond a reasonable doubt by the evidence, or otherwise terminate the proceedings on the evidence or the law. In any such case, unless all defects in the proceedings are promptly cured, the court shall terminate the commitment ordered under Subsection (2) of this Section and order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant to be committed to an appropriate institution of the Department of Mental Hygiene [Public Health].

* * * *

§4.06 Commentary

1. This section establishes the framework within which the question of the defendant's fitness to proceed, as defined in Section 4.04, is determined.

2. Determination of Fitness to Proceed: The Hearing. Paragraph (1) sets the rules for the conduct of the hearing on the issue. It adopts that which is said to be the minority rule which excludes the jury from the trial of this question. MPC Tentative Draft No. 4, p. 197 (1955). In New Jersey, this proceeding is presently controlled by N.J.S. 2A:163-2. This has been interpreted as allowing the trial judge either to try the issue himself or to empanal a jury to hear it. The Court has, however, expressed a preference for having the issue tried to the judge alone. Aponte v. State, 30 N.J. 441, 455 (1959); Farmer v. State, 42 N.J. 579 (1964). The proceeding is civil, "in the nature of an inquest trying a collateral issue," so that the five-sixths rule as to the vote of the jury prevails. State v. Gibson, 15 N.J. 384 (1954).

This paragraph also permits the court to make the determination on the basis of the report of the examining experts when that report is uncontested. This is the law in a number of jurisdictions (MPC

Tentative Draft No. 4, p. 197 (1955)) but not in New Jersey. Our statute, N.J.S. 2A:163-2, speaks of the trial court's institut[ing] an inquiry and tak[ing] proofs" which proofs "may include testimony of qualified psychiatrists to be taken in open court..." Apparently, the practice in this State is to have such a hearing even where all of the experts agree that the accused is unfit to stand trial. See Farmer v. State, 42 N.J. 579 (1964).

The last sentence of paragraph (1) would allow the report of the examining experts to be received in evidence without requiring that they appear and testify. It would thus create an exception to the hearsay rule and would obviate the necessity of taking the testimony of these experts in every case where a report is contested. The sentence continues to assure the defendant the right to summon and cross-examine these experts if he so desires. There is some question about the need for this provision. If the matter is not to be contested, the report could be admitted by consent. If it is to be contested, the testimony would virtually always be required.

3. Effect of Finding of Unfitness. Under paragraph (2), if the defendant is found to be unable to proceed, the proceeding against him is suspended and he is committed to custody "in an appropriate institution...for so long as such unfitness shall endure" In New Jersey, N.J.S. 2A:163-2 provides that if the defendant is found to be unfit to proceed the judge must, in his discretion, decide whether the issue of sanity (i.e., responsibility) at the time of the offense should also be determined at the same hearing. Aponte v. State, 30 N.J. 44 (1959); Farmer v. State, 42 N.J. 579 (1964). If he decides not to do so, or if he does and finds the defendant was sane at the time of the crime but is presently unfit

[illegible] in accord with N.J.S. 30:4-82.

State v. Stern, 40 N.J. Super. 291 (App. Div. 1956). If he tries the issue of sanity at the time of the offense and finds him insane at that time and that such insanity continues, then the defendant is to be committed to the facility for the criminally insane. See N.J.S. 2A:163-2, paragraph 3. Assuming that he is to be treated under N.J.S. 30:4-82 (because he either was sane at the time of the offense or that determination was not made), then he may only be committed if a finding is made that he is a hazard to himself or to others and that institutionalization is necessary. In other words, the civil commitment test is used. State v. Caralluzzo, 49 N.J. 152 (1967). Thus, even though a defendant is unable to stand trial it is possible that he will not be committed. The Code provision quoted above seems to anticipate automatic commitment upon a finding of unfitness to proceed.

4. Proceeding if Fitness is Regained. Paragraph (2) requires a hearing, if requested, on the issue of whether a defendant has regained his fitness to proceed before the proceedings may be resumed. This differs from the practice in most jurisdictions where the certificate of the institution to which the accused was confined or the independent determination of the court, without a hearing, is sufficient. Some state statutes do, however, require such a hearing. MPC Tentative Draft No. 4, p. 197 (1955). In New Jersey N.J.S. 30:4-82, provides that the accused is in a condition to be discharged when he is "in a state of remission and free of symptoms of the mental disease...upon that fact being certified by the chief executive officer, or the chief of service..., to the court". Then he is remanded by court order to the place of original confinement. See State v. Konigsberg, 44 N.J. Super. 281 (App. Div. 1957). Thus, no hearing is now anticipated in New Jersey.

Paragraph (2) also provides for dismissal of the charges pending against the defendant upon his being found fit to proceed if "so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceeding". In that event, the court either orders the defendant discharged or orders him held for civil commitment proceedings. This provision is said, by the drafters, to be "novel American law but not in actual practice, except that the result is usually reached...through the entry of a nolle prosequi". MPC Tentative Draft No. 4, p. 197 (1955). That source cites the value, however, of vesting the power in the court to dismiss where lapse of time caused actual prejudice or because due to the length of time spent in a mental institution, trial and punishment of the defendant would be unjust. In New Jersey, today, no such explicit power exists. The only authorities which might be applicable are those establishing the inherent power of the court to dismiss an indictment where trial of it would be unjust. See, State v. Coolack, 43 N.J. 14 (1964).

5. Consideration of Defenses. The Code sets forth two alternatives in this area. The main formulation would permit the defendant, through his counsel, to bring before the Court for determination "any legal objection to the prosecution which is susceptible of fair determination prior to trial and without personal participation of the defendant". The alternative formulation establishes a procedure for a "special post-commitment hearing". Under it, an application for a hearing is granted if defense counsel satisfies the Court that "as an attorney he has reasonable grounds to believe that his client has, on the facts and the law, a defense to the charge" other than lack of responsibility. The hearing is then held before the Court,

sitting without a jury. No evidence of insanity may be offered. After hearing, the Court may dismiss the indictment or find the defendant not guilty or otherwise terminate the proceeding. If this is done and if defects are not promptly cured, the defendant is either discharged or held for civil commitment proceedings. This formulation is based upon a proposal by the Massachusetts Judicial Counsel (36th Report, pp. 22-28 (1960)).

New Jersey's existing law is exactly the opposite. The only issue which may now be tried while the defendant is unfit to proceed is his responsibility at the time of the offense. N.J.S. 2A:163-2. Even here, the decision to try the issue is within the discretion of the Court. Farmer v. State, 42 N.J. 579 (1964); Aponte v. State, 30 N.J. 441 (1959); State v. Stern, 40 N.J. Super. 291 (App. Div. 1956).

There are few cases on the issue in other jurisdictions and those that there are conflict. See Paulsen & Kadish, Criminal Law and Processes 316 (1962). Our Supreme Court has spoken of the need to be careful not to allow our statutory scheme to be used to punish persons by confinement without an adjudication of guilt at a criminal trial. State v. Caralluzzo, 49 N.J. 152 (1967). See also State v. Stern, 40 N.J. Super. 291, 295 (App. Div. 1956). This thought leads to the conclusion that some procedure should be available to try at least some issues prior to trial even though the defendant is unfit to proceed. It is questionable whether requiring defense counsel to prove a good basis to proceed should be included. Leaving the matter to the court's discretion (as under N.J.S. 2A:163-2) is probably preferable. Further, there is little reason to limit the types of issue only to legal issues, or to insanity, or to exclude insanity. Again, the variety of potential issues and the range of those triable without the defendant's participation leads to the conclusion that the matter

is best left to the Court's discretion.

6. Other State Codes. The codes recently proposed or adopted in other states are generally in accord with the Code. Variations which may be of interest are:

(a) California: (1) Specifically allows the defense, the prosecution or the Court to raise the fitness issue. §538(1). The Code, in §4.06(1), speaks simply of "when the defendant's fitness... is drawn in question". (2) Provides for immediate suspension of the criminal proceeding pending a determination of the fitness issue the first time it is raised. §538(2); §539(2). Thereafter, suspension is discretionary. §538(3). The Code suspends the proceeding when the determination of unfitness has been made. This may be important when the issue is raised during trial. (3) Provides that all fitness hearings shall be in the Superior Court by transfer from inferior tribunals. §538(4). (4) Allows jury trial of the issue on request by either party. §539(2). (5) Adopts §4.06(3) allowing trial of issues of law without defendant's participation. §538(5). (6) Requires commitment for five years prior to dismissal of the charges as in §4.06(2). (7) Allows credit for time under confinement toward any sentence imposed or subsequently imposed. §538(10). (8) Places the burden of proof upon the person claiming incompetency. §539(1).

(b) Illinois (§104-2):

(1) Makes the test of this section applicable to the issue of whether the death penalty should be carried out. (2) Gives defendant an absolute right to trial by jury on the fitness issue. (3) Suspends the proceeding pending a determination of fitness. (4) Places the burden of proof upon the moving party.

(c) Michigan (§767.27a):

(1) Provides for a commitment for a diagnostic

report for sixty days when the issue of fitness is raised. (2) Upon receipt of the report, a hearing is held. (3) Provides a procedure under which, if the defendant is or will be unable to stand trial within 18 months of commitment, is committed as criminally insane and the charges are dismissed. (4) Time while confined is applied against sentences.

SECTION 4.07. DETERMINATION OF IRRESPONSIBILITY ON BASIS OF REPORT; ACCESS TO DEFENDANT BY PSYCHIATRIST OF HIS OWN CHOICE; FORM OF EXPERT TESTIMONY WHEN ISSUE OF RESPONSIBILITY IS TRIED.

(1) If the report filed pursuant to §4.05 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect which substantially impaired his capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law, and the Court, after a hearing if a hearing is requested by the prosecuting attorney or the defendant, is satisfied that such impairment was sufficient to exclude responsibility, the Court on motion of the defendant sahll enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

(2) When, notwithstanding the report filed pursuant to Section 4.05, the defendant wishes to be examined by a qualified psychiatrist or other expert of his own choice, such examinder shall be permitted to have reasonable access to the defendant for the purposes of such examination.

(3) Upon the trial, the psychiatrist who reported pursuant to Section 4.05 may be called as witnesses by the prosecution, the defendant or the Court. If the issue is being tried before a jury, the jury may be informed that the psychiatrists were designated by the Court or by the Superintendent of the Hospital at the request of the Court, as the case may be. If called by the Court, the witness shall be subject to cross-examination by the prosecution and by the defendant. Both the prosecution and the defendant may summon any other qualified psychiatrist or other expert to testify, but no one who has not examined the defendant shall be competent to testify to an expert opinion with respect to the mental condition or responsibility of the defendant, as distinguished from the validity of the procedure followed by, or the general scientific propositions stated by, another witness.

(4) When a psychiatrist or other expert who has examined the defendant testifies concerning his mental condition, he shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged and his opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind which is an element of the offense charged was impaired as a result of mental disease or defect at that time. He shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

* * * *

§4.07 Commentary

1. Paragraph (1) provides a procedure under which, in cases

of extreme mental disease or defect where the exclusion of responsibility is clear, a trial can be avoided. When this occurs, the defendant is subject to commitment under §4.08. In most states, this situation is handled by means of the prosecuting attorney's control over the prosecution. See MPC Tentative Draft No. 4, p. 158 (1955). In New Jersey, the matter is controlled by N.J.S. 2A:163-2 and N.J.S. 30:4-82. Under these statutes, after a determination that the defendant is unfit to proceed, the Court has discretion to make a further finding, with or without a jury, on the issue of responsibility at the time of the offense. Aponte v. State, 30 N.J. 441 (1959); Farmer v. State, 42 N.J. 579 (1964).

The system established by the Code is, however, in an entirely different context from ours, in that there is a report by a court-appointed expert (§4.05), rather than reports by the adversary's own experts. Where the court-appointed expert finds the defendant irresponsible there is probably little need for a trial. This is why it is appropriate for Section 4.07 to require a determination (after a hearing, if requested) by the Court whenever the report finds the defendant irresponsible.

2. Of course, if, under the Code's procedures, the Court disagreed with the report of the expert, and found the defendant responsible, the defendant could relitigate the issue at trial. This is also true under N.J.S. 2A:163-2, paragraph 4.

3. The Code provides that this issue is to be tried to the Court. Existing New Jersey law gives the Court discretion to determine whether or not to have a jury hear the issue. N.J.S. 2A:163-2, paragraph 1; Aponte v. State, supra. This is probably preferable

because of the variety of situations which could arise and because of the strong moral--in addition to medical--considerations attending a finding of insanity. See State v. Selfo, 58 N.J. Super. 477 (App. Div. 1959). It is particularly desirable under the Code system because it anticipates a pre-trial determination whenever the court-appointed expert finds the defendant irresponsible.

4. Paragraph (2) gives the defendant an absolute right to be examined by an expert of his own choosing. It is our law. State v. Whitlow, 45 N.J. 3, 10-11 (1965); State v. Butler, 27 N.J. 560, 599 (1958).

5. The first part of paragraph (3) is intended to make Section 4.05(1) effective. It allows the court-approved expert to be called by either party or by the Court. Further, it allows the Court to inform the jury that the witness is a court-appointed expert. This gives the witness an aura of impartiality and aids in eliminating the "battle of experts". See State v. Whitlow, 45 N.J. 3, 20 (1965). This is our law in the case of impartial medical experts in the civil field. R.4:20-10. Accord, California Penal Code Study §533(8). Of course, such an expert is subject to cross-examination.

6. The last sentence of paragraph (3) prevents testimony by an expert who has not examined the defendant as to a diagnosis of the defendant's mental condition or as to his responsibility, based either upon a hypothetical state of facts or upon his observation of the defendant in court or both. Such testimony has been described as the "least defensible use of the hypothetical question". MPC Tentative Draft No. 4, p. 198 (1955). The provision does not prevent testimony by a non-examining expert as to the validity of procedures followed by or the general scientific propositions stated by other witnesses. New Jersey law allows hypothetical questions but does not require them,

unless the Court so orders. Rule of Evidence 58. Further, hypothetical questions addressed to non-examining experts are permitted subject to cross-examination on both the credibility of the witness and the construction of the hypothetical. State v. Guido, 40 N.J. 191, 198 (1963); State v. Trantino, 44 N.J. 358, 366 (1965). Report, New Jersey Supreme Court Committee on Evidence 113 (1963).

7. Paragraph (4) is designated to assure that the psychiatric expert who has examined the defendant will have an adequate opportunity to state and explain his diagnosis of the defendant's mental condition at the time of the conduct charged and his opinion as to the extent of the defendant's mental impairment at that time, without such a witness being restricted to the latter testimony alone and without having to state his opinion in hypothetical form. He is, of course, subject to cross-examination. MPC Tentative Draft No. 4, p. 198 (1955). The objections of psychiatrists to the kinds of restrictions upon their testimony which many States impose are discussed in MPC Tentative Draft No. 4, pp. 179-181 (1955).

New Jersey's cases allow a broad range of freedom to the testifying expert. See State v. Sikora, 44 N.J. 453 (1965) and Rule of Evidence 58. The fact that the psychiatrist is to have freedom as to his manner of testifying does not mean that his psychiatric theories will necessarily be admissible on all issues. State v. Sikora, supra. This Section defines the manner of the psychiatrist's testifying -- rather than the substance of that testimony.

SECTION 4.08. EFFECT OF ACQUITTAL ON THE GROUND OF MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY; COMMITMENT; RELEASE OR DISCHARGE.

(1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate institution for custody, cure and treatment.

(2) If the Commissioner of Mental Hygiene [Public Health] is of the view that a person committed to his custody, pursuant to paragraph (1) of this Section, may be discharged or released on condition without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the Court by which such person was committed and shall transmit a copy of such application and report to the prosecuting attorney of the county [parish] from which the defendant was committed. The Court shall thereupon appoint at least two qualified psychiatrists to examine such person and to report within sixty days, or such longer period as the Court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the Court may cause such person to be confined in any institution located near the place where the Court sits, which may hereafter be disignated by the Commissioner of Mental Hygiene [Public Health] as suitable for the temporary detention of irresponsible persons.

(3) If the Court is satisfied by the report filed pursuant to paragraph (2) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the Court upon the hearing, the committed person shall thereupon be discharged or released on such conditions as the Court determines to be necessary, or shall be recommitted to the custody of the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(4) If within [five] years after the conditional release of a committed person, the Court shall determine, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of such person or for the safety of others, his conditional release should be revoked, the Court shall forthwith order him to be recommitted to the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(5) A committed person may make application for his discharge or release to the Court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the Commissioner of Mental Hygiene [Public Health]. Moreover, no such application by a committed person need be considered until he has been confined for a period of not less than [six months] from the date of the order of commitment, and if the determination of the Court be adverse to the application, such person shall not be permitted to file a further application until [one year] has elapsed from the date of any preceding hearing on an application for his release or discharge.

* * * *

§4.08 Commentary

1. This Section pertaining the legal effect of acquittal on the ground of mental disease or defect excluding responsibility is characterized by (a) mandatory commitment of the defendant to an appropriate institution upon such an acquittal, (b) dangerousness to himself or others as the criterion for continued custody, (c) power only in the committing court (other than as affected by habeas corpus) to discharge or release, (d) probationary release as an alternative to absolute discharge, (e) application for release or discharge to be made by the responsible public health official or by the defendant with limitations as to the frequency of applications by the latter. MPC Tentative Draft No. 4, p. 199 (1957).

2. The provision for automatic commitment is in accordance with the practice in England and in a minority of American jurisdictions. It is argued by the Drafters of the Code, that such a provision provides the public with the maximum immediate protection and works to the advantage of mentally diseased or defective defendants by making the defense of irresponsibility more acceptable to the public and to the jury. Ibid. Relaxing the M'Naghten rule is frequently thought of as going hand-in-hand with legislative revision in this area. See Weintraub, C.J., concurring in State v. Lucas, 30 N.J. 82, 85 (1959).

At the present time, New Jersey does not have mandatory commitment. Rather, whether lack of responsibility is found at trial (N.J.S. 2A:163-3) or prior thereto (N.J.S. 2A:163-2), the jury must find specially whether the insanity continues. If it does, the defendant is committed into the State Hospital at Trenton. Thus, commitment is contingent upon a jury finding of continued insanity. State v. Vigliano, 43 N.J. 44 (1964); State v. Coleman, 46 N.J. 16 (1965).

3. The Code provides that dangerousness is the criterion for contined custody. Section 4.08(2). Our statutes are not entirely clear on this point. The provision applicable to a finding of insanity at trial, which is found to continue, states that the defendant is to be committed "until such time as he may be restored to reason". N.J.S. 2A:163-2, applicable to pre-trial determinations, also so provides. However, both of these statutes must be read with N.J.S. 30:4-82 that provides in one place that persons confined are to be released when "improved" and, in another, when "in a state of remission and free of the symptoms of the mental disease". The criterion for continued commitment of a person found unfit to stand trial has, however, been found to be that of dangerousness. State v. Caralluzzo, 49 N.J. 152 (1967). This is the civil commitment standard (N.J.S. 30:4-27 et. seq.) and is the Code's standard, Thus, the Code and New Jersey are at least in partial accord on this issue.

4. Paragraph (2) of this Section provides that prior to discharge or release on condition (i.e., parole) an independent psychiatric examination by two physicians is required. This provision is included to "protect both the public and the defendant". MPC Tentative Draft No. 4, p. 200 (1955). It is clear that the Code is designed in this manner to make the more relaxed responsibility

provision of §4.01 more acceptable. No such provision is found in existing New Jersey law. N.J.S. 30:4-82 simply requires a certification by the chief executive officer or the chief of staff of the institution in which the defendant is confined.

5. Upon receipt of the psychiatric reports, the Court must decide whether he is satisfied from them or whether he will hold a hearing. Section 4.08(3).

6. The Code allows release on condition (i.e., parole) because this "furnishes additional protection to the public in the case of those individuals who need some supervision upon their return to the community". MPC Tentative Draft No. 4, p. 200 (1955). Our law now so provides. N.J.S. 30:4-106 et. seq.

7. The Code retains in the committing court the exclusive power to discharge or release on condition (leaving aside habeas corpus). New Jersey law is unclear. The pre-trial commitment statute (N.J.S. 2A:163-2) states that the person may not be "released from confinement except upon order of the Court by which he was committed". The statute covering acquittal on the ground of insanity at trial is silent on the issue of the procedure for release. N.J.S. 30:4-82 requires a court order for discharge but does not speak about release on condition release. The parole statutes (N.J.S. 30:4-106, et. seq.) place the decision in the hands of the chief officer of the institution. See also N.J.S. 30:4-115. Apparently, discharge requires a court order but parole does not. Again, the more stringent procedural rules of the Code are designed to give more protection in the light of the less stringent responsibility test of §4.01.

8. Paragraph (4) puts control over recommitment after release in the hands of the Court. This is a corrollary to the rule

of the preceding provision placing the decision to release in the Court's hands. A five-year limit on the power to recommit is imposed following the New York statute. The decision is now in the hands of the officials of the institution. N.J.S. 30:4-111.

9. Paragraph (5) allows the responsible public official to make an application for release or discharge at any time. Applications by the patient are limited "by what is thought to be the period necessary to observe him initially (six months) and by the interval probably necessary for a significant change in his condition to occur after any application has been denied (one year)." MPC Tentative Draft No. 4, pp. 200-201 (1955). A few states have now prescribed a minimum time the committed person must be kept in custody. Ibid.

10. Wisconsin has established a procedural framework much like the Code. The test for release, however, is stated as

> "finding him sane and responsible [and] that he is not likely to have a recurrence of insanity or mental irresponsibility as will result in acts which but for insanity or mental irresponsibility would be crimes." §957.11(4)

Connecticut's statute allows a temporary period of commitment, subsequent to the trial for determination of the question of immediate release, unless the evidence already availabe convinces the Court that the defendant is not dangerous in which case he may be immediately released. §49(1)(a). The provision for commitment prior to sentence is much like our Sex Offender's Act. Another Connecticut law is that the total period of confinement in the mental hospital may not exceed the period set by the court at the time of commitment and that period may not exceed the statutory maximum sentence for the crime. §49(2)(a).

This is subject to the right of the Court to extend the period of confinement, after hearing, upon a finding of dangerousness. This is essentially a civil commitment proceeding §49(4). Connecticut further requires a regular report (every six months) to the Court by the institution. California's proposed statute is very similar to the Code but has the maximum term provision of the Connecticut statute.

11. Chief Justice Weintraub has gone on record as favoring a time limitation such as that found in the Connecticut and California statutes. Weintraub, Criminal Responsibility, 49 ABAJ 1075, 1078 (1963).

SECTION 4.09. STATEMENTS FOR PURPOSES OF EXAMINATION OR TREATMENT INADMISSIBLE EXCEPT ON ISSUE OF MENTAL CONDITION.

A statement made by a person subjected to psychiatric examination or treatment pursuant to Sections 4.05, 4.06 or 4.08 for the purposes of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication [unless such statement constitutes an admission of guilt of the crime charged].

* * * *

§4.09 Commentary

1. This section embodies the view that the important expert knowledge of the mental condition of a defendant acquired by examination or treatment on order of the Court should be fully available in evidence in any proceeding where his mental condition may properly be in issue; but that, to safeguard the defendant's rights and to make possible the feeling of confidence essential for effective psychiatric diagnosis and treatment, the defendant's statements made for this purpose may not be put in evidence on any other issue. MPC Tentative Draft No. 4, p. 201 (1955).

2. The alternative provision included in the bracketed material, would exclude statements which are confessions or admissions. This is drawn from the Massachusetts Statute (Mass. Gen. Laws, Ch. 233, §23B (1958) and is designed to prevent misuse of the evidence arising out of the jury's failure to follow the court's instructions and to give further protection to the privilege against self-incrimination. MPC Proposed Official Draft, p. 78 (1961).

3. The New Jersey position is in accord with this section without the addition of the alternative. In the leading case of State v. Whitlow, 45 N.J. 3, at 15-17 (1965), the Court held:

(1) "...the results of the ordinary physical and psychological tests (as distinguished from truth serums and the like) including such interrogation as is necessary to determine mental capacity, are admissible."

(2) "The difficult question is whether inculpatory statements or confessions of the accused respecting the crime charged, made during the psychiatric interview and examination may be introduced in evidence. Where it appears at the trial that the conversations with the doctors were necessary to enable them to form an opinion either as to mental capacity to stand trial (where it is in issue) or to commit the crime, such statements or confessions are admissible. Their function or probative force, however, is limited to sanity issue and may not be used as substantive evidence of guilt...such statements have been made competent for this restricted purpose by a number of statutes..." (Citations omitted).

Further, the Court held that, so limited, this rule of evidence does not violate the privilege against self-incrimination. On these issues, see also State v. Lucas, 30 N.J. 37, 79 (1959) and State v. Obstein, 52 N.J. 516 (1968). The Obstein case discussed the problem of the possibility of the jury's misusing the evidence and suggested that a bifurcated trial may be one method of alleviating the difficulty. (52 N.J. at 527, n.1). Further, the case places a limitation upon the prosecutor's use of facts learned from the examination: he may not use such facts as "avenues for further investigation of guilt" and evidence so obtained may not be used at trial (52 N.J. at 531).

4. The Illinois statute states the same rule in a negative way (§104-2(d)):

"No statement made by the accused in the course of any examination into his competency provided for by this Section, whether the examination shall be with or without consent of the accused, shall be admitted in evidence against the accused on the guilt in any criminal proceeding."

SECTION 4.10. IMMATURITY EXCLUDING CRIMINAL CONVICTION; TRANSFER OF PROCEEDINGS TO JUVENILE COURT.

(1) A person shall not be tried for or convicted of an offense if:

(a) at the time of the conduct charged to constitute the offense he was less than sixteen years of age [in which case the Juvenile Court shall have exclusive jurisdiction] or;

(b) at the time of the conduct charged to constitute the offense he was sixteen or seventeen years of age, unless:

(i) the Juvenile Court has no jurisdiction over him, or

(ii) the Juvenile Court has entered an order waiving jurisdiction and consenting to the institution of criminal proceedings against him.

(2) No court shall have jurisdiction to try and convict a person of an offense if criminal proceedings against him are barred by Subsection (1) of this Section. When it appears that a person charged with the commission of an offense may be of such an age that criminal proceedings may be barred under Subsection (1) of this Section, the Court shall hold a hearing thereon, and the burden shall be on the prosecution to establish to the satisfaction of the Court that the criminal proceeding is not barred upon such grounds. If the Court determines that the proceeding is barred, custody of the person charged shall be surrendered to the Juvenile Court, and the case, including all papers and processes relating thereto shall be transferred.

* * * *

§4.10 Commentary

1. This section is designed to define the extent to which criminal proceedings are barred because of the alleged offender's immaturity. It excludes such proceedings absolutely if the actor was less than sixteen years of age at the time of the conduct charged, relying in such case exclusively upon the processes of the Juvenile Court. If the actor was between sixteen and seventeen years of age at the time of his offensive conduct, a system of concurrent jurisdiction is established with primary jurisdiction in the Juvenile Court and criminal jurisdiction only upon waiver by that Court. No effort is

made to define the standards that should guide juvenile courts in waiving jurisdiction, in the view that this is a problem to be dealt with in the Juvenile Court Act.

2. At present, the following New Jersey Statutes control in this area:

> N.J.S. 2A:85-4: "A person under the age of 16 years is deemed incapable of committing a crime."
>
> N.J.S. 2A:4-14: "Except as stated in section 2A:4-15..., the juvenile and domestic relations court shall have exclusive jurisdiction to hear and determine all cases of juvenile delinquency."
>
> * * * *
>
> "But the commission of an act which constitutes a violation of [the motor vehicle laws] by a child of or over the age of 17 years, who is the holder of a valid license to operate a motor vehicle...shall not constitute juvenile delinquency...."
>
> N.J.S. 2A:4-15: "If it shall appear to the satisfaction of the juvenile and domestic relations court that a case of juvenile delinquency as defined in section 2A:4-14 of this title committed by any juvenile of the age of 16 or 17 years, should not be dealt with by the court, either because of the fact that the person is an habitual offender, or has been charged with an offense of a heinous nature, under circumstances which may require the imposition of a sentence rather than the disposition permitted by this chapter for the welfare of society, then the court may refer such case to the county prosecutor of the county wherein the court is situate.
>
> Any juvenile of the age of 16 or 17 years may demand a presentment and trial by jury, and in such case, when this fact is made known to the court, such case, together with all documents pertaining thereto, shall be referred to the county prosecutor.
>
> Cases so referred to the county prosecutor shall thereafter be dealt with in exactly the same manner as a criminal case."

3. The Code treats the problem of accountability of juveniles solely in terms of the respective jurisdiction of the two court systems and not in terms of criminal capacity. MPC Tentative Draft No. 7, p. 14 (1957). This is not a problem in New Jersey because the existing capacity age (16) found in N.J.S. 2A:85-4

is the same as the juvenile court jurisdiction as found in N.J.S. 2A:4-15. This is not true in many other states. The Code's drafters recommend repeal of our capacity statute and reliance exclusively upon their jurisdiction statute. Capacity becomes a moot concept. MPC Tentative Draft No. 7, pp. 15-16 (1957).

4. The Code calls, in Subsection (1)(a) for exclusive jurisdiction -- without exception -- for children under sixteen. This is our law, even as to homicides (N.J.S. 2A:85-4; State v. Monahan, 15 N.J. 104 (1954)). N.J.S. 2A:4-14. In many other states exceptions are made for certain serious offenses.

In subsection (1)(b), the concurrent jurisdiction provisions are found. There are two situations: first, where the juvenile court has no jurisdiction. (Sub-paragraph (i)). Traffic offenses by seventeen-year-olds would come within this provision. (N.J.S. 2A:4-14). Second, where the juvenile court waives jurisdiction. (Sub-paragraph (ii)). This ties in with N.J.S. 2A:4-15. These provisions would not change our law.

5. This section makes as determinative the age when the offense was committed. This is our law. N.J.S. 2A:4-14, 17, 20. Johnson v. State, 18 N.J. 422, 432 (1955). See discussion in MPC Tentative Draft No. 7, pp. 18-20 (1957).

6. Under the Code, non-age is a jurisdictional defect. Under our existing law, capacity is merely a waivable defense which our supreme court has equated with insanity for this purpose. State v. LeFante, 12 N.J. 505, 514 (1953). The question has not been litigated in a jurisdictional context. Other jurisdictions have split on the issue. MPC Tentative Draft No. 7, p. 20 (1957).

7. The last sentence of Subsection (2) concerning transfer in the event the defendant is found to be less than 18 years of age, is in accord with N.J.S. 2A:4-20.

ARTICLE 5. INCHOATE CRIMES

Introductory Note

1. This Article undertakes to deal systematically with attempts, icitations and conspiracies to commit crimes, conduct which has in common t it is designed to culminate in the commission of a substantive offense has either failed to do so in the discrete case or has not yet achieved culmination because something remains to be done by the actor or another rson. The offenses are inchoate in this sense. Although many other crimes defined so that their commission does not rest on proof of the occurrence the evil that it is the object of the law to prevent, the crimes treated this Article have such generality of definition and of application as inchoate imes that is useful to bring them together.

2. It is well to set forth some of the basic considerations behind law of inchoate crimes. The Drafters do so as follows:

> "Since these offenses always presuppose a purpose to commit another crime, it is doubtful that the threat of punishment for their commission can significantly add to the deterrent efficacy of the sanction--which the actor by hypothesis ignores--that is threatened for the crime that is his object. There may be cases where this does occur, as when the actor thinks the chance of apprehension low if he succeeds but high if he should fail in his attempt, or when reflection is promoted at an early stage that otherwise would be postponed until too late, which may be true in some conspiracies. These are, however, special situations. Viewed generally, it seems clear that general deterrence is at most a minor function to be served in fashioning provisions of the penal law addressed to these inchoate crimes; that burden is discharged upon the whole by the law dealing with the substantive offenses.
>
> "Other and major functions of the penal law remain, however, to be served. They may be summarized as follows:
>
> "First: When a person is seriously dedicated to commission of a crime there is obviously need for a firm legal basis for the

intervention of the agencies of
consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemnas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge.

"Second: Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides.

"Third: Finally, and quite apart from these considerations of prevention, when the actor's failure to commit the substantive offense is due to a fortuity, as when the bullet misses in attempted murder or when the expected response to solicitation is withheld, his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice....

"These are the main considerations in the light of which the [Code] has been prepared. * * * ... [W]e deem [the following] to be the major results of the [Code]...:

"(a) to extend the criminality of attempts by sweeping aside the defense of impossibility (including the distinction between so-called factual and legal impossibility) and by drawing the line between attempt and non-criminal preparation further away from the final act; the crime becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose;

"(b) to establish criminal solicitation as a general offense;

"(c) to limit the unity and scope of criminal conspiracy by emphasizing the primordial element of individual agreement, while preserving, so far as possible, the procedural advantage of joint prosecution of related segments of an organized criminal enterprise;

"(d) to eliminate as objectives which may make conspiracy a crime such vague determinants as 'oppression,' 'public morals,' and the like;

"(e) to establish in attempt, solicitation and conspiracy a limited defense in cases of renunciation of the criminal objective; and

"(f) to establish these inchoate crimes as offenses of comparable magnitude to the completed crimes which are their object." (MPC Tentative Draft No. 10, pp. 24-26 (1960))

ECTION 5.01. CRIMINAL ATTEMPT.

(1) Definition of Attempt. A person is guilty of an attempt to ommit a crime if, acting with the kind of culpability otherwise required or commission of the crime, he:

(a) purposely engages in conduct which would constitute the rime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the rime, does or omits to do anything with the purpose of causing or with the elief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the ircumstances as he believes them to be, is an act or omission constituting substantial step in a course of conduct planned to culminate in his ommission of the crime.

(2) Conduct Which May Be Held Substantial Step Under Subsection (1) (c). onduct shall not be held to constitute a substantial step under Subsection 1)(c) of this Section unless it is strongly corroborative of the actor's riminal purpose. Without negativing the sufficiency of other conduct, the ollowing, if strongly corroborative of the actor's criminal purpose, shall ot be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated ictim of the crime;

(b) enticing or seeking to entice the contemplated victim f the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission f the crime;

(d) unlawful entry of a structure, vehicle or enclosure in hich it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission f the crime, which are specially designed for such unlawful use or which an serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be mployed in the commission of the crime, at or near the place contemplated or its commission, where such possession, collection or fabrication serves o lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct onstituting an element of the crime.

(3) Conduct Designed to Aid Another in Commission of a Crime. person who engages in conduct designed to aid another to commit a crime hich would establish his complicity under Section 2.06 if the crime were ommitted by such other person, is guilty of an attempt to commit the crime,

lthough the crime is not committed or attempted by such other person.

(4) Renunciation of Criminal Purpose. When the actor's conduct ould otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of his Section, it is an affirmative defense that he abandoned his effort to ommit the crime or otherwise prevented its commission, under circumstances anifesting a complete and voluntary renunciation of his criminal purpose. he establishment of such defense does not, however, affect the liability f an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal urpose is not voluntary if it is motivated, in whole or in part, by ircumstances, not present or apparent at the inception of the actor's ourse of conduct, which increase the probability of detection or appre- ension or which make more difficult the accomplishment of the criminal urpose. Renunciation is not complete if it is motivated by a decision to ostpone the criminal conduct until a more advantageous time or to transfer he criminal effort to another but similar objective or victim.

* * * *

§5.01 Commentary

1. The Definition of Attempt: The Code's Drafters set forth the

asic considerations, in addition to those set forth in the Introductory

te, above, controlling the provisions in the attempt field:

> "The literature and decisions dealing with the definition of a criminal attempt reflect ambivalence as to how far the governing criterion should be found in the dangerousness of the actor's conduct, measured by objective standards, and how far in the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime. Both criteria may lead, of course, to the same disposition of a concrete case. When they do not, we think...that the proper focus of attention is the actor's disposition, and the [Code] is framed with this in mind. Needless to say, we are infull agreement that the law must be concerned with conduct, not with evil thoughts alone. The question is what conduct, when engaged in with a purpose to commit a crime or to advance towards the attainment of a criminal objective, should suffice to constitute a criminal attempt?
>
> "In fashioning an answer we must keep in mind that in attempt, as distinct from solicitation and conspiracy, it is not intrinsic to the actor's conduct that he has disclosed his criminal design to someone else; nor is there any natural line that is suggested by the situation--like utterance or agreement. The law must deal with the problem presented by a single individual and must address itself to conduct that may fall anywhere upon a graded scale from early preparation to the final effort to commit the crime.

"We think, therefore, that it is useful to begin with any conduct designed to effect or to advance towards the attainment of the criminal objective and to ask when it ought not to be regarded as a crime, either because it does not adequately manifest the dangerousness of the actor or on other overriding grounds of social policy. The formulations in this section are intended as responses to this question." (MPC Tentative Draft No. 10, p. 26 (1960).

2. Existing Statutory Provision. New Jersey's existing legislation ; typical in that it contains no definition of the offense:

"An attempt to commit an indictable offense is a misdemeanor, but the punishment shall not exceed that provided for the crime or offense attempted." (N.J.S. 2A:85-5)

ıe situation is much the same in the case of statutes outlawing attempts to ›mmit particular crimes. See e.g., N.J.S. 2A:113-7 (attempt to kill by ›isoning); N.J.S. 2A:89-4 (attempted arson); N.J.S. 2A:90-2 (assault with ıtent to commit certain enumerated felonies); and N.J.S. 2A:90-3 (same, ›bbery). The statutes of other jurisdictions are collected in MPC Tentative aft No. 10, p. 76 (1960).

In applying these statutes, the courts, lacking meaningful gislative guidance, have followed the principles of attempt liability veloped at the common law.

3. Section 5.01(1): The Requirement of Purpose. The definition attempt in the Code follows the conventional pattern of limiting this choate crime to purposive conduct. In the language found in our cases, ere must be "an intent to commit the crime itself." State v. Weleck, 10 N.J. 5, 373 (1952); State v. Blechman, 135 N.J.L. 99 (Sup. Ct. 1946); State v. hwarzbach, 84 N.J.L. 268 (E.&A. 1913). Cases in other jurisdictions ›eak of "specific intent". MPC Tentative Draft No. 10, p. 27 (1960).

The Code adopts the view that the actor must have for his purpose ıgaging in the criminal conduct or accomplish the criminal result which is ı element of the substantive crime. His purpose need not, however, encompass

ll the surrounding circumstances included in the formal definition of the ubstantive offense. As to them, it is sufficient that he acts with the ulpability that is required for commission of the crime. MPC Tentative raft No. 10, pp. 27-28 (1960). The Drafters of the Code state that it is 'difficult to say what the result would be in this situation under prevailing rinciples of attempt liability. [The Code's] formulation imposes attempt liability in a group of cases where the normal basis of liability is present--purposive conduct manifesting dangerousness--and allows the policy of the substantive crime, respecting recklessness or negligence as to surrounding circumstances, to be applied to the attempt to commit that crime." Ibid. No New Jersey cases were found. An important federal case in an analogous area (aiding and abetting) has held contrary to the Code's view, although the decision was based largely on the particular statutory language involved. United States v. Jones, 308 F. 2d 26 (2 Cir. 1962).

Under paragraph (b), liability for an attempt may be founded upon the actor's belief (as opposed to purpose) that his conduct will cause a particular result which is an element of the crime. The Drafters explain this position in this way:

> "If for example, the actor's purpose were to demolish a building and, knowing and believing that persons in the building would be killed by the explosion, the actor nonetheless detonated a bomb, there would be an attempt to kill even though it was no part of the actor's purpose--i.e., he did not consciously desire--that the building's inhabitants should be killed...[I]t is difficult to say what the decision would be under prevailing attempt principles in a case of this kind. It might be held that the actor did not specifically intend to kill the inhabitants of the building; on the other hand, the concept of 'intent' has always been an ambiguous one and might be thought to include results which are believed by the actor to be the inevitable consequences of his conduct.
>
> The inclusion of such conduct as a basis for liability under paragraph (b) is based on the conclusion that the manifestation of dangerousness is as great--or very nearly as great--as in the

case of purposive conduct. In both instances a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur. The absence in one instance of any desire for the forbidden result is not, under these circumstances, a sufficient basis for differentiating between the two types of conduct involved.

It should be emphasized that this extension of paragraph (b) beyond the area of purposive behavior does not result in the inclusion of reckless conduct." MPC Tentative Draft No. 10, pp. 29-30 (1960)).

4. Section 5.01(1)(a): Rejection of the Impossibility Defense.

The purpose of this paragraph, according to the Drafters of the Code is "to reverse the results in cases where attempt convictions have been set aside on the ground that it was legally impossible for the actor to have completed the crime contemplated." MPC Tentative Draft No. 10, p. 30 (1960). Included among the cases rejected by the Code are People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (Ct. App. 1906) (holding that a person accepting goods which he believed to have been stolen, but which were not then "stolen" goods is not guilty of attempt) Marley v. Stat 58 N.J.L. 207 (Sup. Ct. 1895) (holding that an official who contracted a debt which was unauthorized and nullity, but which he believed to believed to be valid, could not be convicted of an attempt to illegally contract a valid debt.) The Marley case was cited by our Supreme Court in 1952 for the proposition that "there cannot be a conviction for an attempt to commit a crime unless the attempt, if completed, would have constituted a crime." State v. Weleck, 10 N.J. 355, 372 (1952).

The Drafters explain their position as follows:

The basic rationale of these decisions is that, judging the actor's conduct in the light of the actual facts, what he intended to do did not amount to a crime. This approach, however, is unsound in that it seeks to evaluate a mental attitude--'intent' or 'purpose'--not by looking to the actor's mental frame of reference, but to a situation wholly at variance with the actor's beliefs. In so doing, the courts exonerate defendants in situations where attempt liability most certainly should be imposed. In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone

as far as he could in implementing that purpose, and (3) as a result, the actor's 'dangerousness' is plainly manifested.... The paragraph is ... consistent with the general approach of the decisional law concerned with other types of impossibility situations, these cases generally hold that the actor's liability is to be determined by reference to his state of mind and does not depend upon external considerations.

Of course, it is still necessary that the result desired or intended by the actor constitute a crime. If, according to his beliefs as to facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt even though he firmly believes that his goal is criminal.

The basic premise here is that the actor's mind is the best proving ground of his dangerousness. (MPC Tentative Draft No. 10, pp. 31-32 (1960)).

Notwithstanding the Marley case, the rule of Section 5.01(1)(a) is ıe law in New Jersey. In State v. Moretti, 52 N.J. 182 (1968), the defendants ere convicted of conspiracy to commit an abortion upon a particular woman. nknown to them, the woman was not pregnant and, under our law, pregnancy of the oman is an element of the completed substantive offense.

"The defendants contend that since it was impossible to commit an abortion upon Mrs. Swidler because she was not pregnant, they cannot be convicted of a criminal conspiracy to commit an abortion. The argument runs that if no violation of the law was to be accomplished by the act of the defendants; they cannot be held for conspiracy to do that act....

"The crime of conspiracy is distinct from the substantive offense which the conspirators plotted to commit....The essence of the statutory crime of conspiracy is the joining together of the conspirators with an unlawful intent....It is this unlawful purpose upon which they agreed which makes a conspiracy punishable once any overt act is committed in furtherance of it....Here, there can be no doubt that if, as the jury found, there was an agreement among the defendants, its purpose was to commit an unlawful abortion and the conspirators took substantial steps in an endeavor to accomplish this end. That, unknown to them, Mrs. Swidler was not in a condition to be aborted in no way negates their clearly manifested intent to commit a criminal act....That a factor unknown to the conspirators makes it impossible for them to complete their intended crime in no way lessens the degree of culpability involved in the criminal combination.

"The case has been argued as though, for purposes of the defense of impossibility, a conspiracy charge is the same as a charge of attempting to commit a crime. It seems that such an equation could not be sustained, however, because, as discussed above, a conspiracy charge focuses primarily on the intent of

the defendants, while in an attempt case the primary inquiry centers on the defendants' conduct tending toward the commission of the substantive crime....However, we need not pursue this point since we are satisfied that even if we treat the present appeal as an attempt case the defense of impossibility does not shield the defendants.

"In our view, this case is indistinguishable in principle from cases such as State v. Meisch, 86 N.J. Super. 279 (App. Div.), certification denied, 44 N.J. 583 (1965). In Meisch, defendant was convicted of attempted larceny. Likewise, it should be no defense in an attempted abortion case that the woman, because not pregnant, could not be the subject of an abortion. As the Illinois Supreme Court said:

> 'An attempt may be made to commit a crime which it is impossible for the person making the attempt to commit because of the existence of conditions of which he is ignorant. Whenever the law makes one step toward the accomplishment of an unlawful object with the intent of accomplishing that object criminal, a person taking the step with that intent and capable of doing every act on his part to accomplish that object cannot protect himself from responsibility by showing that because of some fact of which he was ignorant at the time it was impossible to accomplish the purpose intended in that case.' People v. Huff, 339 Ill. 323, 171 N.E. 261, 262 (1930).

In that case it was held that the defendant was guilty of an attempted abortion although the woman was not pregnant and therefore, under a statute similar to ours..., the substantive crime of abortion could not be committed.

"The defense of impossibility in a prosecution for an attempted crime has resulted in a confused mass of law throughout the country and the principles announced in Meisch and Huff, supra, are the subject of much dispute.

* * * *

"Our examination of these authorities convinces us that the application of the defense of impossibility is so fraught with intricacies and artificial distinctions that the defense has little value as an analytical method for reaching substantial justice. Many courts hold that where there is a 'legal impossibility' of completing the substantive crime the defendant cannot be guilty of an attempt, but where there is 'factual impossibility' the accused may be convicted. We think the effort to compartmentalize factual patterns into these categories of factual or legal impossibility is but an illusory test leading to contradictory, and sometimes absurd results....In the present case, the defendants' intent to commit

> an abortion on Mrs. Swidler is clear; believing her to be pregnant, they did all that was in their power to bring about the criminal result they desired. That, had the police not intervened, they would have been thwarted in attaining this end by the unknown fact that Mrs. Swidler was not pregnant does not in one whit diminish the criminal quality of their agreement. The consequences the defendants intended was a result which, if successful, would have been a crime. We hold that when the consequences sought by a defendant are forbidden by the law as criminal, it is no defense that the defendant could not succeed in reaching his goal because of circumstances unknown to him....Accordingly, we conclude that the defendants could be convicted of conspiracy to perform an abortion on Mrs. Swidler notwithstanding the absence of pregnancy. Our conclusion is in accord with the Model Penal Code §5.01 (Proposed Official Draft, May 4, 1962)...." (52 N.J. at 186-190)

5. Apart from the decisions considered above, which are frequently described as instances of "legal impossibility", the claim of impossibility has, in the words of the Drafters, proved to be a "poor shield" against criminal attempt charges. MPC Tentative Draft No. 10, p. 32 (1960). The cases relied upon by them are those involving claims of impossibility in attempts to steal where there is nothing to be stolen. State v. Meisch, discussed above in the quotation from the Moretti case, is in accord.

There are cases in other jurisdictions under which there cannot be a conviction for attempt where extrinsic facts or the means chosen are "obviously" not designed to accomplish the end. See MPC Tentative Draft No. 10, pp. 34-37 (1960). No New Jersey authorities were found on the point although the Marley case does speak of the need for "some adaptation, real or apparent, in the thing done to accomplish the thing intended." (58 N.J.L. at 211). The Code rejects any such limitation on the law of attempt. The Drafters recognize that the suitability of the means chosen may be relevant on the question of purpose: "If the means selected were absurd, there was good ground for doubting that the actor really planned to commit a crime." (MPC Tentative Draft No. 10, p. 37 (1960)). Given a finding of purpose, however, their position is that a conviction should follow:

" Another consideration was the view that the criminal law need not take notice of conduct which is innocuous, the element of impossibility precluding any dangerous proximity to the completed crime. Since, however, the law of attempts is concerned not only with preventative arrest but also with manifestations of dangerous character, the fact that particular conduct may not create a risk of harmful consequences is not conclusive. The innocuous character of the particular conduct becomes relevant only if the futile endeavor itself indicates a harmless personality, so that immunizing such conduct from liability would not result in freeing a dangerous person. This last point is the only one which merits consideration here.

"Using impossibility as a guide to dangerousness of personality presents serious difficulties. Some cases can be imagined where it may be argued that the nature of the means selected--e.g., murder by black magic--substantially negates dangerousness of character. On the other hand, there is a good chance that one who tries to commit a crime by inadequate methods and fails will realize the futility of his conduct and seek more efficacious means. It has been suggested that the test of factual impossibility ought to be one of reasonableness: if the actor's failure is caused by a mistake or miscalculation which is a reasonable one the error is not a defense; but if the error is unreasonable the actor is exonerated. Since it cannot be affirmed that those who make unreasonable mistakes are not potentially dangerous, the test is obviously inadequate.

"The approach of the Code is to eliminate the defense of impossibility in all situations. The litigated cases to date have not presented instances where the actor's futile efforts indicate that he is not likely in the future to succeed in committing the crime contemplated or some similar offense. Nor is it likely that attempts of this nature, if they do occur, will be detected or prosecuted. Nonetheless, to provide a method of coping with any such case that does arise it is provided in Section 5.05 that in 'extreme cases' where 'neither the conduct nor the actor presents a public danger,' the court may dismiss the prosecution.

"Under the terms of paragraphs (b) and (c), as well as under Paragraph (a), the liability of the actor turns on his purpose, considered in the light of his beliefs, and not on what is actually possible under existing circumstances. Accordingly, the defense of impossibility is unavailable under all the paragraphs of this Subsection." (MPC Tentative Draft No. 10, pp. 37-38 (1960)).

6. Section 5.01(1)(b): The "Last Proximate Act". It is proposed under this Section of the Code that where the actor has done all that he believes necessary to cause the particular result which is an element of the crime, he has committed an attempt. This is the so-called "last proximate act" and is a

basis for liability both in New Jersey and elsewhere. State v. Blechman, 135 N.J.L. 99, 102 (Sup. Ct. 1946); State v. O'Leary, 31 N.J. Super. 411, 417 (App. Div. 1954); State v. Schwarzbach, 84 N.J.L. 268 (E.& A. 1913); Marley v. State, 58 N.J.L. 207 (Sup. Ct. 1895); see State v. Meisch, 86 N.J. Super. 279 (App. Div. 1965).

> "The formulation covers not only instances in which the actor's efforts must succeed or miscarry independently of the actor's will--as where the contemplated victim is fired upon, but the shots miss or the victim does not die--but also those cases in which the actor has the power to prevent the completion of the crime but need do no further acts towards its commission--as where a bomb is planted which will not explode for some time and can be rendered harmless by timely intervention. Notwithstanding the actor's ability to thus prevent the consequences of his 'last proximate act,' the extreme dangerousness manifested warrants classification of the conduct as an attempt.
>
> "It is clear, of course, that while the 'last proximate act' is sufficient to constitute an attempt it is not necessary to a finding of attempt. No jurisdiction operating within the framework of Anglo-American law requires that the last proximate act occur before an attempt can be charged." (MPC Tentative Draft No. 10, pp. 38-39 (1960)).

7. Section 5.01(1)(c): The General Distinction Between Preparation and Attempt. Paragraph (c) deals with the most difficult problem in defining attempt liability: the formulation of a general standard for distinguishing acts of preparation from acts constituting the attempt. If the "last proximate act", although sufficient, is not required and if every act done with the intent to commit a crime is not to be made criminal, it becomes necessary to establish a means of exclusion and inclusion. The Drafters of the Code have identified several which have been tried or suggested (See MPC Tentative Draft No. 10, pp. 39-47): (a) The Physical Proximity Doctrine. Under this test, the courts state that the overt act must be proximate to the completed crime, or that the act must be one directly tending toward the completion of the crime, or that the act must amount to the commencement of the consummation. (Id. at 39-40) (b) The Dangerous Proximity Test. This test incorporates the "physical

proximity" approach but goes beyond it by holding that to determine whether a given act, constitutes an attempt one must look at the gravity of the offense intended, the nearness of the act to completion of the crime, and the probability that the conduct will result in the offense intended. (Id. at 40-41). (c) The Indispensable Element Approach. This is a variation of the above two tests emphasizing any indispensable aspect of the criminal endeavor over which the actor has not yet acquired control. (d) The Probable Desistance Test. This test is oriented largely toward the dangerousness of the actor's conduct but gives slightly more emphasis to the actor's personality. It provides that the actor's conduct constitutes an attempt if, in the ordinary and natural course of events, without interruption from an outside source, it will probably result in the crime intended. The test requires a judgment, in each case, if an attempt is to be found, that the actor had reached a point where it was unlikely that he would have voluntarily desisted from his efforts to commit the crime. This is the law in New Jersey under the leading case of State v. Schwartzbach, 84 N.J.L. 268 (E.& A. 1913) ("The overt act or acts must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself. Mere preliminary preparations are not the overt acts required"). See also State v. Swan, 131 N.J.L. 67 (E.& A. 1943); State v. Blechman, 135 N.J.L. 99 (Sup. Ct. 1946); State v. O'Leary, 31 N.J. Super. 411 (App. Div. 1954); State v. Moretti, 52 N.J. 182, 187 (1968). The Drafters of the Code reject this test as the standard for distinguishing preparations from attempts. They base this on the argument that, assuming the proposition that probability of desistance sufficiently negatives dangerousness to warrant immunity from liability, they find that the test does not provide a workable standard: "Is there a sufficient empirical basis for making predictions in various points along the way?" MPC Tentative Draft No. 10, pp. 42-43 (1960). (e) The Abnormal Step Approach.

It has been suggested that because of the role of attempts in revealing dangerous personalities, attempt should be defined as a step toward crime which goes beyond the point where the normal citizen would think better of his conduct and desist. The Drafters find many flaws in this suggestion. (Id. at 43).

(f) The Res Ipsa Loquitur Test. An entirely different approach is the view which holds that an attempt is committed when the actor's conduct manifests an intent to commit the crime. The conduct is considered in relation to all of the surrounding circumstances exclusive of representations made by the actor about his intentions. The object of the approach is to subject to attempt liability conduct which unequivocally demonstrates that the actor is being guided by a criminal purpose. This approach has the distinct advantages of providing very certain proof of purpose and of showing the dangerousness of the actor. The Code rejects it because, in the view of the Drafters, it goes too far in this direction. (Id. at 43-46).

The Code's approach to this problem is to set forth two requirements which in addition to the requisite criminal purpose, distinguish attempt from preparation: (1) The act must be "a substantial step in the course of conduct" planned to accomplish the criminal result, and (2) the act must be "strongly corroborative" of criminal purpose in order for it to constitute such a substantial step. MPC Tentative Draft No. 10, p. 47 (1960). The Drafters explain this position in this way:

> "Whether a particular act is a substantial step is obviously a matter of degree. To this extent the present paragraph retains the element of imprecision found in most of the other approaches to the preparation - attempt problem. There are, however, several differences to be noted:
>
> "First, this formulation shifts the emphasis from what remains to be done--the chief concern of the proximity tests--to what the actor has already done. The fact that further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial. It is expected, in the normal case, that this approach will broaden the scope of attempt liability.

"Second, although it is intended that the requirement of a substantial step will result in the imposition of attempt liability only in those instances in which some firmness of criminal purpose is shown, no finding is required as to whether the actor would probably have desisted prior to completing the crime. Potentially the probable desistance test could reach very early steps toward crime--depending upon how one assesses the probabilities of desistance--but since in practice this test follows closely the proximity approaches, rejection of probable desistance will not narrow the scope of attempt liability.

"Finally, the requirement of proving a substantial step generally will prove less of a hurdle for the prosecution than the res ipsa loquitur approach, which requires that the actor's conduct must itself manifest the criminal purpose. The difference will be illustrated in connection with the present Section's requirement of corroboration. Here it should be noted that, in the present formulation, the two purposes to be served by the res ipsa loquitur test are, to a large extent, treated separately. Firmness of criminal purpose is intended to be shown by requiring a substantial step, while problems of proof are dealt with by the requirement of corroboration (although, under the reasoning previously expressed, the latter also will tend to establish firmness of purpose).

"In addition to assuring firmness of purpose, the requirement of a substantial step will remove very remote preparatory acts from the ambit of attempt liability and the relatively stringent sanctions imposed for attempts. On the other hand, by broadening liability to the extent suggested, apprehension of dangerous persons will be facilitated and law enforcement officials and others will be able to stop the criminal effort at an earlier stage--thereby minimizing the risk of substantive harm--without providing immunity for the offender.

"In order to give greater content to the concept of the substantial step, Subsection 5.01(2) provides illustrations of certain common types of behavior which may be held to constitute substantial steps." (Id. at 47-48).

8. Section 5.01(2): Corroboration. The requirement that the actor's conduct shall strongly corroborate his purpose to commit a crime is based on the same rationale as that underlying the res ipsa loquitur view. Framed in terms of corroboration, however, the Drafters state their intent to be not to "so narrowly circumscribe the scope of attempt liability. Rigorously applied, the res ipsa loquitur doctrine would provide immunity in many instances in which the actor had gone far toward the commission of an offense and had strongly

indicated a criminal purpose." MPC Tentative Draft No. 10, p. 48 (1960). The reason for this is that an actor's conduct may be incriminating in a general way without showing, beyond a reasonable doubt, that the actor had a purpose of committing a particular crime:

> "Confessions, despite their weaknesses, play an important role in the apprehension and conviction of criminals. The res ipsa loquitur test unduly restricts their value in an attempt case. The objectives of the res ipsa loquitur test will be met if it is required that the actor's conduct, considered in the light of all the surrounding circumstances, adds significant evidential force to any proof of criminal purpose based solely on the actor's statements. The actor's conduct would then be 'strongly corroborative' of his purpose to commit the crime." (Id. at 49).

9. Section 5.01(2): "Substantial" Step in Particular Situations.

In order to give some definite content to the "substantial step" required for an attempt under section 5.01(1)(c), and to settle confusion in the cases involving a number of recurring situations, a number of instances are enumerated in which attempts may be found if the other requirements of liability are met. If the prosecution can establish that any one of the enumerated situations has occurred, the question must be submitted to the trier of facts whether the defendant has taken a substantial step in a course of conduct planned to culminate in his commission of a crime. The situations thus specifically dealt with are:

(a) Lying in Wait, Searching or Following. This provision is specifically intended to overrule People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (Ct. App. 1927), and cases like it. The manifestation of dangerousness is thought to be sufficient to justify abandoning those cases.

(b) Enticement. The act of enticement of the contemplated victim of the crime is thought to be demonstrative of a relatively firm purpose to commit the crime and clearly indicates the dangerousness of the actor. MPC Tentative Draft No. 10, p. 50 (1960). The Drafters are unsure of the state of present law on the question. (Id. at 50-51).

(c) Reconnoitering. This is included because, again, the cases are unclear whether this alone is sufficient.

(d) Unlawful Entry. Even though usually punished independently under burglary laws, unlawful entry may constitute an attempt. MPC Tentative Draft No. 10, p. 53 (1960). See State v. O'Leary, 31 N.J. Super. 411 (App. Div. 1954). Further, in attempt to rape cases, this provision would move the point of criminality back further than that under existing law (see State v. Swan, 131 N.J.L. 67 (E.& A. 1943)) which the Drafters believed desirable. MPC Tentative Draft No. 10, p. 54 (1960).

(e) Possession of Incriminating Materials. This provision is stricter than many existing cases which find such acts to be preparation. (Id. at 55-58). However, the trend, particularly in legislation, is to expand liability here by creating specific "possession" crimes. See N.J.S. 2A:151-6.

(f) Materials At or Near the Place of the Crime. This problem has arisen most frequently in arson cases and the provision is intended to overrule the case of Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901). The New Jersey arson statute has already done so. (N.J.S. 2A:89-4) This provision would generalize that position.

(g) Soliciting of Innocent Agent. Soliciting an innocent agent should be sufficient to constitute an attempt even if solicitation of one knowingly to commit a crime is not. This is because in the case of an innocent agent there is no independent moral agent to resist the inducement. MPC Tentative Draft No. 10, pp. 61-62 (1960). See State v. Weleck, 10 N.J. 355, 372 (1952) and State v. Blechman, 135 N.J.L. 99 (Sup. Ct. 1946).

10. Other State Codes on the Definition of Attempt:

(a) New York Revised Penal Law §110.00 provides:

> "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of the crime."

§110.10 rejects the defense of legal or factual impossibility if the crime alleged to have been attempted could have been committed had the attendant circumstances been as the person believed them to be.

(b) Illinois: Adopts a variation of the Code in §8-4(a):

> "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense."

Section 8-4(b) rejects the defense of impossibility. California and Michigan are in accord. California Penal Code Revision Project §800 (Tent. Draft 2, 1968); Michigan Revised Criminal Code §1001 (Final Draft, 1967).

(c) Wisconsin Statutes §939.32:

> "An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does act toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor."

(d) New Mexico's proposed revision would punish only attempt to commit felonies. It is defined as "an act done with intent to commit a felony but failing to effect its commission." Report, Criminal Law Study Commission, §28-1.

11. Section 5.01(3): Conduct Designed to Aid Another in Commission of a Crime. If one aids and abets or solicits or conspires with another to commit an offense, he is liable for any attempt made by the other. There have only been a few cases concerning liability for conduct designed to aid another to commit a crime where the crime is not committed or attempted by another person. This might be characterized as attempted aiding and abetting. Authorities are collected in MPC Tentative Draft No. 10, p. 68 (1960).

Where the actor engages in conduct designed to aid another to commit a crime but he does not do all that is necessary to complete his design, the

applicable principles of liability are those set forth in §5.01(1) and (2) respecting substantiality of the step taken and its corroboration of criminal purpose. By the terms of §5.01(3) the criteria of complicity in §2.06 are made applicable here. One of the bases of liability set forth in §2.06, assuming the necessary criminal purpose, is that the actor "attempted to aid" another person to commit a crime. Thus, since the general principles of this Section are applicable in giving content to the reference to "attempt" in §2.06, we return to §5.01(1) and (2) for standards in passing on the sufficiency of conduct short of the last proximate act. MPC Tentative Draft No. 10, p. 69 (1960). Thus, a gap between the law of attempt, which usually is limited to situations where the actor himself intends to commit the substantive crime, and the law of liability for the conduct of another, which usually assigns criminality only where the other person actually commits the crime, is filled.

No directly applicable New Jersey cases were found. Our aiding and abetting cases do seem to anticipate the existence of a principal (State v. Thompson, 56 N.J. Super. 434 (App. Div. 1960) reversed on other grounds 31 N.J. 540 (1960)) even though that principal may not necessarily have been convicted. See Commentary to §2.06(7) and authorities there discussed. Our attempt cases, with the exception of one, have all been situations where the defendant was the actor in the would-be crime. The exception is State v. Blechman, 135 N.J.L. 99 (Sup. Ct. 1946), where the actor had not gone sufficiently far to be convicted of an attempt but he was convicted of the common-law crime of solicitation and not of attempt. In a sense, that is an "attempted aiding and abetting" or, more accurately, an "attempted inducing or encouraging situation.

Of the other states which have recently proposed or adopted new codes, Michigan is alone in including this provision. Connecticut adopts most of §5.01 but eliminates this provision.

12. Section 5.01(4): Renunciation of Criminal Purpose. According to the Drafters of the Code, there is uncertainty in the present law whether abandonment of a criminal effort, after the bounds of preparation have been surpassed, will constitute a defense to a charge of attempt. MPC Tentative Draft No. 10, p. 69 (1960). No New Jersey cases discuss the issue. In a somewhat analogous area, our cases do not allow a defense of termination of complicity to prevent conviction of an aider and abettor. See Commentary to §2.06(c)(i), supra.

Where the defense is recognized, the cases distinguish between abandonments which are "voluntary" and those which are "involuntary".

> "An 'involuntary' abandonment occurs where the actor ceases his criminal endeavor because he fears detection or apprehension, or because he decides he will wait for a better opportunity, or because his powers or instruments are inadequate for completing the crime. There is no doubt that such an abandonment does not exculpate the actor from attempt liability otherwise incurred.
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> "By a 'voluntary' abandonment is meant a change in the actor's purpose not influenced by outside circumstances, what may be termed repentance or change of heart. Lack of resolution or timidity may suffice. A reappraisal by the actor of the criminal sanctions hanging over his conduct would presumably be a motivation of the voluntary type as long as the actor's fear of the law is not related to a particular threat of apprehension or detection. Whether voluntary abandonments constitute a defense to an attempt charge is far from clear, there being few decisions squarely facing the issue." (MPC Tentative Draft No. 10, pp. 69-70 (1960))

Analyzing the cases, the Drafters conclude that the "prevailing view--contrary to the general conceptions of the commentators--is in favor of allowing voluntary desistance as a defense." Ibid. In their view, cases in which the prosecution was for assault, where the defense is generally not recognized, must be treated differently. There, they agree that, given the completed assault, renunciation from the battery should not excuse. Given a "complete and voluntary" renunciation, however, they do accept the defense:

where the last proximate act has occurred but the criminal result can be avoided--e.g., where the fuse has been lit but can still be stamped out. If, however, the actor has gone so far that he has put in motion forces which he is powerless to stop, then the attempt has been completed and cannot be abandoned. In accord with existing law, the actor can gain no immunity for this completed effort (e.g., firing at the intended victim and missing); all he can do is desist from making a second attempt." (MPC Tentative Draft No. 10, pp. 71-73 (1960)).

The Drafters discount the view, taken by some that recognition of the defense of renunciation may add incentive to take the first step toward crime:

"Knowledge that criminal endeavors can be undone with impunity may encourage preliminary steps that would not be undertaken if liability inevitably attached to every abortive criminal undertaking that proceeded beyond preparation. But this is not a serious problem. First, any consolation the actor might draw from the abandonment defense would have to be tempered with the knowledge that the defense would be unavailable if the actor's purposes were frustrated by external forces before he had an opportunity to abandon his effort. Second, the encouragement this defense might lend to the actor taking preliminary steps would be a factor only where the actor was dubious of his plans and where, consequently, the probability of continuance was not great. (Ibid.)

13. As drafted, the defense is an affirmative one. See §1.13. Because the defense is an unusual one and because facts pertinent to renunciation will be peculiarly within the knowledge of the defendant, it may be appropriate instead to place both the burden of producing evidence and the burden of persuasion upon the defendant.

14. Other State Codes: Renunciation. Both New York and Michigan accept the view that the defense should be recognized. They add a limiting provision to the Code that "if mere abandonment is insufficient to accomplish avoidance of the offense, the defendant must have taken further and affirmative steps that prevented the commission thereof." California's Revision Commission recommends (in Tentative Draft No. 2, §802) a provision similar to the Code, adding:

"If the act or the commission involved in the attempt creates a danger to the person or property of another, renunciation is not a defense unless it is accompanied by a successful effort to abate the danger."

Connecticut has adopted the Code virtually intact. (§52(3) and §53).

Under the Wisconsin Code, voluntary abandonment is a defense if it occurs prior to the last proximate act and is a mitigating factor if the last act has occurred but the actor prevents completion of the crime. The Drafters of the Code considered this position and rejected it:

> "In considering the significance to be attached to abandonment of a criminal attempt, one solution which was rejected was provision for reduction of penalty in the event of such abandonment. Insofar as encouragement of desistance is concerned, reductions in sanction would have to be very great in order to have a substantial impact on those already engrossed in a criminal attempt; indeed it is unlikely that anything short of complete immunity would suffice. And in dealing with the question of dangerousness, it seems that, once liability is established, sanctions should be linked to neutralizing the actor's dangerousness and determined on a broad basis with reference to the requirements of the particular offender. An automatic reduction in the case of abandonment would be inconsistent with this approach." (MPC Tentative Draft No. 10, p. 73 (1960)).

SECTION 5.02. CRIMINAL SOLICITATION.

(1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

(2) Uncommunicated Solicitation. It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.

(3) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

* * * *

§5.02 Commentary

1. Introduction. There has been a difference of opinion as to whether a genuine social danger is presented by solicitation to commit a crime. The arguments for and against are set forth by the Drafters of the Code as follows:

> "It has been argued, on the one hand, that the conduct of the solicitor is not dangerous since between it and the commission of the crime that is his object is the resisting will of an independent moral agent. By the same token it is urged that the solicitor, manifesting his reluctance to commit the crime himself, is not a menace of significance. Against this is the view that a solicitation is, if anything, more dangerous than a direct attempt, since it may give rise to that cooperation among criminals that is a special hazard. Solicitation may, indeed, be thought of as an attempt to conspire. Moreover, the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling. Indeed, examples drawn from the controversial fields of political agitation and labor unrest suggest as a non-controversial lesson that the imposition of liability for criminal solicitation may be an important means by which the leadership of a movement deemed criminal may be suppressed. (MPC Tentative Draft No. 10, p. 82 (1960)).

The footnotes accompanying the last sentence support that proposition by references to two New Jersey cases where solicitation cases were used against

leaders in labor agitation situations: State v. Quinlan, 86 N.J.L. 120 (Sup. Ct. 1914) affirmed p.c. 87 N.J.L. 333 (E.& A. 1915) and State v. Boyd, 86 N.J.L. 75 (Sup. Ct. 1914) reversed 87 N.J.L. 560 (E.& A. 1915).

The Drafters conclude that solicitation should be made an offense. In their view, purposeful solicitation presents dangers calling for preventive intervention and is sufficiently indicative of disposition toward criminal activity to call for liability. "Moreover, the fortuity that the person solicited does not agree to commit or attempt to commit the incited crime plainly should not relieve the solicitor of liability, when otherwise he would be a conspirator or accomplice." MPC Tentative Draft No. 10, p. 82 (1960).

2. The Criminality of Solicitations under Existing Law. It is clear that in New Jersey, under the saving provision for common-law crimes (N.J.S. 2A:85-1), solicitations to commit crimes are indictable. State v. Blechman, 135 N.J.L. 99 (Sup. Ct. 1946); State v. Quinlan, supra; State v. Boyd, supra. I Schlosser, Criminal Laws of New Jersey §134. The Boyd case establishes that liability for solicitation exists irrespective of the nature of the offense solicited although cases in other jurisdictions would eliminate solicitations for "trivial" misdemeanors (such as adultery and liquor violations) and limit the rule to "aggravated" misdemeanors. MPC Tentative Draft No. 10, p. 83 (1960). The Drafters believe the New Jersey position to be the appropriate one:

> "The refusal to find liability in the case of...'trivial' misdemeanors seems to be based on judicial belittlement of the completed offense; the crime itself is only malum prohibitum so its solicitation is unworthy of serious censure. Unless legislative disapproval of specified behavior--strengthened by the imposition of criminal sanctions--can be considered 'trivial', there seems to be no justification for exempting any substantive offenses from the coverage of a general solicitation provision. (Id. at 83-84)

In addition to the common-law crime of solicitation, our statutes include many substantive offenses in which counseling another to commit the

forbidden act is sufficient conduct to complete the offense, whether the deed solicited be actually completed or not. In I Schlosser, Criminal Laws of New Jersey §141, these are collected as follows:

> "Thus, in abortion one who advises a pregnant woman to take a drug with intent to procure her miscarriage is guilty of a substantive offense. (N.J.S. 2A:87-1) One who solicits a bribe as reward for his official vote commits an offense (N.J.S. 2A:93-4), as does one who solicits a bribe to influence his action as referee in a sporting contest. (N.J.S. 2A:93-13) Challenging another to a duel is an offense, although none is fought. (N.J.S. 2A:101-1) Soliciting a juror to favor one side against the other is embracery. (N.J.S. 2A:103-1) Advocating homicidal death of another is a substantive offense. (N.J.S. 2A:113-8) Enticing a child under the age of fourteen years to leave its parents or guardian is criminal. (N.J.S. 2A:118-1) Solicitation for prostitution is a substantive offense (N.J.S. 2A:133-2), as is also any solicitation of unlawful sexual or indecent acts. (N.J.S. 2A:170-5) Inciting violence (N.J.S. 2A:148-10 and 11), insurrection of sedition (N.J.S. 2A:148-12) are also substantive offenses."

It should be noted that, under the existing New Jersey view of attempt law, a solicitor can never be guilty of an attempt because he does not intend personally to commit the offense. State v. Blechman, 135 N.J.L. 99 (Sup. Ct. 1946). Other States hold many varying views on this issue. See MPC Tentative Draft No. 10, pp. 85-86 (1960).

3. The Code Provision. Section 5.02(1) makes criminal the solicitation to commit any offense. Even though attempts and solicitations have much in common, the Code treats them individually because each presents problems not pertinent to the other. It is still possible for an act which is a criminal solicitation to also constitute an attempt. Under Section 1.08(1), in that case, the defendant may be prosecuted for either solicitation or attempt, but not for both.

4. Section 5.02(1): The Nature of the Conduct Solicited. In the usual case criminal solicitation involves the solicitation of another to engage in conduct which would itself constitute the crime contemplated. There are, however, other situations in which the solicitation manifests as dangerous

a personality on the part of the actor and is therefore made criminal. It is necessary, of course, that in all cases the actor have the requisite purpose of "promoting or facilitating" commission of the crime. The Drafters explain these other situations which are included in §5.02(1), as follows:

> (a) Solicitation of conduct constituting an attempt. It ordinarily should not be necessary to charge an actor with soliciting another to attempt to commit a crime, since a rational solicitation would never seek an unsuccessful effort but always the completed crime; the charge, therefore, should be one of solicitation to commit the completed crime. But in some cases the actor may solicit conduct which he and the party solicited believe to be the completed crime, but which, for the kind of reasons discussed in connection with legal impossibility, does not in fact constitute the crime. Such conduct will constitute an attempt, and under the present section the actor will be liable for soliciting conduct which constitutes an attempt.
>
> (b) Solicitation of conduct establishing complicity. Under existing law it has been held that soliciting A to solicit B to commit a crime is itself criminal, as is soliciting another to take part in a conspiracy. Liability would similarly be imposed under the present section since in both instances the party solicited was being asked to take steps which would make him a party to the completed crime if it were committed (and also to any attempt to commit that crime).
>
> One case, on its facts, involved a solicitation to aid and abet. The actor, pregnant, requested her boy friend to provide her with money in order that she might procure an abortion. The court held that there was no offense, one opinion suggesting that the action solicited did not constitute an offense because compliance by the boy friend would be mere preparation. Under the present section, if the party solicited is asked to render such aid as would make him a party to the contemplated substantive crime or to an attempt to commit that crime, then the solicitation itself is criminal. (MPC Tentative Draft No. 10, p. 87 (1960)).

5. The Interest of Free Speech: Specificity of Conduct Solicited.

The Drafters discuss the very difficult question of legislative judgment involved here in this way:

> "While solicitation of another to commit a crime apparently is not protected by the First Amendment, (Dennis v. United States, 354 U.S. 298 (1957)) it remains a legislative question whether the punishment of solicitations should be curtailed in order to protect free speech. It cannot be seriously contended that one who uses words as a means to crime, who intends that his words should cause

> a criminal result, makes a contribution to community discussion which is worthy of protection. The problem is not in guarding him. The problem is in preventing legitimate agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric in behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. Minority criticism has to be extreme in order to be politically audible and if it employs the typical device of lauding a martyr, who is likely to be a lawbreaker, the eulogy runs the risk of being characterized as a request for emulation.
>
> No solution to this problem has been found which is entirely satisfactory. The present section makes an effort to protect legitimate agitation by requiring that the criminal conduct allegedly solicited by the speaker must be 'specific'. It is, of course, unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed. But it is necessary under this formulation that, in the context of the knowledge and position of the intended recipient, the solicitation carry meaning in terms of some concrete course of conduct that it is the actor's object to incite.
>
> The requirement that the speaker solicit specific conduct goes somewhat beyond the analysis of the Supreme Court in Yates v. United States, where in interpreting the Smith Act the Court held that to make out a violation there must be advocacy of action to accomplish the overthrow of the government by force and violence rather than advocacy of the abstract doctrine of violent overthrow--although at one point the Court did specify 'concrete action'. Under the present section there must be solicitation of action and that action must be specific. (MPC Tentative Draft No. 10, pp. 87-88 (1960)) (bracketed material from footnotes in original)

That a very real danger exists of solicitation indictments arising from the extremes of activist rhetoric is illustrated by the New Jersey labor agitation cases of State v. Boyd, supra, and State v. Quinlan, supra. See also Masses Publishing Co. v. Patten, 246 Fed. 24 (2 Cir. 1917) reversing 244 Fed. 535 (S.D.N.Y. 1917).

6. Section 5.02(2). Uncommunicated Solicitation. Under existing law in other States, liability for solicitation attaches even though the communication fails to reach the party intended to be solicited, although generally in such case the prosecution must be for attempt to solicit. MPC Tentative Draft No. 10, p. 89 (1960). Under the Code, there is no crime

of attempted solicitation but conduct "designed to effect" is sufficient to constitute criminal solicitation. In order for liability to attach under this subsection the last proximate act must be done to effect communication with the party intended to be solicited. Until this time, the conduct is considered to be "too remote" to manifest the requisite dangerousness of the actor. No New Jersey cases were found.

7. Section 5.03(2): Renunciation of Criminal Purpose. See discussion of Section 5.01(3) above. No New Jersey cases were found.

8. Corroboration. In some states, particularly California and Hawaii, statutes require corroboration in a prosecution for criminal conspiracy. MPC Tentative Draft No. 10, p. 83 n. 9 (1960). See also Kelly v. United States, 194 F.2d 150 (D.C. Cir. 1952). New Jersey has no such requirement.

9. Other State Codes. Among the States with recent revisions or proposals for revisions, two, Connecticut and New Mexico, do not include a solicitation provision. At least in Connecticut's case, the omission was intentional in that such a crime was thought inappropriate. Among the States having such a provision, there are some important variations: California's Commission has recommended limitation of the crime to cases where the conduct solicited is a crime. New York's Revised Penal Law in §§100.00, 100.05 and 100.10, defines solicitation similarly to the Code but divides the offense into three degrees according to whether the crime solicited was (1) a crime, (2) a felony or (3) murder or first-degree kidnapping. Michigan, Illinois and Wisconsin are all quite similar to the Code.

ECTION 5.03. CRIMINAL CONSPIRACY.

(1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(2) Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

(3) Conspiracy With Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(4) Joinder and Venue in Conspiracy Prosecutions.

(a) Subject to the provisions of paragraph (b) of this Subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:

(i) they are charged with conspiring with one another; or

(ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.

(b) In any joint prosecution under paragraph (a) of this Subsection:

(i) no defendant shall be charged with a conspiracy in any county (parish or district) other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and

(ii) neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by such joinder; and

(iii) the Court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(5) Overt Act. No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(6) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(7) Duration of Conspiracy. For purpose of Section 1.06(4):

(a) conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired; and

(b) such abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and

(c) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

* * * *

§5.03 Commentary

I. Introduction

1. Though conspiracy is an offense at common law as well as under current statutes, there has been only fragmentary legislative treatment of the scope and components of the crime. Most state statutes resemble ours in simply establishing the conspiratorial objectives that suffice for criminality (N.J.S. 2A:98-1) and when an overt act will be required (N.J.S. 2A:98-2). The law defining the offense and dealing with the many special problems in its prosecution has been, upon the whole, the product of the courts. MPC Tentative Draft No. 10, p. 96 (1960).

As developed, the crime has been a controversial one. In addition to special grievances based on its use against labor unions and political offenders, the general criticism has been directed to the "danger of a dragnet in the broad, uncertain ground of liability, the wholesale joinder of offenders, the imposition of vicarious responsibility, the relaxation of the rules of evidence, or some or all combined." Ibid.

2. The Drafters of the Code state their purpose to be to meet or mitigate these objections and they then go on to develop a basic framework for the development of a law of conspiracy:

"It is worthwhile to note preliminarily that conspiracy as an offense has two different aspects, reflecting different functions it serves in the legal system. In the first place, it is an inchoate crime complementing the provisions dealing with attempt and solicitation in reaching preparatory conduct before it has matured into commission of a substantive offense. Secondly, it is a means of striking against the special danger incident to group activity, facilitating prosecution of the group and yielding a basis for imposing added penalties when combination is involved.

"As an inchoate crime, conspiracy fixes the point of legal intervention at agreement to commit a crime, or at agreement coupled with an overt act which may, however, be of very small significance. It thus reaches further back into preparatory conduct than attempt, raising the question whether this extension is desirable. We think it is, on the following grounds:

"First: The act of agreeing with another to commit a crime, like the act of soliciting, is concrete and unambiguous; it does not present the infinite degrees and variations possible in the general category of attempts.

* * * *

"Second: If the agreement was to aid another to commit a crime or if it otherwise encouraged its commission, it would establish complicity in the commission of the substantive offense. See Section 2.06....It would be anomalous to hold that conduct which would suffice to establish criminality, if something else is done by someone else, is insufficient if the crime is never consummated.

* * * *

"Third: In the course of preparation to commit a crime, the act of combining with another is significant both psychologically and practically, the former since it crosses a clear threshold in arousing expectations, the latter since it increases the likelihood that the offense will be committed. Sharing lends fortitude to purpose. The actor knows, moreover, that the future is no longer governed by his will alone; others may complete what he has had a hand in starting, even if he has a change of heart.

"We have no doubt, therefore, that in its aspect as inchoate crime--that is, as a basis for preventive intervention by the agencies of law enforcement and for the corrective treatment of persons who reveal that they are disposed to criminality...--a penal code properly provides that conspiracy to commit crime is itself a criminal offense.

"In its aspect as a sanction against group activity, conspiracy presents quite different problems.

"First: One function to be noted in this sphere involves the use of conspiracy to proscribe agreements with objectives that would not be criminal were they pursued or achieved by single individuals, in the view that combination towards such ends presents a danger a lone actor could not create on his own....There are, of course, important areas of conduct in which such delineation of the scope of criminality may be appropriate; it is a commonplace, for instance, in the case of anti-trust. But judgments of this kind must be made sparingly, in the context of the specific field that is involved and other weapons in the legal arsenal that may be brought to bear upon it. It is not a matter to be dealt with in a general provision on conspiracy and it is not so dealt with in the Code.

"To the extent that existing law, decisional and statutory, performs this function by a definition of conspiracy embodying a condemnation of all combinations with objectives that are 'unlawful,' 'malicious,' 'oppressive,' or 'injurious,' as distinct from criminal, we regard it as too vague for penal prohibitions and reject it in the Code.

"Second: Group prosecution is undoubtedly made easier by the procedural advantages enjoyed by the prosecution when conspiracy is charged....Acts and declarations of participants may be admissible against each other, under an exception to the hearsay rule, and ordinarily will be received, subject to later ruling, even before the required basis has been laid. Vicarious responsibility may relax venue rules and the conception of conspiracy as a continuous offense extends the period of limitations. The presentation in one case of a full picture of the workings of a large and complex network of related criminal activities will often help the jury to grasp the part played by individuals who otherwise might be forgotten; a strong case against some defendants may unduly blacken all; the need to work a root and branch extermination of the organized activity may overcome doubts that would otherwise prevail.

"Not all the difficulties posed by those procedures are intrinsic to conspiracy as an offense, however much it is believed by prosecutors that it is by virtue of indictment for conspiracy that the advantages are gained. The same rules as to joinder and venue, the same rules of evidence, will normally apply although the prosecution is for substantive offenses, in which joint complicity is charged. Nevertheless, the (Code) makes some attempt to treat the problems that are raised, focusing separately upon the substantive conceptions that have bearing on procedure, such, for example, as the scope of a conspiracy, and the strictly procedural issues that are involved.

"The (Code) embraces this conception in some part but rejects it in another. When a conspiracy is declared criminal because its object is a crime, we think it is entirely meaningless to say that the preliminary combination is more dangerous than the forbidden consummation; the measure of its danger is the risk of such a culmination. On the other hand, the combination may and often does have criminal objectives that transcend any particular offenses that have been committed in pursuance of its goals. In the latter case, we think that cumulative sentences for conspiracy and substantive offenses ought to be permissible, subject to the general limits on cumulation that the Code prescribes....In the former case, when the preliminary agreement does not go beyond the consummation, double conviction and sentence are barred by Section 1.08(1)(b).

"The barrier to double sentence thus erected does not, however, prevent taking due account of combination in the cases where it has real bearing on the sentence that should be imposed. Those cases are, in our view, limited to situations where what is involved is organized, professional criminality. This is precisely where the sentencing provisions of the Code permit the use of an extended term. See Section 7.03(2)....That, we submit, is a far better way to effect a needed aggravation in the sentence than a cumulation based upon an antecedent combination to commit a consummated crime.

"It should be added that the Code rejects the common sentencing provision for conspiracy, fixed at a level unrelated to the sanction for the crime that is its object, often treating the offense as one of minor gravity even when the purpose is commission of a major crime. Under Section 5.05, conspiracy, like attempt and solicitation, is a crime of the same grade and degree as the most serious of its criminal objectives, except that it is never graded higher than a second degree felony. This is a further indication that the sentencing provisions suffer from no weakness in dealing with the combinations incident to organized group crime. (MPC Tentative Draft No. 10, pp. 96-100 (1960)).

II. DEFINITION OF CONSPIRACY

3. The Conspiratorial Objective: Section 5.03(1). One of the ignificant departures of the Code from present law is in limiting the general onspiracy provision to cases where the conspiratorial objective is a crime. n New Jersey today, both statutory conspiracies and common-law conspiracies ay be proseucted. N.J.S. 2A:98-1 sets forth the forbidden objectives of tatutory conspiracies:

> "Any two or more persons who conspire:
> (a) To commit a crime; or
> (b) Falsely and maliciously to indict another for

a crime, or to procure another to be charged or arrested; or
(c) Falsely to institute and maintain any suit; or
(d) To cheat and defraud a person of any property by means which are in themselves criminal; or
(e) To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or
(f) To obtain money by false pretenses; or
(g) To conceal or spread any contagious disease; or
(h) To commit any act for the perversion or obstruction of justice or the due administration of the laws--
are guilty of a conspiracy..."*

Additionally, one may be indicted and convicted of common-law conspiracy whenever there is

> "a confederacy of two or more persons wrongfully to prejudice another in his property, person, or character, or to injure public trade, or to affect public health, or to violate public policy, or to obstruct public justice, or to do any act in itself illegal." Johnson v. State, 26 N.J.L. 313, 321 (Sup. Ct. 1857) affirmed 29 N.J.L. 453 (E.& A. 1861)

See also State v. Aircraft Supplies, Inc., 45 N.J. Super. 110, 115 (Co. Ct. 1957) (citing cases). It is clear that, in New Jersey today, conspiracies may be prosecuted as crimes although their objective is not, in itself, criminal.

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*Our Legislature has also enacted a special conspiracy statute directed to public bidding situations:

> N.J.S. 2A:98-3: Any person who submits a bid, in response to solicitation of sealed bids, to any...body of this State,... or...political subdivisions of this State, or any requirements for public works, goods or services and who, prior to the date of submission of such bid, directly or indirectly knowingly (a) disclosed the amount said person planned to bid to any other person who was eligible to bid and who thereafter did submit a bid on wuch requirements, or (b) caused or induced or attempted to cause or induce any other person not to participate in the bidding, is guilty of a misdemeanor.
>
> * * * *
>
> N.J.S. 2A:98-4: A person convicted of a violation of this act sahll be sentenced to a fine of not more than $20,000.00 or not more than 20% of the amount such person bid, whichever is greater, or by imprisonment for not more than 5 years, or both. Except as may otherwise be ordered by the Attorney General as the public need may require, a person so convicted shall be ineligible to submit a bid to any such body for a period of 5 years from the date of conviction....

State v. Carbone, 10 N.J. 329, 337 (1952) ("It is not requisite, in order to constitute a conspiracy at common law, that the acts agreed to be done be such as would be criminal if done; it is enough if the acts agreed to be done, although not criminal, be wrongful, i.e., amount to a civil wrong"); State v. Aircraft Supplies, Inc., supra.

The Drafters analyze the situations in which non-criminal objectives may satisfy for a criminal conspiracy and their reasons for rejecting that result as follows:

> "These broad formulations may be considered as of two types, though they are not mutually exclusive: (1) those reaching behavior that the law does not regard as sufficiently undesirable to punish criminally when pursued by an individual but which is considered immoral, oppressive to individual rights, or prejudicial to the public; and (2) those dealing with categories of behavior that the criminal law traditionally reaches, such as fraud and obstruction of justice, but defining such behavior far more broadly than does the law governing the related substantive crimes. The defense of both types is generally placed on the ground of the increased danger of group over individual activity. But it is quite clear that most such provisions fail to provide a sufficiently definite standard of conduct to have any place in a penal code." (MPC Tentative Draft No. 10, p. 103 (1960).

After noting that there may be some doubt as to the constitutionality of a broad "public morals" doctrine under the "void-for-vagueness" doctrine (see Musser v. Utah, 333 U.S. 95 (1948)) the comments continue:

> "As indicated previously, we acknowledge that there are some activities that should be criminal only if engaged in by a group, but believe they should be dealt with by special conspiracy provisions in the legislation governing the general class of conduct in question, and that they should be no less precise than penal provisions generally in defining the conduct they proscribe.
>
> "Nor do we mean to belittle the importance of the provisions aimed at corruption of morals, obstruction of justice, cheating and defrauding and the like. The approach of the...Code, however, is to define the substantive crimes in these areas more specifically and comprehensively than do many present systems, with the result that there is no need to strike at the problem through over-broad conspiracy provisions. (MPC Tentative Draft No. 10, pp. 103-104 (1960)).

4. The Conspiratorial Relationship: Section 5.03(1). The definition of the Code departs from the traditional view of conspiracy as an entirely bilateral or multilateral relationship, the view inherent in the standard formulation cast in terms of "two or more persons" agreeing or combining to commit a crime. Attention is directed instead to each individual's culpability by framing the definition in terms of the conduct which suffices to establish the liability of any given actor, rather than the conduct of a group of which he is charged to be part--an approach which the Drafters of the Code designate as "unilateral". MPC Tentative Draft No. 10, p. 104 (1960).

> "One consequence of this approach is to make it immaterial to the guilt of a conspirator whose culpability has been established that the person or all of the persons with whom he conspired have not been or cannot be convicted. Present law frequently holds otherwise, reasoning from the definition of conspiracy as an agreement between two or more persons that there must be at least two guilty conspirators or none. The problem arises in a number of contexts.
>
> "First: Where the person with whom the defendant conspired is irresponsible or has an immunity to prosecution or conviction for the crime. Section 5.04 provides that this is no defense for the responsible actor..., although this result would be implicit in the basic formulation.
>
> "Second: Where the person with whom the defendant conspired secretly intends not to go through with the plan. In these cases it is generally held that neither party can be convicted because there was no 'agreement' between two persons. Under the unilateral approach of the (Code), the culpable party's agreement was feigned. He has conspired, within the meaning of the definition, in the belief that the other party was with him; apart from the issue of entrapment often presented in such cases, his culpability is not decreased by the other's secret intention. True enough, the project's chances of success have not been increased by the agreement; indeed, its doom may have been sealed by this turn of events. But the major basis of conspiratorial liability--the unequivocal evidence of a firm purpose to commit a crime--remains the same. The result would be the same under the (Code) if the only co-conspirator established a defense of renunciation under Section 5.03(6).
>
> "Third: Where the person with whom the defendant conspired has not been apprehended or tried, or his case has been disposed of in a manner that would raise questions of consistency about a conviction of the defendant. It is well settled that a sole

> defendant may be convicted of conspiracy if it is proved that he conspired with a person who has not been apprehended or is unknown to the grand jurors. The result is generally the same when the other conspirator is known and amenable to justice but has not been indicted or has been granted immunity; the courts reason that this situation raises no questions of consistency and emphasize the importance to the state of the grant of immunity as a means of obtaining testimony. The cases differ, however, about the effect of a nolle prosequi. And where the defendant's only alleged co-conspirator has been acquitted, the prevailing view is that his conviction cannot stand. Under the (Code) the failure to prosecute the only co-conspirator or an inconsistent disposition or inconsistent verdict in a different trial would not affect a defendant's liability." (Id. at 104-106)

5. Our cases speak in traditional terms by defining conspiracy in terms of "an agreement between two or more persons." State v. Carroll, 51 N.J. 102 (1968); State v. Dennis, 43 N.J. 418 (1964); State v. Carbone, 10 N.J. 329 (1952); State v. Cormier, 46 N.J. 494 (1966); State v. Curcio, 23 N.J. 521, 528 (1957). There are indications in our cases, however, that the results reached by adoption of the Code's "unilateral" view are consistent with our Courts' views on conspiracy. In State v. Goldman, 95 N.J. Super. 50 (App. Div. 1967), the Court held that conviction of one conspirator after a dismissal of the indictment as the the only other conspirator, did not prevent conviction of the first. This is the result which is set forth in paragraph "Third", quoted above, as the one the Drafters of the Code believe proper. A strict "bilateral" view would, however, lead to contrary result. Further, the result set forth in paragraph "Second", above, is consistent with our Supreme Court's decision in State v. Moretti, 52 N.J. 182 (1968). Moretti is not directly on point but the same policies which lead to rejection of the impossibility defense--i.e., evaluation of guilt from the point of view of the individual actor--lead to the Code's view here.

6. Other State Codes. Virtually all of the new Codes, both enacted and proposed, adopt the Code's unilateral approach. See New York Revised Penal Law §105.00. Illinois, S.H.A. Ch. 38 §8-2; Michigan Revised Criminal Code §1015(1)

(Final Draft 1967); Connecticut Penal Code §50 (1969); California Penal Code Revision Project §810 (Tentative Draft No. 2, 1968). California would rewrite §5.03(1) as follows:

"A person is guilty of conspiracy to commit a crime if:

(1) he agrees with one or more other persons that he or one of them will engage in conduct which constitutes such crime;

(2) he does so with the intention of engaging in, promoting or assisting in the conduct which constitutes such crime; and

(3) he, or one of them performs an overt act in pursuance of the agreement."

7. Problems of Definition. Mr. Justice Jackson has remarked that "the modern crime of conspiracy is so vague that it almost defies definition." Krulewich v. United States, 336 U.S. 440, 445, 446 (1949) (concurring opinion). The Drafters of the Code recognize the difficulties here and attempt to remedy them through the establishment of precise standards:

> "Ordinarily a crime is defined in terms of proscribed conduct or a proscribed result under specified attendant circumstances, and the actor's state of mind--i.e., whether he must act purposely, knowingly, recklessly or negligently--with respect to each of these elements. One difficulty common to the definition of all inchoate crimes is that the definition must be expressed in terms of preparation; the definition must take account of both the policy of the inchoate crime and the varying elements, culpability requirements and policies of all substantive crimes.
>
> "This problem is particularly difficult in conspiracy. The traditional definition says nothing about the actor's state of mind except insofar as the concept of agreement itself carries certain implications about his attitude toward the crime. It has been left to the cases to determine the standards of culpability required by the inchoate nature of the crime of conspiracy and by the fact that it involves much accessorial behavior, and to relate them to the concept of agreement and the culpability requirements of substantive crimes.
>
> "The (Code) endeavors to provide more precise standards for meeting these problems than do existing statutes and decisions. It requires in all cases a 'purpose to promote or facilitate' commission of the crime. In addition it requires that the actor agree either that he or one or more of the persons with whom he conspires will engage in conduct which constitutes the crime or

that he will aid in the planning or commission of the crime. The operation of these provisions is best illustrated by viewing them against the specific problems that have arisen in the decisions." (MPC Tentative Draft No. 10, pp. 106-107 (1960)).

8. The Requirement of Purpose. The purpose requirement is crucial to the resolution of the difficult problems presented when a charge of conspiracy is leveled against a person whose relationship to a criminal plan is essentially peripheral. Selling supplies to the producers of illicit whiskey is the context in which the issue has usually been discussed. United States v. Falcone, 109 F.2d 579 affirmed 311 U.S. 205 (1940). Knowledge of the use to which the materials are being put is, of course, a condition to criminal liability. The difficult question is whether knowingly and substantially facilitating the criminal venture should be sufficient without a true purpose to advance the criminal end. The decisions elsewhere conflict. Compare with Falcone the case of Direct Sales Co. v. United States, 319 U.S. 703 (1943). No New Jersey case directly presents the issue. What authorities there are were collected and discussed in the Commentary to Section 2.06(3), supra. The considerations in limiting liability for conspiracy to situations where there is a "purpose of promoting or facilitating" are the same whether the charge be conspiracy or complicity in the substantive crime. See MPC Tentative Draft No. 10, p. 108 (1960). In the complicity Section of the Code (2.06(3)) the issue has been resolved in favor of requiring a purpose to advance the criminal end. If the Commission desires to make knowing, substantial facilitation sufficient, a change similar to that suggested in the complicity section (Page IB-54, supra) should be made.

9. As related to those elements of substantive crimes that consist of proscribed conduct or undesirable results of conduct, the Code requires purposeful behavior for guilt of conspiracy regardless of the state of mind required by the definition of the substantive crime. MPC Tentative Draft No. 10, p. 109 (1960). Thus,

> "If the crime is defined in terms of prohibited conduct, such as the sale of narcotics, the actor's purpose must be to promote or facilitate the engaging in such conduct by himself or another. If it is defined in terms of a result of conduct, such as homicide, his purpose must be to promote or facilitate the production of that result." (Ibid.)

However, it would not be sufficient, as it is under the law of attempt (see Commentary to Section 5.01(1), above), if the actor only believed that the result would be produced but did not consciously plan or desire it. The difference in this regard between attempt and the completed offense, (see Section 2.06(8)), on the one hand, and conspiracy, on the other, rests upon the extremely preparatory behavior that may be involved in conspiracy. MPC Tentative Draft No. 10, p. 109 (1960). A fortiori, where recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, there could not be a conspiracy to commit that crime. This should be distinguished from a crime defined in terms of conduct that creates a risk of harm, such as reckless driving. In this situation, conduct, rather than any result it might produce, is the element of the crime, and it would suffice for guilt of conspiracy that the actor's purpose is to promote or facilitate such conduct. Id. at 110.

Concerning the culpability requirements of conspiracy with respect to the third class of elements of substantive crimes--those involving the attendant circumstances--there has been considerable difficulty in the decisions. That problem is considered next.

10. Culpability with Respect to Circumstance Elements. The attempt definition requires that, as to attendant circumstance elements of the substantive crime, the actor have the same kind of culpability that is required for commission of the substantive crime. See Commentary to Section 5.01(1). This rule is consonant with the theories underlying inchoate criminality. If something less than knowledge as to certain circumstances suffices for a given crime, it represents a judgment that the actor's lesser awareness concerning those

circumstances does not decrease his culpability or the offensiveness of his behavior below the point where criminality should be declared. MPC Tentative Draft No. 10, p. 110 (1960).

> "If the actor sets out with the purpose of engaging in the proscribed conduct or producing the undesirable result with the lesser culpability concerning attendant circumstances that suffices for the crime, and his preparation progresses to the point of a conspiracy or attempt, the reasons for reaching his behavior as an inchoate crime are in no wise decreased by such lesser culpability concerning the circumstances." (Ibid.)

The fact that conspiracy is defined in terms of an agreement produces difficulties, however, with respect to the requisite awareness by the conspirator of those circumstance elements regarding which something less than knowledge suffices for the substantive crime. The problem arises most frequently in federal cases where some circumstance that affords a basis for federal jurisdiction (e.g., crossing state lines) is made an element of the crime. The cases are discussed in MPC Tentative Draft No. 10, p. 111 (1960). Most require culpability as to that element. The Drafters find this inappropriate and express their position as follows:

> "The (Code) does not attempt to solve the problem by explicit formulation but here, as in the Section on complicity (2.06)..., we believe that it afford sufficient flexibility for satisfactory decision as such cases may arise. Under Section 5.03(1)(a) it is enough that the object of the agreement is 'conduct which constitutes the crime,' thus importing the mental state required by the substantive offense, except as to result elements, where purpose clearly is required....Although the agreement must be made 'with the purpose of promoting or facilitating' the commission of the crime, we think it strongly arguable that such a purpose may be proved although the actor did not know of the existence of a circumstance which does exist in fact, when knowledge of the circumstance is not required for the substantive offense. Rather than press the matter further in the (Code), we think it wise to leave the issue to interpretation. Too many variations, many of which cannot be foreseen with any confidence, may possible arise." (Id. at 113)

11. The "Corrupt Motive" Doctrine. In People v. Powell, 63 N.Y. 88 (Ct. App. 1875) the defendants were prosecuted for conspiracy to violate a statute requiring municipal officials to advertise bids before

buying supplies for the city. The defendants entered the defense that they did not know of the existence of the statute and had, therefore, acted in good faith. The court accepted this argument, holding that a confederation to do an act "innocent in itself" is not criminal unless it is "corrupt". The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply "to do the act prohibited in ignorance of the prohibition." This is implied from the meaning of the word "conspiracy". Id. at 292.

The decision has been subject to and has been given a number of interpretations and some jurisdictions have rejected it completely. See MPC Tentative Draft No. 10, p. 114 (1960). New Jersey's cases give it full effect. State v. General Restoration Co., 42 N.J. 366 (1964); Wood v. State, 47 N.J.L. 461 (Sup. Ct. 1885); but see State v. Scarlett, 91 N.J.L. 343 (E.& A. 1917). The Drafters reject the rule entirely:

> "The Powell rule, and many of the decisions that rely upon it, may be viewed as a judicial endeavor to import fair mens rea requirements into statutes creating regulatory offenses that do not rest upon traditional concepts of personal fault and culpability. We believe, however, that this should be the function of the statutes defining such offenses. Section 2.04(3)...specifies the limited situations where ignorance of the criminality of one's conduct is a defense in general. See also Section 2.03(9). We see no reason why the fortuity of concert should be used as the device for limiting criminality in this area, just as we see no reason for using it as the device for expanding liability through imprecise formulations of objectives that include activity not otherwise criminal. The melodramatic and sinister view of conspiracy upon which the Powell decision seems to rest is today largely discredited. As an uncertain 'corrupt motive' requirement, it has little resolving power tin particular cases and serves mainly to divert attention from clear analysis of the mens rea requirements of conspiracy." (MPC Tentative Draft No. 10, p. 115 (1960)).

12. The Requirement of Agreement. The Code requires an agreement by the actor that he or one with whom he agrees will commit, attempt or solicit commission of a crime or that the actor will aid him in so doing or in planning to do so. While opinions in cases defining the elements of the conspiratorial relationship undoubtedly include agreement between two or more, many cases go

beyond agreement in description of the central concept of the crime. For instance, many refer to agreement or combination in the alternative or speak of "partnership in criminal purposes." MPC Tentative Draft No. 10, p. 116 (1960). Our cases make it clear that the agreement need not be express nor by all conspirators at the same time. State v. Carbone, 10 N.J. 329 (1952); State v. Hutchins, 43 N.J. 85 (1964); State v. Spruill, 16 N.J. 73 (1954). The Drafters include all of this in the term "agree":

> "We think it clear that neither combination as distinguished from agreement nor the analogy of partnership should be included in the formal definition. If a consensus is demanded, it is clearly indicated by demanding an 'agreement', which need not, of course, be formal or, indeed, explicit in the sense that it is put in words." (MPC Tentative Draft No. 10, p. 117 (1960).

III. UNITY AND SCOPE OF A CONSPIRACY

13. The Problem and The Approach of the Code: Section 5.03(1)(2) and (3). Most of the most difficult problems in conspiracy have been concerned with the scope to be accorded to a combination, i.e., the singleness or multiplicity of the conspiratorial relationships typical in a large, complex and sprawling network of crime. The question differs from that discussed in the Commentary to Subsection (1) in that in most of these cases it is clear that each defendant has conspired to commit or has committed one or more crimes. The question here is, to what extent is he a conspirator with each of the persons involved in the larger criminal network to commit crimes that are their objects, i.e., what is the scope of the conspiracy in which he is involved. MPC Tentative Draft No. 10, pp. 117-118 (1960).

> "The inquiry may be crucial for a number of purposes. These include not only defining each defendant's liability but also the propriety of joint prosecution, admissibility against a defendant of the hearsay acts and declarations of others, questions of multiple prosecution or conviction and double jeopardy, satisfaction of the overt act requirement or statutes of limitation or rules of jurisdiction and venue, and possibly also liability for substantive

crimes executed pursuant to the conspiracy. The scope problem is thus central to the present concern of courts and commentators about the use of conspiracy--the conflict between the need for effective means of prosecuting large criminal organizations and the dangers of prejudice to individual defendants." (Ibid.)

The problems in this field have arisen almost entirely in the federal cases. State prosecutors rarely attempt to prove the wide breadth of criminal enterprises as is done by federal authorities.

Under existing law, questions about the scope of a conspiracy are decided in different ways depending upon the purpose for which the inquiry is made. The same breadth given a conspiracy for purposes of deciding whether there was a variance, particularly if that issue arises in the context or whether or not the error was harmless, would probably not be found were the issue the liability of a particular defendant for every one of the substantive crimes committed in furtherance of the conspiracy. MPC Tentative Draft No. 10, p. 119 (1960). See State v. Burgess, 97 N.J. Super. 428 (App. Div. 1967).

The design of the Code is to treat the joinder problem separately from other matters that depend upon the conspiracy's scope, so that the concept need not be changed depending upon the context. For joinder purposes, under Subsection (4), the broad concept of a "scheme of organized criminal conduct" is used. For other purposes, as discussed below, a more precise standard, which is probably stricter than present law, is used.

> "The Draft relies upon the combined operation of Subsections (1), (2) and (3) to delineate the identity and scope of a conspiracy. All three provisions focus upon the culpability of the individual actor. Subsections (1) and (2) limit the scope of his conspiracy (a) in terms of its criminal objects, to those crimes which he had the purpose of promoting or facilitating and (b) in terms of parties, to those with whom he agreed, except where the same crime that he conspired to commit is, to his knowledge, also the object of a conspiracy between one of his co-conspirators and another person or persons. Subsection (3) provides that his conspiracy is a single one despite a multiplicity of criminal objectives so long as such crimes are the object of the same agreement or continuous conspiratorial relationship." (Id. at 119-120)

14. Party and Object Dimensions. The operation of the provisions described immediately above is illustrated in the Comments to the Code (MPC Tentative Draft No. 10, pp. 120-126 (1960)) by describing several of the leading cases. The complex networks are usually found to have relationships which are analogized to a "wheel" and to a "chain". In a "wheel"-type conspiracy, communication and cooperation exist primarily between a central figure and each individual member but not between the individual members themselves. In a chain relationship there is successive communication and cooperation between A and B, B and C, C and D, and so on. This type frequently is found in a manufacturing--retailing situation. The approach under existing law has been to look at the whole scheme, from an overview, and look for "the conspiracy," i.e., to look for a "single undertaking or enterprise." See e.g., United States v. Bruno, 105 F.2d 92 (2 Cir. 1939). The Code would require a different approach. The question to be decided as to each defendant would be whether and with whom he conspired as to each crime committed by someone in the group, under the criteria set forth in Subsection (1) and (2). Thus, the "overall objective of the entire operation" is not the controlling criteria. Some of the participants may have conspired to commit all of the crimes involved in the operation and under Subsection (3) they would be guilty of only one conspiracy if all these crimes were the object of the same agreement or continuing conspiratorial relationship and the objective of that conspiracy or relationship could fairly be phrased in terms of the overall operation. But this multiplicity of criminal objectives is rejected by the Code as a "poor referent" for testing the culpability of each individual who is in any manner involved in the operation. MPC Tentative Draft No. 10, p. 121 (1960).

Of course, the major difficulty in finding any conspiracy which includes as parties both ends of a "chain" is the absence of any direct communication or cooperation between them. Despite such absence, an agreement may be

inferred from mutual facilitation and evidence of a mutual purpose. Subsection (1) would not preclude this inference, though it is more specific than the present law on the purpose requirement. But the agreement criteria of Subsection (1) tends to become ambiguous when applied to a relationship that involves no direct communication or cooperation. Consequently, Subsection (2) facilitiates the inquiry in such cases:

> "Subsection (2) extends the party dimension of of a defendant's conspiracy beyond those with whom he agreed but at the same time preserves the basic limitation that the defendant must have conspired with someone to pursue the particular objective within the meaning of Subsection (1). He must have agreed with someone with the purpose of promoting or facilitating the commission of a particular crime; if to his knowledge others have conspired with his co-conspirator to commit the same crime he is also guilty of conspiring with them to commit that crime." (Id. at 123).

The Code's provisions also will be useful in analizing and deciding cases involving "wheel" arrangements. Here, there is the difficulty of a lack of direct communication or cooperation between the two groups. Again, the issue would become whether they meet the criteria of Subsection (2). See Id. at 124.

The approach of the Code is in accord with Blumenthal v. United States, 332 U.S. 539 (1947). There, the distinctions drawn by the Court emphasized each actor's purpose to promote or facilitate each criminal object. Evaluating the legal principles established by the Code, the Drafters conclude:

> "We recognize that the inquiry demanded...will often be more detailed and sometimes will be more complicated than that called for under looser, current doctrine. We submit that any greater difficulty involved is justified by the need for effective means of limiting a conspirator's criminal laibility and preventing the other abuses possible under looser approaches toward the scope of a conspiracy. Further, we submit that the focus upon each individual's culpability with regard to each criminal objective should be more helpful to juries than the broad formulations with which they are often charged today; and that it accords more closely with traditional standards for testing criminal liability." (MPC Tentative Draft No. 10, p. 126 (1960)).

15. Effect of Multiple Criminal Objectives. Subsection (3) is concerned with the effect of multiplicity of criminal objectives upon the

plicity and scope of a conspiracy. Such multiplicity may involve the familiar cumulation problems of a single act which violates two or more statutes or successive violations of the same statute; or it may involve a problem peculiar to conspiracy, of an agreement or relationship contemplating the commission of a series of different offenses. The rule of Subsection (3) embodies prevailing present doctrine in New Jersey and elsewhere. State v. LaFera, 35 N.J. 75, 90 (1961); Braverman v. United States, 317 U.S. 49 (1942). The rule is justified as follows:

> "This rule may seem somewhat at odds with a view of conspiracy as strictly an inchoate crime; for it might be expected that criminal preparation to commit a number of substantive crimes would be treated as a number of inchoate crimes, as would be the case if the preparation amounted to attempt. Further, it is arguable that, insofar as this rule avoids a serious cumulation of penalties problem under federal law and in other jurisdictions, there is less need for it in a penal code which treats cumulation problems directly in the sentencing provisions. See Section 7.06,... It is submitted, however, that the rule is desirable not only as a logical consequence of the definition of conspiracy in terms of an agreement...but also because of the extremely inchoate form of preparation that may be involved in conspiracy. A rule treating the agreement as several crimes, equivalent in number and grade to the substantive crimes contemplated, might be unduly harsh in cases—uncommon though they may be--where the conspirators are apprehended in the very early stages of preparation. The grandiose nature of the scheme might be more indicative of braggadocio or foolhardiness than of the conspirators' actual abilities, propensities and dangerousness as criminals. Multiple conspiratorial objectives, assuming a single agreement or continuous conspiratorial relationship, afford a basis for cumulation under the Model Code only to the extent that the Code allows conviction for both the conspiracy and a consummated objective where the conspiracy also includes additional objectives (Section 1.08(1)(b)...) and even here there are limits on the possible cumulation of sentences (Section 7.06....). The grade and degree of a conspiracy with multiple objectives are fixed by Section 5.05(1) as those of the most serious of these objectives.
>
> "The significance of the...rule of Subsection (e) of course extends beyond the question of cumulation of penalties. By holding that a single conspiracy may embrace a multiplicity of criminal objectives the rule affects the determination of the conspiracy's scope for all purposes. Consequently, it operates to the defendant's disadvantage insofar as these purposes involve a conspirator's accountability for all the activities of all the

persons embraced in the conspiracy--e.g., with respect to his liability under present law for substantive crimes, the admissibility against him of hearsay acts and declarations and satisfaction of the overt act requirement or statutes of limitation or rules of venue and jurisdiction....However, with respect to the question of cumulative convictions and multiple prosecution and former jeopardy, a finding of a large conspiracy rather than separate smaller ones is in the defendant's interest, and the rule therefore operates to his advantage." (MPC Tentative Draft No. 10, pp. 128-129 (1960)).

16. Changes in Personnel; Liability of Adherents after Substantive Offense Has Been Committed. Somewhat more troublesome is the question raised by changes in personnel. Although conceptual objections might be advanced against the notion of a single agreement in which parties are added or dropped, present law recognizes that the unity of a conspiracy may be unimpaired by the fact of withdrawal of some of the participants or the addition of new ones. State v. Carbone, 10 N.J. 329 (1952); State v. Salimone, 19 N.J. Super. 600 (App. Div. 1952); State v. Hutchins, 43 N.J. 85 (1964). MPC Tentative Draft No. 10, p. 130 (1960). The existence of a continuing nucleus of participants is stressed, and the addition or withdrawal of some participants at various times is held not to affect the continuing conspiratorial relationship maintained by this nucleus. Ibid. The Drafters believe that this result of a single conspiracy can be reached under Subsection (3) in a proper case despite changes in personnel. If this is considered to be inaccurate, they suggest adding the words, that the Subsection "applies although the agreement is renewed with, or the conspiratorial relationship extended to include, other persons." Ibid.

"Further, it is submitted that the unilateral approach of the (Code) toward each actor's culpability tends to minimize any conceptual difficulty involved in finding a single conspiracy despite changes of personnel, and, assuming such a finding, facilitates the inquiry as to the scope of responsibility of each participant. Since the scope of each person's conspiracy will be measured separately, those who participated in the entire series of crimes could be found guilty of a conspiracy the objectives of which include all these crimes, while the conspiracy of those who joined later would include as objectives only the crimes committed after they joined." Ibid.

17. Cumulation and Former Jeopardy. The problems which, under present law, arise out of the definition of separate conspiracies concerning multiple prosecution, conviction or sentence and double jeopardy are treated by Sections 5.03(3) together with Sections 1.08(2) and 1.10 and by Section 5.05(3) together with Section 7.06. See MPC Tentative Draft No. 10, pp. 133-134 (1960).

IV. SECTION 5.03(4): PROSECUTION OF CONSPIRACY.

18. Introduction. Subsection (4) is said by the Drafters to be "central to the (Code's) overall design to strike a balance between the dangers of prejudice to individual defendants and the needs of the prosecution in dealing with organized criminality." Thus

> "It gives effect to the precise and limited definition of a conspiracy's scope set forth in the earlier Subsections as a restriction upon the placing of venue and upon a conspirator's accountability for the acts and declarations of others. At the same time it employs the broader concept of a 'scheme of organized criminal conduct' as the test for joinder of separate conspiracies, subject to the court's power to order a severance or take a special verdict or take any other proper measures to protect the fairness of the trial." (MPC Tentative Draft No. 10, p. 135 (1960)).

Much contained in these areas falls within the competence of the Supreme Court's rulemaking power. A discussion is included here although much of this Section should be eliminated for this State.

19. Joinder. The issue of joinder in conspiracy trials requires special consideration because it is "integral to the functions of this crime as a device for combatting organized criminality." Ibid. It is clear that a joint trial in cases of organized criminality performs a great service to the prosecution in that it permits presentation in one trial of all aspects of the entire scheme. "In the case of complex and far-flung networks of crime, such a presentation may be essential to an understanding of the entire operation and the role played by each participant; and even in simpler cases the purport of each actor's behavior may be clarified when viewed against the context of

related behavior by his cohorts." Ibid. There are, however, concomitant dangers to the defendant in such a long trial--these include the danger of jury confusion and the danger of being associated in the jurors' minds with nefarious criminals. A further danger to the defendant in a joint trial arises out of the vicarious admissions exception to the hearsay rule (discussed below) and the loose order-of-proof procedures under which it is administered. These dangers exist notwithstanding limiting instructions. See Id. at 136.

To minimize these areas of possible prejudice to defendants, the Code (a) establishes the definitions, discussed previously, as to unity and scope of the conspiracy; (b) establishes these joinder rules; (c) establishes rules as to venue and vicarious admissions; and (d) establishes rules as to the duration of the conspiracy for purposes of the statute of limitations. (§5.03(7)).

Under this subsection,

> "Joint prosecution is allowed if (i) the parties are charged with conspiring with one another or (ii) the conspiracies alleged, though they have different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct. This of course covers the case of a single conspiracy and, it is submitted, also covers every case, regardless of the number of separate conspiracies involved, where it is important to the prosecution to present all aspects of a large and complex organization in a single trial." (Id. at 137)

The language of paragraph (ii) is not unlike that found in the general permissive joinder provisions in a number of existing codes. New Jersey's Rule allows joinder of offenses when "the offenses charged...are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." R. 3:7-6 (R.R. 3:4-7). Joinder of defendants is permitted if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." R. 3:7-7 (R.R. 3:4-8). See State v. Hutchins, 43 N.J. 85 (1964) and other cases applying

these rules collected in I Waltzinger, New Jersey Practice, pp. 447-448, 467-470 and 1969 Supplement pp. 344-347 and 361-365. The language of paragraph (i) probably goes beyond our law in permitting joinder of separate conspiracies having unrelated objectives so long as they involve the same persons. See State v. Baker, 49 N.J. 103 (1967) (such a joinder was not plain error but a motion for severance should be readily granted). The Drafters of the Code believe the fact of repeated association of the same persons for criminal purposes to be sufficient to warrant such joinder. MPC Tentative Draft No. 10, p. 137 (1960).

The provision of Subsection (4)(b)(iii) for court relief from joinder is written to be intentionally broad to cover "all of the various kinds of unfairness that could result from joint trial" (MPC Tentative Draft No. 10, p. 138 (1960)) and is similar to our R. 3:15-2(b). See State v. Sinclair, 49 N.J. 525 (1967).

20. Venue. The rule is well settled in New Jersey and elsewhere that venue in a conspiracy case may be laid in any county in which the agreement was formed or in which an overt act by any of the conspirators took place. State v. LaFera, 35 N.J. 75, 89 (1961). MPC Tentative Draft No. 10, p. 138 (1960). Because present law loosely defines the unity and scope of a conspiracy, the venue protection is said to be "seriously diluted":

> "It is contemplated that the stricter tests of a conspiracy's scope advanced in the (Code) will considerably limit the present dilution of the constitutional protection. Subsection (4)(b)(i) explicitly provides that proper venue for a conspiracy charge will be tested by the defendant's agreement or overt act or an overt act of a person with whom he conspired. It assures that in complex cases involving a number of separate conspiracies, venue as to each conspiracy with which each defendant is charged will not be laid on the basis of an overt act done pursuant to a different conspiracy or by a person with whom he did not conspire." (Id. at 138-139).

21. Vicarious Admissions. Subsection (4)(b)(ii) explicitly assures that liability of any defendant and the admissibility against him of evidence of acts and hearsay declarations of another will not be enlarged by a joinder of separate conspiracies. It affects no change in the evidence law governing vicarious admissions, although to the extent that the operation of that doctrine depends upon the definition of the scope of conspiracy with which he is charged, other substantive provisions may have such an effect. See N.J. Rule of Evidence 63(9)(b) and State v. Yedwab, 43 N.J. Super. 367 (App. Div. 1951).

V. OVERT ACT

22. Subsection (5) alters the common-law rule that the agreement alone is an indictable conspiracy, and requiring in addition allegation and proof of an overt act in pursuance of the conspiracy by any party thereto. In New Jersey today, no overt act need be proved if the conspiracy is prosecuted under N.J.S. 2A:85-1 as a common law crime. State v. Cormier, 46 N.J. 494 (1966). Statutory conspiracies, prosecuted under N.J.S. 2A:98-1, are subject to N.J.S. 2A:98-2:

> "Except for conspiracy to commit arson, breaking and entering, burglary, kidnapping, manslaughter, murder, rape, robbery or sodomy, no person shall be convicted and punished for conspiracy unless some act be done to effect the object thereof by one or more parties thereto."

Provisions such as the above are common (MPC Tentative Draft No. 10, p. 140 (1960)) and the Code follows a similar scheme by excepting from the overt act requirement all felonies of the first and second degree.

23. The precise significance of the overt act requirement and whether it constitutes an element of the crime of conspiracy has been the subject of some dispute. At times it has been viewed merely as a way of affording a basis for venue, jurisdiction and the application of the statute of limitations. At other times, it is viewed as an element of the offense. See MPC Tentative Draft

No. 10, pp. 140-141 (1960). Our cases hold that the agreement itself can satisfy the requirement where the agreement is such that it demonstrates both the intent and the act. State v. Carbone, 10 N.J. 329, 336 (1952); State v. General Restoration Co., 42 N.J. 366, 375 (1964). The Drafters of the Code find this to be an appropriate result. MPC Tentative Draft No. 10, p. 141 (1960). The Drafters conclude, however, that disputes about the nature of the overt act requirement are less important than the consequences of it:

> "The (Code) requires an overt act in the view...that it affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists--added assurance that we believe may be dispensed with where the agreed-upon crime is grave enough to be classified as a felony of the first or second degree and the importance of preventive intervention is pro tanto greater than in dealing with less serious offenses. Even without an overt act requirement, the (Code) provides a locus poenitentiae, since renunciation may establish a defense under the specific provision of Subsection (6). The particular consequences of overt acts with regard to venue and time limitations are also treated expressly, in Subsection (4)(b)(i) and (7)(b). Under the terminology of the Code (Section 1.13(9))...when an overt act is required it is, of course, an element of the crime of conspiracy since it must be alleged and proved to support a conviction. That it is a 'material element' may, however, well be doubted." (Ibid.)

24. As to the kind of act that satisfies the requirement, there is general agreement. It is well settled that any act in pursuance of the conspiracy, however insignificant, is sufficient. Ibid. State v. Moretti, 52 N.J. 182 (1968); State v. Carbone, 10 N.J. 329, 338 (1952); State v. Graziani, 60 N.J. Super. 1 (App. Div. 1960). Conduct which constitutes the conspiracy's criminal objective may itself serve to satisfy the requirement and in a proper case an omission may qualify as an overt act. An act by any conspirator is sufficient as to all parties to the conspiracy. State v. Graziani, supra. An act done after termination of the conspiracy cannot, of course, satisfy the overt act requirement.

25. Almost all of the new codes follow this Section in requiring an overt act. Many, including New York (Revised Penal Law §105.20), have no exception to the requirement, even for conspiracies having very serious criminal objectives. Pennsylvania and Michigan have no overt act requirement at all. Michigan's Commissioners said that they recommended elimination of it on the ground that it is "meaningless" because "extremely insignificant acts suffice to meet the requirement."

VI. SECTION 5.03(6): RENUNCIATION OF CRIMINAL PURPOSE.

26. Subsection (6) varies from prevailing law by providing a limited affirmative defense to the crime of conspiracy based on the actor's renunciation of criminal purpose. This problem should be distinguished from abandonment or withdrawal from the conspiracy (1) as a means of commencing the statute of limitations (see Section 5.03(7)) or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators (see N.J. Rule of Evidence 63(9)) and (3) as a defense to substantive crimes subsequently committed by the other conspirators (see Section 2.06(6)(c) and the Commentary thereto). Present decisions frequently fail to distinguish renunciation from all of these and have created uncertainty by applying the same terminology and the same tests interchangably.

The traditional rule concerning renunciation as a defense to conspiracy is strict and inflexible: since the crime is complete with the agreement and overt act (if necessary), no subsequent action can exonerate the conspirator of that crime. MPC Tentative Draft No. 10, p. 143 (1960). No New Jersey case presents the issue of renunciation but our cases do speak of the crime being complete upon agreement. State v. Moretti, 52 N.J. 182, 187 (1968). In the complicity area, our cases reject the defense of renunciation.

See Commentary to Section 2.06(6)(c)(i), supra, and cf., Commentary to Section 5.01(4).

The Drafters of the Code justify the defense in this way:

"The present rule is rarely questioned, for it follows too easily as a definitional consequence, the conspiracy being defined as complete with the agreement. The rule may be defended only if the act of agreement itself is considered sufficiently undesirable and indicative of the actor's dangerousness to warrant penal sanctions in spite of subsequent renunciation and action to defeat the purposes of the conspiracy. We do not believe such an assertion is supportable. Further, the present rule is inconsistent with the doctrine allowing an analogous defense in the complicity area, and with the judgment embodied in the provisions (of the Code) of the attempt and solicitation allowing a limited defense of renunciation to those crimes. As we remark in the Comments to Section 5.01(4), this judgment is based on two considerations: that renunciation manifests a lack of the firmness of purpose that evidences individual dangerousness, and that the law should provide a means for encouraging persons to desist from pressing forward with their criminal designs....

"The test adopted in Subsection (6) is consistent with those in the attempt and solicitation (provisions). First, the circumstances must manifest (a complete and voluntary) renunciation of the actor's criminal purpose. Second, he must take action sufficient to prevent consummation of the criminal objective. The kind of action that will suffice to this end varies for the three different inchoate crimes. Since attempt involves only an individual actor, abandonment will generally prevent completion of the crime, although in some cases the actor may have to put a stop to forces which he has set in motion and which would otherwise bring about the substantive crime independently of his will. The solicitor, on the other hand, has incited another person to commit the crime (unless the solicitation is uncommunicated or rejected); consequently, the (Code) requires that he either persuade the other person not to do so or otherwise prevent the commission of the crime. Since conspiracy involves preparation for crime by a plurality of agents, the objective will generally be pursued despite renunciation by one conspirator; and the (Code) accordingly requires for a defense of renunciation that the actor thwart the success of the conspiracy.

"The means required to thwart the success of the conspiracy will of course vary in particular cases, and it would be impractical to endeavor to formulate a more specific rule. As a general matter timely notification to law enforcement authorities will suffice, and this result accords with the similar means of exoneration allowed an accomplice who terminates his complicity prior to the commission of the substantive crime (Section 2.06(6)(c)(ii)).

> Notification of the authorities which fails to thwart the success of the conspiracy because not timely or because of a failure on their part will not sustain a defense to the charge of conspiracy but will commence the running of time limitations as to the actor under Section 5.03(7)(c)." (MPC Tentative Draft No. 10, pp. 143-144 (1960)).

As to the sufficiency of the renunciation, see United States v. Chester, 407 F.2d 53 (2 Cir. 1969).

As drafted, the defense is an affirmative one. As noted in the Commentary to Section 5.01(4) (renunciation of attempts) it may be appropriate instead of taking this position to place both the burden of producing evidence and the burden of persuation upon the defendant.

27. Other State Codes: Renunciation. New York has adopted Section 5.03(6). N.Y. Revised Penal Law §35.45(3). Michigan's Commission has made a similar recommendation. Mich. Rev. Criminal Code §1005(3) (Final Draft 1967). Connecticut has also adopted it. Illinois, Wisconsin, and Pennsylvania have no such provision.

VII. DURATION OF CONSPIRACY.

28. Subsection (7) defines the duration of a conspiracy for the purposes of determining the application of time limitations.

Problems similar to those here treated arise in determining the duration of a conspiracy for the purposes of (1) holding a conspirator liable for substantive crimes committed by his co-conspirators and (2) of admitting in evidence against him the acts and declarations of co-conspirators. As to the former, see Section 2.06 and the Commentary thereto. As to the latter, see Evidence Rule 63(9)(b).

The three prargraphs or Subsection (7) lay down the general principle that conspiracy is a continuing crime and that the statute of limitiations begins to run in favor of a conspirator either when he abandons the agreement or when the conspiracy is terminated as to all its parties by their abandonment of it or by

commission of the crime or crimes which are its object. (MPC Tentative Draft No. 10, p. 145 (1960).

29. Conspiracy as Continuous Crime; Termination by Commission of Criminal Objective or Abandonment. Paragraphs (a) and (b), covering termination of the conspiracy as to all parties "accord in general outline with prevailing present doctrine" according to the Drafters. Id. at 146. The leading case recognizing conspiracy as a continuing offense is United States v. Kissel, 218 U.S. 601 (1910) which held that "conspiracy continues up to abandonment or success." Our cases agree. State v. Gregory, 93 N.J.L. 205 (E.& A. 1919); State v. Herbert, 92 N.J.L. 341 (Sup. Ct. 1918) (accomplishment); State v. Ellenstein, 121 N.J.L. 304, 316 (Sup. Ct. 1938).

30. As to abandonment by all the parties, paragraph (b) states that abandonment is "presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitations." Our cases do not speak in terms of a presumption but rather that at least one overt act within the statutory period must be alleged and proved. State v. Rhodes, 11 N.J. 515, 519 (1953); State v. Ellenstein, supra; State v. Gregory, supra; State v. Unsworth, 85 N.J.L. 237 (E.& A. 1913). Under the Code, the rule is applicable both to conspiracies requiring proof of an overt act and those not having such a requirement. Thus, proof an overt act or some other evidence of its vitality within the applicable period of limitation is necessary to overcome the presumption in all conspiracy prosecutions. On the other hand, the Drafters believe that even though an overt act may be required, there is no reason why the rule with respect to abandonment should demand an overt act within the period if the conspiracy can otherwise be shown to be continuous. If the agreement actually has vitality, that should suffice. MPC Tentative Draft No. 10, p. 147 (1960).

31. Acts of Concealment; Crimes Requiring Extended Times for Commission. The definition of "termination" for purposes of the application of the rule in paragraph (a) has lead to considerable difficulty in the decisions. New Jersey's only "accomplishment" case, State v. Herbert, supra, was a clear one. The cases contain two problems which give rise to the problem: (1) uncertainty about when "commission" of a crime is completed and (2) a doctrine that the objective of the conspiracy may extend beyond commission of the crime agreements to conceal the crime and/or to defeat prosecution. Use of the second theory as one to avoid the statute of limitations has been severely limited by decisions of the Supreme Court of the United States. See Krulewich v. United States, 336 U.S. 440 (1949); Lutwak v. United States, 344 U.S. 604 (1953) and Grunewald v. United States, 353 U.S. 391 (1957). All are discussed in MPC Tentative Draft No. 10, pp. 147-150 (1960). Subsidiary agreements to conceal the conspiracy and avoid detection and punishment of the conspirators, whether actual or implied, must, however, be distinguished from conspiracies to commit crimes of such a nature that acts of concealment are part of the commission of the substantive crime and, therefore, may be considered as in furtherance of the conspiracy to commit such crime. See Id. at 150-151.

The Code accepts the policy expressed by the Supreme Court concerning concealment directed solely toward avoiding detection and punishment. As to defining "commission", the position taken is as follows:

> "The Code also provides express criteria, in the time limitations Section, for dealing with substantive crimes, such as kidnapping or restraint of trade, which may require an extended time for commission. It states that 'an offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated'. (Section 1.07(4)). Any more specific determination of the 'commission' of particular kinds of crimes must of course be left to the courts." (MPC Tentative Draft No. 10, p. 153 (1960).

32. Abandonment by Individual Conspirator. Paragraph (c) of Subsection (7) governs abandonment of the agreement by an individual conspirator, which commences the running of time limitations as to the other conspirators. It is quite uniformly recognized. Hyde v. United States, 225 U.S. 347 (1912). As to the type of affirmative action that suffices some cases require only notice to the co-conspirators whereas others require that defendant inform the police. The Code takes the position that the latter is too stringent for purposes of determining the running of the statute of limitations. MPC Tentative Draft No. 10, pp. 153-155 (1960). No New Jersey cases were found.

SECTION 5.04. INCAPACITY, IRRESPONSIBILITY OR IMMUNITY OF PARTY TO SOLICITATION OR CONSPIRACY.

(1) Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; or

(b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

(2) It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under Section 2.06(5) or 2.06(6)(a) or (b).

* * * *

§5.04 Commentary

1. Section 5.04 deals with several related matters involving conceptual and policy questions which have caused some difficulty in the cases. These provisions apply both to conspiracy and to solicitation.

2. Section 5.04(1)(a). Incapacity to Commit Substantive Crime. Many crimes are so defined that only a person who occupies a particular position or has a particular characteristic can be guilty of the crime. This subsection follows what the Drafters state to be the "settled rule" that a person who is incapable of committing a particular substantive offense because he lacks such position or characteristic may nevertheless be guilty of a conspiracy to commit it.

> "The doctrine is clear upon principle, for an agreement to aid another to commit a crime is not rendered less dangerous than any other conspiracy by virtue of the fact that one party cannot commit it so long as the other party can." (MPC Tentative Draft No. 10. p. 170 (1960)).

No New Jersey conspiracy cases were found on the issue. Our aiding and abetting cases on the same point were collected and discussed in the Commentary

2C:2.06(5), above. It was there concluded that most of our cases are in accord with the Code's position (see particularly State v. Marshall, 97 N.J.L. 10 (Sup. Ct. 1922)) but that the recent case of State v. Aiello, 91 N.J. Super. 457, 463 (App. Div. 1966) is to the contrary. It was further concluded that, in the Secretary's opinion, Aiello would not be followed by our Supreme Court and, if it were, it should be legislatively overruled.

The Code goes somewhat further than existing law concerning incapacity of one of the parties, in providing that it suffices if the defendant "believes" that one of them is capable of committing the crime. See MPC Tentative Draft No. 10, p. 171 (1960). This accords with the general principle of the Code in defining inchoate crimes that the defendant's culpability is to be measured by the circumstances as he believes them to be. Ibid.

2. Section 5.04(1)(b): Irresponsibility or Immunity to Prosecution or Conviction. Subsection (1)(b) expressly makes it immaterial to the liability of a solicitor or conspirator that the person whom he solicited or with whom he conspired is irresponsible or has an immunity to prosecution or conviction for the crime. Present decisions in some jurisdictions sometimes hold otherwise on the ground that the definition of conspiracy as an agreement between two or more persons requires that there be at least two guilty conspirators. MPC Tentative Draft No. 10, p. 171 (1960). This, according to the Drafters has "no relevance to the culpability of the party who is responsible and has no immunity" and reflects nothing more than a "strict doctrinal approach toward the conception of conspiracy as a necessarily bilateral relationship, a conception rejected throughout the (Code), which measures the culpability of each defendant individually." Id. at 172. See also Section 2.06(2)(a), (5) and (7).

New Jersey law is in accord with the Code. See the Commentary accompanying the Sections cited immediately above. State v. Goldman, 95 N.J. Super. 50 (App. Div. 1967) is directly on point. There, the only co-conspirator's

indictment had been severed for trial and dismissed prior to conviction of the defendant. This was found not to be a bar to the defendant's conviction. See also State v. Oats, 32 N.J. Super. 435 (App. Div. 1954) and cf., State v. O'Brien, 136 N.J.L. 118 (Sup. Ct. 1947).

3. Section 5.04(2). Liability of Victim; Behavior Inevitably Incident to Commission of the Crime. This Subsection reflects the same policies found in Section 2.06(6)(a) and (b). As to victims, it would confound legislative purpose to hold the victim of a crime guilty of conspiring to commit it. See MPC Tentative Draft No. 10, p. 172 (1960) and Commentary accompanying Section 2.06 (6)(a).

Concerning crimes as to which the behavior of more than one person is "inevitably incident", as was pointed out in the Commentary to Section 2.06(6)(b), varying and conflicting policies are often involved--for example, ambivalence in public attitudes toward the crime and the requirement of corroboration of accomplice testimony. The position taken by the Code, both for complicity and for conspiracy and solicitation is to leave to the legislature in defining each particular offense the selective judgment that must be made as to whether more than one participant ought to be subject to liability.

In State v. Aircraft Supplies, Inc., 45 N.J. Super. 110 (Co. Ct., 1957), Judge Collester held that the "concert of action" rule would preclude conviction of conspiracy to bribe because "where it is impossible under any circumstances to commit the substantive offense without co-operative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy." (45 N.J. Super. at 120). The Drafters of the Code reject this statement of the rule and the rationale behind it:

"It seems clear that Wharton's rule as generally stated and the rationale that conspiracy 'assumes...a crime of such a nature that it is aggravated by a plurality of agents' completely overlook the functions of conspiracy as an inchoate crime. That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it. Further, the rule operates to immunize from a conspiracy prosecution both parties to any offense that inevitably requires concert, thus disregarding the legislative judgment that at least one should be punishable and taking no account of the varying policies that ought to determine whether the other should be. The rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime, for it is clear that the legislature would have taken the factor of concert into account in grading a crime which inevitably requires concert. This consideration is of course irrelevant under the (Code), which precludes cumulative punishment in any case for a conspiracy with a single criminal objective and the completed substantive crime.

"The (Code) consequently goes no further than to provide a person who may not be convicted of the substantive offense under the complicity provision may not be convicted of the inchoate crime under the general conspiracy and solicitation sections. On the other hand, the party who would be guilty of the substantive offense if it should be committed, may equally be convicted of soliciting or conspiring for its commission, since the immunity of the other party gives him no defense under Subsection (1)(b)." MPC Tentative Draft No. 10, pp. 173-174 (1960)).

See Commentary to Section 2.06(5) and (6)(a) and (b), above.

4. Other State Codes.

(a) New York Revised Penal Code

§100.15 "It is no defense to a prosecution for criminal solicitation that the person solicited could not be guilty of the crime solicited owing to criminal responsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct solicited or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of the crime in question."

§100.20 "A person is not guilty of criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the crime."

§105.30 "It is no defense to a prosecution for conspiracy that, owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the agreement or object conduct of the defendant's criminal purpose or to other factors precluding the mental state required for the

commission of conspiracy or the object crime, one or more of the defendant's co-conspirators could not be guilty of conspiracy or the object crime."

(b) Michigan's Commission recommends the adoption of New York's §100.15 and 100.20 but would replace §105.30 as follows:

"It is no defense to a prosecution under this section that the defendant belongs to a class of persons who by definition as legally incapable in an individual capacity of committing the offense that the defendant commanded or solicited another to commit."

(c) Connecticut eliminates Section 5.04 and has no replacement.

(d) California's Commission recommends adoption of Section 5.04 in its entirety.

(e) Illinois:

"It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) has not been prosecuted or convicted, or

(2) has been convicted of a different offense, or

(3) is not amenable to justice, or

(4) has been acquitted, or

(5) lacked the capacity to commit the offense."

"It is defense to a charge of solicitation or conspiracy that if the criminal object were achieved the accused would not be guilty of an offense."

SECTION 5.05. GRADING OF CRIMINAL ATTEMPT, SOLICITATION AND CONSPIRACY; MITIGATION IN CASES OF LESSER DANGER; MULTIPLE CONVICTIONS BARRED.

(1) Grading. Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a (capital crime or a) felony of the first degree is a felony of the second degree.

(2) Mitigation. If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.12 to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

(3) Multiple Convictions. A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime.

* * * *

§5.05 Commentary

1. Sentencing Provisions for Inchoate Crimes. According to the Drafters, prevailing law reflects no general or coherent theory in determining the sanctions that are authorized upon conviction of attempt, solicitation or conspiracy. MPC Tentative Draft No. 10, p. 174 (1960). Generally, the maxima is somewhat less than that for the substantive offense that was the actor's object. The many variations among the states are collected at Id. at 174-178. New Jersey's existing law is as follows:

(a) Attempt. The general attempt provision, N.J.S. 2A:85-5, provides that attempts to commit indictable offenses are misdemeanors but the punishment shall not exceed that provided for the crime attempted. Punishment for a misdemeanor is, unless otherwise provided, imprisonment for up to three years and a fine of up to $1,000. This provision has the effect of (1) making the potential punishment in the case of high misdemeanor substantially less than for the completed offense (i.e., from seven years and $2,000 to three years and $1,000). (2) Making the punishment for attempted misdemeanors the

same as for the completed offense. In addition to this provision dealing with attempts in general, there are special statutory provisions dealing with attempts to commit particular crimes which establish their own sentencing limits: N.J.S. 2A:113-7 (attempt to kill by poisoning; 15 years and $1,000); N.J.S. 2A:89-4 (attempted arson; 3 years and $1,000); N.J.S. 2A:90-2 (assault with intent to kill, or to commit burglary, kidnapping, rape, robbery or sodomy, or to carnally abuse a female under the age of 16, with or without her consent; 12 years and $3,000); N.J.S. 2A:90-3 (assault with an offensive weapon or instrument or by menaces, force or violence demands of another any money, etc., with intent to rob; 7 years and $2,000).

(b) Solicitation. Solicitation is a common-law crime in New Jersey. As such, it is classified by N.J.S. 2A:85-1 as a misdemeanor and is, therefore, punishable by imprisonment for up to three years and $1,000 fine. As noted in the Commentary to Section 5.02, there are many statutes which include solicitations as the act denounced by the substantive offense. The potential sentences vary widely here. For the most part, the less serious offenses are classified as misdemeanors. For some, however, extremely high sentences are available. Thus, inciting insurrection or sedition is punishable by imprisonment for twenty years and a $10,000 fine (N.J.S. 2A:148-12); advocating death by fifteen years and $5,000 (N.J.S. 2A:113-8); and enticing a child to leave its parents by thirty years and $5,000 (N.J.S. 2A:118-2).

(c) Conspiracy. The general conspiracy statute provides that violations are punishable as misdemeanors (three years and $1,000), except for conspiracies involving the possession, sale or use of narcotic drugs, in which case they are punishable as high misdemeanors (seven years and $2,000). Common-law conspiracies, punishable under N.J.S. 2A:85-1 are treated as misdemeanors.

2. Section 5.05(1): Grading. The Code departs from the prevailing law by treating attempt, solicitation and conspiracy on a parity for purpose of sentence and by determining the grade and degree of the inchoate crime by the gravity of the most serious offense that is its object. Only when the object is a capital crime or a felony of the first degree does the Code deviate from this solution, grading the inchoate offense in the case as a felony of the second degree.

> "The theory of this grading system may be stated simply. To the extent that sentencing depends upon the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan. It is only when and insofar as the severity of sentence if designed for general deterrent purposes that a distinction on this ground is likely to have reasonable force. It is, however, doubtful that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object--and which he, by hypothesis, ignores....
>
> "Hence, there is basis for economizing in use of the heaviest and most afflictive sanctions by removing them from the inchoate crimes. The sentencing provisions for second degree felonies, including the provision for extended terms, should certainly suffice to meet whatever danger is presented by the actor.
>
> "On the other side of the equation, it seems clear that the inchoate crime should not be graded higher than the substantive offense; it is the danger that the actor's conduct may culminate in its commission that justifies creating the inchoate crime." (MPC Tentative Draft No. 10, pp. 178-179 (1960)).

3. Other State Codes: Grading and Punishment.

(a) New York. Attempts are gradated for punishment purposes to one degree below the substantive offense. A more complicated structure is established for conspiracies and solicitations. Conspiracy to commit any crime is punished as a Class B misdemeanor; conspiracy to commit any felony as a Class A misdemeanor; and conspiracy to commit a Class B or C felony as a Class E felony. Soliciting any crime is punished as a violation; soliciting a felony as a Class A misdemeanor; and soliciting murder or kidnapping in the first degree as a Class D felony.

(b) Illinois. This State grades all inchoate crimes equally but varies the maximum punishment according to the crime contemplated:

(1) General maximum: five years
(2) Prostitution, weapons, gambling and narcotics offenses: 10 years
(3) Treason, murder or aggravated kidnapping: 20 years
(4) Forcible felonies (solicitation or attempt only): 14 years.

A maximum is imposed that the sentence may never exceed that for the crime contemplated.

(c) Wisconsin. This state generally follows the Code for punishment of attempts and conspiracies, i.e., same as completed offense except if the penalty would be life imprisonment, the maximum is 30 years. For solicitations the maximum is the same as for the substantive crime except it may not exceed five years where that maximum for the substantive crime is less than life imprisonment nor 10 years when the maximum would be life.

(d) Michigan. Attempt and solicitation: one level below the penalty for the substantive offense. Conspiracy: similar to the Code.

(e) Connecticut. Same as the Code.

(f) California. Same as the Code, except adds the following upgrading provision:

> "A conspiracy to commit a misdemeanor involving danger to the person or to commit a series or number of misdemeanors pursuant to a common scheme or plan is a felony of the third degree."

4. Section 5.05(2): Mitigation. Any grading system must be based on general evaluations. When there are specific instances in which the evaluation seems to be far off base correction is possible by means of mitigation under Section 6.12 which is a general authorization to the Court to enter a judgment of conviction for a lesser degree of felony or for a misdemeanor and to impose sentence accordingly when it is of the view that it would be unduly harsh to sentence an offender in accordance with the Code. This is thought by the Drafters of the Code to have "special relevancy" to convictions for

inchoate crimes "in view of the infinite degrees of danger that attempt, solicitation or conspiracy actually may entail." MPC Tentative Draft No. 10, p. 179 (1960). The inclusion of this provision may well satisfy those who would otherwise feel that the definition of attempt under the Code is unduly broad.

5. Section 5.05(3): Multiple Convictions. This subsection precludes conviction of more than one inchoate crime defined by this Article for conduct designed to commit or to culminate in the commission of the same crime.

> "The provision reflects the policy, frequently stated in these comments, of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object. Thus conceived, there is no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense." (Id. at 80).

No New Jersey cases were found.

SECTION 5.06. POSSESSING INSTRUMENTS OF THE CRIME; WEAPONS.

(Omitted from this Draft)

SECTION 5.07. PROHIBITED OFFENSIVE WEAPONS.

(Omitted from this Draft)

* * * *

§§5.06 and 5.07 Commentary

These two sections have been omitted from this Draft. Their substance will be included as part of an Article in the "Definitions of Specific Crimes" (Part II) which will include prohibitions and regulations directed to instruments of crime (e.g. burglar tools), firearms, and to offensive weapons (e.g., bombs, machine guns and metal knuckles). While prohibition and regulation of these items definitely has an inchoate element, because of the danger that they will be used to commit other crimes, the pervasive legislation existing in our State leads one to the conclusion that we have moved beyond that point and we now want them eliminated, as entirely as possible, from our society as an end in itself. To emphasize that point, or, perhaps, to avoid the de-emphasis that could take place from including the provisions here, the field will be treated separately.

Existing New Jersey laws are found in 2A:151-1 through 63; 2A:94-3; 2A:170-3; 2A:144-1 and 2.

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

SECTION 6.01. DEGREES OF FELONIES.

(1) Felonies defined by this Code are classified, for the purpose of sentence, into three degrees, as follows:

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree.

A felony is of the first or second degree when it is so designated by the Code. A crime declared to be a felony, without specification of degree, is of the third degree.

(2) Notwithstanding any other provision of law, a felony defined by any statute of this State other than this Code shall constitute for the purpose of sentence a felony of the third degree.

* * * *

§6.01 Commentary

1. This Section reflects a number of important conclusions which have been drafted into the Code:

> "It is premised on the view that the length and nature of the sentences of imprisonment authorized by the Code must rest in part upon the seriousness of the crime and not, as has been argued, solely on the character of the offender. It also articulates the conclusion that, reserving the question whether death or life imprisonment should be retained for the most serious offenses, like treason or murder, the classification of felonies for purposes of sentence into three categories of relative seriousness should exhaust the possibilities of reasonable, legislative discrimination." (MPC Tentative Draft No. 2, p. 10 (1954))

The number and variety of the distinctions of this order found in the existing New Jersey system is one of the "main causes of the anarchy in sentencing which has been so widely deplored." Ibid. See also State v. Hicks, 54 N.J. 390 (1969).

2. In New Jersey, at the present time, all criminal offenses (except murder, treason and bigamy) are classed either as "high misdemeanors" or as

"misdemeanors" and the sentences applicable to them are, unless specifically provided in the statute defining the offense, defined by N.J.S. 2A:85-6 and 7. The books, however, are full of statutes creating crimes and providing specifically for the punishment available. A favorite response to a particular problem of the day has been for the Legislature to increase the potential penalty for the crime involved. Over the years, some clearly irrational distinctions as to the severity of penalty have crept into the law. Compare N.J.S. 2A:151-59 with N.J.S. 2A:151-160 and with N.J.S. 2A:142-1. Compare N.J.S. 2A:105-5 with N.J.S. 2A:113-8.

3. Any effort to rationalize the situation must result in the reduction of distinctions to a relatively few important categories. As will be seen below, this is an important characteristic of every new penal code. The Drafters of the Code recognize that there is "an arbitrary element involved in the selection of precisely three decisive categories" but that "no need has yet been felt for more...and less would plainly not be adequate." MPC Tentative Draft No. 2, p. 11 (1954). More important than the particular number of such categories, is the adoption of the principle that it is both desirable and possible for the Legislature, both in the Code and in future enactments, to distribute major crimes among such categories. By doing so, the ad hoc determinations now made, leading to substantial disparity and inequity, would be eliminated. It is important to note that adoption of this principle would, in no way, remove the question of punishment from the Legislature because that body would still have to assign crimes to the particular categories and prescribe the specific sentencing limits for the various categories. See ABA Report, Sentencing Alternatives and Procedures §2.1 (Tent. Draft 1968)

4. Paragraph (2) reduces to a felony of the third degree any felony defined by statute other than the Code which is not repealed on enactment of the Code. This is "merely a judgment that the Code should deal, at least with

area of criminality involving crimes so serious that classification as a first or second degree felony for sentence purposes is justified." MPC Tentative Draft No. 2, p. 11 (1954). For New Jersey which presently, of course, does not categorize any crimes as felonies, it would be necessary to change paragraph (2) to speak of "misdemeanors" and "high misdemeanors" defined outside the code are to be treated, for sentencing as felonies of the third degree.

5. Other State Codes. As noted above, all of the new penal codes of other states adopt a classification scheme such as that found in the Code. As long ago as 1935, this was the central contribution of the Draft Code prepared in Illinois and in the 1938 revision of the Title 18, Congress moved significantly in that direction. MPC Tentative Draft No. 2, p. 11 (1954). New York, in its 1967 revision, has basically adopted the Code's classification scheme but it divided felonies into five separate categories. N.Y. Rev. Penal Law §970.00. New Mexico similarly has five categories describing the highest as a "capital felony." Section 25 of the Connecticut Statute, also has five. California follows the Code in having three felony categories but treats the punishment of homicides separately. Various states name the various categories in different ways. See ABA Report, Sentencing Alternatives and Procedures, §2.1, pp. 50-55 (Tent. Draft 1958).

6. The important point to keep in mind, however, is neither the specific number of categories to be created nor the nomenclature to be used in describing each, but rather that a limited group of distinct sentencing categories, regardless of number, should represent the entire range of statutorily authorized punishment for crime; and, perhaps of greater importance, that once it has adopted such an orderly and rational classification system, the Legislature must strictly adhere to it in enacting any future penal legislation.

SECTION 6.02. SENTENCE IN ACCORDANCE WITH CODE; AUTHORIZED DISPOSITIONS.

(1) No person convicted of an offense shall be sentenced otherwise than in accordance with this Article.

(2) The Court shall sentence a person who has been convicted of murder to death or imprisonment, in accordance with Section 210.6.

(3) Except as provided in Subsection (2) of this Section and subject to the applicable provisions of the Code, the Court may suspend the imposition of sentence on a person who has been convicted of a crime, may order him to be committed in lieu of sentence, in accordance with Section 6.13, or may sentence him as follows:

(a) to pay a fine authorized by Section 6.03; or

(b) to be placed on probation [and, in the case of a person convicted of a felony or misdemeanor to imprisonment for a term fixed by the Court not exceeding thirty days to be served as a condition of probation;] or

(c) to imprisonment for a term authorized by Sections 6.05, 6.06, 6.07, 6.08, 6.09, or 7.06; or

(d) to fine and probation or fine and imprisonment, but not to probation and imprisonment [, except as authorized in paragraph (b) of this Subsection.]

(4) The Court may suspend the imposition of sentence on a person who has been convicted of a violation or may sentence him to pay a fine authorized by Section 6.03.

(5) This Article does not deprive the Court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

* * * *

§6.02 Commentary

1. This Section makes it clear that sentences for all offenses must be imposed in accordance with the Code (Subsection (1)) and that, except for incidental civil sanctions such as forfeitures of property, suspension or cancellation of licenses, removal from office and the like, the only dispositions authorized are those permitted by the Code. (Subsection (5)).

2. This Section reserves the question whether sentence of death should be permitted. Decision of this issue will be made in connection with section 210.6.

3. The possible dispositions for crimes are found in Subsection (3): The court may (1) suspend the imposition of a sentence, or (2) commit the defendant in lieu of sentence (Section 6.13), or (3) sentence the defendant. Sentences may be of four different sorts: (a) to pay a fine (Section 6.03), or (b) to be placed on probation with or without a short period of imprisonment, or (c) to imprisonment for a term (Sections 6.05 through 6.09 and 7.06) or (d) to a fine and probation or a fine and imprisonment but not, except as above, to probation and imprisonment. (Subsection (3)). Subsection (4) provides the alternatives in the event of conviction of a violation (Section 1.04(4)), i.e., payment of a fine or suspension of sentence. These provisions differ from existing law in four basic ways:

4. Suspension of Sentence. Unlike the existing practice in New Jersey and in many other states, the Code contemplates only suspension of sentence and not the imposition of a sentence and suspension of its execution.

> "The reason for this view is that if a suspension works out badly and sentence is to be imposed, we do not think the nature of the sentence should be pre-determined at the moment of conviction; the causes of the failure of suspension ought to be before the Court before the sentence is determined. It is unsatisfactory, therefore, to limit the sanctions on the cancellation of suspension to a sentence previously fixed....On the other hand, if a severer sentence than that originally imposed is to be permitted on the cancellation, there seems no point to fixing any sentence in the first place. Under (the Code), if sentence is suspended, the offender knows that if there is a revocation of suspension he faces any sentence that the Court might have imposed originally for the offense." (MPC Tentative Draft No. 2, p. 13 (1954)).

Under our law, the sentencing judge, "after conviction or after a plea of guilty or non vult for any crime or offense (shall have power)...to suspend the imposition or execution of sentence, and also to place the defendant on probation...." N.J.S. 2A:168-1. At common law, the court had power to suspend the imposition of sentence (that is, not to pronounce any sentence) or to suspend execution of sentence (that is, pronounce a custodial sentence but suspend serving it).

See Gehrmann v. Osborne, 79 N.J. Eq. 430 (Ch. 1911); Adamo v. McCorkle, 13 N.J. 61 (1953); State v. Johnson, 42 N.J. 146, 174 (1964). This common law power has now been replaced by the quoted statute. State v. Johnson, supra. However, the probation statute further provides in N.J.S. 2A:168-4, that upon revocation of probation the court "may cause the sentence (originally) imposed to be executed or impose any sentence which might originally have been imposed." See In Re White, 18 N.J. 449 454 (1955). Thus, unlike many States, where the original sentence limits the scope of punishment permissible upon revocation of probation, New Jersey's actual result is like the Code's. For the reason that it will both allow the total circumstances, including the reason for revocation, to be known to the Court at the second hearing and it will avoid any problem of reliance by the Defendant upon a sentence of less than the maximum which might have originally been imposed, it seems desirable not to impose any sentence if it is to be suspended.

5. Probation as a Sentence. The Drafters treat probation as a separate kind of disposition:

> "Probation is here treated as a sentence, rather than the accompaniment of suspension, though the consequences in the event of violation are the same as on suspension. The matter is of relatively minor moment but may serve in some respects to focus thought upon probation as an independent sanction, a result we think important to achieve." (MPC Tentative Draft No. 2, p. 13 (1954)).

6. Probation and a Short Term of Imprisonment. Subsection (b) was revised after the original drafting of the Code to include the optional authorization of a sentence combining probation and imprisonment for not exceeding thirty days, upon conviction of a felony or misdemeanor.

> "While there is controversy as to the wisdom of combining probation and imprisonment, it was believed that a conservative provision of this kind may be considered necessary and unobjectionable in many jurisdictions. The case for such authority is strongest upon sentence for a misdemeanor, since supervised release from local institutions otherwise may be impossible, parole usually being unavailable." (MPC, Proposed Official Draft, pp. 92-93 (1962)).

This provision is comparable to N.J.S. 2A:164-14 which provides:

> "In any sentence involving imprisonment in any county jail, penitentiary or workhouse the Court may, as part of the sentence imposed, require the person so sentenced to serve a designated part of such sentence in the jail, penitentiary or workhouse itself, and, thereafter, after having been given credit for days remitted, if any, to be released on probation..."

No similar power exists in regard to sentences to State Prison or reformatories. On such sentences the Judge may in most instances, put the convicted person on probation immediately, but other agencies perform the function of establishing post-incarceration release under supervision. New Jersey Sentencing Manual for Judges, p. 30 (1969). See N.J.S. 2A:164-17.

The principle of probation with a short term of imprisonment is well established in New Jersey. This Section of the Code would continue that rule with the main question being the propriety of the thirty-day limitation.

7. Mandatory Sentences of Imprisonment. The Code takes the view, unlike the practice in this and many other states, that suspension or probation is authorized in any case except of course, of sentence of death or life imprisonment is ultimately prescribed.

> "This provision rests on the view that no legislative definition or classification of offenses can take account of all contingencies. However right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition where the circumstances were so unusual, or the mitigations so extreme, that a suspended sentence or probation would be proper. We see no reason to distrust the courts upon this matter or to fear that such authority will be abused. Criteria to guide such dispositions are defined in section 7.01." (MPC Tentative Draft No. 5, pp. 13-14 (1954)).

See also ABA Report, Sentencing Alternatives and Procedures, pp. 55-64 (Tent. Draft 1968). New Jersey now has several instances of mandatory sentences (in addition to the life imprisonment and death penalty situation). See, e.g., N.J.S. 2A:168-1 (No probation in repeater narcotics offenses); N.J.S. 39:4-50 (Drunken driving, second offender). It is clear that the Legislature has the power to establish mandatory sentences (State v. Johnson, 42 N.J. 146, 174 (1964))

although the wisdom of their use has been severely criticised. The question of whether to recommend abandonment of mandatory sentences is a basic one for the Commission. If it is decided not to make such a recommendation, a sentence should be included in Subsection (3) stating that these provisions do not apply if a specific provision requiring a mandatory sentence is included in the statute defining the offense. This would, at least, require the Legislature to make a specific, affirmative decision, in each case, to impose a mandatory sentence.

8. Other State Codes. California's proposals are substantially in accord with the Code. Michigan has added a "conditional discharge" alternative which is something more than a suspended sentence but less than full probation. A summary of the provisions establishing this procedure are:

Section 1315 provides for conditional discharge which can be used if the Court determines that probation is inappropriate. This would normally occur when the defendant does not require close supervision.

Section 1320 provides the periods of conditional discharge to be as follows: For a felony, 3 years; for a misdemeanor, 1 year. These can be extended for a felony, 2 years, and for a misdemeanor, 1 year, if the defendant must also make reparations to the victim of the crime. Section 1320 further provides that the Court can terminate the period of conditional discharge at any time.

Section 1325 provides that the Court must notify the defendant of his right to annul a conviction if he successfully completes period of conditional discharge.

Section 1335 provides for unconditional discharge of the defendant when he no longer needs supervision.

Section 1340 provides that a defendant can apply to the Court for an annulment of the record of conviction and sentence after completing the period of conditional discharge successfully.

Connecticut has adopted this same alternative. (Section 31). The kind of conditions set forth in that statute as illustrations are: that the defendant make restitution; that the defendant seek and secure gainful employment; that the defendant support his dependents; that he procure medical and psychiatric treatment; and that he post bond.

SECTION 6.03. FINES.

A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

(1) $10,000, when the conviction is of a felony of the first or second degree;

(2) $5,000, when the conviction is of a felony of the third degree;

(3) $1,000, when the conviction is of a misdemeanor;

(4) $500, when the conviction is of a petty misdemanor or a violation;

(5) any higher amount equal to double the pecuniary gain derived from the offense by the offender;

(6) any higher amount specifically authorized by statute.

* * * *

§6.03 Commentary

1. This Section authorizes the sentencing court to impose a fine for all offenses, based on the theory that such a form of punishment could be an appropriate sanction in any particular type of case, and that, subject to the limiting criteria set forth in Section 7.02, the maximum amounts provided for should generally be sufficient for both deterrent and correctional purposes. MPC Tentative Draft No. 2, p. 22 (1952). Subsection (6) permits a fine of "any higher amount specifically authorized by statute" other than the Code, thereby saving any higher limits so fixed.

2. The existing law of this State is to the effect that if the maximum amount of fine is not contained in the particular substantive criminal statute involved, then the fine for a high misdemeanor is not more than $2,000 (N.J.S. 2A:85-6) and for a misdemeanor is not more than $1,000 (N.J.S. 2A:85-7). As is the case with the wide variety of specific maximums terms of imprisonment scattered throughout the New Jersey Statutes, there are at least fifteen separate maximum fines presently authorized ranging in amount from $25 to $100,000.

Such statutorily prescribed penalties were largely enactments made on the same ad hoc basis as their counterparts relating to the length of imprisonment and they are subject to the same criticisms as set forth in the comments to Section 6.01. The theory underlying the adoption of a legislative punishment classification scheme as to the maximum terms of imprisonment there set forth is also relevant to fines.

3. Of greater significance than the establishment of a rational classification scheme concerning fines is the fact that the Code departs from existing New Jersey law not only in that it recognizes that an offender should be deprived of any "pecuniary gain" derived from the commission of the particular crime in question, but, in addition, that it authorizes the imposition of a fine double the amount of such pecuniary gain. Such provision would be especially useful in the case of situations where persons engage in crime as a business. An example is a bookmaker where, in the words of our Supreme Court, "the defendants who are caught are not vicious (criminals) and do not menace society in other respects." But to them even the maximum fine of $5,000 might be nothing more than "a license fee" to operate a very "lucrative venture." State v. DeStasio, 49 N.J. 247, 254, 257 (1967). Similar acknowledgment of the basic futility of fining such persons is evidenced by the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967) where, at page 199, it is noted that such persons "have little reason to be deterred from joining the ranks of criminal organization by fear of...large fines (because) even when offenders are convicted, the sentences are very light (and the) fines are paid by the organization and considered a business expense." Certainly, there can be little serious dispute with the assertion that by increasing the amount of fine in direct relation to the offender's criminally achieved financial income, it may very well be that the "cost of doing business" could become of such a prohibitive nature as to

dissuade recruitment of employees or partially deter the criminal operation, which in and of itself is a significant and desirable goal. State v. Ivan, 33 N.J. 197, 203 (1960). See Report of Joint Legislative Committee to Study Crime and System of Criminal Justice in New Jersey 13 (1967). The use of a fine in this way is in no way restricted to the realm of bookmaking since a similar degree of profitability exists in the area of loansharking, blackmail, forgery, etc. See Id. at 10. This inefficacy of the existing statutorily authorized fines in New Jersey as punitive sanctions to be employed against certain types of criminal profiteers has been recognized by the State Legislature as can be seen from a comparison of recently enacted N.J.S. 2A:105-5 (1968), concerning "loan sharking" (maximum sentence of thirty years imprisonment and/or a fine of $100,000) with N.J.S. 2A:105-4 (1933), concerning "extortion" (maximum sentence of thirty years imprisonment and/or a fine of $5,000). See also N.J.S. 2A:98-4.

4. Other State Codes. Consideration should be given to the Connecticut statute in this area which is both the most comprehensive and the most explicit of all the various statutes dealing with this type of fine:

> "If a person has gained money or property through the commission of any felony, misdemeanor or violation, then upon conviction thereof the court, in lieu of imposing the fine authorized for the offense under one of the above sections, may sentence the defendant to pay an amount, fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the offense. In such case the court shall make a finding as to the amount of the defendant's gain from the offense, and if the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue. For purposes of this section the term 'gain' means the amount of money or the value of property derived."

This type of provision may, however, be undesirable in requiring proof of facts which may be impossible to actually establish. New York's Statute provides that a fine should only be imposed when the defendant received a pecuniary gains in which case the following alternatives are available:

(1) the defendant must give up his pecuniary gains from the commission of the crime; (2) the fine should relate to the gain; (3) the defendant may be fined in an amount up to twice the amount of money he has gained from the commission of the crime. Michigan's is similar. See also ABA Minimum Standards, Sentencing Alternatives and Procedures §2.7, pp. 117-129 (Tent. Draft (1968).

SECTION 6.04. PENALTIES AGAINST CORPORATIONS AND UNINCORPORATED ASSOCIATIONS; FORFEITURE OF CORPORATE CHARTER OR REVOCATION OF CERTIFICATE AUTHORIZING FOREIGN CORPORATION TO DO BUSINESS IN THE STATE.

(1) The Court may suspend the sentence of a corporation or an unincorporated association which has been convicted of an offense or may sentence it to pay a fine authorized by Section 6.03.

(2) (a) The (prosecuting attorney) is authorized to institute civil proceedings in the appropriate court of general jurisdiction to forfeit the charter of a corporation organized under the laws of this State or to revoke the certificate authorizing a foreign corporation to conduct business in this State. The Court may order the charter forfeited or the certificate revoked upon finding (i) that the board of directors or a high managerial agent acting in behalf of the corporation has, in conducting the corporation's affairs, purposely engaged in a persistent course of criminal conduct and (ii) that for the prevention of future criminal conduct of the same character, the public interest requires the charter of the corporation to be forfeited and the corporation to be dissolved or the certificate to be revoked.

(b) When a corporation is convicted of a crime or a high managerial agent of a corporation, as defined in Section 2.07, is convicted of a crime committed in the conduct of the affairs of the corporation, the Court, in sentencing the corporation or the agent, may direct the (prosecuting attorney) to institute proceedings authorized by paragraph (a) of this Subsection.

(c) The proceedings authorized by paragraph (a) of this Subsection shall be conducted in accordance with the procedures authorized by law for the involuntary dissolution of a corporation or the revocation of the certificate authorizing a foreign corporation to conduct business in this State. Such proceedings shall be deemed additional to any other proceedings authorized by law for the purpose of forfeiting the charter of a corporation or revoking the certificate of a foreign corporation.

* * * *

§6.04 Commentary

1. Subsection (1) provides that upon conviction of an offense, the court may either suspend the sentence of a corporation or unincorporated association or may sentence it to pay a fine authorized by Section 6.04.

2. Subsection (2) provides certain important supplementary sanctions in the area of corporate crime. In the opinion of the Drafters, "a considerable body of experience both under general quo warranto legislation and special penalty provisions in criminal statutes suggests the utility of a broader resort to charter forfeiture as an adjunctive criminal sanction in the corporate cases." MPC Tentative Draft No. 4, p. 202 (1956).

3. Under present law in New Jersey, authority is vested in the Attorney General to bring an action in the Superior Court for the dissolution of a corporation on the ground, among other things, that "the corporation...has repeatedly conducted its business in an unlawful manner." N.J.S. 14A:12-6(1). That same statute provides that the enumeration of grounds for dissolution in the above quoted provision does not exclude any other "statutory or common law action by the Attorney General for the dissolution of a corporation or the revocation or forfeiture of its corporate franchise." N.J.S. 14A:12-6 (3). See In Re Collins-Doan Co., 3 N.J. 382, 393 (1949). As to the procedures to be followed in such cases, see N.J.S. 2A:66-5, 6 and 7.

New Jersey also has a special provision in this regard concerning the gambling laws. N.J.S. 2A:112-4 provides:

> "Any corporation of this State convicted of an offense... (dealing with bookmaking and pool selling) shall be dissolved thereby and its corporate franchises thereby become forfeited and void without any other proceedings to that end."

4. There are several problems involved in drafting a forfeiture provision for inclusion in a penal code:

5. Criteria for Forfeiture. Given the severe consequences of dissolution, the sanction must obviously be made subject to substantial limitations. MPC Tentative Draft No. 4, pp. 202-203 (1955). The existing criteria in New Jersey, under 14A:12-6(1), and elsewhere emphasize the habitual and persistent character of the conduct. There is however, some common law authority to the effect that once should be enough (See MPC Tentative Draft No. 4, p. 203 (1955)) and N.J.S. 2A:112-4, applicable to gambling is in accord. The Drafters suggest following the criteria of repeatedness:

> "The emphasis on persistent misconduct appears appropriate, and it would seem that the keynote for the Code provisions should be the failure of deterrence. As in proceedings under quo warranto statutes, however, proof of persistent misconduct need not be

restricted to prior convictions of the corporation or its agents for criminal offenses. Moreover, forfeiture ought not to be regarded as an automatic consequence even of persistent misconduct; a substantial degree of discretion should be recognized in the court in which the case is brought." (Ibid.)

As originally drafted, subsection (2)(a) would have allowed forfeiture when the purposive criminal conduct was by "a person acting in behalf of the corporation." MPC Tentative Draft No. 4, p. 40 (1955). This was changed after a vote of the American Law Institute to require that the act be by "the board of directors or a high managerial agent." Under New Jersey's existing law, the court must find that the repeated unlawful conduct of the corporation's affairs was by "the corporation." As to imputing acts of agents to the corporation, see Commentary to Section 2.07.

6. The Court Which Should Order Forfeiture. The Code rejects the view that the criminal court should order the forfeiture, instead placing the power in a court of general jurisdiction. This is our law under N.J.S. 14A:12-6 which places such proceedings in the Superior Court. But see N.J.S. 2A:112-4. Placing jurisdiction outside the criminal court might result in forfeiture proceedings not being instituted in appropriate cases. Accordingly, under paragraph (2)(b), the power of the court trying the case is preserved to order the prosecutor to institute forfeiture proceedings where such action seems to be required. MPC Tentative Draft No. 4, p. 203 (1955).

7. Who May Institute Such Proceedings. Under existing law, the power to institute such proceedings is vested in the Attorney General. N.J.S. 14A:12-6 and N.J.S. 2A:66-5 through 7. The Code would place this authority in the hands of the local prosecutor:

> "It would seem that if forfeiture is to be an effective enforcement device, power to initiate the action must be placed in the hands of the local prosecutor who has primary responsibilities for criminal-law enforcement." (MPC Tentative Draft No. 4, pp. 203-204 (1955))

8. Procedures To Determine the Forfeiture Issue. Finally, the Drafters believe it inappropriate and not feasible to define in detail the powers of the court and the procedures to be employed in the forfeiture proceeding authorized by the Code are made to conform to the procedures authorized by law for corporate dissolution and the winding up of the corporation's affairs. Ibid. For New Jersey, See N.J.S. 14A:12-1 et. seq.

9. Other State Codes. Most state codes speak only of fines as the sanction to be used against corporations. Apparently, the forfeiture provision is left, as it now is in New Jersey, to the state's corporation code. Section 1210 of the proposed Michigan Code would add, as an alternative to fining a corporation, the sanction of "conditional discharge" or "unconditional discharge." Apparently, it was believed that there may be situations in which a probation-like control over the corporation's activities would be appropriate.

SECTION 6.05. YOUNG ADULT OFFENDERS.

(1) Specialized Correctional Treatment. A young adult offender is a person convicted of a crime who, at the time of sentencing, is sixteen but less than twenty-two years of age. A young adult offender who is sentenced to a term of imprisonment which may exceed thirty days (alternatives: (1) ninety days; (2) one year) shall be committed to the custody of the Division of Young Adult Correction of the Department of Correction, and shall receive, as far as practicable, such special and individualized correctional and rehabilitative treatment as may be appropriate to his needs.

(2) Special Term. A young adult offender convicted of a felony may, in lieu of any other sentence of imprisonment authorized by this Article, be sentenced to a special term of imprisonment without a minimum and with a maximum of four years, regardless of the degree of the felony involved, if the Court is of the opinion that such special term is adequate for his correction and rehabilitation and will not jeopardize the protection of the public.

[(3) Removal of Disabilities; Vacation of Conviction.

(a) In sentencing a young adult offender to the special term provided by this Section or to any sentence other than one of imprisonment, the Court may order that so long as he is not convicted of another felony, the judgment shall not constitute a conviction for the purposes of any disqualification or disability imposed by law upon conviction of a crime.

(b) When any young adult offender is unconditionally discharged from probation or parole before the expiration of the maximum term thereof, the Court may enter an order vacating the judgment of conviction.]

[(4) Commitment for Observation. If, after pre-sentence investigation, the Court desires additional information concerning a young adult offender before imposing sentence, it may order that he be committed, for a period not exceeding ninety days, to the custody of the Division of Young Adult Correction of the Department of Correction for observation and study at an appropriate reception or classification center. Such Division of the Department of Correction and the (Young Adult Division of the) Board of Parole shall advise the Court of their findings and recommendations on or before the expiration of such ninety-day period.]

* * * *

§6.05 Commentary

1. This Section makes special provision for the sentencing and correctional treatment of offenders under twenty-two years of age at the time of sentence who are convicted in criminal courts. It would include all persons so convicted between the ages of 18 and 22, and those of age 16 or 17 over whom the Juvenile Court waived jurisdiction and who were, thereafter, convicted of crimes. Such persons are described as "young adults." MPC Tentative Draft No. 7, p. 24 (1957).

2. That the younger group of offenders beyond Juvenile Court age should be the subject of special attention in sentencing and specialized effort in correction was the judgment of the American Law Institute when the Model Youth Correction Authority Act was approved.

> "The judgment rested upon recognition that the incidence of criminality and of recidivism in this age span is distressingly and disproportionately high; that these are still, however, formative years in personal development; and that these individuals have many years of active life ahead. Prudence and humanity combined, therefore, to argue for a specialized and concentrated effort in this area. Experience during the intervening years has not, we think, cast doubt upon the wisdom of this underlying judgment, though it has shown how durable and difficult the problems to be dealt with are." (Ibid.)

This same judgment has been made in many other states in establishing such a system and by the Congress when, in 1950, it passed the Youth Corrections Act. A copy of the provisions of that Act is attached hereto.

3. New Jersey has, in a somewhat different way, recognized that youthful offenders should be given different consideration in sentencing and should be treated differently from "hardened criminals." The statutes controlling sentencing to the Reformatories provide as follows:

> "Any male person between the ages of 15 and 30 years, who has been convicted of a crime punishable by imprisonment in the State Prison, who has not previously been sentenced to a State Prison in this State, or in any other State, may be committed to the reformatory." (N.J.S. 30:4-146)

> "The court in sentencing to the reformatory shall not fix or limit the duration of sentence, but the time which any such person shall serve in the reformatory or on parole shall not in any case exceed five years or the maximum term provided by law for the crime for which the prisoner was convicted and sentenced, if such maximum be less than five years; provided, however, that the court, in its discretion, for good cause shown, may impose a sentence greater than five years, but in no case greater than the maximum provided by law, and the commitment shall specify in every case the maximum of the sentence so imposed. The term may be terminated by the board of managers in accordance with its rules and regulations formally adopted." (N.J.S. 30:4-148)

See also N.J.S. 30:4-153 through 155 (Women's Reformatory). In State v. Horton, 45 N.J. Super. 44 (App. Div. 1957), the Court recognized that these statutes recognize a "statutory policy...for the control of youthful offenders...that solution lies in correction and rehabilitation, rather than retribution." See also Ex Parte Zienowicz, 12 N.J. Super. 564 (Co. Ct. 1951) and In Re Nicholson, 69 N.J. Super. 230, 238 (App. Div. 1961). The operation of these provisions is described in New Jersey Sentencing Manual for Judges 31-34 (1969). While particular differences between the Code and the New Jersey Reformatory provisions will be set forth below, it is important to point out two major differences at this point: (1) In New Jersey, the court has discretion whether to sentence the defendant to State Prison, to probation, or to the Reformatory. Under the Code, the only dicision is whether to imprison. If the decision is to do so, the defendant is treated as a young adult offender. (2) The maximum age under the Code is 22. In New Jersey today, it is 30.

4. The basic reason for differential sentencing of young adult offenders is found in subsection (1) which provides that the defendant "shall receive, as far as practicable, such special and individualized correctional and rehabilitative treatment as may be appropriate to his needs." The Division of Young Adult Correction of the Department of Correction would be established by Section 401.6. If it is considered to be beyond the scope of the commission's mandate to recommend reorganization of the correctional structure, the statute should be changed to have commitment be to the Reformatory.

5. Subsection (1) follows the Model Youth Corrections Authority Act in calling for specialized treatment in so far as practicable of all offenders in the specified age group. This is to be distinguished from New Jersey's system (and that of New York, California and the Federal System) of selecting individuals for such treatment before or at the time of sentencing. The Drafters justify this in this way:

"While we believe that special types of sentence serve a useful purpose in this area, as is made clear below, we think the special sentence should relate to the duration of commitment, not to the mandate that specialized methods of correction, adapted to the age of the offender, should so far as practicable be developed and employed. Whether and how far such methods may be practicable in a given case is, in our mind, an issue best determined by correctional administration." (MPC Tentative Draft No. 7, p. 25 (1957)).

6. Upper Age Limitation: As noted above, New Jersey's Reformatory legislation allows commitment up to age 30. The young adult offender statutes use substantially lower age limitations:

"The Model Act and California and Minnesota legislation based upon it apply (with some exceptions) to persons under 21 years of age at the time of their apprehension. So too the upper age limit of the New York legislation is under 21, though at the time of the offense. Under the Federal Youth Corrections Act of 1950, however, the upper age is under 22 at the time of conviction. Drawing such outside limits calls for judgment that cannot escape an arbitrary element. We have, however, deemed it wise to abide by the judgment of the Congress, reflecting as it does the broadest consensus of any legislation and the only test of national opinion in the field. Since the time of sentence is when custody is normally transferred to the correctional authorities, we choose the date of sentence as the time when the offender's age is made decisive." (Ibid.)

7. Exclusions from Provisions of Very Long and Short Terms. Both the Model Act and the statutes which draw upon it exclude from commitment as young adult offenders those subject to sentence of life imprisonment, at one extreme, and to very short sentences, at the other. The Drafters of the Code resolve the issue this way:

"As to young offenders who receive long sentences, we see no reason why the commitment should not be to the Division of Young Adult Correction, though the Division may concive, of course, that specialized treatment is impracticable in many such cases. It seems appropriate, however, that the issue be left for the determination of correctional administration rather than resolved by statute.

"As to offenders convicted of minor offenses, we support the principle that any sentence of imprisonment should, so far as possible, involve commitment to the agency responsible for specialized attention to the young offender. The quality of local institutions used for misdemeanants presents one of the most imposing problems in the field of correction. To expect great

improvement at the local level is, we fear, unrealistic in the country as a whole. To the extent, therefore, that it is feasible to enlist state responsibility in dealing with the younger group among offenders, even on short commitments, the result is generally to be sought. It is, however, quite impossible to judge the point where it is workable to draw the line in different jurisdictions of the nation. We have accordingly retained the Model Act discrimination drawn in terms of 30 days and have presented as alternatives the 90 day provision used in California and Minnesota together with a final possibility of over one year, which is too high but may be the only practicable arrangement in some jurisdictions. The Division will, of course, be free to make use of local institutions where it deems them to be suitable." (Id. at 26).

In New Jersey, under N.J.S. 2A:113-4, if the person is sentenced to life imprisonment he must be sentenced to State Prison. See also N.J.S. 2A:118-1 (Kidnapping). At the lower end, a defendant is not eligible for sentencing to the Reformatory unless he commits a crime punishable by imprisonment in State Prison. N.J.S. 30:4-146.

8. The Drafters of the Code explain the various possibilities as respects the discretion of the court at the time of sentencing and the maximum terms of imprisonment, as well as their views on these issues, as follows:

"Under the Model Act commitment to the Youth Authority is mandatory unless the sentence authorized upon conviction is only a fine or a commitment for not exceeding 30 days or death or like imprisonment. This means that the Court is deprived of power to suspend a prison sentence or to place the defendant on probation. Such determinations to discharge or to release conditionally under supervision are transferred from the province of the court to that of the Authority.

"The maximum duration of the commitment and the control of the Authority, is, moreover, fixed by the Act and governed primarily by age (§32). If the offender was committed for a minor offense and was under 18 at the time of the commitment, his discharge is obligatory before the age of 21; if he was over 18, discharge is required in three years. In the other and more important cases discharge is required before the age of 25. The Authority is, however, granted the extraordinary power to direct that the offender remain subject to its control beyond these periods whenever it 'is of opinion that discharge...at the age limit...would be dangerous to the public.' For such an order to be effective it must be confirmed by the court, after a hearing on notice to the defendant, on a finding that his discharge 'would be dangerous to the public because of his mental or physical

deficiency, disorder or abnormality, or because of his lack of improvement under corrective training and treatment' (§§33, 34). There is no limit to such possible extension, except that periodic review of such orders and confirmations is required (§35).

"This scheme has been accepted only partially in the Authority states. No state has been willing, and very properly in the view of the reporters, to deprive its courts of competence to suspend or admit the young offender to probation. In California commitment to the Youth Authority is discretionary with the Court, not mandatory. In Minnesota the commitment is mandatory if there is a prison sentence for longer than 90 days but the commitment is for "the maximum term provided by law for the crime for which the person was convicted" (§242.13). Discharge is nonetheless required before the offender reaches 25 'unless the commission shall determine that such discharge at that time would be dangerous to the public,' in which event the offender may be remitted to the ordinary processes of correction until the expiration of the maximum provided by law for the offense (§242.27). In California, upon commitment to the Youth Authority, control may be maintained for misdemeanants until the age of 23 or for two years, whichever is the longer, for persons convicted of felonies until 25. The Authority may, however, petition the court for continuation of control but only to the maximum prescribed by law for the offense. On such petition the court is authorized to commit the offender to State Prison for the balance of the maximum. We cannot find, however, that this authority has been employed.

"The Federal Youth Corrections Act of 1950 differs from the Model Act even more extensively than the California and Minnesota legislation. The court is authorized to suspend sentence and to place the defendant on probation. It also is empowered to sentence the defendant under the generally applicalbe law. In its discretion it may employ the special form of sentence authorized by the Act, a term of six years of which not more than four may be required to be spent in a correctional institution prior to conditional release. Alternatively, it may impose a longer maximum up to the limit provided by law for the offense. See 18 U.S.C. §5010. The Youth Correction Division, created within the Board of Parole, is authorized to release conditionally at any time and unconditionally after one year from conditional release. 18 U.S.C. §5017. No autonomous authority has been established; the functions involved fall to the courts, the Director of the Bureau of Prisons and the Youth Correction Division of the Board of Parole as an aspect of their ordinary duties.

"Subsection 2 of section 6.05 closely resembles the Act of Congress. It authorizes, in the discretion of the court, a specialized sentence for the young adult offender, without a minimum and with a maximum of four years, regardless of the degree of felony involved. The court is thus empowered to protect the young offender from the longer maxima provided by section 6.06 when it is of 'opinion that such special term is adequate for his correction and rehabilitation and will not jeopardize the protection

of the public.' Since the term involves no minimum, the Board of Parole or its Young Adult Division...has authority to release on parole at any time. If the court determines to sentence to imprisonment but does not deem the special term appropriate, it may sentence to the ordinary or extended term for the offense involved under section 6.06 or 6.07. Under the general sentencing provisions of the Code, the court is authorized, of course, to suspend sentence or its execution or to place the defendant on probation. See section 6.02,....This flexible, discretionary system seems to us to offer the most suitable pattern available for general employment by the states. It also is, in our view, both sound in principle and consonant with the general positions taken by the Code with respect to the distribution of authority between the courts and the administrative organs of correction." (MPC Tentative Draft No. 7, pp. 26-28 (1957)).

Under New Jersey's existing law, the decision both to imprison and, if so, to sentence to the Reformatory, is discretionary with the trial court. N.J.S. 30:4-146. The length of the sentence is then an indeterminate term for the maximum permitted for the offense or five years, whichever is shorter. If the maximum is more than five years for the crime committed, the Court may "for good cause shown" order that the five year limit not apply and make it apply any term up the maximum for the crime. N.J.S. 30:4-148.

9. Subsection (2) of the Code permits the special four year term only upon conviction of a felony. In this respect it is like N.J.S. 30:4-147 but it is unlike the Model Act and the California legislation. They permit control over misdemeanants for a longer period than the ordinary maximum for their offenses. The Federal Act authorizes its special six-year term for youth offenders even though a lesser maximum is prescribed for the particular offense. The Drafters explain their position in this way:

"We recognize the theory of provisions of this kind, that such a longer term is more reformative than a short, definite sentence to jail. This is a case, however, where we think that theory has outrun a sense of just proportion. Simple regard for personal liberty--of young no less than of mature adults--requires, in our view, that younger people not be subject to more onerous sentences because of their immaturity. We can perceive no adequate basis for sentencing young adults, whose offenses reveal no substantial danger to the community, to sentences as long as those imposed for major crimes." (MPC Tentative Draft No. 7, p. 28 (1957)).

10. The Code leaves the question of segregation of young adult offenders from other offenders to the decision of Correctional Administration. Ibid. This is our law. N.J.S. 30:4-85.

11. Protection from Collateral Consequences. The Drafters believe it to be sound to protect young offenders from the disabilities incident to conviction to the extent that it is feasible to do so. The provisions of the California, Minnesota, New York and Federal statutes also do so. See MPC Tentative Draft No. 7, p. 29 (1957). The method chosen by the American Law Institute to implement the decision that some protective method is appropriate is found in Subsection (3). The court may make a contingent order at the time of sentencing or at the time of discharge from probation or parole. Subsection (3) should be eliminated if section 306.6, dealing with removal of disabilities generally, is recommended for adoption.

12. Commitment for Observation.

> "Subsection 4 follows the federal Act in authorizing the court, when further information is desired as an aid to sentence, to commit a young adult to the Division for observation and study for a period of not exceeding ninety days. Cf. 18 U.S.C. §5010(e) (sixty days or such additional period as the court may grant). The analogous provision in California calls on the Youth Authority to certify that a person referred to it by the court "can be materially benefited by the procedure and discipline of the Authority, and that proper and adequate facilities exist" for his care (§1731.5); it also permits the Authority to return to the court for a re-sentence persons found to be unsuited to its program and facilities (§1737.1). These provisions would seem, however, to deny the court the benefit of diagnostic study unless it has decided to commit to the Authority. We think it preferable to permit the commitment for observation without any implication as the court's final disposition. It should be noted also that under section 7.08 of the Code, any sentence is deemed tentative for a period following its imposition, during which the Commissioner is authorized to petition for re-sentence."
> (MPC Tentative Draft No. 7, p. 31 (1957)).

Subsection (4) should be eliminated if Section 7.08(1) is recommended for adoption. New Jersey now has authority for such commitment for the purpose of psychiatric study. N.J.S. 2A:164-1 and 2.

13. Exerpts from The Federal Youth Corrections Act.

§5006. Definitions.

As used in this chapter--

(e) "Youth offender" means a person under the age of twenty-two years at the time of conviction;

(f) "Committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to section 5010(b) and 5010(c) of this chapter;

(g) "Treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders;

(h) "Conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

§5010. Sentence

(a) If the court is of the opinion that the youth offender does not need a commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision purusant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the

custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

§5011. Treatment

Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment.

§5015. Powers of Director as to placement of youth offenders

(a) On receipt of the report and recommendations from the classification agency the Director may--

(1) recommend to the Division that the committed youth offender be released conditionally under supervision; or

(2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or

(3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

(b) The Director may transfer at any time a committed youth offender from one agency or institution to any other agency or institution.

§5017. Release of youth offenders

(a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division.

(b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

(e) Commutation of sentence authorized by any Act of Congress shall not be granted as a matter of right to committed youth offenders but only in accordance with rules prescribed by the Director with the approval of the Division.

§5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

ECTION 6.06. SENTENCE OF IMPRISONMENT FOR FELONY; ORDINARY TERMS.

A person who has been convicted of a felony may be sentenced to nprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum f which shall be fixed by the Court at not less than one year nor more than ten ears, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the inimum of which shall be fixed by the Court at not less than one year nor more han three years, and the maximum of which shall be ten years;

(3) in the case of a felony of the third degree, for a term the inimum of which shall be fixed by the Court at not less than one year nor more han two years, and the maximum of which shall be five years.

* * * *

ALTERNATE SECTION 6.06. SENTENCE OF IMPRISONMENT FOR FELONY; ORDINARY TERMS.

A person who has been convicted of a felony may be sentenced to imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than ten years, and the maximum at not more than twenty years or at life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum at not more than ten years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum at not more than five years.

* * * *

SECTION 6.07. SENTENCE OF IMPRISONMENT FOR FELONY; EXTENDED TERMS.

In the cases designated in Section 7.03, a person who has been convicted of a felony may be sentenced to an extended term of imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than five years nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than five years, and the maximum of which shall be fixed by the Court at not less than ten nor more than twenty years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be fixed by the Court at not less than five nor more than ten years.

* * * *

Sections 6.06, 6.06 (Alternate) and 6.07 Commentary

1. Sections 6.06 and 6.07 embody the main position of the Code with respect to sentences of imprisonment for felony. The Code sets forth a primary and an alternative position as to the ordinary terms for felonies, differing in the degree of discretion granted the trial court, and a provision governing the imposition of extended terms. The sentence terms which may be imposed under these provisions are as follows (terms are in years):

	Ordinary terms		Extended terms
	§6.06	§6.06A	§6.07
First degree felony:			
minimum	1 to 10	1 to 10	5 to 10
maximum	life	up to 20 or life	life
Second degree felony:			
minimum	1 to 3	1 to 3	1 to 5
maximum	10	up to 10	10 to 20
Third degree felony:			
minimum	1 to 2	1 to 2	1 to 3
maximum	5	up to 5	5 to 10

See Also Section 210.6 (Sentence of Death).

2. In establishing this framework, the Drafters reached several conclusions as to the role of the court in sentencing. These were as follows:

> "The first is that the existence of legislation authorizing an exceedingly long sentence tends to drive sentences up in cases where the impetus ought to be in exactly the other direction. In most cases, the public would be better served by shorter, rather than longer, sentences and by a serious attempt to reintegrate the offender into the society to which he will ultimately return no matter how long his sentence. The second impact of such a sentencing structure is that it is one of the major causes of the much discussed disparity problem. If the range is twenty years for an offense where most offenders who should go to prison should get less than five, the authorized range is an open invitation--and the results verify the hypothesis--to sentences which irrationally spread the whole gamut of the authorized term. The result of such disparity is serious injustice and a loss of respect for the system." (MPC Tentative Draft No. 2, p. 24 (1954)).

See also ABA, Report on Sentencing Alternatives and Procedures §3.1 (Tent. Draft 1968).

3. The Court's Role in Sentencing. The Drafters believe that the court should play a major role in sentencing and that the matter should not be left entirely to the administrative agencies of the penal-correctional system:

> "It is desirable that the court play a substantial role in sentencing, with authority not only to determine whether the offender should be sentenced to imprisonment but also to exercise some influence upon its length. Proposals to shift such authority to a treatment board or to vest it wholly in correctional administration, such as an Adult Authority, were considered at length...but were not accepted. A sound distribution of authority between the court and the administrative organs of correction, rather than a wholesale shift of power, is the end to be achieved. Such a distribution should attempt to give the agencies involved the type of power and responsibility that each is best equipped to exercise, given the time when it must act, the nature of the judgments called for at that stage, the type of information that will be available for judgment and the relative dangers of unfairness or abuse. (MPC Tentative Draft No. 5, p. 24 (1956)).

The same recommendation is made by the ABA Committee on Minimum Standards Report, Sentencing Procedures and Alternatives, §1.1 pp. 43-47 (Tent. Draft 1968) This vesting of broad power in the court is in accord with our law. N.J.S. 2A:164-17. See State v. Cooper, 54 N.J. 330 (1969) (Maximum and minimum differed by one day.)

4. Maximum and Minimum Sentences. The Drafters felt it desirable that sentences of imprisonment for felony be indeterminate, in all cases, with a "substantial spread" between the minimum and the maximum. Maxima, in their opinion, at least for most offenses, need not and should not be inordinately high. "When they are, they have small practical utility and offer danger of abuse." MPC Tentative Draft No. 5, p. 25 (1956). As discussed in connection with Section 6.01, our present statutes have a wide range of potential penalties, some quite inconsistent with one another, and many of very great potential length. This section would establish a framework into which all offenses would be fit.

Under the Code as originally proposed, the maximum would have been fixed by statute but the Court would have had "some control over the minimum, mainly for deterrent purposes and especially in dealing with the gravest crimes, where the deterrent factor normally looms largest at the time of sentencing." MPC Tentative Draft No. 5, p. 26 (1956). This provision was re-drafted using the two alternatives set forth above. The primary proposal would give no discretion to the court in setting the maximum. The alternative differs in that in addition to setting a minimum in all cases the court must also set a maximum. The final paragraph of the alternative requires that the maximum be at least twice as long as the minimum.

The Model Sentencing Act and the Proposed Michigan Code do not provide for the imposition of any minimum term of imprisonment, and instead place the responsibility for determining when the offender is "ready to return to society" upon the correctional authorities, basing their approach to the problem on the fact that the prevailing failure of institutional rehabilitation of criminal offenders is primarily predicated upon the impossibility of a sentencing judge to accurately predict when the particular offender's future behavior will merit his release and, therefore, because the sentence chosen proves to be of too great a duration the offender becomes embittered and his chances for rehabilitation markedly decrease. To adopt the Model Sentencing Act scheme would work a major change in judicial responsibility in sentencing in this State.

The question of whether the primary provision or the alternative should be adopted is an important policy choice. The basic argument in favor of the primary draft (i.e., no judicial discretion as to maximum) is set forth by Professor Wechsler in "Sentencing, Corrections, and the Model Penal Code," 109 U. Pa. L. Rev. 465, 475-479 (1961):

> "When a prison sentence is imposed, its motivation should inhere,...in the court's judgment that it is required to meet the risk that the defendant will commit another crime during the period of a suspension or probation, or to subject the

defendant to correctional treatment that can be provided best within an institution, or, finally, to avoid the depreciation of the seriousness of the crime, under the circumstances of its perpetration.

"The point on which the court can make the best and most decisive judgment at the time of sentence is the last, which calls for an appraisal of the impact of the disposition on the general community, whose values and security have been disturbed. When a sentence of imprisonment is deemed to be essential on this ground, it often will be sufficient for the purpose if the sentence does no more than give the organs of correction reasonable scope for dealing with the individual in light of their evaluation of the case. In that event, the sentence should employ a maximum but not a minimum--beyond the year which is regarded as an institutional necessity for any constructive program to proceed. Cases will arise, however, where a sentence with a maximum alone will not afford the community the reassurance it should have. To enable it to deal with cases of this kind, the court should be empowered to prescribe a minimum duration of the term. The minima that may be used should ordinarily be short, since any loss of liberty measured by years is a substantial deprivation. Hence, only for the very gravest crimes--felonies of the first degree--is a long minimum allowed.

"Even when aided by a competent presentence study and report, the court is poorly equipped at the time of sentence to make solid and decisive judgments on the period required for the process of correction to realize its optimum potentiality or for the risk of further criminality to reach a level where release of the offender appears reasonably safe. The organs of correction, on the other hand, are best equipped to make decisions of this order and to make them later on in time, in light of observation and experience within the institution. If limits are to be imposed on their determination of these questions in the interest of protecting prisoners against undue protraction of release, the limits are best framed as legislative standards based upon a general appraisal of the gravity of various offenses, rather than on judicial assessments of the discrete case. Whether and how long the prisoner ought to be held beyond the minimum, if any, fixed by the court should, therefore, be remitted to correctional administration, that is, to the Board of Parole--within statutory limits varying with the degree of the offense. Professional parole administration, recognizing that the statutory limits envisage the worst cases in a class--not the ordinary or the best--should be relied upon to effect earlier release when the extremes are not involved. There is, accordingly, no reason to look to the court to set a maximum duration of the term other than the legislative maximum prescribed for the offense.

"Furthermore, and certainly of prime importance, it is an abiding difficulty of judicial sentencing that different judges vary in their judgments, producing a disparity in the terms of commitments transcending any that can be attributed to the just individualization of each sentence. The problem can be mitigated slightly by procedural devices like review of sentences on appeal or by a special court, but these are not solutions. The best approach to a solution lies in reducing the variety of the commitments. This can be done with the least sacrifice of other values by employing a fixed maximum determined by the grade and the degree of the offense. That type of maximum, precisely for the reason that it is based upon a generalized legislative judgment governed by the character of the offense, ought to exert far less restraint upon parole boards in their timing of an earlier release than would a maximum purporting to reflect a judgment of the court upon the case at hand. It should, therefore, be most conducive to the application by the board of similar criteria to all the cases it must judge, with consequent reduction of disparity.

"This was the reasoning accepted by the Council and the Institute upon its first consideration of the draft. The position has its critics upon both the points involved. The Advisory Council of Judges of the National Probation and Parole Association, for example, opposed judicial power to impose a minimum and argued for judicial power to control the maximum within the statutory limits. Its concept of the proper form of sentence is, accordingly, the court's determination of a maximum alone, within the maximum prescribed by statute, with authority in the parole board to release at any time.

"The argument against the minimum was not developed in detail, beyond the statement that minimum terms which 'may be inordinately high' constitute one of 'the truly destructive elements in sentencing.' This is, of course, a truism that will not be disputed. The Council of the Institute did not regard the proposed discretionary minima as such and hence was not persuaded by the submission. Some form of minimum, fixed either legislatively or judicially or by jury, or derived from the fact that parole eligibility does not arise until some fraction of the maximum is served, will now be found, it may be useful to observe, in most of our jurisdictions.

"The argument against the fixed maximum stressed the infinite variations in the gravity of crimes which fall within a single statutory definition and in the character of individual offenders. Justice demands, it was contended, that the court be authorized to take account of such diversities by shortening the maximum where mitigating circumstances are present. The answer to it was that insofar as it is valid there are other means provided by the draft

to effect needed mitigations, notably a section which provides that whenever the court 'is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly.' The contemplation of the Code, in short, was that such mitigation be effected by a reduction of degree rather than by introducing the much greater variation in the maxima that full judicial control would necessarily entail. The rejoinder to this answer, however, was that a court should be expected to be more reluctant to adjudicate reduction in degree than to exercise discretion to impose a shorter sentence thantthe statutory limit. There is, I think, some force in this rejoinder, though whether it should be regarded as decisive is, of course, another question.

"A further point of somewhat different nature has been made by...the Code Advisory Committee. Their argument is that denial of discretion to the judge respecting maximum commitment may be less likely to enlarge the discretion of parole boards than to enhance the prosecutor's influence on dispositions. The argument is that practical administration presupposes a preponderance of pleas of guilty. If the court is not empowered to reduce the maximum upon a plea, the prosecutor will take up the slack in his selection of the charge, offering a lesser charge as the consideration for a plea. Judicial control of the maximum has, it is urged, a tendency at least to keep this process in the court so far as possible.

"Evaluation of the point is difficult because reduction of the charge by the prosecutor is a general phenomenon, regardless of the form of sentence. We did, however, seek to test it by experience in California, where statutory maxima which the judge is not empowered to control are employed. Our conclusion was that practice there does not substantially diverge from that in states where the judicial power to vary maxima is conferred. However, it is still the case that mitigation of this kind will occur necessarily in practice. To the extent that this is so, there is a limit on the possibility of really dealing with disparity by legislation with respect to form of sentence.

"Efforts to do so may, indeed, sometimes produce ironical results, as in the case of the new amendments modifying the federal sentencing process. Those changes, which permit the court to fix a lower minimum than the one-third of the fixed sentence that was formerly prescribed by law, are wholly sound in policy, since minima should not be mandatory on the court. Yet the amendments obviously will increase and not reduce disparity, since variations formerly confined to maxima will now extend to minima as well.

"A final argument advanced against the draft was that fixed maxima result in longer prison terms than sentences in which the maximum is subject to control. By hypothesis, they do result in

longer maxima, assuming that the legislative limit is the same, since judicial control can only result in reduction of the maximum in some proportion of the cases in which sentence is imposed. But the contention that fixed maxima result in longer actual retention before release upon parole is most emphatically not established. Paul Tappan's studies suggest strongly that the opposite is probably the case, a position fortified on a priori grounds by the consideration, previously stated, that parole boards normally will give far more attention to a maximum fixed for the special case than one decreed for cases as a class. Moreover, a reduction in the length of terms can hardly furnish a sufficient policy for legislation. The goal is surely to devise the best among imperfect instruments for shaping terms to serve the proper ends of sentencing and of correction, making them long when long terms are in order and short when they are not. What is involved is a most subtle problem in the distribution of authority between the courts and other organs of correction--to give each agency the power and responsibility that each is best equipped to exercise, given the time when it must act, the nature of the judgments called for at that stage, the type of information that will be available for judgment, and the relative dangers of unfairness and abuse.

"On total balance, we believe that our choice of the fixed maximum was right but we are also clear that there is room for reasonable disagreement on the issue. The Institute Council has accordingly approved an alternate provision under which the court would be empowered to set shorter maxima within the statutory limit. The provisions as to minima remain, subject, however, to the limitation that the minimum may not exceed one-half the maximum--a limitation that becomes essential once the maximum may be reduced by the court. Thus if the court, under the alternate provision, were to set a maximum of five years on a sentence for a second degree felony, the minimum could not exceed two and one-half, rather than three--the limit otherwise imposed."

See also ABA Report on Sentencing Alternatives and Procedures §§3.1 and 3.2, pp. 129-160 (Tent. Draft 1968).

5. Extended Terms. The Code continues the existing law in distinguishing between extended terms and ordinary terms for the same crime, based upon the character of the offender:

"When an extended term is employed, the Court should be empowered to raise both the minimum and maximum, within prescribed statutory limits. The lesson of experience with habitual offender laws is, however, that maxima of life imprisonment should not be lightly authorized and that, in any case, long terms should be discretionary and not mandatory. When they are mandatory, they result in inequality of application and extensive nullification.

> In the case of first degree felonies, the extended term provision cannot be of substantial practical importance, since the ordinary term carries a maximum of life imprisonment." (MPC Tentative Draft No. 5, p. 25 (1956)).

As will be seen in connection with Section 7.03, the criteria for imposing extended terms is somewhat different under the Code from under existing law. Our equivalent is found in N.J.S. 2A:85-8 through 13, the Habitual Offenders Law. For a conviction preceded by a conviction of a high misdemeanor, the offender may be imprisoned for a period of twice the maximum sentence for the new offense; for a third conviction, three times the maximum; and for a fourth conviction, life imprisonment. Similar increased penalties are available for multiple narcotics offenses. N.J.S. 24:18-47. See also N.J.S. 2A:164-3 et seq., (the Sex Offenders Act) and N.J.S. 2A:151-5 (extra term for armed offenders).

In addition to the Model Penal Code's proposal, this particular problem was considered and dealt with under The Model Sentencing Act which limited the scope of application of an extended term (of any length up to thirty years irrespective of the crime involved with no minimum term permitted) to the clearly "dangerous offender," specifically excluding the possibility of invoking extension to a defendant who had committed crimes against property. This extended term is justified on the ground that such a "dangerous offender" had seriously demonstrated that he is incapable of functioning within the community and, therefore, society's need to protect itself merited his lengthy incarceration. The Model Sentencing Act, however, would not proportion the extra term to the crime. In this regard, it seems undesirable.

This problem has been dealt with in a variety of ways in other jurisdictions. The Drafters of the New York Code completely reject the system proposed both under the Model Penal Code and the Model Sentencing Act. This was on the basis of the procedural aspects concerning proof of the statutory prerequisites or conditions required for use of an extended term. Instead,

they defined a "persistent offender" as a person who has been convicted of two prior felonies and authorized the court to impose the sentence provided for a Class A felony if the court:

> "...is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest...." New York Penal Law 70.10

	Ordinary Term		Persistent Offenders	
Felonies	Minimum	Maximum	Minimum	Maximum
Class A	15-25	life	15-25	life
Class B	1-3	1-25	15-25	life
Class C	1-3	1-15	15-25	life
Class D	1-3	1-7	15-25	life
Class E	1-3	1-4	15-25	life

Pennsylvania's Proposed Crimes Code basically adopted the Model Penal Code's proposal with one significant variation, i.e., that an "extended term" is also authorized if "the defendant was armed with or used a bomb, machine gun or other fully automatic firearm (any firearm from which a number of shots can be rapidly or automatically discharged with one continuous pull of the trigger) in the course of committing the offense." This is in accord with N.J.S. 2A:151-5. (Additional Sentence for armed criminals).

The Minnesota Statute provides for a discretionary "extended term," the maximum of which cannot exceed the maximum available for the offense involved multiplied by the number of prior felony convictions within the past ten years. This increased punishment can only be imposed if, in addition to finding the commission of the prior felonies, the sentence court is convinced:

> "...that the defendant is disposed to the commission of criminal acts of violence and that an extended term of imprisonment is required for his rehabilitation or for the public safety." Minn. Stat. Ann. 609. 155-16.

Provision is made for immediate parole eligibility in all cases except life sentences, and no minimum term can be imposed. It is comparable to the Model Sentencing Act's proposal that an "extended term" should not be available solely because the defendant has some propensity towards criminality and that such criminal tendencies involve acts of violence.

6. The Length of the Terms. The specific terms established in the Code are justified as follows:

> Maximum:
>
> "The ordinary maxima of 5 years, 10 years and life, with reductions contemplated for good behavior, are based in part on a priori considerations but in major part on the reflection of good practice in the operation of release procedures even when longer maxima have been employed." (MPC Tentative Draft No. 5, p. 25 (1956))

Further, the fact that Section 6.10 adds a period of parole and of potential additional imprisonment for violation of parole, to the maximum should be given some weight.

> Minimum:
>
> "The minima of 1-2 years, 1-3 years and 1-(10) years are not designed to give the Court large scope, except in dealing with first degree felonies, but it is thought that some such flexibility may prove of use. A minimum of one year on prison sentences for felony appears, in any case, to be an institutional necessity In fixing the maxima for the extended terms, the object has been to set them at the highest limits deemed to be practical and reasonable on conviction of the types of crimes involved." (Ibid.)

SECTION 6.08. SENTENCE OF IMPRISONMENT FOR MISDEMEANORS AND PETTY MISDEMEANORS; ORDINARY TERMS.

A person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the Court and shall not exceed one year in the case of a misdemeanor or thirty days in the case of a petty misdemeanor.

* * * *

SECTION 6.09. SENTENCE OF IMPRISONMENT FOR MISDEMEANORS AND PETTY MISDEMEANORS; EXTENDED TERMS.

(1) In the cases designated in Section 7.04, a person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to an extended term of imprisonment, as follows:

(a) in the case of a misdemeanor, for a term the minimum of which shall be fixed by the Court at not more than one year and the maximum of which shall be three years;

(b) in the case of a petty misdemeanor, for a term the minimum of which shall be fixed by the Court at not more than six months and the maximum of which shall be two years.

(2) No such sentence for an extended term shall be imposed unless:

(a) the Director of Correction has certified that there is an institution in the Department of Correction, or in a county, city (or other appropriate political subdivision of the State) which is appropriate for the detention and correctional treatment of such misdemeanants or petty misdemeanants, and that such institution is available to receive such commitments; and

(b) the (Board of Parole) (Parole Administrator) has certified that the Board of Parole is able to visit such institution and to assume responsibility for the release of such prisoners on parole and for their parole supervision.

* * * *

Sections 6.08 and 6.09 Commentary

1. The Code does not provide for indeterminate sentences for misdemeanors or petty misdemeanors, except where an extended term is used.

> "The cases of minor crime where indeterminacy really is important are included in the situations where extended terms may be imposed. Since paroling agencies and parole supervision are extremely rare upon the local level, any unnecessary use of indeterminate sentences on that level must be avoided on obvious, practical grounds. Even when the extended term is used, most jurisdictions would now find it necessary to use bench parole as the releasing mechanism, a solution that we do not think ideal." (MPC Tentative Draft No. 2, p. 27 (1954)).

Our law is in accord. See N.J.S. 2A:164-15 and, as to the Disorderly Persons Act see N.J.S. 2A:169-4.

2. Extended Terms. Section 6.09(2) imposes quite severe restrictions upon the imposition of extended terms in the case of misdemeanors and petty misdemeanors based upon the availability of both local correctional facilities and State Parole personnel. From the Drafters' comments it seems clear that they had some doubts about extended terms in these cases because of the lack of facilities:

> "It should be added that we are, of course, aware of the grossly unsatisfactory character of most local penal institutions and regard improvement in this area as one of the largest needs of the entire penal system. If the proposals here advanced serve to direct energy towards the development of specialized local institutions for dealing with the types of persons sentenced to extended terms, we should regard that as a most constructive path. A possibility in this connection is that state as distinct from local responsibility might begin to be extended at this point." (MPC Tentative Draft No. 5, p. 25 (1956)).

3. New Jersey does not now have any sort of "extended term" provision for sentencing when the offense is below the grade of what is now called a misdemeanor. There is some question about whether there is any necessity for having extended terms for the type of conduct involved in misdemeanors and petty misdemeanors under the Code. This conclusion was arrived at by the Advisory Committee to the Proposed Minnesota Code whose recommendation that the Model Penal Code's provision not be adopted was accepted by that State's Legislature based on the following grounds:

> "These requirements are intended to assure that the habitual offender act is applied only in those cases of the serious offender who for his own sake or in the interest of the public should be confined for a period longer than the maximum provided by the statute violated and that it should not be applied to the offender who is guilty of two or more isolated criminal acts and not otherwise shown to be disposed to criminal behavior dangerous to the public. By their very nature, misdemeanors and gross misdemeanors do not involve acts of violence, dangerous to the public and calling for extended periods of confinement of the perpetrator. Hence, they have been excluded from the application of the recommended sections."

The Code's proposal was recently rejected by the Drafters of the New York Code for similar reasons. See New York Penal Laws §70.40(2). Likewise, such a sentence was rejected under the Model Sentencing Act, Section 9, and the A.B.A.'s Project in Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Section 2.5(b) (1968).

SECTION 6.10. FIRST RELEASE OF ALL OFFENDERS ON PAROLE; SENTENCE OF IMPRISONMENT INCLUDES SEPARATE PAROLE TERM; LENGTH OF PAROLE TERM; LENGTH OF RECOMMITMENT AND REPAROLE AFTER REVOCATION OF PAROLE: FINAL UNCONDITIONAL RELEASE.

(1) First Release of All Offenders on Parole. An offender sentenced to an indefinite term of imprisonment in excess of one year under Section 6.05, 6.06, 6.07, 6.09 or 7.06 shall be released conditionally on parole at or before the expiration of the maximum of such term, in accordance with Article 305.

(2) Sentence of Imprisonment Includes Separate Parole Term; Length of Parole Term. A sentence to an indefinite term of imprisonment in excess of one year under Section 6.05, 6.06, 6.07, 6.09 or 7.06 includes as a separate portion of the sentence a term of parole or of recommitment for violation of the conditions of parole which governs the duration of parole or recommitment after the offender's first conditional release on parole. The minimum of such term is one year and the maximum is five years, unless the sentence was imposed under Section 6.05(2) or Section 6.09, in which case the maximum is two years.

(3) Length of Recommitment and Reparole After Revocation of Parole. If an offender is recommitted upon revocation of his parole, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the Board of Parole but shall not exceed in aggregate length the unserved balance of the maximum parole term provided by Subsection (2) of this Section.

(4) Final Unconditional Release. When the maximum of his parole term has expired or he has been sooner discharged from parole under Section 305.12, an offender shall be deemed to have served his sentence and shall be released unconditionally.

* * * *

§6.10 Commentary

1. First Release of All Offenders on Parole. Section 6.10(1) provides that any offender sentenced to imprisonment for an indefinite term in excess of one year (i.e., all felonies and extended terms for lesser crimes) must first be released conditionally on parole at or before the expiration of his maximum sentence. MPC Tentative Draft No. 5, p. 72 (1956).

> "The (Code) thus proceeds on the view that conditional release on parole, with its accompanying supervision, is a normal and necessary phase in the transition from prison life to full freedom in the community; and that it should, therefore, be the invariable incident of any long-term prison sentence, not an exceptional act of grace bestowed on good risks and withheld from the bad.
>
> "This conception requires the abandonment of the idea that the parole period is a portion of the original prison sentence not required to be served in prison. It calls rather for thinking of a period of supervised release--a 'parole term'--as the

invariable incident of any prison sentence. The prison sentence determines the minimum period that must be served and the maximum period that may be served in prison prior to conditional release. But whenever conditional release occurs there are further periods that must and may be served upon parole, or, if parole should subsequently be revoked, in prison until re-parole or ultimate discharge. This further period (which may or may not be within the limits of the original prison sentence) is by operation of law made an incident of any sentence of imprisonment for an indefinite term, i.e., any sentence other than a fixed term sentence for a misdemeanor or a petty misdemeanor....

"A prison sentence for an indefinite term has, in short, two parts. The first part determines when the offender may and when he must be released on parole. These terms are fixed by sections 6.06, 6.07, 6.09 and 7.06,....The second part determines when the offender may and when he must be discharged from parole, or if his parole has been revoked, from his commitment for parole violation. These terms are fixed by (this) section...." (Id. at 72-73).

2. This approach is a substantial variation from the system now in effect in this State and elsewhere. Under our law, the Parole Board's power to control a convicted person is limited by the maximum of the sentence imposed upon him. This is a result of the fact that parole is something which was superimposed upon an existing system of imprisonment--it has, therefore, been used only to release prior to the time that would otherwise mark the termination of the sentence. Wechsler, Sentencing, Correction and the Model Penal Code, 109 U. Penn. L. Rev. 465 at 484. N.J.S. 30:4-113 (Parole from institutions other than State Prison) and N.J.S. 30:4-123 24 (Parole from State Prison).

"The theory of parole is not, however, that it is an act of leniency by the Board--like Christmas pardons by a governor hard pressed for reelection--but rather that a period of supervised conditional release is a rationally necessary intermediate stage between institutionalization and full restoration to the free community, a stage that is both helpful to the individual and needful for community protection. So long as release on parole must be effected by reduction of the period that otherwise might measure institutional commitment, it is difficult to make the theory hold. Moreover, the system works an obvious anomaly. The worst risks, held the longest time by the parole board, have the shortest period of supervision while the best risks, released early in their terms, are subject to the longest period of control.

> "The anomaly has not escaped the attention of the leaders of parole. As long ago as 1940, Frederick A. Moran of the New York Board of Parole, purporting to speak for 'an increasing number of practical prison administrators and members of boards of parole,' said that 'they raise the question whether any individual should be released from prison without parole supervision,' adding that: 'As long as parole is limited in its use to carefully selected prison inmates, its value to prison administrators, to the prisoner, and to the community must necessarily be limited.' We thought the answer to the question put by Moran was clear and we resolved to make it in the Code." (Ibid.) (109 U. Penn. L. Rev. 484)

rofessor Wechsler also answers the objections of some correctional

uthorities to the plan:

> "Two criticisms of the plan have been offered. The first, which sounds like a neurotic clinging to his symptoms, objects that failures of bad risks held by the Board as long as possible would blacken the good name of parole. This is the view Moran denounced in language I have quoted and I rest upon his words. The second is that adding the separate parole term to the maximum of the initial form of sentence would result in making our sentences unduly long. But long for whom? Not for most persons, who will be released as they now are after a year or two or three, regardless of the fact that they might legally be held for a longer period--frequently for very long. For such prisoners, the separate parole term more probably will mean reduction of the period in which they will be subject to control and recommitment. Long only, then, for prisoners who are held to or close to expiration of the time when their release is made compulsory by law. Is length objectionable in such cases or are the retention judgments of our boards entitled to be given more regard?
>
> "Those who are apprehensive nonetheless about the possible length of our terms should find some reassurance in another section of the draft. Just as the Code attempts to formulate criteria for much discretionary action of the court, as with respect to a probationary disposition or suspension, so it sets forth criteria to guide release decisions on parole. Section 305.9 provides as follows..." (Id. at 486.)

See also Wechsler, Codification of the Criminal Law in the United States,

58 Colm. L. Rev. 1425, 1455 (1968).

Relative to this provision that all prisoners having sentences of one year or more be released on parole, it should be noted that there is substantial support among correctional authorities for universal parole. See the results of a questionnaire in MPC Tentative Draft No. 5, p. 78-80 (1956). It should be noted that in 1956, more than 82% of all such releases in New Jersey were on parole. This is among the highest in the country.

3. As originally drafted, this Section did not make it clear that only the first release must be on parole. A release, after revocation of first parole, at the end of the maximum term plus the implied term, need not be on parole. Section 6.10(1) was redrafted to make this explicit. MPC Proposed Official Draft, p. 103 (1961).

4. Sentence of Imprisonment Includes Separate Parole Term. Section 6.10(2) operates to remove the anomalous situation referred to above by adding to every indefinite term of imprisonment, as a separate portion of the sentence, a term of parole or recommitment for violation of the conditions of parole after the offender's first release on parole. Thus, every sentence is treated as embodying two separate parts: first, the maximum period for which the prisoner may be held prior to his first release upon parole; and second, a term of parole or recommitment for the violation of parole, which starts to run when the parole release occurs. Wechsler, 109 U. Penn. L. Rev. 465, at 484 (1961).

5. The Length of the Separate Term. The Drafters had some difficulty in shaping the dimensions of the second term. As originally drafted, its measure was determined by the length of time the prisoner was held before release, so that those released early would be subject to short periods of supervision and those released after long confinement to control for a long time. See MPC Tentative Draft No. 5, pp. 73-75 (1956). This plan was seriously criticized on the grounds that (1) it allowed the possibility of excessive periods of supervision (and of imprisonment upon revocation) and (2) it was too complex. See Wechsler, 109 U. Penn. L. Rev. 465, 485 (1961). As was finally proposed, the parole term has a minimum of one year and a maximum of five years, in the case of felonies, and two years, in the case of misdemeanors, petty misdemeanors or persons sentenced as young adult offenders. See MPC Proposed Official Draft, p. 103 (1961). Under Section 305.12, the Parole Board is given the power to discharge in between those terms.

6. Length of Recommitment and Reparole After Revocation of Parole.

Another major change in the existing law would be effected by Section 6.10(3) concerning the period of time which an offender could be required to serve, in prison or on reparole, following a revocation of parole:

> "The parole term...not only governs the minimum and maximum period during which the offender is subject to supervision but also the period for which he may be re-imprisoned upon revocation of parole or subjected to supervision upon re-parole. See sections (6.10(3)), 305.20, 305.22. Time served successfully upon parole prior to revocation serves, moreover, to reduce the parole term despite a later revocation; the offender is not required to 'back up' and serve again in prison any time that he has served upon parole.
>
> "We think that this arrangement serves the sense of justice which offenders share with other men and that it is, therefore, desirable in itself and a constructive influence upon correction. Parole violation, to be sure, reflects a failure on parole and gives rise to temptation to effect a harsh reprisal. But here too it is necessary to frame policy that reflects all the multiple objectives of the process of correction, and Draconian severity for what may be a fairly minor violation seems to us to be unjustiable. If the parole violation consists of commission of a new crime, it is generally fair that the offender should be prosecuted and convicted and not merely recommitted by the Board. In that event the sentence for the new offense, which the Court may order to run consecutively to the balance of the parole term (sections 7.06(2); 305.20), will assure that substantial re-imprisonment may be imposed. But if the violation involves only breach of condition, we see no reason for the forfeiture of credit for time served on parole. For if the breach occurs, as most do, early in the parole period, the parole term is long enough to sustain recommitment for a substantial time. If, on the other hand, the breach occurs toward the end of the parole period, we do not think it is a weakness that the length of any recommitment, other than on sentence of a new offense, must necessarily be short. When the offender has effected a law-abiding adjustment in the community for a substantial period of time, the power to re-imprison him for his original crime ought to be reasonably limited and exercised with great discrimination. Moreover, any system of parole terms will present the problem of diminished power in its sanctions as the end of term approaches. What is needed is that the terms be so shaped that they are generally adequate and fair. We submit that these terms are."

Our existing law is in accord with that rejected by the Drafters of the Code.

N.J.S. 30:4-123.24 provides as follows:

> "Serving balance of time after revocation
>
> "A prisoner, whose parole has been revoked because of a violation of a condition of parole or commission of an offense

> which subsequently results in conviction of a crime committed while on parole, even though such conviction be subsequent to the date of revocation of parole, shall be required, unless said revocation is rescinded, or unless sooner reparoled by the board, to serve the balance of time due on his sentence to be computed from the date of his original release on parole. If parole is revoked for reasons other than subsequent conviction for crime while on parole then the parolee, unless said revocation is rescinded, or unless sooner reparoled by the board, shall be required to serve the balance of time due on his sentence to be computed as of the date that he was declared delinquent on parole."

Further, under N.J.S. 30:4-123, 27, "No part of a sentence, for which parole has been granted and revoked, shall be deemed to be served by a prisoner, whose parole was revoked, while he is serving a sentence for an offense other than the one for which he was paroled." See Donnelly v. New Jersey State Parole Board, 91 N.J. Super. 302 (App. Div. 1966)

7. If the parolee is convicted of a new offense, committed while on parole, Sections 7.06(2) and 305.20 provide that the prison sentence for the new crime and the balance of the parole term shall run concurrently or consecutively as the court determines upon sentence for the new offense. If the terms are consecutive, the remainder of the minimum of the parole term if any, is added to the minimum of the new term and the remainder of the maximum of the parole term is added to the maximum of the new term. MPC Tentative Draft No. 5, p. 77 (1956). This is our law. State v. Grant, 102 N.J. Super. 164, 170 (App. Div. 1968) holds that N.J.S. 30:4-123.27, quoted above, is a limitation upon the power of the Parole Board but not upon the inherent power of a sentencing court to make sentences run concurrently or consecutively.

8. Final Unconditional Release. Subsection (4) provides for final release when the maximum parole term expires (whether being served on parole or in prison) or when the defendant is sooner discharged under Section 305.12. See also Sections 305.15 and 305.16 as to termination of supervision.

SECTION 6.11. PLACE OF IMPRISONMENT.

(1) When a person is sentenced to imprisonment for an indefinite term with a maximum in excess of one year, the Court shall commit him to the custody of the Department of Correction (or other single department or agency) for the term of his sentence and until released in accordance with law.

(2) When a person is sentenced to imprisonment for a definite term, the Court shall designate the institution or agency to which he is committed for the term of his sentence and until released in accordance with law.

* * * *

§6.11 Commentary

1. The Drafters' Comments to this Section explain its import:

"This section has been drafted on the premise that the present division between state and local responsibility with respect to imprisonment, distinguishing generally between felons and misdemeanants, is likely to endure. It is, therefore, unlikely to be meaningful to think in terms of a unified system of correction in dealing with the misdemeanant. In such cases, therefore, we call upon the Court to fix the institution for imprisonment. A unified state system on the federal mode seems to us indispensable, however, in the case of felony commitments; and the section has been drafted on the premise that such a system exists or will be inaugurated on enactment of the Code. Accordingly, on sentence of imprisonment for felony, the sentence should be to the custody of the department of correction or whatever comparable, single agency the state provides." MPC Tentative Draft No. 2, p. 28 (1964)

2. This proposal is generally similar to the existing New Jersey law. N.J.S. 2A:164-15 provides as follows:

"Place of imprisonment

"Every person sentenced under the laws of this state to imprisonment for any time less than 1 year shall be confined in the common jail of the county where conviction was had, or the county workhouse or penitentiary, in the discretion of the court, and there safely kept until the term of his confinement shall expire and the fine and costs of prosecution be paid, or until he shall be discharged by due course of law; provided, in counties of the first class no sentence exceeding 6 months shall be made to the common jail of the county. Every person so sentenced to the county workhouse or penitentiary shall be transferred to and confined therein within 10 days after the sentence.

"Every person sentenced to hard labor or imprisonment, except as hereinafter provided, for any term of 1 year or longer shall be imprisoned in the state prison; except that in any county in which a penitentiary is located, a person sentenced to hard labor and imprisonment for a term of not less than 1 year and not exceeding 18 months, shall be imprisoned in the penitentiary of such county

instead of the state prison, unless the person so convicted shall have previously served a term in the state prison, in which case the person so convicted may, in the discretion of the court, be imprisoned in the state prison; provided, nothing herein contained shall be construed to prevent the sentence of persons to penitentiaries in counties of the first class to terms of between 6 months and 1 year.

"In any county in which a workhouse is located, any person sentenced to hard labor and imprisonment for a term of not less than 1 year and not exceeding 18 months, may, in the discretion of the court so sentencing, be imprisoned in such county workhouse instead of the state prison or county penitentiary.

SECTION 6.12. REDUCTION OF CONVICTION BY COURT TO LESSER DEGREE OF FELONY OR TO MISDEMEANOR.

If, when a person has been convicted of a felony, the Court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly.

* * * *

§6.12 Commentary

1. However carefully offenses are defined, it is inevitable that cases will arise where a conviction and a disposition in accordance with the Code will seem unduly harsh to those responsible for its administration. See Section 2.12 (De Minimus Infractions) and the Commentary thereto. Such cases are now dealt with typically by a plea of guilty or conviction of a lesser degree or grade or crime than the defendant actually has committed. See, e.g., State v. Ashby, 43 N.J. 273 (1964); and State v. Bess, 53 N.J. 10 (1968) (reduction of sentence on appeal). In some jurisdictions, the Court is authorized in its discretion to impose either a State Prison sentence or a jail sentence and, when the Court pursues the latter course, the conviction stands in some States as for a misdemeanor rather than a felony. Statutes are collected in MPC Tentative Draft No. 2, p. 29 (1954).

2. The Drafters gave these reasons for including this provision:

> "We think such powers of reduction are both necessary and desirable features of a system of sentencing but we regret to see them assumed or exercised covertly rather than expressly vested in the court and utilized with candid statement of the grounds. We also think such power better exercised by the court than by the agencies of prosecution, where the power is mainly lodged in practice, though infrequently avowed. This section, therefore, grants a power to the Court to save the defendant from a felony conviction on his record, certainly one of the motives of present practice in accepting a plea to a misdemeanor when a felony is charged....How broad the power ought to be is certainly a difficult and doubtful question but that some power should exist we think quite clear. Any device that brings the process of reduction into open Court and denudes it of its present nullifying quality appears to us to be a gain." (MPC Tentative Draft No. 2, p. 29 (1954)

3. A similar provision was recommended by the A.B.A.'s Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures §3.7 197 (1967). See also New York Penal Law §70.05:

> "When a person is sentenced for a Class D or a Class E felony and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less."

4. No such alternative is now available in New Jersey.

SECTION 6.13. CIVIL COMMITMENT IN LIEU OF PROSECUTION OR OF SENTENCE.

(1) When a person prosecuted for a (felony of the third degree,) misdemeanor or petty misdemeanor is a chronic alcoholic, narcotic addict (or prostitute) or person suffering from mental abnormality and the Court is authorized by law to order the civil commitment of such person to a hospital or other institution for medical, psychiatric or other rehabilitative treatment, the Court may order such commitment and dismiss the prosecution. The order of commitment may be made after conviction, in which event the Court may set aside the verdict or judgment of conviction and dismiss the prosecution.

(2) The Court shall not make an order under Subsection (1) of this Section unless it is of the view that it will substantially further the rehabilitation of the defendant and will not jeopardize the protection of the public.

* * * *

§6.13 Commentary

1. This Section is addressed to the question of whether and to what extent civil commitment rather than a sentence for a crime should be employed as the method for public protection in specific situations.

> "Putting aside the problem of the irresponsible, which will be dealt with in another context, the issue has been projected mainly with respect to chronic alcoholics, narcotic addicts, persons suffering from mental abnormality short of psychosis (including so-called sex psycopaths) and, perhaps most doubtfully, prostitutes charged with plying their trade. These are all situations where it has been argued that threatened condemnation on the one hand or punitive dispositions, on the other, offer minimal potentialities for effective control and may be a positive handicap to therapeutic treatment, though therapy is necessary and may have some effectiveness. Prevailing law has moved, to some extent, in this direction, raising by its motion issues quite as difficult as any it has sought to solve." (MPC Tentative Draft No. 2, p. 30 (1954)).

2. In New Jersey, only narcotics addicts and sex offenders are singled out for treatment different from other offenders. Both, however require conviction of a crime and thus are sentencing alternatives to the criminal process. As to sex offenders, see N.J.S. 2A:164-3 et. seq. The operation of the Sex Offenders Act described in New Jersey Sentencing Manual for Judges (1969). As to narcotics addicts, see N.J.S. 30:6C-6 (applicable only to some narcotics offenses) and N.J.S. 4-123.43 (Parole Board power to release narcotics addicts for treatment).

3. The Drafters of the Code, while reserving judgment, tend to believe that the New Jersey system of requiring a conviction and using treatment as a correctional alternative is the correct one:

> "We have not thus far reached a judgment on these issues, though we are satisfied that some of the sex psychopath commitment measures are a retrogression. It may be desirable that all these matters be handled solely in the framework of correction, when the individual is guilty of overt behavior that is criminal, and that compulsory commitments in other situations be held to the clearest cases, where a diagnosis can be made with confidence before such overt conduct has occurred. We recognize, however, that civil commitment measures do exist in some jurisdictions; and we are not prepared at this stage to declare that they should not be used.
>
> "Section 6.13 is drafted, therefore, as a holding provision on this topic, sanctioning the substitution of commitment for conviction where power to commit is now conferred, without expressing approval or disapproval of the policy of using such commitments. Moreover, when the method of subjecting narcotic users to treatment is commitment, it makes small sense to deny that authority if the addict is not guilty of possession merely but has also committed a larceny, for example, to find the means for getting his supply." (MPC Tentative Draft No. 2, p. 31 (1954))

In view of the fact that our statutes use these as sentencing alternatives, the section is probably unnecessary in New Jersey.

3. A decision should be made by the Commission whether our present Sex Offenders Act, or some modification thereof, should be retained as a sentence alternative. See N.J.S. 2A:164-3 and Report of the New Jersey Commission on the Habitual Sex Offender (1950). It is clear that the treatment facilities anticipated by the Act have not been made available. There is some doubt about the constitutionality of continuing to sentence these persons differently if they are not to be given treatment. See State v. Newton, 17 N.J. 271 (1955), State v. Wingler, 25 N.J. 161, (1957). Cameron v. Rouse, 373 F.2d 451 (D.C. Cir. 1966); Powell v. Texas, 392 U.S. 514 (1968). See also Section 6.07 and Section 7.03 and Commentary thereto.

4. The availability of civil commitments as an alternative for narcotics cases is considered by the Secretary to be beyond the scope of the commission's mandate. If proposals in that field are desired, the statutes in California, New York and Michigan should be examined.

ARTICLE 7. AUTHORITY OF COURT IN SENTENCING

SECTION 7.01. CRITERIA FOR WITHHOLDING SENTENCE OF IMPRISONMENT AND FOR PLACING DEFENDANT ON PROBATION.

(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) a lesser sentence will depreciate the seriousness of the defendant's crime.

(2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) the defendant's criminal conduct neither caused nor threatened serious harm;

(b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(c) the defendant acted under a strong provocation;

(d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(e) the victim of the defendant's criminal conduct induced or facilitated its commission;

(f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) the defendant is particularly likely to respond affirmatively to probationary treatment;

(k) the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

(3) When a person who has been convicted of a crime is not sentenced to imprisonment, the Court shall place him on probation if he is in need of the supervision, guidance, assistance or direction that the probation service can provide.

* * * *

§7.01 Commentary

1. This Section establishes criteria for withholding a sentence of imprisonment and for placing the defendant on probation, in those situations where probation is available. See Section 6.02 and the commentary thereto.

2. Presumption of No Imprisonment: Section 7.01(1). This Section expresses the general principle that non-imprisonment disposition is desirable unless there appear some particular reason for institutional commitment. Originally, the Code simply allowed probation but it was redrafted to create this presumption. MPC Proposed Official Draft, 107 (1962). It is made mandatory that the court "deal with a person who has been convicted of a crime without imposing sentence of imprisonment" unless it has determined that a sentence of "imprisonment is necessary for the protection of the public" because: (a) the offender will probably commit another crime during the probationary period; (b) the offender is in need of some special type of treatment that can most effectively provided for in a correctional institution; or (c) imposition of a non-incarcerative sentence would "depreciate the seriousness" of the crime involved.

The Code's declaration of a presumption in favor of probation or a suspended sentence unless sufficient reasons exist for imprisonment is a significant deviation from our present law. The approach of many judges is that "incarceration is the automatic sentencing response." ABA Minimum Standards on Sentencing Procedures and Alternatives 72 (1967). Our present statute simply states that "When it shall appear that the best interests of the public as well as of the defendant will be subserved thereby" a sentencing judge shall have power to

not impose a sentence of imprisonment. See In Re Buehrer, 50 N.J. 501 (1967); State v. Moretti, 50 N.J. 223 (App. Div. 1958). If anything, our present statute seems to create a starting point in favor of imprisonment.

As to the three specific factors set forth in this subsection, see State v. Distaso, 49 N.J. 247 (1967); State v. Ivan, 33 N.J. 197 (1969); State v. Velasquez, 104 N.J. Super. 578 (App. Div. 1969). Because the exercise of discretion is involved, Section 1.02(3) should also be considered.

3. Guidelines: Imprisonment vs. No Imprisonment; Section 7.01(2). Because the Code vests such wide discretion in the Court, the Drafters included this subsection in an effort to formulate criteria to guide its exercise:

> "Such guides, if properly defined, should serve to promote both the thoughtfulness and the consistency of dispositions, while distributing responsibility between the legislature and the court. This is the normal procedure in other fields involving large discretionary powers; there seems no reason why it should not be attempted here.
>
> "Rather than attempt to state considerations making for and against a sentence of imprisonment, the (Code) enumerates the types of factors that may justify the Court in withholding a prison sentence, with or without probation. This approach was used because the reasons for imprisonment are usually obvious; the question likely to prove troublesome is whether there is a sound basis for withholding such a sentence in the particular case.
>
> "The factors enumerated...relate primarily to the question whether the defendant is a source of future danger to the public but they have some bearing also on the relative necessity of a strong sanction for deterrent purposes. In so far as this enumeration serves to give legislative support to the conventional grounds for suspending sentence or placing the defendant on probation, it should strengthen the hand of the Court in ordering such dispositions when it deems them proper, a result that we would hope to bring about." (MPC Tentative Draft No. 2, pp. 34-35 (1954)).

This enumeration of factors is a significant departure from existing law. Presently, the only standard is found in N.J.S. 2A:168-1 quoted above, concerning the "best interests of society." See In Re Buehrer, supra; State v. Moretti, supra. There are, however, indications in our cases that the factors set forth in the Code are considered by our courts to be relevant to the

question of the type of punishment. For example, the fact that the victim in State v. Hall, 87 N.J. Super. 480, 485 (App. Div. 1965), had been a willing participant to the seduction for which the defendant had been convicted and sentenced clearly influenced the Appellate Division in its decision to vacate the sentence of imprisonment for four to six years and place the defendant on probation for a period of two years. See Section 7.01(2)(e). Similarly, the devastating effect a sentence of one-to-two years imprisonment would have on both the defendant and his wife and six children was recognized by one judge in the case of State v. Velasquez, 104 N.J. Super. 578, 585 (App. Div. 1969) as meriting "the imposition of a sentence of probation and a fine." Gaulkin J., dissenting. Section 7.01(2)(k). The majority held however, that the factor found in subsection (1)(c) counterbalanced those considerations. See State v. Ivan, 33 N.J. 197 (1960); State v. DiStasio, 49 N.J. 247 (1967). In modifying a second-degree murder sentence from ten-to-fifteen years imprisonment to a two-to-five year term, the Supreme Court in State v. Bess, 53 N.J. 10, 18-19 (1968), specifically made reference to many factors found in Subsection (2). These include: The circumstances surrounding the crime tending to partially excuse or temper the defendant's criminal conduct (Section 7.01(2)(d)); the fact that the defendant had no prior criminal record and came from a good family (Section 7.01(2)(g)); and that the defendant was "a fit subject for rehabilitation (Section 7.01(2)(j)). Finally, in reducing the original sentence of twenty-to-twenty-five years imprisonment for second degree murder to six-to-eight years imprisonment in the recent case of State v. Hicks, 54 N.J. 390, (1969), the New Jersey Supreme Court made reference to the fact that the event "which gave rise to the homicide, had its inception in a belligerent, provocative, racial and personal slur: which incident while not of such a nature as to require a manslaughter conviction, did merit a reduction of the sentence imposed." See Section 7.01(2)(c), (d), (e) and (h).

4. Guidelines: Probation vs. Suspended Sentence: Section 7.01(3). This subsection provides that in the event the court has determined that imprisonment is not required, it shall place the defendant on probation (rather than impose a suspended sentence) if the defendant "is in need of the supervision, guidance, assistance of direction that the probation service can provide."

5. Other State Codes. This Section of the Code or variation of it has been ratified or recommended for adoption by most of the States in which revision has been commissioned. Both the American Bar Association study group and the President's Crime Commission do so also. There is, however, considerable difference of opinion concerning the goal or goals to be achieved by its adoption, the means of implementation and scope of applicability. For instance, in the A.B.A. Report on Sentencing Alternatives and Procedures, 72-73 (1967), the Advisory Committee recommended adoption of a proposal comparable to Section 7.01 because it "convinced both that sentences which do not involve imprisonment are more likely to be effective in the vast majority of cases and that such sentences represent a great deal less in public expenditures." The President's Commission similarly proposed that probation of suspended sentence should be available in all cases, but placed much greater emphasis on the tremendous rehabilitative benefits to be derived from the adoption of such a plan than did the A.B.A. study group.

The Michigan Study Commission recommended an almost verbatim adoption of Section 7.01. Despite a prior correctional policy in California against placing a defendant on probation where there was a "possible harm to others in the crime committed," and, prohibition of a sentence of probation "where harm was done to others in the crime committed," a recent amendment permits "in unusual cases" and where the "interests of justice" will be best served thereby, that a sentence of probation is to be available in all cases. See Section 1203 of the California Code.

Section 65.00 of the New York Code provides that the Court may grant probation (except for a Class A Felony) if it finds, after considering the history, character, and condition of the defendant, and the nature and circumstances of the particular crime involved, that: (a) confinement is not necessary for the protection of the public, (b) the defendant is in need of guidance, training or other assistance which can be effectively administered without confinement, and (c) such probation is not inconsistent with the ends of justice. Connecticut is similar. (Section 30.1)

Section 1051 of the Pennsylvania Code provides that upon conviction the Court may place the defendant on probation if: (a) the defendant is a first offender, (b) it does not seem likely that the defendant will commit either the same or another crime, and (c) the public good does not demand imposition of a term of incarceration.

SECTION 7.02. CRITERIA FOR IMPOSING FINES.

(1) The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

(2) The Court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) the defendant has derived a pecuniary gain from the crime; or

(b) the Court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

(3) The Court shall not sentence a defendant to pay a fine unless:

(a) the defendant is or will be able to pay the fine; and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

(4) In determining the amount and method of payment of a fine, the Court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

* * * *

§ 7.02 Commentary

1. The "main purpose" of this Section, according to the Code's drafters, is to "retard the merely routine imposition of a fine, at least when other types of disposition have been authorized." MPC Tentative Draft No. 2, p. 37 (1954). Thus, this Section rationalizes the instances in which a fine is appropriate when used as the sole punishment or as an additional punishment, and establishes criteria for the imposition of a fine and for its payment.

2. A Fine as the Sole Punishment: Section 7.02(1). This Section provides that if the sentence is to be a fine alone, the Court must be of the opinion that it alone is sufficient for the protection of the public. See State v. DiStasio, 49 N.J. 247 (1967); State v. Ivan, 33 N.J. 197 (1960);

State v. Velazquez, 104 N.J. Super. 578 (App. Div. 1969).

The theory as to imposition of fines under the New York statute is somewhat different. The general policy of the State of New York in regard to fines is based upon the idea that a felony is a serious crime usually involving a threat of human injury. Thus, imposition of the fine, which is an abstract penalty not related to human injury, is therefore, in most cases, inappropriate as a penalty. Article 70 of the New York Statute provides that the Court may only impose a fine where the defendant has gained money or property by the commission of a felony. This is in accord with Section 2.7 of the ABA Minimum Standards on Sentencing Alternatives and Procedures. In addition, the fine cannot exceed double the amount of the defendant's gain from the commission of such crime. Connecticut's provision is similar. However, in the case of a misdemeanor, the imposition of a fine is not limited to whether the defendant has "gained" from the commission of the crime.

3. A Fine as an Additional Punishment: Section 7.02(2).

Where a fine is to be imposed by the sentencing judge in addition to imprisonment or probation, this subsection imposes limitations designed to assure that the fine will "serve deterrent or correctional objectives". MPC Tentative Draft No. 2, p. 37 (1954). This is in accord with the statement of Chief Justice Weintraub concurring in State v. Lavelle, 54 N.J. 315, at 326 (1969) where he said:

> "A misconception seems to float vaguely in this area that a 'fine' is a debt and that to imprison an offender because he lacks funds to pay a fine is akin to imprisonment for debt. A fine, no less than a jail term is punishment, and is imposed in the hope that it will correct the offender and deter him and others from transgressing."

These criteria are two: First, the Court must find that the defendant has derived a pecuniary benefit from the crime or, second, that a fine is "specially

adapted to deterring the particular crime or correcting the offender. See State v. Ivan, supra; State v. DiStasio, supra; State v. Lavelle, supra.

4. Criteria for Imposition of a Fine: Sections 7.02(3) and (4). These sections establish several criteria for the imposition of fines:

5. Ability to Pay. Section 7.02(3) establishes as the first criteria for imposition of a fine that it shall not be used unless "the defendant is or will be able to pay" it. This provision was included by the Drafters because "so large a number of jail inmates are incarcerated merely for non-payment of their fines." MPC Tentative Draft No. 2, p. 37 (1954). The imprisonment of persons unable to pay fines has been a problem of increasing concern to the judiciary and to the commentators. See State v. Lavelle, 54 N.J. 315 (1969) and State v. Allen, 54 N.J. 311 (1969) affirming 104 N.J. Super. 187 (App. Div. 1969). N.J.S. 2A:166-14, 15 and 16. See also the President's Commission on Law Enforcement and the Administration of Justice: The Court 18 (1967). The ABA Committee on Minimum Standards in its report on Sentencing Alternatives and Procedures (1967) concurs, although speaking in a somewhat different context (i.e., collection rather than imposition):

> "The Advisory Committee would agree with these decisions that imprisonment should be employed only as a method of collecting a fine. It follows from this that imprisonment of an offender who does not have the means to pay--barring the rare but not unknown case of the defendant who deliberately deprives himself of the means to pay--should not be tolerated. Provisions which view imprisonment as a routine response to the failure to pay a fine, or which view imprisonment as an alternative to the payment of a fine, are thus disapproved.
>
> This does not mean, of course, that jail should never be available when a fine has not been paid. The system proposed by the Advisory Committee can be outlined as follows: in the first place, fines should never be levied unless it is reasonably clear that the defendant is going to be able to pay, either immediately or over time. With respect to defendants who cannot or will not be able to pay, a more appropriate sanction should be chosen. With respect to defendants who appear to be able to pay but ultimately do not, the proposal is that there first should be an inquiry into

> the reason for non-payment. Only in the case where such a hearing discloses no excuse for nonpayment would jail be an appropriate response. For this class of offenders, which surely must be small in comparison to the numbers now incarcerated, jail is surely an appropriate remedy--not as an alternative or an equivalent to a fine, but as a device to secure payment or as a sanction for the inexcusable failure to pay."

Our law does not now impose such a limitation.

6. Preventing Restitution or Retribution. Subsection 7.02(3) (b) establishes as the second criteria for the imposition of a fine that it must not "prevent the defendant from making restitution or reparation to the victim of the crime". No such provision is now found in our law.

7. Amount of Fine. The third criteria for the imposition of a fine is found in Section 7.02(4) where it is established that the amount of a fine shall be determined by considering "the financial resources of the defendant and the nature of the burden that its payment will impose". See State v. Ivan, supra; State v. DiStasio, supra; State v. Velazquez, supra.

The New York statute in Section 70.00 states that the amount of the fine may not exceed twice the amount of the defendant's pecuniary gain from commission of the crime.

8. Payment of the Fine. Under Subsection 7.02(4), the same criteria established to determine the amount of the fine are to be used to determine the manner of its being paid. See N.J.S. 2A:166-14 and 15 (payment of fine by labor or by installments) and N.J.S. 30:4-123.15 (Parole Board power as to payment of fine). State v. Lavelle, supra. See also N.Y. Penal Code §215.00.

9. The Michigan Commission has proposed adoption of a set of provisions very similar to the Code.

SECTION 7.03. CRITERIA FOR SENTENCE OF EXTENDED TERM OF IMPRISONMENT; FELONIES.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted or two felonies or of one felony and two misdemeanors, committed at different times when he was over (insert Juvenile Court age) years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistant aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for two or more felonies, or is already under sentence of imprisonment for felony, and the sentences of imprisonment involved will run concurrently under Section 7.06; or

(b) the defendant admits in open court the commission of one or more other felonies and asks that they be taken into account when is is sentenced; and

(c) the longest sentences of imprisonment authorized for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively would exceed in length the minimum and maximum of the extended term imposed.

* * * *

SECTION 7.04. CRITERIA FOR SENTENCE OF EXTENDED TERM OF IMPRISONMENT; MISDEMEANORS AND PETTY MISDEMEANORS.

The Court may sentence a person who has been convicted or a misdemeanor or petty misdemeanor to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has previously been convicted of two crimes, committed at different times when he was over (insert Juvenile Court age) years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a chronic alcoholic, narcotic addict, prostitute or person of abnormal mental condition who requires rehabilitative treatment for a substantial period of time.

The Court shall not make such a finding unless, with respect to the particular category to which the defendant belongs, the Director of Correction has certified that there is a specialized institution or facility which is satisfactory for the rehabilitative treatment of such persons and which otherwise meets the requirements of Section 6.09, Subsection (2).

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for a number of misdemeanors or petty misdemeanors or is already under sentence of imprisonment for crime of such grades, or admits in open court the commission of one or more crimes and asks that they be taken into account when he is sentenced; and

(b) maximum fixed sentences of imprisonment for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively, would exceed in length the maximum period of the extended term imposed.

* * * *

Section 7.03 and 7.04 Commentary

1. Extended Terms: In General; Sections 7.03 and 7.04. The concept of an extended term of imprisonment as a device for dealing with the more difficult criminal was discussed in connection with Sections 6.07 and 6.09. Those two Sections establish the authorized additional lengths of imprisonment terms for persons who, by virtue of the criteria established here, are subject to longer periods of control. Section 7.03 establishes the grounds for imposing an extended term upon persons convicted of felonies and Section 7.04 for lesser offenses. The grounds for the imposition of extended terms parallel one another in these two situations. Variations will be discussed in connection with particular subsections.

2. Existing Law. The concept of using extended terms is extensively employed in present law though in most states it is only through the use of habitual offender laws. The pattern of these laws and the way the Code is drafted to improve upon them was discussed by the Drafters as follows:

> "The statutes vary greatly as to the length of the extraordinary term to which habitual offenders may be sentenced, the number of prior convictions that suffice for imposition of the sentence and the extent to which the sentence is made mandatory upon proof of the convictions.
>
> * * * *
>
> "Experience has shown that sanctions of this kind are more effective when they are both flexible and moderate; highly afflictive, mandatory punishment provisions become nullified in practice.
>
> * * * *
>
> The (Code) proposes, therefore, that the use of the extended term should not in any case be mandatory on the court and that the extended, like the ordinary term, bear a relationship to the gravity of the offense for which the sentence is imposed. The extended term should not, moreover, be avilable only in dealing with offenders whose resistance to correction is established by a record of convictions. The professional criminal (who may have escaped previous conviction) and offenders who present a special danger by reason of gravely abnormal mental condition may present an equal problem of control. There may also be need for power to enlarge the term because of the extent of the defendant's criminality, since consecutive sentences on multiple convictions are sharply limited by section 7.06. The (Code) includes such

cases in the categories for which an extended term is authorized, of the required finding can be made. (MPC Tentative Draft No. 2, pp. 38-41 (1954)).

3. The Code's Provisions: The Court may impose sentence for an extended term only if it finds that the defendant (1) is a persistant offender, (2) a professional criminal, (3) a dangerous mentally abnormal person, or (4) a multiple offender.

> "Paragraphs (1) to (4) state the minimal requirements for each of these findings but the existence of the minimal conditions do not make the finding necessary not is it, indeed, compulsory in any case. Minimal conditions are stated as a safeguard against possibly abusive findings, not as a judgment that establishment of the conditions necessarily demands that the finding in question should be made. Of course, before the court can make the ultimate finding required, it must find that the minimal conditions are established". (Id. at 41-42).

The requirement of a finding of fact discussed above is found in both Sections 7.03 and 7.04 (first paragraph) and is an important limitation upon the Court's power. It is of particular concern in connection with the professional criminal provision and will be discussed at that point.

4. Procedure. The Code calls for court determination of these issues rather than a jury verdict. Our Habitual Offender Act now gives the right to trial by jury but the Sex Offenders Act does not. The Code's view is based on the position that "since the issue bears entirely on the nature of the sentence, rather than on guilt or innocence, we see no reason why a jury trial should be accorded in a system where questions of sentence otherwise are for determination by the Court." MPC Tentative Draft No. 2, p. 42 (1954). The Code calls for notice to the defendant and his right to be heard on the issue. Section 7.07(6).

There are four grounds for imposing extended terms:

5. Persistent Offenders: Sections 7.03 (1) and 7.04 (1). The first ground for imposing an extended term is that the defendant is a "persistant

offender whose commitment for an extended term is necessary for protection of the public." In the case of a felon (Section 7.03 (1)), the Court may not make that finding unless the defendant (a) is over twenty-one years of age and (b) has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when the defendant was over seventeen years of age. In the case of a misdemeanor or a petty misdemeanor (Section 7.04 (1)), the Court may not make that finding unless the defendant has previously been convicted of two crimes committed at different times when he was over seventeen years of age.

These provisions are justified on the ground that the Court is not obliged (as is the case under many state laws) to make the finding so that relatively fewer convictions warrant the conclusion. The requirement of the crimes being committed at different times and, in the case of a felony, of a finding of "relative maturity" are said to "safeguard" the defendant. MPC Tentative Draft No. 2, p. 42 (1954). See ABA Report on Sentencing Alternatives and Procedures §§ 3.3 (Tentative Draft 1968).

6. The existing law of this State provides that if a defendant is convicted of a misdemeanor or a high misdemeanor and he has previously been convicted of a high misdemeanor (or its equivalent if the conviction occurred in another jurisdiction), his sentence may be increased as follows: (1) For a second offense: double the maximum period authorized for the crime involved. (N.J.S. 2A:85-8); (2) For a third offense: triple the maximum. (N.J.S. 2A-85-9); (3) For a fourth offense: "for any term of years or for life". (N.J.S. 2A:85-12). For an extensive historical account of New Jersey's habitual offender statutes, see State v. McCall, 14 N.J. 548 (1954).

It is important to note that the conviction to which the increased

maximum may be applied may be for either a high misdemeanor or a misdemeanor, while the previous conviction must be for a high misdemeanor. In addition, if two or more of the defendant's prior convictions occurred as the result of "two or more of such crimes or high misdemeanors charged in one indictment or accusation, or in two or more indictments or accusations consolidated for trial, (then such convictions) shall be deemed to be only one conviction", N.J.S. 2A:85-8, 9, and 12. See generally State v. Culver, 30 N. J. Super. 561 (App. Div.) affirmed, 16 N.J. 483 (1954). Furthermore, a defendant must be convicted prior to the subsequent offense for the later conviction to be considered as a prior conviction under the Habitual Offender Act. State v. Harris, 97 N.J. Super. 510, 512 (App. Div. 1967).

Considering the foregoing within the scope of the Model Penal Code's provisions dealing with persistent offenders, the following observations seem appropriate:

(a) Both the Code and existing New Jersey law recognize that in at least some instances, "the persistence of the defendant in his criminal course", State v. McCall, supra at 546, should be taken into consideration as to whether enhanced punishment should be imposed;

(b) Both the Code and existing law in this State are in accordance that the power to impose enhanced punishment should be discretionary rather than mandatory. Compare L. 1940, c. 219, p. 889, § 3 (Mandatory life sentence for fourth offender) with L.1953, c. 166, § 3 (Discretionary life sentence or term of years for fourth offenders);

(c) Contrary to the Code's proposal, N.J.S. 2A:85-13 affords the defendant the right to a jury trial as to whether he is guilty of being a multiple offender. State v. Booker, 88 N.J. Super. 510, 515 (App. Div. 1965). See

generally Note, New Jersey's Habitual Criminal Act, 11 Rutgers L. Rev. 654, 661-68 (1957).

(d) Both the Code in Sections 7.03 (1) and 7.04 (1) and the prevailing New Jersey law recognize that a conviction for a crime committed by the defendant when he was juvenile shall not be considered in determining whether he is a multiple offender, State v. McCall, supra.

In addition, to the provisions in N.J.S. 2A:85-8 to 12 dealing with multiple offenders, it should be noted that increased punishment is separately provided for multiple offenders of the Uniform Narcotics Drug Law, N.J.S.A. 24:18-47.

7. Professional Criminals; Sections 7.03 (2) and 7.04 (2). These sections allow the imposition of an extended term if the defendant is a "professional criminal whose commitment for an extended term is necessary for protection of the public." The Court may not make such a finding unless "the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood" or that the "defendant has substantial income or resources not explained to be derived from a source other than criminal activity". In the case of a felony conviction, the defendant must also be over twenty-one years of age.

> "It is, of course, appropriate that longer terms be authorized in dealing with professional criminals, whether they are single operators or involved in organized criminality, but there is difficulty in the formulation of criteria. The matter will sometimes be shown, however, by the circumstances of the crime, as in the Luciano case (277 N.Y. 348, 14 N.E. 2d 433 (1938)). While we do not believe the finding warranted by police reports alone, we propose that the inference that the defendant is a professional felon should be permitted when he has substantial income or resources for which there is no explanation in a source other than felonious activity. If the defendant has such income or resources, we think it reasonable upon sentence that he be required to disclose their source. This is one of the important innovations we propose." (MPC Tentative Draft No. 2, p. 43 (1954)).

New Jersey does not now have any statute establishing a ground for longer terms of imprisonment for professional criminals. The Legislature has, however, recognized that this is an appropriate ground for longer sentences by enactments such as N.J.S. 2A:105-5, loansharking, which is a crime characteristic of organized crime and for which extremely long sentences have been authorized. Further, in State v. Ivan, 33 N. J. 197 (1960) and State v. DeStasio, 49 N.J. 247 (1967) our Supreme Court has recognized that longer periods of incarceration may be necessary to deal with certain kinds of organized crime.

This provision raises difficulties because of the requirement of a finding of fact. Frequently, it will be impossible to make such a finding. The Code provision is still, however, an improvement over existing law. Now, only the maximum within the ordinary term may be imposed. That will still be possible under the Code. Additionally, however, when the finding can be made, extended terms can also be used.

8. Mental Abnormality; Sections 7.03 (3) and 7.04 (3). The third ground for the imposition of an extended term is a finding of a mental abnormality. In the case of a felony conviction, the Court must find that the defendant is a "dangerous, mentally abnormal person whose commitment for an extended term is necessary for the protection of the public. This is limited as follows:

> "The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others."

This provision is intended to reject and replace the "type of vagueness, if not quackery, involved in many current ruberics, such as 'psychopathic personality.' The formulation here suggested not only calls for a finding of danger by the Court but also limits the psychiatric report to factors that

responsible psychiatrists deem necessary before such a finding can be made." MPC Tentative Draft No. 2, p. 43 (1954).

In the case of misdemeanor or petty misdemeanor convictions the defendant must be found to be a "chronic alcoholic, narcotic addict, prostitude or person of abnormal mental condition who requires rehabilitative treatment for a substantial period of time". But:

> "The Court shall not make such a finding unless, with respect to the particular category to which the defendant belongs, the Director of Correction has certified that there is a specialized institution or facility which is satisfactory for the rehabilitative treatment of such persons and which otherwise meets the requirements of Section 6.09, Subsection (2)."

These provisions are explained as follows:

> "These provisions parallel those for extended terms on felony convictions, except that special note is taken of chronic alcoholics, narcotic addicts and prostitutes, who comprise so large a number of those convicted of minor crimes. If special facilities have been provided for persons in these categories, we think a longer term may be required for their effective operation on the individual. Moreover, since the terms are shorter than for felony offenders, we have not narrowed the category of mentally abnormal persons who are eligible for extended terms." (MPC Tentative Draft No. 2, p. 45-46 (1954)).

9. The counterpart of these provisions in existing law is found in the Sex Offender's Act (N.J.S. 2A:164-3 et. seq.). Under that statute, when the defendant has been convicted of certain enumerated crimes, all of which have an element of an abnormal sexual orientation the Court must order the defendant to be committed in the diagnostic center for a complete physical and mental examination. (N.J.S. 2A:164-3). State v. Berrios, 91 N.J. Super 444 (App. Div. 1966). Upon completion of the examination a written report of the results thereof must be sent to the Court. (N.J.S. 2A:164-4). Based upon the report, the operative determination is made:

> "If it shall appear from said report that it has been determined through clinical findings that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior; and, except in convictions for private lewdness, open lewdness or indecent exposure, if either violence was utilized in the commission

> of the offense; or the victim was under the age of 15 years; it shall be the duty of the Court, upon recommendation of the diagnostic center, to submit the offender to a program of specialized treatment for his mental and physical aberrations." (N.J.S. 2A:164-5).

See State v. Thompson, 84 N.J.Super 173, 177 (App. Fiv. 1964). Confinement under the Act is for up to the maximum for the crime committed. N.J.S. 2A:164-6.

The Sex Offenders Law has similarities to the Code provision — but also important differences. The description of the requisite standard is similar but the Code's provision is not limited to enumerated crimes. Further the New Jersey law does not extend the time for incarceration of the offender beyond the maximum for the crime he committed.

10. Multiple Offenders: Sections 7.03 (4) and 7.04 (4). The final ground for the imposition of an extended term is that the defendant is a "multiple offender" (which should be distinguished from "habitual offender" defined in subsection (1) of 7.03 and 7.04). The Court must find that the person is a "multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted." This provision is set forth as a "fair way to deal with the problem of consecutive sentences" which "gives rise to occasional abuse." MPC Tentative Draft No. 2, p. 46 (1954). It should, to some extent, eliminate anomalously long sentences while still producing sentences which are quite long enough for any purpose.

11. Other State Codes. A significant number of important variations of Sections 7.03 and 7.04 of the Code have been recommended and/or adopted in other jurisdictions.

In New York, in order to be sentenced to the equivalent of an extended term as a "persistent felony offender", the defendant not only must have at least two prior felony convictions and have been "sentenced" to a term of one

ar or more as a result of those convictions, but also must have actually erved" some time in prison rather than merely having received a suspended ntence. Connecticut similarly requires actual service of some period of prisonment in order for the conviction to count as a prior offense. It should noted in this context that actual "service" of a prior sentence is not required New Jersey, although it was required prior to 1940. State v. McCall, supra 549.

In Pennsylvania, in order for a conviction to be considered as a "prior nviction" (for purposes of increased punishment) it must have occurred within ve years of the conviction for which the offender is presently being sentenced. e Pennsylvania treatment of a conviction over five years old is completely ntrary to existing New Jersey practice.

Connecticut has created a rather novel category of criminal (for purses of sentencing) denominated a "persistent larceny offender" who may be ntenced to a term of one to five years imprisonment upon his third larceny nviction. This is one of the few situations discovered providing an extended rm for a multiple misdemeanant and generally comparable to that proposed under ction 7.04 of the Code.

Under Section 206 and 208 of the Proposed Penal Code for the State of lifornia, a "persistent offender" or "multiple offender" may be sentenced to extended term with a 15-year maximum for a second or third felony. "Persisnt offender" is a person who has two felony convictions, has been a danger to hers, or committed a sex act on a child in the perpetration of those felonies, d is over 21 years of age. A "multiple offender" is a person who has two felony nvictions with aggregate terms of over 15 years in the commission of which ere was a danger to others (more than one) or in which there was sexually ggressive conduct toward more than one person or child and the defendant was

er 21 years of age. The Statute further provides that there shall be a hearing determine whether a person falls within either of these two categories.

The Court may extend a sentence once the defendant is in jail if it nds a clear pattern of assaultive or sexually aggressive behavior in and out f jail, and if there appears to be substantial chance that the defendant will ill or harm other persons in the future. This is based on incapacitation for monstrated dangerousness. Under the current California law, Section 644(a) rovides that a person convicted of committing any one of the long list of enum- rated crimes can receive life imprisonment if he has two previous convictions. n exception to this rule is that the Court may, within 60 days after such a ling, decide that the defendant is not an habitual offender and may there- pon impose the normal sentence for the crime involved. Anyone declared to be n habitual criminal, having two previous convictions for any one of the enum- rated felonies, is not eligible for parole for a period of between 9 and 15 ears.

The Illinois Statute in Section 1-7(m) provides that when a person has been convicted of two or more offenses not resulting from the same conduct, then, either before or after the sentence for either crime, the Court, at its discre- tion, may order that the term of any one of the convictions must commence upon the expiration of the term of any of the other terms. It is interesting to note that there is no separate habitual criminal offender statute in the State of Illinois.

One of the more detailed procedures is present in Wisconsin where the defendant is classified a "repeater" if: (a) he is convicted of a felony prior to the commission of the present crime, (b) is convicted of a misdemeanor on three separate occasions within a period of 5 years prior to the present crime, which 5-year period does not include any time the defendant may have served in jail. If it is determined that the defendant is a repeater, the

maximum term of imprisonment may be increased: (a) three years if the present sentence is for one year or less, (b) two years if the present setence if one to ten years and the prior convictions were for misdemeanors, (c) six years if the present sentence is one to ten years and the prior convictions were for felonies, (d) two years if the present sentence is over ten years and the prior convictions were for misdemeanors, and (e) ten years if the present sentence if over ten years and the prior convictions were for felonies.

At present, there is no recidivist statute in Michigan. There was such legislation at one time, but a recent Code revision eliminated it because it was found to have been rarely invoked, had no significant role in determining parole eligibility, and there was no substantial sentiment voiced by the committee which redrafted the Michigan Criminal Code for its retention. In addition, there exists in the Michigan adequate provision for committing any person who prison officials feel is likely to commit dangerous acts upon his release, and in such cases these persons may be kept incarcerated beyond the normal maximum terms in a state treatment center under the Department of Mental Health.

The New Mexico Statute provides in Section 29-5 that the Court must, after a second felony conviction, impose a term of imprisonment not less than half the longest term available or more than twice the longest term provided for the commission of a first offense; after a third conviction, give a term not less than the longest term nor more than three times the longest term available for a first offense; and after the fourth conviction, must impose a term of life imprisonment. Section 29-6 provides that if the prior convictions are discovered after the conviction for which the defendant is presently incarcerated, the district attorney making such discovery must, at any time, charge the defendant as an habitual criminal.

No specific recidivist statute appears in the Federal Code, but it does provide that the defendant's past criminal record must be included in any pre-sentence report, pre-sentence report must be made, and must be considered by the Court in imposing the sentence.

Insofar as the A.B.A.'s Sentencing proposal is concerned, the Committee recommended a reduction in the length of the terms of imprisonment imposed, but would endorse special terms of imprisonment for particularly dangerous offenders and those persons who were designated to be professional criminals. It was further commented that any special term of imprisonment ought to bear some rational relationship to the severity of the term otherwise provided for the commission of the crime in question. In addition, the maximum extended term would be limited to a period of 25 years.

CTION 7.05. FORMER CONVICTION IN ANOTHER JURISDICTION; DEFINITION AND PROOF OF CONVICTION; SENTENCE TAKING INTO ACCOUNT ADMITTED CRIMES BARS SUBSEQUENT CONVICTION FOR SUCH CRIMES.

(1) For purposes of paragraph (1) of Section 7.03 or 7.04, a conviction the commission of a crime in another jurisdiction shall constitute a previous nviction. Such conviction shall be deemed to have been of a felony if sentence death or of imprisonment in excess of one year was authorized under the law such other jurisdiction, of a misdemeanor if sentence of imprisonment in cess of thirty days but not in excess of a year was authorized and of a petty sdemeanor if sentence of imprisonment for not more than thirty days was thorized.

(2) An adjudication by a court of competent jurisdiction that the fendant committed a crime constitutes a conviction for purposes of Sections 7.03 7.05 inclusive, although sentence or the execution thereof was suspended, pro- ded that the time to appeal has expired and that the defendant was not pardoned the ground of innocence.

(3) Prior conviction may be proved by any evidence, including finger- int records made in connection with arrest, conviction or imprisonment, that asonably satisfies the Court that the defendant was convicted.

(4) When the defendant has asked that other crimes admitted in open urt be taken into account when he is sentenced and the Court has not rejected ch request, the sentence shall bar the prosecution or conviction of the de- ndant in this State for any such admitted crime.

* * * *

Section 7.05 Commentary

1. Prior Convictions. Convictions in other jurisdictions are treated convictions for the purpose of determining whether the defendant is a "per- stent offender" under sections 7.03(1) and 7.04(1). Problems surrounding the finition and proof or prior convictions are considered in Sections 7.05(1),(2), d (3).

2. Definition of the Grade of a Prior Conviction: Section 7.05(1). der this provision, the grade of a prior conviction is determined by the ntence authorized in the jurisdiction where it occurred, appraised under the ading criteria embodied in the Code. This was done to establish a "uniform andard" to determine whether a conviction under which a given type of sen- nce might have been imposed, was for a felony or for a misdemeanor or a petty sdemeanor. MPC, Tentative Draft No. 2, pg. 47 (1954).

This provision is contrary to existing law in New Jersey and in many other states. Under N.J.S. 2A:85-8 et seq., for the purpose of determining whether the defendant is a "multiple offender" the sentencing court may consider a conviction.

> ". . . of a crime under the laws of the United States or any other State or country, which crime would be a high misdemeanor under the laws of this State . . ."

Problems raised by this way of defining the grade of an offense are discussed in State v. Johnson, 16 N.J. Super. 174 (App. Div. 1951). A similar definitional problem arises in connection with the definition of a crime for purposes of using a conviction to impeach the credibility of a witness. See N.J.S. 2A:81-12 and cases decided thereunder.

The Drafters reject this position because, in addition to the difficulties its application, it is

> "defective in its logic, since the seriousness of the crime ought to be judged by the prevailing norms in the jurisdiction where it was committed." MPC Tentative Draft No. 2, pg. 47 (1954).

This view was adopted by the Drafters of the New York Penal code who point out that frequently the prior conviction was for a federal crime for which there is no analogous state crime.

3. Exclusions From the Definition: Section 7.05(2). Paragraph (2) is addressed to two issues: First, it provides that the suspension of sentence or of its execution does not bar the Court from giving weight to the conviction in considering whether the defendant is a persistent offender. See Section 301.6 of the Code. This is existing law under our Habitual Offender Act. N.J.S. 2A:85-8 et seq. Prior to 1940, our law required both a conviction and service of the sentence thereunder. This was amended by the legislature to place the emphasis upon the conviction rather than the sentence. State v. McCall, 14 N.J. 538 (1954) summarizes the legislation in this area. See also Ex Parte Zee, 13 N.J. Super 312 (1951) affirmed 16 N.J. Super 171 (App. Div. 1959).

The second issue settled by paragraph (2) is the effect of a pardon upon the use of a prior conviction to find the defendant to be a persistent offender:

> "Nor should a pardon bar consideration of the fact of the conviction, unless granted on the ground of innocence. Even when granted on the latter ground, a pardon has been held irrelevant....To give no weight to such an executive determination that the defendant did not commit the crime is, however, both unjust and anomalous. It should be precluded by the statute, as it now is in some states. See, e.g., Cal. Pen Code § 3045; Iowa Code § 747.7; Mass. Gen. Laws c. 279, § 25; Utah Code § 103-1-18." (MPC Tentative Draft No. 2 pg. 48 (1954)).

No New Jersey cases were found.

4. Proof Of The Prior Conviction: Section 7.05(3). This paragraph provides for proof of the prior conviction by "any evidence including fingerprint records..., that reasonably satisfies the Court that the defendant was convicted." This provision would work some change in our law. As to the standard of proof, State v. Wycoff, 27 N.J. Super 322 (App. Div. 1953), holds that the identity of the defendant and the person who was previously convicted must be proved beyond a reasonable doubt. See also, Ex Parte Zee, supra. As to the type of evidence, the Code and our existing law agree that evidence required and that the court may not rely upon judicial notice. State v. Wycoff, supra; Ex Parte Zee, supra; State v. McCall, supra; Ex Parte McBride, 12 N.J. Super 402 (Co Ct 1951) affirmed 15 N.J. Super 426 (App Div 1952). In State v. Winbush, 54 N.J. Super 283, 287 (App Div 1952), fingerprint evidence was used to identify the defendant as suggested by this provision of the Code.

5. "Taking Into Account": Section 7.05(4). Paragraph (4) is based upon the British Practice of "taking into account" at the request of the defendant being sentenced, other crimes of which he has not been convicted. See R. v. Nicholson, (1947) 2 All Eng. R. 535, 536.

"The purpose is to enable a defendant if the Court approves, to start with a clean slate when he is released from prison. To the extent that other crimes are thus admitted, the defendant runs the risk of longer sentence as a multiple offender, under Sections 7.03 and 7.04. He also gains the benefit, however, of the limitations on consecutive sentences that the (Code) lays down.

"The multiplication of detainers is a source of major difficulty under present practice. Their number would be reduced if such a plan as this were put in force, although the problem of the interstate detainer will remain." (MPC Tentative Draft No. 2 pg. 48 (1954)

The ABA Report on Sentencing Alternatives and Procedures also adopts it:

"The advantage of such a procedure to the defendant is that it provides a method by which he can-within the same jurisdiction at least-avoid the problems of outstanding detainers for offenses committed prior to sentencing. The advantage to the system is that it permits the consolidation of offenses before sentencing and the development of a consistent and comprehensive corrections program unencumbered by the possibility of future sentences.

"The consequences of such a plea would of course be that the defendant would render himself subject to any sentence which could legitimately follow conviction of each of the offenses. It should be noted also that the provision in section 3.4(b), supra, would make the same limitations applicable on the ultimate length of the sentence irrespective of whether a separate trial is held.

"It is intended that the court be able to accept a plea under this provision to any offenses committed within the same jurisdiction without regard to limitations such as venue. The only limitation is that the offense be of a type over which the sentencing court or a court inferior to it would have jurisdiction if it had occurred within its territorial limits."

* * * *

"Subsection (b) also refers to the question of whether the defendant should be permitted to plead without the consent of the prosecutor who would normally be responsible for the case. The parallel recommendations of the Advisory Committee on the Criminal Trial on this point included a provision requiring the prosecutor's consent. See ABA Standards, Pleas of Guilty § 1.2 (Tentative Draft, February, 1967).

"There are serious objections in principle to such a provision. The purpose of authorizing the defendant to plead to other offenses is to permit him to wipe the slate clean, to take 'criminal bankruptcy' as it were. The prosecutor should not be permitted for his own reasons to deny the defendant this opportunity. A veto exercised by an elected official to protect a proprietary interest in a case is not compatible with the spirit of the device which is suggested.

"On the other hand, there may be practical reasons why the consent of the prosecutor should be obtained. For example,

> the defendant might otherwise be able to convert a provision based on subsection (b) into a forum-shopping search for accommodating judges. It is clear in any event that the prosecutor should be notified and given an opportunity to present his views on the question, and if the plea is accepted, to make presentations on the facts relevant to a proper sentence. Indeed, much the same effect is accomplished informally by the practice by many prosecutors of closing the books on a charge if the facts regarding it are brought to the attention of a sentencing judge, either within the state or in another state.
>
> "Finally, it should be noted that the provision in subsection (b) cannot alone solve the whole detainer problem. Its biggest defect is that it requires for its operation a willingness by the defendant to plead guilty to the other offenses. And of course it cannot reach the problems caused by interstate of federal-state detainers. But in the view of the Advisory Committee, it carries enough of an advantage in the cases to which it does apply to justify adoption." (ABA Report, pp. 236-238).

The federal system handles this problem in a different way. Under Federal Rule of Criminal Procedure 20, a case may be transferred from the district where it is pending to the district where the defendant is being held for purpose of a plea of guilty and sentencing. The Rule requires the approval of the United States Attorney in each district. Thus, the same problem is dealt with by means of a change of the venue of the case.

Multi-county situations have caused difficulty in our State. See, e.g., State v. Gentile, 41 N.J. 58 (1963). Whether through the Code provision as to "taking into account" , through a rule permitting transfer, or some other procedure, there should be way to get all of the charges pending against the defendant before one judge for sentencing.

ction 7.06. Multiple Sentences; Concurrent and Consecutive Terms.

(1) Sentences of Imprisonment for More Than One Crime. When ltiple sentences of imprisonment are imposed on a defendant for more than one ime, including a crime for which a previous suspended sentence or sentence of obation has been revoked, such multiple sentences shall run concurrently or nsecutively as the Court determines at the time of sentence, except that:

(a) a definite and an indefinite term shall run concurrently and ch sentences shall be satisfied by service of the indefinite term; and

(b) the aggregate of consecutive definite terms shall not exceed e year; and

(c) the aggregate of consecutive indefinite terms shall not ceed in minimum or maximum length the longest extended term authorized for the ighest grade and degree of crime for which any of the sentences was imposed; and

(d) not more than one sentence for an extended term shall be posed.

(2) Sentences of Imprisonment Imposed at Different Times. When a fendant who has previously been sentenced to imprisonment is subsequently ntenced to another term for a crime committed prior to the former sentence, her than a crime committed while in custody:

(a) the multiple sentences imposed shall so far as possible nform to Subsection (1) of this Section; and

(b) whether the Court determines that the terms shall run ncurrently or consecutively, the defendant shall be credited with time served imprisonment on the prior sentence in determining the permissible aggregate ngth of the term or terms remaining to be served; and

(c) when a new sentence is imposed on a prisoner who is on role, the balance of the parole term on the former sentence shall be deemed run during the period of the new imprisonment.

(3) Sentence of Imprisonment for Crime Committed While on Parole. hen a defendant is sentenced to imprisonment for a crime committed while on role in this State, such term of imprisonment and any period of reimprisonment at the Board of Parole may require the defendant to serve upon the revocation his parole shall run concurrently, unless the Court orders them to run nsecutively.

(4) Multiple Sentences of Imprisonment in Other Cases. Except as herwise provided in this Section, multiple terms of imprisonment shall run ncurrently or consecutively as the Court determines when the second or bsequent sentence is imposed.

(5) Calculation of Concurrent and Consecutive Terms of Imprisonment.

(a) When indefinite terms run concurrently, the shorter minimum rms merge in and are satisfied by serving the longest minimum term and the orter maximum terms merge in and are satisfied by discharge of the longest ximum term.

(b) When indefinite terms run consecutively, the minimum terms are added to arrive at an aggregate minimum to be served equal to the sum of all minimum terms and maximum equal to the sum of all maximum terms.

(c) When a definite and an indefinite term run consecutively, the period of the definite term is added to both the minimum and maximum of the indefinite term and both sentences are satisfied by serving the indefinite term.

(6) Suspension of Sentence or Probation and Imprisonment; Multiple Terms of Suspension and Probation. When a defendant is sentenced for more than one offense or a defendant already under sentence is sentenced for another offense committed prior to the former sentence:

(a) the Court shall not sentence to probation a defendant who is under sentence of imprisonment (, except as authorized by Section 6.02 (3) (b)); and

(b) multiple periods of suspension or probation shall run concurrently from the date of the first such disposition; and

(c) when a sentence of imprisonment is imposed for an indefinite term, the service of such sentence shall satisfy a suspended sentence on another count or prior suspended sentence or sentence to probation; and

(d) when a sentence of imprisonment is imposed for a definite term, the period of a suspended sentence on another count or a prior suspended sentence or sentence to probation shall run during the period of such imprisonment.

(7) Offense Committed While Under Suspension of Sentence or Probation. When a defendant is convicted of an offense committed while under suspension of sentence or on probation and such suspension or probation is not revoked:

(a) if the defendant is sentenced to imprisonment for an indefinite term, the service of such sentence shall satisfy the prior suspended sentence or sentence to probation; and

(b) if the defendant is sentenced to imprisonment for a definite term, the period of the suspension or probation shall not run during the period of such imprisonment; and

(c) if sentence is suspended or the defendant is sentenced to probation, the period of such suspension or probation shall run concurrently with or consecutively to the remainder of the prior periods, as the Court determines at the time of sentence.

* * * *

§7.06 Commentary

1. This Section deals with the problem of the imposition of concurrent or consecutive terms following multiple convictions. Because the considerations

vary somewhat depending upon (1) whether the two (or more) convictions were at the same time or at different times and (2) whether a custodial sentence was imposed at the earlier sentence, the Code treats the various possibilities individually:

2. Multiple Sentences; Sentences Imposed at the Same Time: Section 7.06(1). This Section deals with the situation where multiple sentencing is being done by the same Court at the same time. It may arise out of convictions for two crimes or out of a conviction for one crime and a revocation of a prior suspended sentence or a prior probation. In this case, the general rule is that such multiple sentences shall run concurrently or consecutively as the Court determines at the time of sentencing. The subsection, however, imposes four limitations upon this general principle: (a) a definite and an indefinite term must run concurrently and service of the indefinite satisfies the definite; (b) the aggregate of consecutive definite terms may not exceed one year; (c) the aggregate of any indefinite terms, both in maximum and minimum, may not exceed the extended term for the most serous crime committed; and (d) not more than one extended term may be imposed. The Drafters explain the limitation found in paragraph (a) as being intended to avoid the anomalies of (1) postponing a felony term until expiration of a sentence for a misdemeanor or (2) the release of a felon from state prison to enter a local jail. MPC Tentative Draft No. 2, pg. 50 (1954). The limitation on cumulation of up to one year for misdemeanors or only misdemeanors found in paragraph (b) is because when the extent of criminality is too extensive for such disposition an extended term is authorized. See generally ABA Report on Sentencing Alternatives and Procedures 03.4 (Tentative Draft 1968)

3. The inherent power of our courts to punish distinct violations of the law with separate and cumulative penalties is well settled. State v. Maxey,

42 N.J. 62 (1964); In Re DeLuccia, 10 N.J. Super. 374, 380-81C (App. Div. 1950); State v. Mahaney, 73 N.J.L. 53, 56 (Sup. Ct. 1905) affirmed, 74 N.J.L. 849 (E.& A. 1906). State v. Horton, 45 N.J. Super. 44 (App. Div. 1957); New Jersey Sentencing Manual for Judges 34 (1969). See also State v. Johnson, 67 N.J. Super. 414 (App. Div. 1961) (Discretion Reviewable on Appeal).

Our law does not contain the limitations upon consecutive sentences found in the Code. Cases involving fractionalization of one factual setting or of charges upon alternate theories which are repugnant to one another are dealt with in Article I of the Code. See State v. Quatro, 40 N.J. Super. 111 (L. Div. 1956); Remanded 44 N.J. Super. 120 (App. Div. 1956); State v. Riley, 28 N.J. 188 (1958); State v. Cormier, 46 N.J. 494 (1966); State v. Ford, 92 N.J. Super. 356 (App. Div. 1966); State v. Mills, 51 N.J. 277 (1968). There is no restriction in our law such as that found in subsections (1)(a) and (1)(b). State v. Owens, 54 N.J. 153 (1969). State v. Maxey, 42 N.J. 62 (1964), which allows consecutive life sentences and allows a term of years consecutive to a life sentence is inconsistent with subsections (1)(c) and (1)(d).

4. Multiple Sentences; Sentences Imposed at Different Times: Section 1.06(2). Subsection (2) is addressed to the problem of a sentence of imprisonment imposed upon a person who is already serving a term under a sentence imposed for an earlier crime. It does not, however, apply for sentences for crimes committed while in custody. As to persons already serving a prior term, three special rules apply: (a) The multiple sentences imposed must, insofar as possible, conform to subsection (1). (b) whether the new term is to run concurrently or consecutively, the defendant must be credited with time served under the first sentence in determining the permissible aggregate length of the term or terms remaining to be served. (c) when a new sentence is imposed on a prisoner who is on parole, the balance of the parole term on the former sentence shall be deemed to run during the period of the new imprisonment.

Under our existing law, the same cases which establish power to make sentences run concurrently or consecutively when sentences are imposed at the same time (cited in the Commentary to Subsection (1)), establish that power for sentences imposed at different times. Subsection (2)(c), described above, is inconsistent with our present law. N.J.S 30:4-123.24. See Commentary to Section 6.10(3), above.

5. Multiple Sentences: Sentence of Imprisonment for Crime Committed While on Parole: Section 7.06 (3). Under this subsection, when a defendant is being sentenced to imprisonment for a crime committed while on parole in this State, the new term and any term required to be served by virtue of revocation of parole are to be served concurrently unless the Court orders them to be run consecutively.

This is not consistent with New Jersey law. N.J.S. 30.4-123.27 provides as follows.

> "No part of a sentence, for which a parole has been granted and revoked, shall be deemed to be served by a prisoner, whose parole was revoked, while he is serving a sentence for an offense other that the one for which he was paroled."

In State v. Grant, 102 N.J. Super 164 (App. Div. 1968), however, it was held that this statute did not prevent the court from making the sentences run concurrently:

> "However regardless of whatever effect the statute may have in prescribing and limiting the power and discretion of the State Parole Board in the performance of its duties relative to parole, or in providing the courts with guidelines for the disposition of a prisoner upon the completion of his service of a sentence for a crime committed while on parole where the sentencing court has not otherwise explicitly provided, we are convinced that the statute was not intended to and does not divest a court charged with the duty of sentencing a defendant for such subsequent crime of its inherent power to impose such sentence as it may in its discretion consider just to the individual and adequate for the protection of society. While the duty of determining questions of parole devolves upon the State Parole Board, the power of imposing sentence as a correctional measure, and the determination of how the public interest will best be served thereby, lies with the judiciary...

"This power encompasses the discretion to make the sentence consecutive to or concurrent with that remaining to be served on a prior sentence for breach of a condition of parole. That the Legislature did not intend otherwise by the statute is indicated by the language "no part of a sentence*** shall be deemed to be served * * *." (Emphasis added). This is constructional, not mandatory language. In other words, absent a contrary direction by the sentencing judge, a sentence for a crime committed while on parole shall be deemed (e.g., by the parole and prison record-keeping officers) to be served separately from service of the incomplete sentence on which parole was previously granted...

"We therefore conclude that the original (December 5, 1967) sentence of 3-5 years in Sate Prison which provided for its concurrent service 'with the balance of any term to be served by defendant* * *on a parole violation now pending against him' was valid. As noted above, in the absence of such a direction in the sentence, the statute would have been controlling and defendant's term for violation of parole would have been consecutive to service of the term imposed by the court. It follows that the sentence originally imposed, representing the judge's conception of an appropriate exercise of sentencing discretion, should be reinstated." (102 N.J. Super. At 170-171).

The net effect of State v. Grant, therefore, is that the new sentence will be consecutive to the term arising out of the revocation unless the sentencing judge specifies that they are to be concurrent. This is consistent with the Code in that the judge has the power to specify whether the sentence will be concurrent or consecutive. It is inconsistent in what happens absent such specification.

6. Multiple Sentences; Other Situations: Section 7.06(4). This subsection is a residual one giving the sentencing court discretion to make multiple terms of imprisonment run concurrently or consecutively, as the court shall determine, in all cases not covered by another subsection.

7. Multiple Sentences; Calculation of Concurrent and Consecutive Terms: Section 7.06 (5). This subsection establishes the rules for the calculation of the minimum and maximum terms for concurrent and consecutive sentences:

(a) Concurrent Sentences to Indefinite Terms: In this situation, the shorter minimum terms "merge in and are satisfied by" serving the longest minimum term and the same is true as to the shorter maximum terms which "merge in

and are satisfied by discharge of the longest maximum term."

(b) Consecutive Sentences to Indefinite Terms. In this situation, the minimum terms are added to arrive at an aggregate minimum to be served which is the sum of all consecutive minimum terms and a like process is applied to arrive at an aggregate maximum which is the sum of all consecutive maximum terms.

(c) Consecutive Sentences to a Definite and an Indefinite Term. In this case, the definite term is added to both the minimum and the maximum of the indefinite term to arrive at a new indefinite term which satisfies both sentences.

These provisions are consistent with our law. N.J.S. 30:4-123.10, in determining maximums and minimums for the purpose of parole eligibility provides as follows:

> "Whenever, after the effective date of this act, 2 or more sentences to run consecutively are imposed at the same time by any court of this State upon any person convicted of a crime herein, there should be deemed to be imposed upon such person a sentence the minimum of which shall be the total of the minimum limits of the several sentences so imposed, and the maximum of which shall be the total of the maximum limits of such sentences. For purposes of determining the date upon which such a person shall be eligible for consideration for release on parole, the board shall consider the minimum sentence of such person to be the total aggregate of all the minimum limits of such consecutive sentences and maximum sentence of such person to be the total aggregate of all of the maximum limits of such consecutive sentences.
>
> "With regard to consecutive sentences imposed upon prisoners prior to July 3, 1950, and also with regard to consecutive sentences imposed upon prisoners subsequent to July 3, 1950, by different courts at different times, all such consecutive sentences, with the consent of the prisoner, may be aggregated by the board to produce a single sentence, the minimum and maximum of which shall consist of the total of the minima and maxima of such consecutive sentences. Such aggregation shall be for the purpose of establishing the date upon which prisoner shall be eligible for consideration for release on parole."

See State v. Maxey, 42 N.J. 63 (1964); Faas v. Zink, 48 N.J. Super. 309 (App. Div. 1958) Affirmed 25 N.J. 500 (1958).

8. Multiple Terms of Suspension and Probation: Section 7.06(8). This subsection deals with situations where the second sentence is to be either

suspended sentence or a term of probation.

(a). Probation may not be imposed where a defendant is already serving a sentence of imprisionment or where he is to be given a new sentence of imprisonment. An alternate formulation would allow probation where only a short period of time remains on the existing sentence of imprisonment or where Section 6.02 (3)(b) permits of imprisonment followed by probation. See Commentary to Section 6.02 (3)(b) and N.J.S. 2A: 164-14.

(b). Multiple periods of suspension or probation run concurrently. No New Jersey statutes or cases were found. N.J.S. 2A: 168-1 seems to limit probation to five years.

(c) and (d). A sentence of imprisonment, when served, satisfies a prior period of a suspended sentence or of probation. This seems to apply in situations where the prior suspension or probation was not revoked. It it were, under Section 7.06 (1), it would run concurrently or consecutively as the Court might determine.

9. Offense Committed While Under Suspension of Sentence or Probation: Section 7.06 (7). This subsection establishes rules for the situation where a prior suspended sentence or a prior probation is not revoked and a new sentence for a subsequent offense is imposed:

(a) Service of a new indefinite term satisfied the prior probation or suspension.

(b) Service of a definite term does not.

(c) A new probation or suspension runs concurrently or consecutively as the court determines.

10. Other State Cases. Most State codes provide for discretion as to imposing consecutive or concurrent terms. Most establish a presumption of concurrency so that a consecutive term is a deliberate choice. Few have adopted statutory schemes as elaborate as that of the Code.

CTION 7.07. PROCEDURE ON SENTENCE; PRE-SENTENCE INVESTIGATION AND REPORT; MAND FOR PSYCHIATRIC EXAMINATION; TRANSMISSION OF RECORDS TO DEPARTMENT OF ERECTION.

(1) The Court shall not impose sentence without first ordering a pre-ntence investigation of the defendant and according due consideration to a itten report of such investigation where:

(a) The defendant has been convicted of a felony; or

(b) the defendant is less than twenty-two years of age and as been convicted of a crime; or

(c) the defendant will be (placed on probation or) sentenced to imprisonment for an extended term.

(2) The Court may order a pre-sentence investigation in any other case.

(3) The pre-sentence investigation shall include an analysis of the circumstances attending the commission of the crime, the defendant's history of delinquency or criminality; physical and mental condition, family situation and personal habits and any other matters that the probation officer deems relevant or the Court directs to be included.

(4) Before imposing sentence, the Court may order the defendant to sub-mit to psychiatric observation and examination for a period of not exceeding sixty days or such longer period as the Court determines to be necessary for the pur-pose. The defendant may be remanded for this purpose to any available clinic or mental hospital or the Court may appoint a qualified psychiatrist to make the examination. The report of the examination shall be submitted to the Court.

(5) Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential informa-tion need not, however, be disclosed.

(6) The Court shall not impose a sentence of imprisonment for an extended term unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to him of the ground pro-posed. Subject to the limitation of Subsection (5) of this Section, the defend-ant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue.

(7) If the defendant is sentenced to imprisonment, a copy of the report of any pre-sentence investigation or psychiatric examination shall be transmitted forthwith to the Department of Correction (or other state department or agency) or, when the defendant is committed to the custody of a specific institution, to such institution.

* * * *

§7.06 Commentary

1. Section 7.07 contains a series of rules concerning procedure on sentencing, the pre-sentence investigation and report, remand for psychiatric examination prior to sentencing, and transmission of records of the correctional authorities. Most of these matters are now covered by Court Rule and should be eliminated from a substantive code in New Jersey.

Presentence Investigation and Report: Requirement of; Sections 7.07 (1) and (2). Under these provisions, a pre-sentence investigation and report is made mandatory in certain situations (7.07 (1)) and is made permissive in all others (7.07 (2)). The situations in which it is made mandatory are (1) upon conviction of a felony, (2) upon conviction of any crime where the defendant is under 22 years of age and (3) where the sentence is to be for an extended term. The Drafters would prefer a system where a pre-sentence report would be required in every case but recognize that such may not be feasible in many jurisdictions. MPC Tentative Draft No. 2, pp. 52-53 (1954). See ABA Minimum Standards, Sentencing Alternatives and Procedures. (S 3.2(c)).

New Jersey now is roughly equivalent to the Code. R.3:21-2 requires a pre-sentence investigation and report upon any conviction of a crime and R.7:4-6 (a) extends that to cases where a criminal case is disposed of in Municipal Court. That same Rule permits, but does not require, a pre-sentence investigation and report, in all cases below the grade of crime. See State v. Alvarado, 51 N.J. 374 (1968); State v. Culver, 23 N.J. 495 (1957); State v. Leckis, 79 N.J. Super 479 (App. Div. 1963).

(3) Presentence Report: Contents: Section 7.07 (3). This Section established the matters which covered by the report. The existing cour Rules (R.3:21-2 and R.7:4-6 (a)) do not set forth any requirements in this regard. N.J.S. 2A:168-3 provides that the probation officer should report "in writing on the circumstances of the offense, criminal record, social history and present

condition "of the defendant and such officers may obtain a "physical and mental examination" of the defendant. See also State v. Leckis, supra.

(4) Psychiatric Examination Prior to Sentencing; Section 7.07(4).

This subsection provides that, prior to imposing sentence, the Court may order the defendant to submit to psychiatric observation and examination for a period of not more than sixty days. The Court may, if necessary, extend the period. The defendant may be remanded to an available facility or examined by an appointed psychiatrist.

New Jersey now has legislation under which clinics to study the mental and physical condition of convicted persons prior to sentencing may be organized. The organization, personnel rules for the conduct of the clinics and provision for payment of their expense are provided in N.J.S. 2A:164-1 and under N.J.S. 2A:164-2 it is provided that:

> "Every judge, before imposing sentence upon a defendant, may order an examination of the mental and physical condition of such defendant and an investigation of this environment by a clinic organized in the county wherein such sentence is to be imposed, or may send the defendant to an appropriate institution within this state for examination, study and classification."

See also N.J.S. 2A:163-8 (Sex Offenders).

(5) Disclosure of Contents of Pre-Sentence Report: Section 7.05(5).

This subsection would allow a limited right of disclosure of the contents of the pre-sentence report: The defense would be entitled to learn "the factual contents" and "the conclusions" and would have the right to controvert these but "sources of confidential information need not...be disclosed." See MPC Tentative Draft No. 2, pg. 54 (1954). See also Michigan Proposed Code S1215(2).

The Advisory Committee to the Supreme Court of New Jersey would have allowed total disclosure to both the defense and the prosecution subject to a power in the Court to delete "certain portions" therefrom. See Proposed Revision of the Rules Governing The Courts of New Jersey, R.2:23-2, pp. 233-234 (1966) which has a good discussion of the pros and cons. The Court rejected this

proposal and, in R.3:21-2 continued the rule of confidentiality unless otherwise provided by rule or court order. See Pressler, Rules Governing the Courts of New Jersey p. 296 (1969).

Subsection (5) is in accord with New Jersey law that psychiatric reports are to be disclosed to the defendant. R.2:21-3, State v. Winkler, 25 N.J. 161 (1957) and State v. Jones, 91 N.J. Super. 67 (L. Div. 1966) (a questionable precedent).

(6) Extended Terms; Right to a Hearing: Section 7.07(6). The Drafters establish the right to a hearing on the issue of the imposition of an extended term under Section 7.03 and 7.04:

> "Paragraph (6) deals with the special case where the Court has under advisement a sentence of imprisonment for an extended term. We think that fairness demands a hearing focused on the precise question of the existence of the grounds for such a sentence, with notice to the defendant of the ground proposed. We do not think the matter otherwise intrinsically different than the question as to sentence within ordinary limits, as distinguished from the longer term. The section has been framed upon this basis." (MPC Tentative Draft No. 2, p. 57 (1954)).

New Jersey now has two situations involving "extended terms." If the defendant is to be sentenced under the Sex Offenders Act (somewhat equivalent to Section 7.03(3)), he is entitled to notice and to a hearing on the question of whether he fits the requirements of that statute. R.2:21-3; State v. Winkler, supra; but see State v. Jones, supra; State v. Miles, 87 N.J. Super. 571 (L. Div. 1965) affirmed 94 N.J. Super. 169 (App. Div. 1966). See Specht v. Patterson, 386 U.S. 605 (1967). The second situation is the Habitual Offenders Act. Under it, the defendant is also entitled to notice and the opportunity to be heard. See N.J.S. 2A:85-13. See State v. Washington, 47 N.J. 244 (1966); State v. Wadsh, 54 N.J. Super. 283 (App. Div. 1959); State v. Tyler, 88 N.J. Super. [illegible] (App. Div. 1965).

The generalization of the right in the Code provision is probably desirable.

7. Copy of Reports to Institution: Section 7.07(7). This is now provided for by R.3:21-2.

SECTION 7.08. COMMITMENT FOR OBSERVATION; SENTENCE OF IMPRISONMENT FOR FELONY DEEMED TENTATIVE FOR PERIOD OF ONE YEAR; RE-SENTENCE ON PETITION OF COMMISSIONER OF CORRECTION.

(1) If, after pre-sentence investigation, the Court desires additional information concerning an offender convicted of a felony or misdemeanor before imposing sentence, it may order that he be committed, for a period not exceeding ninety days, to the custody of the Department of Correction, or, in the case of a young adult offender, to the custody of the Division of Young Adult Correction, for observation and study at an appropriate reception or classification center. The Department and the Board of Parole, or the Young Adult Divisons thereof, shall advise the Court of their findings and recommendations on or before the expiration of such ninety-day period. If the offender is thereafter sentenced to imprisonment, the period of such commitment for observation shall be deducted from the maximum term and from the minimum, if any, of such sentencing.

(2) When a person has been sentenced to imprisonment upon conviction of a felony, whether for an ordinary or extended term, the sentence shall be deemed tentative, to the extent provided in this Section, for the period of one year following the date when the offender is received in custody by the Department of Correction (or other state department or agency).

(3) If, as a result of the examination and classification by the Department of Correction (or other state department or agency) of a person under sentence of imprisonment upon conviction of a felony, the Commissioner of Correction (or other department head) is satisfied that the sentence of the Court may have been based upon a misapprehension as to the history, character or physical or mental condition of the offender, the Commissioner, during the period when the offender's sentence is deemed tentative under Subsection (2) of this Section shall file in the sentencing Court a petition to re-sentence the offender. The petition shall set forth the information as to the offender that is deemed to warrant his re-sentence and may include a recommendation as to the sentence to be imposed.

(4) The Court may dismiss a petition filed under Subsection (3) of this Section without a hearing if it deems the information set forth insufficient to warrant recondiseration of the sentence. If the Court is of the view that the petition warrants such reconsideration, a copy of the petition shall be served on the offender, who shall have the right to be heard on the issue and to be represented by counsel.

(5) When the Court grants a petition filed under Subsection (3) of this Section, it shall re-sentence the offender and may impose any sentence that might have been imposed originally for the felony of which the defendant was convicted. The period of his imprisonment prior to re-sentence and any reduction for good behavior to which he is entitled shall be applied in satisfaction of the final sentence.

(6) For all purposes other than this Section, a sentence of imprisonment has the same finality when it is imposed that it would have if this Section were not in force.

(7) Nothing in this Section shall alter the remedies provided by law for vacating or correcting an illegal sentence.

* * * *

§7.08 Commentary

1. Commitment for Observation: Section 7.08(1). This subsection provides a procedure whereby, if the Court believes that information in addition to the pre-sentence report is needed, prior to sentencing a person convicted of a felony or a misdemeanor may be committed for a period of up to ninety days to a correctional institution "for observation and study." It is analogous to the provision proposed in Section 7.07(4) and now found in N.J.S. 2A:164-2 and N.J.S. 2A:164-3 (Sex Offenders) as to committment to a hospital or to a diagnostic center for a mental and physical examination. No authority now exists under our law for commitment to a correctional institution prior to sentencing.

The provision would seem to be a wise one. The board range of discretion anticipated by Article 6, particularly as to the use of extended terms, makes desirable making as much information as possible available to the sentencing judge. While this provision would probably be used in relatively few cases, it should be available.

Time spent in confinement for observation under this subsection is credited against any custodial term imposed.

2. Sentences Tentative for One Year: Section 7.08 (2). This subsection, together with the three that follow it, establish the Code's method of dealing with the problems of errors in sentences and in sentence disparity. The position taken is explained by the Code's Drafters in this way:

> "This section takes account of one of the intrinsic difficulties with judicial sentencing, that it is based, at best, upon a limited opportunity to study the offender. If subsequent study at the inception of the correctional process results in the conclusion that the Court proceeded on the basis of misapprehension as to the history, character or physical or mental condition of the defendant an opportunity for re-sentence ought to exist. We provide, therefore, that any sentence of imprisonment for felony is deemed tentative for one year after the offender is received in custody to serve his sentence. If the Commissioner is satisfied that there was a judicial misapprehension, he is directed to call the facts to the attention of the Court.
>
> The plan is based in part on that proposed,,,for the Judicial Conference.... It differs in that we do not provide for a report

to the Court unless there is some indication of judicial misapprehension. The most important cases where we should expect to see such reports made are those in which the Court has sentenced for an ordinary term and the Commissioner believes that an extended term is needed.

Some habitual offender laws now provide for re-sentence at any time on proof of the requisite prior convictions... We think, however, that if such information is not available at the time of sentence, a year provides sufficient period to bring the fact to light. Since the offender, by hypothesis, will be in the hands of the correctional authorities, it seems appropriate that the Commissioner, rather than the prosecuting officers, be vested with responsibility for estimating the significance of such new data and determining whether it should be brought to the attention of the Court. This is the clearer since prior conviction has no mandatory effect on sentence or re-sentence under the provisions of the Code." (MPC Tentative Draft No. 2, pg. 56-57 (1954)).

3. New Jersey now has two procedures under which sentences which are legal but excessive may be corrected. First, under R.3:21-10 a motion may be made to "reduce or change a sentence" within a limited period of time (generally 60 days) after the imposition of the original sentence. See State v. Matlack, 49 N.J. 491 (1967). Second, appellate courts in this state may reverse a judgement of conviction "for error in or for excessiveness of the sentence" and may either impose a new sentence itself or remand the case for resentencing. R.2:10-2. See State v. Laws, 51 N.J. 494, 498 (1968); State v. Johnson, 67 N.J. Super 414 (App. Div. 1961). See also ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Tent. Draft 1967).

The ABA Report on Sentencing Alternatives and Procedures, at pp. 277-282 (Tent. Draft 1968), would use the New Jersey system of appellate review of sentences together with a power to correct or modify within a brief period of time after sentencing but would add thereto authority to reduce the minimum term at any time:

"S 6.2 Authority to reduce: minimum term.

The sentencing court should be authorized to reduce an imposed minimum term (section 3.2) to time served upon motion of the corrections or releasing authorities made at any time.

Commentary

This section states the view that the decision to impose a minimum term should never be irrevocable. Little would seem to be served by freezing a decision that later turns out to have been erroneous. Provision that the sentencing court can undo what hindsight has demonstrated to have been a mistake seems the least that is due the victim.

Several states now authorize such a device, thought the frequency with which it appears to be used is unfortunately another matter.... The same principle is reflected in the provision in Washington which allows the administrative board that fixes the minimum sentence later to reconsider its decision. See Wash. Rev. Code Ann. §9.95.050 (1961). A slightly different device is in use in Alabama, where a minimum sentence (which is normally the less or one-third of the definite sentence imposed or ten years) can be overridden by the unanimous decision of the parole authorities. See Ala Code tit. 42, § 8 (1959).

Finally, it should be noted that the Model Penal Code has adopted an approach which falls considerably short of the provision recommended here. Section 7.08(2) of the Code provides that every sentence to imprisonment is to be deemed tentative for one year. During that time, section 7.08(3) authorizes the institutional authorities to approach the court and request re-sentencing if it appears that the sentence was based on a misapprehension as to the history, character or physical or mental condition of the offender. Section 7.08(5) then explicitly authorizes, after a hearing, the imposition of any sentence (apparently including an increase over the original sentence) that could originally have been imposed. In some contexts this provision can be used for the purpose envisaged by the position taken here. If it is discovered during the first year of a sentence that the minimum period is too high, then reduction can be sought. The Code authorizes minima to extend beyond a year, however, and thus an error which is discovered later cannot be corrected. The Advisory Committee would reject two aspects of the Code position: that which seems to authorize an increase in the sentence on motion of the institutional authorities (see § 6.1(b), supra), and that which limits the period of time during which an error in the impisition of minimum term can be corrected. (pp. 280-281)

New Jersey and the A.B.A Committee both have a special provision for revising sentences at any time to allow the defendant to take advantage of available special facilities. R. 3:21-10 allows resentencing to permit transfer to a narcotics treatment center at any time. A.B.A. § 6.3 allows this for any "special type of facility".

4. Petition by Correctional Authorities: Section 7.08(3). Under this subsection of the Code, the request for re-sentencing is made by the correctional authorities. Our present processes for sentence correction are instituted by the Court or the defendant, in the case of a motion for reduction under R. 3:21-

or by the defendant in the case of an appeal.

5. Procedure on Petition for Review: Section 7.08(4). Under this subsection the Court may dismiss the petition as "insufficient". If the procedure is adopted, there is some question whether this part should be. If the correctional authorities believe a change should be made, a hearing should probably be held. If the Court holds a hearing, defendant has the right to notice and to be heard.

6. Resentencing: Section 7.08(5). It is provided here that any sentence which might have been imposed may be upon resentencing under a petition by the correctional authorities. Under our system, both a motion to correct and an appeal are viewed as leniency procedures so that no increase is possible. State v. Matlack, 49 N.J. 491 (1967); State v. Laws, 51 N.J. 494 (1968). The A.B.A. Committee has specifically rejected the Code in this regard and has approved the New Jersey reduction-only system. A.B.A. Minimum Standards Relating to Sentencing Alternatives and Procedures, § 6.1(b), pp. 277-280 (Tent. Draft 1968).

7. Finality: Section7.08(6). This section provides that a sentence of imprisonment is a final judgment for purposes of determining its appealability notwithstanding the possibility of future revision pursuant to Section 7.08(3). See R. 2:2-1 and R. 2:2-3.

8. Correction of Illegal Sentences: Section 7.08(7). This subsection provides that the procedures found in this Section are to be supplementary to the remedies now in existence for vacating or correcting an illegal sentence. One of the grounds for granting a petitition for post-conviction relief is the "imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law". R. 3:22-2. See State v. Cerce, 46 N.J. 387 (1966). Under R. 3:22-12 a petition based upon this ground may be filed at any time.

ECTION 7.09. CREDIT FOR TIME OF DETENTION PRIOR TO SENTENCE; CREDIT FOR IMPRISONMENT UNDER EARLIER SENTENCE FOR THE SAME CRIME.

(1) When a defendant who is sentenced to imprisonment has previously een det ined in any state or local correctional or other institution following is (conviction of) (arrest for) the crime for which such sentence is imposed, uch period of detention following his (conviction) (arrest) shall be deducted rom the maximum term, and from the minimum, if any, of such sentence. The fficer having custody of the defendant shall furnish a certificate to the Court t the time of sentence, showing the length of such detention of the defendant rior to sentence in any state or local correctional or other institution, and he certificate shall be annexed to the official records of the defendant's ommitment.

(2) When a judgment of conviction is vacated and a new sentence is hereafter imposed upon the defendant for the same crime, the period of detention nd imprisonment theretofore served shall be deducted from the maximum term, and rom the minimum, if any, of the new sentence. The officer having custody of he defendant shall furnish a certificate to the Court at the time of sentence, howing the period of imprisonment served under the original sentence, and the ertificate shall be annexed to the official records of the defendant's new ommitment.

* * * *

§7.09 Commentary

1. Section 7.09(1) concerns the issue of credit for time of detention prior to sentence. The Code sets forth that the defendant is to be given credit for time in detention in any state or local correctional institution or other institution following his arrest or his conviction depending upon which alternative formulation is adopted. The existing New Jersey law is in accord, using the arrest provision:

> "The defendant shall receive credit on the term of a custodial sentence for any time he has served in custody in jail or in a state hospital between his arrest and the imposition of sentence." (R. 3:22-8).

This Rule was a reformulation of R. R. 3:7-10(h) and was rewritten to clarify the right to receive credit on the term of his sentence for time defendant spends in custody in a state hospital. (Proposed Revision of the Rules Governing the Courts of New Jersey, p. 238 (1966).

2. Section 7.09(2) is concerned with the right to receive credit for time served after a vacation of a judgment of conviction and a new sentence for

the same crime.

New Jersey has a statute in this area requiring that credit be given for time of confinement in "any county jail, penitentiary or workhouse or in the state prison, pending the prosecution of an appeal". N.J.S. 2A:164-26. See State v. Allison, 81 N.J. Super. 390 (App. Div. 1963). This same provision has been in R.R. 3:7-10(h) (second sentence) but was not carried forward in the recent revision of the Rules. The Advisory Committee took the position that

> "If a defendant is in custody pending an appeal, then he has necessarily begun service of the sentence imposed and that time is necessarily part of the total time he must serve. The provision that that time shall be deducted from the period of sentence is therefore unnecessary and confusing." Proposed Revision of the Rules Governing the Courts of New Jersey, pg. 238 (1966).

3. The matter is adequately covered by the Rules. N.J.S. 2A:164-26 seems to be unnecessary and the entire Section could well be eliminated for this State.

APPENDIX A to ARTICLES 6 and 7

AMERICAN BAR ASSOCIATION PROJECT ON
MINIMUM STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES

Tentative Draft 1967

PART I. SENTENCING AUTHORITY

1.1 Who should sentence.

Authority to determine the sentence should be vested in the trial judge and not in the jury. This report does not deal with whether the death penalty should be an available sentencing alternative and, if so, who should participate in its imposition.

PART II. STATUTORY STRUCTURE AND JUDICIAL DISCRETION—RANGE OF ALTERNATIVES

2.1 General principles: statutory structure.

(a) All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.

(b) The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case.

(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.

(d) It should be recognized that in many instances in this country the prison sentences which are now authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect the interests of the public. Except for a very few particularly serious offenses, and except under the circumstances set forth in section 2.5(b) (special term for certain types of offenders), the maximum authorized prison term ought to be five years and only rarely ten.

2.2 General principle: judicial discretion.

The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.

2.3 Sentences not involving confinement.

(a) The legislature should authorize the sentencing court in every case to impose a sentence of probation or a similar sentence not involving confinement. It may be appropriate to provide for limited exceptions to this principle, but only for the most serious offenses such as murder or treason.

(b) The following general principles should apply to such sentences:

(i) The court should specify at the time of sentencing the length of any term during which the defendant is to be supervised and during which the court will retain power to revoke the sentence for the violation of specified conditions;

(ii) Neither supervision nor the power to revoke should be permitted to extend beyond a legislatively fixed time, which should in no event exceed two years for a misdemeanor or five years for a felony;

(iii) The sentence to be imposed in the event of the violation of a condition should not be fixed prior to a finding that a violation has occurred.

Standards governing the procedures for revocation or modification of such a sentence are set forth in section 5.5. Standards governing the alternatives which should be available upon the violation of a condition are set forth in section 6.4. Detailed standards dealing with the types of sentences not involving confinement which should be authorized, as well as the terms and conditions which could appropriately accompany such a sentence, will be set forth in a separate report on probation.

(c) A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.

2.4 Partial confinement.

(a) Attention should be directed to the development of a range of sentencing alternatives which provide an intermediate sanction between supervised probation on the one hand and commitment to a total custody institution on the other and which permit the development of an individualized treatment program for each offender. Examples of the types of dispositions which might be authorized are:

(i) confinement for selected periods to a local facility designed to provide educational or other rehabilitative services;

(ii) commitment to a local facility which permits the offender to hold a regular job while subject to supervision or confinement on nights and weekends;

(iii) commitment to an institution for a short, fixed term, followed by automatic release under supervision.

(b) The following general principles should apply to such sentences:

(i) The court should specify at the time of sentencing the length of any term during which the defendant is to be supervised and during which the court will retain power to revoke the sentence for the violation of specified conditions;

(ii) Neither supervision, the power to revoke, nor the maximum length of time during which the offender should be subject to such a sentence should be permitted to extend beyond a legislatively fixed time, which should in no event exceed two years for a misdemeanor or five years for a felony;

(iii) The sentence to be imposed in the event of the violation of a condition should not be fixed prior to a finding that a violation has occurred.

Standards governing the procedures for revocation or modification of such a sentence are set forth in section 5.5. Standards governing the alternatives which should be available upon the violation of a condition are set forth in section 6.4.

(c) A sentence involving partial confinement is to be preferred to a sentence of total confinement in the absence of affirmative reasons to the contrary.

2.5 Total confinement.

(a) For each of the categories of offenses designated pursuant to section 2.1(a), the legislature should specify the term, if any, for which a sentence of commitment to a correctional institution can be imposed. Such sentences should be authorized in accordance with the structure detailed in Part III of this report.

(b) As stated in section 2.1(d), many sentences authorized by statute in this country are, by comparison to other countries and in terms of the needs of the public, excessively long for the vast majority of cases. Their length is undoubtedly the product of concern for protection against the most exceptional cases, most notably the particularly dangerous offender and the professional criminal. It would be more desirable for the penal code to differentiate explicitly between most offenders and such exceptional cases, by providing lower, more realistic sentences for the former and authorizing a special term for the latter. The Advisory Committee would endorse a special term in such a context, but only on the following assumptions:

(i) Provision for such a special term will be accompanied by a substantial and general reduction of the terms available for most offenders; and

(ii) Adequate criteria will be developed and stated in the enabling legislation which carefully delineate the type of offender on whom such a special term can be imposed; and

(iii) Precautions will be taken, such as by the requirement of procedures which assure the adequate development of information about the offender and by provision for appellate review of the sentence, to assure that such a special term will not be imposed in cases where it is not warranted; and

(iv) The sentence authorized in such cases will be structured in accordance with the principles reflected in section 3.1(c); and

(v) The necessary procedures will be developed in accordance with the principles reflected in section 5.5.

Such special terms should not be authorized for misdemeanors and other lesser offenses.

(c) A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in a given case are:

(i) Confinement is necessary in order to protect the public from further criminal activity by the defendant; or

(ii) The defendant is in need of correctional treatment which can most effectively be provided if he is placed in total confinement; or

(iii) It would unduly depreciate the seriousness of the offense to impose a sentence other than total confinement.

On the other hand, community hostility to the defendant is not a legitimate basis for imposing a sentence of total confinement.

(d) It would be appropriate for the legislature to endorse in the penal code standards such as those specified in subsection (c). They are in any event commended to sentencing courts as guides to the exercise of discretion.

2.6 Special facilities.

(a) It is desirable, both on a local and on a statewide, areawide or nationwide basis, that facilities be developed to provide special treatment for certain types of offenders, particularly the young, and that the court be authorized as a sentencing alternative to employ such facilities in appropriate cases.

(b) Employment of such facilities should not result in commitment or supervision for a period longer than would otherwise be authorized for the offense involved. While it may be appropriate to except misdemeanors and other lesser offenses from this general principle, commitment or supervision for a longer period of time should not be authorized unless the following conditions are met:

(i) a presentence report (sections 4.1-4.5) supplemented by a report of the examination of the defendant's mental, emotional and physical condition (section 4.6) has been obtained and considered; and

(ii) the court finds specifically that a proper treatment program is available and that the defendant will benefit from the program; and

(iii) the maximum period for which such commitment or supervision can extend is fixed by statute at no longer than two years; and

(iv) at the conclusion of one year the custodial or supervisory authorities are required to review the progress of the defendant and are required to make a showing to the sentencing court to the effect that the contemplated treatment is actually being administered to the defendant and outlining the progress which the defendant has made; and

(v) as provided in section 6.3, the sentencing court has the authority at any time to terminate the commitment or supervision.

(c) Commitments or treatment programs other than as a part of the sentencing process following a criminal conviction are beyond

2.7 Fines.

(a) The legislature should determine the offenses or categories of offenses for which a fine would be an appropriate sentence, and should state the maximum fine which can be imposed. Except in the case of offenses committed by a corporation, the legislature should not authorize the imposition of a fine for a felony unless the defendant has gained money or property through the commission of the offense.

(b) Whether to impose a fine in a particular case, its amount up to the authorized maximum, and the method of payment should remain within the discretion of the sentencing court. The court should be explicitly authorized to permit installment payments of any imposed fine, on conditions tailored to the means of the particular offender.

(c) In determining whether to impose a fine and its amount, the court should consider:

(i) the financial resources of the defendant and the burden that payment of a fine will impose, with due regard to his other obligations;

(ii) the ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court;

(iii) the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or reparation to the victim of the crime; and

(iv) whether there are particular reasons which make a fine appropriate as a deterrent to the offense involved or appropriate as a corrective measure for the defendant.

Revenue production is not a legitimate basis for imposing a fine.

(d) It would be appropriate for the legislature to endorse in the penal code standards such as those specified in subsection (c). They are in any event commended to sentencing courts as guides to the exercise of discretion.

(e) The court should not be authorized to impose alternative sentences, e.g., "thirty dollars or thirty days." The effect of nonpayment of a fine should be determined after the fine has not been paid and after examination of the reasons for nonpayment. The court's response to nonpayment should be governed by the standards set forth in section 6.5.

(f) In fixing the maximum fine for some offenses, the legislature should consider the feasibility of employing an index other than a dollar amount in cases where it might be appropriate. For example, a fine relative to the amount of the gain might be appropriate in cases where the defendant has profited by his crime, or a fine relative to sales, profits, or net annual income might be appropriate in some cases, such as business or antitrust offenses, in order to assure a reasonably even impact of the fine on defendants of variant means.

(g) Legislative attention should also be devoted to the desirability of a special schedule of fines for offenses committed by corporations.

3.1 Maximum term.

(a) For each of the categories of offenses designated pursuant to section 2.1(a), the legislature should specify the maximum period, if any, for which a sentence of commitment to a correctional institution may be imposed.

(b) If such a sentence is imposed, the court should be authorized to fix in the particular case any maximum period up to the legislative limit.

(c) If a special term is authorized for exceptional cases in accordance with the principles stated in section 2.5(b), it should be related in severity to the sentence otherwise provided for the offense. In addition, the following general principles should apply:

(i) The sentencing court should be authorized to fix a maximum term at any point from the maximum otherwise applicable up to a legislatively prescribed limit. As an outside limit for extreme cases, twenty-five years ought to be the maximum authorized prison term;

(ii) The court should be authorized to fix a minimum term in accordance with the principles stated in section 3.2;

(iii) Whether to sentence a particular offender to the normal term or to the special term should be a matter for the discretion of the sentencing court. Such discretion should be exercised in favor of imposing a special term only if application of the specified statutory criteria supports the conclusion that the defendant fits within the exceptional class, and if the court also concludes that commitment for such a special term is necessary in order to protect the public from further criminal conduct by the defendant.

3.2 Minimum term.

(a) Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself. It is likewise unsound for the legislature to condition parole eligibility upon service of a specified portion of the maximum term.

(b) While recognizing that there are in addition substantial arguments against judicial authority to select and impose minimum sentences, a majority of the Advisory Committee would support a statute which authorizes but does not require the sentencing court to impose, within carefully prescribed legislative limits, a minimum sentence which must be served before an offender becomes eligible for parole.

(c) Minimum sentences are rarely appropriate, and should in all cases be reasonably short. Authority to impose a minimum term should be circumscribed by the following statutory limitations:

(i) The legislature should specify for each of the categories of offenses designated pursuant to section 2.1(a) the highest minimum period of imprisonment which can be imposed;

(ii) Minimum sentences as long as ten or fifteen years should be strictly confined to life sentences. Longer minimum sentences should not be authorized;

(iii) In order to preserve the principle of indeterminacy, the court should not be authorized to impose a minimum sentence which exceeds one-third of the maximum sentence actually imposed;

(iv) The court should not be authorized to impose a minimum sentence until a presentence report (sections 4.1-4.5), supplemented by a report of the examination of the defendant's mental, emotional and physical condition (section 4.6), has been obtained and considered;

(v) The court should be directed to consider prior to the imposition of a minimum term whether making a non-binding recommendation to the parole authorities respecting when the offender should first be considered for parole will satisfy the factors which seem to call for a minimum term. Such a recommendation should be required to respect the limitations provided in subsections (ii) and (iii);

(vi) Imposition of a minimum sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a minimum sentence only after a finding that confinement for a minimum term is necessary in order to protect the public from further criminal conduct by the defendant;

(vii) As provided in section 6.2, the court should be authorized to reduce an imposed minimum sentence to time served upon motion of the corrections authorities made at any time.

3.3 Habitual offenders.

(a) Sentences authorized under present habitual offender legislation should be revised, where necessary, to conform to the following standards:

(i) Any increased term which can be imposed because of prior criminality should be related in severity to the sentence otherwise provided for the new offense;

(ii) The sentencing court should be authorized to fix a maximum term at any point from the maximum otherwise applicable up to a legislatively prescribed limit. As an outside limit for extreme cases, twenty-five years ought to be the maximum authorized prison term;

(iii) The court should be authorized to fix a minimum term in accordance with the principles stated in section 3.2.

(b) Whether to sentence a particular offender to the normal term or to a special term on grounds of habitual criminality should be a matter for the discretion of the sentencing court, and should be determined at the time of sentencing. An additional term should only be permitted if the court finds that such a term is necessary in order to protect the public from further criminal conduct by the defendant, and in support of this finding also finds that:

(i) The offender has previously been convicted of two felonies committed on different occasions, and the present offense is a third felony committed on an occasion different from the first two. A prior offense committed within another jurisdiction may be counted if it was punishable by confinement in excess of [one year]. A prior offense should not be counted if the offender has been pardoned on the ground of innocence, or if the conviction has been set aside in any post-conviction proceeding; and

(ii) Less than five years have elapsed between the commission of the present offense and either the commission of the last prior felony or the offender's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior felony conviction; and

(iii) The offender was more than [21] years old at the time of the commission of the new offense.

The court in addition should be required to comply with a procedure consistent with the principles reflected in section 5.5.

3.4 Multiple offenses: same state; concurrent and consecutive terms.

(a) After convictions of multiple offenses which are separately punishable or in cases where the defendant is serving a prison sentence at the time of conviction, the question of whether to impose concurrent or consecutive sentences should be a matter for the discretion of the sentencing court.

(b) Consecutive sentences are rarely appropriate. Authority to impose a consecutive sentence should be circumscribed by the following statutory limitations:

(i) The aggregate maximum of consecutive terms should not be permitted to exceed the term authorized for an habitual offender (section 3.3) for the most serious of the offenses involved. If there is no provision for an habitual offender for the offenses involved, there should be a ceiling on the aggregate of consecutive terms which is related to the severity of the offenses involved; and

(ii) The aggregate minimum of consecutive terms should be governed by the limitations stated in section 3.2; and

(iii) The court should not be authorized to impose a consecutive sentence until a presentence report (sections 4.1-4.5), supplemented by a report of the examination of the defendant's mental, emotional and physical condition (section 4.6), has been obtained and considered; and

(iv) Imposition of a consecutive sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a consecutive sentence only after a finding that confinement for such a term is necessary in order to protect the public from further criminal conduct by the defendant.

These limitations should also apply to any sentence for an offense committed prior to the imposition of sentence for another offense, whether the previous sentence for the other offense has been served or remains to be served.

(c) Corrections and parole authorities should be directed to consider an offender committed under multiple sentences as though he had been committed for a single term the limits of which were defined by the cumulative effect of the multiple sentences.

3.5 Multiple offenses: different states.

(a) The failure to integrate prison sentences for crimes committed in different states seriously inhibits a consistent, coherent treatment program during confinement. Similarly, detainers typically prevent the phasing of the individual back into the community at the optimal time. It is therefore highly desirable that multiple sentences of imprisonment imposed by different states be served at one time and under one correctional authority. It is also desirable that all outstanding charges of offenses committed in different states be disposed of promptly. Methods of implementing these principles by necessary interstate and federal-state agreements should be explored and effected.

(b) As a preliminary and immediate step towards the solution of these problems, the legislature should require that sentencing courts consider all prison sentences imposed in other states, both those which have been served and those which remain to be served. The following general principles should apply in such cases:

(i) The court should not be empowered to impose a sentence which when added to the out-of-state sentences would exceed any limitations (section 3.4) which would be in effect had all of the offenses occurred within the state of the sentencing court;

(ii) The court should be authorized to impose a sentence to run concurrently with out-of-state sentences, even though the time will be served in an out-of-state institution;

(iii) Sentences to be served consecutively to an out-of-state sentence are rarely appropriate. Imposition of such a sentence should require the affirmative action of the sentencing court, and should be permitted only after a finding that confinement for such a term is necessary in order to protect the public from further criminal conduct by the defendant.

(c) Subject to any permissible cumulation of sentences by the sentencing court (subsection [b]), the legislature should also direct that prison authorities automatically award credit against the maximum term and any minimum term of an in-state sentence for all time served in an out-of-state institution since the commission of the offense. In addition, the legislature should provide that in no event should detainers have the effect of impairing or postponing parole eligibility or in any way affecting the conditions of serving a sentence.

3.6 Credit.

(a) Credit against the maximum term and any minimum term should be given to a defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This

should specifically include credit for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to arrival at the institution to which the defendant has been committed.

(b) Credit against the maximum term and any minimum term should be given to a defendant for all time spent in custody under a prior sentence if he is later re-prosecuted and re-sentenced for the same offense or for another offense based on the same conduct. In the case of such a re-prosecution, this should include credit in accordance with subsection (a) for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(c) If a defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum term and any minimum term of the remaining sentences should be given for all time served since the commission of the offenses on which the sentences were based.

(d) If the defendant is arrested on one charge and later prosecuted on another charge growing out of conduct which occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution should be given for all time spent in custody under the former charge which has not been credited against another sentence.

(e) The credit required to be given by this section should be awarded by the procedure specified in section 5.8.

3.7 Reduction of conviction.

If the defendant has been convicted of a felony, and if the court, considering the nature and circumstances of the offense and the history and character of the defendant, concludes that it would be unduly harsh to sentence the defendant to the term normally applicable to the offense, the court should be authorized to reduce the offense to a lower category of felony, or to a misdemeanor, and to impose sentence accordingly.

3.8 Re-sentences.

Where a conviction or sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense or a different offense based on the same conduct which is more severe than the prior sentence less time already served.

PART IV. INFORMATIONAL BASIS FOR SENTENCE

4.1 Presentence report: general principles.

(a) The legislature should supply all courts trying criminal cases with the resources and supporting staff to permit a presentence investigation and a written report of its results in every case.

(b) The court should explicitly be authorized by statute to call for such an investigation and report in every case. The statute should also provide that such an investigation and report should be made in every case where incarceration for one year or more is a possible disposition, where the defendant is less than [21] years old, or where the defendant is a first offender, unless the court specifically orders to the contrary in a particular case.

(c) Standards relating to the preparation and contents of the presentence report will be developed in a separate report on probation.

4.2 Presentence report: when prepared.

(a) Except as authorized in subsection (b), the presentence investigation should not be initiated until there has been an adjudication of guilt.

(b) It is appropriate to commence the presentence investigation prior to an adjudication of guilt only if:

(i) the defendant, with the advice of counsel if he so desires, has consented to such action; and

(ii) adequate precautions are taken to assure that nothing disclosed by the presentence investigation comes to the attention of the prosecution, the court, or the jury prior to an adjudication of guilt. The court should be authorized, however, to examine the report prior to the entry of a plea on request of the defense and the prosecution.

4.3 Presentence report: disclosure; general principles.

The presentence report should not be a public record. It should be available only to the following persons or agencies under the conditions stated:

(i) The report should be available to the sentencing court for the purpose of assisting it in determining the sentence. The report should also be available to all judges who are to participate in a sentencing council discussion of the defendant (section 7.1);

(ii) The report should be available to persons or agencies having a legitimate professional interest in the information likely to be contained therein. Examples of such persons or agencies would be a physician or psychiatrist appointed to assist the court in sentencing, an examining facility, a correctional institution, or a probation or parole department;

(iii) The report should be available to reviewing courts where relevant to an issue on which an appeal has been taken;

(iv) The report should be available to the parties under the conditions stated in section 4.4.

4.4 Presentence report: disclosure; parties.

(a) Fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.

(b) This principle should be implemented by requiring that the sentencing court permit the defendant's attorney, or the defendant himself if he has no attorney, to inspect the report. The prosecution should also be shown the report if it is shown to the defense. In extraordinary cases, the court should be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review.

(c) The resolution of any controversy as to the accuracy of the presentence report should be governed by the principles stated in sections 4.5(b), 5.3(d), 5.3(f), and 5.4(a).

4.5 Presentence report: time of disclosure; presentence conference.

(a) The information made available to the parties under section 4.4 should be disclosed sufficiently prior to the imposition of sentence as to afford a reasonable opportunity for verification.

(b) In cases where the presentence report has been open to inspection, each party should be required prior to the sentencing proceeding to notify the opposing party and the court of any part of the report which he intends to controvert by the production of evidence. It may then be advisable for the court and the parties to discuss the possibility of avoiding the reception of evidence by a stipulation as to the disputed part of the report. A record of the resolution of any issue at such a conference should be preserved for inclusion in the record of the sentencing proceeding (section 5.7[a][iii]).

4.6 Additional services.

(a) The sentencing decision is of such complexity that each sentencing court must have available to it a broad range of services and facilities from which it can obtain more complete information about the defendant's mental, emotional and physical condition than can be afforded in the presentence report. The court should be able to employ such services in any case in which more detailed information of this type is desired as the basis for a sentence.

(b) The need for such additional services can and should be met by a combination of local services or facilities, such as by authority to employ local physicians or clinics on a case-by-case basis, and of regional, statewide or nationwide services or facilities, such as a central reception and diagnostic center.

(c) There is an urgent need for the various disciplines which are in a position to provide such services to develop professional standards by which high quality can be assured.

(d) Reports which result from the use of such services or facilities should be subject to the same disclosure and verification provisions as those which govern presentence reports (sections 4.3-4.5, 5.4).

5.1 Sentencing judge.

(a) If guilt was determined after a trial, the judge who presided at the trial should impose the sentence unless there are compelling reasons in a specific case to provide otherwise. To accommodate cases where it becomes necessary for another judge to impose the sentence, a system should be established to acquaint the new judge with what occurred at the trial.

(b) If guilt was determined by plea, it is still desirable that the same judge who accepted the plea impose the sentence. It is recognized, however, that the rotation practices of many courts make it impossible in many instances for the same judge to sit in both capacities. In any event, the judge who imposes sentence should ascertain the facts concerning the plea and the offense.

(c) Management of the docket should be controlled by the court and should not be subject to manipulation by either party. Where possible, it is desirable that the same judge sentence all defendants who were involved in the same offense.

5.2 Multiple offenses: consolidation for sentencing; pleading to prior offenses.

(a) To the extent possible, all outstanding convictions should be consolidated for sentencing at one time. All outstanding charges should be disposed of promptly and should likewise be consolidated for sentencing at one time. Charges filed after sentencing should be promptly prosecuted. Any sentence imposed on an offender already under sentence for another offense should be integrated with the prior sentence.

(b) After conviction and before sentence, the defendant should be permitted to plead guilty to other offenses he has committed which are within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction in the same state. It may be appropriate to provide that the plea should not be accepted without the written consent of the official responsible for prosecuting the charge. Submission of such a plea should constitute a waiver of any objections which the defendant otherwise might have to venue or, where no charge has yet been filed, to formal charge. If such a plea is tendered and accepted, the court should sentence the defendant for all of the offenses in one proceeding, subject to the limitations on consecutive sentences stated in section 3.4.

5.3 Duties of counsel.

(a) The duties of the prosecution and defense attorneys do not cease upon conviction. While it should be recognized that sentencing is the function of the court, the attorneys nevertheless have a duty of assisting the court in as helpful a manner as possible.

(b) The prosecutor should recognize that the severity of the sentence is not necessarily an indication of the effectiveness or the efficiency of his office. In addition, the prosecutor, no less than the judge, has the duty to resist clamor by the media of public communications.

(c) Unless asked by the sentencing court, or unless the product of plea discussions or agreement, the prosecutor ordinarily should not make any specific recommendations as to the appropriate sentence.

(d) The duties of the prosecutor with respect to each specific sentence should include the following steps:

(i) The prosecutor should satisfy himself that the factual basis for the sentence will be both adequate and accurate, and that the record of the sentencing proceeding will accurately reflect relevant circumstances of the offense and characteristics of the defendant which were not disclosed during the guilt phase of the case:

(A) If the prosecutor has access to the presentence report, he should measure it against information at his disposal and prepare himself to amplify parts which do not sufficiently reveal matters which are relevant to a proper sentence. The prosecutor should also take proper steps to controvert any inaccuracies in the report. The first such step should normally involve an attempt to avoid the formal production of evidence in open court by reaching an informal agreement with the defense attorney;

(B) If the prosecutor does not have access to the presentence report, he should present at the sentencing proceeding those facts at his disposal which are not known by him to be before the court and which are relevant to a proper sentence;

(ii) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all information in his files which is favorable to the defendant on the sentencing issue;

(iii) If a plea was the result of plea discussions or an agreement which included a position on the sentence, the prosecutor should disclose its terms to the court;

(iv) The prosecutor should determine whether there are grounds for the imposition of a special term based on particular characteristics of the defendant (sections 2.5[b], 3.1[c], 3.3). If he finds such grounds, he should cause the notice contemplated by section 5.5(b)(i) to be served on the defendant and his attorney. He may then prepare a factual case for presentation at the sentencing proceeding.

(e) The defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed.

(f) The duties of the defense attorney with respect to each specific sentence should include the following steps:

(i) The attorney should familiarize himself with all of the sentencing alternatives that are available for the offense of which his client has been convicted and with community and other facilities which may be of assistance in a plan for meeting the needs of the defendant. Such preparation should also include familiarization with the practical consequences of different sentences, and with the normal pattern of sentences for the offense involved;

(ii) The attorney should explain the consequences of the likely sentences to the defendant and assure himself that the defendant understands the nature of the sentencing proceeding. The attorney should ascertain the views of his client once such information has been conveyed;

(iii) The attorney should satisfy himself that the factual basis for the sentence will be both adequate and accurate, and that the record of the sentencing proceedings will accurately reflect relevant circumstances of the offense and characteristics of the defendant which were not disclosed during the guilt phase of the case:

(A) If the attorney has access to the presentence report, this duty should at a minimum involve verification of the essential bases of the report and amplification at the sentencing proceeding of parts which seem to be inadequate. The attorney should also take proper steps to controvert any inaccuracies in the report. The first such step should normally involve an attempt to avoid the formal production of evidence in open court by reaching an informal agreement with the prosecutor;

(B) If the attorney does not have access to the presentence report, this duty should at a minimum involve an attempt to the best of the means at his disposal to ascertain the relevant facts. The attorney should also have the obligation to present at the sentencing proceeding all facts which are not known by him to be before the court and which in the interest of his client ought to be considered in reaching a sentence;

(iv) If a plea was the result of plea discussions or an agreement which included a position of the prosecutor on the sentence, the attorney should disclose its terms to the court;

(v) In appropriate cases, the attorney should make special efforts to investigate the desirability of a disposition which would particularly meet the needs of the defendant, such as probation accompanied by employment of community facilities or commitment to an institution for special treatment. If such a disposition is available and seems appropriate, the attorney, with the consent of the defendant, should make a recommendation at the sentencing proceeding that it be utilized.

(g) It is inappropriate for either prosecution or defense counsel to re-try an individual sentence in the media of public communication.

5.4 Sentencing proceeding.

(a) As soon as practicable after the determination of guilt and the examination of any presentence reports (sections 4.1-4.6), a proceeding should be held at which the sentencing court should:

(i) entertain submissions by the parties on the facts relevant to the sentence;

(ii) hear argument by the defense attorney on the applicability of the various sentencing alternatives to the facts of the case;

(iii) afford to the defendant his right of allocution; and

(iv) in cases where guilt was determined by plea, inform itself, if not previously informed, of the existence of plea discussions or agreements and the extent to which they involve recommendations as to the appropriate sentence.

(b) Where the need for further evidence has not been eliminated by a presentence conference (section 4.5[b]), evidence offered by the parties on the sentencing issue should be presented in open court with full rights of confrontation, cross-examination and representation by counsel.

5.5 Special requirements.

(a) The sentencing court should be required to obtain and consider a presentence report (sections 4.1-4.5) supplemented by a report of the defendant's mental, emotional and physical condition (section 4.6) prior to the imposition of a minimum term of imprisonment (section 3.2), a consecutive sentence (section 3.4), a sentence as an habitual offender (section 3.3), or a special term based on exceptional characteristics of the defendant (sections 2.5[b], 3.1[c]).

(b) The sentencing court should not be authorized to impose a sentence as an habitual offender (section 3.3) or a sentence based on exceptional characteristics of the defendant (sections 2.5[b], 3.1[c]) without taking the following additional steps:

(i) Written notice should be served on the defendant and his attorney of the proposed ground on which such a sentence could be based a sufficient time prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant; and

(ii) With the exception of the presentence report and any supplemental reports on the defendant's mental, emotional and physical condition, all of the evidence presented to sustain the proposed grounds on which such a sentence could be based should be presented in open court with full rights of confrontation, cross-examination and representation by counsel. The defendant should be afforded an opportunity to offer opposition to the proposed action; and

(iii) The presentence report and any supplemental reports on the defendant's mental, emotional and physical condition should be disclosed to the prosecution and the defense at least to the extent required by sections 4.4 and 4.5; and

(iv) Each of the findings required as the basis for such a sentence should be found to exist by a preponderance of the evidence, and should be appealable to the extent normally applicable to similar findings; and

(v) If the conviction was by plea, it should affirmatively appear on the record that the plea was entered with knowledge that such a sentence was a possibility. If it does not so appear on the record, the defendant should not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice.

(c) The procedure for revocation of a sentence not involving con-

finement and for revocation of a sentence involving partial confinement should conform as nearly as possible to the procedure outlined in subsections (b)(i) through (b)(iv) of this section. Standards dealing with the procedure for changes in the conditions under which such sentences will continue in effect will be set forth in a separate report dealing with probation.

5.6 Imposition of sentence.

In addition to reaching the conclusions required as a prerequisite to imposition of the sentence selected, when sentence is imposed the court:

(i) should make specific findings on all controverted issues of fact which are deemed relevant to the sentencing decision;

(ii) normally should state for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed. In the exceptional cases where the court deems it in the best interests of the defendant not to state fully in his presence the reasons for the sentence, the court should prepare such a statement for inclusion in the record;

(iii) should assure that the record accurately reflects time already spent in custody for which credit will be given under the provisions of section 3.6; and

(iv) should state with care the precise terms of the sentence which is imposed.

5.7 Record.

(a) As in the case of all other proceedings in open court, a record of the sentencing proceeding should be made and preserved in such a manner that it can be transcribed as needed. The following items should be available for inclusion in a transcription:

(i) a verbatim account of the entire sentencing proceeding, including a record of any statements in aggravation or mitigation made by the defendant, the defense attorney and the prosecuting attorney, together with any testimony received of witnesses on matters relevant to the sentence and any statements by the court explaining the sentence;

(ii) a verbatim account of such parts of the trial on the issue of guilt, or the proceedings leading to the acceptance of a plea, as are relevant to the sentencing decision;

(iii) copies of the presentence report and any other reports or documents available to the sentencing court as an aid in passing sentence. The part of the record containing such reports or documents should be subject to examination by the parties to the extent provided in sections 4.3 and 4.4. The record should reveal what parts of such reports or documents have been disclosed to the parties and by what method such disclosure was made. It should also contain any record of a presentence conference held in accordance with section 4.5(b).

(b) Adequate resources should be provided to the court so as to permit the transmission of relevant sentencing information to the prison authorities in the event of a commitment. If the defendant is sentenced to imprisonment for a maximum term in excess of one year, the court should be required to forward to the prison authorities a copy of the items described in section 5.7 (a)(iii) and a verbatim transcript of the proceeding described in section 5.6. The court should also be authorized and encouraged to forward any other part of the record which is deemed relevant to the defendant's classification and treatment.

5.8 Procedure for awarding credit.

The credit required by section 3.6 should be awarded in the following manner:

(i) It is good practice for the parties to communicate to the court at the time of sentencing the facts upon which credit for time served prior to sentencing will be based;

(ii) It is good practice for the court to inform the defendant at the time of sentencing of his status on the issue of credit for time previously served;

(iii) The court should assure that the record accurately reflects the facts upon which credit for time served prior to sentencing will be computed;

(iv) The custodian should communicate to the prison authorities at the time the defendant is delivered for commitment the amount of time spent in custody since the imposition of sentence;

(v) The credit to be awarded against the sentence should be computed by the prison authorities as soon as practicable and automatically awarded;

(vi) The prison authorities should inform the defendant of his status as soon as practicable;

(vii) The defendant should be afforded an avenue of post-conviction review for the prompt disposition of questions which may arise as to the amount of credit which should have been awarded.

PART VI. FURTHER JUDICIAL ACTION

6.1 Authority to reduce: general.

(a) It may be appropriate to authorize the sentencing court to reduce or modify a sentence within a reasonable time after its imposition if new factors bearing on the sentence are made known. It is inappropriate for defense counsel or others on the defendant's behalf to approach the judge except by written motion or in open court. It is likewise inappropriate for a judge to reduce or modify a sentence by any proceeding which does not occur in open court.

(b) Under no circumstances should the sentencing court be authorized to increase a term of imprisonment once it has been imposed.

6.2 Authority to reduce: minimum term.

The sentencing court should be authorized to reduce an imposed minimum term (section 3.2) to time served upon motion of the corrections or releasing authorities made at any time.

6.3 Authority to terminate: use of special facilities.

In the event that commitment to a special type of facility is authorized for a period beyond the maximum sentence normally applicable to the offense (section 2.6[b]), the sentencing court should be authorized to terminate the commitment or any supervision at any time. The custodial or supervisory authorities should be required annually to review the progress of the defendant and to make a showing to the court to the effect that contemplated treatment is actually being administered to the defendant and outlining the progress which the defendant has made.

6.4 Modification of sentence: sentence not involving confinement or sentence to partial confinement.

(a) The sentencing court should be authorized to terminate at any time continued supervision or the power to revoke either a sentence not involving confinement or a sentence involving partial confinement. The court should also be authorized to lessen the conditions on which such sentences were imposed at any time, and similarly to shorten the time during which the power to revoke will exist.

(b) The court should be authorized to revoke a sentence not involving confinement or a sentence to partial confinement upon the violation of specified conditions or to increase the conditions under which such a sentence will be permitted to continue in effect. The sentencing alternatives which should be available upon a revocation should be the same as were available at the time of initial sentencing. Specifically, such alternatives should include the imposition of a fine or the imposition of a sentence to partial or total confinement.

(c) The court should not impose a sentence of total confinement upon revocation unless:

(i) the defendant has been convicted of another crime. The sentence in such a case should respect the limitations on consecutive sentences expressed in section 3.4; or

(ii) the defendant's conduct indicates that it is likely that he will commit another crime if he is not imprisoned; or

(iii) such a sentence is essential to vindicate the authority of the court.

If the revocation of a sentence to partial confinement results in a sentence to total confinement, credit should be given for all time spent in custody during the sentence to partial confinement.

6.5 Modification of sentence: fines; nonpayment.

(a) The sentencing court should have the power at any time to revoke or remit a fine or any unpaid portion, or to modify the terms and conditions of payment. When failure to pay a fine is excusable, such authority should be exercised.

(b) Incarceration should not automatically follow the nonpayment of a fine. Incarceration should be employed only after the court has examined the reasons for nonpayment. It is unsound for the length of a jail sentence imposed for nonpayment to be inflexibly tied, by practice or by statutory formula, to a specified dollar equation. The court should be authorized to impose a jail term or a sentence to partial confinement (section 2.3) for nonpayment, however, within a range fixed by the legislature for the amount involved, but in no event to exceed one year. Service of such a term should discharge the obligation to pay the fine, and payment at any time during its service should result in the release of the offender.

(c) The methods available for collection of a civil judgment for money should also be available for the collection of a fine, and should be employed in cases where the court so specifies.

(d) In the event of nonpayment of a fine by a corporation, the court should be authorized to proceed against specified corporate officers under subsection (b) or against the assets of the corporation under subsection (c).

PART VII. DEVELOPMENT OF SENTENCING CRITERIA

7.1 Sentencing council.

In all courts where more than one judge sits regularly at the same place, and wherever else it is feasible, it is desirable that meetings of sentencing judges be held prior to the imposition of sentence in as many cases as is practical. The meeting should be preceded by distribution of the presentence report and any other documentary information about the defendant to each of the judges who will participate. The purpose of the meeting should be to discuss the appropriate disposition of the defendants who are then awaiting sentence and to assist the judge who will impose the sentence in reaching a decision. Choice of the sentence should nevertheless remain the responsibility of the judge who will actually impose it.

7.2 Sentencing institutes.

Provision should be made in every state for the convening of sentencing judges from time to time for the purpose of holding institutes or seminars to discuss problems related to sentencing. The particular goal of such proceedings should be to develop criteria for the imposition of sentences, to provide a forum in which newer judges can be exposed to more experienced judges, and to expose all sentencing judges to new developments and techniques. Prosecutors, members of the defense bar, appellate judges, and corrections and

releasing authorities should be encouraged to participate in such proceedings in order to develop a better understanding of their roles in the sentencing process.

7.3 Orientation of new judges.

In addition to regular sentencing institutes, a program should be developed for the formal orientation of new judges. This should include familiarization with sentencing alternatives, with the services available to the sentencing judge, with the purposes of sentencing and sentence procedures, with the nature of non-custodial facilities which can be utilized in sentencing, and with the nature of the facilities to which a sentenced offender may be committed.

7.4 Regular visitation of facilities.

Provision should be made for regular visits by every sentencing judge to each of the custodial and non-custodial facilities which can be utilized in framing a sentence. In cases where the judge chooses incarceration but does not select the institution of commitment, such visits should include familiarization with the process by which an offender is assigned to an institution.

7.5 Information on sentenced offenders.

In order that judges may be in a position to appraise the effects of their sentencing practices, they should be regularly informed of the status of offenders whom they have sentenced, as well as provided with broader statistical information concerning all offenders sentenced in the same state.

APPENDIX B to ARTICLES 6 and 7
MODEL SENTENCING ACT

ADVISORY COUNCIL OF JUDGES OF THE
NATIONAL COUNCIL ON CRIME AND
DELINQUENCY

1963

ARTICLE I. CONSTRUCTION AND PURPOSE OF ACT

§ 1. Liberal Construction

This act shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for a limited period.

ARTICLE II. PRESENTENCE INVESTIGATIONS

§ 2. When Investigation Made

No defendant convicted of a crime involving moral turpitude, or a crime the sentence for which may include commitment for one year or more, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense or adjudicated a youthful offender.

§ 3. Content of Investigation; Cooperation of Police Agencies

Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish to the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court.

§ 4. Availability of Report to Defendants and Others

As to defendants sentenced under section 9 of this Act, the judge may, in his discretion, make the investigation report or parts of it available to the defendant or others, or he may make the report or parts of it available while concealing the identity of persons who provided confidential information. As to defendants sentenced under section 5 or section 7 of this Act, the judge shall make the presentence report, the report of the diagnostic center, and other diagnostic reports available to the attorney for the state and to the defendant or his counsel or other representative upon request. Subject to the control of the court, the defendant shall be entitled to cross-examine those who have rendered reports to the court. Such reports shall be part of the record but shall be sealed and opened only on order of the court.

If a defendant is committed to a state institution the investigation report shall be sent to the institution at the time of commitment.

ARTICLE III. SENTENCES FOR FELONIES

§ 5. Dangerous Offenders

Except for the crime of murder in the first degree, the court may sentence a defendant convicted of a felony to a term of commitment of thirty years, or to a lesser term, if it finds that because of the dangerousness of the defendant, such period of confined correctional treatment or custody is required for the protection of the public, and if it further finds, as provided in section 6, that one or more of the following grounds exist:

(a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowlingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.

The findings required in this section shall be incorporated in the record.

§ 6. Procedure and Findings

The defendant shall not be sentenced under subdivision (a) or (b) of section 5 unless he is remanded by the judge before sentence to [diagnostic facility] for study and report as to whether he is suffering from a severe personality disorder indicating a propensity toward criminal activity; and the judge, after considering the presentence investigation, the report of the diagnostic facility, and the evidence in the case or on the hearing on the sentence, finds that the defendant comes within the purview of subdivision (a) or (b) of section 5. The defendant shall be remanded to a diagnostic facility whenever, in the opinion of the court, there is reason to believe he falls within the category of subdivision (a) or (b) of section 5. Such remand shall not exceed ninety days, subject to additional extensions not exceeding ninety days on order of the court.

The defendant shall not be sentenced under subdivision (c) of section 5 unless the judge finds, on the basis of the presentence investigation or the evidence in the case or on the hearing on the sentence, that the defendant comes within the purview of the subdivision. In support of such findings it may be shown that the defendant has had in his own name or under his control substantial income or resources not explained to the satisfaction of the court as derived from lawful activities or interests.

§ 7. Murder

A defendant convicted of murder in the first degree shall be committed for a term of life.

Optional § 8. Atrocious Crimes

If a defendant is convicted of one of the following felonies—murder, second degree; arson; forcible rape; robbery while armed with a deadly weapon; mayhem; bombing of an airplane, vehicle, vessel, building, or other structure—and is not committed under section 5, the court may commit him for a term of ten years or to a lesser term or may sentence him under section 9.

§ 9. Sentencing for Felonies Generally

Upon a verdict or plea of guilty but before an adjudication of guilt the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such terms and conditions as it may require. Upon fulfillment of the terms of probation the defendant shall be discharged without court adjudication of guilt. Upon violation of the terms, the court may enter an adjudication of guilt and proceed as otherwise provided.

If a defendant is convicted of a felony and is not committed under section 5 or 7 [or 8] the court shall (a) suspend the imposition or execution of sentence with or without probation, or (b) place the defendant on probation, or (c) impose a fine as provided by law for the offense, with or without probation or commitment, or (d) commit the defendant to the custody of [director of correction] for a term of five years or a lesser term, or to a local correctional facility for a term of one year or a lesser term. Where a sentence of fine is not otherwise authorized by law, in lieu of or in addition to any of the dispositions authorized in this paragraph, the court may impose a fine of not more than $1000. In imposing a fine the court may authorize its payment in installments. In placing a defendant on probation the court shall direct that he be placed under the supervision of [the probation agency].

§ 10. Statement on the Sentence

The sentencing judge shall, in addition to making the findings required by this Act, make a brief statement of the basic reasons for the sentence he imposes. If the sentence is a commitment, a copy of the statement shall be forwarded to the department or institution to which the defendant is committed.

§ 11. Modification of Sentence

The court may reduce a sentence within ninety days after it is imposed, stating the reason therefor for incorporation in the record.

§ 12. Who Imposes Sentence

All sentences under this Act shall be imposed exclusively by the judge of the court.

§ 13. Parole

Sections ..... relating to the powers of the parole board shall be applicable to persons committed under this article.

ARTICLE IV. ALTERNATIVE SENTENCING OF MINORS

§ 14. Arraignment and Trial as Youthful Offender

A person charged with a crime which was committed in his minority but was not disposed of in juvenile court and which involves moral turpitude or is subject to a sentence of commitment for one year or more shall—and, if charged with a lesser crime, may—be investigated and examined by the court to determine whether he should be tried as a youthful offender, provided he consents to such examination and to trial without a jury where trial by jury would otherwise be available to him. If the defendant consents and the court so decides, no further action shall be taken on the indictment or information unless otherwise ordered by the court as herein provided. After such investigation and examination, the court in its discretion may direct that the defendant be arraigned as a youthful offender, and no further action shall be taken on the indictment or information; or the court may decide that the defendant shall not be arraigned as a youthful offender, whereupon the indictment or information shall be deemed filed.

§ 15. Conduct of Trial

If the defendant does not plead guilty, the trial of the charge as youthful offender shall be before the judge without a jury. The trial of youthful offenders and proceedings involving them shall be conducted at court sessions separate from those for adults charged with crime.

§ 16. Admissibility of Statements

No statement, admission, or confession made by a defendant to the court or to any officer thereof during the examination and investigation referred to in section 14 shall be admissible as evidence against him or his interest, except that the court may take such statement, admission, or confession into consideration at the time of sentencing, after the defendant has been found guilty of a crime or adjudged a youthful offender.

§ 17. Disposition of Youthful Offender

If a person is adjudged a youthful offender and the underlying charge is a felony, the court shall (a) suspend the imposition or execution of sentence with or without probation, or (b) place the defendant on probation for a period not to exceed three years, or (c) impose a fine as provided by law for the offense, with or without probation or commitment, or (d) commit the defendant to the custody of [director of correction or youth authority] for a term of three years or a lesser term, or to a local correctional facility for a term of one year or a lesser term. Where a sentence of fine is not otherwise authorized by law, in lieu of or in addition to any of the dispositions authorized in this paragraph the court may impose a fine of not more than $1000. In imposing a fine the court may authorize its payment in installments. In placing a defendant on probation the court shall direct that he be placed under the supervision of [the probation agency]. If the underlying charge is a misdemeanor, a person adjudged a youthful offender may be given correctional treatment as now provided by law for such misdemeanor.

§ 18. Effect of Determination as Youthful Offender

No determination made under the provisions of Article IV shall disqualify any youth for public office or public employment, or operate as a forfeiture of any right or privilege, or make him ineligible to receive any license granted by public authority; and such determination shall not be deemed a conviction of crime except that, if he is subsequently convicted of crime, the prior adjudication as youthful offender shall be considered. The fingerprints and photographs and other records of a person adjudged a youthful offender shall not be open to public inspection, except that the court may, in its discretion, permit the inspection of papers or records.

ARTICLE V. MULTIPLE CHARGES

§ 19. Merger of Sentences

Unless the judge otherwise orders, (a) when a person serving a term of commitment imposed by a court in this state is committed for another offense, the shorter term or the shorter remaining term shall be merged in the other term, and (b) when a person under suspended sentence or on probation or parole for an offense committed in this state is sentenced for another offense, the period still to be served on suspended sentence, probation, or parole shall be merged in any new sentence of commitment or probation.

§ 20. Transmittal of Information of Merger Sentences

The court merging the sentences shall forthwith furnish each of the other courts and the penal institution in which the defendant is confined under sentence with authenticated copies of its sentence, which shall cite the sentences being merged.

§ 21. Effect of Merger of Sentences

If an unexpired sentence is merged pursuant to Section 19 of this Act, the courts which imposed such sentences shall modify them in accordance with the effect of the merger.

§ 22. Concurrent or Consecutive Service of Terms

Separate sentences of commitment imposed on a defendant for two or more crimes constituting a single criminal episode shall run concurrently. Sentences for two or more crimes not constituting a single criminal episode shall run concurrently unless the judge otherwise orders.

ARTICLE VI. REPEALS

§ 23. Sections Repealed, Amended

The following [chapters, sections] are hereby [repealed, amended] .....

.....

All other acts and parts of acts inconsistent with the provisions of this act are hereby repealed.