The New Jersey Penal Code

Volume II: Commentary

Final Report of the New Jersey Criminal Law Revision Commission

FOR THE PROVISIONS OF THE PENAL CODE, CONSULT VOLUME I OF THE COMMISSION'S REPORT

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CHAPTER 1. PRELIMINARY

AMENDMENTS TO STATUTES RELATING TO PARODE

§ 2C:1-1. COMMENTARY

1. This preliminary provision shows the method of transition from the existing system to that of the Code. *Ex post facto* application is, of course, precluded but provisions granting a defense or mitigation and the sentencing provisions may be applied with the consent of the defendant. So too, procedural provisions may apply in cases based on an offense committed before enactment of the Code.

We suggest that the date inserted in subsection a be approximately one year from the time of enactment. This will allow the necessary public familiarization with the Code.

2. The general method applied by subsection b is to make existing law continue in force and apply unless "any of the elements of the offense" charged occurred after the effective date of the Code, except as provided in subsection c and d. The three exceptions of paragraph c are: (1) Procedural provisions of the Code govern "insofar as they are justly applicable and their application does not introduce confusion or delay." This provision is drawn from Rule 59 of the Federal Rules of Criminal Procedure. (2) With the defendant's consent, provisions of the Code which accord a defense, mitigation or a reduction in the severity of the offense apply. (3) With the defendant's consent, the sentencing provisions of the Code apply. An existing statute, N.J.S. 1:1-15, now provides a similar system as to the applicability of new statutes. *See State v. Closter Village,* 31 N.J. Super. 566 (Co. Ct. 1954), *affirmed sub. nom. State v. Low,* 18 N.J. 179 (1955); *State v. Bachelor,* 52 N.J. Super. 379 (App. Div. 1958).

3. The exceptions to § 2C:1-1b found in paragraph d of the Section deal with correction provisions. New Jersey's existing position on changes in correctional law is that there is no power to increase a maximum or minimum sentence (*In re Fitzpatrick,* 9 N.J. Super. 511 (Co. Ct., 1950), *affirmed o.b.* 14 N.J. Super. 213 (App. Div. 1951) and approved in *In re Domako,* 9 N.J. 443 (1952)), but that legislative changes in parole eligibility do not violate any rights of a prisoner. *Zink v. Lear,* 29 N.J. Super. 515 (App. Div. 1953); *White v. Parole Board,* 17 N.J. Super. 580 (App. Div. 1952); *Mahoney v. Parole Board of New Jersey,* 10 N.J. 269 (1952). In enacting a new Parole Act in 1948, however, our Legislature provided that "any prisoner sentenced prior to the effective date of this act shall retain all rights of eligibility for parole available to him under any pre-existing law." N.J.S. 30:4-123.37. See *Zink v. Lear, supra.*

§ 2C:1-2. COMMENTARY

1. This Section undertakes to state the most pervasive general objectives of the Code. The statement is included both for its own sake, as an explanation of the underlying legislative premises, and also as an aid in the interpretation of particular provisions and in the exercise of the discretionary powers vested in the courts and in the organs of correctional administration.

2. Paragraph a defines the general purposes of the Code governing definition of offenses. It is a modification of MPC § 1.02 by the addition of provisions intended to balance the aims of the criminal law to protect the public interest. With this in mind, we have added "condemn" to "forbid and prevent" in subsection a(1) and have added all of subsection a(2). The latter is from the New York Code. While we certainly do not mean this Code to be an instrument of repression or retribution, it must take into account the public need to assure condemnation of offenses and to use the criminal law to prevent further offenses. See *State v. Ivan*, 33 N.J. 197 (1960).

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

4. New Jersey has no such comprehensive statements of the purposes of the criminal law. Spread throughout our case law, however, are many statements which lead to the conclusion that the goals of our present system largely coincide with those stated in paragraphs a and b of this Section. In *State v. Ivan*, 33 N.J. 197 (1960), our Supreme

Court was concerned with the problem of the exercise of discretion by a trial judge in sentencing:

> "The philosophical justification for punishment has divided men for centuries. Suggested bases or aims are (1) retribution, (2) deterrence of others, (3) rehabilitation of the defendant, and (4) protection of the public by isolation of the offender. * * * * Today retribution is not a favored thesis, although some still claim a need to satisfy a public demand for vengeance. Perhaps it persists as an unarticulated premise in individual sentences. Present-day thinking emphasizes deterrence and rehabilitation. Few would permanently isolate the offender without regard to the nature of his crime upon a finding of incorrigibility. That course, however defensible in abstract theory, cannot be seriously considered until future behavior is predictable with substantial certainty. The Legislature has adopted that approach only with respect to multiple convictions. Otherwise society may be secured against repetition of crime only within the limit of the maximum punishment authorized for the particular offense."
>
> "Expressed in other terms, the prevailing theme is that punishment should fit the offender as well as the offense. * * * * Except where the Legislature has decreed a mandatory sentence, thereby determining the punishment should fit the offense without regard to the circumstances of the offender, the problem devolves upon the sentencing judge. Our Legislature has not stated the aims to be achieved by punishment. Indeed few legislatures have, and where they have, the statement has been 'too general to be of service.'"

After quoting MPC § 1.02(2) and the drafters' notes accompanying it, the Court noted that the Code "eschews the prescription of a formula" for the application of these purposes, and continued:

> "No single aim or thesis can claim scientific verity of universal support. Agreement can hardly be expected until much more is known about human behavior. Until then, the sentencing judge must deal with the complex of purposes, determining in each situation how the public interest will best be served. * * * * His answer will be a composite judgment, a total evaluation of all the facets, giving to each the weight, if any, it merits in the context before him. There can be no precise formula. The matter is embedded deeply in individual discretion."
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> "As we have said, the judge must decide in what way the interest of the public will best be served. He seeks justice to society as well as to the individual, and of course justice to the individual is itself a phase of justice to the community. If the offense has strong emotional roots or is an isolated event unassociated with a pressing public problem, there is room for greater emphasis upon the circumstances of the individual offender. On

the other hand, if the crime is a calculated one and part of a widespread criminal skein, the needs of society may dictate that the punishment more nearly fit the offense than the offender. There the sentencing judge may conclude he should give priority to punishment as a deterrence to others and as an aid to law enforcement. The doubts that may beset the deterrent effect of punishment when the crime is steeped in emotional pressures recede sharply when the motivation is pecuniary and the criminal event is part of a calculated 'business' venture. If the prevailing thinking does not strongly support this view, at least no one can demonstrate that those who act upon it do so without legal warrant." (33 N.J. 199–202)

We subscribe to these views.

As to the individual subsections of 2C:1–1a and b, see *State v. Ivan, supra; State v. DiStasio,* 49 N.J. 247 (1967); *State v. Gibbs,* 79 N.J. Super. 315 (App. Div. 1963); *State v. Sikora,* 44 N.J. 453 (1965); *State v. Lucas,* 30 N.J. 37 (1959); *State v. Hudson News Co.,* 35 N.J. 284, 293 (1961); *State v. Meinken,* 10 N.J. 348 (1952); *State v. Provenzano,* 34 N.J. 318 (1961); *State v. Carbone,* 38 N.J. 19 (1962); *State v. Bess,* 53 N.J. 10 (1968); *State v. Johnson,* 67 N.J. Super. 414 (App. Div. 1961).

5. Paragraph c accords the statements of objectives of paragraphs a and b an explicit significance for purposes of interpretation and the exercise of discretionary powers. It gives equal importance, however, to the special purposes of the particular provision involved. The Code does not, as such, preserve the rule that "penal laws must be strictly construed" although paragraphs a(4) and b(5) affirm that fair warning is one of its major purposes. The New Jersey cases set forth the rule of strict construction of penal statutes which means that the statute should not be extended by tenuous interpretation beyond the fair meaning of its terms. The rule is based on the need to avoid its being applied to persons or conduct beyond the Legislature's contemplation. Having said this, however, our cases then go on and hold that the rule of strict construction does not mean that the Legislature's intention should be disregarded. A reasonable interpretation should be made based upon the legislative purpose as revealed by the composite thrust of the whole statute. *State v. Meinken,* 10 N.J. 348 (1952); *State v. Provenzano,* 34 N.J. 318 (1961); *State v. Carbone,* 38 N.J. 19 (1962); *State v. Gattling,* 95 N.J. Super, 103 (App. Div. 1967); *State v. Edwards,* 28 N.J. 292 (1958); *State v. Congdon,* 76 N.J. Super. 493 (App. Div. 1962); *State v. Frost,* 95 N.J. Super. 1 (App. Div. 1967); *State v. Gibbs,* 79 N.J. Super. 315 (App. Div. 1963).

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

§ 2C:1–3. COMMENTARY

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

Faced with an increasing number of offenses based upon conduct which was interstate in nature, many states have enacted laws extending their jurisdiction to cover offenses committed partially outside the state. MPC T.D. 5, p. 3 (1956). New Jersey has never had such comprehensive legislation but, recognizing the need, it copied an old English statute as to venue and jurisdiction over homicides. (N.J.S. 2:184–3 carried forward into R. 3:14–1; See *State v. Wycoff*, 31 N.J.L. 65 (Sup. Ct. 1864)). It also entered into some interstate compacts (see *State v. Federenko*, 26 N.J. 119 (1958) and *State v. Holden*, 46 N.J. 361 (1966)) and enacted legislation extending its criminal jurisdiction three miles into the sea. (N.J.S. 40:18–5).

In our opinion, the Code would somewhat broaden New Jersey's criminal jurisdiction. In view of the continued and increasing importance of criminal conduct which is interstate in nature and given the protection to the defendant from the provisions of § 2C:1–10 of the Code this seems desirable. We have, however, added in subsection f a unique provision granting discretion to the court to dismiss or take some lesser action under a standard similar to that used in the civil doctrine of *forum non conveniens*. This should adequately protect against multiple prosecutions while, at the same time, granting a broad power to the state to prosecute where appropriate.

2. The offense may, under § 2C:1–3a, be based upon either the person's own conduct or the conduct of another for which he is legally accountable under § 2C:2–6. Under the Code, if the offense is committed wholly or partly within this State the accomplice is liable here even though his acts took place entirely outside the state. This follows the law found in many state statutes. MPC T.D. 5, p. 4 (1956). It would, however, expand liability somewhat from that found in our cases. In *State v. Wycoff*, 31 N.J.L. 65 (Sup. Ct. 1864), the Court found that a person who was an accessory before the fact to a larceny in New Jersey could not, under the circumstances, be convicted. He,

while in another state, incited and procured his agent or accomplice to enter this State and commit the larceny. The Court recognized that if he had sent an innocent agent into the State there would be jurisdiction—"otherwise the anomaly would exist of a crime but no responsible criminal"—but where "the instrumentality employed [is] a conscious guilty agent, with free will to act or to refrain from acting, there is no room for the doctrine of a constructive presence in the procurer." Under the Code, the procurer would be legally accountable for the acts of the person within the State. There is no longer any reason to distinguish between various classes of accomplices, particularly based upon theories of "constructive presence," which were thought to be necessary to find the defendant within the state where the crime was "committed." See *State v. LaFera,* 35 N.J. 75, 89 (1961).

3. The Code, in subsection a, establishes six instances in which a person may be convicted under the law of this State of an offense committed by his conduct or the conduct of another person for which he is legally accountable:

(a). Where either certain conduct or a certain result is an element of the offense and it occurs within this State. This is subject to the limitations of subsections b and c, concerning situations where the act is not criminal in the other state, and subsection d, concerning the definition of "result" in homicide cases. Both exceptions will be discussed below.

Our cases have many instances of situations which find either conduct or a result which is an element of an offense to be sufficient if done in this State. Thus, in *State v. West,* 29 N.J. 327, 333-34 (1959), the Court found sufficient "offensive conduct within [New Jersey] even though an impact elsewhere is intended." See also *State v. Lang,* 108 N.J.L. 98, 102 (E. & A. 1931) (death in New Jersey, fatal blow in New York, victim transported to New Jersey by defendants); *Hunter v. State,* 40 N.J.L. 495, 548 (E. & A. 1878) (blow in New Jersey, death in Pennsylvania). However, there are instances where the Code would find jurisdiction but our courts have not. In *State v. Carter,* 27 N.J.L. 499, 500 (Sup. Ct. 1859), the fatal blow occurred in New York but death did not result until two days later at which time the victim was in New Jersey. The victim had come to New Jersey voluntarily. No jurisdiction was found here because "no act [was] done in this state by the defendant." Under the Code, there would be jurisdiction under subsection a(1) because the death, *i.e.,* the result, occurred here. Again, in *State v. Stow,* 83 N.J.L. 14, 15-16 (Sup. Ct. 1912), the defendant was tried and convicted of attempting to counsel and advise another to violate the election laws of New Jersey. He had written to the other person and mailed the letter from New Jersey to Pennsylvania. It was never received by the addressee and came into the hands of the prosecutor.

New Jersey was found to be without jurisdiction to prosecute. The Court reasoned that it is only "the completed act" which gives jurisdiction. The Code in subsection a(1) would find jurisdiction because conduct which is an element of the offense occurred here.

(b). The second instance of conduct which is sufficient is that which occurs outside this State but which is sufficient to constitute an attempt to commit an offense within the State. The drafters of the MPC state this to be the common law although they confess to being unable to find judicial precedents. MPC T.D. 5, pp. 10-11, (1956). The Code would not require that any agency or instrumentality enter the State because "the security of the state is threatened by an attempt to commit a serious offense in the state from outside the state and this gives the state a sufficient interest to control such conduct." *Id.* This reasoning is clearly out of line with the early cases of *Wycoff* and *Carter, supra,* but it is in line with the more recent cases of *LaFera* and *West.*

(c). Paragraph (3) provides for jurisdiction over a conspiracy outside the state to commit a crime within the state, provided that an overt act in pursuance of the conspiracy occurs within the state. This is the law in New Jersey and elsewhere. MPC T.D. 5, p. 11 (1956). *State v. LaFera, supra,* at 89.

(d). Paragraph (4) deals with the situation where conduct within the state establishes complicity in the commission of, or attempt or conspiracy to commit an offense in another jurisdiction. Here, the conduct contemplated must be both an offense in this state and in the State where the result is to take place. The Code's position would refuse to follow *People v. Buffum,* 40 Cal. 2d 709, 256 p. 2d 317 (1953) which holds that it is not a crime in California to conspire to send a woman to Mexico for an abortion even though it was a crime in both places. The place of occurrence under the Code is thought to be immaterial. No New Jersey cases were found although *State v. LaFera, supra,* assumes that prosecution in one State is proper even though the conspiracy is to be committed in another. Further, the reasoning of that case leads to the conclusion that the Code's view would be followed in New Jersey.

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

(f). Paragraph (6) deals with situations in which this State may outlaw conduct even though it occurs wholly outside it when no element of offense occurs within it. It requires an express prohibition by the Legislature of that conduct outside the State, that the conduct bear a reasonable relationship to a legitimate interest of the State and that the actor know or should know that his conduct is likely to affect that state interest. MPC Proposed Final Draft, p. 6 (1962) and T.D. 5, pp. 12-13 (1956). No cases on point were found. *State v. Segal, supra,* and *State v. West, supra,* contain language which gives rise to the belief that our courts, in appropriate circumstances, might find jurisdiction of this sort. But see *State v. Stow, supra.*

4. Subsection b limits the scope of Subsection a(1) in cases where conduct in this state causes a result in another state and where that other state treats the conduct as being noncriminal. Here, a qualified legal effect is given to that other state's law: Where the result is designed or likely to occur in another state which treats that result as non-criminal, conduct in this state leading to that result is not criminal "unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result." See MPC T.D. 5, p. 6 (1956) *Cf., State v. West, supra,* and *In re Cohen,* 10 N.J. 601 (1952). Under subsection c, where the result is caused by conduct occurring outside this State and it would not constitute an offense if the result had occurred there but happens to occur in this State, it is not an offense here unless the result was purposely or knowingly caused within this State. No New Jersey cases were found.

5. Subsection d establishes two special rules as to homicides:

(a). Either the death of the victim or the bodily impact causing death are sufficient to constitute a "result" within the meaning of Subsection a(1). This rule is established because of the "serious nature" of homicide, "the difficulty of detection and the fact that the act causing death and the death may be far apart geographically." MPC T.D. 5, p. 9 (1956). The first provision is designed to cover the situation where the bodily impact causing death occurs within the state though the death occurs elsewhere. The second provision involves a situation where the death occurs in the state. Though the place where the victim dies may be far removed from the place where the defendant's conduct occurred, practical consideration leads to this rule because it may be possible to determine where the victim died but not where the fatal blow was struck. New Jersey has many cases in accord with the second rule, *i.e.,* of impact out of the state and death within. *State v. Lang, supra.* at 102; *Hunter v. State,* 40 N.J.L. 495, 546 (E. & A. 1878), *overruling State v. Carter, supra.* No cases were found on the first point, *i.e.,* of impact in and death out. *Carter* assumes that in such a case jurisdiction would exist. As to venue, where analogous rules are applied, see R. 3:14-1; *State v.*

Brooks, 136 N.J.L. 577 (E. & A. 1947); and *State v. Hauptmann*, 115 N.J.L. 412 (E. &. A. 1935).

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

6. Paragraph e defines "this State" for purposes of the Code. In addition to the general rule, two extensions are included:

(a) The validity of interstate and state-federal compacts is recognized. New Jersey has several interstate compacts concerning jurisdiction in its interstate boundaries with adjoining states. The validity of so extending jurisdiction over crimes is established. *State v. Federanko, supra; State v. Holden, supra.*

(b) A statute which, by means of the definition of "county" extends the criminal jurisdiction of New Jersey three nautical miles into the sea is included by reference.

§ 2C:1–4. COMMENTARY

1. Subsection a sets forth the proposition that any offense, whether defined by the Code or by any other statute of this State, for which a sentence of death or of imprisonment in excess of six months is authorized constitutes a crime. We do not accept the rule of the MPC that imprisonment is only authorized for that which they designate as "crimes." For this reason, in Subsection b we define non-criminal, petty offenses for the violations of which imprisonment for six months or less is authorized. This brings the Code into line with existing New Jersey law. At present, the Disorderly Persons Act (N.J.S. 2A:170–1 *et seq.*; N.J.S. 2A:169–4, six months maximum sentence) permits such conviction and imprisonment. These are not, however, "crimes" within the meaning of our State Constitution; rather, they are "petty offenses." This means that the rights accorded one accused of a crime—mainly the right to trial by jury and to indictment by the grand jury—are not available to these defendants. *State v. Owens*, 54 N.J. 153 (1969); *State v. Maier*, 13 N.J. 235 (1953); *In re Buehrer*, 50 N.J. 501 (1967). The reasoning upon which this is based is as follows:

> "Below the grade of crime (*i.e.*, misdemeanors and high misdemeanors) are lesser offenses, none of which carries the stigma or the disabilities which follow upon a conviction of crime . . .

or authorized maximum penalties as severe as those which may be imposed upon a conviction for crime.

* * * *

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

Further, the State Legislature has power to decide into which category offenses should go by means of the determination of the penalty to be attached to its violation. *State v. Maier, supra; State v. Owens, supra.* This meets the requirements of the Federal Constitution. The line between "petty" and major offenses is where the authorized sentence exceeds six months. *Baldwin v. New York*, 399 U.S. 66, 90 S. Ct. 1886 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968); *State v. Owens, supra.* It was in reaction to the *Duncan* case that our Legislature reduced the available term of imprisonment under the Disorderly Persons Act from one year to six months.

2. Subsection a also classifies crimes using five categories: capital crimes and crimes of the first, second, third and fourth degrees. We continue to reject the term felony and also now abandon the term misdemeanor. Rather, we simply designate all major offenses as "crimes" and then categorize them for sentencing purpose. Subsection b creates a new category of "petty disorderly persons violation" which permits gradation of lesser offenses.

3. Subsection c makes it clear that the intent is to superimpose the grading and sentencing plan of the Code upon offenses defined by statutes other than the Code and to supersede their own sentencing provisions. This is done by Subsections a and b of this Section and by Section 2C:6–1b. Under Section 2C:6–1b, high misdemeanors outside the Code are classified as crimes of the third degree and misdemeanors outside the Code as crimes of the fourth degree. We except from this provision, however, the "New Jersey Controlled Dangerous Substances Act," the drug law of 1970. Because it is so new and is an attempt to reach an accommodation in a very controversial area of the law, we believe it should not be changed at this time. See also Section 2C:43–1.

§ 2C:1-5. COMMENTARY

1. Paragraph a establishes the point that the Code supersedes all common law offenses. This result is intrinsic to the purpose of enacting a new Code. While it has not been possible to re-examine all the areas of law in which the penal sanction is employed, the area of common law offenses has been re-examined. This having been done, there can be no occasion for preserving any crimes at common law.

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

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

Under this statute, offenses have been found for a multitude of offenses, *e.g.*, conspiracy, assault and battery, bribery, keeping a disorderly house, obstructing justice, misconduct in office, unlawful assembly, being a common scold, and extortion.

Our decision to abolish common law crimes requires recognition of several points: (1) Rising standards of notice and specificity give rise to doubts about the constitutionality of some of the common law crime standards and definitions. (2) The definitions of specific offenses in Subtitle 2 of the Code have taken the common law crimes into consideration and, where appropriate, have incorporated those definitions. (3) The decision to abolish common law crimes in our State is a reflection of a change in the basic responsibility for the growth and modernization of the criminal law—from court to legislature. It is important for the legislature to realize that the repeal of N.J.S. 2A:85-1 finally and completely places the responsibility upon that body to assure itself of the comprehensiveness of the statutory law.

3. Paragraph b provides that the provisions of Subtitles 1 and 3 *i.e.*, the general provisions governing the underlying bases of liability, excuse, justification, responsibility, sentences and sentencing, etc., apply to offenses defined by other statutes unless the Code itself provides otherwise.

> "Since the function of [these provisions] is to articulate the norms that ought to govern any application of the penal sanction, this declaration also is intrinsic to the purpose of the [Code]. It comports, moreover, with the usual assumption of the legislature, when it frames *ad hoc* enactments that a body of general principles will guide its application by the courts. To repeat the principles with each enactment is, of course, impossible. On the other hand, the fact that qualifying principles governing the constituents and scope of liability and general defenses are now so

largely based upon unwritten law presents one of the greatest difficulties in the field. Their full articulation in the Code will not only simplify the problem of the courts; it will make it possible for legislative draftsmen to determine knowledgably what departures from these norms may be desired in connection with specific legislation. The ambiguity that beclouds these matters in the present state of penal legislation . . . can be dispelled, it is submitted, in no other way."

4. Although the adoption of this Code will abolish common law crimes and establish general principles for the general part of the criminal law and sentencing, it is not the intent of the Code to displace the role of the judiciary. Issues of interpretation and application must, by the nature of our legal system, be determined in the context of individual cases, by the courts. This process will continue to allow the growth and development of the law.

5. Paragraph c makes it clear that it is not a purpose of the Code to deal with the judicial power to punish for contempt or to use sanctions to enforce an order or a civil judgment or decree, even though imprisonment may be employed. *Cf., In re Buehrer, supra.*

6. There are several statutes granting legislative powers to local governmental units which might be construed as enabling those units to pass ordinances in fields within the area of concern to the Code. See, *e.g.*, N.J.S. 40:48–1 explicitly granting such authority in areas where the Code has provisions (*i.e.*, drunkards, beggars, vagrants, loitering, etc.) and N.J.S. 40:48–2 which might be interpreted as granting such authority by implication. *State v. Ulesky*, 54 N.J. 26, 29 (1969).

Our cases, however, establish a doctrine of preemption under which the legislative power of a local government may not be exerted in terms which conflict with an established State policy. For instance, in *State v. Ulesky, supra*, a municipality enacted a criminal registration ordinance applicable to certain persons who stayed in the municipality for a given period of time. Although assumed to be within the grant of power from the State to the municipality, the Court held that power could not be exercised because preempted:

> "But of course it is elementary that a municipality may not exert the delegated police power in terms which conflict with a State statute, and hence a municipality may not deal with a subject if the Legislature intends its own action, whether it exhausts the field or touches only a part of it, to be exclusive and theretofore to bar municipal legislation. As a general proposition an intent to preempt the power of municipalities will not be lightly inferred . . . but in the final analysis the answer must depend upon the particular setting, the values involved and the impact of local legislation upon those values." (54 N.J. at 29)

As applied to the Penal Code, this problem has two aspects: First, are those areas in which the Code contains provisions on a particular subject. Here, the preemption doctrines of *Ulesky* would seem to be sufficient to protect the State's expressed policy. Second, however, are those situations in which the Code purposely excludes provisions on particular subjects because we believe that those activities should not be the subject of criminal penalties. Here, we mean this section to suggest to the Judiciary the need to protect those negative, unexpressed State policies. See *In re Lane,* 58 Cal. 2d 99, 22 Cal. Rptr. 857, 372 P. 2d 897 (Sup. Ct. 1962); *In re Hubbard,* 62 Cal. 2d 119, 41 Cal. Rptr. 393, 398, 396 P. 2d 809, 814 (Sup. Ct. 1964); *Abbott v. Los Angeles,* 53 Cal. 2d 674, 3 Cal. Rptr. 158, 349 P. 2d 974 (Sup. Ct. 1960).

§ 2C:1–6. COMMENTARY

1. *Rationale of Time Limitations.* We see four separate objectives to statutes of limitations upon criminal prosecutions: (1) The desirability of requiring convictions to be based upon reasonably fresh evidence and the avoidance of an erroneous conviction arising from delay. (2) If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, thereby diminishing *pro tanto* the necessity for imposition of the criminal sanction. If he has repeated his criminal behavior, he can be prosecuted for the more recent offenses. (3) As time goes by, any community retributive impulse diminishes. (4) It is desirable to lessen the possibility of blackmail based on a threat to prosecute or to disclose evidence to enforcement officials. After a period of time, a person ought to be allowed to live without fear of prosecution. See MPC T. D. 5, pp. 16-17 (1956).

2. *Length of the Period.* There is wide disparity among the states as to the length of the period. The drafters of the MPC identify five questions to be answered in resolving this issue. These questions along with our resolution are:

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

The Code provides for limitation for all offenses except for murder (§ 2C:1–6a), the view being that it is desirable to maintain the common police practice never to close the files on an unsolved murder case. Granting the fact that there are other crimes of comparable gravity, we believe that they are less likely to present equal obstacles to prompt discovery of evidence or to have comparably long continued impact on the sense of general security of the community. New Jersey now makes a similar distinction except that it is between "any offense not punishable with death" and those which are. N.J.S. 2A:159–1. Thus, murder and kidnapping now fall in the excluded class. In *State v. Brown,* 22 N.J. 405, 412 (1956), the Court upheld a conviction for second-degree murder where a short form indictment had

been returned beyond the statutory period for non-capital offenses. The court's reasoning was based on the theory that the conviction was for murder which is a unified crime split into degrees only for purposes of punishment and that murder is a capital offense. See *Knowlton,* Criminal Law and Procedure, 14 Rutgers L. Rev. 242, 248 (1961). Essentially, therefore, the New Jersey capital-noncapital distinction is the same as the Code's murder-other crime distinction, except for kidnapping. We believe that kidnapping should be categorized with other very serious crimes such as rape and robbery for this purpose and that murder should stand alone.

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

The Code provides two. The MPC provides four but we believe this to be unnecessarily refined. These two distinctions are simply between crimes (see Section 2C:1–4) and non-indictable offenses (see Section 2C:1–4b). This is similar to the existing New Jersey limitations which are:

Treason (N.J.S. 2A:159–1): Three years

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

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

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

The Code, as noted above, provides for periods of five years and one year. Our present statute provides, generally, the same. There is no empirical data upon which to base a judgment as to the appropriate length of time. To the extent that rationalization is possible, the periods must attempt to reflect the multiple, varying and conflicting goals of the criminal law. Thus, the more serious the offense, the less society will want to see the guilty escape and the lower are the chances for self-reform—but, also, for the more serious offenses the more there is at stake for the defendant and therefore, the greater the need for protection of procedural rights. We believe our provisions adequately provide for this.

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

The Code is drafted on the theory that it is ordinarily desirable to start the running of the period of limitation at the time when a crime is committed rather than at the time the offense is detected or the offender discovered. The assumption is that most offenses are known at least to the victim at the time of or soon after their commission, or that the offense can be discovered by adequate investigation by enforcement officials. This is not likely to be so with certain offenses where both the opportunity for prolonged concealment is great and the public interest in conviction is very high. We single out for such treatment in Subsection c cases of misconduct by a public officer or

employee. The special need to be able to remove such persons from public office and the difficulty of detecting such offenses leads to this provision. See *State v. McFeeley,* 136 N.J.L. 102, 106 (Sup. Ct. 1947); *State v. Hozer,* 19 N.J. 301, 311 (1955). The period is extended to any time when the defendant is in public office or employment or within two years thereafter. The MPC would limit this extension to three additional years. We specifically reject this.

MPC § 1.06(3)(a) also has an extension for frauds and breaches of fiduciary obligation. We believe the general five-year period to be sufficient.

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

We agree that some provisions of this sort are needed and have chosen to include them with the Sections defining the offenses by a requirement of a complaint being made by the victim within a prescribed period of time. An example is § 2C:14–6e (prompt complaint in sexual offenses). The practical effect here is to reduce the statute of limitations to six months.

3. *When does the period of limitation start to run?*

The Code provides that the period of limitation starts to run when the offense is committed. This is in accord with the majority view and with existing New Jersey law. An offense is committed under Subsection f either (1) when every element occurs; or (2) in the case of a continuing offense, when the course of conduct or the defendant's complicity therein terminates.

As to (1), "element" is defined in 2C:1–13h. The statement is in accord with existing law. *State v. Weleck,* 10 N.J. 355, 374 (1952) (distinguishing noncontinuous offenses, such as extortion and attempted extortion, from continuing offenses, such as misconduct in office).

As to (2), "continuing offenses", the concept is well-established in our law although its application can be difficult. The Code, in effect, establishes a presumption against finding that an offense is a continuing one. Our cases have many instances of offenses found to be continuing. *State v. Weleck, supra* (misconduct in office); *State v. McFeeley, supra; State v. Hozer, supra; State v. Garris,* 98 N.J.L. 608 (Sup. Ct. 1923) (same); *State v. Gregory,* 93 N.J.L. 205 (E. & A. 1919) (conspiracy); *State v. Ellison,* 14 N.J. Misc. 635 (Sup. Ct. 1936) (same); *State v. Unsworth,* 85 N.J.L. 237 (E. & A. 1913) (same). There can be difficulty in defining what is or is not a continuing offense for this purpose. The drafters of the MPC were particularly critical of *State v. Ireland,* 126 N.J.L. 444, 445 (Sup. Ct.), *appeal dismissed,* 127 N.J.L. 558 (E. & A. 1941), where, the defendant, an architect, was convicted of creating a public nuisance

because a bath house he designed in violation of the building code collapsed thirteen years after it was built. No act, other than the building's collapse, was alleged to have occurred subsequent to the original construction. The Court held that the two-year statute did not apply because it was a continuing offense and stated:

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

The Court went on to rely upon conspiracy, bigamy and desertion cases in support of this. The case appears to be wrong and may well be inconsistent with other New Jersey authorities. *State v. Rudner,* 92 N.J.L. 20 (Sup. Ct. 1918), *aff'd.,* 92 N.J.L. 645 (E. & A. 1919) (tampering with a water-meter is not a continuing offense even though water is subsequently stolen). To the extent that a given offense does in fact proscribe a continuing course of conduct, no violence is done to the statute of limitations. Since the conduct extends within the periods of limitation, it is subject to prosecution.

4. The rule found in the last sentence of paragraph d is the same as our present law:

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

5. *When is a prosecution commenced?*

The Code requires that "prosecution be commenced" within the period specified and that term is defined in § 2C:1–6e in two ways. As to crimes, a prosecution is commenced when an indictment is found. As to non-indictable offenses, defined by § 2C:1–4b, it is when a warrant or other process is issued, provided that the warrant or process is executed without unreasonable delay. The provision for execution of the warrant without unreasonable delay is intended to protect against its being left without any attempt to serve it. Factors such as defendant's being absent, etc., should be used to determine the reasonableness of the effort. New Jersey now requires that an indictment be found, in the case of crimes (N.J.S. 2A:159–1,2,3) or a complaint filed, in the case of Disorderly Persons Violations (N.J.S. 2A:169–10). "Finding" of an indictment requires that it be both

voted on by the Grand Jury and that it be properly returned into Court. *State v. Rhodes, supra* at 520. The Code's position is based on the view that the basic purpose of the statute is to insure that the accused will be informed of the decision to prosecute and the general nature of the charge sufficiently promptly to allow him to prepare his defense before evidence of his innocence becomes weakened with age. His right to have the case promptly disposed of is not covered by the Code.

6. *Tolling Provisions.* Subsection f specifies the situation in which time is not counted against the period of limitation. It applies where proceedings are terminated prior to final adjudication and provides that time during which a prosecution for the same conduct is pending against the accused in this State does not count against the period of limitation. No New Jersey authorities were found.

MPC § 1.06(6)(a) deals with the situation where the defendant is outside the State and has no reasonably ascertainable place of abode or work within the State. The period may then be extended three years. As originally drafted, the MPC would have required absence from the jurisdiction *and* proof of "a purpose thereby to avoid detection, apprehension or prosecution." MPC T.D. 5, pp. 26-27 (1956). This was rejected in favor of the provision making continuous absence from the State itself sufficient to toll the statute. New Jersey's statutes now provide that they do not apply to any person "fleeing from justice." N.J.S. 2A:159–1,2,3,4 and 2A:169–10. This has been interpreted to mean that mere absence of the accused from the jurisdiction is not enough and the State must show either flight from or concealment within the jurisdiction *plus* an intent to avoid detection or prosecution. *State v. Greenberg,* 16 N.J. 568, 578 (1954); *State v. Estrada,* 35 N.J. Super. 459, 461 (Co. Ct. 1955); *State v. Rosen,* 52 N.J. Super. 210, 215 (L. Div. 1958) (18 year delay). The Code rejects all of these provisions. The prosecutor may stop the running of the statute simply by obtaining an indictment. In our view, no tolling provision is needed in that situation.

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

7. The Code does not allow conviction of a lesser included offense which is barred by the statute when the prosecution is brought for a greater inclusive offense. The result is that there can be no conviction for any offense, included or otherwise, unless prosecution is commenced during the period of limitation applicable to that offense. *Cf., State v. Brown,* 22 N.J. 405 (1956). We believe this to be appropriate because a defendant may, at his option, waive the bar so as to obtain the benefit of having the jury consider the lesser offense.

§ 2C:1-7. COMMENTARY

1. *Scope.* This Section sets out the method of prosecution when behavior constitutes more than one offense. It defines the prosecution's right to charge more than one offense and to convict of an included offense which is not specifically charged in the indictment. The main objective of this Section is to formulate limitations upon unfair multiplicity of convictions or prosecutions. The related problem of accumulation of multiple sentences is dealt with in § 2C:44-5.

2. It should be noted that our Court has pointed out the need for revision of our law in this area. In the words of Justice Jacobs, "many of the difficulties would be eliminated if all charges against a defendant were disposed of in a single trial rather than by piecemeal litigation." *State v. Bell,* 55 N.J. 239 (1970). See also *State v. Cormier,* 46 N.J. 494 (1966) and *State v. Currie,* 41 N.J. 531 (1964).

3. *Prosecution for Multiple Offenses; Limitation on Convictions.*

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

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

(1) Subsection a(1) prohibits conviction of both an offense and an included offense based on the same conduct. "Included offense" is defined in Subsection d. This is our law. See *State v. Riley,* 28 N.J. 188 (1958) (rape and assault); *State v. Hill,* 44 N.J. Super. 110 (App. Div. 1957); *State v. Jones,* 94 N.J. Super. 137 (App. Div. 1967).

(2) Subsection a(2) prohibits, under certain circumstances, conviction for both a criminal conspiracy and a completed offense which was the object of the conspiracy. The Code takes the view that conspiracy to commit an offense, like attempt, may consist merely of preparation to commit that offense. Since, under the Code, the conspiracy is punishable in the same degree as the completed offense, a conviction of either adequately deals with such conduct. This is not true, however, where the conspiracy has as its objective engaging in a

course of criminal conduct since that involves a distinct danger in addition to that involved in the actual commission of any specific offense. Therefore, the limitation of the Code is confined to the situation where the completed offense was the sole criminal objective of the conspiracy. There may be conviction of both a conspiracy and a completed offense committed pursuant to that conspiracy if the prosecution shows that the objective of the conspiracy was the commission of additional offenses. In New Jersey today, conviction of both conspiracy and the completed offense is allowable. *State v. Oats,* 32 N.J. Super. 435 (App. Div. 1954); *State v. Chevenoek,* 127 N.J.L. 476 (Sup. Ct. 1942). This is not now true as to attempt, the failure to complete the crime being part of the definition of attempt. *State v. Swan.* 131 N.J.L. 67 (E. & A. 1943); *State v. Schwarzback,* 84 N.J.L. 268 (E. & A. 1913). The Code's position in regard to conspiracy is proposed also in the case of any other conduct which is made criminal only because it is a form of preparation to commit another crime. If the preparatory conduct has other or further criminal objectives, here, as in conspiracy, the limitation is inapplicable. MPC T. D. 5, p. 33 (1956).

(3) Subsection a(3) prohibits the conviction for two offenses which require inconsistent findings of fact to establish their conviction. This is the law in New Jersey and elsewhere. See *State v. Bell, supra,* and cases cited therein. See *Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189 (1970). The Code does not preclude conviction on one count which is inconsistent with an acquittal on another count. The New Jersey cases have no clear holding on this point but it appears that they are in accord with the Code in allowing a verdict to stand here. *State v. Coleman, supra* at 42; *State v. Dancyger,* 29 N.J. 76, 93 (1959).

(4) Subsection a(4) prohibits conviction under both a general and a specific statute. "Thus, a person could not be convicted, for the same conduct, under a general statute prohibiting lewd conduct and also under a specific statute prohibiting indecent exposure." MPC T. D. 5, p. 33 (1955). See *State v. Riley, supra* (rape and assault); *State v. Hill, supra* (robbery and assault); *State v. Jones, supra.* But *Cf., State v. Craig.* 48 N.J. Super 276 (App. Div. 1958) (breaking and entry conviction does not absorb charge of possession of burglary tools) and *State v. Montague,* 55 N.J. 387 (1970), *modifying* 101 N.J. Super. 483 (App. Div. 1968) (threatening a police officer's life does not merge with assault and battery upon a police officer).

(5) Subsection a(5) deals with the continuing offense. If a statute or the Code prohibits a continuing course of conduct, only one conviction is possible based upon a single uninterrupted course of such conduct. "Thus, a person violates an unlawful cohabiting statute only once, no matter how long his unlawful cohabiting continues, unless the conduct is interrupted, by issuance of process or otherwise,

or unless the statute prescribes that specific periods constitute separate offenses." MPC T. D. 5, pp. 33-34 (1956). In *State v. Juliano,* 52 N.J. 232, 236 (1968), our Supreme Court held (1) that bookmaking convictions for each separate day of bookmaking are proper and (2) separate convictions for both bookmaking on horseraces and bookmaking on baseball games on the same day are proper. The Court noted that "common sense" must be used in sentencing in order to avoid pyramiding of punishment, and thus affirmed the conviction because there had been a term of imprisonment given only on one charge and a suspended sentence on the others. The Code would overrule the first holding of *Juliano,* but not the second.

4. *Limitation on Separate Trials for Multiple Offenses.*

Subsection b is designed to prevent the State from bringing successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a "hold" upon a person after he has been sentenced to imprisonment, or simply to harass him by multiplicity of trials. The State must prosecute in a single prosecution all offenses committed under the circumstances specified in Subsection b. The penalty for failure to do so is that the State is thereafter barred from subsequently prosecuting for any such offense. See § 2C:1–9. Of course, the prosecutor is not required to prosecute for every offense of which the defendant may be guilty. His discretion remains. All that is required by Subsection b is that charges against the defendant, which are known to the proper prosecuting authority and within the venue of the court, be determined in a single rather than multiple trials. Subsection c permits the courts to grant relief from the requirement and order separate trials if it is satisfied that justice so requires. Subject to that possibility the defendant has the right, under the Code, to have his liability for essentially the same conduct litigated in a single trial.

The difficulty lies in defining "essentially the same conduct." Currently, several tests are found in the cases. See discussion of *State v. Currie, supra;* and see *Ashe v. Swenson,* 397 U.S. 496, 90 Sup. Ct. 1189 (1970).

The Code deals with the problem by requiring all offenses to be prosecuted in a single trial in the situations set forth in Subsection b There are two general prerequisites. First, the offenses must be known to the police or the prosecutor. The defendant ought not to be allowed to take advantage of the fact that he has successfully concealed part of his criminal activity from enforcement officials. The second requirement is that the offenses be within the jurisdiction and venue of a single court. Under our venue rules and jurisdiction statutes this imports a major limitation. See *State v. LeJambre,* 42 N.J. 315 (1964). We leave the limitation as to jurisdiction notwithstanding that the Double Jeopardy Clause may compel some limita-

tions on the meaning of that term in this context. See *Waller v. Florida,* 397 U.S., 387, 90 S. Ct. 1184 (1970) and compare *Ashe v. Swenson, supra,* particularly the concurring opinion of Mr. Justice Brennen at footnote 7.

The Code uses two terms to define what has been characterized above as "essentially the same conduct." First, it forbids separate trials for multiple offenses "based on the same conduct," and second, for those "arising from the same criminal episode." "Conduct" is defined in § 2C:1–13d as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions." According to the drafters of the MPC, included in this term is a single act or a single instance of negligence or recklessness which results in the commission of more than one offense. They also make it clear that no effort is made to be more specific than the above definitions because of the "infinite number of possible factual variations" and that "the courts must be entrusted with interpretation in the light of the evident purpose of the Section to eliminate undue harassment by successive trials, so far as that is feasible." MPC T.D. 5, p. 37 (1956). The variety of situations coming under the term "same criminal episode" is discussed in MPC T.D. 5 at pp. 37-39.

Adoption of the Code approach of formulating a given legal test setting forth when multiple trials are possible would be a major change in New Jersey law. The leading case is *State v. Currie, supra* at 536-38, where the defendant was originally convicted in Municipal Court of the Motor Vehicle Act violations of reckless driving and leaving the scene of an accident. Subsequently, he was indicted for atrocious assault and battery and attempted atrocious assault and battery based on the same episode. He was convicted of atrocious assault and battery. On appeal, the Supreme Court found no violation of the rule against double jeopardy:

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

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

> "In [*State v.*] *Roller*[, 29 N.J. 339 (1959)] this Court recently pointed out that neither test has proved to be entirely acceptable, while seeking the elusive ideal test the court has in each in-

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

* * * *

"*Mark* and *Dixon,* as well as *Labato,* reached results which were on their facts entirely fair and consistent with reasonable expectations in the light of the constitutional and common law goals. But they never intended to convey the thought that every magistrate's determination, no matter how minor the offense charged before him will necessarily preclude a subsequent criminal prosecution based in whole or in part on the same activity, no matter how aggravated the crime charged. Indeed in *Labato* itself, Justice Heher seems to have recognized the contrary by his flat statement that the doctrine under which a person acquitted or convicted of a minor offense may not generally be charged again on the same facts in more aggravated form "does not apply when the subsequent charge is that of murder or manslaughter." 7 N.J. at p. 146.

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

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

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

by principles of double jeopardy or *res judicata* and collateral estoppel." (*Supra* at 538–545.)

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

The *Currie* rule was an acceptable way of patching up piecemeal litigation after the fact. We believe, as our Supreme Court has indicated it does also, that these attempts to save prosecutions should be abandoned in favor of a straightforward rule requiring a single prosecution. *State v. Bell, supra.* We do not accept a distinction between cases which were preceded by an upper court prosecution and those preceded by a Municipal Court prosecution. Compare *State v. Currie, supra*, and *State v. Shoopman, supra*, with *State v. Hoag, supra.* The decision of the United States Supreme Court in *Waller v. Florida*, 397 U.S. 387, 90 S. Ct. 1184 (1970), constitutionally precludes such a distinction. Even without that decision, we think it unwise. The State should organize its prosecuting function in such a way as to make these decisions prior to any trial of the defendant. Subsection b puts the prosecutors on notice that they must do so. Our Supreme Court would, however, have the duty of interpreting and applying the language of Subsection b and, as noted previously, this language was intentionally made not to be overly specific. Earlier cases would, of course, be relevant and the "reasonable expectation" test of *Currie* might well prove useful in this context.

5. *Relief from Joinder Requirement.* Subsection c incorporates our Court Rule (R. 3:15-2(b)). We include this provision in the Code because of its importance in relation to Subsection b. See *State v. Manney*, 26 N.J. 362 (1958); *State v. Coleman, supra; State v. Cormier, supra; State v. Sinclair*, 49 N.J. 525 (1967).

6. *Conviction of Included Offense Permitted.* Subsection d permits conviction for an offense which is not specifically charged in the accusative pleadings, provided that the offense is an included offense. With an important exception, discussed below, this general principle has been our law. Previously, it was contained in one of the Court Rules (R.R. 3:7–9(c)) but it was eliminated on recommendation of the Advisory Committee on the ground that it was "substantive law appropriately dealt with, *e.g.*, in the court's charge to the jury, and not

required to be provided for by court rule." *Proposed Revision of the Rules Governing the Court of the State of New Jersey*, pg. 231 (1966). The matter is now governed by the common law found in our cases.

Before turning to the definition of included offense, it is important to discuss the existing limitation upon conviction for included offenses now in force in New Jersey. In *State v. McGrath*, 17 N.J. 41, 44 and 50 (1954), the Supreme Court held that the County Court had no power to deal with simple assault and battery because the Legislature had provided that simple assault and battery was a disorderly persons offense and not a crime, and such offenses are within the "sole jurisdiction of the municipal court." Thus, violations of the Disorderly Persons Act are now not included offenses in indictable crimes. Recently, in *State v. Currie, supra* at 547, the Court reaffirmed *McGrath*:

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

We specifically reject *McGrath*. We have included in Subsection d the words "whether or not the included offense is an indictable offense" to make it perfectly clear that any lesser included offense may and should be charged to the jury.

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

(1) Paragraph (1) provides that a lesser offense is necessarily included in a charge of the greater offense if the proof necessary to establish the greater offense will of necessity establish every element of the lesser offense. This is the majority view (MPC T.D. 5, pp. 40-41 (1956)) and is our law. *State v. Midgeley*, 15 N.J. 574 (1954); *State v. Zelichowski*, 52 N.J. Super. 256 (App. Div. 1955); *State v. O'Leary*, 31 N.J. Super. 411 (App. Div. 1954); *State v. Butler*, 107 N.J.L. 91 (E. & A. 1930); *State v. Stow*, 97 N.J.L. 349 (E. & A. 1922).

(2) Paragraph (2) provides that an attempt to commit the offense charged or to commit any included offense is an included offense.

(3) Paragraph (3) provides for two situations:

(a) The first is the case where the offense differs from the offense charged only in that it requires a lesser degree of culpability. This situation may not come within paragraph (1) since it may require proof of different facts than those required for the offense charged. These are cases of offenses of lesser culpability rather than offenses different than the one charged. The rule that allows a conviction for

manslaughter under an indictment charging murder may be viewed as an illustration of this principle. *State v. Williams,* 30 N.J. 105 (1959); *State v. Zelichowski,* 52 N.J. 377 (1968).

(b) Second is the case where the offense differs from the offense charged only in that less serious injury or risk of injury is necessary to establish its commission. New Jersey adopts this rule in the situation which arises most frequently, that is, the conviction for atrocious assault and battery under an indictment charging murder. *State v. Zelichowski,* 52 N.J. 377 (1968). See MPC T.D. 5, pg. 42 (1956).

7. Submission of Included Offense to Jury. Subsection e states that the Court shall not charge the jury on an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. This is in accord with the New Jersey rule which is found in *State v. Sinclair,* 49 N.J. 525, 540 (1967):

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

See also *State v. Mathis,* 47 N.J. 455, 466 (1966); *State v. Davis,* 50 N.J. 16 (1967); *State v. Pacheco,* 38 N.J. 120, 131 (1962); *State v. Wynn,* 21 N.J. 264, 270 (1956); *State v. Sullivan,* 43 N.J. 209, 245 (1964).

§ 2C:1-8. COMMENTARY

1. This Section states the circumstances in which a former prosecution is a bar to a subsequent prosecution for the same offense, in the narrowest sense of a violation of the same statute based upon the same facts. A bar arises in four general situations: (a) where the first prosecution results in an acquittal, (b) where collateral estoppel operates, (c) where the first prosecution results in a conviction, or (d) where the first prosection is improperly terminated after the jury has been empaneled and sworn and the first witness is sworn.

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

(a) Under Subsection a a finding of not guilty by the trier of fact or a determination by the judge that there is insufficient evidence to raise a jury question will preclude a subsequent prosecution for the same offense. This is our law. *N.J. Constitution of 1947, Art. 1,*

para. 10. State v. Currie, 41 N.J. 531 (1964); *State v. Farmer,* 48 N.J. 145 (1966); *State v. Labato, 7* N.J. 137 (1951).

Under the Code, the determination or verdict itself is sufficient to constitute the bar even though no judgment is entered. This is prevailing law.

(b) The Code requires that there be either a finding of not guilty by the trier of fact or a determination that there is insufficient evidence to support a conviction. This definition of "acquittal" is also used in § 2C:1–9a of the Code. This is our law. A formal acquittal such as on the ground of a variance or a dismissal of an indictment because of improper form or substance or to allow the prosecution to seek a new indictment is not an acquittal. *State v. Fary,* 16 N.J. 317 (1954); *State v. Rosen,* 52 N.J. Super. 210 (Law Div. (1958)).

(c) The Code provides that a finding of guilt of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside. This is our law. In *State v. Williams,* 30 N.J. 105, 119 (1959), our Supreme Court held that a conviction of second degree murder operated as an acquittal of first degree murder so that a conviction of the latter offense was not possible after a reversal of the first judgment.

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

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

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

3. *Final Order or Judgment as an Estoppel.* Subsection b provides that a final order or judgment is a bar to a subsequent prosecution for the same offense if (1) the final order or judgment was entered after the complaint was filed or the indictment found; (2) the final order or judgment is not reversed, vacated or set aside pursuant to law, and (3) the final order to judgment required a determination inconsistent with a fact or legal proposition necessary for conviction of the offense. MPC T.D. 5, p. 49 (1956).

(a) The Code holds that factual estoppel ought to apply to the criminal law as well as the civil law. This has been the New Jersey view. *State v. Cormier,* 46 N.J. 494 (1966). It is now constitutionally compelled. *Ashe v. Swenson,* 397 U.S. 496, 90 S. Ct. 1189 (1970).

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

(c) The order or judgment must be a *final* order or judgment. The rationale for this requirement is that if it is a final order or judgment the State can and should appeal (R. 2:3–1), if dissatisfied, rather than to commence a second prosecution. No New Jersey authorities were found on the point.

(d) The determination may be either of law or fact, if necessarily inconsistent with a proposition of law or fact that must be established for conviction. The fact must, therefore, be an "ultimate fact." MPC T.D. 5, p. 51 (1956). *State v. Bell, supra; State v. DiGiosia,* 3 N.J. 413 (1950), *State v. Emery, 27* N.J. 348 (1958), and *State v. Leibowitz, 22* N.J. 102 (1956) demonstrate that this is New Jersey's law. There are no New Jersey cases as to estoppel on previous determinations of law, although it is applied to such determinations elsewhere. MPC T.D. No. 5, p. 51 (1956).

4. *Former Conviction.* Subsection c provides that a prior conviction is a bar to a subsequent prosecution in two situations: (1) where there is an existing judgment of conviction, *i.e.,* one that has not been reversed or vacated; and (2), if no judgment was entered for reasons other than on motion of the defendant, then if there is a verdict or plea of guilty upon which judgment of conviction can be entered. This is the law here and elsewhere. *State v. LeFante,* 12 N.J. 505 (1953), *State v. Labato, 7* N.J. 137 (1951), *State v. Turco,* 99 N.J.L. 96 (Sup. Ct. 1923). MPC T.D. 5, p. 14 (1956). There is no need for inquiry as to whether the judgment of conviction is "on the merits" because so long as the judgment remains unreversed and not vacated, the defendant is subject to punishment pursuant to

it and ought not, while it stands, be subjected to a subsequent prosecution for the same offense. No New Jersey authorities were found. A plea of guilty has the same effect as a verdict of guilty.

5. *Improper Termination of Trial.* Subsection d dealing with improper termination of a trial, is based upon the premise that it is undesirable to allow the State to withdraw from a poorly presented or poorly received case and to start over again with the hope of better success the second time. Our cases reflect this as the basis for the rules of law in this area. *State v. Romeo,* 43 N.J. 188, 194–195 n.1 (1964); *State v. Locklear,* 16 N.J. 232, 236 (1954). Two approaches to the problem are feasible: It can be assumed that any termination is proper unless for a prohibited reason or, it can be assumed that a termination is improper unless for a justifiable reason. The latter is the traditional approach. *State v. Romeo, supra; State v. Locklear, supra; State v. Farmer,* 48 N.J. 145 (1966).

To come within the ban of this Section, the termination must take place after the jury is empaneled and sworn or, in a non-jury case, after the first witness is sworn. This is existing law. MPC T.D. No. 5, p. 53 (1956). *State v. Farmer, supra* at 169; *State v. Locklear, supra* at 235; *State v. Williams,* 30 N.J. 105, 120 (1959).

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

(1) First, where the defendant consents to the termination or waives his right to object to it. This is our law. *State v. Wolak,* 33 N.J. 399, 401 (1960) (Motion for mistrial denied; subsequently reconsidered on court's own motion and granted without objection by defense counsel. *Held,* no bar to subsequent prosecution); *State v. Williams, supra; State v. Locklear, supra.* Waiver problems are discussed in MPC T.D. 5, p. 53 (1956).

(2) Second, is where the jury is unable to agree. This does not bar a subsequent prosecution. *State v. Roller,* 29 N.J. 339 (1959), *State v. Williams, supra.*

(3) Third, is a general category where the termination is justified because of the circumstances then existing. Our Supreme Court has said that it is impossible to list all of the circumstances which will justify the termination of a trial prior to verdict. *State v. Farmer, supra* at 170–171, 174. See also *United States v. Perez,* 22 U.S. 579, 580 (1824). In *State v. Romeo,* 43 N.J. 188 (1964), the Court stated the rule as follows:

> "The law in this State is thoroughly established that, while principles of double jeopardy may be applicable to bar a second trial where the first has been terminated short of verdict, yet . . . if the first trial was terminated or the jury discharged because of incapacitating illness of the judge or a juror or jurors or of the defendant, or misconduct or disqualification of some members

of the jury, or on account of an untoward incident that renders a verdict impossible, or some undesigned matter of absolute necessity, or the failure of the jury to agree upon a verdict after a reasonable time for deliberation has been allowed, subsequent prosecution for the offense [is] not barred, for reasons of justice and public interest. * * * . . . we insist that the abortive termination be for a sufficient legal reason and an absolute or an overriding necessity . . . and carefully review the trial court's action to be certain that these requirements are fairly met . . .".

See also *State v. Farmer, supra* ("manifest necessity"; "urgent necessity"); *State v. Locklear, supra.* Instead of using a general phrase as we do, the MPC sets forth somewhat more specific . . . general reasons. MPC T.D. 5, p. 54 (1956) these are:

(1) *Physical Necessity.* "This may result from such contingencies as the death or illness of the judge, a juror, attorney or member of their immediate families." MPC T.D. 5, p. 54 (1956). *State v. Romeo, supra; State v. Williams, supra.*

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

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

(4) *False Statements by a Juror on Voir Dire.* See *State v. Romeo, supra.*

We accept our Supreme Court's view that categorization is unwise and, therefore, have rewritten this Section to allow termination for "manifest or absolute or overriding necessity" and "a sufficient legal reason." We believe the reasons set forth that the MPC to be within our definition.

§ 2C:1-9. COMMENTARY

1. This Section deals with those situations in which a former trial or proceeding prior to trial is a bar to a subsequent prosecution for a different offense, whether a violation of a different statute or a different violation of the same statute. There are five general situations in which a prosecution for a "different offense" may be barred by a previous trial or proceeding prior to trial:

2. First, under Subsection a(1) there is a bar where the former prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is for an offense of which the defendant could have been convicted at the previous trial. This is our law. *State v. Williams,* 30 N.J. 105 (1959); *State v. Cooper,* 13 N.J.L. 361

(Sup. Ct. 1833). The bar exists only so long as the judgment remains undisturbed. After reversal, it operates only to prevent conviction of a more serious offense of which the defendant was, by implication, acquitted at the first trial. *State v. Williams, supra; State v. Wolf*, 46 N.J. 301 (1966). See discussion of § 2C:1–8a, above.

3. Second, under Subsection a(2), there is a bar in any case where the subsequent prosecution is for an offense which should have been charged in a single prosecution under Section 2C:1–7b. The penalty for failure to join an offense, unless otherwise excused, is that the State is precluded from subsequently charging the defendant with that offense. This provision does not apply if the first judgment has been reversed or if the failure to join was because the trial court granted a separate trial. Additionally, the State may subsequently prosecute for an offense which, although it arose out of the same transaction, was not consummated (*e.g.*, assault conviction followed by the victim's death and a homicide prosecution) or was not known to the police or prosecutor at the time of the previous prosecution.

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

4. Third, a bar arises under subsection a(3) whenever the second prosecution is for

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

As to (a), our cases have, at times, followed the rule of *Blockburger v. United States*, 284 U.S. 299 (1932) in what may be characterized as a mechanical application. *State v. Shoopman*, 11 N.J. 333 (1953). At other times, an analysis seemingly like that of the Code has been employed. *State v. Cormier, supra; State v. Currie, supra.* It seems clear, however, that the rule of this subsection of the Code is more stringent than the "reasonable expectations" test of the *Currie* and *Cormier* cases. As to (b), this is intended to take care of those situations where there is no compulsory joinder under § 2C:1–7 because a severance was allowed.

5. Fourth, subsection (b) defines the scope of collateral estoppel as it applies to a subsequent prosecution for a different offense. See generally discussion of § 2C:1–8b, *supra; State v. Cormier, supra*; and *Ashe v. Swenson, supra.* The provision applies whenever the previous determination is inconsistent with a fact which must be estab-

lished to convict of the second offense. *State v. Cormier, supra,* is on point.

6. Fifth, subsection c provides a bar to a subsequent prosecution for a different offense if the former trial was improperly terminated and the offense for which the subsequent prosecution is brought is one of which defendant could have been convicted at the former trial had it not been improperly terminated. The protection here is narrower than that following an acquittal or conviction at the first trial. See § 2C:1–9a(2) above. This is based on the fact that improper termination is virtually always the result of a good faith but erroneous ruling of the trial judge. MPC T.D. 5, p. 59 (1956).

§ 2C:1–10. COMMENTARY

1. This Section sets forth the circumstances in which a previous prosecution in one jurisdiction bars a subsequent prosecution in another jurisdiction. *United States v. Lanza,* 260 U.S. 377 (1922) holds that, in the absence of a statute, the rule against double jeopardy does not apply as between separate sovereignties. *Lanza* and its progeny were followed in *State v. Cooper,* 54 N.J. 330 (1969) which adopts a strict "two sovereigns" rule. *Waller v. Florida,* 397 U.S. 387 90 S. Ct. 1184 (1970) throws some doubt on these authorities. This Section must take a more limited approach than is the case where both prosecutions are in the same jurisdiction (Sections 2C:1–8 and 9) since compulsory joinder and permissive joinder rules may vary.

2. The Code does not bar a subsequent prosecution after a former prosecution in a foreign country. This is contrary to statutory law in many jurisdictions. MPC T.D. 5, p. 61 (1956). We believe it more appropriate to handle this through international agreements.

3. Subsection a provides a bar when there has been a former acquittal on the merits as well as on former conviction in a federal court or court of another state. This is limited to courts of general jurisdiction so as to avoid giving a binding effect to findings of inferior courts. This limitation is not found in the MPC. By incorporating the definition of "acquittal" and "conviction" from Section 2C:1–8, the prior judgment must be both on the merits and undisturbed. Two situations are covered by the Code:

(a) A subsequent prosecution is barred if it is based on the same conduct as was the former trial. See discussion of § 2C:1–7b. The term "same conduct" is intended to be broader than "same act." MPC T.D. 5, p. 63 (1956). *Cf., Ashe v. Swenson,* 397 U.S. 496, 90 S. Ct. 1189 (1970). This is limited, however, by three exceptions. First, it does not apply if the first offense and the second offense each requires proof of a fact not required by the other and the law defining each was intended to prevent "a substantially different harm or evil." Second, it does not apply if the second offense is intended to prevent a "sub-

stantially more serious harm or evil" than the first offense. This limitation is not found in the MPC and is unique to our Code. It is intended to prevent a prosecution for a minor offense from having a binding effect as to a serious offense. *Cf., State v. Bell*, 55 N.J. 239 (1970). Third, it does not apply if the second offense was not consummated when the first trial began.

(b) Subsection b makes collateral estoppel applicable between jurisdictions provided the adjudication in the foreign jurisdiction took the form of a final order or judgment on the merits in a court of general jurisdiction. See §§ 2C:1–8b and 2C:1–9b and *Ashe v. Swenson, supra.* Notice that, in this situation, the parties are not the same in both suits, *i.e.*, there are different plaintiffs.

§ 2C:1–11. COMMENTARY

1. This Section sets forth three situations when a prosecution is not a bar to a subsequent prosecution within the meaning of Sections 2C:1–8 through 10.

2. First, it is not a bar if the former prosecution was before a court which lacked jurisdiction over the defendant or the offense. This is the law in New Jersey and elsewhere. MPC T.D. 5, p. 64 (1956). It is important to distinguish between error within the court's jurisdiction and jurisdictional error. The Code only bars prosecution in the latter situation. *Id.* The New Jersey case establishing the rule is *State v. LeJambre*, 42 N.J. 315, 319 (1964). There, a magistrate had downgraded a robbery complaint and tried it as a petty larceny. He did not have the prosecutor's permission to do so. Subsequently, an indictment for robbery was returned and the Supreme Court held that the former conviction upon a plea of guilty was not a bar. In view of the fact that the magistrate had neither authority to try the robbery charge nor without the prosecutor's permission to amend it to charge petty larceny, his accepting the plea of guilty was an act outside his authority. Consequently, it was a legal nullity and could furnish no basis for a plea of double jeopardy. The Court specifically relied upon MPC § 1.11(1), which is Subsection a of our Code, finding it to be "the traditional rule which has been followed generally throughout the country and leads to a denial of the defendant's double jeopardy plea here." See *State v. Dixon*, 40 N.J. 180 (1963) and cases cited in *State v. LeJambre, supra* at 319.

3. Second, it is not a bar if "the former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer." MPC § 1.11(2) requires also proof of a "purpose of avoiding the sentence which might otherwise be imposed." We have eliminated this provision but, in so doing, intended that the word "procured" should be interpreted as requiring substantial culpability on the

defendant's part. In the *LeJambre* case the Supreme Court specifically referred to MPC § 1.11(2) and adopted it as our law:

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

We do not envision our changing the wording of this Section as rejecting this holding. See also *State v. Dixon, supra* and *State v. Bell*, 55 N.J. 239 (1970).

4. Third, is the situation where the former prosecution resulted in a judgment of conviction which was held invalid in a post-conviction relief proceeding or similar process. Again, it is not bar. § 2C:1–11c. This is the law in New Jersey and elsewhere. "The courts agree that it should be immaterial whether the defendant attacks the judgment collaterally or by direct appeal." MPC T.D. 5, p. 65 (1956). See *In re Garofone*, 80 N.J. Super. 259 (Law Div. 1963), *affd.*, 42 N.J. 244 (1963), *In re Carter*, 14 N.J. Super. 591 (Co. Ct. 1951); *State v. Lamoreaux*, 20 N.J. Super. 65 (App. Div. 1952).

The same limitation upon a reprosecution found in § 2C:1–8a that a conviction of a lesser included offense is an acquittal of the greater offense, although the conviction is subsequently set aside, applies here.

§ 2C:1–12. COMMENTARY

1. This Section, in Subsection a prescribes the conventional requirement that the prosecution must prove a charge of crime beyond a reasonable doubt. Subsequent paragraphs recognize that this basic requirement is not wholly unqualified in application because of doctrines shifting the burden of adducing evidence, the burden of proof and presumptions.

2. Paragraph a calls for proof beyond a reasonable doubt of "every element of the offense." That term is defined in § 2C:1–13h to mean such conduct or such attendant circumstances or such a result of conduct as (1) is included in the description of the forbidden conduct in the definition of the offense; or (2) establishes the required kind of culpability; or (3) negates an excuse or justification for such conduct; (4) negates a defense under the statute of limitations; or (5) establishes jurisdiction or venue.

Our cases are generally in accord. In *State v. D'Orio*, 136 N.J.L. 204, 208 (E&A. 1947), the Court quoted, with apparent approval, a trial court charge which had said that "the defendant is presumed to be innocent . . . and unless the crime charged in each of its elements, is proven against him beyond a reasonable doubt, he is entitled to an acquittal." See also *State v. Cutrone*, 8 N.J. Super. 106, 111 (App. Div. 1950) ("each and all of [the] elements [of the crime charged]"); *State v. DiRienzo*, 53 N.J. 360 (1969) (culpability); *State v. Tonnison*, 92 N.J. Super. 452, 456 (App. Div. 1966) (exception in the statute); *State v. Fair*, 45 N.J. 77, 91 (1965) (excuse or justification); *State v. Abbott*, 36 N.J. 63, 72 (1961) (same); *State v. Dolce*, 41 N.J. 422, 432 (1964) (same); *State v. Garvin*, 44 N.J. 268 (1965) (alibi-presence of defendant); *State v. Estrada*, 35 N.J. Super. 459 (Co. Ct. 1955) (Statute of Limitations). No cases were found as to the standard proof in jurisdiction and venue. *Cf., State v. O'Shea*, 16 N.J. 1, 5 (1954). In several states the law is that venue need only be proved by a preponderance of the evidence. In some, the same is true of jurisdiction. See MPC T.D. 4, p. 109 (1955). The drafters of the MPC conceded that there is much to be said concerning distinguishing for purposes of the standard of proof, between those facts which establish the criminality of the defendant's conduct and those which merely satisfy procedural requirements. They decided not to make such a distinction, however, because of the "larger difficulty in presenting to a jury different standards for appraising different features of the prosecution's case." *Id.*

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

> "A reasonable doubt is not a mere possible or imaginary doubt; it is that state of the case, where, after an examination and comparison of all the evidence you cannot say that you feel an abiding conviction to a moral certainty of the guilt of the defendant." *State v. Cutrone, supra* at 111.

4. The Code changes the verbiage of the usual reference to the "presumption of innocence" found in our cases. *State v. Humphreys*, 101 N.J. Super. 539 (App. Div. 1968); *State v. Cutrone, supra; State v. D'Orio, Supra.* The law of evidences makes the word "presumption" carry particular procedural connotations and, therefore, the Code speaks of "assuming" the innocence of the accused.

5. Paragraph b is addressed to the first qualification of the reasonable doubt provision, namely, the case of an affirmative defense. Subparagraph (1) deals with a situation where the denomination of a defense as affirmative relieves the prosecution of the burden of adducing evidence in the first instance on the issue; the evidential burden is imposed upon the defendant. Unless there is evidence supporting the defense, there is no issue on the point to be submitted to the jury.

When, however, there is evidence supporting the defense (whether presented by the prosecution or the defendant), the prosecution has the normal burden, *i.e.*, the defense must be negatived by proof beyond a reasonable doubt. This is our law when a defense is characterized as affirmative. *State v. Abbott, supra* at 72; *State v. Fair, supra* at 91; *State v. Chiarello*, 69 N.J. Super. 479, 498 (App. Div. 1961); *State v. Dolce; supra* at 432.

The Code does not attempt to state how strong the evidence must be to satisfy the test that "there is evidence" supporting the defense. We believe that this should be left to the courts but recognize that "it should suffice to put the prosecution to its proof beyond a reasonable doubt that the defendant shows enough to justify such doubt upon the issue." MPC T.D. 4, p. 110 (1955). *State v. Chiarello, supra,* so holds. The subsequent Supreme Court cases of *Abbott* and *Fair* have not addressed themselves to the issue although they seem to approve *Chiarello* in this regard.

6. Having defined the effect of describing a particular element as an "affirmative defense" in Subsection b(1), Subsection c defines when a ground of defense is affirmative. First, provision is made in subparagraphs (1) and (2) for the cases in which either the Code or some other statute outside the Code so provides. Second is an attempt to state a general principle for other situations, *i.e.* when

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

The decision to make a particular matter into an affirmative defense is a "subtle balance which acknowledges that a defendant ought not be required to defend until some solid substance is presented to support the accusation but, beyond this, perceives a point where need for narrowing the issues, coupled with the relative accessibility of evidence to the defendant warrants calling upon him to present his defensive claim." MPC T.D. 4, p. 111 (1955). The test of subparagraph c(3) seems to be that which has guided our courts in assigning the term "affirmative defense" to particular matters. See *State v. Chiarello, supra; State v. Abbott, supra; State v. Fair, supra; State v. Dolce, supra; cf., State v. Garvin, supra; State v. New York Central R. Co.*, 37 N.J. Super 42, 50 (App. Div. 1955); *State v. Blanca*, 100 N.J. Super. 241, 248 (App. Div. 1968); *State v. Rabatin*, 25 N.J. Super. 24, 31 (App. Div. 1953).

7. Paragraph b(2) sets forth a second exception to the proof beyond a reasonable doubt standard of Subsection a. This is where a defense, under the Code or another statute, requires the defendant to prove it by a preponderance of the evidence. The statute must "plainly" require this. The Code's position is not to so shift the burden of proof except for most exceptional considerations. It should be noted that this is a situation where we are dealing with an element

of the offense. When not an element, the matter is treated by Subsection d. There is, of course, more doubt as to the wisdom and, perhaps, the propriety of a provision which switches the burden of persuasion rather than merely switching the burden of going forward, or raises a presumption.

8. Subsection d deals with findings of fact, called for in applications of the Code, as to matters not an element of an offense within the meaning of § 2C:1–13h. Illustrations are: a finding that defendant lacks mental capacity to proceed § 2C:4–6b; a finding that the defendant is a persistent offender § 2C:44–3; a claim of double jeopardy where the issue is the identity of the person charged. Subparagraph (1) distributes the burden of proof to either the prosecution or the defendant depending upon whose interest or contention will be furthered if the finding should be made. This is said to be existing law. MPC T.D. 4, p. 114 (1955). Our cases simply decide such issues without giving explicit treatment to the rule guiding the decision. See *State v. Janiec*, 9 N.J. Super. 29, 32 (App. Div. 1950), *aff'd.*, 6 N.J. 608 (1951). The standard of proof of Subparagraph b, *i.e.*, that the fact "be established to the satisfaction" of the tribunal, is intentionally ambiguous. It means at least proof by a preponderance of the evidence but beyond that the issue is left to the courts. The variety of situations requires flexibility.

9. *Presumptions.* Paragraph e deals with presumptions. It simply incorporates our law of evidence. See Rules of Evidence 13 and 14. We see no need for a special rule in our Code and the provisions of the MPC (§1.12(5)) do not differ, in substance, from our law. See *State v. DiRienzo*, 53 N.J. 360 (1969), *State v. Humphreys*, 54 N.J. 406 (1969), *reversing* 101 N.J. Super. 530 (App. Div. 1968); *State v. Corby*, 28 N.J. 106 (1958).

§ 2C:1–13. COMMENTARY

1. Except for paragraphs h and i, none of the definitions in this Section is independently important but they have influence upon the meaning of other Code provisions. Their meaning is described in the context of those Code provisions. Paragraphs h and i are of sufficient general significance to make comment upon them worthwhile, at this point:

> "The ingredients of criminal offenses necessarily consist of (1) specified conduct or (2) specified attendant circumstances or (3) a specified result of conduct, meaning by conduct, as paragraph (4) provides, action or omission and its accompanying state of mind. The term 'element' is commonly employed to designate any such ingredient of an offense. There are, however, ambiguities in current usage, especially whether 'element' includes those facts about the conduct or the circumstances which negative de-

fenses on the merits (*e.g.*, the fact that homicide was not in necessary self-defense) or show that it occurred within the period for which a prosecution is not barred by limitations or establish jurisdiction and venue. It has proved convenient for the purposes of drafting to define 'element of an offense' broadly enough to include all such facts as 'element.' Paragraph h expressly so provides.

"While this broad definition of 'element' is useful for the purposes of the procedural provisions . . . it is obviously too broad for the purpose of the culpability provisions [Section 2C:2–2 *et seq.*]. Here what is needed is a concept that delineates the types of elements to which requirements of *mens rea* should be applied. Paragraph i, defining 'material element of an offense,' is designed to perform this function. When problems of culpability are dealt with in the Code, the reference is always to 'material' elements as distinguished from 'elements.'

"An element is 'material' under paragraph i if it does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (1) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (2) the existence of a justification or excuse for such conduct. Unless an element would be adjudged material by this criterion, its requirement can have no bearing on the actor's fault in acting as he did; his state of mind with respect thereto ought, therefore, to be deemed irrelevant. To state the matter differently, the reasons that may make it proper to provide that conduct does not constitute a crime unless the actor knows the facts that give his conduct its offensive character would not support, for example, a requirement that the actor know the facts that serve to vest a jurisdiction in the court in which the prosecution may be lodged." (MPC T.D. 4, pp. 118–119 (1955)). (Paragraphs have been renumbered.)

§ 2C:2–1. COMMENTARY

1. Subsection a states the necessary condition for criminal liability that conduct must include a voluntary act or the omission to perform an act of which the actor is physically capable. The requirement is reflective of the fact that the law cannot hope to deter involuntary movement or to stimulate action which the actor cannot physically perform. Formal social condemnation through a criminal conviction in such a situation would be inappropriate—other means of social control should be employed. The statement is reflective of the present law in New Jersey. *State v. Labato*, 7 N.J. 137, 148 (1951) ("Some act of commission or omission lies at the foundation of every crime."); *State v. Cooper*, 13 N.J.L. 361 (Sup. Ct. 1833); *State v. Gooze*, 14

N.J. Super. 277 (App. Div. 1951) (Dizzy spell from a disease known as "Meniere's Syndrome" where defendant knew of his susceptibility to such incident); *In re Lewis,* 11 N.J. 217 (1953) (Falling asleep while driving under circumstances where defendant knew of his being extremely tired).

2. The rule of Subsection a does not require that liability must be based on the voluntary act or the omission by itself, but rather that liability may be based upon conduct which *includes* such act or omission. This is intended not to preclude liability in situations such as the *Gooze* and *Lewis* cases, where liability is based upon the entire course of conduct, including the specific conduct that resulted in the injury. See also *People v. Decina,* 2 N.Y. 2d 133, 138 N.E. 2d 799 (Ct. App. 1956).

3. The second sentence of Subsection a sets forth the limitation upon the general rule by defining a general class of items which are not recognized as voluntary acts for this purpose. This should be interpreted to exclude from the definition reflex actions, convulsions, unconsciousness and sleep when those terms signify a total collapse or coma. In the case of unconsciousness, there are states of physical activity where self-awareness is grossly impaired or even absent, such as epileptic fugues, amnesias, extreme confusions, etc. See authorities cited in MPC T.D. 4, p. 121 (1955). The same is true of sleep which may give rise to total unconsciousness, somnambulism or even to a clouded state between sleep and wakefulness. See *Fain v. Commonwealth,* 78 Ky. 183 (1879) and discussion in MPC T.D. 4, p. 122 (1955). The Commission intends to leave the application of the standard in these situations to the judiciary. The same is true of the issue whether acts done under hypnotism should be considered voluntary.

4. Subsection b states the conventional provision as to when omissions unaccompanied by action suffice for liability. The omission must be one of the two sorts: (1) it may be made expressly sufficient by the law defining the offense; or (2) it may arise out of a duty to perform the omitted act which is otherwise imposed by law. Thus, under the Code, as well as under existing law, the duty to act may arise under some branch of the civil law. See *Wechsler and Michael,* A Rationale of the Law of Homicide, 37 Colum. L. Rev. 701, 751 (1937). See also *State v. O'Brien,* 32 N.J.L. 169 (Sup. Ct. 1867) (Failure of railroad switch-operator to perform employment duty).

5. *Possession as an Act.* The problem involved here is one of defining the word "possession" so as to make it an "act" under § 2C:2–1a. It is important to distinguish this question, *i.e.,* the mental element necessary to make the possession an act, from the question of the *mens rea* or mental element with which the possession must take place to make the possession criminal. The definition is found in § 2C:2–1c which provides that possession is an act if the "possessor knowingly procured or received the thing possessed or was aware of

his control thereof for a sufficient period to have been able to terminate his possession." The Code provision is in accord with existing New Jersey law. *State v. Labato, supra; State v. DiRienzo*, 53 N.J. 360, 369–370 (1969) (Defining "possession" as "intentional control and dominion" over stolen property which is to be distinguished from the State's burden of proving guilty knowledge, *i.e.*, that the defendant possessed the goods knowing them to be stolen: " 'Intentional control and dominion' means merely that the defendant was aware of his possession: 'One who has the physical control of a chattel with the intent to exercise such control either on his own behalf or on behalf of another is in possession of the chattel.' Restatement Second, Torts § 216, comment b.")

§ 2C:2–2. COMMENTARY

1. This Section is one of the keystones of the Code. It articulates the general *mens rea* requirements for the establishment of liability, *i.e.*, the general framework for defining the terms which establish the mental element necessary for each of the Code's specific offenses. There is nothing like this in the existing New Jersey statutes. Mental elements for crimes are now set forth by the use of terms such as "unlawfully," "maliciously," "intentionally" and the meaning appropriate for the particular crime is left to the judiciary.

2. The approach of the Code is based on the view that it is necessary for clear analysis that the question of the kind of liability required to establish the commission of an offense be faced squarely with respect to each material element of the crime. See § 2C:1–13i. The answer may, of course, be the same in many cases as to each such element. This approach is in accord with the modern New Jersey cases. In a murder case the prosecution must normally prove an intent to kill or to cause grievous bodily harm to establish the required culpability with respect to the element of the crime involving the result of the defendant's conduct. But if self-defense is claimed, it is enough for the prosecution to show that the defendant's belief in the necessity to act did not rest upon reasonable grounds. Thus, as to the first element purpose or knowledge (as defined in the Code) is necessary whereas as to the second element negligence is sufficient. *State v. Hipplewith*, 33 N.J 300, 316 (1960); *State v. Fair*, 45 N.J. 77, 90 (1965); see also *State v. Williams*, 29 N.J. 27 (1959).

3. The Code acknowledges and defines four different kinds of culpability: purpose. knowledge, recklessness and negligence. It also recognizes that the material elements of offenses vary in that they may involve (1) the nature of forbidden conduct, or (2) the attendant circumstances, or (3) the result of conduct. With respect to each of these three types of elements, the Code defines each of the kinds of culpability that may arise. The resulting distinctions are, we think,

both necessary and sufficient for the general purposes of penal legislation.

The purpose of articulating these distinctions in detail is to promote the clarity of definitions of specific crimes and to dispel the obscurity with which the culpability requirement is often treated when concepts such as "general criminal intent," "*mens rea*," "presumed intent," "malice," "willfullness," "scienter" and the like are used.

4. In defining the kinds of culpability a narrow distinction is drawn between acting purposely and knowingly. Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or the result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. We conceive this definition to be sufficient to include a conditional conscious object. See MPC T.D. 4, p. 129 (1955); *Perkins, Criminal Law,* pp. 579–582 (2 Ed. 1969). The distinction between purpose and knowledge is no doubt inconsequential in most cases; acting knowingly is ordinarily sufficient. But there are areas where the discrimination is required and is made under existing law, using the awkward concept of "specific intent." The New Jersey cases now embody such a concept of "purposely" although they do not employ such a term. Examples are *State v. DiPaolo,* 34 N.J. 279, 295 (1961) ("We are here concerned with the category described [in the murder statute] as a willful, deliberate and premeditated killing. . . . As settled by judicial construction, the first element is premeditation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word 'deliberate' does not mean 'willful' or 'intentional' as the word is frequently used in daily parlance. Rather it imports 'deliberation' and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally, the word 'willful' signifies an intentional execution of the plan to kill which had been conceived and deliberated upon."); *State v. King,* 37 N.J. 285 (1962); *State v. Weleck,* 10 N.J. 355, 373 (1952) ("We recognize that to be guilty of an attempt to commit a crime a defendant must have intended to commit the crime itself."); *State v. Davis,* 38 N.J.L. 176 (*Animus furandi* for larceny: ". . . it has been uniformly held that the felonious intent must manifest a purpose to deprive the owner wholly of his property.").

5. A broader discrimination is drawn between acting either purposely or knowingly and acting recklessly. As the Code uses the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk that is of probability rather than certainty; the matter is contigent from the actor's point of view. Whether the risk relates to the nature of the actor's conduct or to the existence of the requisite attendant circumstances or to the result that may ensue is immaterial;

the concept is the same. The Code requires, however, that the risk thus consciously disregarded by the actor be substantial and unjustifiable; even substantial risks may be created without recklessness when the actor seeks to serve a proper purpose. Accordingly, to aid the ultimate determination, the Code points expressly to the factors to be weighed in judgment: the nature and degree of the risk disregarded by the actor, the nature and purpose of his conduct and the circumstances known to him in acting.

Some principle must be articulated, however, to indicate what final judgment is demanded after everything is weighed. There is no way to state this value-judgment that does not beg the question in the last analysis. The point is that the jury must evaluate the conduct and determine whether it should be condemned. The Code, therefore, proposes that this difficulty be resolved by asking the jury whether the defendant's conduct involved a gross deviation from the standard of conduct that a reasonable person would observe. This seems to us, to be the most appropriate way to put the issue to a jury.

There are New Jersey cases which use language which seems to recognize the distinction drawn by the Code between "knowingly" and "recklessly" based on the degree of risk that the material element will occur. It is impossible to exactly equate our case definitions with those of the Code. For example, in *State v. Gooze*, 14 N.J. Super. 277, 282–83 (App. Div. 1951), the Court interpreted a statute which required that the defendant act "carelessly and heedlessly in willful and wanton disregard of the rights and safety of others":

> "Generally, the negligence required to support a criminal charge for a death caused thereby is more than ordinary common law negligence and is something more and greater in degree than negligence to impose civil liability. . . . 'In the second class of cases the rule is a broad one, as it regards as criminal negligence any act or omission done or left undone, as the case may be, in reckless disregard of the life or safety of another' . . . Such negligence is often described as 'gross' negligence, the word 'gross' in this collocation implying an indifference to consequences . . . . 'The statute [in question] according to its plain words, makes the act of operating a motor vehicle in a way "so that the lives or safety of the public might be endangered" a criminal offense. It is that act which is penalized. The intent with which the act is done is an immaterial factor.' Gross negligence includes a 'wanton or reckless disregard of the rights and safety of others.' . . . 'To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result. . . .

> Our courts make a distinction between gross negligence and willful and wanton disregard of the rights and safety of others. To constitute willfulness, there must be design, purpose, intent to do wrong and inflict injury. To constitute wantonness, the party doing the act, or failing to act, must be conscious of his conduct, and, without having the intent to injure, must be conscious, from his knowledge of existing circumstances and conditions that his conduct will naturally and probably result in injury. . . . To constitute willful or wanton misconduct, the wrongful act willfully done must be 'of such a nature that the injury complained of is the obviously natural result to be expected therefrom. This is so because the law presumes that a wrongdoer intends what he knows, or should know, to be the natural consequence of his wrongful act' . . . 'it is clear as is said by Dr. Wharton, in his work on Criminal Law (Section 1003) that where death is the result of an occurrence unanticipated by the defendant, but which arose from his negligence or inattention, his criminal responsibility depends on whether or not the injury which caused the death was the regular, natural and likely consequence of defendant's conduct. If it was, then the defendant is subject to indictment. If it was not, he cannot properly be charged with a penal offense.' " (Citations omitted)

See also *In re Lewis,* 11 N.J. 217, 221–22 (1953) which, in interpreting the same statute, spoke of the requirement being of a

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

See also *State v. Williams, supra* at 40. There, discussing criminal liability for the excessive use of force by a police officer in making an arrest, the Court said:

> " 'Negligence, to be criminal, must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to cause death' . . . * * * When the force exceeds what reasonably appeared necessary, the for-

bidden conduct is shown but an excess as such is consistent with an honest error of judgment, and no public interest would be served by stamping as a criminal a man who, compelled to act, merely errs in his estimate. The force should be excessive to a point where some culpable attitude is evident. There should appear . . . 'a wanton abuse.' * * * And in the context of an officer obliged to overcome resistance, and to injure to the extent reasonably necessary to that end, wantonness means either a consciousness of the excessiveness of the force or such excess as reveals an utter disregard of the rights of the offender, as distinguished from a good faith but erroneous estimate of what was needed."

The New Jersey cases defining "knowingly" or "with knowledge," when used in a criminal statute, are roughly in accord with the definition of "knowingly" found in § 2C:2–2b(2). See *State v. Doto,* 16 N.J. 397 (1954) ("one who willfully swears falsely" interpreted as "knowingly"); *State v. Sullivan,* 24 N.J. 18 (1957); *State v. Jusiak,* 16 N.J. Super. (App. Div. 1951) (receiving stolen goods *knowing* them to have been stolen); *State v. Goldman,* 65 N.J.L. 394 (Sup. Ct. 1900); *State v. Loomis,* 89 N.J.L. 8 (Sup. Ct. 1916), aff'd., 90 N.J.L. 216 (E. & A. 1917); *State v. D'Adame,* 82 N.J.L. 315 (Sup. Ct. 1912), aff'd., 84 N.J.L. 386 (E. & A. 1913).

The clause concerning awareness of a "high probability" of the existence of a fact as sufficient for knowledge, should be interpreted as dealing also with a problem known as "willful blindness" or "connivance" i.e., the situation where the defendant is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist. Such cases should be viewed as acting knowingly and not merely as recklessly. The proposition that willful blindness satisfies for a requirement of knowledge is established in our cases. *State v. Jusiak, supra* at 181; *State v. Loomis, supra, Cf., State v. D'Adame,* 84 N.J.L. 386 (E. & A. 1912), *affirming* 82 N.J.L. 315 (Sup. Ct. 1913) and *State v. Doto, supra.*

The Code includes as cases of acting knowingly when what is involved is a matter of existing fact, but not when what is involved is the result of the defendant's conduct, necessarily a matter of the future at the time of acting. The position reflects what we believe to be the normal policy of criminal statutes which rest liability on acting "knowingly", as is so commonly done. The inference of "knowledge" of an existing fact is usually drawn from proof of notice of high probability of its existence, unless the defendant establishes an honest, contrary belief. The Code solidifies this usual result and clarifies the terms in which the issue is submitted to the jury.

6. The fourth kind of culpability is negligence. It is distinguished from acting purposely, knowingly or recklessly in that it does not involve a state of awareness. It involves a situation where the actor

creates inadvertently a risk of which he ought to be aware, considering its nature and degree, the nature and the purpose of his conduct and the care that would be exercised by a reasonable person in his situation. The tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned. That finding is verbalized as "gross deviation from the standard of care that a reasonable man would exercise under the circumstances." The jury must find fault and find that it was substantial; this is all the provision is intended to mean.

The Code requires consideration of the care that would be exercised by a reasonable person in "the actor's situation." There is an inevitable ambiguity in "situation." If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would be sufficient under present law. But the congenital factors, intelligence or temperament of the actor would not now be held material in judging negligence; and could not be without depriving the criterion of all its objectivity. The Code is not intended to displace discriminations of this kind; it is designed to leave the issue to the courts.

Of the four kinds of culpability defined, there is, of course least to be said for treating negligence as a sufficient basis for imposing penal liability. Since the actor is inadvertent, by hypotheses, it may be argued that the threat of punishment for negligence must pass him by, because he does not realize that it is addressed to him. So too it may be urged that education or corrective treatment, not punishment, is the proper social method for dealing with persons with inadequate awareness, since what is implied is not a moral defect. We think, however, that this is to over-simplify the issue. Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Accordingly, we think that criminal negligence, as here defined, cannot be wholly rejected as a ground of culpability which may suffice for purposes of penal law, though we agree that it should not be generally deemed sufficient in the definition of specific crimes, and that it often will be right to differentiate such conduct for the purposes of sentence.

The New Jersey cases recognize a difference between civil and criminal negligence both according to the risk assumed and the defendant's awareness of the risk. There does not appear to be any New Jersey case which would find criminal liability based upon negligence as defined by the Code. Our cases stress the fact of the defendant's consciousness or awareness as being the element giving culpability to his conduct. *State v. Gooze, supra* at 282; *State v. Williams, supra; State v. Weiner*, 41 N.J. 21, 25–26 (1963).

7. Paragraph c(1) seeks to assist in resolution of a common ambiguity in penal legislation, the statement of a particular culpability requirement in the definition of an offense in such a way that it is unclear whether the requirement applies to all the elements of the offense or only to the element that it immediately introduced.

The Code proceeds in the view that if a particular kind of culpability has been articulated at all by the Legislature, as sufficient with respect to any element of the offense, the normal probability is that it was designed to apply to all material elements. Hence this construction is required, unless a "contrary purpose plainly appears." When a distinction is intended, as it often is, proper drafting ought to make it clear.

8. Paragraph c(2) establishes that when negligence suffices for liability, purpose, knowledge or recklessness are sufficient *a fortiori*; that purpose and knowledge similarly substitute for recklessness; and purpose substitutes for knowledge. Thus it is only necessary to articulate the minimal basis of liability for the more serious bases to be implied.

9. *Strict or Absolute Liability.* Subsection c(3) deals with the problem of strict or absolute liability. We reject the provision found in MPC §2.05 which would prevent conviction of an offense for which a sentence of imprisonment is possible unless the offense contains a culpability element. See MPC T.D. 4, p. 140 (1955).

Adoption of the MPC position would have worked very substantial change in existing New Jersey law. There are many instances in our law—both that which is traditionally criminal and that which is "regulatory"—where strict liability is imposed. *State v. Hudson County News Co.*, 35 N.J. 284, 293 (1961) (particular statute held to require *mens rea*: "Since absolute criminal liability . . . may harshly result in the imprisonment of persons who are not morally culpable, it has understandably received criticism in academic circles . . . The modern judicial trend is fortunately the other way."); *Morss v. Forbes*, 24 N.J. 341, 358 (1957) ("Within reasonable limits, the Legislature has the power and the right to designate the mere doing of an act as a crime, even in the absence of the *mens rea* which was a necessary prerequisite at common law . . . Where words clearly indicating the requirements of a criminal intent are omitted, the issue becomes one of statutory construction to ascertain the meaning of the legislative body."); *State v. DeMeo*, 20 N.J. 1, 8-11 (1955) (bigamy prosecution); *State v. Labato, supra* at 149–150; *State v. Moore*, 105 N.J. Super. 567 (App. Div. 1969) (carnal abuse prosecution—strict liability as to girl's age). In our view, this change would have been too drastic.

We agree, however, with the drafters of the MPC that strict liability is undesirable where a jail sentence is imposed because of

the type of moral condemnation which is and which ought to be implicit when imprisonment is involved. There is much weight to the argument that in the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform. MPC T.D. 4, p. 140 (1955). The contrary argument in favor of absolute liability is that it is necessary for enforcement of the particular statute where it obtains. In our view, this argument is too powerful to be completely ignored.

There have recently been decisions of the Supreme Court of the United States indicating that the States will have less freedom than the earlier cases had indicated in defining crimes without *mens rea*. *Compare United States v. Balint*, 258 U.S. 250 (1922); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910) and *United States v. Behrman*, 258 U.S. 280 (1922) with *Robinson v. California*, 370 U.S. 660 (1962); *Lambert v. California*, 355 U.S. 225 (1957) and *Smith v. California*, 361 U.S. 147 (1959). But *cf., Powell v. Texas*, 392 U.S. 651 (1968). See also *Morissette v. United States*, 342 U.S. 246 (1952). These decisions, together with the strong antistrict liability opinion of Mr. Justice Jacobs in the *Hudson County News Co.* case (35 N.J. at 289–294) lead to the conclusion that modification of existing law as to strict liability is appropriate.

We have done this in subsection c(3). This provision is basically the same as Section 15.15(2) of the New York Penal Code. First, it suggests that in interpreting penal legislation, the fact that no culpability requirement is stated does not preclude reading the statute to include such an element. Second, a form of presumption against strict liability is created. A clear legislative intent to impose that type of liability is required. This is similar to our Supreme Court's approach in *State v. Hudson County News Co., supra.*

10. Paragraph d states the conventional position that knowledge of the existence, meaning or application of the law determining the elements of an offense is not an element of that offense, except in the exceptional situations where the law defining the offense or the Code so provides. This is the law as found in our cases. *Morss v. Forbes, supra* at 359; *State v. Prusser*, 127 N.J.L. 97, 101 (Sup. Ct. 1941). See also cases and discussion accompanying § 2C:2–4.

It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. But in so far as this point is involved there is no need to state a special principle; the legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge, recklessness or negligence, as the case may be, is required for culpability by paragraphs a to c. The law involved is not the law defining the offense; it is some other legal rule

that characterizes the attendant circumstances that are material to the offense. If, on the other hand, no legal element is involved in the material attendant circumstances, there is no basis for contending that ignorance of such element has a defensive import; it is simply immaterial.

The paragraph recognizes, however, that there may be special cases where knowledge of the law defining the offense should be an element of the offense *i.e.,* where only conscious violation of the law, in the sense of an awareness that one's conduct is a violation of the law, ought to constitute a crime. Such a result may be brought about directly by the formulation of the definition of the crime, *e.g.,* explicitly requiring awareness of a regulation, violation of which is denominated an offense. It also may be brought about by a general provision of the Code, as in the special circumstances dealt with by Section 2C:2–4c. In either case, the result is exceptional and arises only when the governing law "plainly so provides." MPC T.D. 4, p. 313 (1955).

11. Paragraph e is addressed to the case where the grade or degree of an offense is made to turn on whether it was committed purposely, knowingly, recklessly or negligently, a common basis of discrimination of offenses. The position taken is that when distinctions of this kind are made, the grade or degree of a conviction ought to be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense. The theory is, of course, that when the kinds of culpability involved vary with respect to different material elements, it is the lowest common denominator that indicates the quality of the defendant's conduct.

The best illustration is afforded by the case of homicide where an intentional killing is normally treated as an offense of higher degree than a homicide by negligence. But even though the actor meant to kill, he may have acted only negligently with respect to another material element of the offense, e.g., he may have deemed the homicide to be in necessary self-defense or necessary to prevent a felony or to effect arrest, without sufficient ground for such belief. Such a homicide ought to be viewed as reckless or as negligent, since recklessness or negligence is all that is established with respect to justifying elements as integral to the offense as the killing itself. A person who believes that justifying facts exist but has been reckless or negligent in so concluding presents the same type of problem as a person who acts recklessly or negligently with respect to the creation of a risk of death. The Code formulation gives general application to the point that is involved. MPC T.D. 4, p. 131 (1955).

§ 2C:2-3. COMMENTARY

1. This Section is concerned with offenses which are so defined that causing a particular result is a material element of the offense. It undertakes to define the causality relationship which should generally be required to establish liability for such offenses and also to deal with inevitable problems incident to variations between the result of the conduct and the result sought or contemplated by the actor or probable under the circumstances of the action.

2. The approach set forth here is a substantial change in the way in which these problems would be faced from that now in use. At the present time, the law is that the defendant's conduct must be both the actual cause and the proximate cause of the result with which he has been charged. As to actual causation, see *State v. Weiner,* 41 N.J. 21, 36 (1963) (Conviction reversed for failure of prosecution to prove which of various theories of alleged criminally negligent acts actually caused the deaths). As to proximate causation, see *State v. Reitze,* 86 N.J.L. 407 (Sup. Ct. 1914) (Death must be "the natural and probable result. . . . criminal responsibility depends upon whether or not the injury which caused the death was the regular, natural and likely consequence of defendant's conduct.") The latter concept, proximate cause, has presented enormously difficult problems because of the vagueness of the term. See *State v. Reitze, supra* (Tavern owner not guilty of manslaughter of customer to whom he sold liquor while knowing him to be intoxicated. Death was from a fall outside tavern); *State v. Loray,* 41 N.J. 131 (1963) (Felony-murder prosecution arising out of a mugging-robbery in which decedent died of a heart attack. Defendant's conduct characterized as a "precipitating" and "contributing" cause); *State v. Meyers,* 7 N.J. 465 (1951) (Murder prosecution arising out of death of wife when she jumped into river on defendant-husband's command. Decedent's act was a dependent one rather than a voluntary one so that the chain of causation was not broken); *State v. Diamond,* 16 N.J. Super. 26 (App. Div. 1951) (Effect of contributory negligence of decedent upon liability of defendant in an automobile manslaughter prosecution is that it may destroy proximate causation.) See generally *Perkins,* Criminal Law 690-738 (2nd Ed. 1969).

3. Rather than attempt to systematize these variant rules, the Code undertakes a fresh approach on what we conceive to be the central issues. Paragraph a(1) treats but-for cause as the causality relationship that normally should be regarded as sufficient, in the view that this is the simple, pervasive meaning of causation that is relevant for purposes of penal law. When concepts of "proximate causation" disassociate the actor's conduct from a result of which it was a but-for cause, the reason always inheres in the judgment that the actor's culpability with reference to the result, *i.e.,* his purpose, knowledge, recklessness or negligence, was such that it would be unjust to permit

the result to influence his liability or the gravity of the offense of which he is convicted. Since this is so, the Code proceeds upon the view that problems of this kind ought to be faced as problems of the culpability required for conviction and not as problems of "causation". Paragraph a(2) contemplates, however, that this general position may prove unacceptable in dealing with particular offenses. In that event, additional causal requirements may be imposed explicitly. MPC T.D. 4, p. 132 (1955).

Paragraphs b and c are drafted on the theory stated. They assume that liability requires purpose, knowledge, recklessness or negligence with respect to the result required by the offense and deal explicitly with variations between the actual result and that designed, contemplated or risked, as the case may be, stating when the variation is not material.

Paragraph b is addressed to the case where the culpability requirement with respect to the result is purpose or knowledge. Here if the actual result is not within the purpose or the contemplation of the actor, the culpability requirement is not established unless the actual result involved the same kind of injury or harm as that designed or contemplated but the precise injury inflicted was different or occurred in a different way. Here the Code makes no attempt to catalogue the possibilities, *e.g.,* to deal with the intervening or concurrent causes, natural or human; unexpected physical conditions; distinctions between the infliction of mortal or non-mortal wounds. It deals only with the ultimate criterion by which the significance of such possibilities ought to be judged, *i.e.,* that the question to be faced is whether the actual result is too accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of his offense.

It may be useful to recall that what will usually turn on the determination will not be the criminality of a defendant's conduct but rather the gravity of his offense. Since the actor, by hypothesis, has sought to cause a criminal result, he will be guilty of some crime under a well-considered penal code even if he is not held for the actual result. Thus the issue in penal law is very different than in torts. Only in form is it, in penal law, a question of the actor's liability. In substance, it is a question of the severity of sentence which the Court is authorized or obliged to impose. Its practical importance thus depends on the disparity in sentence for the various offenses that may be involved, *e.g.,* the sentences for an attempted and completed crime. Our formulation should suffice for the exclusion of those situations where the actual result is so remote from the actor's purpose or contemplation that juries can be expected to believe that it should have no bearing on the actor's liability for the graver offense or, stated differently, on the gravity of the offense of which he is convicted. The advantage of putting the issue squarely to the jury's

sense of justice is that it does not attempt to force a result which the jury may resist. It also leaves the principle flexible for application to the infinite variety of cases likely to arise.

Paragraph c deals with the case where recklessness or negligence is the required kind of culpability and where the actual result is not within the risk of which the actor was aware, or, in the case of negligence, of which he should have been aware. The principles which govern are the same as in the case where purposely or knowingly causing the specified result is the material element of the crime. If the actual result involved the same kind of injury or harm as the probable result, the question asked is whether it was too accidental in its occurrence or too dependent on another's volitional act to have just bearing on the actor's liability or on the gravity of his offense. The governing considerations are the same as in the situation dealt with by paragraph b.

3. Paragraph d is a combination of MPC §§ 2.03(2)(a) and 2.03(3)(a). It states the one clear case in which, whatever the mode of culpability required, a difference between what actually occurred and what was intended, contemplated or risked is not material. This is the case where the only difference is that a different person was injured or different property affected, or that less serious or less extensive injury or harm occurred. In this class of cases present law holds the defendant responsible for the result and the Code restates this position. *State v. Gallagher,* 83 N.J.L. 321 (Sup. Ct. 1912) (unintended victim).

4. In our opinion, the adoption of the Code approach will have a much greater effect upon the decisional process than it is likely to have upon the result in specific cases. For example, in the *Loray* case the issue to be put to the jury under § 2C:2–3b would be whether the death of an elderly robbery-mugging victim from a heart attack during the crime (since it is the same kind of injury as that designed) was "too remote to have a just bearing on the gravity of the actor's offense." This would replace the question now put to the jury of whether the attack was the "proximate cause" of the death in that it was the "precipitating" and "contributing" natural and probable cause of it. *State v. Loray, supra* at 140-141. A similar analysis applied to the *Reitze* and *Meyers* cases show the same result. *Reitze* would, in all likelihood, result in a judgment of acquittal on the ground that the fall resulting in death was too remote or accidental to have a just bearing on the actor's liability. The death in *Meyers* of the wife could be found by the jury not to be too remote or accidental in the light of the attack by the defendant upon her.

5. Subsection e is necessary to retain a probable consequence test for absolute liability situations because, by definition, no result is designed, contemplated or risked consciously by the defendant.

§ 2C:2-4. COMMENTARY

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

> "To put the matter this way is not, of course, to say anything that would not otherwise be true, even if no provision on the subject should be made. As Glanville Williams summarized the matter, the rule relating to mistake 'is not a new rule; and the law could be stated equally well without reference to mistake. . . . It is impossible to assert that a crime requiring intention or recklessness can be committed although the accused laboured under a mistake that negatived the requisite intention or recklessness. Such an assertion carries its own refutation.' Criminal Law p. 137. This obvious point, is, however, sometimes overlooked in general formulations purporting to require that mistake be reasonable if it is to exculpate, without regard to the mode of culpability required to commit the crime. . . .
>
> It is true, of course, that whether recklessness or negligence suffices as a mode of culpability with respect to a given element of an offense is often raised for the first time in dealing with a question of mistake. . . . The fact that this may happen emphasizes the importance of perceiving that the question relates to the underlying rule as to the kind of culpability required with respect to the particular element of the offense involved." *Id.* at 136-137.

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

2. The Code does, however, make two changes in existing law as to mistake of fact. In the first place, under existing law, the mistake must

be "reasonable." See *State v. Fair, supra; State v. Chiarello, supra; State v. Bess, supra; State v. Hipplewith, supra.* The Code does not set forth such a requirement. It is our belief that honesty as a ground, in general, for mistakes is all that should be required. The jury will, of course, use the reasonableness of the mistake in evaluating the defendant's claim of honesty.

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

4. *Mistake of Law.* A great deal of confusion exists on this subject because two types of situations are frequently discussed under the same headings. It is important to distinguish between ignorance of the legal standard established by the statute the defendant is alleged to have violated and a mistake as to some external body of law which may destroy the *mens rea* for the crime charged. The basic proposition is that the accused need not be aware of the standard established by the criminal statute he is charged with having violated. Therefore, ignorance of, or mistake about, that statute does not effect the culpability requirement nor constitute a defense. This is the rule of § 2C:2–2c and is our law. *State v. Hudson County News Co., supra; State v. De Meo,* 20 N.J. 1 (1955); *Morss v. Forbes,* 24 N.J. 341 (1957); *State v. Western Union Telegraph Co.,* 12 N.J. 468, 490-492 (1953); *State v. Halstead,* 41 N.J.L. 552 (E. & A. 1879); *Cutter ads. State,* 36 N.J.L. 125 (Sup. Ct. 1873).

Where, however, the crime requires *mens rea* and the mistake or ignorance negatives the particular culpability requirement under that statute, the mistake or ignorance excuses. Into this category fall the "specific intent" cases ("purposely" under the Code) where a mistake or ignorance of the law destroys that intent. *Cutter ads. State, supra.* Generally, in present law such ignorance or mistake must be reasonable. However, where there is no culpability requirement as to the element about which a mistake was made, a belief, no matter how reasonable, cannot excuse. In the leading case of *State v. Long,* 5 Terry 262, 65 A. 2d 489 (Sup. Ct. Del. 1949), the Court held that this rule did not

apply where the defendant had, in good faith, consulted an attorney about the validity of his out-of-state divorce and thereby could demonstrate by extrinsic proof his belief. The New Jersey Supreme Court refused to apply *Long* in a bigamy prosecution in which a Mexican mail order divorce had been disclosed to the clerk charged with issuing marriage license. *State v. DeMeo, supra.* The basis of Justice Jacobs' opinion for the Court is not entirely clear and could have been (1) a refusal to expand the common law rule; (2) a belief that it was unreasonable to believe that a mail order Mexican divorce was valid; or (3) a failure to equate the court clerk in *DeMeo* with the lawyer in *Long.*

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

5. The Code also establishes four exceptions to the rule of Section 2C:2–2c that ignorance of the legal standard of the crime with which defendant is charged does not excuse: First, it is a defense where the criminal statute itself provides that knowledge of its existence is necessary. Sections 2C:2–2e and 2C:2–4a. *State v. Cutter, supra,* is in accord. Second, it is a defense where the criminal statute itself has not been published nor made available. Section 2C:2–4(c)(2). Third, it is a defense where the defendant relies upon some official pronouncement that his conduct was not criminal. Finally, it is a defense where the defendant "otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude." We believe that all four of these categories involve situations where the act charged is consistent with entire law-abidingness of the actor, where the possibility of collusion is minimal and a judicial determination of the belief in legality should not present substantial difficulty. While subsection c would work changes in New Jersey law, there are precedents which lead to the conclusion that it is not entirely out of step with our State's judicial thought. In 1873, the Supreme Court stated in *Cutter ads. State, supra,* that the legal maxim that "ignorance of the law does not excuse" is subject to certain important exceptions, *i.e.,* where the law is not settled or is obscure and where the guilty intention, being a necessary constituent of the particular offense, is dependent on a knowledge of the law.

> "Where the act done is *malum in se,* or where the law which has been infringed was settled and plain, the maxim, in its rigor,

will be applied; but where the law is not settled, or is obscure, and where the guilty intention, being a necessary constituent of the particular offense, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied.

And in *State v. DeMeo, supra* at 14, a bigamy prosecution, the Court followed the traditional view that a mistake as to the right to remarry would not excuse but then went on to

> "expressly withhold determination as to the availability in situations not before us . . . of a defense to a bigamy prosecution resting upon the defendant's honest belief, reasonably entertained, that he was legally free to marry. . . ."

See also Mr. Justice Wachenfeld's dissent in *State v. DeMeo, supra* at 15. There are, however, strong statements in other opinions that would lead to the conclusion that reliance such as that set forth in § 2B:2–4c(1) and (2) could never excuse. *State v. Western Union Telegraph Co., supra* at 493 (advice of counsel); *State v. Prusser,* 127 N.J.L. 97 (Sup. Ct. 1941); *State v. Atti,* 127 N.J.L. 39, 44 (Sup. Ct. 1941), *aff'd.,* 128 N.J.L. 318 (E. & A. 1942); *Morss v. Forbes, supra* at 341; *Halstead v. State, supra.*

§ 2C:2–5. COMMENTARY

1. This is a provision not found in the MPC. It is intended to save any existing defenses which would excuse or alleviate liability and which are neither covered by the Code nor the law defining the particular offenses. While we believe it appropriate in codifying the substantive offenses to abolish common-law crimes (see Section 2C:1–5), there may be unusual defenses which should be retained if appropriate in a particular situation. We would not wish to exclude them by implication and thus we have included this Section and one applicable to existing justification defenses. (§ 2C3–2b.)

2. It is intended that the defense of obedience to military orders, as defined at common law, would be included in this Section. See MPC § 2.10.

§ 2C:2–6. COMMENTARY

1. *General Purpose.* The objective of this Section is to declare that criminal liability is based upon behavior and to delineate all situations in which criminal liabilty may rest in whole or in part upon behavior of another. Where such liability depends upon special considerations involved in the definition of particular offenses, this Section calls attention to the fact that cases of this kind exist and points for their decision to the definition of the crime. But insofar as a determination rests upon general principles of liability, those principles are here set forth. The main areas of existing law thus covered are those in which

criminal liability rests on the behavior of an innocent or irresponsible agent, joint criminality or accessorial participation through aiding, abetting and conspiracy. Accessories after the fact are not included. They are treated as violating a separate crime under Chapter 29 of the Code. They are so treated under existing law. N.J.S. 2A:85–2. *State v. Sullivan,* 77 N.J. Super. 81 (App. Div. 1962).

The Section differentiates the different modes of complicity in an offense for the purpose of developing their content. It does not, however, contemplate that such distinctions should have a procedural significance. As is presently true in New Jersey, which has abolished the common law distinctions between principals and accessories, it is sufficient under the Code to charge commission of a crime. N.J.S. 2A:85–14; *State v. Western Union Telegraph Co.,* 12 N.J. 468, 494-495 (1953), *State v. Cooper,* 10 N.J. 532 (1952); *State v. Jacques,* 99 N.J. Super. 224, 235 (App. Div. 1968). Notice that the system employed by the Code does not employ the term "principal," on the ground that it is unnecessary.

2. Subsection a establishes the basic principle, which is now true in New Jersey, that criminal liability may be based upon either one's own behavior or the behavior of another.

There is presently legislation making it a substantive offense to aid particular activities, which may or may not be criminal themselves. See, *e.g.,* N.J.S. 2A:104–1 through 12 (Aiding certain non-criminal escapes). There is also legislation making criminal specific conduct which is proscribed for the reason that it furthers or facilitates commission of a crime. See, *e.g.,* N.J.S. 2A:112–3 (Keeping a gambling resort).

The provisions of Section 2C:2–6 are not intended to displace such special legislation (to the extent it is retained or incorporated into the Code) though the Section "should be deemed judicially to have a bearing on interpretation of words like 'aid' or 'assist' when they occur in formulations of this kind." MPC T.D. 1, p. 15 (1953).

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

(1) *Innocent or irresponsible agents.* It is universally recognized that a person is no less guilty of the commission of an offense because he uses the overt behavior of an innocent or irresponsible agent. He is accountable as if such conduct were his own. The existing New Jersey statute which, somewhat obscurely, establishes this principle is the second paragraph of N.J.S. 2A:85–14: "Any person who willfully causes another to commit a crime is punishable as a principal." The New Jersey cases are in accord. *State v. Lisena,* 129 N.J.L. 569 (Sup. Ct. 1943), *aff'd.o.b.,* 131 N.J.L. 39 (E. & A. 1943); *State v. Faunce,* 91 N.J.L. 33 (E. & A. 1917); *Noyes v. State,* 41 N.J.L. 418 (Sup. Ct. 1879); and *State v. Wycoff,* 31 N.J.L. 65 (Sup. Ct. 1864).

(2) *Made accountable by law.* This paragraph leaves undisturbed those situations where special legislation has explicitly imposed or has been construed to impose an extraordinary measure of accountability for the behavior of another. It is included in order to make it clear that such liability is not supported by general principle, rather it must rest upon a special legislative will manifested in the definition of the particular offense. Most situations involve liability for acts of agents or employees in the course of their employment either because such liability is based upon explicit legislation or the statute has been interpreted as including such liability. Our cases, in general, only find liability where it is explicitly set forth in the statute or where there is proof that the principal actually aided, encouraged or connived in the perpetration of the act done by the agent or that the illicit act was habitually done in the usual course of business. *State v. Pinto,* 129 N.J.L. 255 (Sup. Ct. 1943) (Alcoholic Beverage Law); *State v. Weiner,* 41 N.J. 21, 26 (1963) (Manslaughter prosecution: ". . . If defendant is to be criminally liable with respect to an act or omission of his nurse, it could not merely be because he was her employer. He could be so liable only if he directed her conduct or assented to it or failed to act with respect to it in circumstances which indicate the . . . wantonness or recklessness [necessary for a criminal prosecution]."; *State v. Pennsylvania R.R. Co.,* 84 N.J.L. 550 (Sup. Ct. 1913) (Nuisance prosecutions for smoke emissions); *State v. American Alkyd Ind., Inc.,* 32 N.J. Super. 150 (Co. Ct. 1954). Thus, by incorporating existing law, the only situations in which vicarious liability would be imposed would be those where the Legislature has explicitly determined to do so.

(3) *Accomplices.* Finally, one is "legally accountable" for the conduct of another when he is an "accomplice" of the other person "in *the* offense." By "the offense" is meant that offense charged for which guilt is in question under § 2C:2–6a. The basis and scope of complicity under tihs paragraph is set forth in § 2C:2–6c below. "Accomplice" is meant to be "employed as the broadest and least technical [term] available to denote criminal complicity." MPC T.D. 1, p. 20 (1953).

4. Subsection c, in defining "accomplice" sets forth the modes and extent of complicity in criminal behavior, delineating both the nature of the action or omission and the mental state that will suffice for liability. We believe that it does not differ markedly from current statutes, except in avoidance of redundancy, and in articulating the requirements of purpose or of knowledge that the legislation now ignores. This would replace the language found in N.J.S. 2A:85–14 which provides that "any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal." See *State v. Kuznitz,* 36 N.J. Super. 521, 531 (App. Div. 1955).

5. The Code diverges from the language of the New Jersey cases, although not from the language of the New Jersey statute, in that it does not make "conspiracy" alone a basis for complicity in substantive offenses committed in furtherance of its aims. It asks instead the more specific question of whether the defendant commanded, encouraged, aided or agreed to aid in the commission of the crime charged. The reason given for this treatment is that there appears to be no other or no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise. Specifically, finding liability for each of the substantive offenses (in addition to liability for the conspiracy and any substantive offenses which can be "brought home" to the particular defendant) in sprawling conspiracies should be prohibited. See, *e.g., People v. Luciano,* 277 N.Y. 348, 14 N.E. 2d 433 (1938); *United States v. Bruno,* 105 F. 2d 921 (2nd Cir. 1939), *reversed on other grounds,* 308 U.S. 287 (1939); *Anderson v. Superior Court,* 78 Cal. App. 2d 22, 177 P. 2d 315 (1947). According to the drafters of the MPC, no cases actually press the liability for substantive crimes arising out of conspiracies as far as the existing rule would theoretically allow and the cases which declare the doctrine normally involve defendants who had a hand in planning or committing the crime. MPC T.D. 1, p. 22 (1953). The New Jersey cases, while speaking in terms of "conspiracy", do so in cases where the Code would clearly find liability. *State v. Cooper, supra* at 568 ("All those who conspire to commit a crime and participate some way in its commission are joint principals."); *State v. Jacques, supra* at 235. It should be remembered, that conspiracy is evidentially important and may, evidentially, be sufficient to prove command, encouragement, agreement to assist, assistance, etc. The Code's position is that the jury should not be told that it establishes complicity as a matter of law.

6. The Code limits the scope of liability to crimes which the accomplice had the purpose of promoting or facilitating. It is intended not to include those which he merely knowingly facilitated substantially. We agree with the MPC in this regard. Essentially, this issue is the extent to which it is deemed appropriate to require persons to avoid dealing with known criminals. While one does not want to burden normal channels of trade, one also wants to have dealers avoid making a profit from crime.

No New Jersey case directly presents the issue. *State v. Ellrich,* 10 N.J. 146, 150 (1952) was a case in which a physician referred a girl to an abortionist. The Court referred to certain evidence which gave rise to inferences of "guilty knowledge" and a "knowledge of the criminal nature of the transaction" and a "consciousness" of the illegal character. Subsequent language in the opinion leads to the conclusion that mere guilty knowledge (with assistance) would not be enough and that he must be "an active partner in the intent."

It is, of course, clear that mere knowledge, without more, cannot lead to criminal liability. *State v. Sullivan, supra; State v. Fox,* 70

N.J.L. 353 (Sup. Ct. 1904). Our other cases in the area speak in general terms such as "shared in the intent." See *State v. Fair,* 45 N.J. 77, 95 (1965); *State v. Smith,* 32 N.J. 501, 521 (1960); *State v. Jacques, supra* at 235; *State v. Cooper, supra* at 568. Some of our cases speak in terms of a person being responsible only for the "natural and probable consequences" of the crime actually intended. *State v. Carlino,* 98 N.J.L. 48, 52 (Sup. Ct. 1922), *aff'd.* 99 N.J.L. 292 (E. & A. 1923). Such is the law elsewhere. MPC T.D. 1, p. 25 (1953). However, these statements have usually appeared in homicide cases where doctrines of transferred intent, felony-murder and liability for recklessness present a special situation. (The Code would not extend liability beyond the purpose the defendant shares or what he knows. Probabilities are said to have an important evidential bearing on this issue but they are not independently sufficient.)

7. The Code includes in § 2C:2-6c(1) not only those who command, request, encourage, provoke or aid but also those who agree or attempt to aid in the planning or execution. It also includes one who has a legal duty to prevent the crime who fails to make proper effort to do so. This represents an exhaustive description of the ways in which one may purposely enhance the probability that another will commit a crime. There being a purpose (*i.e.*, a "specific intent") to further or facilitate, there is no risk of innocence.

8. Subsection c(2) preserves all special legislation declaring that particular behavior suffices for complicity, whether or not it would suffice under the above standards.

9. We have eliminated a provision of the MPC (§ 2.06(4)) providing that complicity in conduct causing a particular criminal result leads to accountability for that result so long as the accomplice has the purpose or the knowledge with respect to the result that is demanded by the definition of the crime. We do not disagree with it but find it unnecessary in that the same result flows from general principles. Our law is in accord. *State v. Fair, supra* at 95.

10. Subsection d provides that a person who is legally incapable of committing an offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity. This provision is a fair statement of existing law. *Clark and Marshall,* Crimes, § 8.10, p. 536 (7th Ed. 1967); *State v. Warady,* 78 N.J.L. 687 (E. & A. 1910) (conviction of bigamy of a man who did not himself marry the woman but who was present at the marriage, urged it and aided its being contracted). *State v. Marshall,* 97 N.J.L. 10 (Sup. Ct. 1922) (a person may be convicted as an aider and abettor of the crime of embezzling money as a tax collector notwithstanding that the person is not himself a tax collector); *State v. Goldfarb,* 96 N.J.L. 71 (Sup. Ct. 1921) (Rape by a woman); *State v. Jackson and Kisinger,* 65 N.J.L. 105 (Sup. Ct. 1900) (Statutory rape by a woman). In *State v. Aiello,* 91 N.J.

Super. 457, 462–463 (App. Div. 1966), the Court held that defendant Guiliano could not be convicted of a violation of a statute which provides that "Any person who . . . being the owner of a building or place where any business of lottery . . . is carried on knowingly, by himself or his agent, permits such premises to be so used—is guilty" . . . of a crime. The Court continued:

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

While the Court may have correctly reversed the conviction of Guiliano on other grounds, the above proposition stated in the case is out of step with the Code, with authorities elsewhere and with prior New Jersey authorities. We believe that it is probably wrong. To the extent it represents the law which our Supreme Court would follow, it should be legislatively overruled.

11. Subsection e sets forth exceptions to the general principles of accessorial liability established above.

(1) *Victims.* The victim of a crime is excluded from liability for an offense, although his conduct in a sense assists in the commission of the crime, because to view the victim as involved in the commission of the crime "confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection." MPC T.D. 1, p.35 (1953). See *Regina v. Tyrell* (1894), 1 Q.B. 710 (Female in statutory rape is not an accomplice) and *Gebardi v. United States,* 287 U.S. 112 (1932) (Woman is not guilty under the Mann Act of conspiracy to transport herself.) New Jersey recognizes that a victim of a crime should not be capable of being convicted of the crime. Classifying a woman upon whom an abortion has been committed as a victim, the cases hold her incapable of being convicted of that crime or aiding and abetting it. *In re Vince,* 2 N.J. 443, 450 (1949); *State v. Murphy,* 27 N.J.L. 112, 114 (Sup. Ct. 1858); *State v. Hyer,* 38 N.J.L. 598, 600 (Sup. Ct. 1877); *State v. Thompson,* 56 N.J. Super. 438, 444 (App. Div. 1959), *reversed on other grounds,* 31 N.J. 540 (1960).

(2) *Conduct "inevitably incident."* The Code also provides that when the offense is so defined that the person's conduct is "inevitably incident to its commission" then he is not an accomplice. Our cases

concur. *State v. Aircraft Supplies*, 45 N.J. Super. 110 (Co. Ct. 1957). (Conspiracy). This is subject to a general exception to subsection e of "unless otherwise provided by the Code or by the law defining the offense." Many situations may arise in which a judgment as to appropriate exceptions from liability must be defined. Conflicting policies and strategies lead to the conclusion that a person should be excluded from liability in one instance but that normal principles of accessorial liability should apply in another where his conduct is "inevitably incident." Factors to be considered include the need to obtain the testimony of that person, the need to corroborate that testimony, the ability of the prosecutor to obtain convictions and the public view of the appropriateness of such convictions.

It is impossible to attempt systematic legislative resolution of these issues. Therefore, we leave the question to be resolved as each issue arises before the Legislature. The presumption, under the Code, is that conduct which is "inevitably incident" does not lead to accessorial liability unless the legislation so provides.

(3) *Termination of Complicity.* A person is not an accomplice under the Code if he terminates his complicity under circumstances manifesting a complete and voluntary renunciation. "Complete" and "voluntary" are defined by § 2C:5–1d. Though action that suffices for complicity may have occurred, the law does and should contemplate that liability may be averted if the reason for its imposition disappears before the crime has been committed. The Code anticipates that the action needed to comply with this provision will vary with the accessorial behavior that has preceded the decision to withdraw. It should be noted that this provision will remove liability for the substantive offense but not for any conspiracy which has been committed unless it satisfies § 2C:5–2f.

In some instances, it will be impossible to deprive his conduct of effectiveness in the commission of the offense without making independent efforts to prevent the crime. In that case, Section 2C:2–6e(3)(c), by incorporating Section 2C:5–1d, requires giving warning to the police or otherwise making proper effort to prevent the crime in order to gain immunity.

This defense is not now recognized in New Jersey. Our cases hold that, in order to escape the penalty denounced against a crime, the defendant must cease to act in complicity as soon as he has knowledge of the criminal character of the conduct of the persons who he is accompanying. *State v. DeFalco*, 8 N.J. Super. 295, 299 (App. Div. 1950); *State v. Churchill*, 105 N.J.L. 123 (E. & A. 1928); *Engeman v. State*, 54 N.J.L. 247 (Sup. Ct. 1892). *Cf., State v. Zuprosky*, 127 N.J.L. 218 (E. & A. 1941).

13. Subsection f is concerned with procedural problems concerning the distinctions between principals and accessories. First, the paragraph follows the modern legislation which deprives the distinction

between principals and accessories of its common law procedural significance. Thus, the law would continue to be that the distinction between principal and accomplice or aider and abettor has been abolished in New Jersey for purposes of indictment and punishment. N.J.S. 2A:85–14. *State v. Morales,* 111 N.J. Super. 521 (App. Div. 1970); *State v. Cooper,* supra at 568; *State v. Western Union Telegraph Co., supra* at 495. Such is not true where a statute sets forth an exception to N.J.S. 2A:85–14 and establishes a different punishment for an aider and abettor from that provided for the principal. *State v. Seaman, supra; State v. Woodworth,* 121 N.J.L. 78 (Sup. Ct. 1938). Further, the same is not true as to an accessory after the fact. N.J.S. 2A:85–2, *State v. Sullivan, supra.*

It is still true under the Code, as under existing law, that (1) the commission of the offense and (2) the defendant's complicity therein must be proved and found by the jury as the elements of the liability of the accomplice. *State v. Thompson,* 31 N.J. 540 (1960), *reversing* 56 N.J. Super. 438 (App. Div. 1959); *State v. Marshall,* 97 N.J.L. 10 (Sup. Ct. 1922).

However, in addition to following the change from the common law in these regards, the Code also goes on to allow conviction of an accomplice though the principal actor "has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted." § 2C:2–6f. We recognize that this provision opens the possibility that an accomplice may be prosecuted after the person charged with the commisison of the crime has been acquitted and that this is, to some extent, undesirable as leading to inconsistent verdicts. But while inconsistent verdicts of this kind present a difficulty, they are intrinsic to the jury system and appear to be a lesser evil than granting immunity to the accomplice because justice has miscarried in the charge against the person who committed the offense.

Schlosser states the rule in New Jersey to be that when the person who is charged with the commission of the crime, *i.e.*, the principal, is acquitted all aiders and abettors and accessories must be also. For this he cites early common law text writers and *State v. Marshall, supra. Schlosser,* New Jersey Criminal Laws § 115, pp. 87–88, nn. 3–4 (1953). The *Marshall* case, however, involved a situation where one defendant, Caithness, was indicted for embezzlement by a tax collector and the other defendant, Marshall, was indicted for aiding and abetting that embezzlement. The proofs actually showed that Marshall was the embezzler. Her conviction as a principal could not be sustained under that statute because she was not legally capable of performing the act—she was not a tax collector. At least one other case adopts Schlosser's view. In *State v. Thompson,* 56 N.J. Super. 434, 444 (App. Div. 1960), *reversed on other grounds,* 31 N.J. 540 (1960), it was held that a man who aided and abetted a woman to abort herself could not be convicted:

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

Several New Jersey cases indicate that the law is, in fact, not as stated by Schlosser but rather is closer to the Code's view. In an early case, *State v. Warady, supra,* the Court held that proof of the conviction of the principal actor of bigamy was unnecessary to find an accessory guilty. Further, in *State v. Oates,* 32 N.J. Super. 435 (App. Div. 1954), the Court held that there was no "manifest injustice" such that the defendant should be allowed to withdraw a *non-vult* plea in a situation where he pleaded to a conspiracy charge and his alleged co-conspirator was acquitted by a jury after the defendant's plea but prior to the time of his sentencing. The Court found it unnecessary, because of the procedural posture of the case, to decide the issue outright but the opinion seems to indicate a leaning toward the view that acquittal of one should not necessarily lead to acquittal of the other. *Oates* was followed in *State v. Goldman,* 95 N.J. Super. 50 (App. Div. 1967). Again, in *State v. Cooper, supra* at 568, the Court held that acquittal of the one of a group of felons who actually killed the decedent (because of a failure of proof as to him, his confession having been excluded as involuntary) would not prevent conviction of the others of felony murder. The Court recognized that individual consideration of guilt could well lead to varying results in the jury's verdict. The *Marshall* case was specifically distinguished. In *State v. Fair, supra,* at 94–96, the Supreme Court considered a situation in which two actors might have been guilty to different degrees:

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

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

§ 2C:2–7. COMMENTARY

1. In the early years the recognition of corporate responsibility was inhibited by certain procedural difficulties and conceptual notions. The most persistent of the latter was the idea that a corporation might not be held for an offense involving a criminal intent. In recent years most of these limitations have been swept aside. The modern development, however, has proceeded largely without reference to any intelligible body of principle and the field is characterized by the absence of articulate analysis of the objectives thought to be attainable by imposing criminal fines on corporate bodies.

In New Jersey today, it would appear that there are virtually no crimes, including those requiring a criminal intent or a corrupt motive, of which a corporation may not be guilty. The early law permitted only conviction of crimes characterized by nonfeasance, but New Jersey soon allowed conviction also for misfeasance. *State v. Morris and Essex R. Co.*, 23 N.J.L. 360 (Sup. Ct. 1852) (maintaining a public nuisance); *State v. Lehigh Valley R. Co.*, 90 N.J.L. 372 (Sup. Ct. 1892) (manslaughter); *State v. Passaic Co. Agri. Soc.*, 54 N.J.L. 260 (Sup. Ct. 1870) (keeping a disorderly house); *Joseph L. Sigretto and Sons, Inc. v. State*, 127 N.J.L. 578 (Sup. Ct. 1942) (obtaining money under false pretenses); *State v. Continental Purchasing Co.*, 119 N.J.L. 257 (Sup. Ct.), *aff'd.*, 121 N.J.L. 76 (E. & A. 1938) (conspiracy); *State v. Western Union Telegraph Co.*, 13 N.J. Super. 172 (Co. Ct. 1951), *aff'd.*, 12 N.J. 468 (1953) (maintaining a disorderly house); *State v. Graziani*, 60 N.J. Super. 1 (App. Div. 1959), *aff'd. o.b.*, 31 N.J. 538 (1960). In this regard, *i.e.*, allowing a corporation to be charged with almost any crime, the New Jersey cases are probably somewhat ahead of the cases in many other States. *Clark and Marshall*, Crimes, § 6.17, pg. 453 (7th Ed. 1967). In New Jersey, a corrupt or evil intent, when necessary for conviction of a crime, may be imputed to the corporation from its agents. *Joseph L. Sigretto and Sons, Inc. v. State, supra; State v. Passaic Co. Agri. Soc., supra; State v. Western Union Telegraph Co., supra; State v. Graziani, supra.* There is little discussion in the cases of the level of authority at which a person who has the requisite *mens rea* must stand in order to allow the intent to be imputed. In the *Sigretto* case the issue under consideration was the sufficiency of the indictment and no facts were set forth in the opinion. In the *Passaic County* case the facts are not set forth and the holding is purely conclusionary. Both the *Graziani* case and the *Western Union* case give some indication of the level at which intent must exist among subordinates in order to be imputed. *Graziani* was an easy case in this regard. The knowledge of the illegal activity was held by the president of a close corporation (he owning all but one share of it) and by his brother, the corporation's secretary (he owning the only other share). The Court stated, as the rule, that the "guilty intent of corporate officers may be imputed to a corporation

to prove the corporation's guilt." *State v. Graziani, supra* at 17. In the *Western Union* case, the issue was the sufficiency of an indictment alleging that the corporate defendant sent messages in aid of an illegal business, contrary to a state statute, but which did not allege through what agent or agents the defendant acted. The Court found it unnecessary to make this allegation. The implication is that the guilty knowledge of the telegraph company's branch manager is sufficient. It should be noted that the statements in the early (1852) case of *State v. Morris and Essex R. Co., supra* at 364, 370, that a corporation is incapable of performing crimes of "treason, felony or other crimes involving *malus animus* in its commission" or, as stated later in the opinion, of "perjury . . . treason . . . murder . . . (or) any crime, involving corrupt intent" can no longer be considered as controlling. *Cf., State v. Lehigh Valley R. Co., supra.*

2. Subsection a sets forth three situations in which a corporation may be criminally responsible:

(1) *Acts of an Agent.* Paragraph (1) identifies the situations in which a corporation may be held liable for the conduct of an agent acting within the scope of his office or employment. The act must be performed "in behalf of the corporation" to avoid extension of liability to situations where the act was done for the purpose of defrauding the corporation. MPC T.D. 4, p. 147 (1955). The rule of paragraph (1) as to agents seems to be in accord with New Jersey law, to the extent sufficient cases exist to draw a generalization. *State v. Western Union Telegraph Co., supra.* See also, 6 Rutgers L. Rev. 211, n. 27.

As to the kinds of offenses for which the corporation may be convicted under this paragraph, we continue existing law by presuming corporate liability except in those statutes where a legislative purpose not to impose liability on corporations appears. The purpose of this provision is to maintain criminal liability in the area of regulatory legslation now in effect which imposes criminal liability upon corporations. The law now is the same. N.J.S. 1:1–2. *State v. Natelson Bros.*, 21 N.J. Misc. 186 (Comm. Pleas 1943).

(2) *Omissions.* Paragraph (2) recognizes the responsibility of corporations for the commission of offenses consisting of the omission of a duty imposed by law on such bodies.

(3) *General Rule.* Paragraph (3) states the general principle of corporation liability, governing any situations not covered by paragraphs (1) and (2). The drafters of the MPC explain it as follows:

> "In approaching the analysis of corporate criminal capacity, it will be observed initially that the imposing of criminal penalties on corporate bodies results in a species of vicarious criminal liability. The direct burden of a corporate fine is visited on the shareholders of the corporation. In most cases, the shareholders have

not participated in the criminal conduct and lack the practical means of supervision of corporate management to prevent misconduct by corporate agents.

"It would seem that the ultimate justification of corporate criminal responsibility must rest in large measure on an evaluation of the deterrent effects of corporate fines on the conduct of corporate agents. Is there reason for anticipating a substantially higher degree of deterrence from fines levied on corporate bodies than can fairly be anticipated from proceeding directly against the guilty officer or agent or from other feasible sanctions of noncriminal character?

"It may be assumed that ordinarily a corporate agent is not likely to be deterred from criminal conduct by the prospect of corporate liability when, in any event, he faces the prospect of individually suffering serious criminal penalties for his own act. . . .

"Yet the problem cannot be resolved so simply. For there are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain especially where the penalties threatened are moderate and where the offense does not involve behavior condemned as highly immoral by the individual's associates.

* * * *

"Acquittals in certain cases of obvious guilt may reflect more than faulty or capricious judgment on the part of the juries. It may represent a recognition that the social consequences of a criminal conviction may fall with a disproportionately heavy impact on the individual defendants where the conduct involved is not of a highly immoral character. It may also reflect a shrewd belief that the violation may have been produced by pressures on the subordinates created by corporate managerial officials even though the latter may not have intended or desired the criminal behavior and even though the pressures can only be sensed rather than demonstrated. Furthermore, the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy. . . .

* * * *

"The approach of paragraph (3) is to provide for a more restricted basis of liability for all cases not included within the terms of paragraphs (1) and (2). The general *respondeat superior* approach of paragraph (1) is rejected for these cases, and corpo-

rate liability is confined to situations in which the criminal conduct is performed or participated in by the board of directors or by corporate officers and agents sufficiently high in the hierarchy to make it reasonable to assume that their acts are in some substantial sense reflective of the policy of the corporate body. . . . The phrase 'high managerial agent' is defined in subsection b(3). Given the wide variations in corporate structure, these criteria are necessarily very general. . . .

* * * *

"In practical effect, paragraph (3) would result in corporate liability for the conduct of the corporate president or general manager but not for the conduct of a foreman in a large plant or of an insignificant branch manager in the absence of participation at higher levels of corporate authority. Paragraph (3) thus works a substantial limitation on corporate responsibility in cases in which the deterrent effects of corporate fines are most dubious but preserves it in cases in which the shareholders are most likely to be in a position to bring pressure to bear to prevent corporate crime." MPC T.D. 4, pp. 148–151 (1955) (References have been renumbered.)

3. Subsection c is new and based on the assumption that a primary purpose of corporate fines is to "encourage diligent supervision of corporate personnel by managerial employees in those cases in which the corporation is bound by the conduct of inferior personnel. Where that diligence can be shown . . . exculpation should follow except in those cases where such a defense is clearly inconsistent with the legislative purpose manifested in defining the particular offense." MPC T.D. 4, p. 154 (1955). If the Legislature has imposed strict liability, there is no reason to exculpate.

4. *Corporate Agents.* Section d is designed to avoid any difficulties in the direct imposition of criminal sanctions on guilty corporate agents. Several specific situations are set forth in MPC § 2.07(6) with which we do not take issue. We believe them to be adequately covered by our statement of a general principle.

§ 2C:2–8. COMMENTARY

1. Subsection a states the existing New Jersey law. The statement that "intoxication of the actor is not a defense unless it negatives an element of the offense" means that intoxication of the actor, at least when it is self-induced, is not, as such, a defense to a criminal charge. *State v. Sinclair,* 49 N.J. 525, 544 (1967) ("Our cases settle that the prostration of the mental faculties by voluntary intoxication from alcohol or drugs cannot lead to an acquittal. . . ."); *State v. Trantino,* 44 N.J. 358, 369 (1965); *State v. White,* 27 N.J. 158, 165–166

(1958); *State v. Wolak*, 26 N.J. 464, 477–478 (1958). This means that it is not an excuse that the actor might not have committed the offense had he been sober—"and this upon the demands of public security." *State v. Trantino, supra.* See MPC T.D. 9, p. 2 (1959).

2. Aside from being a complete defense, however, intoxication may either exculpate or mitigate guilt if the defendant's intoxication, in fact, prevents his having formed a mental state which is an element of the offense and if the law will recognize the proof of the lack of that mental state. The combinations of subsections a and b of § 2C:2–8 accomplish that result. It can be demonstrated that the rule stated in those two subsections of the Code express the existing New Jersey law on the subject: Intoxication, at present, is admissible when relevant to disprove a "specific intent" when such is an element of the crime charged, but not to disprove a "general intent," when that is the required mental element. Thus, in *State v. White*, 27 N.J. 158 (1958) it was held that evidence of intoxication was admissible to disprove that defendant had the specific intent of killing willfully, deliberately and premeditatedly, as required for first degree murder, but that the general criminal intent of "malice," required for second degree murder, could not be disproved by such evidence. Again, the specific intent necessary to prove a felony may be destroyed by intoxication making the defendant not guilty of felony-murder. *State v. Sinclair, supra* at 544; *State v. White, supra* at 165–166.

The same result, using different terminology, would be reached under the Code. That which the cases now describe as a "specific intent" can be equated, for this purpose, with that which the Code defines as "purpose" and "knowledge." See § 2C:2–2b. A "general intent" can be equated with that which the Code defines as "recklessness" or criminal "negligence." The statement, under existing law, that intoxication will not destroy a general intent, when that is sufficient for a given crime, can be restated as holding that recklessness is satisfied even though the defendant was unaware of a risk of which he would have been aware were he not intoxicated. (Recklessness, except in this situation, as defined by the Code, requires awareness or risk. § 2C:2–2b(3).) The Code specifically makes awareness unnecessary for recklessness in this situation. § 2C:2–8b. Recklessness is sufficient to satisfy malice. *State v. Gardner*, 51 N.J. 444, 458 (1968). This explains why, under existing law, intoxication can destroy the willfulness, deliberateness and premeditation necessary for first degree murder but cannot destroy the malice necessary for murder.

3. Subsection c states the existing law that intoxication does not, in itself, constitute mental disease sufficient to satisfy the Code's position on responsibility. *State v. White, supra; State v. Wolak, supra* at 478. ("Thus, accepting the premise that insanity founded on a constitutional psychopathic personality was not established, but assuming that voluntary drunkenness was superimposed on that mental

weakness to the extent that it produced for the time being an inability to distinguish between right and wrong, the crime would not be excused on the ground of insanity."); *State v. Trantino, supra* at 368–369.

Note, however, that intoxication may be behavior associated with mental disease and may be symptomatic of it. It would then be part of the total disease picture admissible to prove such a mental illness. *State v. White, supra* at 165. See MPC T.D. 9, p. 9 (1959).

5. *Non-self-induced intoxication.* The Code in § 2C:2–8d(1) provides an affirmative defense in the case of non-self-induced intoxication in the event it is sufficient to meet the standard for lack of criminal responsibility. "Non-self-induced intoxication" is defined by exclusion under § 2C:2–8e(2). The New Jersey cases in discussing intoxication speak of "voluntary" intoxication as not excusing criminal conduct. *State v. White, supra; State v. Sinclair, supra.* No New Jersey case was found in which involuntary intoxication was asserted and it has been said that none exists elsewhere where it was successful. MPC T.D. 9, p. 10 (1959). No New Jersey case was found establishing the degree of intoxication resulting from involuntary drinking. *Saldiveri v. State,* 217 Md. 412, 143 A. 2d 70 (1958) holds in accord with the Code that the involuntary intoxication must amount to insanity.

6. *Pathological Intoxication.* The Code treats pathological intoxication in the same manner it treats involuntary intoxication. See § 2C:2–8d(2). "Pathological intoxication" is defined in § 2C:2–8e(3) and is intended to cover the situation where an intoxicating substance is knowingly taken into the body and due to bodily abnormality, extreme and unusual intoxication results. See MPC T.D. 9, pp. 11–12 (1959). No New Jersey case was found.

7. *Definition of "intoxication."* New Jersey law is in accord with the definition found in § 2C:2–8e(3) that intoxication is not limited to alcoholic intoxication. *State v. Sinclair, supra* at 544; *State v. White, supra* at 162–167; *State v. Close,* 106 N.J.L. 321 (E. & A. 1930). When a narcotics addict commits a crime to obtain funds to prevent withdrawal, he is held accountable under existing law. *State v. White, supra.* It is only where the drug causes "intoxication" (as defined in § 2C:2–8e(1)) and that intoxication negatives an element of the offense (under § 2C:2–8a) that it will have any effect upon a crime committed by an addict. See MPC T.D. 9, pp. 12–13 (1959).

§ 2C:2-9. COMMENTARY

1. *The Present Law.* New Jersey does not have a statute concerning duress as a defense to a criminal act but there are two New Jersey cases which left open the question of whether duress is a defense. In *State v. Palmieri,* 93 N.J.L. 195, 199–200 (E. & A. 1919), the issue was whether the trial court had erred in refusing to permit the defendant to prove that he shot the deceased while under duress:

> "The effect of duress as a defense in a prosecution for crime does not seem to have been considered in any reported case in this state, and there is considerable divergence of judicial opinion elsewhere concerning it. . . . We are not called upon to decide the fundamental question, because even where duress is recognized as a defense, the rule is substantially uniform that the compulsion which will excuse a criminal act must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done."

See also *State v. Churchill,* 105 N.J.L. 123 (E. & A. 1928).

There is wide variation among those states recognizing the defense as to the limitations imposed upon it. These variations have centered around four basic questions: (a) *To what crimes is the defense applicable?* Many—or, perhaps, most—states limit the defense so as to make it inapplicable to the most serious offenses. Murder under duress is frequently excluded. MPC T.D. 10, p. 2 (1960); *Perkins,* Criminal Law, p. 951 (2nd Ed. 1969). (b) *What threats may establish the defense?* Again, with substantial variation, the most frequent statement in the case law is that the compulsion must be "of such a nature as to induce a well-grounded apprehension of death or great bodily harm if the act is not done." *Perkins, supra* at 954. Most state statutes speak simply in terms of "reasonable grounds." MPC T.D. 10, p. 2 (1960). (c) *How immediate must the harm threatened be?* Both the existing statutes and the case law require that the threat be "instant" or "imminent" or "immediate." *Perkins, supra* at 954; MPC T.D. 10, pp. 3–4 (1960). (d) *Is a reasonable belief that the threat exists sufficient to establish the defense or must the threat be actual?* Most state statutes allow the defense if the actor had an honest and reasonable belief as to the necessity for his action. MPC T.D. 10, p. 3 (1960). *Cf., State v. Fair, supra* at 91–93.

2. *The Proper Scope of the Defense.* In evaluating the Code's provision as to duress, two other provisions of the Code must be described. First, there is a justification provision found in § 2C:3–4a which saves any common-law defense of necessity. The present section gives the principle of necessity application where the evil apprehended comes from another person rather than from the perils of the physical world. It is intended that any defense under § 2C:3–4a

should not be superseded by § 2C:2–9. The problem then is whether there are situations where the defendant cannot justify his conduct under § 2C:3–2a but where he should still be excused. This leads to the second Section of the Code to be examined: Section 2C:2–1a provides that such situations do lead to an absence of liability where the actor is so far overwhelmed by force that his behavior is involuntary, *i.e.,* where there is no "act." The situation under consideration in the duress provision differs in that defendant claims to be psychically incapable of not acting, and therefore excused, in a manner similar to the physical incapability of the necessity and "no act" situations. The Code's position is to equate the two.

3. The Code rejects the view on this issue, expounded by some, that one should look to the actor's ability to withstand the coercion. Instead, it would only allow coercion which "a person of reasonable firmness in his situation would have been unable to resist." In this regard, the Code's position is similar to existing law on the provocation formula to reduce murder to manslaughter. See *State v. King,* 37 N.J. 285 (1962); *State v. McAllister,* 41 N.J. 342 (1964). See MPC T.D. 10, pp. 6–7 (1960):

> "... law is ineffective in the deepest sense, indeed it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemnatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust."

Note that the standard established by the Code is not wholly external. It takes account of the defendant's "situation." This is intended to take account of stark, tangible factors which differentiate the actor from another such as his size or strength or age or health—but not to take account of matters of temperament.

4. For this defense, the Code requires a threat to a person, either the actor or another. Threats to property are insufficient to excuse, although, in limited circumstances, they may justify under § 2C:3–2a.

5. We follow the lead of the Wisconsin Code (Section 939.46) in allowing the defense to operate in a homicide case only to mitigate the offense from murder to manslaughter. Other authorities follow this same rule. MPC T.D. 10, p. 2 (1960); *Perkins,* Criminal Law, p. 951 (2nd Ed. 1969). The value of human life, in our view, justifies placing this higher standard in this situation.

6. Beyond this, the Code rejects the limitations now found in many cases and statutes demanding that the threat be death or great bodily harm; that the threat be to the defendant rather than to another; or that the injury be immediate. All of these are simply to be given evidential weight in the application of the statutory standard.

7. The limitation upon the defense where the defendant recklessly put himself into the situation is said to be in accord with the few cases on the subject. MPC T.D. 10, p. 8 (1960). Notice that this provision is more stringent than the normal pattern of the Code which would only allow conviction for those crimes for which recklessness suffices as the mental element. (§ 2C:3–9b) The exceptional nature of the defense justifies this. For negligence, the normal pattern is followed.

8. *Married Women and Coercion.* At common law, a married woman was subject to two special rules: (a) A woman could not be convicted of a crime if she acted under the coercion of her husband except for murder, manslaughter, treason and offenses conducted by the intrigues of the female sex, such as keeping a house of ill-fame. *State v. Grossman,* 95 N.J.L. 497 (E. & A. 1921); *Perkins,* Criminal Law, p. 914 (2nd Ed. 1969). (b) There was a rebuttable presumption that criminal acts of the wife done in the presence of the husband are not voluntary but coercive. *State v. Goldfarb,* 96 N.J.L. 61 (Sup. Ct. 1921); *State v. Martini,* 80 N.J.L. 685 (Sup. Ct. 1910).

A New Jersey statute provides as follows:

> "The fact that an offense is committed by a married woman in the presence of her husband, or, though not in his presence, near enough to be under his immediate influence and control, shall not create a presumption that her offense was committed under coercion of her husband, or render him responsible for the commission of the offense." (N.J.S. 2A:85–3)

The effect of this statute is to destroy the presumption of coercion, and the underlying rule that coercion should excuse should be abolished. § 2C:2–9c. The historical reason for the development of the rule is completely gone. See *Perkins,* Criminal Law pp. 911–913 (2nd Ed. 1969); MPC T.D. 10, p. 9 (1960). While the duty of a wife to live with her husband gives rise to special problems for the criminal law, that should not excuse the wife. No such rule applies in other situations where one person may dominate over another, such as employer-employee and parent-child. "The duty of a wife to obey her husband should not be reinforced by acquitting her of crimes committed at his command." MPC T.D. 10, p. 11 (1960).

We include the second sentence of § 2C:2–9c in order to avoid the implication that the repeal of N.J.S. 2A:85–3 reenacts the common-law presumption.

§2C:2–10. COMMENTARY

1. *In General.* The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense. Statutes frequently define offenses in terms of the consent, or lack thereof, or will of the victim. If so, proof of this element is an essential element of the prosecution's case. See *e.g.,* Rape, N.J.S. 2A:138–1 ("forcibly against her will"), *State v. Harris,* 70 N.J. Super. 9 (App. Div. 1961). Additionally, however, there are situations where, in the definition of the crime, words expressly addressed to the victim's consent, or lack thereof, have not been included but where it is clear that the legislative conception of the offense was to include this element. See *e.g.,* Assault (N.J.S. 2A:90–1) where consent destroys the apprehension required. *State v. Cooper,* 22 N.J.L. 52 (Sup. Ct. 1849).

2. *Consent to Bodily Harm.* Section b defines three instances in which consent to conduct charged to constitute an offense is a defense because it causes or threatens to cause bodily harm: (1) if the bodily harm consented to or threatened by the conduct consented to is not "serious." This is in accord with existing law in New Jersey and elsewhere. See *State v. Cooper, supra* (Indictment for assault in committing an abortion. Held, woman's assent purged the act of criminality and the act of aborting her is not an offense "of so high a nature" as to preclude application of this rule.); *Clark and Marshall,* Crimes 352 (7th Ed. 1967). (2) If the bodily harm is part of the conduct or harm which are reasonably foreseeable hazards of joint participation in concerted activity of a kind not forbidden by law such as a lawful athletic contest or competitive sport. No New Jersey cases exist but the *Cooper* case, *supra,* allowing consent to an assault, would indicate that the rule will be followed. See, generally, *Clark and Marshall,* Crimes 353 (7th Ed. 1967). (3) If the consent establishes a justification under Chapter 3 of the Code. This is intended to incorporate privileges such as one given by Section 2C:3–5 which might include consent to medical treatment.

3. *Ineffective Consent.* The Code, in Subsection c, sets forth three situations in which, unless otherwise provided in the definition of the offense, assent does not constitute consent:

(1) If it is given by a person who is legally incompetent to authorize the conduct. Some statutes makes consent by a person below a particular age legally ineffective. See N.J.S. 2A:138–1 (Carnal Abuse).

(2) If it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense. This is in accord with New Jersey law. See, *e.g.,* N.J.S. 2A:138–2 (Carnal knowledge of female inmates of homes for feeble-minded or mentally

ill) and N.J.S. 2A:138–1 (Intercourse with a woman under the influence of a narcotic drug); *State v. Terry,* 89 N.J. Super 445 (App. Div. 1965) ("mentally able to resist").

(3) If it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense. The rule as to force is in accord with the law in New Jersey and elsewhere. See *State v. Terry, supra; State v. Harris,* 70 N.J. Super. 9 (App. Div. 1961); *Clark and Marshall,* Crimes 359 (7th Ed. 1967). The same is true as to duress, which is defined as coercion arising out of the threat to use unlawful force. See *State v. Terry, supra; State v. Harris, supra.* No New Jersey cases on deception were found. The decisions elsewhere are conflicting. *Clark and Marshall,* Crimes 358 (7th Ed. 1967); *Perkins,* Criminal Law 165 (2nd Ed. 1969). The issue has arisen most frequently in connection with intercourse between a doctor (or a pretended doctor) and a patient as part of a treatment. The Code's position would be to find such a person guilty as assent here would not be consent because it was obtained by "deception of a kind sought to be prevented by the law defining the offense." *People v. Don Moran,* 25 Mich. 356, 12 Am. Rev. 283 (Sup. Ct. 1872).

§ 2C:2–11. COMMENTARY

1. This Section of the Code introduces a new idea into the substantive criminal law. It is MPC § 2.12. In criminal law enforcement, many agencies exercise discretion as to the appropriateness of prosecution in a particular case. The police constantly must make decisions as to whether to arrest or, after arrest, whether to proceed with the case. Thereafter, both the prosecutor and the Grand Jury are charged with the obligation of determining both the sufficiency of the evidence to proceed and the appropriateness of doing so. Further, at least as to the Municipal Courts, experience has shown that judges will, on occasion, enter a finding of not guilty even in the face of proven guilt because, under the circumstances, a conviction is considered to be inappropriate.

The drafters of the MPC summarize all of this as a "kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications." In order to bring this exercise of discretion to the surface and to be sure that it is exercised uniformly throughout the judicial system, this Section of the Code has been included. It should be noted that the Code uses the word "shall," meaning that if the Court makes the requisite findings, it must dismiss.

2. Subsection a requires a dismissal if the defendant's conduct was within a customary license or tolerance not expressly negatived by the victim nor inconsistent with the law. An example would be that of trespassing upon land in an area where it has traditionally been permitted by the owners or picking up a newspaper from a stand when one does not have the money for it intending to pay the next day.

3. Subsection b is the situation where the conduct literally comes within the Section as drafted but only to an extent which is too trivial to warrant the condemnation of a conviction. Attributing common sense to the Legislature, it would not have intended the prosecution of every single instance even though there is a technical violation of the statute.

4. Subsection c applies to a similar situation where there are extraordinary and unanticipated mitigations for the particular conduct. This statute would allow the judiciary to use a rule of reason which, without a legislative recognition of such power, a court might feel that it would be precluded from using by the separation of powers doctrine. As a safeguard and to bring to the surface the reasons for believing that no jury ought to convict in a particular situation, the Court is required to file a statement of its reasons for action taken under this Subsection.

5. It should be made clear that this Section is intended as an additional area of discretion in the administration of the criminal law by way of judicial participation and not as a replacement for the traditional exercise of discretion by the prosecutor, the grand jury and the police. The Section should not be used by those agencies as an excuse for buck-passing.

§ 2C:2–12. COMMENTARY

1. A defendant whose crime is a result of an entrapment is neither less reprehensible or dangerous nor more reformable or deterrable than another defendant who was not entrapped. It is an attempt to deter wrongful conduct on the part of the government, and more particularly of the police, which justifies the defense of entrapment, not the innocence of the defendant. When the police increase the risk of offending on the part of the innocent a great deal of harm is done. This includes the fact that the police are not then pursuing their proper task of apprehending those who offend without their encouragement, causing the police to lose respect, and causing increased suspicion of them in the community. The defense is almost universally recognized in the United States including New Jersey. *State v. Dolce*, 41 N.J. 422 (1964); *State v. Dennis*, 43 N.J. 418 (1964); *State v. White*, 86 N.J. Super. 410 (App. Div. 1965); *State v. Johnson*, 90 N.J. Super. 105, 116–117 (App. Div. 1965).

2. *The Definition of Entrapment in the Present Law.* The principal difficulty in defining the police conduct which gives rise to the defense lies in attempting to distinguish between those police tactics of deceits and persuasions which are necessary to police work and ought not to be forbidden and those which should. Because in the enforcement of "crimes without victims," *i.e.*, narcotics, vice, gambling, liquor violations, etc., there are no complaining witnesses, misrepresentation

by a police officer or agent concerning his identity is a practical necessity. MPC T.D. 9, p. 16 (1959).

In both of the leading decisions of the Supreme Court of the United States (*Sorrells v. United States,* 287 U.S. 435, 442 (1932) and *Sherman v. United States,* 356 U.S. 369 (1958)), the majority opinion focused attention, in defining the defense, on the defendant's character as well as on the misconduct of the police. Thus, in *Sorrells,* Chief Justice Hughes said the defense is established "when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sherman* applied this same test, *i.e.,* inducement by the government and innocence of the defendant. See also *Accardi v. United States,* 257 F. 2d 168 (5th Cir. 1958). *Sorrells v. United States, supra* at 448–49, based the defense upon being an implied exception to the broad legislative enactment.

3. New Jersey has adopted the test of the majority opinions in *Sherman* and *Sorrells.* In *State v. Dolce, supra* at 430–32, the Court defined the defense as follows:

> "Entrapment exists when the criminal design originates with the police officials, and they implant in the mind of an innocent person the disposition to commit the offense and they induce its commission in order that they may prosecute. *Sorrells v. United States.* . . . It occurs only when the criminal conduct was the product of the creative activity of law enforcement officials. *Sherman v. United States.* . . . In such situation although the violation of the criminal law is not denied . . . conviction of the defendant cannot be had because the methods employed by the enforcement officials are unconscionable and contrary to public policy. *Sorrells.* . . . The courts will not permit their process to be used in aid of a scheme for the actual creation of a crime by those whose duty it is to deter its commission. Chief Justice Warren, speaking . . . in *Sherman,* likened police methods which constitute entrapment to those which produce coerced confessions and unlawful searches. . . . The defense is spoken of as establishing an estoppel against the government or as a bar to prosecution or as removing the case from the purview of the statute. . . .
>
> Judicial abhorrence of entrapment does not mean that police officials cannot afford opportunities or facilities for the commission of criminal offenses. Artifice and stratagem, traps, decoys and deceptions may be used to obtain evidence of the commission of crime or to catch those engaged in criminal enterprises. . . . According to *Sherman,* . . . in determining whether entrapment existed, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminals. . . . Or. . . , 'Is the defendant a strayed lamb or an ensnarled wolf?' The law will

protect the innocent from being led to crime through the activities of law enforcement officers but it will not protect the guilty from the consequences of subjectively mistaking apparent for actual opportunity to commit crime safely."

See also, *State v. Dennis,* 43 N.J. 418 (1964); *State v. Johnson,* 90 N.J. Super. 105, 116–117 (App. Div. 1965).

4. In contrast to the majority of the Supreme Court in *Sherman* and *Sorrells* and the New Jersey formulation in *Dolce,* Mr. Justice Roberts would have centered attention upon the conduct of the police. See his concurring opinion in *Sorrells v. United States, supra* at 454. He would not insist that the defendant be "innocent" and, although not exactly attempting to draw the line between proper and improper police conduct, he noted a difference between "artifice or deception," implied to be proper, and "trickery, persecution, or fraud," implied to be improper. Mr. Justice Frankfurter concurring with three other Justices in *Sherman v. United States, supra* at 382 would formulate the defense solely with reference to police behavior. Under his test, the "innocence," *i.e.,* the character of disposition of the defendant is irrelevant. See discussion in MPC T.D. 9, pp. 17–18 (1959).

5. The MPC formulation adopts the views of Justice Roberts in *Sorrells* and Justice Frankfurter in *Sherman.* It would overrule those cases and the New Jersey cases which follow them. It speaks only to the conduct of the police and is available to any defendant, irrespective of his character, provided the behavior of the prosecuting authorities has created a risk that those who presently would obey the law might be drawn to crime. MPC T.D. 9, p. 19 (1959). The chief justification for this formulation is that it gives "full deterrent effect" to the defense, and the police conduct toward a defendant may be particularly objectionable even though he thought of committing the crime prior to any inducement by officials. "Law enforcement officers may feel free to employ forbidden methods if the 'innocent' are freed but the habitual offenders, in whom the police have the greater interest, will nevertheless be punished." *Id.* at 20. Further, investigation into the character and disposition of the defendant tends to obscure the task of judging the quality of the police behavior.

Our recommended formulation is an intermediate position between the MPC provision and the test of *Sherman* and *Sorrells.* It accepts the criticism of the latter that it is inappropriate to require innocence. It does not go so far as MPC § 2.13 in that it not only requires the police officer to "induce or encourage" the criminal activity but it requires that his conduct "as a direct result, causes" that activity. Thus, a defendant cannot take advantage of coincidental improper police conduct. While this test, to some extent, cuts down the deterrant effect of the entrapment rule, it does so only in cases where it would be most inappropriate to permit the offender to escape conviction.

6. *The Burden of Proof: Subsection b.* The Code places the burden of proof upon the defendant because the defense does not negative an element of the offense and does not "truly seek to excuse or justify a criminal act. The defense is, in fact, a complaint by the accused against the State for employing a certain kind of unsavory enforcement. The accused is asking to be relieved of the consequences of his guilt by objecting to police tactics. He is plaintiff and should be required to come forward with the evidence and to establish the main elements of his claim by a preponderance of proof." MPC T.D. 9, p. 21 (1959). This would change New Jersey law. Under *State v. Dolce, supra* at 432, entrapment is a "negative defense" meaning that the defendant has the burden of coming forward with some evidence to support the defense but, once having done so, the burden is upon the prosecution to prove, beyond a reasonable doubt, that he was not entrapped.

7. *Trial of the Entrapment Issue.* We take the position that the issue of entrapment should be tried to the court rather than to the jury. In our view, this is a legal question analogous to search and seizure. In the *Dolce* case, the Court left the question open for consideration through the Rule-making power. *State v. Dolce, supra* at 437–438. The present practice is to try the issue to the jury.

8. *Entrapment by Persons Without Official Position.* The Code follows existing law in (1) not allowing the defense if the inducement comes from a private person without official connection (MPC T.D. 9, p. 14, n. 1 and p. 22 (1959)) and (2) allowing the defense when the inducement is by a person who is employed by or acts as a part of law enforcement through the active or passive cooperation of officials. *Id.* at 23. This accords with our law. *State v. Dougherty,* 86 N.J.L. 525 (Sup. Ct. 1915), *reversed on other grounds,* 88 N.J.L. 209 (E. & A. 1916) (Burns Detective Agency). *Cf., State v. Scrotsky,* 39 N.J. 410 (1963) (search and seizure).

9. *Limitation of the Defense.* The majority opinion in *Sorrells v. United States, supra* at 451, recognizes that a particular offense may be such that it could have no implied legislative exception because it is too "heinous or revolting." No reported entrapment case allows the defense where great physical damage has taken place. MPC T.D. 9, p. 23 (1959). The Code places such a limitation on the defense. Here, the offender should be punished and the deterrant effect to the conniving police would be to prosecute them. *Id.* at 23–24.

INTRODUCTORY NOTE TO CHAPTER 3

This Chapter formulates the justification defenses for conduct which would otherwise constitute an offense. At the present time, all of the New Jersey statutory law in this area is found in N.J.S. 2A:113–6:

> "Any person who kills another by misadventure, or in his or her own defense, or in the defense of his or her husband, wife,

parent, child, brother, sister, master, mistress or servant, or who kills any person attempting to commit arson, burglary, kidnapping, murder, rape, robbery or sodomy, is guiltless and shall be acquitted."

The New Jersey Law as to justification defenses is actually found in the cases and, in fact, the words of the above statute are not followed any longer. See, *e.g., State v. Fair,* 45 N.J. 77, 90 (1965) (the justification of killing to defend another can apply in the case of a stranger, not withstanding the enumeration of relationships in N.J.S. 2A:113–6); *State v. Abbott,* 36 N.J. 63, 73 (1961).

The approach of the Code is to abandon this case-by-case development in favor of a fresh, integrated treatment of the subject. In doing this, the Code looks not to the offense with which the defendant has been charged but, rather, to the conduct which he seeks to justify. Under the *Abbott* case, *supra,* this is now the approach of our law. Additionally, the Code's approach in this area is to establish carefully standards both as to the right to use force and as to the amount of force which may be used. On several occasions, the Code distinguishes between the right to use "deadly force" and the right to use "moderate" (*i.e.* less than deadly) force. Our Supreme Court has also adopted this approach. *State v. Abbott, supra.*

§ 2C:3–1. COMMENTARY

1. Paragraph a provides that any claim of justification under this Chapter constitutes an affirmative defense. Under § 2C:1–12b, this means that the prosecution has no evidential burden as to this defense unless and until evidence appears in either the State's or defendant's case to support the defense. Given such evidence, however, the defense must be negatived beyond a reasonable doubt. This is the law in New Jersey. *State v. Abbott, supra* at 72; *State v. Fair, supra* at 90–91.

2. Paragraph b is to make clear that the Chapter is not designed to create privileges in the civil law. Although particular conduct may be privileged in the criminal law, it may be that it should not be in the civil law. The fact that conduct should not be criminal does not mean that the actor should not respond in damages. In the converse situation, where the civil law affords a privilege which the criminal does not recognize, the Code is silent. The courts may want to fashion limitations upon tort privileges to take into consideration the new criminal provisions so as to create a remedy where none now exists. Whether or not this is to happen is, however, beyond the scope of this Code.

§ 2C:3–2. COMMENTARY

1. *Necessity: Subsection a.* This Section incorporates the defense of necessity to the extent that such a defense is now permitted to operate to justify conduct under the law. There is no existing statute on the necessity problem in New Jersey and there have been no cases dealing with the issue. The drafters of the MPC take the position that, "while the point has not been free from controversy, it seems clear that necessity has standing as a common-law defense. Such issue as there is relates to its definition and scope." MPC T.D. 8, p. 5 (1958). Many other states have adopted statutes recognizing the defense and defining its limits. The Commission believes it more appropriate to leave the issue to the Judiciary. The rarity of the defense and the imponderables of the particulars of specific cases convince us that the Courts can better define and apply this defense than can be done through legislation. In this regard, the courts should look both to MPC § 3.02 and New York Penal Code § 35.05 for guidance as to the scope of the defense as defined at common law. We do, however, place a limitation on the defense: the issue of competing values must not have been foreclosed by a deliberate legislative choice, as when the law has dealt explicitly with the specific situation that presents the necessity or a legislative purpose to exclude the justification claimed otherwise appears. This language is adopted from MPC § 3.02(1)(b) and (c).

2. *Justifications Sufficient at Common Law: Subsection b.* A general saving provision applicable to justifications is included here as in the case of excuses and alleviations in Section 2C:2–10. While we are confident that the Code defines all proper justification defenses, we would not want to destroy by inference a proper, but unusual, defense which we have failed to include. We, therefore, make sufficient any defense of justification permitted by the common law and not inconsistent with a deliberate legislative choice.

§ 2C:3–3. COMMENTARY

1. This Section accepts as justification for the purposes of the criminal law, the civil law regulating public duties and functions. Included are those defining the duties or functions of public officers and the assistance to be rendered to such officers in the performance of their duties, those regulating the execution of legal process, and those governing the armed services and the conduct of war. In a similar manner, it defers to the requirements of the judgment or order of a competent court or tribunal.

There is no comprehensive statement of the above principle found in either New Jersey cases or statutes. It is, however, clear that § 2C:3–3a reflects the existing New Jersey law. A few examples illustrate this: To establish the criminal liability of a police officer

who makes an arrest, the courts look to the law establishing the duties and functions of the police officer. See *e.g., State v. Williams,* 29 N.J. 27 (1959). To establish the right to act to execute legal process, reference is made to the law governing that area to determine any criminal responsibility. See *e.g., Grove v. Van Duyn,* 44 N.J.L. 654 (E. & A. 1882).

2. Paragraph b sets forth the limits upon the extent to which the Code will defer to the other branches of the law for purposes of defining the justification of execution of public duty: (1) If any force is to be used toward or upon any person, then the other Sections of this Chapter apply to establish limitations upon the right to use force. Thus, in cases involving potential criminal liability for the use of excessive force in making an arrest, § 2C:3–7 (Use of Force in Law Enforcement) and, perhaps, § 2C:3–4 (Use of Force in Self-Protection) would apply rather than this Section. (2) Deadly force may never be justified under this Section except where specifically authorized by law.

3. Subsection c extends the justification to cases where the actor acts in belief that his conduct is required by a judgment or in the lawful execution of legal process or to assist a public officer in the performance of his duties.

This paragraph does not afford protection to an officer who exceeds his own legal authority as to his own duties. See *Davis v. Hellwig,* 21 N.J. 412, 416–417 (1956). He is bound to know his own limitations. *Cf.,* § 2C:3–9a. Paragraph c applies only to protect an officer or a private citizen from errors made by others. The above provision would work a change in our law only to the extent of eliminating the requirement that the actor hold a belief which is reasonable. The lack of jurisdiction of the court or tribunal is, under § 2C:3–3c(1), limited to "competent" courts and tribunals. Thus, we follow the cases holding that process issued by a court entirely without jurisdiction over the subject matter affords no protection to the person executing the process. *Grove v. Van Duyn, supra.* However, competent courts committing errors or irregularities, even though they affect jurisdiction, will not make the officer liable. *Jennings v. Thompson,* 54 N.J.L. 55 (Sup. Ct. 1891). See also the "reasonable mistake of fact" doctrine applied to the defense-of-another situation in *State v. Fair, supra* at 92–93, and the doctrine of *State v. Williams, supra,* which would apply here. If an officer acted under a mistaken belief in the validity of legal process, notwithstanding its invalidity, he could, using the reasoning of that case, be found guilty only of an offense for which recklessness or negligence suffices. The same would probably be true, under *Williams,* of a person who assists an officer who is exceeding his authority. This result is reached under the Code by Section 2C:3–3 and 2C:3–9.

§ 2C:3–4. COMMENTARY

1. The basic rule as to self-defense is found in Paragraph a. This establishes the principle in terms of force which the actor uses against another person in the belief that force is immediately necessary for the purpose of protecting himself against the other's use of unlawful force on the present occasion.

2. *Necessity and Belief in Necessity: Reasonable and Honest Belief vs. Honest Belief.* In New Jersey today, the justification defenses are only available to a defendant who has a belief in the need to use force which is both honest and reasonable. *State v. Bess,* 53 N.J. 10, 16 (1968) (self-defense and prevention of a felony); *State v. Fair, supra* at 92–93 (defense of another); *State v. Hipplewith,* 33 N.J. 300, 316–317 (1960) (self-defense); *State v. Brown,* 46 N.J. 96, 102 (1965) (same); *State v. Williams, supra* at 39 (use of force in law enforcement); *State v. Brown,* 62 N.J.L. 666, 709 (E. & A. 1898). If the defendant forms an honest but unreasonable belief in the need to use force for some justifiable purpose and, acting pursuant to that belief, kills another person, he is guilty of murder. *State v. Bess, supra; State v. Bonofiglio,* 67 N.J.L. 239 (E. & A. 1901); *State v. Scott,* 104 N.J.L. 544 (E. & A. 1928); *State v. Abbott, supra; State v. Fair, supra* at 96; *State v. Chiarello,* 69 N.J. Super. 479, 484–495 (App. Div. 1961).

There is one exception to this rule. In *State v. Williams, supra* at 39–43, it was held that a police officer who wantonly uses an unreasonable amount of force to overcome resistance by a person he is arresting is guilty only of manslaughter. In that situation, the justification defense of law enforcement is only partially available to the defendant because of his use of excessive force. That partial defense, however, makes him guilty only of manslaughter, and not of murder, on reasoning based upon a "parity of considerations" to the doctrine of provocation. *Id.* at 42–43. The reasoning leading to the *Williams* holding might well be applied to other situations. It could well be applied to defendants coming under defenses other than under the special powers granted police officers. It might also be applied to issues other than, as in *Williams,* the use of excessive force. Generally speaking, these issues have not been litigated. Where they have, no reference has been made to *Williams.* See *State v. Bess, supra* at 16.

The Code's treatment of this problem is (1) to make justification defenses available whenever the "defendant believes" in the need to act and not to require a finding of reasonableness in the formation of that belief but (2) to hold that the justification defenses found in those Sections is not available in a prosecution for which either recklessness or negligence is a sufficient culpability if the defendant was reckless or negligent, as the case may be, in forming such a belief or in acquiring or failing to acquire any knowledge or belief which is material to the

justifiability of his use of force. See Section 2C:3–9b. These provisions are from the MPC and are in accord with its general rule holding a person responsible only for the lowest offense for which the determinative kind of culpability is established for every material element of the offense, *i.e.*, the least common denominator. MPC § 2.03(10). The Code's approach is to apply the principles of *State v. Williams* to all elements of the offense and to all classes of defendants.

The Commission has decided to recommend this change because we believe the defendant is entitled to have his actual belief submitted to and considered by the jury. We trust the jury to use the reasonableness of the belief as a factor in determining its actuality. The *Williams* case, we believe, gives strong reason for this position. This recommendation is made for all of the defenses in this Chapter which depend upon a belief by the actor.

3. Under existing law, there is occasionally an overlap between the scope of justification defenses. At common law, there are instances where the scope of one justification defense may be broader than that of another. See *e.g., State v. Bonofiglio, supra. Bonofiglio* was overruled in this regard by *State v. Fair, supra* at 92. The Code eliminates all such overlaps.

4. Under the Code, "accidental" necessity, *i.e.*, a necessity to act of which the defendant was unaware, cannot give rise to a privilege. This would be contrary to statements in some New Jersey cases which are to the effect that either an actual necessity or a reasonable belief in necessity suffices. *State v. Bonofiglio, supra* at 245; *State v. Hipplewith, supra* at 316–317; *State v. Brown, supra* at 102–103. It should be noted that in none of the above cases was the question of accidental necessity directly presented and the statements might be considered *dictum.*

5. *Imminence.* The New Jersey cases speak of a limitation upon the right to use defensive force to those situations where the danger of unlawful violence to the person is "immediate," *Brown v. State, supra* at 708, or "imminent," *State v. Fair, supra* at 91. There is no case in New Jersey which examined the exact meaning of this requirement. In many states, however, it means that the defendant must apprehend that the unlawful force he fears will be used against him at the exact time he acts. MPC T.D. 8, p. 17 (1958). The Code eliminates this requirement in favor of one which requires that the actor believe that his defensive action is immediately necessary and the unlawful force which he fears, and is defending against, will be used "on the present occasion" but not necessarily immediately. *Ibid.*

6. *Unlawfulness of Force by Aggressor.* The Code does not require actual unlawfulness of the force against which the actor defends himself; it is enough, subject to the limitation of § 2C:3–9a, that the actor reasonably believes it to be so. See Commentary to § 2C:3–9a. There

do not appear to be any New Jersey cases on this point but the rejection of the "alter ego" rule in favor of the "reasonable mistake of fact" rule in *State v. Fair, supra* at 92, leads strongly to the conclusion that the New Jersey courts would reach the Code's position.

The term "unlawful force" is defined in § 2C:3–11a. The definition is designed to include in the force against which it is lawful to defend any use of force which (1) is employed without the consent of the party against whom it is directed and (2) is not affirmatively privileged under the Code or the laws of torts. MPC T.D. 8, p. 28 (1958). No New Jersey cases specifically discuss the fact that the force giving rise to the use of self-protection must be unlawful—although that thought is implicit in the cases. There is, therefore, no case discussion of this point. In *Brown v. State, supra* at 703, the point is made that there is no right whatever to resist lawful force which, in that case, was a lawful arrest.

7. *Excessive Force.* The Code allows the actor to evaluate the degree or amount of force necessary by stating the rule as to it in terms of that which the actor honestly "believes." Section 2C:3–4a. The New Jersey cases now impose a rule of reasonableness both as to the need to use force and the amount of force. Thus, if a defendant uses more force than appears reasonably necessary and kills, he would be guilty of murder. *State v. Abbott, supra.* ("If the force used was unnecessary in its intensity, the claim of self-defense may fall for that reason."); *State v. Bess, supra; State v. Bonfiglio, supra; State v. Scott,* 104 N.J.L. 544, 546 (1928); *State v. Fair, supra.* But *cf. State v. Williams, supra,* as discussed above, making the use of excessive force by a police officer in dealing with a person resisting arrest manslaughter on a theory of reasoning analogous to the provocation cases. The Code's position on these matters is the same as our position on the unreasonable belief issue, *i.e.*, it allows conviction only for a crime for which recklessness or negligence is a sufficient *mens rea.* See Section 2C:3–9b. We read the *Williams* case as reason to establish the imperfect defense by the use of excessive force not only in law enforcement cases but in all justification situations. Thus, the defendant's honest belief as to the degree of force necessary controls under § 2C:3–4a to prevent conviction for a crime requiring a culpability of purpose or knowledge but, under § 2C:3–9b, the actor could be convicted of a lesser crime for his recklessness or negligence. This recommendation is made for all of the defenses in the Chapter which depend upon the amount of force used by the actor.

8. *Limitations upon the Justified Use of Force.* The Code establishes limitations upon the use of any force (§ 2C:3–4b(1)) and, in other circumstances, upon the use of "deadly force" (§ 2C:3–4b(2)). Under subparagraph (3) of that Section, these are the only limitations imposed other than the general principle stated in subparagraph a.

9. *Limitations upon the Use of Any Force.*

(a) *Use of Force to Resist Unlawful Arrest by Peace Officer.* Paragraph b(1)(a) denies a justification for the use of force to resist a mere arrest which the actor knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful. This rule is contrary to the common law but is now the law in New Jersey. *State v. Koonce,* 89 N.J. Super. 169 (App. Div. 1965); *State v. Montague,* 55 N.J. 387 (1970), modifying 101 N.J. Super. 483 (App. Div. 1968), *State v. Mulvihill,* 105 N.J. Super. 458 (App. Div. 1969) certif. granted, 54 N.J. 560 (1969).

This Paragraph has no application when the actor apprehends bodily injury, as when the arresting officer unlawfully employs or threatens deadly force, unless the actor knows that he is in no peril greater than arrest if he submits to the assertion of authority. *State v. Koonce, supra* at 182, cites this with approval. See also *State v. Mulvihill, supra.*

The *Montague* case holds that resistance is proper if the defendant reasonably believes the officer not to be acting in good faith in the performance of his duties, but instead to be using excessive force or engaged in a private altercation. 55 N.J. at 405. *State v. Mulvihill, supra.* By adding the words "in the performance of his duties," we have incorporated this holding into the Code.

(b) *Use of Force to Resist Unlawful Force Used by Occupier Acting Under Claim of Right.* Paragraph b(1)(b) forbids the use of force in resistance of force used by an occupier or possessor of property, although the occupier's use of force is unlawful or believed to be unlawful, where the actor knows that the occupier acts under a claim of right to protect the property and the actor is not a public officer in the performance of his duties or a person lawfully assisting him therein. The thought behind this is to compel resort, in appropriate cases, to the use of the courts to settle disputes. MPC T.D. 8, p. 19 (1958). The rule of this paragraph is the law in New Jersey. *State v. Rullis,* 79 N.J. Super. 221 (App. Div. 1963).

10. *Limitations on the Use of Deadly Force.* Paragraph b(2) imposes further limitations upon the use of force, this time upon the use of "deadly force." Deadly force is defined in § 2C:3–11 as "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" and includes purposely firing a firearm in the direction of another person or at a vehicle in which one is believed to be. The first part of the Code's definition of "deadly force" was adopted by our Supreme Court in *State v. Abbott, supra* at 71. As in the case of the general self-defense principle, this provision depends upon the actor's belief as to the need to act subject to § 2C:3–9.

There are three limitations upon the use of deadly force:

(a) *Apprehension of Serious Injury.* Deadly force is not justifiable unless the actor believes it to be necessary to protect himself against "death or serious bodily harm." § 2C:3–4b(2). It is well-established law that the amount of force used must bear a reasonable relationship to the magnitude of the harm which the actor seeks to avert. Under § 2C:3–4a, moderate force may be employed against any unlawful force, except for those limitations set forth in § 2C:3–4b, but deadly force may only be used when "serious" injury, as above defined, is apprehended.

The New Jersey cases have not approached the issue in quite the same manner. Since the issue almost always arises in homicide cases, however, the results are in accord with the Code. The cases make it clear that there must be a reasonable relationship between the injury apprehended by the attack and the force used in defense. *State v. Abbott, supra* at 68–69. For the most part, that relationship is simply stated as there being a right to kill to preserve one's own life or to protect oneself from serious bodily harm. *State v. Hipplewith, supra* at 316; *State v. Bonofigllo, supra* at 245; *State v. Mellillo,* 77 N.J.L. 505 (E. & A. 1908); *State v. Wells,* 1 N.J.L. 424 (Sup. Ct. 1790) ("his own destruction or some very great injury").

(b) *Use of Protective Force by Initial Agressor.* Paragraph b(2)(a) denies justification for the use of deadly force if the actor, with the purpose of causing death or bodily harm, provoked the use of force against himself in the same encounter. This is a narrower forfeiture of the privilege of self-defense than under existing law, both in New Jersey and elsewhere, where justification may not be claimed by an initial agressor or after a mutual agreement to fight. *State v. Agnesi,* 92 N.J.L. 53 (Sup. Ct.), *aff'd. o.b.,* 92 N.J.L. 638 (E. & A. 1918) ("the necessity must not be of the defendant's own creation"); *State v. Jones,* 71 N.J.L. 543 (E. & A. 1904); *State v. Abbott, supra* at 69; *State v. Blair,* 2 N.J.L.J. 346, 347 (O. & T. 1879) (provoker must abandon his unlawful purpose, retreat and put his adversary in the wrong before he may use self-defense). The narrower forfeiture of the right of an agressor to use force is justified, in our view, by the general duty to retreat set forth in § 2C:3–4b(2)(b). The retreat obligation will cover almost all the situations now covered by the special rule for aggressors and provokers, except where the person goes into the fight with a positive purpose to seriously injure or kill the victim. Here, he must desist and retreat, even if he would not otherwise meet the obligations of the retreat rule.

(c) *The Duty to Retreat.* Paragraph b(2)(b) denies a justification for the use of deadly force if the actor knows he can avoid the necessity of using such force with complete safety by retreating or surrendering possession of a thing to a person asserting a claim or right thereto or complying with a demand that he abstain from some action which he has no duty to take. See MPC § 3.04(2)(b)(ii).

This "retreat rule," as stated, is the law in New Jersey. *State v. Abbott, supra.* Certain points as to the scope of the retreat rule should be made: First, it is only when "deadly" force is going to be used in defense that one must if possible, retreat, if otherwise justified. Moderate force may always be used without retreating. *Id.* at 70. Second, it is only when the actor "knows" that he may retreat "with complete safety" that he must. This makes the retreat rule of the Code a relatively limited one. *State v. Abbott, Id.* at 72.

The Code states two exceptions to the retreat rule:

(i) A person is not required to retreat from his dwelling (as defined in § 2C:3–11c) unless he was the initial aggressor or is assailed in his dwelling by another person whose dwelling he also knows it to be. This is New Jersey law. *State v. Pontery,* 19 N.J. 457, 475 (1955); *Cf. State v. Abbott, supra* at 67 (common driveway). The MPC would not require retreat in one's place of work. We have eliminated this as an exception to the retreat rule, being of the opinion that places of work should not be equated with dwellings for this purpose. No New Jersey cases on places of work were found.

(ii) The second exception to the retreat rule is for public officers or persons justified in making an arrest or in preventing an escape. Here, public policy requires that the function be performed and that if forcible resistance is encountered, it be overcome. Threatening death or serious injury to an officer attempting to execute a court order, for example, cannot be permitted to stultify it. New Jersey law is in accord. *State v. Williams, supra* at 39; *Bullock v. State,* 65 N.J.L. 557, 572 (E. & A. 1900).

§ 2C:3–5. COMMENTARY

1. The Code does not limit the persons whom one may protect to any particular relationships. The existing New Jersey statute sets forth a number of specific relationships (N.J.S. 2A:113–6) but the Supreme Court has not followed that limitation upon the defense. *State v. Fair,* 45 N.J. 77 (1965) (drinking partner-stranger). Thus, the Code, existing New Jersey law, and other modern authorities are in accord on this point. MPC T.D. p. 31 (1958). Further, while the existing statute is limited, by its terms, to homicides, it has not been so limited in application. *State v. Chiarello, supra.* The Code also is not so limited.

2. The Code follows the "*mens rea*" or "reasonable mistake of fact" theory as opposed to the "alter ego" theory allowing intervention under the facts as the actor believes them to be. To be protected, Section 2C:3–5a sets forth three elements as to which this belief must exist: (1) If the attack were upon the intervenor he would have the right to act in his own defense under § 2C:3–4 and using only the amount of force permitted by § 2C:3–4. (2) The person whom

he is protecting could act in his own defense. (3) The necessity of his acting. This is in accord with New Jersey law which adopts the objective test and requires reasonableness. *State v. Fair, supra* at 92–92; *State v. Chiarello, supra* at 495; *State v. Montague*, 55 N.J. 387 (1970). The intervenor might well be protected even though the person on whose behalf he acts could not, in fact, use self-defense. *State v. Montague, supra.*

By making Section 2C:3–5 subject to Section 2C:3–9 and by tying the justification to protect another to Section 2C:3–4 in subparagraph a(1) of this Section the defense is limited to allow it to operate for an actual belief but to make the actor subject to conviction of a lesser offense.

3. Subsection b places limitations upon the right to use force to protect another person which are coordinate with the limitations imposed by the "retreat" rule of § 2C:3–4b(2)(b). Thus, where a person would be obliged to retreat or take like action before acting in self-defense, he is obliged where possible to cause a person for whose benefit he acts to retreat or take like action. The right not to retreat in one's home is extended so that neither the intervenor nor the person protected need retreat in either's home to any greater extent than his own.

§ 2C:3–6. COMMENTARY

1. This Section justifies in certain circumstances the use of force against the person to protect property. It should be distinguished from § 2C:3–10 which allows the use of force against property, *i.e.*, the privilege to damage another's property, to protect one's own property.

2. This Section is a substantial modification of the analogous provision of the MPC (§ 3.06), drawing upon both that provision and the statutes of New York (§§ 35.20 and 35.25). Unlike the MPC, but like most State codes, this Section makes a basic distinction between the use of force against another in defense of premises and in defense of property. Variations exist both as to the right to use force (Subsections a and c) and as to the limitations upon the use of force (Subsections b and d).

3. There is very little New Jersey case law on this topic. The absence of authority is probably due to the fact that the right to use deadly force to protect property is very limited and, therefore, most defendants attempt to make out the broader defenses of self-protection and/or prevention of a crime. See, *e.g., State v. Bonofiglio*, 67 N.J.L. 239 (E. & A. 1901).

The rules found in the New Jersey cases may be summarized as follows: (1) Deadly force may never be used for the defense of property as such and if it is so used the defendant is guilty of murder. *State v. Zellers*, 7 N.J.L. 265 (*220), 293 (*243) (Sup. Ct. 1823); *State v. Blair*, 2 N.J.L.J. 246. (2) Less than deadly force, including

all reasonable and necessary force short of taking the intruder's life, may be used to remove a trespasser. *State v. Blair, supra.* (3) Deadly force may be used to protect one's dwelling place. *State v. Blair, supra; State v. Zellers, supra.* (4) One may not use any force to recover possession of property, real or personal, when it is in the possession of another who claims a right to possession. To use force, he must have actual, and not merely constructive, possession. Otherwise, he is left to his legal remedies. *State v. Rullis,* 79 N.J. Super. 221, 231 (App. Div. 1963).

4. Both as to premises and personal property, the Code requires possession or an equivalent. In the case of premises, Subsection a requires "possession or control" or that the person be "licensed or privileged to be thereon." As to personal property, possession by the actor or another for whom he acts is required under Subsection c. In this regard, the Code follows existing law except as to licensees. *Perkins,* Criminal Law 1029 (2nd Ed. 1969). See MPC T.D. 8, p. 37 (1958). In New Jersey it is clear, at least, that the property may not be in the possession of the person who claims a right in it against whom force is used. If it is, no force may be used. *State v. Rullis, supra.* Possession by a third person has not been litigated in this State. The Code goes beyond the common law in allowing licensees of property to use force to protect it. Since one may only act against a wrongful intruder, a licensee could not use force to prevent entry by the licensor.

5. The operative provisions as to the right to use force in both Subsections a and c are, in the main, drawn from the New York Code (§§ 35.20 and 35.25).

6. The Code, in Subsections b and d, establishes several limitations upon the use of force: (a) *Request to Desist.* There is some common law authority for this requirement which may be thought of as the property analog to the retreat rule. The provision is MPC § 3.06(3)(a). (b) *Exclusion of Trespasser.* It is settled that a trespasser may not be expelled in circumstances in which extreme harm is likely to befall him. MPC T.D. 8, p. 42 (1958). See *State v. Blair, supra.* (c) *Use of Deadly Force.* As to premises, Subsection b(3) limits the use of deadly force to dwellings and to repel criminal attacks under certain circumstances. The provision is MPC § 3.06(3)(d). We believe this standard to be a proper limitation of the existing law found in *State v. Zellers, supra; State v. Blair, supra*; and *State v. Fair,* 45 N.J. 77 (1965). It does not, of course, limit the right to act in self-protection or to defend another and to do so without retreating in one's own dwelling (§§ 2C:3–4 and 2C:3–5).

7. We have eliminated MPC § 3.06(4), (5) and (6) concerning use of confinement as protective force, use of devices to protect property and use of force to pass wrongful obstructors. We believe the general standards of this Section sufficient to deal with these cases.

§ 2C:3–7. COMMENTARY

1. This Section establishes the general rules of justifiability of the use of force which the actor reasonably believes is necessary to effect a lawful arrest. Such a privilege now exists in New Jersey. *Brown v. State,* 62 N.J.L. 666, 703 (E. & A. 1898) ("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); *Antiwine v. Jones,* 14 N.J. Super. 86 (App. Div. 1951); *Noback v. Town of Montclair,* 33 N.J. Super. 420 (Law. Div. 1954).

2. As is true with the other Sections in this Chapter the justifying principle is cast in terms of the actor's belief subject to § 2C:3–9. Under that provision, when the actor is reckless or negligent as to a belief he holds, he may be prosecuted for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability. This is the law in New Jersey today on the question of a police officer's use of excessive force in effectuating an arrest. *State v. Williams, supra* at 39.

3. It should be noted that the general privilege 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. The justification applies 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 § 2C:3–9a. Thus, 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 § 2C:2–2.

5. 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. 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 T.D. 8, p. 55 (1958). No New Jersey cases establishing such a requirement were found. *Cf., Davis v. Hellwig, supra.*

(b) Section 2C:3–7b(1)(b) 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 § 2C:3–3c(1) because otherwise a mistake of law would not excuse. MPC T.D. 8, p. 55 (1958).

6. *Limitations on the Use of Deadly Force.*

Paragraph b(2) 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 not need to retreat (§ 2C:3–4b(2)(b)(ii)) and the officer may use deadly force. *State v. Williams, supra.* The problem arises most frequently in this form in cases where the person sought to be arrested flees and the actor believes it necessary to shoot at him to prevent the escape. *Id.*

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, supra* at 39), 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, supra* at 416; *State v. Williams, supra* at 37. 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, supra* at 416. As to resisting offenders, and by "resisting" is meant only during the period of actual resistance (*State v. Williams, supra* 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, supra* at 572; *Antwine v. Jones, supra* at 88. The officer's liability for excessive force was discussed previously. No New Jersey cases were found on the issue of arrests by private citizens.

As recommended, Section 2C:3–7b(2) is a modification of MPC § 3.07(2)(b). We have eliminated the line between felonies and misdemeanors as anachronistic but have worked a new and similar distinction into a subsequent provision. Certain additional qualifications have been 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, supra.* Further, the actor must believe that the person was engaged in one of certain enumerated crimes all of which demonstrate either a use of force against a person, or that immediate apprehension is necessary. In our view, this provision is, at the same time, sufficiently limiting upon the right of police to shoot to protect the public interest but not unduly restrictive where an immediate arrest is important, and sufficiently simple to be under-

stood, applied and followed. While this Section would no longer permit the use of deadly force to arrest in every felony, it is more liberal than existing law in turning the issue to the officer's belief as to the commission of a crime rather than having justification depend upon the actual commission of a felony. See New York Penal Code § 35.30. We reject the MPC view (§ 3.07(2)(b)) as too restrictive of the police and too difficult to apply in a given situation.

7. *Use of Force to Prevent Escapes from Custody.* Paragraph c deals with two distinct problems:

(1) It states explicitly the amount of force which may be used to prevent the escape of a person in custody after arrest and establishes as the limit on that amount of force the same amount which could be used to effectuate that arrest in the first instance. This is contrary to many authorities but it is close to the New Jersey position. *State v. Williams, supra* 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. This would continue under the Code. § 2C:3–4b(2)(b)(ii); § 2C:3–7b(2)(c)(i).

(b) The paragraph also deals with the problem of escapes by persons committed to penal institutions and here the Code allows the use of deadly force if the custodian or guard reasonably 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 T.D. 8, p. 64 (1958). Again, a limitation is imposed as to the risk to innocent persons.

8. Paragraph (d) establishes standards applicable to private persons who are attempting to effect an unlawful arrest. Subsection (1) 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 so long as he believes the arrest to be valid.

Subsection (2) deals with private citizens who are volunteers and establishes a more stringent standard of an affirmative reasonable belief in the lawfulness of his conduct and that the arrest would be lawful if the facts were as he believes them to be.

9. *Use of Force to Prevent Suicide or Commission of a Crime.* The Code in § 2C:3–7e allows the use of force according to the actor's belief

subject to the provision for recklessness or negligence in § 2C:3–9(b). See Commentary to § 2C:3–4. The Code limits the privilege according to the nature of the offense 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 of 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 T.D. 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 Sections 2C:3–3 to 3–6 apply notwithstanding the criminality of the conduct against which force is used. Section 2C:3–7e(1). This prevents overlap and inconsistency between the defenses. New Jersey law is in accord. *State v. Fair,* 45 N.J. 77, 92 (1965). (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 it is likely that the person whom he seeks to prevent from committing a crime will endanger human life or inflict serious physical injury 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. The provision here is not, however, limited to force used by peace officers. While arrest is pecularily 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 Sections 2C:3–4 to 3–6. 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 Section 2C:3–7e(2)(b) concerning the use of force in riots, New Jersey now has special legislation in this area (N.J.S. 2A:126–1 to 7) which would be replaced by the Code. There is some question whether a riot situation which does not give rise to use of deadly force under Section 2C:3–3 or Section 2C:3–7 should justify the use of deadly force simply because it is a riot. We recommend inclusion of 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.

§ 2C:3–8. 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. It is intended to include, but not necessarily to be limited to relationships such as parent, guardian, or other person in a similar relationship to a minor; teacher or other person entrusted with the care or supervision of a minor for a special purpose; guardians or other persons similarly responsible for the general care and supervision of an incompetent person; doctors, other therapists, persons assisting them and their patients; wardens or other authorized officials of correctional institutions; persons responsible for the safety of a vessel or an aircraft or persons acting at their direction; and persons 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.

2. The Section is based upon MPC § 3.08 but is intended to generalize the rules there set forth. It is drafted on the view that in this area the penal law should, on the whole, accept and build upon the privileges recognized in other bodies of law (*e.g.,* the domestic relation, school law, correctional law, etc.) and in the law of torts except where a penal law departure from the civil law has been made clear by the Legislature. Deadly force must, however, be authorized by one of the provisions of this Chapter. The Commission does not disagree with any of the specific rules set forth in MPC § 3.08 and believes that the Courts should look to that provision, as well as to existing law, in interpreting this Section. As to existing law, see *Richardson v. Parole Board,* 98 N.J.L. 690 (E. & A. 1923) (parent-child); *State v. Pickles,* 46 N.J. 542 (1966) (same); N.J.S. 18A:6–1 (Use of corporal punishment by teachers); N.J.S. 30:4–4 (Use of force by correctional authorities); N.J.S. 48:12–104 (Railroads, excluding disorderly or non-fare paying passengers); *Runyon v. Pennsylvania R. Co.,* 74 N.J.L. 225 (1908) (same).

§ 2C:3–9. COMMENTARY

1. Paragraph a 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 criminal law or the law of arrest or search, the mistake does not exculpate. See § 2C:2–2i and MPC T.D. 8, p. 18 and p. 77.

2. *Reckless or Negligent Use of Excessive but Otherwise Justifiable Force.* As discussed in the Commentary to Section 2C:3–4, while the actor's belief need only be honest, the use of force not authorized by the prior Sections due to defendant's recklessness or

negligence will result in a conviction of a crime for which recklessness or negligence suffices. That result is reached by this Section. See *State v. Williams,* 29 N.J. 39 (1958).

3. *Reckless or Negligent Injury or Risk of Injury to Innocent Persons.* Paragraph c 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 Chapter does not entirely preclude any justification (see § 2C:3–7b(2)(c)), the person is guilty of the offense 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 to be considered in evaluating negligence. *Davis v. Hellwig, supra* at 416.

§ 2C:3–10. COMMENTARY

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

§ 2C:3–11. COMMENTARY

These definitions were discussed in the Commentary to § 2C:3–4.

§ 2C:4–1. COMMENTARY

1. Section 2C:4–1 sets forth the Code's test for responsibility, *i.e.,* of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did. What is involved is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction where a punitive-correctional disposition is appropriate and will be used and those in which a medical-custodial disposition is the only kind that the law should allow. MPC T.D. 4, p. 156 (1955). A very hard practical problem is 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 *State v. Lucas,* 30 N.J. 82, 87 (1959) (Weintraub, C.J.) (Concurring opinion).

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, 39 (1965).

See also *State v. Lucas, supra; 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).

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 T.D. 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." *Id.*

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, supra* at 470.

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. New Jersey has rejected this variation. *State v. Lucas, supra.*

5. The Commission recommends the abandonment of *M'Naghten* in favor of the test set forth in this Section. The provision found in 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. The "irresistible impulse" variation of *M'Naghten* is in-

sufficient to do this because it may be impliedly restricted to sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection. There is no good reason to exclude these. MPC T.D. 4, p. 157 (1955). Thus, the Code finds the proper question to be whether the defendant was without the capacity "either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Application of this standard calls for distinction, as required by *State v. Sikora, supra,* between "incapacity, upon the one hand, and mere indisposition on the other." MPC T.D. 4, pp. 157-158 (1955).

6. 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. 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." (*Ibid.*)

As drafted, the Code speaks of "substantial and adequate capacity." The term "substantial" comes from MPC § 4.01 but we have added the term "adequate" to express to the jury that they must determine the justice of the defendant's case. We have taken this term from the Vermont statute (T. 13, § 4801). It is anticipated that the psychiatric and psychological testimony would be addressed to the substantiality of the defendant's impairment but not to the adequacy. Thus, the psychiatrist will not be asked to make a moral or legal judgment. He can confine his opinion to the medical question which he is qualified to answer. While it might be said that this test asks the jury to pass upon a matter other than one strictly of "fact", in our opinion the jury does this in any case and justice is served by putting the issue to them directly.

7. We reject the rule of *Durham v. United States,* 214 F. 2d 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 was an important early step in the process of modernizing the concept of responsibility. Time and reflection have, however, shown that the *Durham* test 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, to be both unworkable and undesirable. See *State v. Lucas, supra* at 70. Even in the District of Columbia, the *Durham* case has gone through a process of judicial revision and reformulation so as to make it closely approximate the Model Penal Code test. *McDonald v. United States,* 312 F. 2d 847 (D.C. Cir. 1962); *Washington v. United States,* 390 F. 2d 444 (D.C. Cir. 1967). See *United States v. Freeman,* 357 F. 2d 606, 622 F.N. 51 (2nd Cir. 1966).

8. Section 2C:4–1b is designed to exclude from the concept of "mental disease or defect" the case of persons who engage in mere recidivism or narcotics addition. Such will not, of itself, justify acquittal. *United States v. Freeman, supra.*

9. It is intended that the term "defect" should include congenital and traumatic mental conditions as well as disease. This is not now the case under the *M'Naghten* rule. *State v. Cordasco, supra* at 197.

10. Since the promulgation of the MPC in 1961, there has been a strong movement, both legislative and judicial, toward adoption of its provision (§ 4.01) or of a variation of it. Judicial adoption of the Code has been particularly strong among the United States Courts of Appeals. See *e.g., United States v. Freeman, supra,* and *United States v. Smith,* 404 F. 2d 720 (6th Cir. 1968). In *United States v. Currens,* 290 F. 2d 751 (3rd Cir. 1961), the Court of Appeals adopted the second portion of MPC § 4.01, *i.e.,* substantial capacity to conform one's conduct to the requirements of the law, but rejected the first, *i.e.,* to appreciate the criminality of his conduct, as being redundant. Among the states, most of the change has come from State legislatures. A large number have adopted the MPC or a variation of it. See, *e.g.,* New York Penal Code § 11.20; Illinois § 6–2; Vermont T.13. § 4801.

11. In recommending the adoption of § 2C:4–1, it should be noted that we also recommend changes in both the manner of determining responsibility through a court-appointed expert (§ 2C:4–5) and the provisions for mandatory commitment and court control over release (§ 2C:4–8) found in this Chapter. These procedural safeguards offer firm assurance against any abuse arising out of the change in the test for responsibility.

§ 2C:4-2. COMMENTARY

The first sentence of Paragraph a follows existing New Jersey law in allowing evidence that the defendant's capacity to have a purpose was impaired by a mental disease or defect. In *State v. DiPaolo,* 34 N.J. 279, 294-95 (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 premediate, 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." (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. *Id.* at 470. Cases in other jurisdictions have conflicted sharply. MPC T.D. 7, p. 193 (1955).

2. The problem is broader than the question of the admissibility of evidence on an issue of purpose. It could arise as 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 that it is admissible to distinguish between 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 P. 2d 53 (Sup. Ct. 1949); *People v. Henderson,* 60 Cal. 2d 482, 386 P. 2d 677 (Sup. Ct. 1963); *People v. Conley,* 64 Cal. 2d 310, 411 P. 2d 911 (Sup. Ct. 1966). In the *State v. Sikora, supra* at 471, our Supreme Court dealt with this line of cases which had been relied upon by the defendant. 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.* . . ."

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, difficult 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. The second sentence of paragraph a is intended to leave further development in this field to case law in our Courts. The Commission believes it would be inappropriate to foreclose the admission of such evidence but also believes that the implications of the admission of such evidence should be carefully considered in the context of particular cases. It should be noted that MPC § 4.02(1) would admit such evidence on all culpability issues.

3. Paragraph b 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. A provision of this kind tends to reduce the practical importance of the issue of responsibility, since that issue is always most acute when capital punishment is involved. MPC T.D. 4, p. 193 (1955). See also *State v. Lucas, supra.* This provision is, in effect, a supplement to § 2C:9–6b concerning the admissibility of evidence at a hearing to determine whether to impose the death penalty. Our cases allow for the admission of such "background" evidence. *State v. Mount,* 30 N.J. 195, 218 (1959); *State v. Sikora, supra* at 472 (citing the MPC).

4. As to paragraph c, *State v. Reynolds,* 41 N.J. 163, 177 (1963) holds that when the defendant offers "background" evidence under *State v. Mount, supra,* the State may, within reasonable bounds, rebut that evidence. The Code continues this rule.

§ 2C:4–3. COMMENTARY

1. *Burden of Proof.* Paragraph a makes mental disease or defect excluding responsibility an affirmative defense. Under § 2C:1–12b, this means that when evidence supporting an affirmative defense has been adduced, the defense must be disproved beyond a reasonable doubt. This changes the present New Jersey law which is that the burden of going forward with evidence 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). Many recent cases, in other areas, have, however, cast doubt upon whether this rule would be followed today.

2. *Notice of Insanity Defense.* Paragraph b incorporates New Jersey Court Rule 3:12 requiring notice of an intent to rely upon a defense for which expert psychiatric testimony is or may be necessary. This Rule was adopted pursuant to the Supreme Court's decision in *State v. Whitlow,* 45 N.J. 3, 22 n. 3 (1965), that such a provision was both appropriate and not in violation of the privilege against self-incrimination. See *State v. Risden,* 56 N.J. 27 (1970).

3. *Form of Verdict.* The Code, in paragraph c 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 in New Jersey. 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 § 2C:4–8. In view of the fact that N.J.S. 2A:163–3 will be repealed, the reference in R. 3:19–2 should be changed to this Section or the Rule should be amended to refer to this Section.

§ 2C:4–4. COMMENTARY

1. The criterion of fitness to proceed set forth in this Section is, in general, universally accepted. Our present 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, 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 § 2C:4–6.

2. This Section is MPC § 4.04. The standard for determining lack of fitness to proceed is essentially that now found in our cases.

§ 2C:4–5. 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.

2. *The Impartial Expert.* 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 T.D. 4, p. 195 (1955) and in *State v. Whitlow,* 45 N.J. 3, 11, n.1 (1965). As pointed out in the *Whitlow* case, when the defendant 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." (*Id.* 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, Id.* at 20. The procedure under the Code would be to have an examination by one or more impartial experts. MPC T.D. 4, p. 196 (1955). In *State v. Whitlow, supra,* 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."

3. Under the Code, it is the defendant's having given notice pursuant to Section 2C:4–3b or because doubt as to his competency otherwise comes to the attention of the Court which gives rise to the Court's power to require an examination. The same is true under existing law. Compare *State v. Whitlow, supra,* with *State v. Obstein,* 52 N.J. 516 (1968).

4. 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 T.D. 4, p. 196 (1955); *State v. Whitlow,* supra.

5. Paragraph a further provides for commitment to a mental facility for a period of up to sixty days, or longer if the Court so orders, for purposes of conducting the examination. In *State v. Whitlow, Id.* at 24, 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." In the absence of such legislation, the *Whitlow* case itself establishes the Court's 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.

6. The final provision of paragraph a sets forth that a "qualified psychiatrist retained by the defendant or by the prosecution be permitted to witness and participate in the examination." This is to assure both parties the opportunity for an adequate psychiatric examination by an expert of its own choice and is thought to be a device which would help avoid the battle of experts. MPC § 4.05 gives this right to the defendant alone. *Cf., State v. Whitlow, Id.* at 21.

7. Paragraph b clarifies the question of what methods may be used in the examination. It is specifically provided that, if necessary, questions as to the crime alleged may be asked. *Whitlow* so holds. (*Supra* at 16). See also *State v. Obstein, supra* at 527.

8. Paragraph c deals with the contents of the psychiatric report. Generally, statutes give the examining physician little guidance in this area and there is, therefore, little assurance the report will be adequate. MPC T.D. 4, pp. 196–197 (1955). In *State v. Whitlow, supra* at 9, the Court pointed out the particular 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."

9. The Code deals with the situation of the defendant's refusal to cooperate by instructing the examining physician to so report to the Court when that occurs and by permitting affirmative coercive techniques to persuade the defendant to cooperate if it is found that the unwillingness was not a result of mental disease or defect. Agreement by the prosecution and defense to one mutually-acceptable expert is one possible manner of approach. *State v. Whitlow, supra* at 20. Others include commitment for observation (*Id.* at 23-24) and ex-

clusion or limitation of the defense psychiatrist's testimony (*Id.* at 23). The Court held in *State v. Obstein, supra* at 529, that the State's psychiatrists could testify before the jury to the defendant's refusal to cooperate. This power is found in Subsection d. If the Court finds the reason for uncooperativeness to be a mental disease or defect, then coercive measures may not be taken.

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

§ 2C:4–6. COMMENTARY

1. This Section establishes the framework within which the question of the defendant's fitness to proceed, as defined in Section 2C:4–4, is determined.

2. *Determination of Fitness to Proceed: The Hearing.* Paragraph a sets forth the rules for the conduct of the hearing on the issue. It excludes the jury from the trial of this question. This proceeding is presently controlled by N.J.S. 2A:163–2 which has been interpreted as allowing the trial judge either to try the issue himself or to empanel a jury to hear it. The Supreme 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).

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 T.D. 4, p. 197 (1955)) but not now 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, supra.*

3. *Effect of Finding of Unfitness.* Under paragraph b, 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 as long as such unfitness endures. Presently, 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, supra; Farmer v. State, supra.* 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 to proceed, then he is treated 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. 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 changes this. Commitment is automatic followed by a right to discharge, parole or release, under Subsection b, if danger is absent.

4. *Proceeding if Fitness is Regained or If Danger is Absent.* Paragraph b requires a hearing, if requested, on the issue of whether a defendant has regained his fitness to proceed before the proceedings may be resumed. Our statute, 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 provision is made for a hearing in New Jersey. Paragraph b also provides a procedure whereby a defendant who is unfit to proceed but who is not civilly commitable, *i.e.*, is not a danger to himself or to others, may be discharged, paroled or released on condition. This is the problem faced in *State v. Caralluzzo, supra.* In accord with the automatic commitment provisions of Section 2C:4–8 as to a finding of insanity, we recommend automatic commitment in this case but release surrounded by the procedural safeguards of Section 4–8b through e.

5. Paragraph c 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 may order that the defendant either be discharged or held for civil commitment proceedings. This provision is said 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 T.D. 4, p. 197 (1955). There is value, however, in 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).

6. *Consideration of Defenses.* The Code permits 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 and to permit trial of the insanity issue.

New Jersey's existing law allows only the insanity issue to be tried while the defendant is unfit to proceed. N.J.S. 2A:163–2. The decision to try the issue is within the discretion of the Court. *Farmer v. State, supra; Aponte v. State, supra; State v. Stern, supra.* We believe that some procedure should be available to try some issues in addition to insanity prior to trial even though the defendant is unfit to proceed. *Cf. State v. Caralluzzo, supra,* where the Court expressed concern as to confinement of a defendant without an adjudication of guilt at a criminal trial. We believe that this proposal serves that goal.

§ 2C:4–7. COMMENTARY

1. Paragraph a 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 Section 2C:4–8. Presently, the matter is controlled by N.J.S. 163–2 and N.J.S. 30:4–82. Under these statutes, after a determination has been made 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, supra,* 42 N.J. 579 (1964).

The system established by the Code is, however, in an entirely different context from our present one, in that there is a report by a court-appointed expert (§ 2C:4–5), rather than reports by the adversary's own experts. Where the court-appointed expert finds the defendant to be irresponsible there is probably little need for a trial. This is why it is appropriate for Section 2C:4–7 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 procedure, 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 may be tried to the Court or to the jury. Existing New Jersey law similarly 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 grant of discretion is because of the variety of situations which 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. 472 (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 b 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). Paragraph c gives a similar right to the prosecution after the defense has done so (see *State v. Obstein, supra*) and subject to appropriate safeguards (see *State v. Whitlow, supra*).

5. The first part of paragraph d is intended to make Section 2C:4–5a 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, supra* at 20. This is our law in the case of impartial medical experts in the civil field. R. 4:20–10. Of course, such an expert is subject to cross-examination.

6. Paragraph d 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. New Jersey's cases, allowing a broad range of freedom to the testifying expert, do 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.

§ 2C:4–8. COMMENTARY

1. This Section pertaining to 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 or like remedy) to discharge, parole or release, (d) probationary release or parole 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, and (f) a definite time limitation on the period of commitment subject to recommitment on a new finding of danger.

2. The provision for automatic commitment is in accordance with the practice in England and in a minority of American jurisdictions. 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. 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. 37, 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 continued custody. Section 2C:4–8b. 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 in conjunction 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 b of this Section provides that prior to discharge, parole, release on condition or transfer for treatment as under civil commitment an independent psychiatric examination by two physicians is required. This provision is included to protect both the public and the defendant. It is clear that the Code is designed in this manner to make the more relaxed responsibility provision of Section 2C:4–1 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 2C:4–8c.

6. The Code allows release on condition or 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 T.D. 4, p. 22 (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, release on condition or transfer as in civil commitment (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. 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 § 2C:4–1.

8. Paragraph d 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 e 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 or a significant change in his condition to occur after any application has been denied (one year). MPC T.D. 4, pp. 200–201 (1955).

10. *Time Limit on Commitment.* Subsection f requires release of the defendant after ten years unless he is found by the Court, after hearing to be subject to civil commitment. If so found, he may again be committed for another 10 year period. It is not intended that there be any limit upon the number of times a defendant may be committed. It is, however, intended that a new finding of dangerousness must be found at least every 10 years.

§ 2C:4–9. 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. To safeguard the defendant's rights and to make possible the feeling of confidence essential for effective psychiatric diagnosis and treatment, however, the defendant's statements made for this purpose may not be put in evidence on any other issue. New Jersey law is in accord with this Section. In the leading case of *State v. Whitlow,* 45 N.J. 3, 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 the 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). *State v. Obstein, supra* at 531, 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. This Section would not change that rule.

2. Subsection b requires the Court to bifurcate the trial where serious prejudice would arise out of trial of the guilt issue with the responsibility issue due to the need to use as evidence inculpatory statements of the defendant made to the examining psychiatrist. In such cases, the Court may order the responsibility issue tried using the procedure established by Section 2C:4–7. For this purpose, contrary to that section, a jury must be empaneled to try the issue.

§ 2C:4–10. COMMENTARY

1. This Section defines 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 and Domestic Relations 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 and Domestic Relations Court and criminal jurisdiction only upon absence of jurisdiction of that Court, waiver by that Court, or demand by the juvenile. 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 law governing that Court.

2. At present, N.J.S. 2A:85–4, 2A:4–14 and 2A:4–15 control in this area. N.J.S. 2A:85–4 should be repealed and N.J.S. 2A:4–14 and 15 should be retained without change.

3. The Code treats the problems of accountability of juveniles solely in terms of the respective jurisdiction of the two court systems and not in terms of criminal capacity. 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.

4. The Code, in Subsection a(1), calls for exclusive jurisdiction, without exception, for children under sixteen. This is our law. *State v. Monahan*, 15 N.J. 104 (1954); N.J.S. 2A:4–14.

In Subsection a(2), the concurrent jurisdiction provisions are found. There are three situations: First, where the juvenile court has no jurisdiction. (Sub-paragraph (a)) Traffic offenses by seventeen-year-olds would come within this provision. (N.J.S. 2A:4–14). Second, where under N.J.S. 2A:4–15 the juvenile court waives jurisdiction. (Sub-paragraph (b)). Third, is where, under the same statute, the juvenile demands to be tried as an adult. (Sub-paragraph (c)) 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). Under the Code, non-age is a jurisdictional defect.

6. The last sentence of Subsection b 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.

INTRODUCTORY NOTE TO CHAPTER 5

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

2. The drafters of the MPC set forth some basic considerations behind the law of inchoate crimes. We subscribe to these views:

> "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 law enforcement to prevent its 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 dilemmas 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 noncriminal 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;

* * * *

"(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 . . . 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 T.D. 10, pp. 24-26 (1960).)

§ 2C:5-1. COMMENTARY

1. *Existing Statutory Provision.* New Jersey's existing legislation 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)

The situation is the same in the case of those existing statutes outlawing attempts to commit particular crimes. In applying these statutes, the courts, lacking legislative guidance, have followed the principles of attempt liability developed at the common law.

2. *The Definition of Attempt.* There has been a basic ambivalence in the law of attempt 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. In accordance with the MPC, we believe the proper focus of attention to be the actor's disposition. The Code is drafted with this in mind. Starting from this point, the Code then goes forward to define 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. See MPC T.D. 10, p. 26 (1960).

We limit our definition of crimes of attempt to those situations where the offense attempted is a crime. An attempt to commit a disorderly persons offense is, in our view, not sufficiently serious to be

made the object of the penal law. Many disorderly persons offenses are too innocuous or themselves too far removed from the feared result to support an attempt offense.

3. *Section 2B:5–1a(1): The Requirement of Purpose.* The definition of attempt in the Code follows the conventional pattern of limiting this inchoate crime to purposive conduct. In the language found in our cases, there must be "an intent to commit the crime itself." *State v. Weleck,* 10 N.J. 355, 373 (1952); *State v. Blechman,* 135 N.J.L. 99 (Sup. Ct. 1946); *State v. Schwarzbach,* 84 N.J.L. 268 (E. & A. 1913). Cases in other jurisdictions speak of "specific intent."

We adopt the view that the actor must have for his purpose engaging in the criminal conduct or accomplishing the criminal result which is an element of the substantive crime. His purpose need not, however, encompass all the surrounding circumstances included in the formal definition of the substantive offense. As to them, it is sufficient that he acts with the culpability that would be required to support a charge of the commission of the completed crime. This view allows the policy of the substantive crime, respecting culpability as to surrounding circumstances, to be applied to the attempt to commit that crime. No New Jersey cases were found on this point.

4. *Section 2C:5–1a(1): Rejection of the Impossibility Defense.* The purpose of this paragraph is to reverse the results in those cases in other jurisdictions where attempt convictions have been set aside on the ground that it was impossible for the actor to have completed the crime contemplated. MPC T.D. 10, p. 30 (1960). The rule of Section 2C:5–1a(1) is, however, now the law in New Jersey. In *State v. Moretti,* 52 N.J. 182, 186–90 (1968), the defendants were convicted of conspiracy to commit an abortion upon a particular woman. Unknown to them, the woman was not pregnant and, under our law, pregnancy of the woman is an element of the completed substantive offense. The defendants contended that since it was impossible to commit an abortion upon the woman because she was not pregnant, they could not be convicted of a criminal conspiracy to commit an abortion. The Supreme Court treated the case the same as if it were an attempt case for the purpose of evaluating the defense of impossibility:

> "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. * * * '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.'

* * * *

"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."

5. 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 T.D. 10, pp. 34–37 (1960). No New Jersey authorities were found on the point although *Marley v. State*, 58 N.J.L. 207, 211 (Sup. Ct. 1894) does speak of the need for "some adaptation, real or apparent, in the thing done to accomplish the thing intended." The Code rejects any such limitation on the law of attempt, recognizing 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 T.D. 10, p. 37 (1960). Given a finding of purpose, however, their position is that a conviction should follow.

6. *Section 2C:5–1a(2): The "Last Proximate Act."* Under this Section, 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, supra* at 102; *State v. O'Leary*, 31 N.J. Super. 411, 417 (App. Div. 1954); *State v. Schwarzbach, supra; Marley v. State, supra.* See also *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." (MPC T.D. 10, pp. 38–39 (1960).)

7. *Section 2C:5–1a(3): The General Distinction Between Preparation and Attempt.* Paragraph (3) 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. New Jersey's cases adopt a rule which has become known as "the probable desistance test." This test is oriented largely toward the dangerousness of the actor's conduct but gives some slight 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. The leading case is *State v. Schwarzbach, supra* ("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 pre-preparations are not the overt acts required"). See also *State v. Swan,* 131 N.J.L. 67 (E. & A. 1943); *State v. Blechman, supra; State v. O'Leary, supra; State v. Moretti, supra* at 187. We reject this, as well as several other tests, as the standard for distinguishing preparations

from attempts. The rejection of this particular one is because, assuming the proposition that probability of desistance sufficiently negatives dangerousness to warrant immunity from liability, the test does not provide a workable standard: "Is there a sufficient empirical basis for making predictions in various points along the way?" (MPC T.D. 10, pp. 42–43 (1960).)

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 T.D. 10, p. 47 (1960). The drafters of the MPC 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 pre-

viously 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 (2) provides illustrations of certain common types of behavior which may be held to constitute substantial steps." (*Id.* at 47–48.)

8. *Section 2C:5–1b: Corroboration.* The requirement that the actor's conduct shall strongly corroborate his purpose to commit a crime is intended to assure that it demonstrates that he is being guided by a criminal purpose. It does not, however, go so far as those cases using a *res ipsa loquitur* doctrine because to do so 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. 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.

9. *Section 2C:5–1b: "Substantial" Step in Particular Situations.* In order to give some definite content to the "substantial step" required for an attempt under Section 2C:5–1a(3), 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:

(1) *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 sufficient to justify abandoning those cases.

(2) *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 T.D. 10, p. 50 (1960).)

(3) *Reconnoitering.* This is included because the cases are unclear whether this alone is sufficient. *Id.*

(4) *Unlawful Entry.* Even though usually punished independently under burglary laws, unlawful entry may constitute an attempt. MPC T.D. 10, p. 53 (1960). See *State v. O'Leary, supra.* Further, relating to attempt in rape cases, this provision would move the point of criminality back further than that under existing law (see *State v. Swan, supra*) which was believed to be desirable.

(5) *Possession of Incriminating Materials.* This provision is stricter than many existing cases in other jurisdictions which find such acts to be preparation.

(6) *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 present New Jersey arson statute has already done so. (N.J.S. 2A:89–4) This provision would generalize that position.

(7) *Soliciting:*

(i) *Innocent Agents.* Soliciting an innocent agent should constitute an attempt because there is no independent moral agent to resist the inducement. See *State v. Weleck, supra* at 372, and *State v. Blechman, supra.*

(ii) *Persons to Commit a Crime Knowingly.* There has been a difference of opinion as to whether a genuine social danger is presented by solicitation to commit a crime.

> "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 noncontroversial 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 T.D. 10, p. 82 (1960).)

We have concluded that solicitation should be made an offense. In our 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 T.D. 10, p. 82 (1960).

In New Jersey, under the common law crimes saving provision (N.J.S. 2A:85–1), solicitations to commit crimes are now indictable. *State v. Blechman, supra; State v. Quinlan,* 86 N.J.L. 120 (Sup. Ct. 1914) *aff'd. p.c.* 87 N.J.L. 333 (E. & A. 1915); *State v. Boyd,* 86 N.J.L. 75 (Sup. Ct. 1914), *rev'd.,* 87 N.J.L. 560 (E. & A. 1915). The *Boyd* case establishes that liability for solicitation exists irrespective of the nature of the offense solicited although cases in some other jurisdictions would eliminate solicitations for "trivial" crimes (such as adultery and liquor violations) and limit the rule to "aggravated" crimes. The Commission believes 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. (MPC T.D. 10, pp. 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.

Contrary to the MPC and to existing law, however, we recommend that solicitation not be included as a *separate* offense. Instead, a solicitation to commit a crime, if otherwise sufficient, is made to constitute a "substantial step" under Section 2C:5–1a(3). We have included language in Section 2C:5–1b(7) designed to do this. Thus, we would change the New Jersey common law rule that a solicitor can never be guilty of an attempt because he does not intend to commit the offense personally. *State v. Blechman, supra.* This provides an offense of which a true solicitor may be convicted. At the same time, it requires the making of sufficient findings as to both the specificity of the conduct solicited and the actor's purpose to protect against unwarranted prosecutions.

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 offense 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 offense. These other situations are included in Section 2C:5–1b(7):

> *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.
>
> *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 T.D. 10, p. 87 (1960).)

The Interest of Free Speech; Specificity of Conduct Solicited. The drafters of the MPC discussed 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 T.D. 10, pp. 87-88 (1960).)

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 (2nd Cir. 1917), *reversing* 244 Fed. 535 (S.D.N.Y. 1917).

Uncommunicated Solicitation. The MPC makes immaterial for the crime of Criminal Solicitation the fact that the actor failed to communicate with the person he solicits to commit a crime "if his conduct was designed to effect such communication (MPC § 5.02(2)). In eliminating this provision from the Code, making solicitation a form of attempt, we do not intend to foreclose prosecution for an attempt by an uncommunicated solicitation in an appropriate case.

10. *Section 2C:5-1c: Conduct Designed to Aid Another in Commission of a Crime.* If one aids and abets 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 an offense where the offense is not committed or attempted by another person. This might be character-

ized as attempted aiding and abetting. Authorities are collected in MPC T.D. 10, p. 68 (1960).

Where the actor engages in conduct designed to aid another to commit an offense but he does not do all that is necessary to complete his design, the applicable principles of liability are those set forth in § 2C:5–1a and b respecting substantiality of the step taken and its corroboration of criminal purpose. By the terms of § 2C:5–1c the criteria of complicity in § 2C:2–6 are made applicable here. One of the bases of liability set forth in § 2C:2–6, assuming the necessary criminal purpose, is that the actor "attempted to aid" another person to commit an offense. Thus, since the general principles of this Section are applicable in giving content to the reference to "attempt" in § 2C:2–6, we return to § 2C:5–1a and b for standards in passing on the sufficiency of conduct short of the last proximate act. MPC T.D. 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 offense, and the law of liability for the conduct of another, which usually assigns criminality only where the other person actually commits the offense, 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.), *rev'd. on other grounds*, 31 N.J. 540 (1960)) even though that principal may not necessarily have been convicted. *State v. Morales*, 111 N.J. Super. 521 (App. Div. 1970). See Commentary to § 2C:2–6f 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 offense. The exception is *State v. Blechman, supra,* 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 rather than attempt. In a sense, that is an "attempted aiding and abetting" or, more accurately, an attempted inducing or encouraging situation.

12. *Section 2C:5–1d: Renunciation of Criminal Purpose.* According to the drafters of the MPC, 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 T.D. 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 § 2C:2–6e(3)(a).

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.

"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 T.D. 10, pp. 69–70 (1960).)

Analyzing the cases, the drafters of the MPC conclude that the "prevailing view—contrary to the general conceptions of the commentators—is in favor of allowing voluntary desistance as a defense." *Id.*

"The requirement of 'renunciation' or purpose involves two elements: (1) that the abandonment of the criminal effort originate with the actor and not be forced upon him by some external circumstance such as police intervention; and (2) that the abandonment be permanent and complete rather than temporary or contingent—*e.g.*, a decision by the actor to wait for a better opportunity to commit the crime would not manifest renunciation of criminal purpose.

"The basis for allowing the defense involves two related considerations.

"First, renunciation of criminal purpose tends to negative dangerousness. . . . In cases where the actor has gone beyond the line drawn for preparation, indicating *prima facie* sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime.

"This line of reasoning, however, may prove unsatisfactory where the actor has proceeded far toward the commission of the contemplated crime, or has perhaps committed the 'last proximate act.' It may be argued that, whatever the inference of dangerousness from such an advanced criminal effort outweighs the countervailing inference arising from abandonment of the effort. However, it is in this latter class of cases that the second of the two policy considerations comes most strongly into play.

"A second reason for allowing renunciation of criminal purpose as a defense to an attempt charge is to encourage actors to desist from pressing forward with their criminal designs, thereby diminishing the risk that the substantive crime will be committed. While, under the Code, such encouragement is held out at all

stages of the criminal effort, its significance becomes greatest as the actor nears his criminal objective and the risk that the crime will be completed is correspondingly high. At the very point where abandonment least influences a judgment as to the dangerousness of the actor—where the last proximate act has been committed but the resulting crime can still be avoided—the inducement to desist stemming from the abandonment defense achieves its greatest value.

"On balance, it is concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stages of an attempt, it significantly negatives dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort. And, because of the importance of encouraging desistance in the final stages of the attempt, the defense is allowed even 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 T.D. 10, p. 71-73 (1960).)

The drafters of the MPC 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." (*Id.*)

We have added to the MPC definition, however, a requirement found in the New York Code that a renunciation, in order to be complete, must prevent the completion of the crime—including, if necessary, "further and affirmative steps" by the defendant to do so.

As drafted, the defense is an affirmative one which the defendant must prove by a preponderance of the evidence. We believe this to be

appropriate because the defense is an unusual one and because facts pertinent to renunciation will be peculiarly within the knowledge of the defendant.

§ 2C:5-2. 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 it. 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.

As developed, the offense 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." (MPC T.D. 10, p. 96 (1960).)

2. The drafters of the MPC 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.
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> "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 [2C:2–6]. . . . 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 threshhold 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 not longer governed by his will alone; others may complete what he has 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 to 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 prohibitoins and reject it in the [Code].

"*Second:* Group prosecution is undoubtedly made easier by the procedural advantages enjoyed by the prosecution when con-

spiracy 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; 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.

"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 [2C:1–8a(2)].

"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 [2C:44–3b]. . . . 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 2C:5–4], 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 T.D. 10, pp. 96–100 (1960).)

II. Definition of Conspiracy.

3. *The Conspiratorial Objective: Section 2C:5–2a.* One of the significant departures of the Code from present law is in limiting the general conspiracy provision to cases where the conspiratorial objective is an offense. In New Jersey today, both statutory conspiracies and common-law conspiracies may be prosecuted. N.J.S. 2A:98–1 sets forth the forbidden objectives of statutory conspiracies:

"Any two or more 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), *aff'd.*, 29 N.J.L. 453 (E. & A. 1861).

See also *State v. Aircraft Supplies, Inc.*, 45 N.J. Super. 110, 115 (Co. Ct. 1957) (citing cases). Our Legislature has also enacted a special conspiracy statute directed to public bidding situations. N.J.S. 2A:98–3 and 4. It is clear that, in New Jersey today, conspiracies may be prosecuted as crimes although their objective is not, in itself,

criminal. *State v. Carbone*, 10 N.J. 329 (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 of the MPC 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 T.D. 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 overbroad conspiracy provisions. (MPC T.D. 10, pp. 103–104 (1960).)

We use "offense" rather than "crime" to define the objective of conspiracies thereby including disorderly persons offenses. These are sufficiently definitively stated to meet the above objections; they would be included in the MPC by its definition of the word "crime."

4. *The Conspiratorial Relationship: Section 2C:5–3a.* 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 T.D. 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 [2C:5–3] 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 intended 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 to 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 unquivocal 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 [2C:5–2f].
>
> "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 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, supra; 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 to the only other conspirator did not prevent conviction of the first. This is the result which is set forth in paragraph "Third," quoted in the Introduction, above, as the one we believe proper. A strict "bilateral" view would, however, lead to a 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. *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 MPC recognized the difficulties involved and attempted to remedy them through the establishment of precise standards:

> "Ordinarily a crime is defined in terms of 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 T.D. 10, pp. 106–107 (1960).)

7. *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 (2nd Cir. 1939) *aff'd.,* 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 *United States v. Falcone, supra,* with *Direct Sales Co. v. United States,* 319 U.S. 703 (1943). No New Jersey case directly presents the issue. What authorities there are have been collected and discussed in the Commentary to Section 2C:2–6c. 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. In the complicity Section of the Code (§ 2C:2–6c) the issue has been resolved in favor of requiring a purpose to advance the criminal end and that position is adopted here.

8. 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 offense. (MPC T.D. 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." (*Id.*)

However, it would not be sufficient, as it is under the law of attempt (see Commentary to Section 2C:5–1a), 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 2C:2–6b), on the one hand, and conspiracy, on the other, rests upon the extremely preparatory behavior that may be involved in conspiracy. MPC T.D. 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 offense, there could not be a conspiracy to commit that offense. This should be distinguished from an offense 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 offense, and it would suffice for guilt of conspiracy that the actor's purpose is to promote or facilitate such conduct. *Id.* at 110.

9. *Culpability with Respect to Circumstance Elements.* Concerning the culpability requirements of conspiracy with respect to the third class of elements of substantive offenses—those involving the attendant circumstances—there has been considerable difficulty in the decisions. The attempt definition requires that, as to attendant circumstance elements of the substantive offense, the actor have the same kind of culpability that is required for commission of the substantive offense. See Commentary to Section 2C:5–1a. This rule is consonant with the theories underlying inchoate criminality. If something less than knowledge as to certain circumstances suffices for a given offense, 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 T.D. 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." (*Id.*)

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 offense. The problem arises most frequently in federal cases where some circum-

stance 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 T.D. 10, p. 111 (1960). Most require culpability as to that element. The drafters of the MPC found this inappropriate and expressed their position as follows:

> "The [Code] does not attempt to solve the problem by explicit formulation but here, as in the Section on complicity [§ 2C:2–6], we believe that it affords sufficient flexibility for satisfactory decision as such cases may arise. Under Section [2C:5–2a(1)] 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 possibly arise." (*Id.* at 113.)

10. *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 92.

The decision has been subject to and has been given a number of interpretations and some jurisdictions have rejected it completely. See MPC T.D. 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 Code rejects 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 [2C:2–4c] specifies the limited situations where ignorance of the criminality of one's

conduct is a defense in general. See also Section [2C:2–2d]. 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 in particular cases and serves mainly to divert attention from clear analysis of the *mens rea* requirements of conspiracy." (MPC T.D. 10, p. 115 (1960).)

11. *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 an offense 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 a "partnership in criminal purposes." (MPC T.D. 10, p. 116 (1960).) Our cases make it clear that the agreement need be neither express nor made by all conspirators at the same time. *State v. Carbone, supra; State v. Hutchins,* 43 N.J. 85 (1964); *State v. Spruill*; 16 N.J. 73 (1954). The Code includes 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 T.D. 10, p. 117 (1960).)

III. Unity and Scope of a Conspiracy.

12. *The Problem and The Approach of the Code: Section 2C:5–2a, b and c.* 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 a in that in most of these cases it is clear that each defendant has conspired to commit or has committed one or more offenses. The question here is, to what extent is he a conspirator with each of the persons involved in the larger criminal network to commit offenses that are their objects, *i.e.*, what is the scope of the conspiracy in which he is involved. (MPC T.D. 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." (*Id.*)

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 of 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 offenses committed in furtherance of the conspiracy. MPC T.D. 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, the definition is left to the Courts through application and interpretation of the Rules. For purposes within the Code, a standard, which is probably stricter than present law, is used.

"The Code relies upon the combined operation of Subsections [a, b and c] to delineate the identity and scope of a conspiracy. All three provisions focus upon the culpability of the individual actor. Subsections a and b limit the scope of his conspiracy (1) in terms of its criminal objects, to those crimes which he had the purpose of promoting or facilitating and (2) 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 c 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." (MPC T.D. 10. pp. 119–120 (1960).)

13. *Party and Object Dimensions.* The operation of the provisions described immediately above is illustrated in MPC T.D. 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 (2nd 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 offenses committed by someone in the group, under the criteria set forth in Subsection a and b. 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 offenses involved in the operation and under Subsection c they would be guilty of only one conspiracy if all these offenses 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 his 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 T.D. 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 a would not preclude this inference, though it is more specific than the present law on the purpose requirement. But the agreement criteria of Subsection a tends to become ambiguous when applied to a relationship that involves no direct communication or cooperation. Consequently, Subsection b facilitates the inquiry in such cases:

> "Subsection [b] extends the party dimension 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 [a]. 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 analyzing 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 b. 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 MPC, the drafters concluded:

> "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 liability 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 T.D. 10, p. 126 (1960).)

14. *Effect of Multiple Criminal Objectives.* Subsection c is concerned with the effect of multiplicity of criminal objectives upon the unity 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 c 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 2C:1–8a(2)] and even here there are limits on the possible cumulation of sentences [Section 2C:44–6]. The grade and degree of a conspiracy with multiple objectives are fixed by Section [2C:5–4a] as those of the most serious of these objectives.

"The significance of the . . . rule of [Subsection c], 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 T.D. 10, pp. 128–129 (1960).)

15. *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, supra; State v. Salimone*, 19 N.J. Super. 600 (App. Div. 1952); *State v. Hutchins, supra.* MPC T.D. 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. We believe that this result of a single conspiracy can be reached under Subsection c in a proper case despite changes in personnel as if the words, that the Subsection "applies although the agreement is renewed with, or the conspiratorial relationship extended to include, other persons" were in the Code.

"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." *Id.*

16. *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 Section 2C:5–2 together with Section 2C:1–8 and 2C:1–10 and by Section 2C:5–4c together with Section 2C:44–6. See MPC T.D. 10, pp. 133–134 (1960).

IV. Prosecution of Conspiracy.

17. The MPC, in Section 5.03(4), contains rules as to venue, joinder and the admissibility of vicarious admissions. We have eliminated these provisions, believing them to be adequately covered by our Rules of Court and Evidence Rules. We recommend for study by the Supreme Court the rules found in MPC § 5.03(4).

V. Overt Act.

18. Subsection d alters the common-law rule that the agreement alone is an indictable conspiracy, and requires, in addition, 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, supra.* 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."

The Code follows a similar scheme by excepting from the overt act requirement all crimes of the first and second degree. The MPC requires both "allegation" and "proof" of an overt act. We require only the latter leaving the pleading issue to the Rules.

19. The precise significance of the overt act requirement and whether it constitutes an element of the offense 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 T.D. 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, supra* at 336; *State v. General Restoration Co., supra* at 375. The Drafters of the MPC found this to be an appropriate result. MPC T.D. 10, p. 141 (1960). They concluded, 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 [e]. . . . Under the terminology of the Code . . . 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." *Id.*

20. 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. *State v. Moretti, supra; State v. Carbone, supra* at 338; *State v. Graziani, supra.* An act done after termination of the conspiracy cannot, of course, satisfy the overt requirement.

VI. Section 2C:5–2e: Renunciation of Purpose.

21. Subsection e varies from prevailing law by providing a limited affirmative defense, which the defendant must prove, based on the actor's renunciation of criminal purpose. This problem should be distinguished from the defenses of abandonment and withdrawal from the conspiracy which may serve as a means of commencing the running of the statute of limitations or as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators or as a defense to substantive offenses subsequently committed by the other conspirators. 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 offense is complete with the agreement and overt act (if necessary), no subsequent action can exonerate the conspirator of that offense. MPC T.D. 10, p. 143 (1960). No New Jersey case presents the issue of renunciation but

our cases do speak of the offense being complete upon agreement. *State v. Moretti, supra* at 187.

We have made the renunciation defense co-extensive for purposes of attempts, complicity and renunciation by referring all to the definition in Section 2C:5–1d.

VII. Duration of Conspiracy.

22. Subsection f 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 offenses 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 2C:2–6 and the Commentary thereto. As to the latter, see Rule 63(9)(b) of the New Jersey Rules of Evidence.

The three paragraphs of Subsection f lay down the general principle that conspiracy is a continuing offense and the statute of limitations 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 offense or offenses which are its object. MPC T.D. 10, p. 145 (1960).

23. *Conspiracy as Continuous Crime; Termination by Commission of Criminal Objective or Abandonment.* Paragraphs (1) and (2), covering termination of the conspiracy as to all parties accord in general outline with prevailing doctrine. *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).

24. As to abandonment by all the parties, paragraph (2) states that abandonment is "presumed if neither the defendant nor any one 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 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 of 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, 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.

25. *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 led 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 difficulty: (1) uncertainty about when "commission" of an offense is completed and (2) a doctrine that the objective of the conspiracy may extend beyond commission of the offense to agreements to conceal the offense 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, supra; Lutwak v. United States,* 344 U.S. 604 (1953) and *Grunewald v. United States,* 353 U.S. 391 (1957). All are discussed in MPC T.D. 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 offenses of such a nature that acts of concealment are part of the commission of the substantive offense and, therefore, may be considered as in furtherance of the conspiracy to commit such offense. 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 2C:1–7d.] Any more specific determination of the 'commission' of particular kinds of crimes must of course be left to the courts." (MPC T.D. 10, p. 153 (1960).)

26. *Abandonment by Individual Conspirator.* Paragraph (3) of Subsection f governs abandonment of the agreement by an individual conspirator, which commences the running of time limitations as to him. It is quite uniformly recognized. See *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 T.D. 10, pp. 153-155 (1960).) No New Jersey cases were found.

§ 2C:5-3. COMMENTARY

1. *Section 2C:5-3a(1). Incapacity to Commit Substantive Crime.* Many offenses are so defined that only a person who occupies a particular position or has a particular characteristic can be guilty of the offense. The Subsection provides 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 T.D. 10, p. 170 (1960).)

No New Jersey conspiracy cases were found on the issue. Our aiding and abetting cases on the same point are collected and discussed in the Commentary to § 2C:2-6e. 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) seems to be the contrary. As in § 2C:2-6e, the Commission recommends not following *Aiello* to the extent it does, in fact, accurately reflect existing law.

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 offense. See MPC T.D. 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.

2. *Section 2C:5-3a(2): Irresponsibility or Immunity to Prosecution or Conviction.* Subsection a(2) expressly makes it immaterial to the liability of a conspirator that the person whom he solicited or with whom he conspired is irresponsible or has an immunity to prosecution or conviction for the offense. Such a fact 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 conspriacy 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 2C:2-6b(1), e and g. New Jersey law is in accord. See the Commentary accompanying the Sections cited immediately above. In *State*

v. Goldman, 95 N.J. Super. 50 (App. Div. 1967), 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).

3. *Section 2C:5–3b. Liability of Victim; Behavior Inevitably Incident to Commission of the Offense.* This Subsection reflects the same policies found in Section 2C:2–6e and 2C:2–6f(1) and (2). As to victims, it would confound legislative purpose to hold the victim of an offense guilty of conspiring to commit it. See MPC T.D. 10, p. 172 (1960) and Commentary accompanying Section 2C:2–6f(1).

Concerning offenses as to which the behavior of more than one person is "inevitably incident," as was pointed out in the Commentary to Section 2C:2–6f(2), varying and conflicting policies are often involved —for example, ambivalence in public attitudes toward the offense and the requirement of corroboration of accomplice testimony. The position taken by the Code, both for complicity and for conspiracy 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, 120 (Co. Ct., 1957), the court 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." The drafters of the MPC rejected 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 that 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 [a(2)]." (MPC T.D. 10, pp. 173–174 (1960).)

See Commentary to Section 2C:2–6e and f(1) and (2), above.

§ 2C:5–4. COMMENTARY

1. *Sentencing Provisions for Inchoate Crimes.* Prevailing law seems to reflect no general or coherent theory in determining the sanctions that are authorized upon conviction of attempt, solicitation or conspiracy. MPC T.D. 10, p. 174 (1960). Generally, the maxima is somewhat less than that for the substantive offense that was the actor's object. 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 (imprisonment for up to three years and a fine of up to $1,000) but the punishment shall not exceed that provided for the crime attempted. 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) and (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 menace, 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. 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.

(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 misdemeanors.

2. *Section 2C:5–4a: Grading.* The Code departs from the prevailing law by treating attempt (and, therefore, 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 crime of the first degree does the Code deviate from this solution, grading the inchoate offense in the case as a crime 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 T.D. 10, pp. 178–179 (1960).)

4. *Section 2C:5–4b: 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 2C:43–11 which is a general authorization to the Court to enter a judgment of conviction for a lesser offense 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 was thought by the drafters of the MPC 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 T.D. 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. We have gone beyond the MPC in this regard by adding a special provision as to persons convicted of conspiracy who were only marginally related to the main scheme.

5. *Section 2C:5–4c: Multiple Convictions.* This Subsection precludes conviction of more than one inchoate crime defined by this Chapter for conduct designed to commit or to culminate in the commission of the same offense.

> "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.

§ 2C:5–5. COMMENTARY

1. This provision was N.J.S. 2A:94–3 into which we have incorporated the best features of § 140.35 of the New York Penal Code. N.J.S. 2A:170–3, which included a burglar's tools provision as a disorderly persons offense has been eliminated.

INTRODUCTORY NOTE TO CHAPTER 11 AS TO THE PROBLEM OF CAPITAL PUNISHMENT

The provisions recommended in this Chapter are based on the assumption that the death penalty is to be retained as a punishment for murder.

The Commission has not addressed itself to the issue of the abolition of the death penalty. This is because a Commission in this State recommended its retention in 1964 and a new Commission is being formed to review the issue. Thus, the question seems to be beyond the scope of our mandate. We do, however, believe it appropriate to recommend limitations upon the penalty and changes in the way the issue is to be determined.

If the Code is to be changed to eliminate the death penalty, major portions of this Chapter and of Chapter 4 (Responsibility) will have to be revised. The recommendations in those two Chapters, should, to the extent, be considered temporary pending a determination of the problem of capital punishment.

§ 2C:11–1. COMMENTARY

1. The definition of "human being" set forth adopts the common-law definition which has been the law of New Jersey and which excludes the killing of a fetus from homicide. See *In Re Vince*, 2 N.J. 443, 450 (1949); *State v. Cooper*, 22 N.J.L. 52 (Sup. Ct. 1849); *State v. Murphy*, 27 N.J.L. 112, 114 (Sup. Ct. 1858). An earlier draft of our Code would have included as human beings a person "who is alive and includes a viable fetus." This would have included as homicides situation such as that set forth in *Keeler v. Superior Court*, Cal. 2d , Cal. Rptr. (Sup. Ct. June 12, 1970) reversing 80 Cal. Rptr. 865 (Ct. App. 1969) where a viable fetus was purposely stomped from its mother by the defendant. California, following the common law rule, held this not to be homicide as to the fetus. Change, if appropriate, was thought to be for the Legislature. We do not recommend the change because of (1) the problems in determining viability, (2) the problems in distinguishing abortions which should not be treated as homicides and, (3) while purposeful killings of viable fetuses perhaps should be homicide, reckless and negligent killings probably should not. The feeling of terror raised in the community is not present where the victim of a homicide is a fetus. Conviction of a defendant as in the *Keeler* situation of aggravated assault, which under our Code would be a crime of the second degree, seems sufficient.

2. As to the definition of "bodily injury," see Commentary to Section 2C:12–1a(1).

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

§ 2C:11–2. COMMENTARY

1. It is clear that causing death purposely, knowingly or recklessly must be sufficient to establish criminality. The Code also bases liability on negligence where the negligence meets the additional requirements of Section 2C:11–5. Prevailing law would, in most States, base liability for homicide on criminal negligence alone. MPC T.D. 9, p. 25 (1959). Negligence, as defined in the Code, requires the lack of reasonable care that may suffice for civil liability. While the inadvertent creation of risk may establish negligence, there must be "substantial and unjustifiable risk" of causing death, of which the actor should be aware; and the risk must be "of such a nature and degree that the actor's failure to perceive it" involves "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." This is a change from the existing New Jersey law.

In connection with the Commentary to Section 2C:2–2b(4) it was concluded that there were no instances in New Jersey law basing criminal liability upon conduct which would only be negligent, as that term is defined in the Code. See *State v. Gooze*, 14 N.J. Super. 277, 282 (App. Div. 1951); *State v. Williams*, 29 N.J. 27 (1959); *State v. Weiner*, 41 N.J. 21, 25–26 (1963). These cases emphasize a requirement of a consciousness or awareness of risk-creation on defendant's part—an element explicitly eliminated from the definition of "negligently" under the Code. We put that element back in Section 2C:11–5 by requiring, for negligent homicide, that the defendants conduct be "under circumstances manifesting extreme indifference to the value of human life."

2. This Section has the effect of dealing with criminal homicide as a generic category and distinguishes the various forms for purposes of sentence. This mode of organization is implicit in the existing statutory scheme in New Jersey but the point is obscured when murder or the degrees thereof and manslaughter are treated as separate crimes. MPC T.D. 9, p. 26 (1959). See *State v. Brown*, 22 N.J. 405, 412 (1956); *State v. Guido*, 40 N.J. 191, 210 (1962). In differentiating among criminal homicides for purposes of sentence, the Code distinguishes among murder, manslaughter and negligent homicide, classified as crimes of the first, second and third degree respectively. The content of these categories and their differences from the similar categories of prevailing law are discussed in the Comments to the appropriate Sections. The Code proposes, in addition, the abandonment of the traditional distinction between first and second degree murder but we do retain as the determinants of capital, or potentially capital, murder those under which there is a purpose to kill and enumerated felony-murders. The Code also proposes: (1) the exclusion from the capital class of certain murders where a clear ground of mitigation is established; (2) a specification of aggravating circumstances, at least one of which must be established before a capital sentence becomes possible; (3) a final discretionary determination by the jury, based upon a balancing of all the aggravating and mitigating circumstances that appear; and (4) a supplementary proceeding, after conviction of murder, to determine whether sentence of death should be imposed.

4. *Summary of Existing New Jersey Law.* In New Jersey, under the existing statutes, all unlawful homicides are classified as murders or as manslaughters. N.J.S. 2A:113–6 defines when a homicide is not criminal. See *State v. Gardner*, 51 N.J. 444, 459 (1968). With the enactment of the Code, this Section should be eliminated.

Murders are unlawful homicides accompanied by the state of mind known as "malice." *State v. Brown, supra* at 411; *State v. Williams, supra* at 36; *State v. Gardner*, 51 N.J. 444, 458 (1968). Under our cases, "malice" is defined as at common law but has been supplemented by N.J.S. 2A:113–1. *State v. Gardner, supra; State v. Paris*, 8 N.J.

Super. 383 (L. Div. 1959). As to the so-called "presumption of malice," see *State v. Gardner, supra* at 459, and *State v. Bess*, 53 N.J. 10 (1968). The most frequent statement of the definition of malice is that given by sir James Stephen in his *Digest of the Criminal Law*:

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

The first two parts of the definition were specifically quoted in the *Gardner* case as being our law. See also *State v. Mulero*, 51 N.J. 224, 229 (1968); *State v. Moynihan*, 93 N.J.L. 253, 258 (E. & A. 1919); *State v. Silverio*, 79 N.J.L. 482, 488 (E. & A. 1910). The last two parts have been subjected to legislative revision which is expressed in N.J.S. 2A:113–1. The first part of this statute sets forth the rule known as the felony-murder doctrine. See *State v. Cooper*, 13 N.J.L. 361 (Sup. Ct. 1833). The statutory rule is more limited than the common-law rule in that only certain enumerated felonies ("arson, burglary, kidnapping, rape, robbery, sodomy") are sufficient to support a murder conviction. The felonies referred to are as defined at common law. *State v. Butler*, 27 N.J. 580, 588-89 (1958); *State v. Hauptmann*, 115 N.J.L. 412, 424 (E. & A. 1935). The scope of the New Jersey felony-murder rule will be discussed below in connection with Section 2C:11–3. As to the second part of the statute, killing a peace officer, see *Bullock v. State*, 65 N.J.L. 557, 573 (E. & A. 1900) and *State v. Butchey*, 77 N.J.L. 640, 642 (E. & A. 1909).

Degrees of Murder. Assuming that malice is found and that the defendant is thus guilty of murder, the New Jersey law then requires a further determination of whether the murder is of the first degree or

of the second degree. This determination is made solely for the purpose of determining the character of punishment. The degrees of murder do not constitute separate and distinct crimes, but merely grades of the same offense. "Murder in either of the statutory degrees is murder at common law." *State v. Brown, supra* at 412. The degrees of murder are defined in N.J.S. 2A:113–2. *First degree murder* can be proved by the State (see *State v. Gardner, supra*) in either of several ways. The most important is that of "willful, deliberate and premeditated killing." This was defined by our Supreme Court in *State v. DiPaolo,* 34 N.J. 279, 295 (1961), as follows:

> "The statutory language is actually an inverse statement of the natural sequence of the required mental operations. . . . As settled by judicial construction, the first element is premediation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word 'deliberate' does not here mean 'willful' or 'intentional' as the word is frequently used in daily parlance. Rather it imports 'deliberation' and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally, the word 'willful' signifies an intentional execution of the plan to kill which had been conceived and deliberated upon. . . .
>
> "The three mental operations we have just described are matters of fact. The judiciary cannot bar evidence which rationally bears upon the factual inquiry the Legislature has ordered. The capacity of an individual to premeditate, to deliberate, or to will to execute a homicidal design, or any deficiency in that capacity, may bear upon the question whether he in fact did so act. Hence, evidence of any defect, deficiency, trait, condition, or illness which rationally bears upon the question whether those mental operations did in fact occur must be accepted.
>
> "No specific period of time is required (to conceive the intent and carry it into execution deliberately and with premeditation) but if the time is sufficient to fully and clearly conceive the design to kill and purposely and deliberately execute it, the requirements of our statute are satisfied. *State v. Pierce,* 4 N.J. 252, 267–68 (1950). See also *State v. Cordasco,* 2 N.J. 189 (1949) accord *State v. Coleman,* 46 N.J. 16 (1965); *State v. Agnew,* 10 N.J.L.J. 165 (O. & T. 1887)."

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

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

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

The jury's role in this determination is discussed in connection with Section 2C:11–7. N.J.S. 2A:113–3 controls guilty pleas in murder cases. This provision is also discussed in connection with Section 2C:11–7.

Manslaughter. The New Jersey statute does not define manslaughter. N.J.S. 2A:113–5 merely provides the punishment for it. Thus, manslaughter is defined as at common law. That body of law divided manslaughters into two categories.

> "Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act." *State v. Brown, supra* at 411.

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

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

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

The crime may take three forms. It may be committed through malfeasance which is the committing of an unintentional homicide in the doing of a criminal act not amounting to a felony, nor naturally tending to cause death or great bodily harm. This is the misdemeanor-manslaughter rule. See *State v. Reitze,* 86 N.J.L 407 (Sup. Ct. 1914). It may also be committed through misfeasance which is an unintentional killing by gross negligence in the doing of a lawful act. See *State v. Blaine,* 104 N.J.L. 325, 237–328 (E. & A. 1928); *State v. Weiner, supra* (Negligence, to be criminal, must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to cause death). Finally, it can be committed through nonfeasance, *i.e.*, the unintentional killing of another

by omission to perform a legal duty owing to him, under circumstances showing inexcusable negligence, or failure to exercise reasonable diligence. See *State v. O'Brien*, 32 N.J.L. 169 (Sup. Ct. 1867); *State v. Ireland*, 126 N.J.L. 444 (Sup. Ct. 1941) *appeal dismissed*, 127 N.J.L. 558 (E. & A. 1942). See generally, *Clark & Marshall*, Crimes § 10.12, pp. 711–714 (7th Ed. 1967).

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

(1) "Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, is guilty of a misdemeanor. . . ." (N.J.S. 2A:113–9)

(2) "Any person, who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman. . . . uses any . . . means whatever, is guilty of a high misdemeanor. If, as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5,000 or by imprisonment for not more than 15 years, or both." (N.J.S. 2A:87–1)

We believe such special statutes to be unnecessary. They are eliminated from the Code which is deliberately designed to deal with homicide by principles of general application. MPC T.D. 9, p. 28 (1958).

§ 2C:11–3. COMMENTARY

1. This Section delineates the criminal homicides that may be denominated murder, with the specific result of establishing them as crimes of the first degree and, for some of them, subject to the further requirement of Section 2C:11–7, the possibility of the death sentence or of life imprisonment.

2. *Purpose or Knowledge.* The Code places criminal homicides committed purposely or knowingly in the murder category. Subject to the mitigation based on provocation under Section 2C:11–4a(2), we believe that homicides committed purposely or knowingly belong in the ultimate category. Unlike the MPC, however we further grade this category. It is only purposeful killings which subject the defendant to capital punishment. We do this to follow the distinction made in existing law that only willful, deliberate and premeditated killings are murders in the first degree.

This is because we do not believe the category of potentially capital homicide should be expanded. Even though certain knowing homicides may be as bad or worse than some purposeful killings, we retain that distinction to limit the death penalty to cases where it is now available. Homicides committed purposely or knowingly would clearly fall into the murder category under existing law. *State v.*

Gardner, 51 N.J. 444, 458 (1968) holds that malice is established by proof that the defendant had an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not. While this definition encompasses more than what would be purposely or knowingly taking life under the Code, it clearly encompasses at least that much.

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

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

The Code carries this basic judgment reflecting the view that there is a kind of reckless homicide that cannot fairly be distinguished for this purpose from homicides committed knowingly. Recklessness presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness should be assimilated to knowledge. The conception employed is that of extreme indifference to the value of human life. The significance of purpose or knowledge is that, cases of provocation apart, it demonstrates precisely such indifference. Whether recklessness is so extreme that it demonstrates similar indifference is not a question that, in our view, can be further clarified; it must be left directly to the trier of the facts. If recklessness exists but is not so extreme, the homicide is manslaughter.

4. *Purpose to Injure.* The Code definition of murder accords no express significance to an intent to cause grievous bodily harm. Such a purpose establishes malice under our existing law (*State v. Gardner, supra; State v. Williams*, 29 N.J. 27, 36 (1959)) and such a killing would generally constitute second-degree murder. We think, however, that such cases are more satisfactorily judged by the standards of recklessness and extreme recklessness as to causing death. In making that determination the fact that the actor's purpose was to injure is, of course, a relevant consideration, as also are the nature and the gravity of the injury intended or foreseen.

5. *Felony-Murder.* The Code advances a somewhat new approach to the problem of homicides occurring in the course of the commission of felonies. Such homicides will continue to constitute murder if they are committed during the course of and in furtherance of certain

enumerated major crimes. In this regard we reject the presumption provision found in MPC § 210.2. We believe that provision to go too far in failing to recognize the deterrent effect of a felony-murder rule. We use, instead, the provision found in the New York Code. This allows a limited affirmative defense as to the non-perpetrator participant in the felony where that person is able to demonstrate that he did not assume a homicidal risk. We believe this to be a workable and appropriate limitation on existing law.

New Jersey now has a broad felony-murder rule. N.J.S. 2A:113–1. Further, under N.J.S. 2A:113–2, "murder which is . . . committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, is murder in the first degree." Thus, the intent to commit the felony not only makes the killing murder but also makes it first degree murder. The definition of those felonies used is the more restrictive common law definition. *State v. Butler*, 27 N.J. 560 (1958); *State v. Hauptmann*, 115 N.J.L. 412 (E. & A. 1935); *State v. Burrell*, 120 N.J.L. 277 (E. & A. 1938); *State v. Lucas*, 30 N.J. 37 (1959). Aside from this, however, in many other ways, New Jersey's cases broaden rather than restrict the rule. See *State v. Hauptmann, supra* (*res gestae*); *State v. Carlino*, 98 N.J.L. 48, 54 (Sup. Ct. 1922); *State v. Turco*, 99 N.J.L. 46, 102 (E. & A. 1923); *State v. Smith*, 32 N.J. 501, 521 (1960) (aiding and abetting); *State v. Rosania*, 33 N. J. 267, 270 (1960); *State v. McKeiver*, 89 N.J. Super. 52, 55 (L. Div. 1965); *State v. Kress*, 105 N.J. Super. 514, 525 (L. Div. 1969) (Killing by a police officer of a person who was either a bystander or was being used by defendant as a shield is felony-murder as to defendant.)

Despite the generality of the felony-murder rule and the frequency with which it is deemed applicable to even accidental homicide, principled argument in its defense is hard to find. Such argument as can be made reduces in essence to the explanation Holmes gave in *The Common Law* (pp. 58–59) for finding the law "intelligible as it stands," though he carefully withheld his own endorsement:

> ". . . if experience shows, or is deemed by the lawmaker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the law-maker may consistently treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends."

It is true that we have no way of knowing how many of the homicides resulting in felony-murder convictions were committed purposely, knowingly or recklessly and how many were negligent or accidental. But it is our belief that this rule of law does lead some to refuse to assume a homicidal risk in committing these other crimes. Allowing this limited defense should deal with such persons in an appropriate way by holding them responsible for the felony but not for the homicide.

6. *Sentencing Provisions.* Under Subsection b, murder is a crime of the first degree. We categorize murders, however, depending upon whether they were (1) purposeful or felony-murders or (2) other forms of murder. The first subjects the defendant to the possibility of the death penalty; the latter subjects him only to life imprisonment or sentence as in a crime of the first degree. Under existing law, first-degree murders are punished by death or by life imprisonment, as determined by the jury. N.J.S. 2A:113–2. See *State v. Reynolds*, 41 N.J. 163, 187 (1963). Second degree murder is punished by imprisonment for up to 30 years, sentencing being by the court.

§ 2C:11–4. COMMENTARY

1. The existing New Jersey law on manslaughter is set forth in the Commentary to Section 2C:11–2. Our statute merely defines the punishment for manslaughter (N.J.S. 2A:113–5) leaving its definition to the common law.

2. *Departures from Prevailing Law in the Code.* The Code reflects prevailing law and terminology insofar as it treats reckless homicide as manslaughter, relying on the definition of recklessness in Section 2C:2–2b(3). Thus, in *State v. Weiner*, 41 N.J. 21, 25-26 (1963), the Court held:

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

The Code does not treat criminally negligent homicides as manslaughter, instead adopting the view that they should be treated as a separate category graded lower for sentence purposes. See Section 2C:11–5.

3. Another departure from existing law is abandonment of the misdemeanor-manslaughter rule, i.e., that a homicide is *ipso facto* manslaughter if it resulted from an otherwise unlawful act. See *State v. Reitze,* 86 N.J.L. 407 (Sup. Ct. 1914). There must be a substantial and unjustifiable risk of homicide to establish either recklessness or negligence. Given such risk, the character of the actor's conduct is relevant, of course, in determining recklessness or negligence and its unlawfulness may warrant the conclusion that the risk created was unjustifiable; that is a matter to be dealt with by the courts in framing charges with respect to recklessness and negligence.

4. Finally, the class of cases which would otherwise be murder but may be reduced to manslaughter under the present law because the homicidal act occurred "in heat of passion" upon "adequate provocation" is substantially enlarged by paragraph a(2). The Code reframes entirely the decisive question, asking whether the homicide was committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse" and adding that the "reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." We thus treat on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance. We also introduce a larger element of subjectivity in the appraisal, though it is only the actor's "situation" and "the circumstances as he believes them to be," not his scheme of moral values, that are thus to be considered. The ultimate test, however, is objective; there must be "reasonable" explanation or excuse for the actor's disturbance. This is, we think to state in fair and realistic terms the criteria by which men do and should appraise the mitigating import of mental or emotional distress when it is a factor in so grave a crime as homicide. The existing New Jersey law on these matters is found in *State v. King,* 37 N.J. 285, 299 (1962); *State v. Wynn,* 21 N.J. 264 (1956); *State v. Guido,* 40 N.J. 191, 209 (1963); and *State v. McAllister,* 41 N.J. 342, 353 (1964). In *State v. King, supra* at 299–302, the issue was whether the trial court properly charged that words alone could not constitute sufficient provocation to reduce a killing to manslaughter:

> "Defendant, admitting that this charge is in the approved language of the common law and accepted and recognized as the law of this State, seeks to have this court expunge so much thereof as would result in making the proof of insulting and contemptuous behavior alone, unaccompanied by a physical contact, a sufficient ground to reduce the crime from murder to manslaughter.

* * * *

"The reduction of the homicide from murder to manslaughter by provocation is a two-stage proceeding in England, (1) the provocation must be so gross as to cause the ordinary reasonable man to lose his self-control and to use violence with fatal results, and (2) the defendant must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime while so deprived. . . . Coincident with the development of the law in England, the law was similarly developed in this State, although our cases have not expressed this principle in identical fashion. However, we have on a case by case basis established that to reduce the crime from murder to manslaughter it must appear that the killing occurred during the heat of a passion resulting from a reasonable provocation, a passion which effectively deprived the killer of the mastery of his understanding, a passion which was acted upon before a time sufficient to permit reason to resume its sway had passed. * * * In England, mere words, however insulting or reproachful, do not constitute provocation. *Perkins, Criminal Law* 49 (1957). The inadequacy of insulting words alone as productive of a passion sufficient to reduce the crime to manslaughter has also been upheld in this State. * * * In effect, the principles just enunciated represent the 'reasonable man' test of the English law, albeit in less precise fashion. The conclusion to be gleaned from a reading of our cases is that the English formalized test is a proper statement of our view of the law.

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

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

In *State v. Guido, supra* at 209–10, the Court considered the problem of defining the "suddenness" required by the formulation found in the *King* opinion:

"Here defendant did not point to any specific event as the provocative one. Rather she claimed a course of ill treatment and oppression which closed in upon her so completely that her own death appeared for a while to be the only way out. Within that course of conduct were incidents which could have constituted provocation but none in fact had evoked a homicidal response when it occurred. As indicated above, the conventional statement would exclude a claim of manslaughter if the elapsed time were sufficient for a reasonable man to cool off. Thus, assuming defendant did experience a burst of emotion which overwhelmed her reason, the question is whether a course of conduct such as we have described can legally suffice as provocation.

"Homicides are divided into categories to the end that the authorized punishment will reflect the magnitude of the wrong. In the nature of the subject, these categories cannot be perfectly designed, and so a particular set of facts falling within the definition of second-degree murder may be thought less culpable than a factual pattern within the category of manslaughter. Nonetheless the sentence may match the offense and the offender, since although the maximum term for second-degree is 30 years and for manslaughter 10 years, N.J.S. 2A:113–4 and 5, a lesser sentence may be ordered upon a verdict in the higher degree.

"Hence the question is not whether there are circumstances of mitigating quality but whether, in the light of our statutory scheme,[4] the factual pattern comes fairly within the concept of manslaughter. We think it does. It seems to us that a course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue, should permit a finding of provocation. In taking this view, we merely acknowledge the undoubted capacity of events to accumulate a detonating force, no different from that of a single blow or injury. The question is simply one of fact, whether the accused did, because of such prolonged oppression and the prospect of its continuance, experience a sudden episode of emotional distress which overwhelmed her reason, and whether, if she did, she killed because of it and before there had passed time reasonably sufficient for her emotions to yield to reason.

"Upon this view, we believe the testimony required the issue of manslaughter to be sent to the jury."

Footnote four, accompanying the above passage reads as follows:

"4. We note that the Model Penal Code § 210.3 proposes that criminal homicide constitute manslaughter when:

"(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional

disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

"But, as the comments in Tentative Draft No. 9 (May 8, 1959) reveal, the quoted conception of manslaughter is part of another approach to homicide in which there is no provision for degrees of murder and in which manslaughter is designed to include part of what our Legislature has called murder in the second degree."

5. *Intent to Injure.* Under prevailing law in most jurisdictions one who causes death by simple battery is guilty of manslaughter, however improbable the fatal result, since the battery is an unlawful act. See MPC T.D. 9, p. 44, n. 1 (1959). This is rejected by the Code:

"Under the [Code] such cases will be manslaughter only if the actor is held reckless, which requires that he be aware of a substantial risk of causing death; absent such awareness, they may be negligent homicide, though even then substantial homicidal risk is necessary.

"The reason is the fundamental one that has already been discussed. Whether the matter is viewed in relation to the just condemnation of the actor's conduct or in relation to deterrence or correction, and all are relevant perspectives, neither the terminology nor the sanctions appropriate for homicide may fairly be applied when the fatality is thus fortuitous. The actor's conduct is a crime defined in reference to the specific evil it portends, e.g., bodily injury. The inequality involved in treating homicides as manslaughter, when they are accidental in the sense supposed, serves no proper purpose of the penal law and is abusive in itself." (*Id.*)

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

6. *Recklessness as to Justification.* A special case of homicide which has presented difficulty under present grading standards arises when the homicidal act was believed to be necessary for some justifying purpose, such as self-defense, but the grounds for such belief are deemed to be unreasonable. Given an intent to kill or to injure seriously, reduction of the homicide to manslaughter depends, under present law, on a finding of legally adequate provocation. See *State v. Bess,* 53 N.J. 10, 16 (1968); *State v. Fair,* 45 N.J. 77, 92-93 (1965); cf., *State v. Williams,* 29 N.J. 27, 39 (1959). These cases, however, establish some softening of this doctrine. See also *State v. Guido, supra.*

The justification provisions of Chapter 3 of the Code have been so framed that when the actor believes the force that he employs is necessary for any of the purposes which may establish a justification, his belief affords him a defense although it is erroneous, subject to the qualification of Section 2C:3–9 that when "the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force," he may be convicted of "an offense for which recklessness or negligence, as the case may be, suffices to establish culpability." These provisions assure that homicides in self-defense, defense of others, defense of property, effectuation of arrest or crime prevention, where the actor's belief in the necessity rests on unreasonable grounds, must be approached as crimes of recklessness or negligence, if they are crimes at all. Such homicides, accordingly, are manslaughter at most under the Code—whether or not there was intent to kill.

It should be added, however, that such a mitigation only will occur where the actor's erroneous belief involved error of fact; error of penal law, such as the belief that deadly force is justifiable to prevent trespass, is declared to be immaterial by Section 2C:3–9a. In such cases the offense is murder if the actor kills purposely or knowingly, unless there is mental or emotional disturbance deemed to rest on reasonable explanation or excuse within the meaning of paragraph a (1) of this Section. It is, however, clear that fright or terror is an emotional disturbance contemplated by this formulation. Absent such disturbance, we are not persuaded that an aberrational belief in the legitimacy of resort to deadly force should suffice to reduce to manslaughter, though we agree, of course, that motive is a relevant consideration if capital punishment is drawn in issue.

7. *Mental or Emotional Disturbance.* The objective nature of the present test for provocation was emphasized by the decision in *State v. McAllister, supra* at 252-53. In that case the defendant argued that it was error for the trial court to refuse to charge that the defendant's severe mental and emotional defects could be considered on the question of mitigation from murder to manslaughter where the stimulus was less provoking than that necessary for a person not suffering from such defects:

> "The answer to defendant's argument as it relates to manslaughter, is found in our test for the mitigation of a homicide from murder to manslaughter. [After quoting the test from the *King* case, the court continued, quoting from another source:]
>
> " 'The murder-manslaughter distinction has a wholly different history and is based on wholly different criteria from those involved in distinguishing degrees of murder. The former is of common law, the latter statutory; the former involves an objective test, the latter subjective. The provocation which at common law reduces a homicide to manslaughter must be such as is

calculated to produce hot blood or passion in a reasonable man, an average man of ordinary self-control. Unless it meets this objective standard of reasonableness, the subjective fact of passion does not make the killing manslaughter. Such factors as mental abnormality or intoxication are therefore irrelevant, since the 'reasonable man' standard postulates a sane and sober man.'

"Defendant's proffered thesis would make the criterion entirely a subjective test of the actual effect of the action of the deceased upon the mind of the particular defendant charged with his homicide. The application of the 'ordinary man' test as the objective standard against which to measure the subjective fact of passion, makes defendant's suggested individual subjective test inappropriate. Such a norm presupposes an 'ordinary man', which expression by its very nature contemplates a person without 'serious mental and emotional defects.' "

We reject this. Paragraph a(2) widens the class of homicides which may be reduced from murder to manslaughter under existing law because they are committed when the actor suffers from extreme emotional disturbance, the "heat of passion" of the common law. In the first place, the Code does not confine the mitigation to cases of provocation in the ordinary meaning of the term, i.e., an injury, injustice or affront perpetrated by the deceased on the actor. By referring to "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" rather than to provocation, the Code avoids a merely arbitrary limitation on the nature of the antecedent circumstances that may justify a mitigation when the homicidal actor was in great distress.

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

Thirdly, and most importantly, the formulation seeks to qualify the rigorous objectivity of the prevailing law insofar as it judges the sufficiency of provocation by its effect on the reasonable man. To require, as the rule is sometimes stated, that the provocation be enough to make a reasonable man do as the defendant did is patently absurd; the reasonable man quite plainly does not kill. But even the correct and the more common statement of the rule, that the provocative circumstance must be sufficient to deprive a reasonable or an ordinary man of self-control, leaves much to be desired since it totally excludes any attention to the special situation of the actor.

Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the inference as to the actor's character that it is fair to draw upon the basis of his act. So too in such a situation . . . where lapse of time increased rather than diminished the extent of the outrage perpetrated on the actor, as he became aware that his disgrace was known, it is shocking in our view to hold this vital fact to be irrelevant.

We submit that the formulation in the Code affords sufficient flexibility to differentiate between those special factors in the actor's situation which should be deemed material for purposes of sentence and those which properly should be ignored. We say that there must be a "reasonable explanation or excuse" for the extreme disturbance of the actor, and that the reasonableness of any explanation or excuse "shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." There will be room, of course, for interpretation of the breadth of meaning carried by the word "situation," precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced.

8. *Grading of Manslaughter.* The Code makes manslaughter a crime of the second degree. Under existing law, it is punishable by up to 10 years. N.J.S. 2A:113–5.

§ 2C:11–5. COMMENTARY

1. *Negligent Homicide Under Existing Law.* This Section is addressed to those homicides caused by criminal negligence as distinguished from recklessness, the essence of the difference being that the reckless actor "consciously disregards" the homicidal risk created by his conduct while the criminally negligent actor merely "should be aware" of the danger he creates.

Inadvertence to risk is not, in most States, a barrier to conviction of manslaughter. MPC T.D. 9, p. 50 (1959). It seems clear that, in New Jersey, this is not the case. The formulations of the culpability required both for involuntary manslaughter and under the death by

automobile statute (N.J.S. 2A:113–9) demand awareness. As to involuntary manslaughter see: *State v. Weiner,* 41 N.J. 21, 25–26 (1963); *State v. Williams,* 29 N.J. 27 (1959); *State v. Blaine,* 104 N.J.L. 325 (E. & A. 1928). As to death by automobile ("Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful and wanton disregard of the rights of safety of others is guilty of a misdemeanor. . . .") see: *State v. Oliver,* 37 N.J. Super. 379 (App. Div. 1955); *State v. Donley,* 85 N.J. Super. 127 (App. Div. 1964); *In Re Lewis,* 11 N.J. 217 (1953); *State v. Diamond,* 16 N.J. Super. 26 (App. Div. 1951); *State v. Gooze,* 14 N.J. Super. 277 (App. Div. 1951).

2. *The Policy of Liability.* We recommend that criminal negligence suffice under this Section when that negligence is "under circumstances manifesting extreme indifference to the value of human life" and that it be a crime in the third degree. It has been urged that inadvertent negligence is not a sufficient basis for a criminal conviction, both on the utilitarian ground that threatened sanctions cannot influence the inadvertent actor who, by hypothesis, does not perceive their relevancy and on the ground that punishment should be reserved for cases that involve a moral fault which here is absent. We are not persuaded that in condemning homicide by negligence, given the requisite degree of risk, the law is impotent to stimulate care that otherwise might not be taken or that an actor's failure to use his faculties may not be deemed a proper ground for condemnation. As to the meaning of the phrase "under circumstances manifesting extreme indifference to the value of human life," see the Commentary to Section 2C:11–3a(3).

The Code definition of criminal negligence, applied to homicide, requires that the homicidal risk "be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct, the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." We think that justice is sufficiently safeguarded by insisting on substantial culpability or deviation; that the terms of this Section preclude the condemnation of inadvertent risk creation unless the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong. They also serve and rightly we believe to convict conduct which is inadvertent as to risk only because the actor is insensitive to the interests and claims of other persons in society.

We recommend, therefore, that such negligent homicide be made criminal. The distinction between advertence and inadvertence is, however, of such large importance generally in evaluating both the actor's conduct and his character that we propose to treat such homicides as of a lower grade than manslaughter. In grading the offense as a crime of the third degree, the Code provides a sentence

somewhat greater than our existing death by automobile statute but somewhat less than our existing manslaughter statute (to the extent crimes falling within this Section would have been manslaughter). Given the ameliorative powers which the Code rests in the Court, we do not think the sanction is excessive.

While we appreciate the practical value of the special provision for vehicular homicides, we think it to be unnecessary as the Code is drawn. The separation from manslaughter is accomplished by treating criminally negligent homicide as a distinct offense of lower grade. If the evidence does not make out a case of criminal negligence, we see no reason for creating liability for homicide, as distinguished from any traffic offense that is involved.

§ 2C:11–6. COMMENTARY

1. *Attempted Suicide.* The common law treated both suicide and attempted suicide as a crime. See *State v. Carney,* 69 N.J.L. 478 (Sup. Ct. 1903). In 1957, our Legislature enacted a statute making attempted suicide a disorderly persons act violation. N.J.S. 2A:170–26.5. We recommend repeal of this statute because this is not an area in which the penal law can be effective and that its intrusions in such tragedies is an abuse. In our opinion, the existing civil commitment statutes are sufficient for this purpose.

2. *Causing Suicide.* The purpose of Subsection a is to subject behavior which causes suicide to the penalty for murder or manslaughter, as the case may be. It is not treated as a separate offense. No New Jersey cases directly on point were found. *State v. Myers,* 7 N.J. 465 (1951) was a case in which a defendant was convicted of first-degree murder for having forced his wife to jump into the Passaic River, where she drowned. The case was argued on a causation theory by the defense but does seem to be in accord with the Code.

3. *Aiding Suicide.* Under the Code, the special provision dealing with aiding suicide applies only if the actor goes no further than aid; if he is himself the agent of the death, the crime is murder notwithstanding the consent or even the solicitation of the deceased under Subsection a.

If the suicide occurs, or is attempted, under Subsection b the defendant is guilty of a crime of the second degree. Proper cases warranting further reduction can be handled by sentence discretion or by guilt reduction under Section 2C:43–11. In the case of a bare aiding, the Code reduces guilt to a crime of the fourth degree.

§ 2C:11–7. COMMENTARY

1. *The Problem of Capital Punishment.* Under existing law, the death penalty may be imposed in New Jersey for murder in the first degree (N.J.S. 2A:113–4), kidnapping for ransom (N.J.S. 2A:118–1), treason (N.J.S. 2A:148–1) and assault on certain high governmental officials (N.J.S. 2A:148–6). Generally, we consider the issue of the abolition of the death penalty to be beyond the scope of the Commission's mandate although there is considerable sentiment within the Commission for abolition. We have taken the steps of eliminating capital punishment for all crimes other than murder and restructuring both the standards and procedure for imposition of the sentence of death.

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

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

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

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

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

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

3. *The Problem of Grading and Discretion.* We recommend replacement of the existing structure of grading and discretion with a different set of standards. The Code rejects the usual division of capital murder into degrees although we continue to make the death penalty available only for purposeful killings and felony-murders.

We agree that the deliberation standard ought to exclude from the capital category cases where the homicide is committed under the influence of an extreme mental or emotional disturbance produced by causes which give rise to proper sympathy for the defendant. Insofar as this is the objective to be sought, it is accomplished by the Code in the provision for a reduction to manslaughter in cases of "extreme mental or emotional disturbance for which there is a reasonable explanation or excuses." We consider this grading to be appropriate. Given such mental or emotional disturbance resting on such cause, the case for a mitigated sentence does not depend on a distinction between impulse and deliberation; the very fact of long internal struggle may be evidence that the actor's homicidal impulse was deeply aberrational, far more the product of extraordinary circumstances than a true reflection of the actor's normal character, as, for example, in the case of mercy killings, suicide pacts, many infanticides and cases where a provocation gains in its explosive power as the actor broods about his injury. And apart from such disturbance of the actor, we think it no less clear that some purely impulsive murders may present no extenuating circumstance. As Stephen put it long ago (3 History of the Criminal Law [1883] p. 94): "As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. In many cases there is no premeditation unless the word is used in a sense as unnatural as 'aforethought' in 'malice aforethought,' but each represents even more diabolical cruelty and ferocity than that which is involved in murders premediated in the natural sense of the word."

The same point was made by the Home Office before the Royal Commission on Capital Punishment, as follows:

> "Among the worst murders are some which are not premeditated, such as murders committed in connection with rape, or murders committed by criminals who are interrupted in some felonious enterprise and use violence without premeditation, but with a reckless disregard of the consequences to human life. . . . There are also many murders where the killing is clearly intentional, unlawful and unaccompanied by any mitigating circumstances, but where there is no evidence to show whether there was or was not premeditation." See Minutes of Evidence p. 12; Report pp. 174–174.

The question then is whether it is possible to construct a more satisfactory delineation of the class of murders to which the capital sanction ought to be confined insofar as it is used at all.

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

merely knowing or reckless. Here, we differ from the MPC. We agree with their point that the distinctions we make are not entirely rational—but we believe this to be necessary to avoid any expansion of the category of cases subject to the death penalty. Having limited capital cases to purposeful killings and to felony murders, we then point to the main circumstances of aggravation and of mitigation that should be weighed against each other when they are presented in a concrete case. Such circumstances are enumerated in Subsections a, c and d. Standards are not constitutionally compelled. *McGautha v. California,*—U.S.—, 91 S.Ct. 1454 (1971). Such an enumeration is desirable, we submit, if only as guidelines to the exercise of sound discretion by the court or jury, as the case may be.

Under Subsection a(1) the Court is directed to sentence to life imprisonment or as for a first degree crime, without conducting any further proceeding, if it is satisfied that none of the aggravating circumstances was established by the evidence at the trial or will be established if a further proceeding on the issue of the death sentence should be initiated. Thus if no aggravating circumstance appears in the evidence and the prosecuting attorney does not propose to prove one in the subsequent proceeding, sentence of imprisonment will be imposed. The Court also is instructed by Subsection a(2) to impose sentence other than death if it is satisfied that the evidence at the trial established substantial mitigating circumstances which call for some leniency in the sentence; or, under a(3), if the defendant, with the consent of the prosecuting attorney, has been permitted by the Court to plead guilty to the charge as a noncapital crime or as a crime of the first degree; or, under a(4), if the defendant was under 18 at the time of the killing. We believe MPC § 210.6(1)(e) to be covered by our Subsection a(1) and MPC § 210.6(1)(f) to be covered by Section 2C:43–11. See MPC T.D. 9, pp. 68-73 (1959).

4. *The Court or Jury as the Organ of Discretion.* If a sentence of imprisonment is not imposed by the Court under Subsection a, a further proceeding must be initiated to determine whether or not sentence of death should be imposed. Under Subsection b the issue is placed in the hands of a jury and requires that the jury affirmatively agree to the imposition of the death penalty. This continues existing law. N.J.S. 2A:113–4. But cf., *State v. Laws, supra.* Our formulation is different from the MPC which would require the Court and the jury to agree.

5. *The Separate Proceeding to Determine Sentence.* The Code establishes a bifurcated trial on the issue of the death penalty. In New Jersey, the issue is determined as part of the jury's verdict (N.J.S. 2A:113–4) and evidence admissible solely on the issue of punishment is offered at trial with a limiting instruction. *State v. Mount,* 30 N.J. 195, 210 (1959); *State v. Reynolds, supra* at 175. In our opinion, this rule creates an inescapable dilemma. Either the

determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt. Although the Supreme Court of the United States has upheld the unitary trial (*McGautha v. California, supra*) we believe it appropriate to abandon it by legislation.

There is no reason to insist upon a choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence. The solution is to bifurcate the proceeding, abiding strictly by the rules of evidence until there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing sentence. It is the plan that California has adopted with satisfactory results. The system is adopted in the Code. Unless a capital sentence is precluded by Subsection a, the Court is directed to conduct a separate proceeding after conviction of murder to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding will be before either the trial jury or one specially empaneled.

A subcommittee of the New Jersey Supreme Court's Advisory Committee on Criminal Procedure recently submitted a report on the Bifurcated Trial. See also *State v. Laws, supra; State v. Mount,* 30 N.J. 195 (1959) ; *State v. Forcella, supra.*

6. *Background Evidence.* Subsection b allows the admission of evidence relevant to sentence. Such "background evidence" may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating and mitigating circumstances enumerated in Subsection c and d. It also provides that the exclusionary rules of evidence shall not apply. The prosecution thus may offer reports of investigation of the defendant, subject to a safeguard we believe to be important. The defendant's counsel should at least be granted a fair opportunity to rebut any hearsay statements, which would require only that he be seasonably informed of the factual contents and conclusions stated in any reports that will be used. This is the solution that the Code proposes for pre-sentence reports in general. Our law is in general accord. *State v. Mount, supra; State v. Reynolds, supra.* The Code does change the existing practice in this

State of allowing evidence to be admitted without regard to its legal admissibility.

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

> "If the proceeding is before a jury, it is contemplated that it ordinarily will be the jury that determined guilt; the evidence relating to the crime will thus not have to be repeated. We think, however, that it is desirable to recognize that good cause may be shown for empaneling a second jury and such power is conferred upon the Court, as in the California statute. There is an argument against such power in the Court which should be recognized, a juror's knowledge that he may not be in a position to control the verdict as to sentence may induce him to hold out against conviction, the elimination of this risk is, indeed, one of the virtues of the whole discretionary plan. If this is deemed, as it may be, a point entitled to controlling weight, the provision for another jury ought to be eliminated. We think, however, that practice would so uniformly use the trial jury that the problem is largely theoretical." (MPC T.D. 9, p. 76 (1959).)

8. *Argument on Death Penalty.* The Code explicitly allows both the prosecution and the defense to make argument for and against sentence of death. No effort is made to limit the arguments that may be made. This is not a problem that will yield to any legislative formulation and the Court must be relied upon to assure that decencies prevail. See *State v. Reynolds, supra.*

9. *Standard for Imposition of Capital Punishment.* Our cases give no standard to the jury and this accords with the majority of cases in other states. See *State v. Bunk,* 4 N.J. 461 (1950); *Petition of Ernst,* 294 F. 2d 556 (3rd Cir. 1961); *State v. Forcella, supra; State v. Johnson,* 34 N.J. 212 (1961). The Code changes this. We think the jury should be told that it may not decide that sentence of death shall be imposed unless it finds that there was an aggravating circumstance specified in Subsection c and further that there were no substantial mitigating circumstances but that the judgment otherwise is within its discretion. MPC T.D. 9, p. 77 (1959). See *McGautha v. California, supra.*

10. *Jury Instruction on Parole.* The Code allows, but does not require, the jury to be told about parole possibilities, *i.e.*, the nature of the sentence of imprisonment that is the alternative to death. The argument in favor of such information is, that a decision presupposes an awareness of alternatives, and that the jury necessarily will speculate about the matter if it is not so informed. The instruction will, if given, give the Court an opportunity to put the matter in its proper light, not merely stating that there is a legal power to parole, but also noting that the parole system permits the retention as well as the release of the prisoner upon the basis of a reconsideration of his

future by a competent tribunal years after the commission of the crime, when time and the correctional experience may have effected fundamental changes in his personality. This is a change from existing law. Under *State v. White,* 27 N.J. 158 (1958), the jury is to be instructed that this issue is not of concern to them and they are to ignore it. See also *State v. Laws, supra* at 186.

11. *The Requirement of Jury Agreement and of Unanimity under Subsection b.* Existing New Jersey law is that the jury must be unanimous on both guilt and on the death penalty. *State v. Reynolds, supra* at 187, overruling *State v. Bunk, supra,* and *State v. Tune,* 17 N.J. 100 (1954). The Code requires that the jury must agree that a sentence of death should be imposed. This respects the tradition that a jury verdict in a criminal matter ought to be unanimous. It has the further virtue of reducing the danger that one or two jurors may hold out against conviction of the crime because of opposition to the punishment. The bifurcated hearing system may enlarge that risk, as we have previously noted, insofar as a different jury is at least theoretically possible. The risk ought not to be further enlarged. More than this, however, we believe that sentence of death is so enormous and exceptional a disposition in our time in the United States that it should not be imposed upon the judgment of a jury unless the case is clear enough to produce unanimity.

If the jury is unable to agree, there is a question whether the Court should be empowered to submit the issue to a second jury. We think that one submission ought to be enough and that if there is disagreement the Court should terminate the matter by imposing sentence of imprisonment.

14. *The Alternative to the Death Penalty.* The Code authorizes imposition of a sentence of life imprisonment or sentence for a crime of the first degree in the event the jury rejects the death penalty. The decision whether to impose life imprisonment or a sentence for a crime of the first degree is a judicial decision to be made in the usual manner for sentencing.

§ 2C:12–1. COMMENTARY

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

2. *Existing New Jersey Law.* Our statutes contain a series of provisions dealing with the offenses in this area. All of these will be replaced by this, or this and other, Sections of the Code. In descend-

ing order of seriousness, as judged by the potential sentence, the statutes are as follows:

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

(b) Assault with intent to kill or to commit certain enumerated violent felonies. High misdemeanor punishable by imprisonment for 12 years. (N.J.S. 2A:90–2)

(c) Atrocious assault and battery by maiming and wounding. High misdemeanor. (N.J.S. 2A:90–1)

(d) Willful and malicious assault with an offensive weapon or by force with intent to rob. High misdemeanor. (N.J.S. 2A:90–3)

(e) Assault and battery upon law enforcement officers acting in the performance of his duties; upon firemen while so acting; or upon rescue workers while so acting. High misdemeanor. (N.J.S. 2A:90–4)

(f) Mayhem: willfully and on purpose and from premeditated design or with intent to kill or maim cuts off or disables any limb or member of another. High misdemeanor. (N.J.S. 2A:125–1)

(g) Knowingly obstructing, assaulting or wounding a person serving court process or orders while so acting. Misdemeanor. (N.J.S. 2A:99–1)

(h) Challenging to a duel, accepting a challenge, knowingly bearing a challenge; engaging in a duel; acting as a second in a duel. Misdemeanor. (N.J.S. 2A:101–1)

(i) Interfering with, assaulting, or wounding newsmen while so acting. Misdemeanor. (N.J.S. 2A:129–1)

(j) Committing an assault or an assault and battery. Disorderly person. (N.J.S. 2A:170–26)

(k) Fighting, attempting to fight, aiding and abetting a fight. Disorderly person. (N.J.S. 2A:170–27)

3. *Bodily Injury.* Under this Section, the offenses require attempting to cause, causing or attempting to put in fear of bodily injury or serious bodily injury. Under Section 2C:11–1, this means at least physical pain, illness or impairment of physical condition. At common law, actual injury was unnecessary; the slightest touching or offensive contact was a battery; *State v. Maier,* 13 N.J. 235 (1953); *Central R.*

Co. of New Jersey v. Simandl, 124 N.J. Eq. 207 (Sup. Ct. 1938); *State v. Stan,* 97 N.J.L. 349 (E. & A. 1922); *Lynch v. Commonwealth,* 131 Va. 762, 109 S.E. 427 (1921). Our present Disorderly Persons Act provision, N.J.S. 2A:170–26, speaks merely of an "assault or an assault and battery" and no cases were found on whether, under that statute, actual injury must be found. *State v. Maier, supra,* holds that this statute covers that which was previously the common-law crime. In any event, the Code rejects this rule because, in our view, mere offensive touching is not sufficiently serious to be made criminal, except in the case of sexual assaults as provided in Section 2C:14–4.

4. *Assaults with Intent to Commit Another Crime.* The Code eliminates from the assault section the crimes which are characterized by an assault with the purpose of committing another serious crime such as murder, rape, etc. In New Jersey, these would be N.J.S. 2A:148–6, N.J.S. 2A:90–2, N.J.S. 2A:90–3 and, in part, N.J.S. 2A:125–1. Instead of treating them as assaults, the Code treats them as attempts to commit the substantive crime and, for the most part, grades them as crimes of the second degree. See Section 2C:5–4a. This scheme causes no problem with regard to gradation, which is generally equivalent to existing law except for assaults upon high executive officials with intent to kill and to show hostility to government under N.J.S. 2A:148–6. This is now a capital or life imprisonment offense and would be downgraded to a ten-year-maximum offense.

5. *Simple Assault: Section 2C:12–1a.* The crime of simple assault may be committed in any of four ways:

6. *Causing or Attempting to Cause Bodily Injury to Another: Section 2C:12–1a(1).* Under this Section, it is provided that simple assault may be committed by attempting to cause or by purposely, knowingly or recklessly causing bodily injury. There is no question as to the first three. As to recklessness, however, there may be some question, but we believe it appropriately included:

> "There is some difference of opinion as to whether reckless injuring can be prosecuted under existing battery statutes. Most courts hold that it can. Some say that the necessary intent to injure can be inferred from the recklessness. . . . Others are more candid and hold that recklessness replaces intent. . . . In addition, there are statutes in many states dealing with various sorts of reckless or negligent conduct on an ad hoc basis. . . . These statutes can be applied both in the case of actual injuries and potential injuries." (MPC T.D. 9, p. 84 (1959))

New Jersey's cases are not entirely clear. *State v. Stan, supra,* and other cases speak simply of the need for the State to prove "an intent to inflict such injury." Further, *State v. Schutte,* 87 N.J.L. 15 (Sup.

Ct. 1915) *aff'd.*, 88 N.J.L. 396 (E. & A. 1916), specifically disclaims the sufficiency of negligence for the crime. "Both the willful wrongdoing that constitutes malice in the law and also an intention to inflict injury are of the essence of a criminal assault. . . ." A more recent case, *State v. Chiarello,* 69 N.J. Super. 479 (App. Div. 1961) speaks of assault as requiring proof of guilty intent or negligence. As used in our cases, the term "negligence" can be roughly equated with the Code's term "reckless." Cf., *State v. Maier,* and *State v. Schutte, supra.*

8. *Negligently Causing Bodily Injury with a Deadly Weapon: Section 2C:12–1a(2).* Subsection a(2) makes negligently causing bodily injury to others with a deadly weapon an offense. This is not now an offense in New Jersey. To come within our present Disorderly Persons Act provision, the use of the deadly weapon would have to be under circumstances allowing an inference of that which we now denominate in the Code as recklessness. While no cases were found so holding, this is gleaned from the many cases emphasizing a need to prove awareness in order to find criminal liability. *State v. Weiner,* 41 N.J. 21 (1963); *State v. Williams,* 29 N.J. 27 (1959); *State v. Gooze,* 14 N.J. Super. 277 (App. Div. 1951).

9. *Attempting by Physical Menace to Put in Fear of Imminent Bodily Injury: Section 2C:12–1a(3).* It is simple assault for a defendant to attempt by physical menace to put another in fear of imminent serious bodily injury. This is our law. *State v. Drayton,* 114 N.J. Super. 490 (App. Div. 1971); *State v. Sill,* 112 N.J. Super. 368, 370 (App. Div. 1970); *State v. Maier, supra; Francisco v. State,* 24 N.J.L. 30 (Sup. Ct. 1853). New Jersey law is in accord with the Code on the situation where the defendant has no intent to injure, i.e., such constitutes an assault. *State v. Seifert,* 85 N.J.L. 104 (Sup. Ct. 1913) *aff'd.*, 86 N.J.L. 706 (E. & A. 1914).

10. *Gradation of Simple Assault.* In general, simple assault is a disorderly persons offense. In the event there is a fight or scuffle by mutual consent, the offense is downgraded to a petty disorderly persons offense. This is a variation from existing law. Under N.J.S. 2A:170–27, fighting is equated with assault and battery.

11. *Aggravated Assault: Section 2C:12–1b.* The crime of aggravated assault can be committed in any of five ways:

12. *Attempting to Cause Serious Bodily Injury: Section 2C:12–1b (1).* Attempting to cause serious bodily injury to another is an aggravated assault. "Serious bodily injury" is defined in Section 2C:11–1. Presently, this offense would be punished either under the atrocious assault and battery provisions (N.J.S. 2A:90–1) or one of the statutes outlawing assaults with intent to commit certain other crimes (N.J.S. 2A:90–2) (kill, burglary, kidnapping, rape, robbery, sodomy

or carnal abuse) or N.J.S. 2A:90–3 (robbery with force)) or as an attempt, under N.J.S. 2A:85–5, to commit some other crime.

13. *Causing Serious Bodily Injury: Section 2C:12–1b(1).* Causing serious bodily injury to another is aggravated assault when done with any of three culpabilities: "purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life."

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

> "These cases make it quite clear that to constitute an atrocious assault and battery the assault must be savagely brutal or outrageously or inhumanly cruel or violent and that the nature of the attack is of paramount importance in determining whether the crime has been committed. The kind and severity of the injuries inflicted is another factor to be taken into consideration." (*State v. Edwards,* 28 N.J. 292, 296-299 (1959))

See also *State v. Riley,* 28 N.J. 188 (1958); *State v. Capawanna,* 118 N.J.L. 429, 432 (Sup. Ct. 1937) *aff'd. p.c.,* 119 N.J.L. 337 (E. & A. 1938); *State v. McGrath,* 17 N.J. 41, 49 (1954).

14. *Attempting to Cause Bodily Injury with a Deadly Weapon: Section 2C:12–1b(2).* It is also aggravated assault to attempt to cause bodily injury to another with a deadly weapon. "Deadly weapon" is defined in Section 2C:11–1. This crime is now covered by part of N.J.S. 2A:90–3. ("Any person who willfully and maliciously assaults another with an offensive weapon or instrument . . . is guilty of a high misdemeanor.") See *State v. Drayton,* 114 N.J. Super. 490 (App. Div. 1971); *State v. Jackson,* 90 N.J. Super. 306 (App. Div. 1966).

15. *Causing Bodily Injury with a Deadly Weapon: Section 2C:12–1b(2) and (3).* Purposely, knowingly or recklessly causing bodily injury to another person with a deadly weapon is the fourth way in which the crime of aggravated assault may be committed. This should be distinguished from negligently causing such injury, which, under Section 2C:12–1a(2) is simple assault and also distinguished from causing serious bodily injury under Section 2C:12–1b(1). The use of the deadly weapon with a serious culpability gives reason for treatment as a more serious offense even with a less substantial injury.

Such an offense would now be treated as either an attempted murder (N.J.S. 2A:85–5), an assault with intent to kill (N.J.S. 2A:90–2), or an atrocious assault and battery (N.J.S. 2A:90–1). Under the *Riley* and *Edwards* cases, *supra,* the crime of atrocious

assault and battery would be established because the *mens rea* is sufficiently vicious even though there is a less serious wounding.

16. *Causing Bodily Injury to Certain Public Officials: Section 2C:12–1b(4).* In Subsection (4) we continued the policy now expressed in N.J.S. 2A:90–4 of upgrading certain simple assaults to aggravated assaults because of the status of the person assaulted as a public official. See *State v. Grant,* 102 N.J. Super. 164 (App. Div. 1968). We have, however, eliminated the separate category of assaults on newsmen (N.J.S. 2A:199–1) as inappropriate and upon persons serving court orders or papers (N.J.S. 2A:99–1) as unnecessary. The latter crime is adequately dealt with as an obstruction of government function.

While we have simplified the language defining the categories of persons included under this provision, we do not intend to change the substance from that now found in N.J.S. 2A:90–4.

17. *Gradation of Aggravated Assaults.* We have gradated aggravated assaults more than the scheme found in the MPC. We agree with the MPC that aggravated assaults under Subsection b(1) should be treated more seriously than those under b(2). The latter are assaults with a deadly weapon where it does not appear that there was intent to do serious harm or the type of recklessness referred to in paragraph (1). It would be unnecessarily harsh, for example, to subject a person to ten years maximum imprisonment for a mere attempt to inflict minor injury with a knife or club. In particular circumstances the use of such implements would often support an inference of purpose or recklessness leading to a second degree conviction; and use of a firearm to shoot at the victim would almost certainly lead to that conclusion. But a judgment as to the seriousness of the actor's ill-will should not follow automatically from classification of the implement he employs, when the imposition of very heavy sentences is the issue. MPC P.O.D., p. 135 (1962). Further, we equate simple assaults on the enumerated public servants under Subsection b(4) with b(2). Here, the injury is relatively minor but the use of a deadly weapon is roughly equatable with attacking a peace officer or public servant. We have also added a crime of the fourth degree under Subsection b(3) of certain reckless uses of a deadly weapon not resulting in serious bodily injury. Without this provision such offense would be simple assault under Subsection a(2) and we consider the six months imprisonment maximum to be inadequate in this case.

§ 2C:12–2. COMMENTARY

1. This Section creates a new offense known as "recklessly endangering". Under existing law, reckless conduct which creates a risk of death or of great bodily harm is treated on an *ad hoc* basis. The reckless driving statute is the most familiar. N.J.S. 34:4–96.

Additionally, however, the following statutes make various forms of reckless conduct either a crime or a violation of the Disorderly Persons Act in this State at present:

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

(b) *Disorderly Persons Act Violations*: N.J.S. 2A:170–6 (Diseased person having sexual intercourse); N.J.S. 2A:170–9 (Giving false alarm); N.J.S. 2A:170–13 (Driving horse while intoxicated); N.J.S. 2A:170–16 (Use of mercury in hats); N.J.S. 2A:170–60 (Shooting or throwing things at trains); N.J.S. 2A:170–66 (Moving warning signs); N.J.S. 2A:170–25.2 (Discarding icebox); N.J.S. 2A:170–54.2 (Offer or gift of harmful food to children); N.J.S. 2A:170–69.4 (Blasting near gas pipes); N.J.S. 2A:170–69 (Interfering with lifesaving).

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

2. The Code consolidates and generalizes the principle found in these statutes. Common to all of these statutes is a legislative judgment that the specified conduct entails a serious risk to life or limb, a risk out of proportion to the possible utility of the conduct. In effect, they are *ad hoc* reckless conduct statutes. This Section establishes a general prohibition of recklessly engaging in conduct which places or may place another person in danger of death or serious bodily injury. It does not require any particular person to be actually placed in danger, but deals with potential risks, as well as cases where a specific person actually is within the zone of danger. It is applicable to all specific situations of reckless conduct which have arisen in the past, as well as new situations which will arise in the future.

3. The Section establishes a special rule as to firearms: both recklessness and danger are presumed where a person knowingly points a firearm at or in the direction of another, without regard to the actor's belief as to whether the gun is loaded.

4. *Gradation of Reckless Endangering.* We have adopted the lead of the New York Penal Code (§§ 120.20 and 120.25) in grading this offense. The MPC does not do so. Where the recklessness manifests extreme indifference to the value of human life, we make the offense a crime of the fourth degree. Without this element, *i.e.*, where recklessness alone is shown, we make it a disorderly persons offense.

§ 2C:12-3. COMMENTARY

1. This Section is directed against those who employ threats in circumstances more serious than would be covered by minor offenses like disorderly conduct or breach of the peace. The Code deals in other Sections with other serious situations such as intimidation to obtain property, intimidations to coerce official behavior, or coercions which interferes with freedoms of action. Terroristic threats are separated out and treated as more serious offenses, because where the object is to prevent serious alarm for personal safety, such as may arise from letters or anonymous telephone calls threatening death, kidnapping or bombing, the class of threats can be narrowly defined, and the gravity of the offense can be related both to the seriousness of the threat and the disturbing character of the psychological result intended or risked by the actor. Moreover, in the case of terroristic threats there is no occasion to exempt from criminal liability on the ground of the actor's possibly benign ultimate purpose, as is appropriate in connection with the offense of coercion. See MPC P.O.D., p. 136 (1962).

2. New Jersey now has several statutes dealing with various aspects of terroristic threats. N.J.S. 2A:113–8 ("Any person who . . . threatens to take . . . the life of any person . . . is guilty of a high misdemeanor, and shall be punished by . . . imprisonment for not more than 15 years. . . ."; See *State v. Gibbs,* 134 N.J.L. 366 (Sup. Ct. 1946)); N.J.S. 2A:105–3 ("Any person who knowingly sends or delivers any letter . . . threatening to injure, maim, wound, kill or murder any person, or to burn, destroy, or injure his property, or to do any civil injury to any person or to property, though no money or other valuable thing be demanded is guilty of a misdemeanor."); N.J.S. 2A:118–2 ("Any person who threatens to kidnap . . . any [person], or threatens . . . to send or carry such [person] to any other point within this state, or into another state . . . , or who threatens . . . to force, persuade, or entice a child within the age of 14 years of age to leave its father, mother or guardian . . . , or to secrete or conceal the child, or who procures any such act to be done, is guilty of a high misdemeanor and shall be punished by imprisonment for a term of not more than 30 years. . . . "). Such conduct might also come within either N.J.S. 2A:170–29 (Offensive language); N.J.S. 170–28 (Disturbing assemblies); or N.J.S. 2A:170–9 (Giving false alarm).

3. *The Scope of the Code Provision.* This Section is limited to threats to commit a criminal offense. This is narrower than the range of threats specified in legislation dealing with intimidation of public officials or extortion of property. The Section also deals with threats made merely to "terrorize".

In drafting legislation penalizing threats, we would not wish to authorize grave sanctions against the kind of verbal threat which expresses transitory anger rather than settled purpose to carry out the

threat or to terrorize the other person. For example, presistent telephone threats or even a single verbal threat might be made in such terms or circumstances as to support the inference that the actor intended to terrorize. . . . Accordingly, Section 2C:12–3 permits punishment of such threats even though not written. On the other hand we have not gone so far as to punish mere intent to alarm. This seems too loose, inasmuch as every threat intentionally communicated to the victim may be said to involve some purpose to alarm. MPC T.D. 11, pp. 8–9 (1961).

§ 2C:13–1. COMMENTARY

1. *Background and Rationale.* Kidnapping, which was only a misdemeanor at common law, has become in modern legislation one of the most severely punished offenses. Overbreadth is now the problem:

> "The central problem of legislative reform in this field is to devise a proper system of grading to discriminate between simple false imprisonment and the more terrifying and dangerous abductions for ransom or other felonious purpose. In particular, provision for the death penalty must be consistent with general policy in this regard embodied in sections dealing with murder and attempted murder." MPC T.D. 11, p. 11 (1960).

2. *Existing New Jersey Law.* Our present kidnapping statute is N.J.S. 2A:118–1. See generally, *State v. Gibbs,* 79 N.J. Super. 315 (App. Div. 1963). Additionally, several abduction laws cover various forms of kidnapping behavior: See N.J.S. 2A:86–1, 2 and 3. See generally, *State v. Johnson,* 67 N.J. Super. 414 (App. Div. 1961). Finally, the common-law crime of false imprisonment may be indictable under N.J.S. 2A:85–1 and would be punishable as a misdemeanor (unless the Disorderly Persons Act statute on assaults and batteries is interpreted as supplanting that crime, cf., *State v. Maier,* 13 N. J. 235 (1953) and *State v. McGrath,* 17 N.J. 41 (1955)).

3. The basic policy questions which influenced drafting our provision were discussed by the drafters of the MPC in this manner:

> "A distinctive feature of the original common law offense was the requirement that the victim be sent out of the country, a requirement echoed in American legislation that speaks of taking out of the state, or county. A very substantial displacement was contemplated. . . . Various circumstances and forces led to an expansion of the original concept. It would soon be apparent that distance and isolation could be achieved within the realm, and that even distance was not essential to isolating a victim from the law and his friends, e.g., by 'secret' confinement in the immediate vicinity.

"Another explanation of the expansion of kidnapping may well be the same defects in the law of attempt which played a part in the growth of arson and burglary, namely, immunity from punishment up to the 'last act' before completion, and minor penalties even then. . . . It now becomes possible to restrict the scope of artificial 'substantive' crimes like burglary and kidnapping, which are significant chiefly as attempts to commit a variety of other offenses but carry penalties appropriate to the most atrocious of the possible objectives of the offender. And it is desirable to restrict the scope of kidnapping, as an alternative or cumulative treatment of behavior whose chief significance is robbery or rape, because the broad scope of this overlapping offense has given rise to serious injustice, as well as to distortion of criminal statistics.

"Examples of abusive prosecution for kidnapping are common. . . . The criminologically non-significant circumstance that the victim was detained or moved incident to the crime determines whether the offender lives or dies.

* * * *

"The blame cannot be placed exclusively at the door of the prosecutor for choosing to indict for kidnapping. When an especially outrageous crime is committed there will always be public clamor for the extreme penalty which the laws permit, and it is asking too much of public officials and juries to resist such pressures. Rather, it is precisely the obligation of penal legislators to minimize opportunities for such injustice by clearly and rationally restricting discretion to punish.

* * * *

"A valid justification for retaining kidnapping as a serious offense still exists, notwithstanding adequate provision has been made for attempts to commit other grave crimes. In the first place, if the offense is properly defined so as to be limited to substantial isolation of the victim from his normal environment, it reaches a form of terrifying and dangerous aggression not otherwise adequately punished. Such behavior needs to be penalized at least as false imprisonment, since it does not clearly fall within the ambit of sections dealing with bodily harm. But a misdemeanor penalty for false imprisonment, may not be proportionate to the gravity of the behavior considered as a whole. * * * * A final reason for retaining kidnapping as a distinct offense, and for making it a first degree felony under some circumstances, is that an isolated victim may be killed and disposed of in such a way as to make proof of murder impossible, although the fact of abduction with criminal purpose is clear.

"It is necessary, therefore, to define an aggravated offense of kidnapping which shall consist of removal or confinement involving substantial isolation of the victim where the duration of the isolation, the intention of the kidnapper, or other circumstances, makes the behavior specially terrifying and dangerous." (MPC T.D. 11, pp. 11–15 (1960)).

The problems discussed above have been recognized by our Courts. In *State v. Johnson,* 67 N.J. Super. 414, 422—423 (App. Div. 1961), Judge Gaulkin dealt with the definitional problems in our kidnapping statute in two contexts: First, the problem of the overlap, between the kidnapping statute and the abduction statutes:

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

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

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

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

"Although the nub of the kidnapping offense envisoned in the preceding Comment is substantial 'isolation' of the victim, we encountered difficulty in our effort to define the offense completely in terms of isolation. A draft which was debated by the Council of the Institute provided that a person should be guilty of kidnapping:

" 'if he removes another to a place where he is isolated from the protection of law or the aid of others . . .'

"Some found this objectionable because it might be construed as requiring proof that the victim had actually reached the isolated place where the kidnapper meant to hold him, whereas it was

felt that the crime should be complete, for example, when the victim had been forced or decoyed out of his house and into the car of the kidnapper. Accordingly the Section was recast in terms of removing the victim 'from' his regular haunts, instead of 'to' a place of isolation. This eliminates the absurdity of prosecuting for kidnapping in cases where the victim is forced into his own home to open the safe, or to the back of his store in the course of a robbery. For situations where the victim is seized elsewhere than in his residence or place of business, the section requires removal 'a substantial distance from the vicinity' of seizure. By using the word 'vicinity' rather than 'place' and by requiring substantial removal, the section makes clear the purpose to preclude kidnapping convictions based on trivial changes of location having no bearing on the evil at hand." (MPC T.D. 11, pp. 15–16 (1960).)

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

As has New York in its Code, we accept the view of the MPC in substantial part. As to kidnappings having a purpose of holding for ransom or reward or as a hostage, however, we continue existing law by allowing any removal or confinement to suffice (Subsection a). Proof of that purpose is, in our view, sufficient to justify conviction given even a minor interference with the victim. As to kidnappings for other purposes, we do, however, require a "substantial" interference unless the removal is from the victim's home or place of business (Subsection b). Thus, here, we adopt the MPC. We reject the New York provision which requires a holding for 12 hours. (N.Y. Penal Code § 135.25).

The Code provides for kidnapping by detention as well as removal. We do not require "isolation" as does the MPC, finding that to be implicit in the notion of confinement. Under Subsection a, proof of the purpose removes the need for substantiality. Under Subsection b, the confinement must be for a substantial period.

5. *"Unlawfulness" of Defendant's Conduct.* As is true under existing law (*State v. Gibbs, supra*), the confinement or removal must be "unlawful," i.e., "accomplished by force, threat or deception." Further, as is true with our present law, kidnapping of a child under 14 may be accomplished by force, or by persuasion or enticement:

"In addition, removal or confinement of a child under 14 is made unlawful even with its consent, where the actor has one of the nefarious purposes listed in Subsection a. This covers not only behavior which current legislation often designates as 'en-

ticing' or 'inveigling', but also cases where no more is proved than that defendant 'took' the child, perhaps at the child's request.

* * * *

"Legally privileged removal and confinements, *e.g.*, by policemen or jailers, would not be punishable as kidnapping, even if some prosecutor were prepared to prove that the policeman's purpose was one of those specified in Subsection a, in view of Section [2C:3–3], which makes all conduct 'justifiable' when required or authorized by law. Even in the case of illegal arrest, there could be no prosecution for kidnapping absent one of the purposes specified in Subsection a. Under the general principles of culpability in this Code, the actor who claims that he thought himself legally privileged to remove or confine himself cannot be convicted without proof that he was at least reckless in this regard." (MPC T.D. 11, pp. 16–17 (1960).)

6. *Kidnapping Purposes.* New Jersey's statute is practically limitless as to the purpose for which the defendant acted, merely stating that he must have the "intent to send or carry such [person] to any other point within this state, or into another state, territory or county. . . ." This type of definition is criticized by the drafters of the MPC and we reject it.

"The irrationalities of present kidnapping law . . . are largely the result of combining very comprehensive definitions of kidnapping purposes with very high penalties appropriate to kidnapping for ransom with serious injury or death of the victim. Two courses are open to correct this situation. One would be to restrict kidnapping to the ransom situation. The other would be to cover a variety of purposes but curtail the penalty for most kidnapping. * * * * It thus becomes a matter of less consequence that our kidnapping purposes are broadly defined.

"Nevertheless we think it important to specify the dangerous purposes which should serve to distinguish even second degree kidnapping from lesser offenses of illegal detention. Thus the list of purposes in Subsection a and b would exclude from kidnapping: cases where a parent out of affection takes his child away from the other parent or lawful custodian; detention for purposes of prosecution or treatment; driving an unwilling acquaintance about the country-side to compel him or her to listen to proposals of business or love. Moreover, while our proposal would permit kidnapping conviction of a fleeing felon who commandeers a car and compels the owner to drive him away, it does so by explicit provision of clause (1) or Subsection b. This would not authorize conviction, for example, of a young man who compelled or tricked another into driving him somewhere merely for the sake of the ride.

"The remaining purpose clauses of Subsection a are designed to specify other terrifying and dangerous removals and confinements. Thus, clause (2) covers vengeful or sadistic abductions accompanied by threats of torture, death, or other severely frightening experience. Clause (3) raises to the aggravated felony level certain interferences with political and governmental functions which might otherwise be misdemeanors or felonies of the third degree, e.g., abduction of witnesses, candidates, party leaders, officials, voters.

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

We have eliminated the "shield" provision found in MPC § 212.1(a) believing our Section 2C:13–1a sufficient to encompass this.

7. *Gradation and Punishment.* Kidnapping is a crime of the first degree. We do not, however, recommend retention of the death penalty for this crime. The crime may, become a crime of the second degree:

"The basic reason for grading ordinary kidnapping as a second degree felony, despite the much higher level of punishment currently provided, is to avoid disproportion in penalties between this offense and such felonies as robbery, rape, and burglary, especially where the removal or confinement is a relatively minor incident to the other offense. As pointed out [previously], we seek to obviate resort to prosecution for kidnapping as a means of imposing exceptional sanctions on some robbers and rapists who are distinguished from others only by a criminologically insignificant movement or detention of the victim. The present section does provide for additional punishment where significant movement or detention of the victim serves to differentiate the behavior of the offender. Thus, if the actor does substantially isolate the victim, as required by subsection b, he can be prosecuted both for the kidnapping and for the other offense. If the other offense is a felony, he will be a 'multiple offender,' subject to an 'extended sentence.' Requiring separate charges compels the agencies of justice to focus on the issue whether there was a substantial removal or confinement significantly differentiating the defendant's behavior." (*Id.* at 18—19.)

The Code does have "upgrading" provision: It makes kidnapping a crime of the first degree when the defendant does not voluntarily release the victim alive and in a safe place prior to apprehension.

"It seems to us that the main justification for treating kidnapping as seriously as murder or aggravated rape is the likelihood of a victim disappearing permanently during a kidnapping, without possibility of proving murder. Accordingly, we propose to maximize the kidnapper's incentive to return the victim alive, by making first degree penalties apply only when the victim is not 'released alive in a safe place.' For cases where the victim is returned to his friends, even with substantial injury, the maximum 'extended sentence' . . . should suffice as a deterrent. Our grading also affords some incentive to the kidnapper to avoid even the [second-degree crime] penalty by returning the victim unharmed or not seriously hurt, since minor harm amounting to no more than the misdemeanor of bodily injury under [Section 2C:12–1] would not lead to an extended sentence, leaving the offender subject only to the ordinary second degree maximum of 10 years. Certainly those formulations which authorize extreme penalties unless the victim is 'liberated unharmed' are unsatisfactory both because they require that no harm whatever shall have been done to the victim, and because they refer to the moment of liberation without regard to the circumstances, which may be such as to make serious harm or death quite likely." (*Id.* at 19–20.)

§ 2C:13–2. COMMENTARY

1. This Section provides intermediate penalties between those for kidnapping and false imprisonment, where the illegal restraint involves involuntary servitude or risk of serious bodily harm. This provision is necessary because such restraints would not come within Section 2B:212–1 since a person may be held in slavery or peonage more or less openly and in his accustomed haunts. Also, in view of the fact that the victim is not isolated, in danger of death, nor necessarily terrorized, classification of this offense as a crime of the third degree seems adequately severe.

2. The only equivalent in New Jersey law is found in some sections of our Prostitution laws, *i.e.*, N.J.S. 2A:131–3, 4, 5, 6, 10 and 12, which are concerned with involuntary placings of women in houses of prostitution.

§ 2C:13–3. COMMENTARY

1. False imprisonment was a misdemeanor at common-law and as such was indictable under N.J.S. 2A:85–1. With the enactment of N.J.S. 2A:170–26, it seems likely that the common law in this regard has been supplanted and the offense is punishable as an assault or an assault and battery under the Disorderly Persons Act.

This Section is limited to "substantial" interference with liberty. It is not intended to make criminal every detention that might lead to a civil suit for false imprisonment. For example, a brief detention of a suspected thief by the victim who seeks to question the detainee or recover his property would not violate this Section. If the behavior is designed to extort some concession from the victim or another, it may also violate Section 2C:12–3. If it constitutes also official oppression, Section 2C:30–1 will come into play.

2. Under Sections 2C:13–1, 2 and 3, proof of an unlawful interference must be shown. See Section 2C:13–1d. In the case of Sections 2C:13–1 and 2, a wrongful purpose must be shown. Under this Section, however, knowing unlawful restraint is sufficient without regard to the actor's purpose. For purposes of this Section, then, we have added an affirmative defense for child custody by relatives for the sole purpose of controlling the child. If liability is to attach in such cases it should be under Section 2C:13–4.

§ 2C:13–4. COMMENTARY

1. *Custody of Children.* New Jersey's statutes do not now provide a special category of offense dealing with interference with child custody. Presumably, it would come within the kidnapping, abduction or assault and battery provisions. A special provision applies to abduction of girls under 18. (N.J.S. 2A:86–3).

We treat interference with the custody of children as a separate offense. Violation of lawful custody, especially of children, requires special legislation, notwithstanding its similarity in some respects to kidnapping. The interest protected is not freedom from physical danger or terrorization by abduction, since that is covered by Section 2C:13–1, but rather the maintenance of parental custody against all unlawful interruption, even when the child itself is a willing, undeceived participant in the attack on this interest of its parent. The problem is further distinguishable from kidnapping by the fact that the offender here will often be a parent or other person favorably disposed toward the child. One should be especially cautious in providing penal sanctions applicable to estranged parents struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings.

The age of 18 is selected as the limit of parental interest in custody, to be protected by criminal law, since this is the age at which children are completing high school education and beginning to move out into the relative independence of self-support or higher education. But we recognize in Subsection a(2) that at least from the age of 14 there may be cases where the child itself is principally responsible for a determination to leave home, so that it is unfair to punish a companion who merely fell in with the child's plan.

Substitution of children is the subject of a special provision in § 135.55 of the New York Code. We believe this Section adequate, without a special provision, to cover that problem.

2. *Custody of Committed Persons.* A separate provision establishes the standard as to interferences with the custody of committed persons. This is defined to include persons sent to foster homes, private hospitals, and the like, even though no formal judicial commitment has been made. N.J.S. 2A:104–9 now makes a misdemeanor of aiding or abetting "the escape or elopement of an inmate confined in any public institution in this State."

§ 2C:13–5. COMMENTARY

1. This is one of a series of provisions designed to deal with various forms of coercive behavior. Elsewhere in the Code, extortion of money, coercion of official behavior and threats designed to induce terror are treated as criminal. Here, coercive behavior designed to interfere with one's freedom of action is outlawed. New Jersey now has no general provision in this field. N.J.S. 2A:105–3 outlaws sending or delivering of writings threatening to do any "civil injury" to any person. Presumably, some aspects of the behavior outlawed by this Section would fall within its terms. See also N.J.S. 2A:105–5 (Loansharking).

2. The basic difference between this Section and Section 2C:12–3, Terroristic Threats, is that here the prosecution will have to show that the coercion was not for "benign purposes." For example, threats designed to deter the "victim" from continuing to take narcotics or from gambling away his fortune would not be criminal under the present section. The threats here outlawed parallel those found in the Theft by Extortion provision. (Section 2C:20–5)

3. *Grading.* Subsection b is designed to prevent inconsistency between this Section and the grading provided elsewhere for certain offenses of a similar nature. See Section 2C:20–2b(2). Threatening a crime of the third degree or greater or having a criminal purpose makes the offense a crime of the third degree. Otherwise, it is a crime of the fourth degree.

INTRODUCTORY NOTE TO CHAPTER 14 ON ADULTERY AND FORNICATION

1. As originally drafted, the MPC contained a provision outlawing Illicit Cohabitation or Intercourse. This provision was deleted from the MPC. Our Code follows that decision. Thus, adultery and fornication are entirely removed from the area of criminality.

2. *Existing New Jersey Law.* Under our present statutes, both Adultery and Fornication are crimes. See N.J.S. 2A:88–1 (Adultery

and N.J.S. 2A:110–1 (Fornication). The difference between these crimes depends upon the marital status of the woman. *Application of Smith,* 71 F. Supp. 968 (D. N.J. 1947); *State v. Lash,* 16 N.J.L. 380 (Sup. Ct. 1838); See *State v. Catalano,* 30 N.J. Super. 343 (App. Div. 1954); *State v. Sharp,* 75 N.J.L. 201 (Sup. Ct. 1907) *aff'd.,* 76 N.J.L. 576 (E. & A. 1908).

§ 2C:14–1. COMMENTARY

1. *Present New Jersey Law.* Rape and carnal abuse are now high misdemeanors under N.J.S. 2A:138–1. See also N.J.S. 2A:138–2 (Sexual intercourse with a female in an institution; 3-year penalty).

2. *Background and General Scheme of Section 2C:14–1.* It is everywhere regarded as a serious offense for a male to have intercourse with a female other than his wife by means of force, threats, or certain forms of fundamental deception. The chief problems are (i) to decide and express what shall be the minimum amount of coercion or deception to be included here, *i.e.,* drawing the line between rape—seduction, on the one hand, and illicit intercourse on the other, and (ii) to devise a grading system that distributes the entire group of offenses rationally over the range of available punishments. The latter problem is especially important because: (1) the upper ranges of punishment may be very high; (2) the offense is typically committed in privacy, so that conviction often rests on little more than the testimony of the complainant; (3) the central issue is likely to be the question of consent on the part of the female, a subtle psychological problem in view of social and religious pressures upon the woman to conceive of herself as victim rather than collaborator; and (4) the offender's threat to society is difficult to evaluate.

The classification proposed in the text is based on the following rationale: the extreme punishment of a crime of the first degree is reserved for situations which are the most brutal or shocking, evincing the most dangerous aberration of character and threat to public security, and which also provide some objective support for the complainant's testimony of non-consent. The remaining offenses embraced in common law rape or the usual statutory first degree are classified as crime of the second degree. Subsection b delineates certain categories in which it appears desirable and safe to set even lower limits on punishment. While there are few statistics on punishments actually imposed following convictions of rape, those available indicate a judicial tendency to follow the pattern proposed by the text rather than to apply the extreme sanctions permitted by present statutes. See MPC T.D. 4, pp. 241–243 (1953).

3. *Liability of Males.* The substantive offense is written in terms of male aggression. The Code rejects the position of some jurisdictions which designate female aggression as rape.

It seems more realistic to regard this as a problem of corruption of morals, rather than sexual aggression. Restricting primary liability to males does not, however, preclude liability of a female who aids a male offender to ravish a female.

4. *Carnal Knowledge.* Sexual intercourse is defined as including abnormal intercourse by the mouth or anus as well as normal copulation. In this respect, it is broader than prevailing legislation in New Jersey and elsewhere. See *State v. Auld,* 135 N.J.L. 293 (E. & A. 1947); *State v. Sorge,* 123 N.J.L. 532 (Sup. Ct. 1940, affd., 125 N.J.L. 445 (E. & A. 1941). Such acts would, however, fall within existing sodomy legislation.

> "From the point of view of the woman who is attacked, these deviate forms of aggression would usually be equally shocking and abhorrent." (MPC T.D. 4, p. 244 (1953).)

5. *Penetration.* The rape cases in New Jersey and in other states require proof of some actual penetration into the female sex organ "however slight" in order for the crime to exist. *State v. Orlando,* 119 N.J.L. 175 (Sup. Ct. 1937), *State v. Riley,* 49 N.J. Super. 570 (App. Div.), *aff'd.,* in part, 28 N.J. 188 (1958). Such is not true for carnal abuse in New Jersey. Contact, without penetration, is sufficient. *State v. Hummer,* 73 N.J.L. 714, 718 (E. & A. 1906); *State v. MacLean,* 135 N.J.L. 491 (Sup. Ct. 1947); *State v. LeFante,* 14 N.J. 584, 593 (1954). The Code requires penetration for all offenses under Section 2C:14–1 and retains the "however slight" rule:

> "The chief issue which has arisen in defining the behavior to be treated as rape is whether to require proof of something more than 'slight penetration' of the outer female genitalia. It is settled law that the crime can be completed without orgasm or complete penetration of the male organ into the vagina. Predominantly the present statutes call for 'actual penetration' or 'any penetration however slight.' Under either formula it is held that the slightest penetration of the outer part of the female genitalia is sufficient; it need not be shown that the male organ reached the vagina. The reasoning behind this is said to be that the essence of the offense is the outrage to the person and feelings of the female, . . . The rule of 'slightest penetration' has been criticized . . . , as punishing attempt rather than the completed offense. . . . Giving this scope to the crime of rape makes it cover activity quite outside the common understanding of sexual intercourse, *viz.,* a kind of sexual foreplay that some females engage in voluntarily who would strenuously resist any effort to penetrate the vagina. Under 'any penetration' rule there is no legal obstacle to convicting a man of raping a woman who, nevertheless, remains a 'virgin' in the sense

that her hymen is intact. This legal paradox would be largely resolved by requiring proof of penetration beyond the hymen. However, even the stricter rule would not preclude conviction where the victim's hymen has not been broken, since some membranes are sufficiently elastic or have natural openings large enough to permit penetration without rupture.

"The text adheres to the 'any penetration' rule of present law, in part because our lower scale of penalties makes this more tolerable, and in part because of the greater reliance which can be placed on the verity of complaining witness' testimony where the issue is whether there was any penetration rather than how much." (MPC T.D. 4, p. 245 (1953).)

6. *Female not the Wife.* See Section 2C:14–6b. Knowledge that the victim was not his wife is required:

"Under the general provisions of this Code there could not be liability for rape unless the accused knew that the victim was not his wife or was reckless in this regard. Some such requirement seems important particularly in cases where rape liability can be imposed for consensual relation, *e.g.*, with girls below the age of 16. A man who married a young girl, without knowing that she was already married to another, might find himself charged with statutory rape for sleeping with his supposed wife." (*Id.* at 246.)

7. *Gradation of the Offense: Aggravated Rape: Section 2C:14–1a.* Subsection a is designed to limit narrowly the occasions for imposing the extreme penalty for rape. Four situations distinguish Aggravated Rape from the lesser offense of Rape. Aggravated Rape, in turn, is then gradated into two categories for punishment purposes. The situations which are made the most serious offense, a crime of the first degree, are restricted to cases where the victim suffers serious physical injury or where in effect she is attacked by a stranger. These circumstances mark the most brutal assaults, and, in addition, furnish some objective indication in support of the complainant's testimony that she did not consent. The community's sense of insecurity and (consequently the demand for retributive justice) is especially sharp in relation to the character who lurks on the highway or alley to assault whatever woman passes, or who commits rape in the course of burglary.

8. *Aggravated Rape: Compulsion by Force or Threat: Section 2C:14–1a(1).* This Section covers the classic rape case where the woman is overpowered by violence or the threat of it. Our present statute requires that the act be "forcibly against her will" and, under our cases, resistance must be "in good faith and without pretense, with active determination." *State v. Terry,* 89 N.J. Super. 445 (App. Div. 1965). It need not be "to the utmost." The Code uses the term "compelled to submit" to express the thought now found in our *Terry* case.

It avoids a possible ambiguity of the "utmost" phrase, which might be construed as calling for some showing that the woman was physically incapable of additional struggle against her assailant. Where additional struggle would obviously be useless and dangerous, the failure to struggle should not absolve the accused. (MPC T.D. 4, pp. 246–247 (1953).) Our cases do not detail whether or not the fear must be reasonably grounded. They simply speak of force or compelling fear. *State v. Harris,* 70 N.J. Super. 9 (App. Div. 1961); *State v. Terry, supra.* In most states, the fear must be reasonably grounded. The Code rejects this.

> "The text adopts the minority view in imposing liability where the woman submits out of 'fear' of violence, without requiring that the fear be reasonably grounded. One who takes advantage of a woman's unreasonable fears of violence should not escape punishment any more than the swindler who cheats gullible people by false statements which they should have found incredible. The majority rule is probably related to the extreme penalties which follow a rape conviction under present law; with so much at stake legislators and judges were reluctant to permit a jury to convict on a woman's testimony that she was frightened into submission in circumstances where most women would not have been intimidated." (MPC T.D. 4, p. 247 (1953).)

Subsection a(1) introduces an innovation in extending the range of threats to include threats of serious bodily injury to anyone. The general objective is to reach all "compelling" threats. Present law furnishes little guide, other than as to threat of physical harm to the female herself.

9. *Aggravated Rape: Non-resistance Due to Drugs, Intoxicants, Etc., or Due to Unconsciousness: Section 2C:14–1a(1) and (2).* Where graded, current rape statutes generally put these situations in the gravest category of the offense and ordinarily require as does the Code that the substance be administered by or with the privity of the defendant. While no New Jersey cases were found, decisions in jurisdictions with non-particularized statutes, as ours, indicate that if, in fact, the woman is unconscious, she is incapable of giving consent. Defendant will, therefore, be guilty of rape even if he did not bring about the unconscious condition, but merely took advantage of it.

Under Subsection a(2) cases in which the victim is drugged or intoxicated are treated as equivalent to forceful rape only where the defendant undermined the judgment and will of the victim by, for example, surreptitiously administering drugs. Where the defendant deliberately employs such means the victim need not be rendered completely unconscious.

10. *Rape: Female Less than 12 Years: Section 2C:14–1a(4).* This age is the same as the carnal abuse provision of N.J.S. 2A:138–1.

As to females between 12 and 16, see Section 2C:14–3 (Corruption of Minors and Seduction).

11. *Aggravated Rape: Gradation.* Rape is a second degree crime except in two situations. If serious bodily injury is done to any person or if the victim was not a voluntary social companion of the defendant, it is upgraded to a first degree crime.

12. *Rape: Section 2C:14–1b.* The Code defines a lesser offense, a third degree crime, for less offensive forms of involuntary sexual intercourse:

13. *Rape by Threats: Section 2C:14–1b(1).* Threats of a form less than that described for Section 2C:14–1a(1) suffice for this crime:

> "As the gravity of the threat diminishes, the situation gradually changes from one where compulsion overwhelms the will of the victim to a situation where she can make a deliberate choice to avoid some alternative evil. The man may threaten to disclose an illicit affair, to foreclose the mortgage on her parents' farm, to cause her to lose her job, or to deprive her of a valued possession. The situation may move into a shadow area between coercion and bargain. A bargain for gain is not within the present section; but subsection b(1) is designed to reach all situations of actual compulsion, i.e., where the female's submission is determined by fear of harm, with an objective test of the efficiency of the coercive element." (MPC T.D. 4, p. 247 (1953).)

14. *Rape: Mental Deficiency of the Victim: Section 2C:14–1b(2).* The common law judges brought intercourse with mental defectives within the definition of rape by an extraordinary interpretation virtually disregarding the ordinary requirement of force. They said that in cases involving insane or unconscious women the force required to penetrate the woman would suffice to convict of rape. The person who has non-violent intercourse with mental defectives remains subject to extreme rape penalties today. We distribute this class of cases between aggravated rape and rape depending on the degree of impairment of the victim's mentality. The behavior does not lead to a general sense of insecurity in the community, as does the forceful rape, and the harm done is not as great, if outrage to the feelings of the victim be regarded as the essential evil against which we legislate.

The difficult problem is to define the degree of mental deficiency or impairment which shall bring the statute into play. The Code limits criminality to situations of known mental disease or defect so serious as to render the woman "incapable of appraising the nature of her own conduct." Conditions affecting only the woman's capacity to "control" herself sexually will not involve criminal liability. Also, by specifying that the woman must lack capacity to appraise "the nature" of her conduct, we make it clear that we are not talking about appraisals in-

volving value judgments or consideration of remote consequences of the immediate acts. The typical case that remains within the revised clause would be the case of intercourse with a woman known to the defendant to be manifestly and seriously deranged. (MPC P.O.D., p. 144 (1962).)

16. *Rape: Fraud: Section 2C:14–1b(3).* Cases where the victim did not know a sexual act was being committed or where she mistakenly thought the actor was her husband are included here as rape. As to cases where the female is unaware that a sex act is being committed, two situations have developed out of the doctor-patient relationship, which is the primary concern of paragraph (3) of Subsection b. In one situation the doctor has intercourse with a female patient who has been led to believe that she must submit to intercourse as necessary treatment. In such a situation, courts have found the necessary element of "force" to be lacking and have refused to sustain a conviction of rape. This would be reached under paragraph (1) of Subsection b if the doctor's representations as to the consequence of her refusal to submit reached the proportions of intimidation.

In the other situation, the doctor has intercourse under the pretense of making a digital or instrumental manipulation for therapeutic reasons, or of making an examination or performing an operation. In this type of case defendant has been held guilty of rape on the theory that there could be no consent when the woman was unaware that a sexual act was taking place. The requirement of force is bypassed, as in the case of intercourse with idiots, with the observation that in such cases, the force necessary to accomplish penetration is sufficient. We classify this as third degree rape because, although the woman does not "consent" the intercourse is not against her will. The physical danger of forceful ravishment is not present. We are dealing with an aggravated form of intercourse by trick or deception, *i.e.,* seduction, a kind of activity that most women can prevent, and that can be deterred by lesser sanctions.

Subsection b(3) covers another form of aggravated "seduction" where the woman submits believing that the intercourse is with her husband. Three situations are covered: (i) where the defendant impersonates the husband; (ii) where the defendant induces his victim to go through a marriage ceremony by deceiving her as to his eligibility, *e.g.,* where he knows his marriage is bigamous; and (iii) where the defendant stages a mock marriage in reliance on which the female engages in intercourse with him. No sufficient reason appears for distinguishing between the various types of misrepresentation that intercourse is marital. MPC T.D. 4, pp. 255-257 (1953).

§ 2C:14–2. COMMENTARY

1. *Present New Jersey Law.* Deviate sexual intercourse—sodomy—is now a high misdemeanor punishable by imprisonment for up to 20 years. N.J.S. 2A:143–1. As interpreted by our courts, this crime includes anal intercourse and bestiality, but it does not include fellatio or cunnilingus. *State v. Morrison,* 25 N.J. Super. 534 (Co. Ct. 1953) (Francis, J.); *State v. Pitman,* 98 N.J.L. 626 (Sup. Ct. 1923) *aff'd.,* 99 N.J.L. 527 (E. & A. 1924). This is contrary to the law in most states and reaches the odd situation that some practices of male homosexuality are serious crimes but Lesbianism is not an offense. (Mouth-genital contact may, however, be punished as lewd and lascivious behavior under N.J.S. 2A:115–2. *State v. Morrison, supra.*) Emission is not required. *State v. Taylor,* 46 N.J. 316 (1966).

2. *Consentual Sodomy Between Adults.* We have arrived at the conclusion that private homosexuality between consenting adults not involving force, imposition or corruption of the young should not be an offense.

The sexual impulse finds expression in a variety of ways other than heterosexual copulation. Substantial numbers of males and females find themselves drawn to members of their sex. In both homosexual and heterosexual relationships, gratification may be sought and bestowed digitally, orally, or by the anus. There may be no human partner, as in copulation with animals or corpses, or in masturbation. Some individuals obtain sexual satisfaction from exposing themselves indecently, from wearing clothes of the opposite sex, or from contact with objects of symbolic sexual significance, *e.g.*, a shoe or an undergarment. Heterosexual copulation must also be considered deviate when accomplished by force or with a child, especially when these circumstances appear to be essential to the actor's gratification. Superficially non-sexual offenses such as larceny, burglary, or arson may have an avowed or unconscious sexual aspect, just as, for that matter, approved behavior, including successful pursuit of art, literature, money, or fame, may be bound up with sexual drives. It is generally agreed, also, that an isolated episode of deviate sexuality may have no important significance with respect to the character of the actor, being the result of a chance encounter, curiosity or experiment.

Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the grounds that no harm to the secular interests of the community is involved in a typical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.

As in the case of illicit heterosexual relations, existing law is substantially unenforced, and there is no prospect of real enforcement except against cases of violence, corruption of minors and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interest of blackmailers. Existence of the criminal threat probably deters some people from seeking psychiatric or other assistance for their emotional problems; certainly conviction and imprisonment are not conducive to cures. Further, there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others. Lastly, the practicalities of police administration must be considered. Funds and personnel for police work are limited, and it would appear to be poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved. Even the necessary utilization of police in cases involving minors or public solicitation raises special problems of police morale, because of the entrapment practices that enforcement seems to require, and the temptation to bribery and extortion.

4. *Grading According to Degree of Compulsion.* The same distinctions used to grade Aggravated Rape and Rape are used to grade this offense. See commentary to Section 2C:14–1.

5. Subsection c is taken from the New York Code and is designed to forbid any sexual conduct with dead humans. We have not included any provision as to private sexual contact with animals.

§ 2C:14–3. COMMENTARY

1. This provision consolidates all crimes involving sexual offenses against minors, both as to ordinary heterosexual relations and deviate relations, except when such acts are done against girls under the age of 12. These latter continue to be treated as Rape and Sodomy, graded as higher offenses, under Sections 2C:14–1a(4) and 2C:14–2a(4).

The Sections forbids sexual intercourse, deviate sexual intercourse or causing another to engage in the latter in any of three situations:

2. *Under-age Females; Age Disparity: Section 2C:14–3a(1).*

The "age of consent" is set at 16 years and the defendant must be more than four years older than the girl.

New Jersey's carnal abuse statute and a section of our sodomy law now cover these crimes: N.J.S. 2A:138–1 (Carnal Abuse by male over 16 of girl under 12, punishable by 30 years; Carnal Abuse by male over 16 of girl between 12 and 16, punishable by 15 years); N.J.S. 2A:143–2 (Sodomy with a child under 16, 30 years).

These ages—12 years for the greater offense and 16 for this—are justified because special treatment of consensual intercourse with a child is warranted not only because the immature require protection and to prevent the outrage to parental and community feelings, but also because an adult male's proclivity for sex relations with children is a recognized symptom of mental aberration, called pedophilia. On the other hand, statistics of arrest and conviction do not demonstrate unusual recidivism such as one might expect of mentally ill offenders. Moreover, a single instance of sexual relations with a child does not establish mental aberration. Another factor to be considered is that extremely young victims may not make competent witnesses.

There appear to be three significant categories involving the age of the female: (1) prepuberty victims with a considerable probability of aberration in the male aggressor, (2) the period of puberty, when the girl arrives at physical capacity to engage in intercourse, but remains seriously deficient in comprehension of the social, psychological, emotional and even physical significance of sexuality, so that it is still realistic to regard her as victimized, and (3) the period of later adolescence when the chief significance of the behavior is its contravention of the moral standards of the community. This last category is reserved for separate treatment in sections dealing with sexual corruption of minors. The critical periods selected in the text are those where the female is under 12 years old and where she is between 12 and 16. (MPC T.D. 4, p. 253(1953).)

Further, the youth of the male is given significance by requiring that he be at least four years older than the female. The rationale of statutory rape is victimization of immaturity. It seems necessary, therefore, to recognize that immature males may themselves be victims of adolescence rather than engaged in exploitation of others' inexperience. Boys under 17 will not be subject to ordinary penal treatment so that no express exemption of this class is required in this section. The most convenient way to give effect to the victimization rationale is to require a substantial age differential in favor of the male. Thus, a youth who had relations with a 12 year old would have to be at least 17; where the girl was just under 17, the boy would have to be 21, to come within Subsection a(1). Certainly, existing statutory provisions under which the rape label is applied to sexual experimentation by a girl just under and a boy just over 16 seem harsh and unreasonable.

3. *Guardians and Persons Responsible for Welfare: Section 2C:14–3a(2).* Under Subsection a(2) only guardians and others responsible for supervising the young, *e.g.*, probation officers, camp supervisors, may be penalized.

4. *Intercourse with Women in Custody of Some Authority: Section 2C:14–3a(3).* Where women are in custody, coercion and abuse of

authority can easily be present. On the other hand, it must be recognized that institutionalized women may freely and competently seek sexual relations with available males, whether casual visitors, fellow-inmates, or members of the custodial group. The prevention of such intercourse may be a proper objective of the criminal law, but it is entirely too undiscriminating to lump all such cases together for the severe punishment appropriate to forceful rape. That is the policy now pursued by our law under N.J.S. 2A:138–2 which grades the offenses as a misdemeanor. The provision in the Code is limited to personnel having "supervisory or disciplinary authority" over the victim.

5. *Seduction.* The crime of Seduction is now defined by two New Jersey statutes: N.J.S. 2A:142–1 and 2. See *State v. Hall,* 85 N.J. Super. 312 (Law Div. 1964) *modified,* 87 N.J. Super. 480 (App. Div. 1965); *State v. Slattery,* 74 N.J.L. 241 (Sup. Ct. 1907). Presently, there is a wide divergence in American legislation as to what, if any, forms of fraudulent procurement of extra-marital intercourse shall be criminal. At first blush, it would appear obviously desirable to punish the practice of deception where an innocent girl is induced to engage in extra-marital intercourse. Both deception and extra-marital intercourse are undesirable, and it may be asked why the law should punish a man for defrauding a girl of a few dollars but not for defrauding her of her virtue. Further reflection, however, discloses significant criminologic distinctions, which lead to caution in punishing deception for sexual gain. Whatever may have been the case in preceding generations, the present generation would hardly be unanimous in the view that intercourse is a favor granted by the female only in exchange for a quid pro quo. A substantial body of present opinion would regard intercourse as a matter of mutual gratification, an expression as much of the female's libido as the male's. To the extent that this is the case, it would rarely be true that the female "yields" completely or predominantly on account of the deception. Furthermore, deception appears to play quite a different role in seduction than in property fraud. In the typical case of property fraud, the deception is likely to relate to the monetary value of what the victim receives in exchange for what he gives up. Deception in love, on the other hand, is typically directed at arousing emotions. It must be noted that a certain amount of mutual or self-deception of this character is common among swains and lovers. It is significant also that one kind of deception that would be undisputably criminal in a business transaction *viz.* misrepresentation of an article transferred to the victim, would be clearly insufficient in amorous transactions. To the extent of the foregoing, deception in love does not betoken the same depravity and deviation from social norms as deception in business, and is less likely to deprive the victim of anything she really wants to keep.

Moreover, we must recognize that in such an area courts and juries will have unusual difficulty in distinguishing with sufficient certainty between vicious instances of victimization by fraud and superficially similar cases in which an angry and disappointed woman testifies to words or innuendoes of promise. Considerations of this character have led to widespread legislation abolishing civil actions for breach-of-promise and seduction, one of the main grounds being that it was primarily an instrument of blackmail.

All of these factors lead us to the conclusion that seduction should not, of itself, be criminal. The MPC formulation of intercourse by a "promise of marriage," which would have continued existing New Jersey law (N.J.S. 2A:142–1 and 2; *State v. Hall, supra; State v. Slattery, supra*), has been rejected.

§ 2C:14–4. COMMENTARY

1. *Introduction.* This Section deals with acts of sexual aggression which do not involve the peculiarly resented element of "penetration." Presently, these acts would be treated under a variety of statutes, *e.g.*, assault, carnal abuse (See *State v. McLean*, 135 N.J.L. 491 (Sup. Ct. 1947) and *Application of Faas*, 42 N.J. Super. 31 (App. Div. 1956), lewdness or indecency, impairing the morals of a minor, etc.

2. *"Sexual Contact."* "Sexual Contact" is so defined as to require an actual touching. See MPC T.D. 4, pp. 292–293 (1953).

3. *Consent.* Originally, the Section required that the act be done with "no consent." This was eliminated as establishing "too strict a standard of criminality, considering the frequency with which tentative sexual advances are made without explicit assurance of consent." MPC P.O.D., p. 149 (1962).

4. The acts and the relationships under which touchings are made criminal are found in Subsection a through h and parallel the categories found in Sections 2C:14–1, 2, and 3.

5. *Gradation.* The MPC grades Sexual Assault as a misdemeanor. We vary the degree of the offense in accord with the policies expressed in the other Sections of this Chapter and in existing law. Particularly, as to very young girls (Subsection d) we grade such conduct as a crime of the third degree. See N.J.S. 2A:138–1.

§ 2C:14–5. COMMENTARY

1. Lewd or indecent behavior is now punishable under N.J.S. 2A:115–1. As construed by our cases, this provision includes the offense of Indecent Exposure. The general offense of Open Lewdness is covered in Section 2C:34–1 of the Code. Indecent Exposure is treated at this point because the special case of genital exposure for

sexual gratification is punishable more severely than ordinary open lewdness, since the behavior amounts to, or at least is often taken as, threatening sexual aggression. For the same reason this offense is placed in the Chapter of the Code dealing with other types of sexual aggression, whereas open lewdness is included in the Chapter that encompasses obscenity and prostitution. (MPC T.D. 13, p. 82 (1961).)

2. Our cases now require that the act be done "in public." The most recent case holds that the exposure must actually be seen by someone (*State v. Buffano,* 5 N.J. Super. 255 (App. Div. 1919)) although an earlier case indicated that this was not necessary (*Van Houten v. State,* 46 N.J.L. 16 (Sup. Ct. 1883)). See also *State v. Toohey,* 6 N.J. Super. 97 (App. Div. 1950). The Code abandons the idea of being "in public" and instead requires that the act be "under circumstances in which he knows his conduct is likely to cause affront or alarm."

§ 2C:14–6. COMMENTARY

1. *Mistake as to Age: Section 2C:14–6a.* It is generally held under present law that even a reasonable mistake as to the age of the girl does not exculpate or mitigate a sex offense. MPC T.D. 4, p. 253 (1953). Such is the law in New Jersey. In *State v. Moore,* 105 N.J. Super. 467 (App. Div. 1969), defendant was charged with carnal abuse of a girl who was 14 years of age. The sole argument made on defendant's behalf on the appeal was that the trial court should have recognized as a defense that the accused reasonably believed that the prosecutrix was above the age of 16 years. The jury had been instructed that the defendant's mistaken belief of the girl's age could not be considered as a defense. The Court affirmed the conviction holding that

> "It is no defense that the defendant did not know that the female was under the statutory age of consent. It is immaterial that the defendant in good faith believed that the female was above the prohibited age, that he had exercised reasonable care to ascertain her age; that his belief, though erroneous, was reasonable; or that the defendant had been misled by the appearance or statements of the female.
>
> "The defendant acts at his peril that the female may in fact be under the age of consent.
>
> * * * *
>
> "It is noteworthy that the words 'willfully,' 'intentionally,' 'knowingly,' or words of similar import are absent from . . . our statute."
>
> "Except for a recent California decision, *People v. Hernandez,* 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P. 2d 673, 8 A.L.R. 3d

1092 (Sup. Ct. 1964), it has been the universally accepted view of the courts of this country that defendant's knowledge of the age of the woman is not an essential element of the crime of statutory rape and, therefore, it was no defense that the accused reasonably believed her to be of the age of consent.

"*State v. Koettgen,* 89 N.J.L. 678 (E. & A. 1916), indicates that where the Legislature has specified a particular age as the essence of an enactment, it is age in fact, not in reasonable belief or appearance, that is dispositive. Reference in support thereof was made in *Koettgen,* at p. 683, to *Reg. v. Robins,* 1 C & K. 456, 47 E.C.L. 456, where it was held that it was no defense that the prisoner did not know that the girl was under sixteen, or that from her appearance he might have thought she was of greater age. The age of the prosecutrix is the distinguishing ingredient of the crime of carnal abuse. * * *." *State v. LeFante,* 12 N.J. 505, 513 (1953).

The Code, follows existing law as to the age of 12 and above that age makes the defendant's reasonable belief an affirmative defense. Section 68(b) of the Connecticut Code follows this rule.

2. *Spouse Relationships: Section 2C:14–6b.*

(a) *Definition of Spouses.* Two problems are covered in this area by the Code. Where the definition of an offense excludes conduct with a spouse, the exclusion includes persons "living as man and wife" regardless of the legal status of their relationship. The substantial possibility of consent is said to justify this position. MPC T.D. 4, p. 245 (1953). No New Jerey cases were found.

Along the same lines, this exclusion from the definition of spouse is inoperative where they are living apart in a state of separation. In *Rex v. Clarke,* [1949] 33 Cr. App. Rep. 216, All. E.R. 448, it was held that a judicial separation order containing a non-cohabitation provision revoked the marital consent of the wife making the husband liable for rape. Mere filing a divorce petition is not, however, sufficient. *Regina v. Miller,* [1954] 2 W.L.R. 138. The Code does not accept this latter view. We take this position because of the substantial possibility of consent in the resumption of sexual relations in this situation, coupled with the special danger of fabricated accusations. Again, no New Jersey cases were found.

(b) *Spouse as Accomplice.* Even though a spouse or a woman is excluded from liability by a particular section of this Chapter, the spouse or the woman may be convicted as an accomplice in a sexual act "which he or she causes another person, not within the exception, to perform." This is our law. *State v. Jackson,* 65 N.J.L. 105 (Sup. Ct. 1921); *State v. Goldfarb,* 96 N.J.L. 71 (Sup. Ct. 1921). See cases collected in Commentary to Section 2C:2–6.

3. *Sexually Promiscuous Complaints: MPC Section 213.6(4).* We eliminate this provision of the MPC. We believe that the fact

of the offense is the relevant issue and it is for the Court to properly instruct the issue on the evidence relevant to that issue. See *Schlosser,* Criminal Laws of New Jersey § 2081; *O'Blenis v. State,* 47 N.J.L. 279 (Sup. Ct. 1885); *State v. Rubertone,* 89 N.J.L. 285 (E. & A. 1916); *State v. Ward,* 101 N.J.L. 275 (Sup. Ct. 1925).

4. *Prompt Complaint.* At common law, a strong, but not conclusive presumption was raised against a woman by her failing to complain of rape within a reasonable time after the fact. MPC T.D. 4, p. 264 (1953). In the absence of a statute, making a prompt complaint is admissible to repel a suggestion that the complainant was insincere. See, *e.g., State v. Balles,* 47 N.J. 331 (1966); *State v. Gambutti,* 36 N.J. Super. 219 (App. Div. 1955). No special statute of limitations exists in this State, however, as to rape cases. This provision of the Code establishes such a rule. The specific requirement that the offense be brought to the attention of the public authorities within three months is an innovation. A prosecutor would, however, hesitate to institute prosecution on a stale complaint. The possibility that pregnancy might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing the offense to the attention of the authorities, are sufficient grounds for setting some time limit upon the right to complain. Likewise, the dangers of blackmail or psychopathy of the complainant make objective standards imperative. A specific possibility of extension of time is made in the case of young children and incompetents for the obvious reason that if such individuals, under our rationale, do not possess the judgment and capacity necessary to become willing participants in an act of sexual intercourse, their deficiency may also blind them to the need for complaint. Fear of parental anger or confusion as to the significance of the act might well encourage silence in this situation. Hence the three month period for complaint does not begin to run, for such individuals, until after a competent person specially interested in the victim learns of the offense, but in no event more than one year.

5. *Testimony of Complainants: Subsection 2C:14–6d.* New Jersey now does not require corroboration in rape and carnal abuse cases. *State v. Garcia,* 83 N.J. Super. 345 (App. Div. 1964); *State v. Andolord,* 108 N.J.L. 47 (Sup. Ct. 1931). For seduction, however, a statutory provision specifically requires corroboration. N.J.S. 2A:142–3. See *State v. Brown,* 65 N.J.L. 687 (Sup. Ct. 1902) *aff'd.,* 65 N.J.L. 687 (E. & A. 1903); *State v. Carlone,* 109 N.J.L. 208 (Sup. Ct. 1932); *Zabriskie v. State,* 43 N.J.L. 640 (E. & A. 1881). Neither sodomy nor indecent exposure now require corroboration. *State v. Fleckenstein,* 60 N.J. Super. 399 (App. Div. 1960).

This Subsection requires corroboration for all criminal prosecutions under this Chapter.

§ 2C:14–7. COMMENTARY

This provision was N.J.S. 2A:170–6. It has been downgraded to a petty disorderly persons offense as it seems apparent that it is intended merely to force treatment.

§ 2C:17–1. COMMENTARY

1. *Arson; Background and Rationale.* The common law felony of arson was defined as willful and malicious burning of another's dwelling house or its adjacent structures. *State v. Lucas,* 30 N.J. 37 (1959); *State v. Schenk,* 100 N.J. Super. 122 (App. Div. 1968). There has been a vast legislative development of the crime which has greatly expanded it. Our present statutes are: *2A:89–1* (Arson; punishment); *2A:89–2* (Burning ships and buildings other than dwelling houses); *2A:89–3* (Setting fire to or burning property to defraud); *2A:89–4* (Attempting to destroy buildings or contents of buildings with fire or explosives); *2A:89–5* (Burning or injuring property, crops, trees); *2A:89–6* (Malicious burning of woods or cranberry bogs, fences or lumber).

Most states have statutes which gradate the crime of arson according to varying criteria. The type of structure and the degree of danger to the community are the most frequent. Our present statutes have very little grading. Further, in most states, the penalty for arson as applied to a dwelling is much more severe than in New Jersey.

Section 2C:17–1 grades the offense partly according to the kind of property destroyed or imperiled and partly according to danger to the person. We are reluctant to rest entirely on danger to the person in view of the fact that almost any illegal or careless burning endangers life to some extent, as fire fighters and onlookers are drawn to the scene. To make any dangerous burning a crime of the second degree would be inconsistent with Sections 2C:12–1 and 2. On the other hand, we do not think it useful to go so far as to grade arson with reference to various types of property burned, time of burning, presence of a human being in the burned structure, etc. Instead, we define a single class of more serious burning, *viz.* of a "building or occupied structure." Within this broad category, other agencies can do better than the legislature in proportioning punishment to the actor's demonstrated indifference to human life and other variables in his personality and behavior.

We have enlarged the concept of arson to include exploding as well as burning. The criminologic considerations are quite similar: likelihood of extensive property destruction accompanied by danger to life. Also explosions frequently lead to fires, just as fires sometimes cause explosions.

2. *"Starts a Fire"; Purpose to Destroy or Defraud; Attempt and Preparation.* Section 2C:17–1a defines the most serious offense in terms of starting a fire or causing an explosion. Under it, the actor is guilty of arson even though the fire is extinguished before any significant damage is done. In effect, the attempt (as defined at common law) is punishable equally with the completed offense. With the enactment of Section 2C:5–1, that which would have been mere preparation at common law will be punishable as an attempt and will be penalized equally with the completed offense. Thus, the words "starts a fire or causes an explosion" serve merely to identify the kind of behavior which is the subject of *this* Section, not the point at which criminal liability begins or the line between lesser and graver offenses. As to present law, see *State v. Heard,* 105 N.J. Super. 172 (App. Div. 1969) (fireproof building; slight damage is sufficient under N.J.S. 2A:89–1.) and *State v. Schenk, supra.* (Actual burning necessary, as at common law under N.J.S. 2A:89–1. Any charring, alteration or destruction is sufficient.)

The requirement of purpose to destroy or damage, in clause (1) of Subsection a, makes it clear that the mere employment of fire with more limited purposes, *e.g.*, use of an acetylene torch to detach metal fixtures from a structure, or to gain entry to a building or safe, does not fall within the crime of Aggravated Arson defined by Subsection a. See *State v. Schenk, supra.* It may, however, lead to liability for Arson under Subsection b.

3. *"Buildings or Occupied Structure."* The definition is the same as that used for burglary. The intent is to limit it to substantial, specially cherished property whose burning would typically endanger life.

4. *Property "of Another."* Traditional arson law excepted burning one's own property and other lawful burning by specifying that the property be that "of another" or that the burning be "malicious." *Kane v. Hibernia Mut. Ins. Co.,* 39 N.J.L. 697 (E. & A. 1877). Our statutes abandon the requirement that the property be that "of another" but retains the "malicious" requirement. *State v. Midgeley,* 15 N.J. 574 (1954); *State v. Lentz,* 92 N.J.L. 17 (Sup. Ct. 1919). The Code avoids the word "malicious," because it has acquired an artificial and uncertain meaning, having been used to designate states of mind ranging from intent to recklessness or even gross negligence. Accordingly, it is necessary to retain the restriction of arson to property "of another," except where the culpability of the behavior rests on other factors, *e.g.*, intent to defraud in clause (2) of Subsection a, or recklessness of the safety of persons in clause (1) of Subsection b.

To burn down a structure owned and occupied by the actor may or may not be reckless in relation to other people's safety or valued property, depending on the isolation of the premises and the degree

of care taken, but the actor's poor choice of means to get rid of his own property does not mark him as the same kind of dangerous character as one who burns his own building to defraud an insurer, or another's building to wreak vengeance.

The necessary distinction between destroying property of one's own and destroying others' property requires refinement of the notion of what is one's own. In the law of arson, property is that "of another," if someone other than the actor is the lawful occupant, notwithstanding that the actor may have title." (MPC T.D. 11, p. 39 (1960)).

5. *Burning to Defraud.* Special provision for this situation is common in present law, as in N.J.S. 2A:89–3, and is necessary in the Code which is otherwise confined to burning property "of another." Arson for insurance is perhaps the most frequent and dangerous behavior in the field. Often the property involved is a stock of merchandise which would not be a building or structure within clause (1). Accordingly, clause (2) makes it a crime of the second degree to burn one's own property with purpose to collect insurance. The last sentence of clause (2) serves as a reminder to prosecutors and judges that the heavy penalties of arson are not intended for behavior which, while objectionable as part of a fraudulent scheme, has no element of general or personal danger. There is no reason to penalize the burning of an insured camera in a furnace more severely than any other form of destruction or concealment incidental to the filing of a fraudulent claim. On the other hand, where the fraudulent burning of one's own property entails the dangers typical of other arson, we believe it is properly graded in the most severely punished category of arson.

6. *Arson: Reckless Burning; Criminal Negligence.* Subsection b makes reckless burning of property a crime of the third degree which is denominated as Arson. Considering that recklessness of personal safety, unaccompanied by actual injury, is punishable under this Code as a crime of the fourth degree (Section 2C:12–2), it would be hard to justify extreme severity here. Even if harm is actually caused, classification of the offense as a crime of the second degree seems excessive, for example, in the case of a workman who accidentally sets fire to a shop by taking unjustified risks with heating tools, electrical equipment, or explosives. Accordingly, Subsection b proposes third degree penalties for reckless burning.

The question whether criminal negligence, as distinguished from recklessness, should be penalized when fire is involved arises in view of the fact that a number of states do punish types of negligent burning. The question is especially important under this Code, because the recklessness offenses defined in Subsection b requires "conscious disregard" of risk involving a gross deviation from proper standards of conduct. The issue has been resolved by defining "criminal mis-

chief" in Section 2C:17–3a to include negligent burning, with minimal penalties where no substantial harm is done.

7. Failure to Control or Report a Fire. The Code in Subsection c of this Section follows existing law in restricting punishments of omissions to failure to perform a legally required act.

§ 2C:17–2. COMMENTARY

1. This Section presents a new concept in American penal law. Our law contains a few *ad hoc* provisions, such as N.J.S. 2A:170–69.4 through 69.6 dealing with excavating near gas pipes and with use of explosives near gas pipes. See also N.J.S. 2A:88A–1 (Tampering with, damaging, or making improper adjustments to air craft) and N.J.S. 2A:122–9 (Injuring fire alarm system; false alarms). The Code generalizes these. It is patterned on European legislation dealing with activity creating a "common danger." Fire, dealt with by the law of arson, is the prototype of forces which the ordinary man knows must be used with special caution because of the potential for wide devastation. Modern legislation puts explosion, flood, poison gas, and avalanche in the same category, and modern technology development alerts us to possibilities of catastrophe in mishandling radioactive material. (MPC T.D. 11, p. 52 (1960).)

2. Subsection b, Failure to Report a Catastrophe, as in Section 2C:17–1c, creates a limited duty to report.

§ 2C:17–3. COMMENTARY

1. *Damaging Property.* This Section defines the behavior that is punishable because it harms or threatens to harm property. Insofar as the Section deals with purposeful unjustified actual harm to tangible property it corresponds to the traditional "malicious mischief" offense. Beyond that, the Section attempts to generalize a large mass of legislation punishing careless or unintentional harms to particular kinds of property and behavior which in the judgment of the legislature should be forbidden in order to avert risk of harm. MPC T.D. 2, pp. 126–127 (1954). Our Statutes now contain the "mass" of provisions referred to, all of which are replaced by this Section.

2A:122–1.	Malicious destruction of or damage to property. (See generally, *State v. Tennison*, 92 N.J. Super. 452 (App. Div.).)
2A:122–2.	Injuring or destroying mortgaged property after foreclosure proceedings begun.
2A:122–4.	Destroying boundary marks.
2A:122–5.	Tapping, interfering with, or damaging sewers or sewerage works.
2A:122–6.	Malicious injury to electric wires or plant.

2A:122–7. Running water into mines or damaging or obstructing airways, shafts, etc.

2A:122–8. Obstructing extinguishment of fires; hindering or obstructing fire apparatus.

2A:122–9. Injuring fire alarm system; false alarms.

2A:122–10. Defacing, destroying or damaging buildings used for religious, charitable or educational purposes.

2A:122–12. Desecration or display of desecrated religious symbol.

2A:170–32. Removing or defacing posted notices against trespassing.

2A:170–33. Unlawful dumping of junk on private property.

2A:170–35. Cutting, destroying, or removing trees or timber on land of another without owner's consent; exception.

2A:170–36. Malicious injury to property.

2A:170–37. Malicious mischief.

2A:170–39. Poisoning domestic animals.

2A:170–93. Injuries to or destruction of property by tenant.

2. *Tampering.* Paragraph (2) of Subsection a relates to interference with another's property with purpose or risk of harm, although the property interfered with may not itself be damaged, as when an unauthorized person moves a railroad switch or sets a control lever in an industrial plant in such a way as to slow down operation. In existing law tampering offenses are typically limited to public utility property, vehicles, and particular situations like opening the gate of a corral to permit livestock to escape. Note that the offense cannot be stated as "purposely or recklessly tampers," since the tampering itself must be intentional. The recklessness applies only to the harm which may follow. MPC T.D. 2, p. 127 (1960).

3. *Gradation.* As in the case of theft, the offense is gradated according to amount of harm.

§ 2C:18–1. COMMENTARY

1. *"Occupied Structure."* This designation of the premises protected by burglary law (which is also incorporated into arson law) is narrower than current statutes which often extend to any structure or vehicle. This is true in New Jersey under N.J.S. 2A:94–1 which makes as the subject of breaking or entering "any building, structure, room, ship, vessel, car, vehicle or airplane." See *State v. Butler*, 27 N.J. 560 (1958), comparing this statute with the common-law offense. By restricting the offense to buildings and occupied structures, we confine it to the intrusions which are typically most alarming and

dangerous. Occupance is to be distinguished from "presence" of a person, which is an aggravating circumstance under some statutes. We reject this because the presence or absence of a person in a structure which is normally occupied will often be purely a matter of chance and the intruder is ordinarily well able to judge whether the structure is a dwelling, store, factory, warehouse, or other place for the conduct of human affairs. It is unnecessary to prescribe that "buildings are generally employed by human beings in ways that amount to occupancy."

§ 2C:18–2. COMMENTARY

1. *Background and Rationale.* The core of the common law concept of burglary was breaking and entering a dwelling house at night with intent to commit a felony therein. See *State v. Burrell*, 120 N.J.L. 277 (E. & A. 1938); *State v. Hauptmann*, 115 N.J.L. 412 (E. & A. 1935); *State v. Butler*, 27 N.J. 560 (1958). The scope of the offense has been drastically enlarged by statute so that now it may be committed by entry alone, in day as well as night, and with intent to commit many more crimes: N.J.S. *2A:94–1.* (Breaking and entering or entering); N.J.S. *2A:94–2.* (Use of high explosives in breaking or entering); N.J.S. *2A:170–3.* (Presence in or near buildings or other places with intent to steal.)

This expansion of the crime of burglary has led to serious problems. Since every burglary is by hypothesis an attempt to commit some other crime, and since even the lower degrees of burglary are often punishable more severely than the crime which the actor was preparing to commit, the great expansion of burglary has introduced serious anomalies in prosecution and punishment. The prosecutor and the courts have it in their power to treat as burglary behavior which is distinguishable from theft on purely artificial grounds. This over-expansion of burglary legislation is probably explicable as an effort to compensate for defects of traditional attempt law. The common law ordinarily did not punish a person who embarked on a course of criminal behavior unless he came very close to his goal; sometimes it is put that to be guilty of attempt the actor must do the final act which would accomplish his object but for the intervention of circumstances beyond his control. Moreover, penalties for attempt were disproportionately low as compared with the completed offense. Expansion of burglary provided a kind of solution for these problems. By making entry with criminal intent an independent substantive offense, the moment when the law could intervene was moved back, and severe penalties could be imposed.

The notable severity of burglary penalties is accounted for by the fact that the offense was originally confined to violent nighttime assault on a dwelling.

But the Code remedies the defects of common law attempt, moving the point of criminality well back into the area of preparation to commit crime, and it provides severe penalties for attempts to commit grave crimes.

The needed reform takes the direction of narrowing the offense to something like the distinctive situation for which it was originally devised: invasion of premises under circumstances specially likely to terrorize occupants. MPC T.D. 11, pp. 55–57 (1960).

2. *Unprivileged Entry.* The definition of the burglarious entry in the Code is like our present statutes. (N.J.S. 2A:94–1 and 2; see *State v. O'Leary*, 31 N.J. Super. 411 (App. Div. 1954).) At common law the "breaking" had become little more than symbolic, often requiring absurd distinctions. The core of the conception of breaking seems to have been "unlawful intrusion" or, as put in Subsection a, "entry without privilege." At least this much of the concept of "breaking" should be retained in order to exclude from burglary situations like the following: a servant enters his employer's house meaning to steal some silver, a shoplifter enters a department store during business hours to steal from the counters, a litigant enters the courthouse with intent to commit perjury; a fireman called to put out a fire resolves, as he breaks down the door of the burning house, to appropriate some of the householder's belongings. Such situations involve no intrusion, no element of aggravation of the crime which the actor proposed to carry out, and we therefore decline to follow those current statutes which purport to include any entry with criminal purpose. We do, however, add to the MPC provision as to unprivileged entry one forbidding "surrepticious remaining." In our view, the dangers inherent in the two are indistinguishable.

A person is "privileged" to enter, within the meaning of Section 2C:18–2, if by license, custom or otherwise, the general public is invited or permitted to enter, and it is not intended that a proprietor of a store might enlarge the applicability of the burglary law by posting notices that shoplifters are not welcome. Furthermore, under the General Principles of this Code, a person who mistakenly supposed that he had a right to enter or remain in a building would not be guilty of burglary, even if he entered or remained to commit a crime. MPC T.D. 11, p. 58 (1960).

The Code also refers to "premises . . . open to the public" which makes it clear that entry into premises accessible to the public cannot be prosecuted as burglary even if the proprietor sought to restrict the implied license, for example, by posting notice at the door of a department store that loiterers and shoplifters are forbidden to enter. MPC P.O.D., p. 157 (1962). *Davis v. Hellwig*, 21 N.J. 412, 418 (1956), appears to be inconsistent with this view of burglary.

3. *Criminal Purpose.* Unlike our law, the Code makes criminal the burglarious purpose to commit "any offense." Three aspects of the provision make it permissible to so broaden the crime. These are (1) the restrictions of burglary to occupied structures or vehicles, (2) the requirement of unlawful or instrusive entry, and (3) the moderation of penalties except in circumstances of special danger. Absent these, burglary law would visit its special severity inappropriately such as on a tramp who enters a deserted barn meaning to burn a plank for warmth, or a swindler who enters a store to sell worthless securities or pass a bad check.

To specify "any offense" comports better with the realities of law enforcement. The burglar is often apprehended, if at all, in the process of entering, when it may be difficult to know more than that he is up to some mischief. Recognition of this is reflected in the rule that the specific criminal purpose need not be pleaded or proved with the same particularity as in prosecuting the crime which the burglar had in mind. If there is reasonable doubt as to the criminal purpose of the intruder, it should be enough to convict him of criminal trespass. Certainly intrusion for such innocent purposes as sleep, escape from inclement weather, or to secure an interview, should not entail the possibility of criminal penalties, based on a presumption of criminal intent. MPC T.D. 11, pp. 60-61 (1960). See *State v. Tassiello,* 75 N.J. Super. 1 (App. Div.) *aff'd.,* 39 N.J. 282 (1962).

The word "therein" in Subsection a is intended to make it clear that the mere purpose to commit criminal trespass by intrusion into the premises does not satisy the criminal purpose requirement for burglary.

4. *Grading of Burglary.* The gist of the burglary offenses here envisioned is unlawful intrusion in occupied structures by dangerous characters. Since we do not view the offense as a means of penalizing early stage attempts to commit heinous offense, we reject grading related to the gravity of the ultimate offense.

5. *Duplicate Penalties.* The provision in Subsection c restricting duplicate convictions for burglary and for the offense which the burglar intended to carry out is designed to prevent the abusive practice of imposing consecutive sentences for burglary with intent to steal and for the actual theft.

§ 2C:18-3. COMMENTARY

1. *Present New Jersey Law.* This State now has a series of disorderly persons act offenses dealing with trespassing.

2A:170-31. Trespassing; penalty

See *State v. Shack,* 58 N.J. 297 (1971); *State v. Terwillinger,* 49 N.J. Super. 149 (App. Div. 1958)

and *State v. Kirk,* 84 N.J. Super. 151, (Law Div. 1964) *aff'd.,* 88 N.J. Super 130 (App. Div. 1965).

2A:170–34. Trespassing with horses and hounds

2A:170–58. Jumping on or off trains

2A:170–59. Trespassing upon railroad premises or cars

2A:170–31.1. Peering into windows or other openings of dwelling places

2A:170–33. Unlawful dumping of junk on private property

2. The Code's policy is to consolidate these into a comprehensive statutory enactment. Some trespasses involving no physical damage to the property calls for criminal sanctions. Not every treading on land of another should be an offense, and there is wide variation in existing legislation defining the trespasses which ought to be punishable. The common thread that runs through all the diversity of existing petty criminal legislation is the notion of intrusion: most people have no objection to strangers tramping through woodland or over pasture or open range, but a building is generally intended to keep out persons not licensed by the owner. A fence may be ambiguous: to keep livestock in or out, rather than to hinder passage of human beings. The theory of this Section is that where a landowner wishes to assert his right to exclude from open land and to have the backing of the criminal law, it is not too much to ask him to give notice. With regard to orchards, plowed land and the like, it is enough to punish purposeful or reckless damage.

3. *Affirmative Defenses: Subsection c.* The affirmative defense provided in Subsection c in respect to premises open to the public parallels the conception of licensed entry which we have introduced in the burglary section. The primary objective is to exclude criminal prosecution for mere presence of a person in a place where the public generally is invited. Persons who become undesirable by virtue of disorderly conduct may of course be prosecuted for that offense. The Section is not intended to preclude resort by the occupant to civil remedies for trespass, including his privilege, whatever it may be, of barring entry or ejecting. In controversies such as have arisen in the "sit-in" cases, the effect of the present proposal would be merely to make it explicitly an issue whether the conditions imposed on access to premises open to the public were "lawful." They might be unlawful by virtue of federal law relating to facilities of interstate transportation, statutory or common law requirements of non-discrimination in places to which the public resorts, or for other reason.

§ 2C:19-1. COMMENTARY

1. *Background and Rationale.* Common law robbery was theft of property from the person or in the presence of the victim by force or by putting him in fear either of immediate bodily injury or of certain other grievous harms. *State v. Cottone,* 52 N.J. Super. 36 (App. Div. 1958). The offense was a capital felony. Most states, like New Jersey, have eliminated the death penalty for robbery. Most have also introduced a grading scheme. See MPC T.D. 11, pp. 68–69 (1960). New Jersey has not and instead has a statute declaratory of the common law. N. J. S. 2A:141–1; See *State v. Cottone, supra.* It should be noted that N.J.S. 2A:151–5, frequently used in connection with this statute allows an additional penalty of imprisonment for being armed during the commission of the offense.

Robbery then, consists of a combination of theft and actual or threatened injury. *State v. McDonald,* 91 N.J.L. 233 (Sup. Ct. 1918); *State v. Bowden,* 62 N.J. Super. 339 (App. Div. 1960). Each element of it consists, under the Code, of a separate offense. The Code rejects, however, the notion that it might be sufficient to prosecute for these crimes and to cumulate punishment where appropriate:

> "Many threats are not criminal, apart from special circumstances. For example, a threat (as distinguished from actual attempt) to punch someone in retaliation for a slight is generally not criminal. Only a minority of states provide misdemeanor penalties even for coercive threats, *i.e.*, those designed to secure some non-pecuniary concession from the person threatened. . . . Moreover, even if all threats were subject to minor penalties, *e.g.*, as 'disorderly conduct,' the combination of penalties for a petty theft and a petty threat or minor violence by no means corresponds to the undesirability and danger of the offense. The violent petty thief operating in the streets and alleys of our big cities, the 'mugger,' is one of the main sources of insecurity and concern of the population. There is a special element of terror in this kind of depredation. The ordinary citizen feels himself able to guard against surreptitious larceny, embezzlement, or fraud, to some extent, by his own wits or caution. But he abhors robbers who menace him or his wife with violence against which he is helpless, just as he abhors burglars who penetrate the security of his home or shop. In proportion as the ordinary man fears and detests such behavior, the offender exhibits himself as seriously deviated from community norms, requiring more extensive incapacitation and retraining. In addition, the robber may be distinguished from the stealthy thief by the hardihood which enables him to carry out his purpose in the presence of his victim and over his opposition —obstacles which might deter ordinary sneak thieves." (MPC T.D. 11, p. 69 (1960).)

2. *"In the Course of Committing Theft."* This provision is unusual insofar as it makes classification of robbery depend in part on behavior after the theft has been accomplished in that it defines the term to include immediate flight following the theft. This was not the common law rule but it has been adopted by statute or by decision in most jurisdictions. MPC T.D. 11, p. 70, n. 3 (1960). The thief's willingness to use force against those who would restrain him in flight strongly suggests that he would have employed it to effect the theft had there been need for it. *Cf., State v. Zupkowsky,* 127 N.J.L. 218 (E. & A. 1941) (Felony murder during escape from robbery); *State v. Gimbel,* 107 N.J.L. 235 (Sup. Ct. 1930) (Same).

3. *Taking from the Person or in the Presence.* This is the traditional basis for classifying theft as robbery. *State v. Foro,* 92 N.J. Super. 356 (App. Div. 1966); *State v. Cottone, supra; State v. Butler,* 27 N.J. 560 (1958). It is not made explicit in the Code but would ordinarily be a part of the case since the circumstances of violence imply presence of the victim. In a few circumstances, however, the Code would apply where property is not taken from the person or presence. For example, an offender might threaten to shoot the victim in order to compel him to telephone directions for the disposition of property located elsewhere.

4. *Attempted Robbery, Assault with Intent to Rob.* Common law larceny and robbery required asportation, however slight, and, therefore, the penalty for robbery was avoided if the crime was interrupted before the accused laid hold of the goods, or if it developed that the victim had no property to hand over. The Legislature deemed the penalties for attempt too mild in such case so the crime of assault with intent to rob and assault with an offensive weapon were devised. (N.J.S. 2A:90–2 and 3.) There is no penological justification for treatment distinctions on this basis and, therefore, the Code makes it immaterial whether property is or is not obtained.

5. *The Aggravating Circumstances; Grading.* The circumstances specified in Subsection a are largely self-explanatory. Clause (2) encompasses use of a toy pistol or unloaded gun, since a device can be employed to threaten serious injury and may be effective to create fear of such injury. It has often been contended, usually unsuccessfully, that such objects are not "dangerous" or "deadly." If, then, a weapon be used to menance or recklessly injure, the offense will be a crime of the second degree; and if it be used to attempt to kill or seriously injure, the offense will be a crime of the first degree.

6. *Gradation.* We have added to the aggravating circumstances set forth in the MPC, two from the New York Code (§ 160.15): being armed with a deadly weapon and use or threatened immediate use of a dangerous instrument.

§ 2C:20–1. COMMENTARY

1. Most of the definitions in this Section are self-explanatory or are considered as they apply to other Sections in this Chapter. Some require explanation:

2. *"Deprive": Section 2C:20–1a.* Traditional larceny law required an intent to deprive the owner permanently; but in cases involving high-value, mobile property, like cattle and vehicles, it was held that a jury might find an intent to permanently deprive on the basis of evidence that the offender took the property for temporary use without intending to return, abandoning it under circumstances that amounted to a "reckless exposure to loss." *State v. Davis*, 38 N.J.L. 176 (Sup. Ct. 1875), is the leading case. Where the intent to return was contingent on payment of a reward or on repurchase by the owner, the jury could find an intent to deprive permanently in case the owner refused to pay the reward or other demand. *State v. Hauptmann*, 115 N.J.L. 412, 426 (E. & A. 1935).

The effect of the Code's definition of "deprive" is: (a) to retain the general rule that it is sufficient if the withholding be permanent; (b) to accept the common law position of *Davis* that some temporary deprivations are thefts (those that involve a substantial risk of total loss in some contingencies) and of *Hauptmann* as to rewards; and (c) to extend theft liability to situations of prolonged deprivations which substantially subvert the owner's dominion over his property.

3. *"Property of Another": Section 2C:20–1g.* This definition is intended to prevent a person from raising as a defense to a charge of theft that the property involved was the subject of certain kinds of joint or unusual ownership characteristics. The general rule that property had to be "of another" (N.J.S. 2A:119–2) leads to some complications. See *State v. Satsky*, 4 N.J. Misc. 335 (Sup. Ct. 1926); *Durback v. Fidelity & Guaranty Ins. Corp.*, 17 N.J. Super. 160 (App. Div. 1952); *Adams v. State*, 45 N.J.L. 448 (Sup. Ct. 1882).

The Code definition covers several situations: (a) *Co-ownership.* This Subsection removes any doubt as to the liability of a partner or tenant-in-common or co-owner of a joint bank account for stealing from the other parties who share an interest in the same property. In New Jersey (*Durback v. Fidelity & Guaranty Ins. Co., supra*), convictions are prevented by the conception that each of joint owners has complete title to the jointly owned property, so that he cannot misappropriate what already belongs to him. Whatever the merits of such notions in the civil law, it is clear that they have no relevance to the criminal law's effort to deter deprivations of other people's economic interests. (b) *Wrongfulness of Victim's Possession.* The Code, in this regard, reflects existing law. It is inconsistent with the objectives of theft law to permit one who wrongfully appropriates wealth an escape from liability merely because the victim of the mis-

appropriation has also incurred criminal liability or forfeiture of property rights with respect to the property. The definition does not, however, preclude the application of the claim of right defense. *Id.* See Section 2C:20–2c. (c) *Owner of Encumbered Property; Security Title in Another.* The final sentence of the definition in Subsection g removes from the definition of "property of another" that which is in possession of the actor where another person has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. Although many of the security devices which creditors and vendors have worked out for their own protection put them, at least for civil law purposes, in the status of owners of the property, a vendee or debtor in possession is likely to regard himself as the owner, subject only to an obligation to pay the debt. The use of criminal sanctions to control the behavior of such vendees and debtors therefore presents unique problems which can be better dealt with in the context of other provisions for the protection of creditors, *e.g.*, fraudulent concealment of assets.

4. *"Trade Secrets": Section 2C:20–1h.* "Property" is defined in Subsection f to include trade secrets. That term is defined here as in N.J.S. 2A:119–5.2(c).

§ 2C:20–2. COMMENTARY

1. *Consolidation of Theft Offenses; Section 2C:20–2a.* The general definition of theft in this Chapter consolidates into a single offense a number of heretofore distinct property crimes including larceny, embezzlement, false pretense, cheat, extortion, blackmail, fraudulent conversion, receiving stolen property and the like. Consolidation is accomplished by permitting a conviction for theft if it was accomplished by any of the methods set forth in Chapter 20, notwithstanding that it was erroneously specified in the charging papers.

The decision to consolidate theft offenses is one of the most important in the Code. The common unifying conception in all these is the "involuntary transfer of property"; the actor appropriates property of the victim without his consent or with consent obtained by fraud or coercion. The traditional distinctions are explicable in terms of a long history of expansion of the role of the criminal law in protecting property but many of the distinctions have real differences in the feeling of the society toward varying forms of theft.

Consolidation cannot have for its purpose the avoiding of a properly specific delineation of the various types of criminal property deprivations. It is certainly not a solution, as has sometimes been supposed, for shortcomings in the definition of any branch of theft.

The purpose of consolidation is to prevent procedural difficulties resulting from the fact that the boundaries between the traditional offenses are obscure and from the rule that a defendant who is charged

with one offense cannot be convicted by proving another. In many cases, an unwary prosecutor might stumble as between larceny, false pretense and embezzlement. There are several ways of solving this procedural problem. One is to define a new crime so broadly as to include all our vaguely separated theft offenses, so that evidence of appropriation by any of the proscribed techniques will support the charge. In addition, upon indictment for any property offense the defendant may be convicted of any other which is established by the evidence or may be convicted of the offense charged on evidence establishing another property offense. The first course cannot be relied on alone if a court is free to require the indictment to specify more than the name of the offense, so as to perpetuate the common law distinctions for pleading purposes.

Subsection a, then deals with the problem by making "theft" into one crime, by permitting a conviction for any form of theft defined in this Chapter under a simplified charge, and by giving the Court power to give additional information to the defendant to avoid prejudice.

2. *Present New Jersey Law.* Our law of theft is not, of course, consolidated at this time. The relevant statutes now in the area which are covered by the various sections of the Chapter are:

Chapter 91. Banks and Financial Corporations
2A:91–4. Officers of banks overdrawing accounts

Chapter 102. Embezzlement, Conversion and Misappropriation
2A:102–1. Embezzlement by public officers and employees
2A:102–2. Embezzlement by trustee, etc.
2A:102–3. Conversion of property of corporation by director or officer
2A:102–4. Embezzlement by officers or employees of banks
2A:102–5. Embezzlement by employees, agents, consignee, factor, bailee, lodger or tenant
2A:102–6. Embezzlement by carrier
2A:102–7. Purchasing property from carrier without consent of owner
2A:102–8. Embezzlement and conversion by operatives
2A:102–9. Misappropriation of funds paid by mortgagee to mortgagor for building purposes
2A:102–10. Misappropriation of funds paid to contractor for building purposes
2A:102–11. Misappropriation of funds paid to subcontractor for building purposes
2A:102–12. Misappropriation of funds received by contractor for construction of public improvement
2A:102–12.1. Evidence: sufficiency to authorize conviction
2A:102–13. Advance funeral payments
2A:102–14. Repayment on demand.
2A:102–15. Invalid advance funeral payment agreements

2A:102–16. Violations
2A:102–17. Exceptions

Chapter 105. Extortion, Threats and Unlawful Taking

2A:105–1. Unlawful takings
2A:105–2. Public officer or employee, judge or magistrate taking fees in criminal cases
2A:105–3. Sending or delivering threatening letters or letters demanding money
2A:105–4. Threatening to kidnap, kill or injure for purposes of extortion
2A:105–5. Loans, payment or repayment: threatening to kidnap, kill or injure

Extortion is also a common-law crime under N.J.S. 2A:85–1. See *State v. Morrissey,* 11 N.J. Super. 298 (App. Div. 1951).

Chapter 111. Frauds and Cheats

2A:111–1. Obtaining money, property, etc., by false pretense
2A:111–2. Obtaining money or property by falsely pretending to be poor or unemployed
2A:111–3. Obtaining medical treatment or financial assistance by false representations
2A:111–4. Furnishing improper supplies pursuant to orders of relief authority
2A:111–6. Obtaining money by fraudulent game or device
2A:111–8. Making false reports as to solvency: obtaining property thereby; confirming false reports previously made
2A:111–19. Defrauding hotel keepers and landlords; evidence of intent
2A:111–20. Removal or sale of mortgaged property
2A:111–21. Fraudulent disposition of borrowed or leased property
2A:111–21.1. Fraudulent disposition of personal property subject to security interest
2A:111–22. False statements as to pedigree of animals
2A:111–23. Misrepresentations in regard to redemption of tax sale certificate and holder's rights
2A:111–24. Misrepresentation that articles were made for or acquired from federal government or its armed forces
2A:111–28. Soliciting contributions for charitable organizations; misrepresentations
2A:111–29. Nonexistent organizations, soliciting contributions for
2A:111–30. Use of funds contributed for charitable purposes for other purposes
2A:111–31. Violation a misdemeanor

Article 3. Trespassing; Injury to Real and Personal Property

2A:170–38. Unlawful taking of motor vehicle
2A:170–40. Temporary taking of horses
2A:170–41. Unauthorized use of plays and operas

Article 4. Frauds and Misrepresentations

2A:170–43. Obtaining valuable thing from state, municipality, charitable organization or association by false statement
2A:170–44. Obtaining free hospital treatment by misrepresentation
2A:170–46. Damaging rental motor vehicle mileage registering instrument; evidence of intent to defraud.
2A:170–47. Defrauding hotel or restaurant keeper or hospital; evidence of intent
2A:170–48. False statements concerning hotels or lodging houses
2A:170–49. Obtaining property or service by fraudulently operating coin receptacles
2A:170–50. Hiring horses or wagons by deceit

Article 6. Disorderly Acts Relating to Public Utilities, Conveyances, Roads and Other Public Property

2A:170–55. Failure to pay fare on public conveyance
2A:170–63. Fraudulently tapping electirc wires, or gas or water meters or pipes; presumptive evidence
2A:170–64. Tampering or connecting with electric meters; presumptive evidence
2A:170–64.1. Coin box telephones, interfering with
2A:170–64.2. Obtaining telephone and telegraph service by fraud

3. *Grading of Theft Offenses*

(a) *Generally.* As is true with almost all jurisdictions, New Jersey now discriminates in punishment of theft according to the amount stolen. Under N.J.S. 2A:119–2, theft of more than $500.00 is a high misdemeanor and of less than $500.00 is a misdemeanor. Our statutes, however, also have several specific situations (*e.g.*, N.J.S. 2A:119–2 (Larceny from the Person) and N.J.S. 2A:119–8.1 (Theft of Narcotics)) which upgrade the offense regardless of the amount.

We continue to gradate based on amount stolen and also continue the policy of upgrading certain types of thefts regardless of the amount stolen. In this regard, we reject as too lenient the grading system recommended by the MPC and look more in the direction of the Codes of other states, particularly New York.

First, we make theft by extortion a crime of the second degree. We do so because of the overtones of this offense in the area of

organized crime. Second, we make thefts of more than $500 crimes of the third degree and upgrade certain other thefts to a crime of the third degree without regard to amount: thefts of firearms, vehicles, drugs, some receiving stolen property, thefts from the person, in violation of a fiduciary obligation or of public records. Finally, all other thefts (*i.e.*, generally, of less than $500) are crimes of the fourth degree unless the defendant proves the value of the stolen property to be less than $50 in which case it is a disorderly persons offense.

(b) *Standard of Value.* No New Jersey cases were found establishing the standard of value to be used in determining the grade of larceny. The Code in Subsection b(3), is intentionally vague. The first sentence is intended to forestall defense contentions that a finding of value in excess of the critical figure should be set aside because the court used one standard of value rather than another. The value test is such a rough one at best that a trial court's standard should be accepted unless clearly arbitrary.

(c) *Aggregation of Amounts Stolen in Separate Transactions.* The second sentence of Subsection b(3) permits aggregation of amounts. The scope of the actor's disregard of property rights cannot always be judged by looking only at the amount which he takes at a single moment from a single person. The bank teller who, day after day, steals a $20 bill from his employer will have $600 at the end of a month, and is clearly engaged in criminal theft. The driver of a department store delivery truck containing hundreds of parcels, each worth less than $50, ought not to be regarded as a petty thief, guilty of multiple offenses, when he sells the contents of the truck to a "fence" and makes off with the proceeds. A swindler who moves along the street cheating housewives out of individually petty amounts is in the same situation, criminologically, although both the place and the victim change with each transaction.

4. *Claim of Right: Subsection c.* To be guilty of theft, the actor must be aware that he is appropriating property and that it is the property of another, *i.e.*, there must be a "conscious" misappropriation. He is not a thief if he mistakenly supposes that the owner has consented or that the law gives him the right to take without the consent of the owner. However, it would be sufficient for the prosecution to charge and prove appropriation of property without consent of the owner; the burden is then upon the accused to come forward with some evidence that would bring him within the exceptions for innocent misappropriation.

The Code adopts the position that a genuine belief in one's legal right shall in all cases be a defense to theft. Persons who take only what they believe themselves entitled to constitute no significant threat to our property system and manifest no character trait worse than ignorance. The decisions rejecting the defense represent, in the main, fact situations of extremely incredible claims. A trial court need not,

of course, give an instruction with regard to a defense for which no credible testimony whatever is adduced. But this principle cannot be applied to cases where the defendant testifies as to his own belief at the time of appropriation. Juries should be trusted to reject incredible claims. If absolute criminal liability for wrongful withholding of public funds be desirable, this should be accomplished elsewhere than in a statute defining "theft."

Subsection c(3) includes a kind of privilege of self-service for *bona fide* customers.

5. *Theft from Spouse: Subsection d.* This Subsection permits theft from spouses, except as to household and personal effects which may only be stolen if the parties no longer live together.

§ 2C:20–3. COMMENTARY

1. This Section establishes the basic "taking" rule defining the crime of theft. To explain it, it is important to refer back to Section 2C:20–1 which defines "deprives" (Subsection a); "movable property" (Subsection d); "property" (Subsection f), and "property of another" (Subsection g).

2. The crime here defined may be committed in many ways, *i.e.*, by a stranger acting by stealth or snatching from the presence or even the grasp of the owner, or by a person entrusted with the property as agent, bailee, trustee, fiduciary or otherwise. Thus offenses which formerly fell into such categories as larceny, embezzlement and fraudulent conversion are dealt with here. In contrast to most existing embezzlement legislation there is no effort to spell out the various relations of trust which can lead to liability. It is immaterial what relation the thief has to the owner or to the property.

3. *Distinction Between Movable and Immovable Property; Section 2C:20–1d.* The definition of "property" is quite comprehensive. Real estate is included as it should be for most purposes of a theft law, *e.g.*, obtaining real estate by deception or intimidation. But mere use or occupation of land should not be classified as theft, even though it be an exercise of unauthorized control with a purpose of permanent appropriation. The immobility and relative indestructibility of real estate makes unlawful occupancy a relatively minor harm for which civil remedies, supplemented by mild sanctions for trespassing, should be adequate. Further, the definition removes landlord-holdover tenant cases from theft law.

Subsection b, however, makes it clear that a trustee, guardian, or other person empowered to dispose of immovable property of others, subjects himself to theft liability if he misappropriates the property in ways that may well be beyond effective relief by civil remedies, *i.e.*, by a transfer or encumbrance which, being made by the holder of legal

title to a person acting in good faith, would be effective as against beneficial owners.

4. *Unlawful Taking or Exercise of Unlawful Control.* As applied to movable property, unlawfully taking or exercising unlawful control is the act which makes the conduct criminal: this description of the behavior that constitutes theft of the larceny-embezzlement type replaces the common law larceny requirements of "caption" and "asportation," as well as a great variety of current legislative terms.

We have chosen "unlawful taking or exercise of unlawful control" as the test, thus dispensing with the mechanical common law standards of physical seizure and movement. "Taking" unauthorized control becomes the touchstone in the ordinary case of theft by a stranger; "exercise" of unauthorized control is the requirement in the typical embezzlement situation where the actor already has lawful control. The test has the virtue of simplicity, which is important especially for use in jury trials. It has sufficient flexibility for application to the tremendous diversity of situations to be covered in a modern economy. The test also appears to discriminate between attempt and accomplishment at a psychologically significant point. It seems likely, for example, that the critical psychological "threshhold" for a would-be auto thief is probably the point at which he enters the car and addresses himself to the controls, rather than the moment when he releases the clutch or steps on the gas to put the car in motion. Before he "takes the wheel" he will be more easily frightened off or he may voluntary desist. The psychological difference between starting the engine and starting the car is probably very small. MPC T.D. 2, pp. 61–62 (1953).

5. *The Mental Element.* Subsection a requires a purpose to deprive (Section 2C:20–1a). Subsection b requires a purpose to benefit himself or another not entitled thereto.

§ 2C:20–4. COMMENTARY

1. *Present New Jersey Law.* This form of theft is presently covered by our False Pretense statute, N.J.S. 2A:111–1, and by several other statutes in N.J.S. 2A:111 (Frauds and Cheats).

2. *Section 2C:20–4: Obtains Property of Another.* Definitions of "obtain," "property" and "property of another" may be found in Section 2C:20-1. If the deception is effective to cause the victim to part with property, it is in general no defense that a reasonable person would not have been misled, or that the deception was as to something not "material," or that other influences also contributed to the victim's decision. The only qualifications of this proposition are expressly set forth below. (MPC T.D. 2, p. 65 (1953).) "Materiality" and "reliance" are not required in New Jersey. *State v. Allen*, 53 N.J. 250 (1969), *reversing* 100 N.J. Super. 42 (App. Div. 1968).

3. *The Mens Rea.* Our statute now speaks of a defendant acting "knowingly or designedly, with intent to cheat or defraud." *State v. Allen, supra; State v. Fladger,* 94 N.J. Super. 205 (App. Div. 1967); *State v. Greco,* 29 N.J. 94 (1959). The Code continues this high standard of proof as to the requisite *mens rea* by requiring proof of "purpose." Accidental or careless creation of a misimpression is not included. The actor must intend to create the impression for the purpose of inducing the owner to part with his property. Even if he recognizes that the impression created is likely to have the effect of inducing consent, he is not guilty of deception unless that was his purpose. Likelihood of deception is, of course, evidence of a purpose to deceive; but the ultimate issue is subjective purpose to deceive. However, it is sufficient that inducing consent was one of several purposes of the actor. (MPC T.D. 2, p. 65 (1953).)

4. *The Act: Creating an Impression.* For the definition of the act of false pretenses in N.J.S. 2A:111–1 of making "false promises, statements, representation, tokens, writings or pretenses," the Code substitutes the broader language of "creating or reinforcing a false impression." So far as "creating" is concerned, no substantive change is contemplated. The cases construing the false pretense statutes recognized that deceptive non-verbal behavior was within the statute. The broader language is preferred because it says what "false pretense" and "misrepresent" had to be construed to say. It is the falsity of the impression purposely created or reinforced, rather than of any particular representation made by the actor, which is determinative. Thus it is possible to deceive by statements which are literally true. Deception includes halftruths, *i.e.,* statements which are literally true, but misleading because of the omission of necessary qualifications. See *State v. Donohue,* 84 N.J. Super. 226 (App. Div. 1964); *State v. Tomlin,* 29 N.J.L. 13 (Sup. Ct. 1860); *State v. Vanderbilt,* 27 N.J.L. 328 (Sup. Ct. 1859).

5. *"Reinforcing an Impression."* These words make criminal a false statement of an existing state of mind, taking care of the case in which the victim of a fraud had a false impression prior to the actor's intervention, so that it could not be said that the actor "created" the impression. If the actor confirms the false impression for the purpose of inducing consent and obtains property thereby he will be guilty of theft. Mere failure to correct a known misimpression which is influencing the owner would not ordinarily amount to "reinforcing," except in the situations covered by Subsections b through d, but any affirmative contribution may suffice. MPC T.D. 2, p. 65 (1953). This is now our law. *State v. Trypuc,* 53 N.J. Super. 6 (App. Div. 1959); *State v. Pearson,* 39 N.J. Super. 50 (App. Div. 1956); *State v. Kaufman,* 18 N.J. 75 (1955).

6. *Actor's Belief.* Under present law, not only must the statement be false but the actor must know it. Objective and subjective falsity

are necessary. *State v. Greco, supra; State v. Samurine,* 47 N.J. Super. 172 (App. Div. 1957) *rev'd. on other grounds,* 27 N.J. 322 (1958). The Code continues this requirement. If the actor in fact believes in the accuracy of the impression created or reinforced, he is not guilty of deception even though his belief was stupid or unreasonable. But it is not necessary for the prosecution to prove that the actor affirmatively disbelieved; if he created the impression that he believed something to be true, when in fact he had no belief on the subject, he has deceived. MPC T.D. 2, p. 66 (1953).

7. *Nondisclosure.* Generally, the Code does not require affirmative disclosure. Taking advantage of a known mistake, which is influencing the opposite party to a bargain, is not criminal under existing law in the absence of special circumstances imposing a duty to correct the mistake. The Code does not attempt to make this behavior criminal, primarily because the borderline between desirable and disapproved behavior in this area is so ill-defined in our society that criminal sanctions are likely to impinge on some conduct well within the bounds of approved commercial activity.

Three situations are set forth, however, in which non-disclosure suffices. Subsection b deals with preventing the acquiring of information; Subsection c with failing to correct a false impression "which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship"; and Subsection d with failing to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record. We believe that liability may be imposed in these situations without jeopardizing normal business practices or entering the field of controversial moral obligations.

8. *Subject Matter of the Impression.* The traditional restriction of theft by fraud is to deception as to an "existing fact or condition." *State v. Lamareaux,* 16 N.J. 167 *affirming* 29 N.J. Super 204; *State v. Kaufman, supra; State v. Pasquale,* 5 N.J. Super. 91 (App. Div. 1949). This is rejected by the Code. This is accomplished both by the unqualified word "deception" and by the explicit negation of extant limitations in Subsection a. The deception may relate to the intention of any person, the opinion of the actor or a third person, the state of the law in any jurisdiction, or events of the past, present or future. Whatever means the actor selects as the effective ones to deceive will be included.

(a) *Promises and Intention.* False promises are now within N.J.S. 2A:111–1. *State v. Kaufman, supra; State v. Lamoreaux, supra.* This is continued under the Code although it is the minority rule. MPC T.D. 2, pp. 68–69 (1952). The last sentence of Subsection a is intended to avoid abusive prosecutions designed to force defaulting

debtors to pay. It avoids conviction on no more evidence than the fact that the contract was not performed. The fact of breach is not sufficient evidence of an original intention not to perform.

(b) *Opinion; Value; "Puffing."* Although no cases were found, the rationale of *State v. Kaufman, supra,* would seem to indicate that a false statement of opinion or value could be the subject of a crime under N.J.S. 2A:111-1. The cases elsewhere conflict:

> "It is often said and infrequently held that a misrepresentation of one's opinion, not being a statement of 'fact,' is excluded from the false pretense statutes. The contrary has been held under the federal mail fraud statute and in some states, when the proof shows that the opinion was intended to be taken seriously and was not honestly entertained. Upon examination the cases which suggest an immunity for representations of opinion usually turn out to involve either honest opinions or 'seller's talk' which the actor did not intend to be taken literally. Such behavior would not be criminal under this Code because the actor did not purposely create an impression which he disbelieved.
>
> "Value would seem to be simply an example of something on which sellers frequently give opinions; but there have been decisions that exclude such statements from criminal false pretense even where the court accepts other 'opinions' as the basis of conviction for theft. The basis of such decision appears to be a belief that exaggeration of value by a seller is incapable of deceiving a buyer; but this is obviously a question of fact to be determined on the circumstances of each case rather than by rule of law." MPC T.D. 2, p. 69 (1952).

"Puffing" or "exaggeration" is explicitly dealt with in the last sentence of the Section: excluded from the definition of "deception" is "puffing by statements unlikely to deceive ordinary persons in the group addressed."

(c) *Law.* No New Jersey cases were found on deceptions as to the law. The Code does not exclude false representations as to law. There are conflicting precedents elsewhere on criminal liability for obtaining property by false representations as to relevant law. We follow the decisions that impose liability whenever defendant obtains property by a knowing misstatement of the law. Of course, a legal opinion, like other statements in the course of bargaining, might be made with the understanding that the opposite party is not taking such utterances at their face, in which case the defense must be on the ground that the actor did not purposely create a false impression. MPC T.D. 2, pp. 71–72 (1953).

9. *Non-Pecuniary Deception.* The last sentence of the Section excludes deceptions having no pecuniary significance. In view of the general elimination of the issue of "materiality" it seems desirable to

exclude from the possibility of theft prosecution cases such as those in which a salesman misrepresents his political or lodge affiliations. It may be desirable on other grounds to punish such falsehoods, but they are too remote from the basic concern of Chapter 20, which is to protect property interest. By hypothesis the deceived person received everything that he bargained for in the way of property.

§ 2C:20–5. COMMENTARY

1. *Present New Jersey Law.* See N.J.S. 2A:105–1 through 5 (Extortion, Threats and Unlawful Takings); N.J.S. 2A:119A–1 through 4 (Loansharking); and *State v. Begyn*, 34 N.J. 35 (1961).

2. *The General Scope of Section 2C:20–5.* This Section deals with situations where coercion rather than deception is the method employed to make the victim transfer his property. Related offenses in present law are designated as extortion, blackmail, demanding by menaces and robbery (excluding robberies effected by actual forceful deprivation rather than threat of force).

A threat need not be express. It is sufficient, for example, that the actor asks for money in exchange for his promise not to inflict physical harm, or in exchange for "protection" from harms where the actor intends to convey the impression that he will in some fashion instigate the harm from which he proposes to "protect" the victim. The threat may be implicit from the situation, as where a policeman while effecting an arrest asks for money and releases the prisoner from custody on receiving it. This Section covers oral as well as written threats.

This Section covers threats to injure *anyone*, on the theory that if the threat is in fact the effective means of compelling another to give up property, the character of the relationship between the victim and the person whom he chooses to protect is immaterial. Whether a threat to injure a third person, unrelated to the victim, was intended to intimidate or was effective for that purpose can be decided by the jury or other trier of fact. There is no justification for providing as a matter of law that such threats can never intimidate, and no defendant should escape liability for an effective intimidation on the ground that persons other than the chosen victim would not have been intimidated.

Section 2C:20–5 provides a list of particular harms which must be threatened in order to come within the offense of extortion. A law which included *all* threats made for the purpose of obtaining property would embrace a large portion of accepted economic bargaining. Examples of menaces which ought not to be included are: to breach a contract, to persuade others to breach their contracts, to infringe a patent or trade mark, to change a will or persuade another to change a will, to refuse to do business or to cease doing business, to sue, to vote stock one way or another. For the most part these are situations in which a private property economy must tolerate considerable "eco-

nomic coercion" as an incident to free bargaining. Civil remedies are usually adequate to deal with abuse of the privilege. Some coercive economic bargaining may call for legal restriction by anti-trust laws, labor legislation and the like; but theft penalties would be quite inappropriate.

The threatened harm need not be "unlawful." The actor may be privileged or even duty-bound to inflict the harm which he threatens; yet if he employs the threat of harm to coerce a transfer of property for his own benefit he clearly belongs among those to whom theft sanctions should be applied. The case of the policeman who is under a duty to make an arrest illustrates the point. His threat to arrest unless the arrestee pays him money is clearly extortionate although the policeman would be derelict if he did not arrest. MPC T.D. 2, pp. 75–76 (1953).

3. *Section 2C:20–5a: Threats of Bodily Injury or Criminal Offense.* These are now covered by N.J.S. 2A:105–3, 4 and 5 although those statutes are not as general as the Code. This Section is intended to include physical harms, restraints, and confinements such as kidnapping or confinement in a jail or mental institution. MPC T.D. 2, p. 76 (1953). "Any other criminal offense" is intended to cover situations such as this:

> "A racketeer obtains property from another racketeer by threatening to operate houses of prostitution or illegal gambling enterprises in competition with him. Threat to compete would not ordinarily come within [Section 2C:20–5] because the right to compete is one which, under some circumstances in our society, may be bargained away. However, where the competition itself would be criminal activity, there is no need to immunize a threat to engage in that activity, used for the purpose of extortion." (*Id.*)

4. *Section 2C:20–5b: Threat to Accuse of an Offense.* This is now covered (if in writing) by N.J.S. 2A:105–3. A source of dispute is the question of the relevance of the fact that the victim has in fact committed the crime. In a few of the jurisdictions in which the question has been raised, it has been held that actual commission is relevant, not as a complete defense, but as tending to rebut an "intent to extort" where the crime committed has damaged the defendant and the property extorted appears to be reasonable reparation for the damage done. Thus, even in this minority of states, there is no question of requiring that the threat be to lodge an "unlawful" charge of crime. The actual commission of the crime to be charged bears rather on defendant's good faith claim of rights to the property extorted. MPC T.D. 2, pp. 76–77 (1953).

As concerns a situation where a person asserting a civil claim to compensation for personal injury threatens to file a criminal complaint, the affirmative defense provided in the last sentence of the Subsection assures proper disposition of such cases. It is made criminal to

threaten prosecution if and only if the actor thereby obtains or attempts to obtain more than he believes is due him. MPC P.O.D., p. 170 (1962).

5. *Section 2C:20–5c: Threats to Expose Secrets to Defame or to Impair Credit or Business Repute.* The Code covers the exposure of secrets or publicizing asserted facts, whether true or false which are defaming or are harmful to business or credit repute. As in the case of Subsection b, this Subsection is subject to the affirmative defense stated in the last paragraph of the Section.

6. *Section 2C:20–5d: Official Action.* This is now covered, as to actual officials, by N.J.S. 2A:105–1 and 2. The typical case covered by Subsection d is extortion under color of office, as where an elevator inspector or tax collector threatens to report violations which might lead to large non-criminal penalties. The offense lies close to that of bribery, and the same transaction may constitute both crimes, but if the element of intimidation be present, the present section will apply. The element of intimidation also serves to distinguish this crime from provisions found among "crimes against the government" prohibiting the acceptance of gifts in connection with official conduct. A threat to bring about adverse official action may, of course, be made by one who is not himself an official. This Subsection is also subject to the affirmative defense.

7. *Section 2C:20–5e: Strikes; Boycotts.* Subsection e reaches the threat of collective unofficial sanctions where an official of a trade association or union, for example, is lining his own pocket by employing coercive power which he is supposed to wield on behalf of his organization. Where the demand is on behalf of the organization, the Section does not apply even though the demand may go beyond any honest claim of right. This is because it would be unwise to subject these bargaining processes to serious risk of criminal sanctions, where guilt may turn on nice questions of what is a "lawful objective" of a strike.

8. *Section 2C:20–5f: Giving or Refusing Testimony.* Such a provision appears in the New York Code and in the MPC. It is also subject to the affirmative defense.

9. *Section 2C:20–5g: Other Threats.* Any particularization of criminal threats is bound to be incomplete. Subsection g states the general principle on which other threats are to be included within extortion. Examples of situations which might occur and not be covered in other Subsections are: (a) the foreman in a manufacturing plant requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination; (b) a close friend of the purchasing agent of a great corporation obtains money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere; (c) a professor obtains property from a student by threatening to give him a failing grade. We follow

New York's Code and the proposed Michigan and California Codes in particularizing, more than the MPC, the character of the threat required by Subsection g.

10. *Affirmative Defense.* The last paragraph of the Section allows an affirmative defense to Subsections b, c, d and f where the property obtained was "honestly claimed as restitution or compensation for harm done in the circumstances to which" the threat relates.

§ 2C:20–6. COMMENTARY

1. *Assumption of Control Required.* Theft penalties are not imposed on persons who merely learn of the whereabouts of lost property but do not assume some control over it. If it is desirable to provide criminal sanctions to compel people to communicate helpful information to the owners of lost property, this should be done by separate legislation not carrying the moral imputation of theft and presumably with lower sanctions. Mere handling of a lost article for purposes of examination would not be an assumption of control within this Section. The likelihood of restoration to the owner will often be increased rather than diminished by noninterference of casual finders. MPC T.D. 2, p. 83 (1953).

2. *Omission as Essence of the Crime.* Even though a finder may take possession with intent to keep the property from the owner, he is not liable to conviction under this Section if within a reasonable time he acts to restore the property to the owner. Thus, essentially, finders are punished for failure to act rather than for an initial misappropriation. The realistic objective in this area is not to prevent the initial appropriation but to compel subsequent acts to restore to the owner. Therefore, the Section permits conviction even where the original taking was honest in the sense that the finder then intended to restore, but subsequently changed his mind; and it bars conviction where the finder acts with reasonable promptness to restore the property, even though he may have entertained a fraudulent purpose at some time during his possession.

3. *Negligent Failure to Restore Not Theft.* Consistent with our general conception of theft, Section 2C:20–6 is limited to purposeful omission to take steps to restore. No one should be punished as a thief merely because he stupidly or carelessly failed to follow a course of action which would have been apparent to another.

4. *Mislaid Property.* At common law, the distinction between lost property, which was not intentionally deposited by the owner in the place where it was found, and mislaid property, which was intentionally deposited by the owner who subsequently forgot where he put it, was significant for distinguishing between various forms of theft. Under Chapter 20, the criminality of fraudulent appropriation does

not depend on an interference with possession. The distinction between lost and mislaid therefore becomes obsolete.

5. *Necessity of Permanent Appropriation.* Since the Section requires a purpose to "deprive," the definition in Section 2C:20–1a controls.

6. *Mistaken Delivery or Transfer.* Section 2C:20–6 deals with a class of cases which occasioned difficulty in the development of the law of theft. One who accepts a $10 bill knowing that the other person thinks he is handing over a $1 bill acquires it without trespass or false pretense. Nor is the receiver in any of the employee or fiduciary relations enumerated in the usual embezzlement statute. Consequently, special legislation or judicial sleight-of-hand was required to reach persons taking advantage of such mistakes.

It is necessary to limit the kind of mistakes which give rise to the liability under Section 2C:20–6 to avoid impinging on certain types of tolerated sharp trading. For example, it is not proposed to make criminal the purchase of another's property at a bargain price on a mere showing that the buyer was aware that seller was misinformed regarding the value of what he sold.

7. *Reasonable Measures.* Originally, the MPC listed "reasonable measures":

> "(3) *Reasonable Measures.* In determining what are reasonable measures, account shall be taken of the following factors, among others: the nature and value of the property, the expense and inconvenience of the restoration measure, and the reasonable expectation of compensation to the finder for expense and inconvenience borne by him. The following, among others, are reasonable measures which bar liability under this Subsection unless the actor purposely omits other steps which he believes would be more likely to result in restoration:
>
> "(a) compliance with procedure prescribed by laws relating to the preservation and restoration of lost property;
>
> "(b) delivery of the property to law officers for restoration to the owner; or
>
> "(c) delivery of the property to the occupant of the premises or operator of the vehicle where the property was found for restoration to the owner."

This listing was intended to furnish some measure of guidance to finders and, in particular, to encourage the tendency to put primary responsibility for lost property on the occupant of premises or operator of vehicles where lost property is found, since this is most likely to result in restoration. This was ultimately eliminated as "unnecessary" (MPC P.O.D., p. 170 (1962)) but we include it to give guidance in defining the meaning of the term.

§ 2C:20–7. COMMENTARY

1. *Present New Jersey Law.* See N.J.S. 2A:139–1 through 4.

2. *In General; Assimilation of Receiving to Theft.* The Code incorporates the traditionally distinct crime of receiving stolen property as part of the new comprehensive theft offense. On both analytical and practical grounds it is necessary to punish receiving. Analytically, the receiver does precisely what is forbidden by the law of theft, namely, he exercises unauthorized control over property of another with the purpose of applying or disposing of it permanently for the benefit of himself or another not entitled. From the practical standpoint, it is important to punish receivers in order to discourage theft. The existence and functioning of the "fence," a dealer who provides a market for stolen property, is an assurance, especially to professional thieves of ability, to realize the unlawful gain.

Consolidation of receiving with other forms of theft affords the same advantages as other aspects of the unification of the theft concept. It reduces the opportunity for technical defenses based upon legal distinctions between the closely related activities of stealing and receiving what is stolen. One who is found in possession of recently stolen goods may be either the thief or the receiver; but if the prosecution can prove the requisite thieving state of mind it makes little difference whether the jury infers that the defendant took directly from the owner or acquired from the thief. Consolidation also has a consequence favorable to the defense by making it impossible to convict of two offenses based on the same transaction. MPC T.D. 2, p. 93 (1953).

3. *The Unlawful Act: "Receiving."* Existing legislation defines the prohibited activity in various terms, *i.e.,* "receiving," "buying," "purchasing," "accepting," and "taking." Our courts have included "constructive possession" within the meaning of "possession." *State v. Serrano,* 53 N.J. 356 (1969); *State v. Kimbrough,* 109 N.J. Super. 57 (App. Div. 1970); *State v. Bozeyowski,* 77 N.J. Super. 49 (App. Div. 1962). The last sentence of Subsection a defines "receiving" so as to simplify this. The essential idea sought to be expressed is acquisition of control whether in the sense of physical dominion or of legal power to dispose. The definition of receiving is correspondingly broad.

4. *Movable Property.* The definition of this term is in Section 2C:20–1d.

5. *Knowledge or Belief; Presumption.* Under this Section, either knowledge that the property was stolen or a belief that it was probably stolen suffices for conviction. Our present law requires the former, *i.e.,* knowledge. *State v. Kimbrough, supra.*

As is true with present law, the Code provides a presumption as to this knowledge or belief in certain circumstances. It is, however, much more limited than our present law. Under our present law, only N.J.S. 2A:139–1 has a presumption. Thus, when the defendant's act falls within one of the other receiving statutes, particularly N.J.S. 2A:139–3 (motor vehicles) the State must proceed under that statute and it receives no benefit of any presumption. *State v. Bott,* 53 N.J. 391 (1969).

The presumption in N.J.S. 2A:139–1 was recently defined and upheld in *State v. DiRenzo,* 53 N.J. 360, 370–382 (1969):

> "Defendant has launched a broad-based attack on the constitutionality of N.J.S. 2A:139–1. He contends that in authorizing a jury to infer guilty knowledge from the mere fact of possession of stolen goods, the statute contravenes due process of law and violates the fifth amendment's protection against compulsory self-incrimination. The constitutional argument breaks down into four related parts.
>
> "A. The first argument is [that] . . . a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. . . . Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the Legislature to create it as a rule governing the procedure of courts.
>
> "With regard to the present case, we cannot say that it is contrary to common experience to recognize, as the Legislature recognized, that the unexplained possession of stolen goods within a limited time from their theft more than likely carries with it the knowledge that the goods were stolen.
>
> * * * *
>
> "As for the one year limitation set forth in the statute, it is our opinion that that provision operates for the benefit of the accused, precluding any inference to be drawn from the naked possession of stolen goods after one year from the date of their theft. Of course, there may be other evidence which along with possession, would warrant an inference of guilty knowledge in cases where possession occurs after one year from the theft.
>
> "It has long been held in the absence of a statutory provision such as ours that possession of recently stolen property permits an inference that the possessor knew that the property had been stolen, unless the possession is satisfactorily accounted for.
>
> * * * *

"The defendant's guilty knowledge is an element of the crime in the present case, thus it must be proved by the State beyond a reasonable doubt. Since we have held that the inference of guilty knowledge is sufficient if it more likely than not comports with common experience, does this reduce the burden of persuasion below a 'reasonable doubt' standard? The crux of the matter is that it would only if the jury were compelled to draw the inference and convict on the basis of possession alone; that is, if the burden of proof of guilty knowledge were taken from the State. * * * * But the inference is permissive only. The jury is free to accept or reject the inference, since according to the statute, possession of stolen goods merely 'authorizes' conviction. The statute recognizes only an inference of 'probable reasoning, for the guidance of the jury, but can impose no positive binding rule.' * * * * Thus the burdens of proof and persuasion remain with the State and the defendant's possession has the effect simply of one circumstance to be considered by the jury in deciding whether the State has proved guilty knowledge beyond a reasonable doubt.

* * * *

"B. It is also argued that N.J.S. 2A:139–1 is unconstitutional on its face because it restricts the trial court's powers over the judicial proceeding. * * * * We do not, however, construe the provision in N.J.S. 2A:139–1 that unexplained possession of stolen property 'shall be deemed sufficient evidence to authorize conviction' as in any way curtailing the judge's traditional power.

* * * *

"D. Defendant contends further that the use of N.J.S. 2A:139–1 in the present case contravenes his fifth amendment privilege against compulsory self-incrimination. This argument has two facets: First, whether on its face the statute compels a defendant to take the stand to explain his possession of the stolen goods; and second, in the present case, whether the judge in his charge adversely commented on the defendant's failure to testify. * * * *

"The pertinent part of N.J.S. 2A:139–1 requires that the accused show the various defenses 'to the satisfaction of the jury.' This language does not require that the defendant must personally explain his possession of stolen goods to the jury. The inference of guilty arising from the unexamined possession may be met by evidence other than that of the defendant. Indeed, evidence adduced by the State, or evidence which the State fails to adduce, may be sufficient to preclude any adverse inference. There is nothing in the statute which compels the defendant himself to offer evidence. * * * *

"The question remains whether the judge's charge in the present case unfairly commented upon the defendant's failure to testify. In facing a similar situation, the United States Supreme Court in *Gainey* said: '[I]n the context of the instructions as a whole, we do not consider that the single phrase 'unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the 'jury can be fairly understood as a comment on the petitioner's failure to testify.'

* * * *

"We are satisfied that N.J.S. 2A:139–1 neither unfairly compels an accused to take the witness stand nor, as qualified by the judge's charge in this case, constitutes a prohibited comment on the defendant's failure to testify."

The Code's presumption is much more limited. We reject the limitation of MPC § 223.6 that there is no presumption other than in the case of "dealers." We, instead, make the presumption apply as to *any* person who receives stolen property either from two persons or on two occasions or without adequate consideration. Subsection b(1), (2) and (3). Subsection b(4), however, applies only as to "dealers" who are put on a form of "inquiry notice." We believe these presumptions, which are drawn from, but are more restrictive than, the New York Code and the proposed Michigan Code, adequately protect against "fence"-type operations. Further, they allow a conviction for receiving where theft cannot be shown but restrict this to appropriate circumstances.

6. *Receiving to Restore to Owner.* An affirmative defense is provided in Subsection a as to this situation. Typically, it will be that of an insurance company or detective agency.

§ 2C:20–8. COMMENTARY

1. The limitation of the common law and ordinary false pretense legislation to theft of "property" left many forms of wealth unprotected. Generally, obtaining labor or professional service by fraud is not punished. MPC T.D. 1, p. 99 (1952). Some special legislation now deals with certain aspects of this area. See Commentary to Section 2C:20–2.

2. The provisions of the Code are limited to transactions of a business or pecuniary significance. The execution of documents of non-pecuniary significance can be dealt with elsewhere, *e.g.*, fraudently procuring a governmental official to sign or revoke an administrative regulation may be penalized in connection with other provisions for the protection of governmental operations. Employment contracts are excluded because fraudulent job applications present a distinct socio-

logical problem, insofar as the objective of the actor is to secure an opportunity to render services for which he will be paid, rather than to secure unearned gain. However, a false pretense of willingness and ability to work could be used as a means of obtaining money, *e.g.*, an advance from a prospective employer; and this would constitute theft under Section 2C:20–4.

3. *Disposition of Services.* Subsection b deals with the case where services paid for by one person are diverted without his consent to the benefit of some other person not entitled.

§ 2C:20–9. COMMENTARY

1. This Section is intended to extend theft liability to misappropriation of property, *i.e.*, a form of breach of contract rather than misappropriation of identifiable property belonging to the victim. For example, an employer has an arrangement with his employees pursuant to which he withholds part of their pay on the understanding that the money withheld will be used to pay certain obligations of the employees to third persons. He fails to pay, and uses the funds withheld for his own purposes. The courts are likely to say, even under the broadest of present statutes dealing with fraudulent conversion of "property of another," that the employer is not guilty of stealing since he neither received nor held anything belonging to the employees. The artificiality of this reasoning can be seen from the fact that if the employees had drawn full pay at one window and passed part of it back to the employer's cashier at the next window, there would be no difficulty in holding the employer guilty of embezzlement for converting these funds to his own use. The physical manipulation of greenbacks can have no criminologic significance.

The Section applies also where statutes require certain classes of persons who receive funds to reserve such funds for particular purposes. See examples in the Commentary to Section 2C:20–2. (N.J.S. 2A:102–9, 10, 11, 12.)

Some of the existing legislation imposes absolute criminal liability for failure to pay over, especially in the case of public officials handling government receipts. The text, however, limits theft liability to cases of knowing violation of the obligation to reserve the funds received for specified purposes. In the case of public officials and other who are likely to be familiar with their legal obligations, it creates a presumption of knowledge, as well as a presumption that the actor used the missing funds as his own. This presumption does not relieve the prosecution of the burden of proving guilty beyond a reasonable doubt, but suffices to take a case to jury in the absence of explanation by the defendant. MPC T.D. 2, pp. 80–82 (1952).

§ 2C:20–10. COMMENTARY

1. *Present New Jersey Law.* N.J.S. 2A:170–38, set forth under Section 2C:20–2, now makes "unlawful use" of a motor vehicle a Disorderly Persons Offense.

2. Subsection a of this Section is directed at the phenomenon of "joy-riding," *i.e.*, taking someone else's car without permission, not meaning to keep it, but just for the pleasure of driving it. We reject "use," the word in our present statute, it being too broad because it covers use without removal. A tramp sleeping in a parked truck would be using it. MPC T.D. 2, p. 89 (1953).

3. *Reasonable Belief as to Consent.* The last sentence of Subsection a(1) introduces the defense of reasonable belief that the owner would have consented. This is necessary to exempt from criminal liability a good deal of informal borrowing of automobiles by members of the same household or friends of the owner. MPC P.O.D., p. 174 (1962).

4. Following the lead of the proposed Michigan Code, we sever "riding in" a vehicle from taking and make that a lesser offense under Subsection a. See *State v. Bott*, 53 N.J. 391 (1969).

§ 2C:21–1. COMMENTARY

1. The present New Jersey Statutes in this area are as follows:

2A:109–1.	Forgery or uttering forged records, instruments, writings, etc
2A:109–2.	Selling or possessing counterfeit promissory notes, bank notes or clearing house certificates
2A:109–3.	Making or possessing plates for counterfeiting promissory notes, bank notes or clearing house certificates
2A:109–4.	Forgery or using forged passenger tickets
2A:109–5.	Using false passage tickets
2A:109–6.	Counterfeiting gold or silver coins
2A:109–7.	Counterfeiting or possessing counterfeit foreign coins
2A:109–8.	Uttering bills of insolvent banks
2A:109–9.	Advertising counterfeiting money, stamps, and green goods.
2A:109–10.	Using fictitious name or address in promoting counterfeiting schemes
2A:109–11.	Writings or papers as presumptive proof of fraudulent character of scheme
2A:109–12.	Issuing false stock
2A:111–25.	Removal of means of identification of machine, device, appliance or product by one in business of selling or repair of property

2A:111–26. Acquisition for resale of machine or device having means of identification removed

2A:111–27. "Motor vehicle" within act defined

2A:147–1. Counterfeiting trade-marks; sale of goods bearing false trade-mark

2. *Background and Rationale.* In preparing the Code, we have operated on the assumption that much of the desire for authenticity, previously covered by the law of forgery, is now better dealt with as forms of false pretense (*i.e.*, theft) and fraud. Our new law remedying shortcomings in the law of theft, fraud, attempt, complicity and professional criminality diminish greatly the need for a separate forgery offense. The crime is conservatively drafted to avoid penalties disproportionate to those for fraud. Moreover, in the administration of forgery law, sentencing courts and parole boards should be alert to the potentiality of unfairness in cumulating convictions for forgery and fraud based on forgery. It would ordinarily be hard to justify punishing an employee more harshly for forging his employer's endorsement on a check than for stealing for $100 of his employer's cash. MPC T.D. 11, pp. 78-80 (1960).

3. *Scope of Section: Forged "Writings."* The prevailing pattern in American forgery legislation is to list a series of documents regarded as having special legal or commercial significance. See *State v. McLaughlin*, 47 N.J. Super. 271 (App. Div. 1957); *State v. Berko*, 75 N.J. Super. 283 (App. Div. 1962); *United States v. Amden*, 158 Fed. 996 (D. N.J. 1908). The Code broadens the coverage of the crime by including "any writing." "Writing" is defined to include "printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification." The effect of this definition is to remove any limitation of forgery to writings of a legal or evidentiary nature. The fact that the documents are of this character continues to play a part in the grading of the offense. Thus the section covers doctors' prescriptions, trademarks, identification and credit cards, diplomas, and professional certificates. It makes all sorts of private records, accounts, letters, and diaries the subject of forgery. Among other consequences, the effect of this is to make punishable forgeries which are harmful not because they defraud the person relying on the falsity, but because they damage the purported author of the statement in his good name, standing, position or general reputation or because they misrepresent or injuriously affect the sentiments, opinions, conduct, character, prospects, interests, or rights of another.

Section 2C:21–1 is satisfied by a purpose to defraud or injure anyone or acting "with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone." As to the latter, this is to make it clear that a forger commits an offense even though he does not defraud the person to whom he sells or passes the forged writings, as where

the transferee takes with knowledge of the forgery for the purpose of passing the writings as authentic. MPC P.O.D., 176 (1962). See *State v. Sabo,* 86 N.J. Super. 508 (App. Div. 1965); *State v. Bulna,* 46 N.J. Super. 313 (App. Div. 1957).

4. *Falsity.* "Falsity," under existing New Jersey law implies that the writing is "not genuine, fictitious, and not a true writing." *State v. Berko, supra; Rohr v. State,* 60 N.J.L. 576 (E. & A. 1897); *State v. Ruggiero,* 43 N.J. Super. 156 (App. Div. 1957). Under Subsection a of the Code's definition, the false nature of the writing is set forth with specificity in order to distinguish this crime from ordinary false pretense. The falsity must relate to authenticity; a document is not forged merely because it contains extrinsic misrepresentations. MPC P.O.D. 176 (1962); MPC T.D. 11, p. 83 (1960).

5. *Alters, Makes or Utters.* The Code makes altering, making and uttering sufficient. "Uttering" is intended to include displaying, *e.g.,* of a false medical diploma, even without making, issuing, etc. MPC T.D. 11, p. 84 (1960). See *State v. Ready,* 77 N.J.L. 329 (E. & A. 1909).

6. *Possession of Forgery Equipment.* Current forgery legislation includes specific provisions on manufacture or possession of dies or other means of committing forgery, and on possession of forgeries with intent to utter. See N.J.S. 2A:109–2 and 3. The MPC relies on attempt law in this regard. We, however, like New York, in Subsection c, include a separate crime of possession of forgery devices.

7. *Relation to Counterfeiting.* Given the definition of "writing" in Section 2C:21–1, the Code has no separate provision as to counterfeiting.

8. *Grading.* Subsection b of the Code grades forgeries of a public nature and securities as crimes of the second degree. Private forgeries are crimes of the third degree if the instrument affects legal relations, *i.e.,* wills, deeds, commercial instruments, or if it is tokens, etc., or if it is a drug prescription or drug paraphernalia prescription, etc. Otherwise, forgeries are crimes of the fourth degree.

§ 2C:21–2. COMMENTARY

1. This Section arose from the elimination of "objects" as the subject of Forgery under Section 2C:21–1.

2. This conduct appears to be criminal in New Jersey at this time in only limited circumstances. See N.J.S. 2A:111–23, and 24.

§ 2C:21–3. COMMENTARY

1. *Present New Jersey Law*

2A:119–4. Stealing deeds, leases, account books and other written instruments
(See also Section 2C:21–4.)

2A:119–5. Stealing or fraudulent destruction of wills

2A:111–5. Obtaining execution of valuable security or affixing name thereto by false pretense
(See Commentary to Section 2C:21–14.) (Includes provision as to destruction.)

2. Subsection b is taken from §§ 175.30 and 175.35 of the New York Code. It relates to instruments containing false statements and differs from forgery (Section 2C:21–1a) in that only knowledge of falsity need be shown and not a purpose to defraud.

§ 2C:21–4. COMMENTARY

1. *New Jersey Law.* We now have a series of statutes dealing with aspects of these crimes:

2A:91–3. False reports as to solvency of banks

2A:91–5. False entries by bank officers and employees

2A:91–6. Banks and trust companies, false statements, entries or reports to deceive examiners

2A:91–7. Building and loan and other associations, false statements, entries or reports to deceive examiners

2A:91–8. Building and loan and other association director or officer; false statement or report or misrepresentation

2A:111–9. Destruction of books of corporation, partnership, or association, or making false entries therein (See *State v. Cronin,* 86 N.J. Super. 367 (App. Div. 1964, *aff'd.,* 44 N.J. 581 (1965).)

2A:111–10. Keeping fraudulent accounts by directors, officers, etc., of corporation, partnership or association

2A:111–11. Making or circulating false statements by officers, etc., of corporation, partnership or association

2A:111–12. Issuing false stock

2A:111–39. Dual contracts for purchase or sale of real property; violations

2A:119–4. Stealing deeds, leases, account books and other written instruments

2A:122–3. Malicious destruction of written instruments

2. We depart from the MPC in this Section in distinguishing between business and financial records and other (*i.e.*, private, non-business) records. The Code classifies them all as misdemeanors. We have taken the New York provision as to issuing false financial statements and incorporated it into Subsection b as crimes of the third degree. All other records are crimes of the fourth degree under Subsection a.

§ 2C:21-5. COMMENTARY

1. *Existing New Jersey Law.* This State now has two sets of bad check statutes. N.J.S. 2A:111-15 through 17 applies to checks in the amount of $200.00 or more. N.J.S. 2A:170-50.4 through 50.6 are identical except that they apply to checks "in an amount less than $200.00" and the offense is a Disorderly Persons Act Violation. In each case, making, drawing, uttering or delivering a check with intent to defraud and knowing at the time of doing so that the check will be dishonored is the definition of the offense. Further, in each case, the act is deemed prima facie evidence of intent to defraud and the certificate of protest of nonpayment is deemed presumptive evidence of insufficient funds and that the person knew it. In *State v. Pollack,* 43 N.J. 34 (1964), the Court held that the effect of this presumption is to preclude the granting of a motion for judgment of acquittal because of lack of a specific intent to defraud. Even if the accused comes forward with evidence of his lack of knowledge that funds were insufficient, the check's nonpayment is sufficient to allow the jury to infer such intent. Money must, however, be obtained. See *State v. Kapelsohn,* 9 N.J. Super. 177 (App. Div. 1950).

2. The chief reason for the existence of widespread special legislation dealing with bad checks is eliminated by the Code, namely, the doubt whether a misrepresentation of intention to perform a promise could be a criminal false pretense. See Section 2C:20-4.

> "A check might be regarded as no more than the drawer's promise that the bank would pay. The bad check laws, in addition to eliminating the doubt as to liability on false promises, accomplish two other things which seem worth preserving: (a) they eliminate the requirement of obtaining property by means of false pretense, and (b) they created a presumption of knowledge that the check would not be paid under certain circumstances." MPC T.D. 2, p. 117 (1954).

3. *Obtaining Property.* This was more significant under existing law than it would be under the Code.

> "For example, there would be doubt under many existing laws whether the actor obtained property when he deposits in his account in bank A a check drawn on bank B. Under the comprehensive definition of property in [the Code], a bank credit

would be property. The question arises whether it should be criminal to give someone a bad check as a gift or payment of pre-existing debt. The affirmative answer given under most present laws is retained in Section [2C:21–5], primarily for the reason that one who negotiates a bad check knows that even if he is not cheating the recipient, the check is likely to be renegotiated for cash or property, or at least to result in improper bank credits." MPC T.D. 2, p. 118 (1954).

4. *The Presumption of Knowledge.* The presumption of knowledge is probably the most important practical reason for retaining special bad check provisions. Consider the position of the hotel keeper or merchant who finds that a check he cashed is drawn on a fictitious account. In this situation is it possible but highly improbable that the transaction was innocent: the drawer may absentmindedly have put the name of the wrong bank in a blank check, or he may have intended to open an account before the check was presented. In the case of checks on real but inadequate accounts, the chance of innocent miscalculation by the drawer is much greater, but is pretty well negatived by a refusal to make the check good promptly. The amounts involved may be small, and the drawer may be a transient against whom swift action must be taken. It seems appropriate therefore to create a basis for arresting him without further proof of the fraudulent purpose, putting the burden on him to come forward with some evidence of innocent mistake. These presumptions are, however, quite a bit more limited than under existing law. An important feature of Section 2C:21–5 is that it makes the presumption applicable in theft prosecutions as well as in prosecutions under the check statute itself. We eliminate, as inappropriate to the Code, the rule as to the certificate of protest being presumptive evidence.

5. *Gradation.* Our present law makes the offense a misdemeanor if the check exceeds $200.00, punishable by imprisonment for one year. If less than $200.00, it is a Disorderly Person Offense punishable by imprisonment for six months. Under the Code, the offense is a crime of the fourth degree. If, however, money is obtained the passer could be prosecuted for the more serious crime of theft by deception, under other Sections of the Code. MPC P.O.D., p. 178 (1962).

§ 2C:21–6. COMMENTARY

1. *Present New Jersey Law.* The following statutes would be replaced by this Section or by the Sections of the Code relating to theft and to fraudulent practices:

2A:111–40. Definitions

2A:111–41. False statements made in procuring issuance of credit card

2A:111–42. Credit card theft

2A:111–43. Intent of cardholder to defraud, penalties; knowledge or revocation

2A:111–44. Intent to defraud by person authorized to furnish money, goods, or services, penalties

2A:111–45. Incomplete credit cards; intent to complete without consent

2A:111–46. Receiving anything of value knowing or believing that it was obtained in violation of § 2A:111–43

2A:111–47. Prosecution for violation

2A:111–48. Presumptions

2A:111–49. Penalties

2A:111–50. Construction of act

2A:111–51. Partial invalidity

2. This Section is intended to fill a gap in the law relating to false pretense and fraudulent practices. Sections 2C:20–4 and 2C:20–8 cover theft of property or services by deception. It is doubtful whether they reach the credit card situation because the user of a stolen or cancelled credit card does not obtain goods by any deception practiced upon or victimizing the seller. The seller will collect from the issuer of the credit card, because credit card issuers assume the risk of misuse of cards in order to encourage sellers to honor the cards readily. Thus it is the non-deceived issuer who is the victim of the practice.

The proposed grading parallels the grading by amount in the theft sections of the Code except that we do not provide for anything less than a crime of the fourth degree even when the amounts are quite small. The rationale, is that this method of defrauding lends itself to repeated violation by transients and undermines reliance on a useful credit mechanism. MPC P.O.D., p. 179 (1962).

§ 2C:21–7. COMMENTARY

1. *New Jersey Law.* This State now has a series of unrelated statutes dealing with some of the deceptive business practices in Section 2C:21–7: See N.J.S. 2A:108–1 through 8; 2A:111–22 through 24; 2A:111–32; 2A:150–1; 2A:170–42; 2A:170–72.

2. We intend to consolidate these many varied provisions in this Section. It takes cognizance of a large body of special legislation that supplements and extends the older crimes of false pretense and cheat. The extensions are in the direction of (1) eliminating the requirement that the deceiver actually obtained property by his deception; he need not even come so close to obtaining as to fall within the compass of the ordinary attempt statute; (2) watering down or eliminating the requirement of knowledge of falsity; and (3) dispensing with proof of misrepresentation in certain situations where the relevant affirmation is implicit.

These extensions of the laws against criminal fraud appear to have occurred in specially sensitive areas of business transactions; and the fact of the actor's being in business offers a rationale for the special treatment, even though none of the present laws are expressly limited to activities in trade. A butcher with a false scale in his shop has such an obvious motive and opportunity for shortweighting that one need not wait until he actually uses the scale to conclude with reasonable assurance that he is engaged in anti-social activity. Therefore the ordinary requirement of the law of attempt that the act come close to accomplishment, which reflects our disinclination to engage in policing mere evil inclinations, can be relaxed.

Furthermore, the practicalities of enforcement favor dispensing with the summoning in of outraged housewives to testify as victims. Weights and measure are generally supervised by some kind of inspection system. The inspector may well arrive at a time when no customers are being served, and it would be most inefficient to compel him to await an attempted cheating before holding the operator responsible for the false weight found on the premises. Shopkeepers themselves would probably prefer enforcement which did not involve their customers.

Likewise, some relaxation of the ordinary requirement that the state prove guilty knowledge as part of its case is understandable in the context of these transactions. The professional generally has reason and opportunity to know whether his weights are false, his goods adulterated or mislabeled, his financial statements and public advertising accurate. And it is more important that he be put to proof that he was unaware, since falsity of his measure is likely to victimize numerous customers.

As to the third aspect of these offenses—relaxation of the requirement of "misrepresentation"—there is less need for action on this score in view of the broad definition of deception in Section 2C:20–4. Nevertheless, it is well to remove any doubt whether it is criminal, for example, knowingly to deliver to a customer less than a quantity previously ordered and paid for by him, where no representation of quantity is made at time of delivery and no money is obtained on the strength of any representation.

It is advantageous to bring the various categories of deceptive practice together in a single section for consistent treatment of common issues like *mens rea* and punishment.

§ 2C:21–8. COMMENTARY

1. This was N.J.S. 2A:170–50.1 through 50.3. We continue it as a separate provision of the Code because of the peculiar nature of the fraudulent practice.

§ 2C:21–9. COMMENTARY

1. This is § 190.35 of the New York Code. See N.J.S. 2A:111–12 and 13.

2. No separate provision as to this class of offense is found in the MPC. We believe that the acts and statuses of offenders found here are of a sufficiently severable class to be treated separately.

§ 2C:21–10. COMMENTARY

1. *Present New Jersey Law.* Again, in this area, this State has a series of unrelated statutes:

2A:91–1.	Bank officials, etc., asking or receiving bribes or undue fees
2A:91–2.	Exceptions to Section 2A:91–1
2A:93–7.	Bribery of labor representatives
2A:93–8.	Bribery of foreman for certain purposes
2A:93–9.	Witnesses in case of indictment under sections 2A:93–7, 2A:93–8; incrimination; immunity
2A:170–88.	Corruption of agents, employees or servants; corporate agents punishable individually
2A:170–89.	Immunity from prosecution under Section 2A:170–88
2A:170–90.	Employment by "kickback"
2A:170–91.	Bonus in connection with rental of property under rent control

2. *Breach of Duty of Fidelity: Subsection a.* This Section generalizes from extant legislation dealing with "commercial bribery," usually of agents or fiduciaries, and extends that principle to managers of any public or private institution or corporation, including labor organizations. In principle, all relations which are recognized in a society as involving special trust should be kept secure from the corrupting influence of bribery. The extension of criminal law to assure the bona fides of publicly exhibited contests illustrates the breadth of this new development in penal law. It seems clear that, as provided in clause (3) of Subsection a, a lawyer or physician who accepts a bribe to betray the confidences of client or patient should be subject to prosecution. Subsection a requires conscious disregard of a known duty of fidelity. In this respect it is somewhat narrower than some current commercial bribery laws which would appear to penalize a purchasing agent for taking a gift from a seller, without the knowledge and consent of the agent's principal, even though such gifts are common in the trade and the agent is unaware of any betrayal of his professional or legal obligations.

3. *Breach of Duty to Act Disinterestedly: Subsection b.* This paragraph brings within the reach of the penal law a class of betrayals

of trust exemplified in the "payola" scandals. The same principle would be involved if an organization providing consumers with ratings of various products on the market were to accept money from a manufacturer to distort the ratings in his favor. Obviously, a criminal provision limited, as is Subsection b, to payment made to influence decision falls far short of solving the whole problem of commercial corruption. But even in relation to public officials the penal law is just beginning to play a role in the conflict of interest situation, as standards of morality become higher and more precise. In the area of commercial practices, these standards remain nebulous and had best, therefore, be enforced for a while through rules and discipline of private employers, backed by civil remedies such as are available against unfair competitive methods. The phrase "being engaged in the business of" is in Subsection b in order to confine the Subsection to professional critics, commercial rating agencies, and the like, excluding individual endorsements of products by prominent athletes, actors, and the like. These endorsements are probably vulnerable to attack as "unfair methods of competition," but like "puffing" of wares are unlikely to deceive most members of the audience as respects the disinterestedness of the endorsement.

4. Subsection c makes the giver guilty as well as the receiver.

§ 2C:21–11. COMMENTARY

1. *Present New Jersey Law.* New Jersey now has a series of statutes dealing with bribery in sporting contests which would be replaced by this Section:

2A:93–10. Giving or promising bribe to participant in sporting contest

2A:93–11. Receiving of bribe by participant in sporting contest

2A:93–12. Failure of participant in sporting contest to report solicitation to accept bribe

2A:93–13. Giving or promising bribe to referee, umpire or other official in sporting contest

2A:93–14. Receiving of bribe by referee, umpire or other official in sporting contest

2. *The Scope of Section 2C:21–11.* This Section expands existing law not only by including non-sporting events, but by including any form of corrupt interference as by administering drugs to an athlete. Subsection c follows the rule of N.J.S. 2A:93–12 in requiring reporting of attempts to bribe or rig. Subsection d extends liability to persons who would not be reached under ordinary rules of complicity as aiders and abettors of the briber or bribee, but who assist in deceiving the public by staging or participating in the staging of a contest which they know to be spurious.

Application of the Section will sometimes call for distinguishing between "contest" and a "spectacle." Some exhibitions which are contests in form, *e.g.*, a chariot race in a moving picture, obviously are not held out to the public as a rivalry the outcome of which is to be determined by the best efforts of the participants. At least one state has indicated, by express exemption from its sports corruption statute, that professional wrestling is to be put in the same category.

§ 2C:21–12. COMMENTARY

1. Most states provide criminal penalties for debtors or conditional vendees who dispose of property subject to a security interest in ways that may prejudice the secured creditor. See, in New Jersey, N.J.S. 2A:111–20 (Removal or sale of mortgaged property); N.J.S. 2A:111–21.1 (Fraudulent disposition of personal property subject to security interest); and N.J.S. 2A:122–2 (Injuring or destroying mortgaged property after foreclosure proceedings begun).

2. This Section is necessary because laws dealing with theft are framed in terms of larceny or embezzlement of goods "of another." Section 2C:20–1g defines property "of another" so as to exclude from theft conduct of an owner in possession of property subject to a security interest.

3. *The Scope of Section 2C:21–12: Purpose to Defraud.* Although there is need for penal legislation in this area, we believe that many current laws go too far when they provide penalties for acts such as removing encumbered property from the country or selling the property without consent of the secured creditor. Such behavior may be evidence of fraud, but it is also quite consistent with innocence. We therefore limit this Section to cases where there is a purpose to hinder enforcement of the security interest. Arguably the legislation might provide for a presumption of intent to defraud in certain situations, but the presumption would have to be carefully confined to situations where an inference of fraud is reasonable, in which case there seems to be little necessity for a presumption.

4. *Gradation.* The offense is classified as a crime of the fourth degree regardless of the amount involved. This differs from our theft sections, under which stealing of amounts over $500 is a crime of the third degree. The difference is justified because offenders against this Section are less dangerously deviated from social norms than are outright thieves who take property to which they have no claim. Moreover, sellers can guard against this kind of fraud by caution in extending credit. Higher penalties are available whenever it can be shown that the borrower intended, at the time he entered into the security arrangement, to dispose of the encumbered property in violation of the obligation assumed. See Section 2C:20–4 (Theft by Deception).

§ 2C:21–13. COMMENTARY

1. *Present New Jersey Law.* See N.J.S. 2A:111–8 (Making false reports as to solvency, obtaining property thereby; confirming false reports previously made).

2. *The Scope of Section 2C:21–13.* This Section goes as far as seems appropriate in authorizing punishment to prevent defrauding of unsecured creditors. We can be fairly conservative here since our Code elsewhere makes it criminal to secure credit or merchandise upon a false representation of intent to pay.

§ 2C:21–14. COMMENTARY

1. This Section is based on widespread legislation punishing this type of behavior, usually in relation to banks. New Jersey now has a more limited statute: N.J.S. 2A:91–8 applies to building and loan associations and to credit unions and requires that the misrepresentation be in writing. "Financial institution" is defined in Section 2C:20–1b. Liability is limited to managerial personnel on the theory that the criminal law should not place the burden on tellers and clerks to suspend operations of a financial institution on the ground of its inability to meet its obligations. Knowledge of the institution's precarious situation is required to be proved.

§ 2C:21–15. COMMENTARY

1. *Present New Jersey Law: Public Property.* New Jersey now has several statutes dealing with misapplication of entrusted public property:

2A:135–3. Public officers or employees unlawfully obtaining state, county, municipal or school district funds

2A:135–4. Unlawful detention of public property by public officer after expiration of term

2A:135–5. Disbursing moneys or incurring obligations in excess of appropriations or amount limited by law.

See also N.J.S. 2A:102–1 (Embezzlement by public officers and employees).

2. *Public Property: The Code.* We reject the view that public officers should be liable for theft upon proof of no more than "unauthorized" disposition of entrusted property, however innocent or laudable the purpose, because, in our view, it is a confusion of the law of theft and of maladministration. Fraudulent behavior is defined and appropriately punished in earlier sections of this Chapter. Nonfraudulent misdealing with property should be differentiated because the moral quality of the behavior does not deserve the stigma of a theft conviction, and because as a practical matter criminal sanctions

less severe than those provided for theft will suffice to deter a person from wrongful dealing with property in a way that involves no gain for himself or other individuals in whom he might be interested. It is probable that much of the present legislation really represents an attempt to assure conviction of persons believed to be thieves, by relieving the prosecutor of the necessity of proving the thieving purpose. It seems unconscionable to provide that half-proved embezzlement shall be designated and punished as theft. The legitimate demand for lawful conduct of the government's property affairs can be met by provisions like those of Section 2C:21–13 limiting punishment to knowing violation of regulations.

3. *Present New Jersey Law: Entrusted Private Property.* Generally, in this area our statutes require a fraudulent intent. See, N.J.S. 2A:102–2 (Embezzlement by trustee, etc.) and N.J.S. 2A:102–3 (Conversion of property of corporation by director or officer). In some areas, misapplication *per se* is, however, sufficient. See 2A:111–30 (Use of funds contributed for charitable purposes for other purposes.) The Code equates public and private entrusted property for this purpose.

§ 2C:21–16. COMMENTARY

1. *Present New Jersey Law.* See N.J.S. 2A:111–5 (Obtaining execution of valuable security or affixing name thereto by false pretense).

2. When theft legislation is limited to the obtaining of "property," some fairly important forms of cheating may be overlooked. Thus it may not be false pretense where the only thing secured by defendant's deception was a guaranty of his indebtedness. Widespread legislation deals with this problem by punishing anyone who procures a signature or other execution of defined classes of documents by fraud. Section 2C:21–16 is limited to transactions of business or pecuniary significance, consistently with the general scope of Chapter 21. The execution of documents of non-pecuniary significance can be dealt with elsewhere, *e.g.*, fraudulently procuring a governmental official to sign or revoke an administrative regulation may be penalized in connection with other provisions for the protection of governmental operations.

§ 2C:21–17. COMMENTARY

1. *Present New Jersey Statutes.* See N.J.S. 2A:111–18 (False personation) and N.J.S. 2A:170–19. (Persons representing themselves to be members of armed forces or auxiliaries; wearing insignia to induce belief of former membership therein.) See also N.J.S. 2A:116–1 (Unlawful wearing of fraternal insignia); N.J.S. 2A:116–2 (Unlawful use of fraternal name or insignia); N.J.S. 2A:116–3 (Unlawful use of badge, emblem of insignia or military orders).

2. The MPC has no impersonating statute except for public servants. MPC § 241.9. We retain that Section (2C:28–8) but also add this one as to private impersonations. Our provision is drawn from the Connecticut Code and the proposed Michigan Code.

§ 2C:21–18. COMMENTARY

1. This is §§ 175.50 and 175.55 of the New York Code. Such conduct may be forgery, theft or attempted theft. This petty disorderly persons offense is made available for minor uses or possession of slugs.

§ 2C:21–19. COMMENTARY

1. This Section consolidates several provisions relating to the extension of credit and collection upon it.

2. Subsection a relating to Usury was taken from § 190.40 of the New York Code and from N.J.S. 2A:119A–1 and 2A:170–102.

3. Subsection b was taken from N.J.S. 2A:119A–3.

4. Subsection c was taken from § 190.45 of the New York Code and from N.J.S. 2A:119A–4.

5. Subsection d was taken from § 190.50 of the New York Code.

6. Subsection e is § 190.55 of the New York Code.

7. Subsection f was N.J.S. 2A:99A–1, 2 and 4. See *American Budget Corp. v. Furman,* 67 N.J. Super. 134 (App. Div. 1961), *aff'd.,* 36 N.J. 129 (1962).

§ 2C:24–1. COMMENTARY

1. *Existing New Jersey Statutes.* Our present law is found in N.J.S. 2A:92–1, 2 and 3.

2. *Previously Contracted Marriage.* Our statute speaks of a "person having a husband or wife." The Code changes this to speak of a "married person" who "contracts or purports to contract" a subsequent marriage. This is intended to include persons who underwent a previous void marriage. It is possible to contract a marriage which in legal effect is a nullity and then to contract a second marriage under circumstance where the actor demonstrates by his behavior a dangerous disposition to plural marriage, unless he comes within the good faith defense of subparagraph (4). Furthermore, the text facilitates the conviction of one who upon trial for marrying C, while already married to B, attempts to defeat the prosecution by proving that the B marriage was itself bigamous and void because A was his first and only legal bride. This is the result reached under our present statute. In *Ysern v. Horter,* 94 N.J. Eq. 135 (Ch. 1923), it was held that a voidable marriage, *i.e.,* one which one of the parties during the lifetime of both

has the option by a decree to have declared void *ab initio,* is, until such a decree is made, a valid marriage rendering each party incapable of marrying a third party, and any purported marriage to a third party supports an indictment for bigamy.

3. *Mens Rea; Mistake as to Death of Prior Spouse; Effect of Prolonged Absence.* There are frequent statements in judicial opinions and elsewhere that the offense of bigamy does not require *mens rea.* Such is the case in New Jersey. *State v. DeMeo,* 20 N.J. (1955), *affirming* 35 N.J. Super. 168 (App. Div.). We challenge the breadth of such statements but even to the extent they are true, we substantially revise the circumstances in which the defendant's subsequent marriage will not result in the crime of bigamy.

4. *Belief in Death of Spouse. Section 2C:24–1a(1):* Paragraph (1) of Subsection a follows the small minority of states which absolve the defendant in a bigamy case where it appears that he believed his first spouse to be dead. The prevailing view, and that now followed in New Jersey, is that such a defense is unavailing even if the mistake was based on reasonable grounds. MPC T.D. 4, p. 222 (1955). See *State v. DeMeo, supra* at 7–9, expressly rejecting the leading case to the contrary of *Regina v. Tolson* [1899] 23 Q.B. 168. This position was reached largely as a matter of construction of the language of statutes rather than on policy grounds. (20 N.J. 8.) However, when the matter is considered afresh on policy grounds, there seems to be no valid reason to stigmatize or punish remarriage by people who in good faith believe themselves to be widows or widowers.

5. *Prolonged Absence of Spouse. Section 2C:24–1a(2):* Paragraph (2) of Subsection a deals with the problem of prolonged absence of a spouse. New Jersey, under N.J.S. 2A:92–1, allows this defense if (1) the spouse has remained outside the United States continuously for 5 years or (2) the spouse has been absent for 5 years and the remarrying partner believes the other person to be dead. Note that in the first case no belief in death is necessary. We reformulate the rule to require "living apart for five consecutive years throughout which the prior spouse was not known by the actor to be alive." To treat absence as a justification for ignoring the marriage is probably an anachronism, appropriate for a time when it was impossible to obtain a divorce by judicial decree, or on a basis other than adultery. This is not the situation today. Also we live in a time when large numbers of husbands and some wives serve overseas under circumstances which should not of themselves constitute grounds for criminality. Service by publication is possible where the spouse is absent. A spouse's prolonged "disappearance" would more often give rise to a conviction that he would not reappear, rather than a genuine belief that he was dead. Accordingly, the formula "not known to be alive" is used in subparagraph (2). The text also employs "living apart" rather than "absence," since it seems inadvisable to make criminal liability for a

remarriage turn on the question of who initiated or was at fault in an ancient separation. MPC T.D. 4, pp. 223-224 (1955).

6. *Life Imprisonment; Civil Death.* There are provisions in many states (but not in this Code) that one sentenced to life imprisonment shall be deemed "civilly dead"; and a few bigamy statutes (but not New Jersey's) explicitly except the remarriage of the convict's spouse under these circumstances. We believe this problem should be dealt with in the divorce law rather than by exception to bigamy liability. To deal with the problem only by way of exception from bigamy leaves unresolved the civil consequences of this quasi-divorce.

7. *Invalid Judgment of Divorce; Mistake as to Eligibility for Remarriage.* Paragraphs (3) and (4) of Subsection a adopt the view of a growing but yet small minority of states that one who has reasonable basis for believing himself legally eligible to marry does not become a criminal upon his second marriage. Our reasons for abandoning the majority rule are: (1) The decisions which exemplify the rule frequently rest upon construction of existing statutes rather than on fresh appraisal of the policy. It will be argued, for example, that a bigamy statute which does not explicitly require evil intent and which has an express provision permitting second marriage following a valid divorce necessarily indicates a legislative intent to exclude mistake as a defense. (2) Questions of the validity of foreign divorces are so perplexing that lawyers and the courts themselves are divided on many issues. Under these circumstances laymen should not be subject to criminal penalties for good faith mistakes for which they have reasonable ground. (3) It is well settled that a single person who marries a divorced person is not liable to punishment if he made a reasonable mistake as to the legal validity of the other's divorce.

In addition to a general reasonable belief in a legal right to marry, the entry of a judgment dissolving the marriage can be sufficient where a Court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the actor does not know that judgment to be invalid. This provision is intended to lighten the burden of exculpation for a defendant who remarries following an out-of-state divorce. The thought is that even a person with some sophistication in law may be uncertain as to the validity of a foreign divorce. It seems harsh to subject him to a criminal bigamy prosecution, especially since the questionable divorce may be that of his second spouse from another person.

The state of the law in New Jersey is unclear. The leading case is *State v. DeMeo, supra.* The trial court, in charging the jury, had set forth the statutory exceptions found in N.J.S. 2A:92–1, including that pertaining to divorce. The jury was instructed that domicil was the jurisdictional basis for divorce and that the burden of bringing himself within the statutory exception rested with the defendant. *State v. Reilly,* 88 N.J.L. 104 (Sup. Ct. 1915) *aff'd,* 89 N.J.L. 627

(E. & A. 1916). The Court in *DeMeo* found that, under our law, the Mexican divorce was absolutely void. (*Supra* at 5–6.)

"The defendant DeMeo does not now contend that the divorce of February 18, 1953 has any validity in this State; his position is that the exemplified copy of the Mexican divorce should have been admitted, not to establish that he was legally divorced, but as evidence tending to support a defense that he acted in good faith and without any intention of violating the bigamy statute. In *State v. Najjar, supra,* this court held that a defendant who remarries on the basis of a Mexican mail order divorce (which lacks even colorable validity) may not avail himself of a defense based on the absence of criminal intent. The defendant DeMeo urges that the *Najjar* case be re-examined and that our bigamy statute now be construed as affording a comprehensive defense based on the defendant's honest belief that he was free to remarry.

* * * *

"The strict liability which the weight of authority in this country imposes has been justified as being in fulfillment of the strong public policy in favor of marriage stability; but since it may harshly result in the criminal conviction of persons who are not morally culpable it has understandably received severe criticism in academic circles. . . . Professor Hall suggests that the paramount fact is not that bigamy is a statutory offense but that the penalty therefor is severe and he urges that "a *mens rea, e.g.*, entry into a marriage with knowledge of an existing binding union," should always be required. But even the courts which have expressed disagreement with the weight of authority have declined to go that far in endangering bigamy prosecutions by permitting a defense based on subjective belief without accompanying objective safeguards.

"In the recent case of *Long v. State,* 5 Terry 262, 65 A. 2d 489, 497 (Del. Sup. Ct. 1949), . . . the defendant left Delaware for Arkansas in 1946; he was a retired police officer in bad health and testified that he intended "to leave Delaware permanently and take up a permanent domicile in Arkansas." While in Arkansas he instituted divorce proceedings and a decree of divorce was entered in 1947. The defendant then returned to Delaware and thereafter remarried. He was indicted for bigamy and found guilty by a jury. The trial court had rejected evidence from which the jury might have found that prior to his remarriage the defendant had consulted a reputable Delaware attorney to whom he made full and fair disclosure of the relevant circumstances and who advised him that he was legally free to remarry. The Supreme Court of Delaware held that the evidence should have been admitted and remanded the cause for a new trial. It

stated that it would recognize ignorance or mistake of law as a defense where the defendant had acted in good faith and before engaging in his conduct had "made a *bona fide*, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law." It acknowledged that its recognition of the defense, even as thus safeguarded, might have some deterrent effects upon the view that they were "greatly outweighed by considerations which favor allowing it."

"New Jersey's bigamy statute is similar to most of the bigamy statutes now in force in the United States. The statutory language is broad and contains no express reference to criminal intent; if the majority view throughout the country is adhered to in all its rigor, then a defendant's mistaken belief that he was legally divorced prior to his remarriage constitutes no defense even though he be fully prepared to establish that he acted in good faith after diligently having taken reasonable precautions. On the other hand if the more humane minority view is found acceptable, then a contrary result may readily be reached in our State as a matter of statutory construction; as Justice Heher has said, that which is properly implied is as much a part of our statutory law as that which is expressed.

* * * *

"While much more may perhaps be said for the minority view and the moral considerations which support it, we consider that, in any event, it has no proper application to the particular circumstances presented in the instant matter. The defendant DeMeo knowingly remarried on the basis of a Mexican mail order divorce. He has not at any time suggested that he remarried under a factual misapprehension or that he took reasonable steps toward ascertaining the legal validity of the divorce; indeed, if such steps had been taken they would quickly have disclosed its utter worthlessness. *State v. Najjar, supra,* which in 1949 affirmed a bigamy conviction for remarriage after a Mexican mail order divorce clearly described the futility of such divorces. . . .

* * * *

"We now reaffirm the sweep of *Najjar* in striking down Mexican mail order divorces for all purposes in bigamy prosecutions. However, as was done in *Najjar,* we expressly withhold determination as to the availability 'in situations not before us' (1 N.J. Super. at page 214) of a defense to a bigamy prosecution resting upon the defendant's honest belief, reasonably entertained, that he was legally free to remarry in New Jersey."

Mr. Justice Wachenfeld entered a dissenting opinion which is similar to the position reached (legislatively) by the Code:

"The basic question here is whether in a bigamy prosecution good faith reliance upon a judgment of divorce which in law is void is still a valid defense.

* * * *

"I voted for affirmance in the *Najjar* case, *supra,* but further study and consideration bring me to the conclusion that I was in error.

"A final judgment of divorce, even where the judgment is void and even though it is generally known to be worthless, unless this general knowledge is imputed or brought home to the defendant, should constitute a defense in a criminal action of bigamy. The defendant's intent and the query as to whether or not he acted under a genuine mistake of law go to the very heart of our concept of criminal behavior and become part of the *mens rea* which is a fundamental in our criminal law. The crime of bigamy, like any other crime, at least those where the Legislature has not specifically excluded the element of criminal intent in defining the crime itself, requires a guilty mind and an intent to do wrong.

"Not only is this the law, but it seems to be an inseparable part of human nature and the foundation of fundamental fairness, as is reflected by the inquiry of the jury in the case at hand.

* * * *

"Because we have vigorously frowned upon Mexican divorces in our adjudications on foreign edicts brings with it no reason why we should assume that everyone is as cognizant as lawyers and judges are of the discredit and disrepute in which these decrees are held. There is nothing in our divorce law which neutralizes or changes the doctrine we have always adhered to, that a wrongful act and a wrongful intent must concur before a criminal penalty falls.

"Mr. Average Citizen who, as he did here, submits to one of the major state departments his application for a marriage license and sets forth therein in full that he was divorced by a Mexican divorce decree, giving its date and the court which granted it, has a right to assume he can utilize the very license issued by the state without going to jail for having done so.

"It must come as a distinct shock to an honest person who has made full disclosure to his sovereign state as to his exact marital status and secured a license to embark upon another matrimonial

venture to find that without wrongful or criminal intent he automatically becomes a convict on a criminal charge which he cannot even defend because the court refuses to accept the very evidence he relied upon and which was, inferentially at least, approved by the state itself at the time he made his original intentions known. Such a result is not good law, and his incarceration cannot conceivably be synonymous with that kind of justice which we so proudly proclaim."

8. *Other Person Participating in Bigamous Marriage.* Subsection b is substantially in accord with N.J.S. 2A:92–3 punishing the knowing participation in a bigamous or polygamous marriage.

9. *Punishment.* Bigamy is now punishable as a high misdemeanor. Under the Code, bigamy is a crime of the fourth degree. Note that bigamy may be punished under the rape provision of the Code if the defendant, by concealing or misrepresenting his marital status, causes a woman to submit to intercourse with him in the belief that he is her lawful husband.

§ 2C:24–2. COMMENTARY

1. *Introduction.* Sexual intercourse between closely related persons is almost universally regarded as a grave offense. Various explanations are available for this undertaking by the State to punish activity which may be carried on in private, by mutual consent of the participants, and without obvious impact on the community. The drafters of the MPC identify five rationales which have been offered which they discuss as follows so that one or more of them can be selected as the guide for the proper scope of the statute.

"(1) The incest law may represent simply the placing of civil sanction behind a religious tenet. * * * *

(2) The laws against incest may have their justification in the science of genetics, *i.e.*, they may serve civil and utilitarian function of preventing such inbreeding as would result in defective offspring. * * * *

(3) Sociological and anthropological literature suggests that the objectives of the incest prohibition are: (a) to promote the solidarity of the family by preventing sex rivalries and jealousies within it, (b) to promote the cohesiveness of the larger social group by compelling individuals to establish relationships outside the family, (c) to promote cultural diffusion. * * * *

(4) Even if it were demonstrable that the incest laws promote no secular goal, it might nevertheless be necessary to have a penal law on the subject where there is a general and intense hostility to the behavior, since a penal law will neither be accepted nor respected if it does not seek to repress that which is universally regarded by the community as misbehavior.

(5) The actual incidence of prosecution for incest in our society suggests that the incest laws operate primarily against a kind of imposition on young and dependant females."

In the light of this it would appear that a modern law of incest, carrying felony penalties, should be confined to relationships which (a) present a relatively clear biological risk, or (b) a high likelihood of abuse of parental or other familial influence. In most cases a line so drawn would coincide with the most widely and intensely felt religious (or other) aversions. It should be permissible for a state to adopt broader restrictions against marriages which it regards as undesirable, but the violation of any such regulations should not carry the infamy or penalty commonly associated with incest.

2. *Existing New Jersey Statutes.* New Jersey now has two separate incest crimes. The general statute deals with incest by sexual intercourse between persons who may not, under our law (N.J.S. 37:1–1), marry. N.J.S. 2A:114–1. In addition to the general incest statute, N.J.S. 2A:114–2 deals with both incest and certain forms of incestuous conduct by a parent and his child.

3. *Section 2C:24–2: Prohibited Relationships.*

(a) *Consanguineous.* We believe the crucial problem here to be the marriage of first cousins. There is substantial unanimity in the condemnation of sexual relations between persons more closely related. We include all relationships closer than first cousins. Thus, brothers and sisters of the half-blood are covered, as well as persons in lineal ascent or descent and uncle-niece and aunt-nephew. But contrary to most present American legislation, uncle-niece and aunt-nephew by the half-blood intercourse is not incestuous. Legitimacy is, of course, irrelevant where the concern is with blood lines. New Jersey law now makes such marriages incestuous. *Bucca v. State,* 43 N.J. Super. 315 (App. Div. 1957) (uncle-niece).

(b) *Adoptive and Step-Relations.* There is a split among the states as to whether incest should be limited to blood relations. New Jersey's general incest statute (N.J.S. 2A:114–1), incorporating our marriage statute (N.J.S. 37:1–1) apparently requires a blood relationship. The statute concerned with the parent-child relationship (N.J.S. 2A:114–2) speaks, somewhat ambiguously, of "child of such parent" in one place, and "child of his own flesh and blood" in another. No New Jersey cases were found.

There are valid reasons for prohibiting sexual relationships between step-parent and step-child, or between adoptive parents and children. Sexual freedom within the "artificial" family would be disruptive of family unity, just as in the natural family. Such an illicit relationship generally means a breach of the "parent's" duty to guide the child into satisfactory adult sexual adjustment. But it is possible to imagine

cases which involve neither illicit relationship nor exploitation. Following the majority rule, we so treat it and therefore exclude it from incest.

The case of adoption is somewhat different inasmuch as the law here is attempting to duplicate, so far as possible, the structure of the natural family. We prohibit marriage between adoptive parent and child but stop at that point. It is certainly inadvisable to carry the incest conception so far as to make it a crime for an adoptive uncle and niece to marry and we put adoptive brothers and sisters in the same category.

(c) *In-Laws.* New Jersey's statutes do not now prohibit intercourse between in-laws and the Code agrees.

4. *Section 2C:24–2: The Prohibited Act.* A single act of sexual intercourse is the almost universally prohibited behavior. Although our statute speaks in terms of persons who "intermarry" or who commit "adultery" or "fornication," the cases have interpreted it as requiring sexual intercourse. *State v. Masnik,* 125 N.J.L. 34 (E. & A. 1940) *affirming* 123 N.J.L. 355 (Sup. Ct. 1939); *State v. Columbus,* 9 N.J. Misc. 512 (Sup. Ct. 1931) ("The gist of the crime of incest is sexual intercourse. . . .").

The Code changes this to make marriage suffice. This position is adopted here because (1) in almost every conceivable case proof of marriage sufficiently establishes that intercourse has occurred, and no good purpose can be accomplished by giving the parties an opportunity to escape conviction by testifying that they did not engage in normal intercourse, where such testimony probably will be collusive and almost impossible to contradict; and (2) such marriages should be deterred in any event. Under the MPC "cohabitation" would suffice. Following New York's lead, we eliminate this from the Code because of the possibility of abuse.

Under the existing statute relating to parent and child, both incest and certain forms of "incestuous conduct" are defined. These are "lewdness with, or an act of indecency towards, or tending to debauch the morals and manners of a child . . . or . . . any infamous proposal to a child . . . with intent to commit adultery or fornication with the child. . . ." See *State v. Masnik, supra.* Such conduct would not come within Section 2C:24–2. It would be punishable, although not as severely, as a sex offense or under 2C:24–4.

5. *Section 2C:24–2: Knowledge of Relationship.* The Code requires that the defendant act knowingly. The New Jersey statute does not address itself to the problem and no cases were found. Cf. *State v. DeMeo,* 20 N.J. 1 (1955) (Bigamy).

6. *Relation to Rape.* Since the text does not require mutual consent of the parties to incestuous intercourse, it is in accord with current law to the effect that a man cannot avoid conviction for incest

by showing that he compelled the woman to submit, *i.e.*, he was guilty of rape. See *State v. Hughes,* 108 N.J.L. 64 (Sup. Ct. 1931), *rev'd on other grounds,* 109 N.J.L. 189 (E. & A. 1932); *State v. Columbus, supra.*

7. Punishment of Incest. New Jersey now grades incest into two categories: The general provision provides for imprisonment for up to five years and up to $1,000 fine. The parent-child statute, both for incest and the lesser forms of incestuous conduct is punishable for up to 15 years and a fine of $1,000. The Code classifies it as a crime of the third degree. This is based on the judgment that so heavy a threat will be enough to deter those people who are deterrable. Moreover this Section makes the more severe penalty of second degree crime applicable to cases of gravest concern on account of the youth of the girl. In the light of these considerations, provision for imprisonment terms of 10 or more years could only reflect moral indignation or retributive impulses. No grading of the offense is called for, since we have eliminated from incest those affinal and remote relations for whom lower sentences are usually prescribed.

§ 2C:24–3. COMMENTARY

1. A "Commission to Study the New Jersey Statutes Relating to Abortion" created by a Concurrent Resolution of the Legislature recently reported and suggested substantial changes in the laws in this field. We agree with that Report that the existing statutes are entirely inadequate to reflect present-day standards. Because the Legislature has submitted this issue to a separate study commission, we deem it inappropriate for us to make any recommendations in the area. Whatever statute relating to abortion the Legislature chooses to enact should be inserted at this point.

§ 2C:24–4. COMMENTARY

1. This Section incorporates into the Code the existing law as to abuse, abandonment, cruelty and neglect of children by making such conduct criminal under the definitions of those terms in Title 9. The intent is to incorporate the crime now defined in N.J.S. 9:6–3 without substantial change except for the penalty provisions. N.J.S. 2A:96–1 (Concealing Birth or Death of Child); 2A:96–2 (Hiring out or Employing Minors for Mendicant or Immoral Purposes); 96–3 (Debauching or Impairing Morals of a Child under 16); and 2A:96–4 (Contributing to Delinquency of a Child) have all been omitted. In our opinion, this and other Sections of the Code would cover those offenses. See *State v. White,* 105 N.J. Super. 234 (App. Div. 1969); *State v. Raymond,* 74 N.J. Super. 434 (App. Div. 1962) *appeal dismissed,* 39 N.J. 241; *State v. Hintenberger,* 41 N.J. Super. 597 (App. Div. 1956); *State v. Balles,* 47 N.J. 331 (1966); *State v. Montalbo,* 33 N.J. Super. 462 (App. Div. 1955).

2. We are not happy with the breadth of, nor the precision of the definitions of, abuse, abandonment, cruelty and neglect in N.J.S. 9:6–1. The conduct which is appropriately prevented by non-criminal sanctions need not always also be made criminal. Further, provisions of Chapter 6 of Title 9 show the basic thrust of it not to be to provide a criminal sanction but rather a strong remedy to compel support and/or proper conduct toward the child. Pending a re-examination of those definitions for civil purposes, we do not believe we should tamper with them for criminal purposes which might destroy the most effective sanction to stop the misconduct. We do believe that reconsideration of this entire field of law would be appropriate. With hesitancy, then, we simply recommend continuation of existing law.

§ 2C:24–5. COMMENTARY

1. *Basic Policy.* The chief feature of Section 2C:24–5 is that it confines the criminal offense of non-support to persistent failure to provide support which the accused knows he is legally obliged to provide. As will be seen below, present law penalizes any "willful" default on specified obligations. This change to "persistence" is the preferable goal of legislation and administration in this field. Exemplary punishment is of doubtful efficacy in complex family situations where many forces, psychic, social, and economic may combine to excuse, if not justify, the behavior. Moreover, imprisonment should be a last resort here, since it incapacitates the defendant from providing the very support which the community seeks to require and frustrates any broader effort to rehabilitate the family situation. Our statutes now contain provisions making it clear that the basic policy thrust is to compel the defendant to perform his duty.

Nevertheless, it appears desirable to retain a limited penal provision, at least until adequately staffed family courts are established. By focusing on "persistent" defaulters, we express a legislative policy in favor of resort, in the first instance, to non-penal measures. And, by framing the offense in terms of known legal obligations, we avoid the necessity of attempting to decide, in the penal law, who is entitled to support, at what levels, with what excuses for non-support, etc.

The concept of "persistent" violation connotes repetition, obstinacy, willfulness; and it is difficult to formulate a more precise standard to differentiate the aggravated case of continued defiance of the support law, which we wish to penalize, from the simple case of default which may be solved by an official notice of judicial order to pay, or some intelligent social work. Since defendant can be convicted only if he knows he is obliged by law to furnish support, there is no trap for innocent persons in the undefined but meaningful term "persistently." Our law is in accord with this policy. See *Baucum*

v. N.J. Parole Board, 68 N.J. Super. 271 (App. Div. 1961); *State v. Monroe,* 30 N.J. 160 (1959); *State v. Savastini,* 14 N.J. 507 (1954).

2. Originally, the drafters of the MPC included as an alternative formulation a clause at the end of the Section reading as follows:

> ". . . to preserve that person from destitution. It shall not be a defense under this Section that the dependent is saved from destitution by his own resources or the aid of others."

This raised the issue of whether the Section should be confined to averting "destitution" or whether the provision should extend to other support, *e.g.* alimony ordered in connection with a divorce. MPC T.D. 9, p. 189 (1959). We reject, as does the MPC, the limitation. The last sentence of the rejected clause accords with New Jersey's present law. *State on Complaint of Bruneel v. Bruneel,* 14 N.J. 53 (1953).

3. *Present New Jersey Law.* This State has, since 1917, had in effect a variation of the Uniform Desertion and Nonsupport Act. Two crimes are defined in our statutes. N.J.S. 2A:100–1 covers simple willful desertion by a husband or father. See *State v. Garris,* 98 N.J.L. 608 (1923) (relationship of this statute to N.J.S. 2A:100–2); *State v. Vreeland,* 89 N.J.L. 423 (Sup. Ct. 1916) *aff'd,* 90 N.J.L. 727 (E. & A. 1917) (what constitutes desertion); *State v. Kretzkamp,* 87 N.J.L. 80 (Sup. Ct. 1915); *Greenspan v. Slate,* 12 N.J. 425 (1953); *State v. Harot,* 46 N.J. Super. 158 (App. Div. 1957) (each day a separate offense); *State v. Greenberg,* 16 N.J. 568 (1954). N.J.S. 2A:100–2 extends to non-support or desertion by husband or parent where the wife or child is destitute. See *State on Complaint of Bruneel v. Bruneel, supra; State v. Monroe,* 30 N.J. 160 (1959); *State v. Napoleon,* 37 N.J. Super. 595 (App. Div. 1955).

The Code, it should be noted, does not follow our law in providing that the crime occurs for either desertion or non-support. Although the offense has been defined as desertion or non-support, no prosecution for desertion was found that did not also involve non-support.

4. Section 2C:62–1 provides powers for the Court to coerce support from the defendant.

§ 2C:24–6. COMMENTARY

1. These provisions are N.J.S. 2A:96–6 and 7 carried forward without substantial change. The language of the provisions has been simplified. As to the definition of "person" see § 2C:1–13g. As to N.J.S. 2A:96–6, see generally, *State v. Segal,* 78 N.J. Super. 273 (App. Div. 1963) and *State v. Wasserman,* 75 N.J. Super. 480 (App. Div. 1962) *aff'd.,* 39 N.J. 516 (1963).

§ 2C:24–7. COMMENTARY

1. This Section is New York Penal Code § 260.25. Our law now has no comparable generalization.

§ 2C:27–1. COMMENTARY

1. The definitions set forth here are used in the Chapters pertaining to Bribery and Corrupt Influence; Perjury and Other Falsification in Official Matters; Obstructing Governmental Operations; Escapes; and Abuse of Office. Some require explanation:

2. "Benefit" (Subsection a) should be distinguished from "pecuniary benefit" (Subsection f). The latter is used in Section 2C:27–1 to define Bribery in Official and Political Matters. See the Commentary to that Section.

3. "Official proceeding" is defined mainly for use in Section 2C:28–1 (Perjury) and the implications of the definition are there considered. "Official proceeding" is to be distinguished from "judicial proceeding," which is not defined and from "administrative proceeding" (Subsection h). We add "arbitration proceeding" to the definition of official proceeding found in the MPC.

4. "Statement" is defined mainly for use in Section 2C:28–1 (Perjury) and the implications of the definition are there considered.

§ 2C:27–2. COMMENTARY

1. *Existing New Jersey Law.* Bribery is now both a common-law crime and a statutory offense in this State.

(a) *The Common-Law Offense.* The common-law offense of bribery is indictable as a misdemeanor in New Jersey under N.J.S. 2A:85–1. Statutes in the area have been interpreted as merely defining and fixing the punishment for bribery in certain cases; they do not prevent use of the common-law crime. *State v. Begyn,* 34 N.J. 35 (1961); *State v. Ellis,* 33 N.J.L. 102 (Sup. Ct. 1868). In 1 *Schlosser, Criminal Laws of New Jersey,* § 25.1 (3 Ed. 1970), the common-law offense is defined:

> "The common law offense of bribery is very broad. It extends to any public officer who accepts a bribe and to any person who offers or gives the bribe, for it is as much a crime to tender a bribe as it is to receive one. Essentially the offense of bribery consists in corruptly tendering or receiving a price for official action or non-action. Bribery is the receiving or offering any undue reward by or to any person whatsoever, in a public office, in order to influence his behavior in office and incline him to act contrary to the known rules of honesty and integrity. It is immaterial whether the office be one in the state, county or municipal government;

any attempt, successful or not, to influence any public officer in his official conduct by the offer of a reward of pecuniary compensation is bribery. The offense is reciprocal: whenever it is a crime to receive a bribe it is a crime to tender one.

* * * *

"The common-law offense of bribery extends to any public officer. It covers all public officers: county prosecutors; chiefs of police; policemen; municipal aldermen; mayors; and members of a municipal governing body, among others."

In *State v. Begyn, supra,* the Court defined the crime as follows:

"We next turn to common law bribery, a very broad offense which has always existed in New Jersey as an indictable misdemeanor. *State v. Ellis,* 33 N.J.L. 102 (Sup. Ct. 1868); *State v. Srholez,* 16 N.J. Super. 344 (Law Div. 1951). It consists in 'receiving or offering any undue reward by or to any person whatsoever, in a public office, in order to influence his behavior in office and incline him to act contrary to the known rules of honesty and integrity.' 1 Schlosser, Criminal Laws of New Jersey § 390 (1953). See also Perkins, Criminal Law, 396–399 (1957). The crime is committed by the mere offer as well as by the actual payment; in the latter event it is of no moment that the original solicitation may have been by the officer rather than the briber. It is not necessary that the act requested be one which the official has authority to do. Sufficient it is if he has official power, ability or apparent ability to bring about or contribute to the desired end. Perkins, *op. cit.* 405–06. Both the offeror and the recipient are guilty of the offense and it makes no difference whether the official action bargained for thereafter actually takes place. Apparently mere solicitation of a bribe by or on behalf of an officer, without payment being made, did not constitute bribery at common law but it has been made a crime in certain situations by our statutes. N.J.S. 2A:93–4 and 6. *State v. Merkle,* 82 N.J.L. 172 (Sup. Ct. 1912); reversed on other grounds, 83 N.J.L. 677 (E. & A. 1912); *State v. Smagula,* 39 N.J. Super. 187 (App. Div. 1956). Such does, however, amount to attempted extortion. *State v. Weleck,* 10 N.J. 355 (1952). The necessary *mens rea* on the part of the briber, if he is accused, requires only an intent to subject the official action of the recipient to the influence of personal gain or advantage rather than public welfare since the social interest demands that official action should be free from improper motives of personal advantage. On the part of the bribee, if he be the one charged, an intent to use the opportunity to perform a public duty as a means of acquiring an unlawful personal benefit or advantage supplies the necessary corrupt intent. Perkins, *op. cit.* 406. It seems obvious that, on the State's proofs, a case of common law

bribery was also made out against both the payor and defendant." (*supra* at 47-48.)

(b) *Statutory Offenses of Bribery Involving Public Officials:*

2A:93–1. Bribery of judge or magistrate; acceptance of bribe

2A:93–2. Bribery of legislators; acceptance by legislators or other persons

2A:93–3. Exemption from prosecution under section 2A:93–2 on giving testimony

2A:93–4. Soliciting or receiving reward for official vote

2A:93–5. Disqualification to hold office

2A:93–6. Giving or accepting bribes in connection with government work, service, etc.

2A:103–1. Embracery

2A:103–2. Acceptance of reward by juror: disqualification

2A:105–1. Unlawful takings

2A:105–2. Public officer or employee, judge or magistrate taking fees in criminal cases

2. *Classes of Persons as to Whom Bribery is Prohibited.* The Code by virtue of the definition of "public servant" in Section 2C:27–1g covers not only "officials" but all public employees. In this regard, it is like modern legislation in many other states but unlike our offense, both statutory and common law, which extends to "officials." Additionally, the Code deals here with political party officials (Section 2C:27–1e) and electors. Bribery and intimidation of witnesses are dealt with in Section 2C:28–6.

3. *Kinds of Action as to Which Bribery is Prohibited.* The bribery statutes in most states speak of bribing a public official with intent to influence his decision, vote or other action which is or may be pending before him. Standing alone, such a formulation would appear to restrict bribery to decision-making or discretionary functions of public servants who may have matters "pending" before them. The Code intends to include the activities of "ministerial" public servants which would not fit the category of decision-making. This is done by Subsection c which forbids bribery as to "any benefit as consideration for a violation of a known duty as public servant or party official."

We follow existing law in proscribing bribery in decision-making without regard to whether the bribe was intended to cause the bribee to do something wrong, and in requiring an intent to cause breach of duty where the conduct falls outside the decision-making category. This makes it clear that the bribery section does not apply to: (a) situations where the law contemplates payment of fees for services rendered by a public servant; or (b) tips or other compensation for services rendered by a public servant consistently with his duties. We recognize that the practice of tipping or paying minor officials for

services which it is their duty to perform gratis is an evil against which administrative and legislative action is appropriate. However, the practice is widespread and even open in some quarters, indicating that community standards of behavior in this area have not yet crystallized sufficiently to warrant the application of penal sanctions in most cases. Accordingly, the primary means of social control should be by enforcement of discipline within the civil service, and by special legislation carrying minor penalties, outside the Penal Code.

4. *Nature of the Benefit; Political Inducements.* This Section does not employ the word "corruptly" to characterize the forbidden influence. Although that word is often used in extant legislation and judicial opinions, it is ambiguous in application to two important categories of cases (i) where the alleged briber seeks to justify his conduct on the ground that he sought only to counter opposing "corrupt" offers, or to influence an official to make the decision which he should in any event make; and (ii) where the alleged bribe is an offer of appointment or promotion in the public service, or of political support, in exchange for like commitments by the offeree. Instead, Subsection a prohibits unqualifiedly the giving or receiving of any *pecuniary* benefit to influence official or political discretion. Offers of non-pecuniary benefits, *e.g.*, political support, honorific appointments, are penalized, under Subsection b, only in connection with attempts to influence judicial and administrative proceedings. "Administrative proceeding" is defined in Section 2C:27–1 so as to include quasi-judicial proceedings and, also, some proceedings directed toward formulation of regulations, if the law contemplates that the outcome shall be based on evidence and findings. The definition will also cover some actions that might be called "executive" or "administrative," where the official action applies a general rule to an individual, *e.g.*, in granting or revoking a license, awarding veteran's disability compensation or social security pay.

5. *"In Consideration."* This Section requires that the benefit be "in consideration" of the official action or agreement therefor. This is the more conventional formula in bribery legislation, and prevents application of the bribery sanction to situations where gifts are given in the mere hope of influence, without any agreement by the donee. We deal with gifts to officials in Section 2C:27–7.

6. The second paragraph of this Section as to lack of jurisdiction, etc., is our law. *State v. Ellis, supra.*

7. The third paragraph, as to the lack of defenses is taken from the New York Code. The Code does not allow a defense, as does New York, that the person did not bribe because he was extorted. We believe a person in such a situation must report the incident to the authorities rather than pay the money.

8. *Gradation.* Current law divides briberies between high misdemeanors and misdemeanors. The Code makes them all crimes of the

third degree. In principle it would be desirable to provide a grading of offenses which range in seriousness from petty offers to traffic policemen to corruption of high government officials in matters involving the general welfare of the state or large sums of money. Also, prosecution might be facilitated by classifying minor derelictions as lesser offenses. Difficulty in drafting a satisfactory set of legislative grading criteria has persuaded us not to attempt to do so, leaving it to the Court to reduce the grade of the conviction under the power conferred in the provision relating to sentencing.

§ 2C:27–3. COMMENTARY

1. *Present Law.* The drafters of the MPC summarize the law as to the use of intimidation to influence the behavior of public officials as follows:

> "Penal legislation against the use of intimidation to influence the behavior of public officials is much rarer than legislation against bribery, although there are numerous special statutes relating to jurors and others involved in judicial administration, to legislators, and to law enforcement officers." (MPC T.D. 8, pp. 107–108 (1958).)

See also 18 U.S.C. § 1505 (1952).

As to corrupt influence by means short of bribery or intimidation, the law is summarized as follows:

> "The prevalence of penal legislation against improper influencing of jurors, masters, referees and the like, even when there is no showing of bribery or coercion, evidences a judgment that lesser pressures may materially obstruct the administration of justice. Existing laws vary significantly. The broadest formulations reach 'any attempt to influence' a verdict. More commonly there is a requirement that the influence be 'corrupt' or 'improper.' Sometimes there is the additional requirement that the influence be by communication outside the regular course of proceedings.
>
> This universal concern to protect *judicial* proceedings from improper influence has now to be extended to the administrative proceedings which play so large a part in modern government. The Federal Criminal Code makes it a felony to 'corruptly . . . influence, obstruct, or impede the due and proper administration of the law' under which a proceeding is being had before a department or agency of the United States. The same section forbids corrupt influence or obstruction of 'the due and proper exercise of the power of inquiry' in a Congressional investigation. The state codes frequently go so far as to punish in general terms corrupt influencing of legislators." (MPC T.D. 8, pp. 111-112.)

2. *New Jersey Law.* We now do not have any comprehensive legislation in this field. Our embracery statute (N.J.S. 2A:103–1) covers intimidations and corrupt influences as to jurors. As to other judicial proceedings, the common-law crime of obstructing justice would seem to apply. *State v. Cassatly,* 93 N.J. Super. 111 (App. Div. 1966). In some circumstances, our extortion statutes (N.J.S. 2A:105–3, 4 and 5) or the common-law offense of extortion (*State v. Morrissey,* 11 N.J. Super. 298 (App. Div. 1951) would apply.

3. *The Nature of the Forbidden Threats.* As was true with bribery under Section 2C:27–2, it was necessary to draw the line between permissible and prohibited threats. Threats of political opposition are legitimate means of influencing political decisions. A public official's threat to discharge a subordinate, if he pursues a particular course of official behavior, may be reprehensible interference or legitimate supervision. It would be intolerable to subject such threats to review by way of criminal prosecution. A threat to arrest or bring criminal prosecution raises similar problems. As with the bribery statute, we set forth a specific statement of wrongful threats.

§ 2C:27–4. COMMENTARY

1. Soliciting or accepting pay for past official favor should be discouraged because it undermines the integrity of administration. Compensation for past action implies a promise of similar compensation for future favor. Apart from this implied bribery for the future, when some "clients" of a public servant undertake to pay him for favors, others who deal with the same public servant are put under pressure to make similar contributions or risk subtle disfavor. We have not gone so far here as to prohibit all gifts to public servants, a matter which for the most part should be handled through civil service regulations and non-penal disciplinary measures. *Cf.* Section 2C:27–6, below. Nor have we here undertaken to deal with the question of private supplementation of public salaries, or private compensation for services which an official is supposed to render gratis, where there is no payment for "favoring" the payor. These prophylactic regulations can, if necessary, be dealt with by special legislation.

2. *Present Law.* Except for some special legislation in some states, there is little legislative precedent for this Section. In New Jersey, this conduct would fall within the common-law crime of misconduct in office. *State v. Begyn,* 34 N.J. 35 (1961); *State v. Lally,* 80 N.J. Super. 502 (App. Div. 1963); *State v. Silverstein,* 76 N. J. Super. 536 (App. Div.) *aff'd.,* 41 N.J. 203 (1962); *State v. Cohen,* 32 N.J. 1 (1060) *reversing* 56 N.J. Super. 509 (App. Div. 1959); *State v. Lombardo,* 18 N.J. Super. 511 (App. Div. 1952).

§ 2C:27–5. COMMENTARY

1. Some existing codes forbid retaliation against jurors, court officials and witnesses. See, *e.g.*, 18 U.S.C. § 1503 (1952). Apparently, unless the harm would in itself be an offense, *i.e.*, assault, this form of conduct is not now criminal in New Jersey.

2. We believe retaliation for past official action should be deterred for much the same reasons as apply to rewarding past official favor, although the need for special provision is less urgent since some forms of retaliation are independently criminal. The considerations which call for deterring retaliation against participants in judicial administration would seem equally applicable to other official proceedings and to public servants generally.

There is here a problem of defining the kinds of retaliatory acts which should be covered. This has been solved by limiting the offense to "unlawful" retaliation.

§ 2C:27–6. COMMENTARY

1. *Present New Jersey Law.* New Jersey now has a Conflicts of Interests Law (N.J.S. 52:13D–1 *et seq.*) which establishes both a penalty and a forfeiture of office provision for acts by state officials that would fall within this provision. No generally applicable criminal statute now exists. However, there are some statutes in this field which are described below. Additionally, as to the public official, the common-law offense of misconduct in office might apply and the crime of bribery might be made out as to the giver. As to the specific provisions of Section 2C:27–6, the following existing statutes apply or might apply: Subsection a: N.J.S. 2A:93–6; Subsection b: N.J.S. 52:34–19; Subsection c: N.J.S. 2A:93–1 and N.J.S. 2A:105–2; Subsection d: N.J.S. 2A:93–2.

§ 2C:27–7. COMMENTARY

1. This Section reaches an otherwise easy evasion of bribery laws, where the briber purports to pay for "services" rendered in connection with certain pending official matters rather than expressly to influence decision. It is recognized that this Section does not reach all forms of the evil against which it is directed. For example, it relates only to services and not to arrangements by which a public servant could advantageously supply goods or land in connection with some public project pending before him. Nor does the section reach the situation where a public servant shares in compensation paid to his private partners or other business organizations in which he may be substantially interested. This would take us generally into the field of conflict of interest, which is beyond the scope of the Code. However, it seems appropriate to include in the penal code the most obvious

case where a public servant serves two masters under circumstances barely distinguishable from bribery.

The provision only applies to certain types of compensation, *i.e.*, to advice and assistance in promoting legislation, claims against the government, and the like.

2. Subsection b requires proof of knowledge of illegality in prosecuting a layman for compensating a public servant for services. The public servant who is at the same time engaged in the private practice of law or other profession may be expected to know the applicable ethical and legal rules. The same cannot be expected of the private client, who may not even be aware that the lawyer, whom he has regularly retained, now occupies a relevant governmental post.

3. *Existing New Jersey Law.* The activities here forbidden might come within the common-law offense of misconduct in office. See also N.J.S. 2A:93–6.

§ 2C:27–8. COMMENTARY

1. Only a minority of jurisdictions presently make it criminal to take money for procuring an appointment or advancement in the public service. MPC T.D. 8, p. 115 (1958). Of course, if money is paid to the appointing official to influence the appointment, the general bribery laws apply. A few provisions prohibit sale of influence in transactions other than appointments. *Id.*

In New Jersey, N.J.S. 2A:93–6 is applicable to this area. See *State v. Smagula,* 39 N.J. Super. 187 (App. Div. 1956), in which a conviction was upheld for bribery where payment for the act demanded by the public officials was to go to the campaign fund and not to them.

2. *The Scope of the Section.* Subsection a covers any sort of benefit which the government can bestow, unemployment compensation, authority to engage in regulated businesses, subsidies, etc., as well as appointments in public service. Subsection b extends to the sale of special influence, whether by a public servant or civilian. Subsection b is limited to exploitation of "special" influence, as defined, in order not to prejudice the legitimate activities of lawyers and other professional representatives.

§ 2C:27–9. COMMENTARY

1. This provision is based on § 33–2 of the Illinois Code. No comparable provision now exists in our law.

§ 2C:28-1. COMMENTARY

1. *Introduction to Provisions Relating to Perjury and Other Falsifications to Authorities.* The general plan of these Sections is as follows. Section 2C:28-1 defines the situation in which lying to officials constitutes a crime of the third degree. The distinguishing features of this offense are: (a) oath or equivalent affirmation; (b) materiality of the falsification; and (c) requirement that the falsification be in an official proceeding involving a hearing. In the absence of an oath or affirmation, falsification amounts at most to a crime of the fourth degree under Sections 2C:28-3 to -5. If the falsification is under oath, it nevertheless constitutes only the crime of the fourth degree of "False Swearing," as provided in Section 2C:28-2, where another element is lacking. Under Subsection b of Section 2C:28-2, the offense is reduced to disorderly persons level if the falsification under oath is not in an official proceeding or if it is not made with intent to mislead an official. The usual case to which this would apply would be falsification in a writing sworn to before a notary, in strictly private transactions; but it would also apply to falsification in an affidavit filed with the government in a non-hearing matter where the falsification was immaterial or without intent to mislead.

Unsworn falsification is made punishable when it is in writing and intended to mislead officials. Section 2C:28-3a. Even without proof of purpose to mislead, it will constitute a petty disorderly persons offense if made on an official form giving notice of the applicability of penal sanctions. Section 2C:28-3b. The requirement of purpose to mislead, here as well as in Section 2C:28-2 is intended to serve somewhat the same function as the requirement of materiality in Section 2C:28-1, *i.e.,* to prevent its application to trivial misstatements not calculated to obstruct justice. There are, however, important differences between these standards, which will be explained later.

Unsworn oral falsification is made punishable only in situations specifically designated in Section 2C:28-4 and Section 2C:28-5, although these Sections would also apply to written misinformation of the kinds specified.

2. *Existing New Jersey Statutes.* Perjury is defined by N.J.S. 2A:131-1, 2 and 3. False swearing is defined by N.J.S. 2A:131-4 through 7. In addition to these provisions, our statutes now contain many specific provisions as to false swearing or testimony in specific proceedings. See statutes collected in N.J.S.A. under N.J.S. 2A:131-1.

3. *Definition. Section 2C:28-1a.* The basic definition of the offense is found in Section 2C:28-1a. Our cases now define perjury as a "willful and corrupt false swearing or affirming, under oath lawfully administered in the course of a judicial or quasi-judicial

proceeding, to some matter material to the issue." *State v. Sullivan,* 24 N.J. 18 (1957); *Cermak v. Hertz Corp.* 53 N.J. Super. 455 (App. Div. 1959) *aff'd.* 28 N.J. 568 (1960); *State v. Kowalczyk,* 3 N.J. 51 (1951) *reversing* 4 N.J. Super. 47 (App. Div. 1950).

It should be noted that acts which constitute perjury might also constitute the crime of obstructing justice. See *e.g., State v. Cassatly,* 93 N.J. Super. 111 (App. Div. 1966); *State v. Kelsey,* 80 N.J.L. 641 (Sup. Ct. 1910) *writ of error dismissed,* 82 N.J.L. 542 (E. & A. 1911).

4. *Materiality; Section 2C:28–1b.* A required element of perjury under existing law is that of "materiality." *State v. Ellenstein,* 121 N.J.L. 304 (E. & A. 1938); *Gordon v. State,* 48 N.J.L. 611 (E. & A. 1887); *State v. Voorhis,* 52 N.J.L. (E. & A. 1889); *State v. Scott,* 12 N.J. Misc. 278 (Sup. Ct. 1934). This is one of the elements which now distinguishes perjury from false swearing.

(a) *Requirements and Definition.* There is good reason to give legislative significance to this factor, since a false answer to a trivial or irrelevant question will not usually hamper government and is unlikely to indicate antisocial propensities in the declarant. On the other hand, the possibility of making a defense on this ground has hampered perjury prosecutions, with much appellate litigation on this issue. Courts and legislatures have reacted to this difficulty with a variety of rules calculated to minimize the impact of the requirement of materiality. See *State v. Sweeten,* 83 N.J.L. 369 (Sup. Ct. 1912); *State v. Voorhis, supra.* Because some courts have continued to have difficulties with the materiality requirement, proposals have been made to eliminate it from the definition of perjury. Others have recommended grading the offense to require materiality for the most serious offense but not for the less serious. This is our law (compare N.J.S. 2A:131–1 with N.J.S. 2A:131–4). We follow it under the Code. Our formulation ('could have affected the course or outcome of the proceeding') is equivalent to the 'capable of influencing' rule found in many judicial opinions.

The Code states explicitly that the question of materiality, in the perjury trial, is not governed by the rules of evidence which may have been applicable in the proceeding where the alleged perjury occurred. For example, hearsay, which might or should have been excluded in the original proceeding, may be prosecuted as perjury if its content is such as might influence the tribunal. For various reasons, the law of evidence sometimes calls for the exclusion of matter which may concededly have logical relevance. Some of these rules are frequently ignored in practice when counsel deem it inadvisable to raise the issue by objection. It would be plainly against public policy to immunize false swearing merely because the testimony might have been excluded on objection which was not made. The result would be, for example, that an unqualified expert witness could not be punished for con-

sciously falsifying an opinion which he did in fact give to the jury. Furthermore, the technicality of evidence law would, if imported into perjury, seriously hamper prosecution. Finally, it should be noted that Section 2C:28–1 applies to grand jury proceedings, legislative investigations, and administrative hearings, as well as court trials, each with its own peculiar, more or less defined, rules of admissibility.

(b) *Mistakes as to Materiality.* Subsection b negatives any defense on the ground that the declarant mistakenly believed the falsification to be immaterial. This has the effect of subjecting to Section 2C:28–1 some people who lie about matters they believe to be unimportant to the officials to whom the false statement is made. Such a lie would therefore be told without purpose of misleading official action. However, witnesses are not usually qualified to make judgments on materiality in the technical sense in which that concept is here employed; and at least one of our purposes is to compel the witness to make his objections to immaterial questions openly, rather than by swearing to false answers. Furthermore, a defense of mistake on this point would in practice probably prevent convictions except where the significance of the information was obvious. Thus a difficult requirement of materiality would be reintroduced in practice, despite the policy expressed in our definition of the term. No New Jersey cases were found. Our statute requires that the act be "corruptly" done and mistake as to materiality might be thought to negative that element. In *Dodge v. State,* 24 N.J.L. 455 (E. & A. 1854), evidence of immaterial falsities were admitted to prove corrupt intention and "lack of mistake."

(c) *Materiality: Question of Law or Fact.* The last sentence of subsection b declares that materiality of a falsification, on any given state of facts, is a question of law. This is in accord with the overwhelming weight of judicial authority and is now our law. *State v. Lupton,* 102 N.J.L. 530 (Sup. Ct. 1926); *Gordon v. State,* 48 N.J.L. 611 (E. & A. 1887). The significance of the rule is that the court instructs the jury as to whether the misstatements are so related to the issues in the proceeding as to satisfy the legal requirement of "materiality." MPC T.D. 6, pp. 113-115 (1957).

5. *"Statement", Section 2C:27–1i.* This Section defines the term "statement" as "any representation, but includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation." This definition has several important connotations:

(a) *Number of Offenses.* The offense of perjury might be regarded either as the making of a false oath, from which it would follow that there would be only a single offense regardless of how many false statements were made under that oath, or, as in prevailing law and the Code, the offense can be regarded as committed by each false state-

ment made under the oath. An intermediate course would be possible if, as we would recommend, "statement" is not construed so rigorously as to apply to individual sentences, but rather to connote any single item of information communicated in one sequence of declarations or responses to questioning. *Id.* at 115-116.

(b) *Opinions.* The Code expressly provides that false statements of opinion, belief or other state of mind may be criminal. This is the general rule today. *Ibid. See State v. Sullivan,* 25 N.J. Super. 484, 490 (App. Div.) *certif. denied,* 13 N.J. 289 (1953):

> "The defendant concedes that there might arise situations where a person could be charged with perjury based upon his opinions or beliefs. However, defendant argues that in such cases the existence or non-existence of belief in the conclusion reported becomes the basis of the perjury charge, not the existence or non-existence of the facts forming the basis of the opinion or belief.
>
> "As to statements of opinion it is said:
>
> "The broad general rule to the effect that a statement to support a charge of perjury must not be based upon an opinion is subject to the qualification that a statement of belief or opinion, under oath, constitutes the offense when, as a matter of fact, the witness had no such belief or opinion.
>
> "If, in a prosecuion for perjury, questions are asked of a general character, upon material issues, either involved in the case itself or to discredit the witness, and he answers falsely, and it is shown that this is deliberate and willful, his answer will afford the basis for a prosecution for perjury, even though the questions may be too general to form the basis for the impeachment of the witness. 41 Am. Jur. supra, sec. 6, p. 6.
>
> "There is a distinction between an honest but erroneous statement of opinion and a false statement of fact. The latter is held to be a matter of perjury. 70 C.J.S. supra, sec. 5, p. 462. Similarly, it is held that a false statement of opinion or belief may constitute the offense of perjury and in such matters the existence or non-existence of an opinion or belief is in itself a material matter of fact. 70 C.J.S. supra, sec. 5, p. 462.
>
> * * * *
>
> [O]ur research has not revealed any applicable New Jersey decisions. In examining the authorities of foreign jurisdictions, we find cases . . . hold, in effect, that if a person makes an affidavit he knows is false, although stated to be on information and belief, he may be indicted for perjury."

See also *State v. Engels,* 32 N.J. Super. 1 (App. Div. 1954).

(c) *Statements Not Believed by Defendant.* We believe that prosecution if based on misrepresentation should be barred where the

declarant is called upon to give information as to objective facts, he states them accurately (or, at least, there is no proof of falsity), yet it can be proved that he did not believe his statement. The final clause of Subsection a deals with this problem by permitting prosecution only where state of mind is explicitly the subject of the statement. Mere implicit assertions of good faith in making representations of fact not shown to be false will not suffice.

(d) *Oath of Office and Other Promissory Oaths.* We have not excluded oath of office and other promissory oaths from criminality. Perjury prosecutions for violation of promissory oaths are rare, but if it can be shown that someone took an oath, for example, faithfully to perform the duties of office, having already received a bribe or otherwise agreed to betray his trust, there is no reason in principle to give special immunity to that kind of misrepresentation of the declarant's state of mind at the time he took the oath. New Jersey law is now in accord. N.J.S. 41:3–1 specifically makes such acts criminal.

(e) *Specificity.* The Code does not attempt to state how definite a statement must be. A statement may be so vague or ambiguous as to preclude a satisfactory demonstration that it is false.

6. *Falsity.* The Code follows prevailing law which requires proof of falsity. *State v. Lupton,* 102 N.J.L. 530 (Sup. Ct. 1926); *State v. Sullivan,* 25 N. J. Super. 484 (App. Div. 1953); *State v. Snyder, supra.* This requirement of falsity here should be distinguished from the lesser requirement of Section 2C:20–4, Theft by Deception.

7. *Mens Rea, Lack of Belief, Purpose to Mislead.* The Code follows the well settled rule that a defendant is not to be held criminally liable for an inadvertent misstatement or for unconscious tricks of his own tongue or ear. Perjury now is a "willful" and "corrupt" false swearing "with intent of misleading." *Cermak v. Hertz Corp., supra, State v. Sullivan, supra.* See, as to false swearing, N.J.S. 2A:131–7 and *State v. Siegler,* 12 N.J. 520 (1953) (false swearing by omission).

Ordinarily it can be assumed that a person heard and understood a question correctly and that the answer he is heard to make is the answer he intends to give. But if there is any question about that, the State will have the normal burden of proof that the defendant meant to convey the impression which he did convey, or was reckless in this regard. MPC T.D. 6, P. 125 (1957).

It is also required that the defendant lack belief in the false statement which he made. This is something short, however, of requiring proof of knowledge or belief that the statement is false, since a person can be convicted if he makes a false statement without any belief in the matter, i.e., reckless whether it be true or false. Since a person who knows that what he says is false necessarily lacks belief in the truth of the statement both situations are covered by the Code "which he does not believe." Our law is in accord with the Code in this

regard, at least as regards the offense of false swearing. In *State v. Doto,* 16 N.J. 397 (1954), the Supreme Court held that one who believes he is testifying falsely or who does not know whether his testimony is true or false may be guilty of false swearing. In other words it may be perjurious for one to swear that a fact exists when he knows nothing about it or thinks or believes the contrary of his testimony.

Lack of belief or knowledge of falsity, sufficient for conviction under Section 2C:28–1, must be distinguished from "intent to mislead," which is required for conviction under Sections 2C:28–2a(2) and 2C:28–3. One may be guilty of perjury even in lying about seemingly unimportant matters if these are held to be "material." This is considered necessary to avoid a practical immunity for conscious lying about things which the witness deemed unimportant. But where, as in Section 2C:28–2 and 3 it becomes possible to convict for false statements not made in the course of official proceedings, a more affirmative purpose to pervert justice ought to be shown. Ordinarily, it could not be shown unless the lie related to something the declarant recognizes to be material.

8. *Oath; Irregularities No Defense.* This Section of the Code deals with statements under oath or affirmation. The guiding principle is that when the community commands or authorizes certain statements to be made with special formality or on notice of special sanction, the seriousness of the demand for honesty is sufficiently evident to warrant application of criminal sanctions. Upon this principle it makes little difference what formula is employed to set this seal of special importance on the declaration. Oath, affirmation for those with religious or other scruples against oaths, or—under Section 2C:28–3—notice that the State means to apply criminal penalties to misstatements, should suffice. Technical irregularities in the administration of the oath are of no concern to the defendant, as we have expressly provided in Subsection c.

Our crime of perjury now requires that the false testimony be under oath or affirmation. *State v. Dayton,* 23 N.J.L. 49 (E. & A. 1850); *State v. Randazzo,* 92 N.J. Super. 579 (App. Div. 1966). No cases were found on technical irregularities in the oath.

Presently, lack of jurisdiction is a defense to a charge of perjury (*State v. Lawson,* 98 N.J.L. 593 (Sup. Ct. 1923) *aff'd.,* 100 N.J.L. 185 (E. & A. 1924), but it is not to a charge of false swearing (N.J.S. 2A:131–6).

9. *Retraction.* Subsection d allows a limited defense of retraction in a perjury prosecution where the retraction is made during the same proceeding before it has had any substantial effect and before the falsity has become manifest. Prompt retraction can usually be shown in support of the defense that the original misstatement was due to a

misunderstanding, i.e., was not an intentional falsification. But once it is clear that the original falsification was intentional, retraction is generally not recognized as a defense. Those who do recognize the defense do so in the hope of providing an incentive for the witness to correct his misstatement and tell the truth before the end of the proceeding. The United States Supreme Court rejected the defense in 1937 fearing that such a rule might encourage a witness to swear falsely in the belief that if the falsity is not discovered the statement will have its intended effect but, if discovered, the witness may avoid punishment by belatedly telling the truth. *United States v. Norris,* 300 U.S. 564 (1937). The Code attempts to preserve incentive to correct falsehoods, without impairing the compulsion to tell the truth in the first place. The danger that witnesses might be encouraged to take a chance on perjury is limited by the draft's requirement that recantation take place before the falsity becomes manifest.

There is, of course, some possibility that the defense may be unfairly denied if the courts apply too rigidly the requirement that recantation precede exposure of the falsehood. It is not uncommon in a grand jury investigation for a prosecutor to wring information from a reluctant witness shortly after the witness has denied any knowledge of the affair, and this may be accomplished with nothing more than leading questions. See *State v. Kowalczyk,* 3 N.J. 51 (1949). In such circumstances it seems unfair to prosecute for perjury, and especially to facilitate such prosecutions with provisions on inconsistent statements, as in our Subsection e. One possible solution to the problem presented when self-contradiction is elicited by persistent questioning is for the judges to regard the series of questions and answers dealing with a single subject as a unit, so that perjury conviction would be barred where the final effect of that part of the testimony is true.

In New Jersey, the *Kowalczyk* case rejects the retraction defense. We abandon the rule of that case.

10. *Inconsistent Statements.* Under our present crime of perjury, the State must plead and prove that the particular statement alleged to be perjurious is false. This is not true under our crime of false swearing. There, under N.J.S. 2A:131–5, contradictory statements need only be set forth and the State need only plead and prove that one or the other of them is false. *State v. Kowalczyk, supra; State v. Ellenstein, supra.* The Code extends, in Subsection e, the New Jersey rule as applied to false swearing to the more serious offense of perjury.

11. *Corroboration.* In New Jersey, for conviction of perjury, the State must offer corroborative evidence. *State v. Caporale,* 16 N.J. 373 (1954) adopted the summary of the law given by Mr. Justice Brennan in *State v. Bulach,* 10 N.J. Super. 107, 110-111 (App. Div. 1950):

"The requirement in perjury cases of corroborative evidence of the testimony of a single witness, an exception to the rule that one witness' testimony suffices in most cases, has been criticized by text writers and some courts. VII *Wigmore on Evidence* (3rd Ed. 1940), sections 2040, 2041; Annotation, 111 A.L.R. 825. However, the requirement is firmly embedded in our law. *State v. Taylor,* [5 N.J. 474] (1950); *Zabriskie v. State,* 43 N.J.L. 640, at [page] 647 (E. & A. 1881); *State v. Lupton,* 102 N.J.L. 530 (Sup. Ct. 1926); *State v. Ellison,* 114 N.J.L. 237 (Sup. Ct. 1935). This does not mean that the testimony of two witnesses is required; the testimony of one witness plus proof corroborating his evidence suffices. The two witness rule obtaining in some states probably was not followed at any time in New Jersey *Zabriskie v. State, supra.*

"* * * In this State we have adopted the test that the oath of a single witness must be supported by 'proof of strong corroborating circumstances of such character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence,' 'something more than the mere weight of evidence in favor of the state,' *Zabriskie v. State, supra,* 43 N.J.L. at page 647; *State v. Carlone,* 109 N.J.L. 208, at [page] 211 (Sup. Ct. 1932); see also *State v. Lupton, supra,* 102 N.J.L. at 535, 2 *Wharton's Criminal Evidence* (11th Ed., 1935), sec. 913."

Under N.J.S. 2A:131–6, corroboration is not necessary, however, for a charge of false swearing. The Code applies the same rule to both the greater and lesser offense.

12. *Punishment.* Under existing law, the different forms of perjury are all high misdemeanors for which imprisonment for up to 7 years is authorized. False swearing is a misdemeanor (3 years). The Code limits the perjury penalty to a crime of the third degree.

13. *Subornation of Perjury.* Our statute, as most others do, states as a separate offense the subornation of perjury, which is the willful procuring of another to commit perjury. We eliminate it as a separate offense—because it is merely a restatement of accomplice liability.

§ 2C:28–2. COMMENTARY

1. *Present New Jersey Law.* Our present False Swearing statutes are N.J.S. 2A:131–4 through 7. See also N.J.S. 41:3–1, which is to be repealed.

2. Generally, this Section makes it a crime of the fourth degree to swear falsely in some situations lacking elements required for perjury under Section 2C:28–1.

Thus, if the false statement is made, whether or not in an official proceeding, but with a purpose to mislead, the Section applies. We

have eliminated the provision found in the MPC as to immaterial falsifications made in an official proceeding. Such may, in our view, be too trivial to be property within this provision.

3. *Private Affidavits.* A final limitation in MPC § 241.2(2) would exclude private affidavits from the scope of the provision. We follow the policy of N.J.S. 2A:131–4 and have no such exclusion.

4. The provisions of Section 2C:28–1c through f (Irregularities No Defense; Retraction; Inconsistent Statements; Corroboration) are made applicable here by Subsection c.

5. The following New Jersey statutes are made unnecessary by this provision: N.J.S. 2A:91–6 (Banks and trust companies; false statements, entries or reports to deceive examiners); N.J.S. 2A:91–7 (Building and loan and other associations; false statements, entries or reports to deceive examiners); and N.J.S. 2A:91–8 (Building and loan and other association director of officer; false statement or report or misrepresentation).

§ 2C:28–3. COMMENTARY

1. This Section is a general provision as to falsifications to authorities. Among the comment-worthy features of subsection a, in addition to requirement of writing and intent to mislead, are the extension of liability to misleading omissions, in clause (2), and to things other than writings, e.g., false samples, false boundary markers, in clause (4). The inclusion of misleading omissions in connection with applications for a benefit from the government is analogous to our position on misrepresentations to defraud; indeed, if the benefit is pecuniary, the Code provisions on Theft by Deception would apply anyway.

2. *Present Law.* Our statutes now contain a series of provisions as to false statements to official agencies. See N.J.S. 2A:131–6. All seem to require that the statement be under oath. This general provision would both eliminate the need for so many statutes and eliminate the need for an oath where a purpose to mislead is proved.

3. *Statements "Under Penalty." Subsection b.* In civil practice, our rules allow a certification in lieu of oath. R. 1:4–4. This same motion is picked up and generalized here by Subsection b. Under this device, the government indicates the special gravity which it attaches to truth in a particular document. It is especially useful as an alternative to prescribing oaths before notaries, avoiding inconvenience and expense. If this device were widely substituted for notarial oaths there would be some hope of rehabilitating the oath as a genuine symbol of verity, instead of its present status as a mechanical formula. The specification that this device can be used only by legislative authority is intended to make sure that it is not overused, merely on the whim of officials, with consequent depreciation of its value. The

low penalty is consistent with the absence of any requirement of materiality or intent to mislead, which elements, if present, would put the offense into Subsection a even without the penalty notice.

4. The provisions of Section 2C:28–1c through f are made applicable here by Subsection c.

§ 2C:28–4. COMMENTARY

1. *Present New Jersey Law.* New Jersey now has a statute dealing with such false reports. N.J.S. 2A:148–22.1 (Giving false information to law enforcement officer or agency). See *State v. Hobbs,* 90 N.J. Super 146 (App. Div. 1966) (false statement about a murder). See also N.J.S. 2A:170–9 ("false police alarms").

§ 2C:28–5. COMMENTARY

1. Three separate offenses are stated in this Section:

(a) *Tampering with a Witness or Informant: Subsection a.* At present in New Jersey, this conduct would be indictable either as a common-law bribery or as a common-law obstruction of justice under N.J.S. 2A:85-1. See *State v. Cassatly,* 93 N.J. Super. 111 (App. Div. 1966); *State v. Begyn,* 34 N.J. 35 (1961). It could also be contempt of court. *In Re Jeck,* 26 N.J. Super. 514 (App. Div. 1953).

(b) *Retaliation Against Witness or Informant: Subsection b.* This too would presently be indictable as a common-law obstruction of justice. (*State v. Cassatly, supra*) or contempt. We allow any "wrongful" act to suffice here for liability. MPC § 241.6(2) would require an "unlawful" act. We believe the former term to give desirable added flexibility to the Section.

(c) *Witness or Informant Taking Bribe: Subsection c.* This would presently be indictable as a common-law bribe (*State v. Begyn, supra*; 1 *Schlosser,* Criminal Laws of New Jersey § 25.1 (30 Ed. 1970)) or contempt.

§ 2C:28–6. COMMENTARY

1. While no New Jersey cases on point were found, such conduct would seem to fall within the common-law crime of obstructing justice. N.J.S. 2A:85–1; *State v. Cassatly,* 93 N.J. Super. 111 (App. Div. 1966). It could also fall within the contempt power.

2. The Code eliminates any requirement, as found in some states, that the suppressed material be admissible.

§ 2C:28–7. COMMENTARY

1. *Present New Jersey Law.* The offense here defined is now covered by several New Jersey statutes. See N.J.S. 2A:109–1 (Forgery or uttering forged records, instruments, writings, etc.); N.J.S. 2A:122–3 (Malicious destruction of written instruments; N.J.S. 2A:136–9 (Stealing or altering records; additional penalty when verdict, judgment or sentence affected).

§ 2C:28–8. COMMENTARY

1. *Present New Jersey Statutes*

2A:135–10	Personating public officers or employees
2A:135–11	Unauthorized persons taking acknowledgments
2A:170–20.5	Impersonating officer, member or employee of law enforcement organization

2. *The Scope of Section 2C:28–8.* Our present statute requires no more than a false pretense of official status. N.J.S. 2A:135–10. The Code requires proof of a purpose to induce submission to official authority by the person to whom the pretense is made.

§ 2C:29–1. COMMENTARY

1. *In General.* The purpose of this Section is to prohibit a broad range of behavior designed to impede or defeat the lawful operation of government. The Section is therefore a general supplement to the other provisions of the Code dealing with particular methods of interfering with proper functioning of the administration, e.g., official misconduct or oppression, bribery, intimidation, perjury, tampering with evidence, escapes. Although such a general supplement is desirable, it must incorporate certain limitations lest the Section be used to nullify policy decisions expressed elsewhere in this article. It is necessary to avoid language so broad that it might be construed to cover political agitation opposed to governmental policy or other exercise of civil liberties. Accordingly, Section 2C:29–1 has been confined by limiting it to (1) violent or physical interference, (2) other acts which are "unlawful" independently of the purpose to obstruct the government.

2. *Present Law.* At the present time, New Jersey operates both under the common-law crime of Obstructing Justice and under several specific offenses.

As to the common-law crime, the Appellate Division defined the crime in *State v. Cassatly,* 93 N.J. Super. 111, 118-19 (App. Div. 1966), as follows:

> "Defendant argues that he could not lawfully be adjudged guilty of the crime of obstructing justice because the proofs did

not show that at the time he refused to surrender the recordings to law enforcement officials there was a proceeding pending before a court or a grand jury relating to the bribery solicitation, and that he had knowledge of it.

"The precise issue has not been dealt with in any of the reported decisions in our State. However, we do not agree that the offense requires that at the time of commission of the act charged there must be pending a proceeding before a court or a grand jury.

"We are not here concerned with a crime which has been specifically defined by a statute. The crime of obstructing justice is a common law crime made punishable as a misdemeanor under N.J.S. 2A:85–1. Under the common law it was a misdemeanor to do any act which prevents, obstructs, impedes, or hinders the due course of public justice. *1 Burdick, Law of Crimes,* § 283, p. 409 (1946), *Perkins, Criminal Law,* p. 422 (1957). It is an obstruction of justice to stifle, suppress or destroy evidence knowing that it may be wanted in a judicial proceeding or is being sought by investigating law enforcement officers.

* * * *

"It is undisputed that defendant knew crimes against the State (solicitation of a bribe) had been committed; that the wire and tape recordings he obtained contained vital evidence thereof; and that a police investigation of such crimes had been instituted. He initiated the investigation himself, and was provided with recording equipment to obtain evidence and the assistance of a police officer. He had no right to secrete, suppress or destroy such evidence, knowing that it might be wanted in a judicial proceeding or that it was being sought by investigating officers. We are satisfied that one who knowingly and willfully impedes a lawfully conducted investigation by police of a crime, whether or not a formal charge has been made or a grand jury proceeding begun, can be prosecuted for the crime of obstructing justice."

See also the cases as to the common-law crime of Misconduct in Office. *State v. Begyn,* 34 N.J. 35 (1961); *State v. Lally,* 80 N.J. Super. 502 (App. Div. 1963); *State v. Silverstein,* 76 N.J. Super. 536 (App. Div. 1962) *aff'd.,* 41 N.J. 203 (1963); *State v. Winne,* 12 N.J. 152 (1953). Additionally, several New Jersey statutes deal with obstructing governmental functions.

3. *Violent or Physical Interference.* The Section embraces the common provisions against assaults on officials while engaged in the performance of their duties, making it clear, however, that the behavior must be directed at interference with the official function; *i.e.* the Section does not extend to a private altercation which happens to

occur at a time when the victim is engaged in official duties. Also covered is violent and disorderly conduct intended to prevent the convening or functioning of legislatures, courts or other tribunals. Non-violent physical interference, such as tampering with an official's automobile to prevent his attendance at a proceeding or his execution of duty is also reached by the Section.

4. *Other Unlawful Act.* Examples of unlawful acts which obstruct, impair or pervert the functioning of government are usurpation of public office, and impersonating a candidate in a civil service examination. It means any act which is, without regard to its purpose to obstruct government, already declared illegal.

5. *Exceptions.* The exception in this Section for flight, refusal to submit to arrest, and other forms of non-submission to authority, are necessary to prevent an overly broad application of the terms "physical interference" and "unlawful act." One who runs away from an arresting officer or who makes an effort to shake off the policeman's detaining arm might be said to obstruct the officer physically. A person who violates a condition of his probation or parole by going to a forbidden place would be engaged in an unlawful act. Failure to file tax returns or other required documents may be unlawful and properly punishable by special provisions. But these are not cases within the contemplation of a Section concerned with affirmative subversion of government processes. Nor would we desire to make it criminal to flee arrest. The adequate social measure for this is to authorize police to pursue and use force necessary to arrest. If the arrest is effectuated, prosecution can be had for the original offense. If, as is very often the case, the arrested person is innocent or cannot be proved guilty of the offense for which he was arrested, it would be unjust and conducive to grave abuse to permit prosecution for an unsuccessful effort to evade the police.

6. We have not recommended enactment of a separate provision as to interference with firefighting operations. See MPC § 229.8 and N.Y. § 195.15. We believe that subject to be adequately covered by this section.

§ 2C:29–2. COMMENTARY

1. Resistance to arrest is one of the most common forms of obstructing the execution of the laws. We deal with it specifically rather than leaving it to the general terms of Section 2C:29–1, because we wish to grade the offense depending upon the presence of forcible resistance that involves some substantial danger to the person. We reject the MPC view that mere non-submission should not be an offense, believing an affirmative policy of submission to be appropriate as seems now to be our law. *State v. Mulvihill,* 57 N.J. 151 (1970); *State v. Washington,* 57 N.J. 160 (1970); *State v. Koonce,* 89 N.J. Super. 169 (App. Div. 1965).

The Section is not limited to arrest or other police activity, but extends to any discharge of official duty which is opposed by forcible or other means endangering the official.

2. Resisting Arrest is now a crime in New Jersey only to the extent it could be prosecuted under the common law crime of Obstructing Justice as defined in *State v. Cassatly*, 93 N.J. Super. 111 (App. Div. 1966). It is covered by ordinances in most municipalities.

§ 2C:29–3. COMMENTARY

1. *Background; Accessory after the Fact; Present New Jersey Law.* This Section derives from the common law rules relating to accessories after the fact, but breaks decisively from that tradition. The common law rests on the notion that a person who helps an offender avoid justice becomes in some sense an accomplice in the original crime. Modern legislation, although often retaining the old terminology of accessory, rejects the earlier consequences of the "accomplice" theory. Our present statute is N.J.S. 2A:85–2. See *State v. Sullivan*, 77 N.J. Super. 81 (App. Div. 1962).

2. *The Theory of Section 2C:29–3.* Rather than proceeding on an "accomplice" theory, we use the theory of obstructing justice. A person who aids another to elude apprehension or trial is interfering with the processes of government. It is his willingness to do that and the harm threatened by such behavior that makes appropriate penal measures, rather than any fiction that equates a "harborer" with the murderer or traitor whom he harbors. It is obvious that many persons who have no other inclination to antisocial activity may be influenced by offer of gain, or by friendship or kinship, to help a fugitive from justice. Once this distinct criminologic problem is recognized, the basis is laid for prosecuting this kind of obstructive behavior for what it is, without regard to whether the prime offender can be tried or convicted, and with penalties not necessarily related to those prescribed for the principal offense.

3. *Minor Offenses; Principal Offense Commited in Another Jurisdiction.* Our present statute applies only to lending aid to persons whose offense amounts to a high misdemeanor. Federal law, some states, and the Code extend the prohibition to aiding all lesser offenses. This follows from our purposes to deter obstruction of justice. One can add to the difficulties of the police just as much where they are pursuing a misdemeanant as where they are after a felon. Furthermore, there are situations where the aider does not know what crime the putative offender may have committed, as where an unscrupulous surgeon agrees to change the appearance of a fugitive without caring to know the nature of his offense. In any event, it seems undesirable to introduce into prosecutions of this sort an issue of law (and defendant's knowledge thereof) as to the classification of the primary offense.

The principal crime referred to in this Section may have been committed in another state. The mutual interest of the states in effective enforcement of the criminal law justifies the broad scope of this Section.

3. *Mens Rea.* The Section requires proof of a purpose to hinder apprehension, prosecution or conviction. Our statute still seems to require guilt of the person aided. By requiring a purpose to obstruct, it is not necessary to require guilt on the part of the person aided or a mental element by the actor as to it.

A purpose to aid the offender to avoid arrest is not proved merely by showing that defendant gave succour to one who was in fact a fugitive. A fugitive is likely to seek from his friends and relatives shelter, food, and money to sustain himself. Their provision of such personal relief betokens other motivations than the objective of impeding law enforcement. We recognize that motivations may be mixed and permit conviction where the obstructive purpose was present, leaving other motivations to be taken into consideration either by way of exemption of certain classes of near kin, or as ground for mitigating sentence after conviction.

4. *Acts Constituting Prohibited Aid.* Our present law has both a general phrase "aids or assists," and a specific enumeration, "provides with money, transportation, conveyance, place of abode, refuge, concealment, disguise, or otherwise aids or assists." We abandon this to forbid specified kinds of aid. That there may be need to limit the kinds of aid which will be made criminal appears when we consider the possible application of the Section to a person who merely refuses to answer police questions about the fugitive, or gives or counsels him as to likely refuges or the law of extradition, or supplies bail. Although assistance of this character would appear to fall within the ordinary meaning of the term "aid," the courts have shown a reluctance to extend the law so far.

Among the activities specifically brought within the scope of this Section, we list first the traditional offense of harboring or concealing the fugitive, which requires proof that he was hidden or secreted by the actor. Efforts to conceal the commission of the crime, or to suppress, alter, destroy, or hide evidence are and ought to be covered. Warning the principal of imminent discovery or apprehension is likewise an unequivocal intervention against law enforcement.

Paragraph d has an exception to take care of cases like fellow-motorists warning speeders to slow down for a speed trap or a lawyer advising a client to discontinue illegal activities.

One form of assistance to the putative offender that deserves special consideration is money. Providing a fugitive with funds is an act of equivocal significance. He may use it to escape or hide, to pay debts

or go into business, or to support himself or his dependents, or to hire a lawyer. Paragraph b is intended to require proof that money was furnished not merely pursuant to a general desire to promote the offender's plan to remain at large, but specifically to facilitate escape efforts.

Clauses f and g have been added to MPC § 242.3. They are from § 205.50 of the New York Code. As to subsection f, this provision is new to our law. It is in MPC § 242.4 as well as the New York Code. It covers the situation where, with a purpose to facilitate the consummation of a criminal plan, after an offense has been committed, a person assists in carrying out the unlawful object, for a share in the loot or for other reasons. It is distinguished from Section 2C:29–1 by the fact that there is no purpose to obstruct justice. For example, one might act as custodian of the proceeds of a bank robbery until the robbers should agree on a distribution, or help a thief to collect a reward for the return of stolen goods, or to exchange marked ransom money. Although behavior of this sort might be regarded as helping to conceal the culprit, so that prosecution under Section 2C:29–1 might be possible, there is a certain artificiality in proceeding on the theory of obstruction of justice against one who has really linked himself to the principal offense, and whose interest in frustrating detection is bound to be as much for himself as others.

With regard to non-cooperation with police investigations, it should be borne in mind that the law provides means of compelling testimony under oath, and that a penal policy with respect to unsworn false statements to police has been laid down in other Sections of the Code with advertence to the danger of abusive charges being brought by police against persons interviewed in the course of investigating crime. The borderline case of 'volunteered' misinformation to the police, dealt with in clause g would not be covered elsewhere, and is intended to reach those who take the initiative in throwing the police off the track.

5. *Exemption of Relatives.* Our present statute exempts husbands and wives. We reject this preferring to leave this factor for consideration in sentence and treatment. It is hard to justify any particular limit of the exemption, and exemption rules make trial difficulties even where the defendant may not be within the exempt class if the government has the burden of proving that the exempted relationship does not exist.

6. *Gradation.* Our statute now makes the crime punishable for up to 3 years. We use here a system of grading intended to vary the seriousness of the offense with that of the offense committed by the other person. There is, however, no need to go so far as to equate the two.

§ 2C:29–4. COMMENTARY

1. *Basic Policy.* The common law offense of "compounding" and its statutory replacement penalize agreements, for a consideration, to refrain from giving information to law enforcement authorities concerning a crime. Our statute is N.J.S. 2A:97–1. See *State v. Fisher,* 94 N.J.L. 12 (Sup. Ct. 1920); *Brittin v. Chegary,* 20 N.J.L. 615 (Sup. Ct. 1846).

2. *Restoration or Indemnification.* A major legislative issue is whether the prohibition should cover the situation where the victim of a crime agrees to drop prosecution if the alleged offender restores property belonging to the victim or pays damage for harm he has suffered. The common law and our statute made no such exception. The position of the Code is to make fair restitution or indemnification an affirmative defense. It does not require prior judicial approval. The reasons for adopting this position are essentially that our society does not, in general, impose penal sanctions to compel persons to inform authorities of crime. A person who refrains from reporting a crime of which he was the victim because his loss has been made good is no more derelict in his social duty than one who, out of indifference or friendship to the offender, fails to report a known crime. The criminal law is ineffective to promote reporting to offenses by victims who are willing to "settle" with the offender, since compounding laws can easily be evaded by accepting restitution or indemnification without any explicit "agreement" to drop prosecution. Finally, compounding laws impugn the widespread practice of prosecutors, who are frequently content to drop prosecution when restitution has been made by the offender.

3. *Permitted Compromises.* Restoration or indemnification is the only standard. We find it impossible to adequately classify offenses according to the seriousness of it for this purpose and then to forbid compromises in such cases.

4. *Concealing, Misprision; Failure to Report Serious Offenses.* The common law offense of misprision of treason or felony went beyond accessory law and punished mere failure to report the commission, or even the prospective commission, of grave offenses. MPC T.D. 9, p. 209 (1959). Our statute requires concealing and not disclosing knowledge of the actual commission of arson, manslaughter, murder or any high misdemeanor. N.J.S. 2A:97–2. See also N.J.S. 2A:148–2 (Misprision of Treason). Modern interpretations of such statutes require affirmative acts of hiding although misprision simply required neglecting the duty to inform. *State v. Hann,* 40 N.J.L. 228 (E. & A. 1878).

The Code has no concealing or misprision statute. It requires instead either obstructing (Section 2C:29–1), hindering (Section 2C:29–3), aiding (Section 2C:29–4) or compounding (this Section).

Thus, specific affirmative acts are required and mere failure to report is insufficient.

§ 2C:29–5. COMMENTARY

1. *Current New Jersey Statutes.* Our current statutes are N.J.S. 2A:104–1 through 10. See *State v. Wedin,* 85 N.J.L. 399 (Sup. Ct. 1914); *In Re Rigg,* 95 N.J. Eq. 341 (Ch. 1924); *State v. Errickson,* 32 N.J.L. 421 (Sup. Ct. 1868); *Meehan v. State,* 46 N.J.L. 355 (Sup. Ct. 1884).

2. *Escape.* Subsection a follows prevailing law in defining escape simply as departure without lawful authority from official detention including departure from certain kinds of constructive custody. See N.J.S. 2A:104–6. It is important, however, that the concept of escape should not be extended to such things as failure of a probationer to report at a specified time to his probation officer, or to a parolee's violation of parole conditions by going outside a specified area. Ordinary administrative sanctions for breach of probation or parole are appropriate for such incidents.

Defining escape as departure without lawful authority should prevent application of the Section to situations where the prisoner has not left custody, although he may be in a part of the prison where he is not supposed to be. Even if the prisoner goes outside the prescribed boundary of his freedom of movement, as in the case of a trusty who walks off limits for a moment without purpose to elude official control, this need not be held a 'departure from detention.' On the other hand, an intention to return to custody will not prevent a finding of "departure" where there has been a substantial severance of official control.

3. *Official Detention.* New Jersey's present laws and the Code agree in defining official detention more broadly than merely institutions for detaining persons charged with or convicted of crime. The breadth of the institutional coverage is desirable in view of the diversity of institutional facilities employed in modern penology. At the same time care must be exercised to avoid making it criminal for a person to depart from an institution which he has voluntarily entered for psychiatric or other treatment, although his entry may for some purposes be described as a "commitment."

4. *Permitting or Facilitating Escape.* Subsection deals with those who aid escapes, either by failing as public officials to maintain requisite control over prisoners, or by helping prisoners to overcome official control. The general complicity Section (2C:2–6) will not be sufficient to deal with this problem because it is limited to persons having a "purpose to promote or facilitate" but this Section permits convictions of those who "knowingly" or "recklessly" cause or facilitate escapes. In this connection it should be noted that present

legislation often penalizes even negligence on the part of custodial officials. See N.J.S. 2A:104–2. This position we reject on the ground that dismissal and other nonpenal sanctions are sufficient and appropriate to deal with official incompetence. On the other hand recklessness may properly be punished.

5. *Legal Irregularities in Custody.* Existing law is confused and contradictory on the question of escape from an official detention which is in some respect illegal. Sometimes the line is drawn between defects which render the detention "void" and those which render it "voidable."

Subsection c makes a distinction, not unlike that formerly made in the Federal escape law, between detention in a prison or pursuant to a judicial or quasi-judicial commitment, and what might be called "executive" detention, principally arrest. There is no defense of illegality except in relation to these executive detentions. As to them, clause (1) of Subsection c provides, in effect, that non-violent escapes from illegal arrest are not criminal. Clause (2) excludes from criminal escape even violent efforts to escape in clear cases of abusive arrest by officers who know there is no basis for the arrest. This does not mean that the use of violence in such cases is approved. The violence may constitute criminal assault, but it does not render the departure from such illegal custody a criminal escape.

The Section does not permit an escape to be justified by proof that the conditions of confinement were bad even to the point of violating state legal requirements. However, a right of the prisoner to save his life by leaving a burning prison, for example, has always been recognized and would be preserved under our general provisions as to justification. MPC T.D. 8, pp. 136–137 (1958).

No direct New Jersey authority on these problems was found. The decisions in *State v. Montague,* 55 N.J. 387, 403–406 (1970), *modifying* 101 N.J. Super. 483 (App. Div. 1968) and in *State v. Koonce,* 89 N.J. Super. 169 (App. Div. 1965), lead to the conclusion that our courts would reach of position similar to the Code.

6. *Mens Rea.* Since Subsection a does not specify otherwise, the general provisions of the Code permit conviction upon proof of knowledge, purpose, or recklessness. The ordinary situation to which the Section will apply will be a purposeful escape. Recklessness may become an issue in relation to the element of unlawfulness of the departure from detention, under Subsection a, as well as in relation to official laxness in permitting escapes, under Subsection b.

7. *Grading.* Subsection d makes the offense a crime of the third degree where the detention was for a crime, after conviction for any offense, where force or a threat thereof is used in escaping, or where a public servant aids the escape. Otherwise, it is a crime of the fourth degree.

§ 2C:29–6. COMMENTARY

1. *Present New Jersey Statutes.* Our statutes in the area are N.J.S. 2A:104–8, 11 and 12.

2. *The Scope of Section 2C:29–6.* We do not include a provision, as in existing law, as to unauthorized communication with prisoners as we believe that criminal penalties in this area should be limited to more serious breaches of prison discipline. We do, however, include a separate provision as to contraband other than for escapes because (1) such items may lead to serious breaches of discipline (*e.g.,* liquor) and (2) in some cases there may be doubt whether a particular item is an implement for escape.

§ 2C:29–7. COMMENTARY

1. *Present New Jersey Law.* See N.J.S. 2A:104–13 and 14.

2. *The Scope of Section 2C:29–7.* This provision is not intended as one to protect the bondsman. Rather, as with our present law, it is intended to punish obstructive non-appearance. It is not limited to cases where a defendant is released on bail. The Section extends to cases where a convicted defendant is released for a period between judgment and the beginning of sentence, since the rquired appearance "at a specified time and place" is not limited to appearance in court.

3. *Grading.* As is true with our existing law, we generally grade this offense according to the offense for which the defendant was required to appear. However, in the case of crime, we abandon this and make all such non-appearances crimes of the fourth degree unless (1) the offense charged is a crime of the third degree or higher and (2) proof of flight or hiding to avoid answering is shown. In this case, the offense is a crime of the third degree.

§ 2C:29–8. COMMENTARY

1. This was N.J.S. 2A:127–4. We have downgraded the offense to a disorderly persons offense.

§ 2C:30–1. COMMENTARY

1. *Present Law.* In New Jersey, there are several statutes dealing with specified oppressive activities. See, *e.g.,* N.J.S. 10:1–8 (Discriminatory Exclusion from Jury Service); N.J.S. 2A:106–1 (Violating Extradition Procedures); N.J.S. 2A:135–12 (Discriminatory Administration of Relief); N.J.S. 2A:135–13 (Exploiting Relief Recipients for Political Contributions). Additionally, to the extent not supplanted by specific statutory provisions, these acts are indictable as common-law crimes under N.J.S. 2A:85–1. See *State v. Begyn,* 34 N.J. 35 (1961); *State v. Silverstein,* 76 N.J. Super. 536 (App. Div. 1962), *aff'd.,* 41 N.J. 203 (1963).

2. *Scope of The Section.* This Section embraces all official activities. Narrower statutes, limited to judicial or law enforcement officers, obviously hark back to a day when these were the main instruments of governmental intervention in the lives of citizens. Today opportunities for oppressive use of official power exist everywhere in the bureaucracy, and we ought not to rely on vague conspiracy laws to condemn and deter such behavior. Subsection b makes it clear that the Section applies to improper denial of aid, privilege, or protection to which a person is entitled by law, as well as to aggressive action against the individual.

3. *Official Capacity.* It is important to discriminate between misbehavior involving the actor's official capacity, and purely private wrongdoing by one who may incidentally be a public servant. So far as his private behavior is concerned, an official is subject to the same standards of behavior and penal controls as other persons; *i.e.*, he may be punished for assault, extortion, or criminal trespass. It is only when he make use of his official status to wrong another that the more comprehensive prohibitions of the legislation against oppression become appropriate. Thus, an altercation between two policemen on duty leading to an assault by one on the other raises only issues of private wrongdoing, whereas assault by a policeman against a prisoner raises issues of abuse of authority even if the policeman's motivation is personal.

Little problem arises where the defendant purports to act "in his official capacity," as in the case of an official attempting to extort a confession to be used in prosecuting the victim, or in the case of unlawful arrest on the basis of a warrant known to be invalid. It has long been settled that a public servant who does purport to be acting in an official capacity does not save himself from conviction of official oppression by showing that his acts were contrary to law, and for that reason to be regarded as unofficial. To that contention the answer has been that "misuse of power, possessed by virtue of state law and made possible only because the wrong-doer is clothed with authority of state law, is action taken 'under color of' state law."

Our cases draw the same line. See *State v. Welek*, 10 N.J. 355, 365 (1952) quoting *1 Burdick, Crimes*, § 272, p. 387 (1946); *State v. Cohen*, 56 N.J. Super. 509, 512 (App. Div. 1969) *rev'd. on other grounds*, 32 N.J. 1 (1969); *State v. Silverstein, supra.*

4. There is some overlap between this Section and other offenses like bribery, extortion or obstruction of justice. We do not see this as a reason for narrowing the definition of official oppression because of the confusion which would result and because of defenses it might raise.

5. *Pretense of Official Action.* The Code eliminates pretense of action with official authority from this Section and leaves that to Section 2C:28–8.

6. *Mens Rea.* This Section requires that the defendant "knowingly" do forbidden things. This includes knowledge that he was infringing the legal rights of the victim. Mistake of law will be a defense, to the extent that it negatives this knowledge.

Our cases under the common law crime simply speak of acting "corruptly" or with "criminal intent." *State v. Begyn, supra; State v. Lally,* 80 N.J. Super. 502 (App. Div. 1963).

§ 2C:30–2. COMMENTARY

1. This is Section 195.00 of the New York Code. It is intended to consolidate the law as to malfeasance and non-feasance by public servants. Subsection a covers conduct of commission and Subsection b deals with acts of omission. It is directed at every type of such conduct by a public servant.

2. New Jersey now makes all the violations of duty by public servants criminal. *State v. Winne,* 12 N.J. (1953) (Indictment of County Prosecutor sufficient where it alleged failing in bad faith to take action against gambling establishments without any allegation of actual corruption.) See also N.J.S. 2A:135–9 (Neglect of duty).

3. *The Scope of Section 2C:30–2.* Official misconduct is made criminal under this Section only when the public servant's act or "omission" is coupled with an intent to obtain a benefit or to injure some person.

Subsection a, which condemns aggressive action, requires that the "act" relate to the public servant's office and that it constitute an unauthorized exercise of his official functions. In addition, the public servant must know that such act is unauthorized. An "act" may be unauthorized because it is declared to be such by statute, ordinance, rule, regulation or otherwise.

Subsection b, the "omission to act" phase of this offense, has reference to a public servant who consciously refrains from performing an official non-discretionary duty, which duty is imposed upon him by law or which is clearly inherent in the nature of his office. In addition, the public servant must know of the existence of such non-discretionary duty to act. Thus, such duty must be either one that is imposed by law, or one that is unmistakably inherent in the nature of the public servant's office, *i.e.,* the duty to act is so clear that the public servant is on notice as to the standards that he must meet. In other words, the failure to act must be more than a mere breach of good judgment. In the absence of a duty to act, there can be no conviction.

The kind of culpability required by this Section is stated alternatively, *i.e.,* the public servant's intent must be either (a) to obtain a benefit, or (b) to injure another person or to deprive another person of a benefit. The first alternative covers situations where the public

servant's intent is to obtain a gain or advantage for himself or another person. The second alternative is designed to cover cases where the public servant's intent is to injure some person or to deprive some person of a gain or advantage. A person may be "injured," for example, by being subjected to an unlawful search and seizure. A person may be deprived of a gain or advantage, for example, by being denied or impeded in the exercise of some right or privilege.

§ 2C:30–3. COMMENTARY

1. Present law has no generalization equivalent to this Section. In all states, one finds a variety of particular instances prohibited under sanctions of varying degrees of severity. Thus, officials may be prohibited from buying up state obligations. The purpose is evidently to prevent enrichment of officials who can buy state obligations when they are selling at a discount, because of advance knowledge that favorable official action is about to take place. This is a kind of fraud on the state's creditors. Also the possibility of obtaining such benefits could easily lead officials to postpone or conceal favorable developments, or to bring about unfavorable action, in order to provide an opportunity to acquire state obligations cheaply.

Additionally, in New Jersey such acts would probably fall within either misconduct in office or the common law crime of conspiracy.

2. *The Scope of Section 2C:30–3.* This Section attempts to identify the element of unconscionable behavior which is common to all the offenses mentioned above, namely, speculation or wagering on official action which the defendant is in a position to influence, or on the basis of confidential information to which he has or has had access only for official purposes. It goes beyond existing special legislation since it reaches speculation based on restricted official information on contemplated action in every department or agency of government. It covers both persons in office at the time of the misconduct and those who leave office with the purpose of misusing information.

It should be observed that the Section says nothing as to the duty of an official who has an investment, perhaps antedating his public service, in an enterprise about to be affected by official action of his government unit. He would not be prevented from selling his holdings in anticipation of adverse developments. The extent to which public servants should be allowed to retain holdings in fields subject to action of their government units is a matter for regulatory control outside the province of the Code.

§ 2C:33–1. COMMENTARY

1. *Present Legislation.* All states now penalize some form of unlawful assembly or riot. New Jersey's Statutes are as follows:

2A:126–1. Definition of "mob"

2A:126–2. Taking part in mob with intent to injure person or property

2A:126–3. Mob violence; penalty for persons participating; "serious injury" defined

2A:126–4. Unlawful assemblies; proclamation to disperse; form; duties of peace officers

2A:126–5. Arrest of persons continuing together after proclamation; penalty

2A:126–6. Persons killing rioters hold guiltless

2A:126–7. Obstructing making of proclamation to disperse

2. *Riot.* The law of conspiracy and attempt covers all phases of preliminary collaboration to commit offenses; and the offense of disorderly conduct reaches the violent, tumultuous, noisy, and dangerous aspects of either individual or group behavior. The reasons, however, we adopt for retaining a distinct riot offense are three: (1) to provide aggravated penalties for disorderly conduct where the number of participants makes the behavior especially alarming; (2) to provide penal sanctions for disobeying police orders directing a disorderly mob to disperse; and (3) to subject to police orders persons present but not shown to be implicated in the disorderly behavior—a kind of expanded "complicity," necessitated by the fact that police cannot be expected to distinguish participants from non-participants intermingled in a mob. It seems entirely proper to distinguish between "mob" disorderliness and individual misbehavior. Not only is mob behavior more dangerous and frightening, but also it poses special problems for the police. In vast rural and suburban territories, the lone policeman carries the burden of maintaining order. When numerous persons confederate against him, they are emboldened, and he is rendered powerless or driven to the use of arms.

It is of course necessary to prove that the rioters were involved in a common disorder; it is not enough to show that numerous individuals were engaged in similar unrelated activities. The formulation of riot here, "participating in a course of disorderly conduct," avoids the difficulty since it is not limited to participation with allies. Mere presence without taking part by word or deed is not participaton. By "disorderly conduct," we mean the offense defined in Section 2C:33–2.

By defining riot as an aggravation of disorderly conduct, we prevent application of the riot penalties to peaceful joint behavior of which the police may disapprove on the ground that it tends to provoke others to violent reactions, or even to assemblies to commit offenses

unattended by circumstances of disorder. Thus, this Section does not reach mere "unlawful assembly."

3. *Inciting to Riot.* Unlike present law, we do not define a separate offense of inciting to riot. Given our provisions as to attempt, conspiracy, etc., we believe it unnecessary.

4. *Disobedience of Dispersal Order.* Subsection b penalizes refusal to disperse by those present at the scene of a riot whether or not the individual is a participant in the unlawful assembly. Two changes are made from existing law: First, the persons who may give the order are not limited to police and sheriffs but include other law enforcement-type people. Second, dispersal orders formerly were cast in terms of an order to "desist or disperse." It now seems preferable to omit the reference to desistance. The actual participants in the disorderly conduct are subject to penalty apart from any order, so the Subsection mainly affects "others in the immediate vicinity." It is meaningless to order them to "desist or disperse" since by hypothesis they are not engaged in the disorderly conduct.

§ 2C:33–2. COMMENTARY

1. *Background; Common Law and Current Legislation.* The common law, perpetuated and extended in many current statutes and ordinances, penalizes "breach of the peace," broadly defined as any behavior which disturbs or tends to disturb the tranquillity of the citizenry. This definition is sufficiently comprehensive to include behavior which, though carried on quietly or privately, would tend to provoke an individual victim to violent reaction. Thus, it includes challenging to a duel, sending a defamatory letter, and eavesdropping.

Disorderly conduct is a statutory offense occupying generally the same ground as common law breach of peace, but with a number of modifications and supplements. These vary a good deal from state to state.

New Jersey now has a large number of such statutes. The most important are:

2A:170–26. Assault; assault and battery

2A:170–27. Fighting

2A:170–29. Offensive language; molesting or interfering with person

2A:170–30. Loitering or creating a disturbance while under the influence of intoxicating liquor

2. *Section Limited to Improper Behavior Which Itself Disturbs Public Tranquillity.* Section 2C:33–2 covers the most common types of misbehavior by which individuals can make a public nuisance of themselves. It embodies the usual formulations against "violent or tumultuous" behavior, "threats or fighting," excessive noise, and the

like. With respect to noise, the term "unreasonable" is preferred over "loud," since loud noise may be appropriate in some places and on some occasions.

Subsection b extends beyond acts creating physical discomfort inasmuch as it includes offensively coarse or indecent utterances and abusive language. Such behavior on a street or in a public conveyance constitutes an assault on public sensibilities. The term "offensively" is used to modify "coarse" to make it clear that the impropriety of the language is to be related to the group to whom it is addressed. See *State v. Profaci*, 56 N.J. 346 (1970); *State v. Reed*, 56 N.J. 354 (1970). Such coarse or indecent language is penalized under Subsection b regardless of any actual or presumed tendency to evoke disorder among the hearers, since the interest we seek to protect is freedom from present nuisance rather than freedom from anticipated violence. A rule that words may be punished only if they tend to provoke violence would give immunity to disgusting public verbal behavior merely because the unwilling audience comprised only persons too timid, weak or well-behaved to respond with disorderly violence. Subsection c is a catch-all that reaches "stink bombs," the strewing of garbage, nails, or other noxious substances in public passages, turning off the lights in a theater, and an endless variety of other public annoyances which mischief can conceive. Present laws often achieve this result by penalizing "disorderly conduct" without defining it. It seems preferable to try to achieve as much definition as is practicable, and especially, in Subsection c, to make it clear that not all discomforting activities are criminal. For example, the maintenance of a tannery, dump, or other odorous business might create public discomfort or violate the zoning laws, but it would not be punishable as disorderly conduct since this Subsection expressly excludes acts which serve a legitimate purpose of the actor.

Section 2C:33–2 is confined to "public" inconvenience, the term "public" being defined so as to require that the comfort of a plurality of persons be jeopardized. But it is made clear that this public discomfiture can occur in privately owned facilities such as stores, apartment-houses, theaters.

3. *Orderly Speech that Provokes Disorder.* So far as Section 2C:33–2 is concerned, a speaker cannot be held liable criminally for utterances which are provocative merely on account of the ideas communicated. Purposeful incitation to disorderly conduct or other crime is penalized in Chapter 5 of the Code. But the fact alone that the speaker knows that his ideas will be distasteful or even that their expression creates a "clear and present danger" of disorderly response will not make the speech unlawful. The clear-and-present danger test affords very little protection against police interference with nondisorderly public speech on grounds that disturbance is imminent.

§ 2C:33-3. COMMENTARY

1. *Present New Jersey Statutes.* We now have three statutes in this area: N.J.S. 2A:122–11. (Giving of false information as to location or existence of bomb) N.J.S. 2A:132–1. (False alarms or messages over police radio or telegraph transmissions); and N.J.S. 2A:170–9. (Giving false alarm.)

2. *The Scope of Section 2C:33–3.* The Code generalizes these provisions. Not only are false alarms included but also bomb scares and all dangerous emergency alarms, *e.g.*, floods, hurricanes, landslides, sinking ships, civil defense. The police force, too, would qualify as an emergency organization when responding to an alarm of this character. The provision is justifiable on the ground of waste of government resources and the likelihood that the actor will cause personnel or equipment to be unavailable to deal with real emergencies. It is an aggravated form of disturbing the peace which, as in the case of bomb scares, can have grave consequences. Compare also Section 2C:12–3.

§ 2C:33–4. COMMENTARY

1. Special provision for these private annoyances is required since Section 2C:33–2 (Disorderly Conduct) is limited to disturbance of some general impact. The present Section is also needed to fill a gap caused by some exclusions from the provisions of Section 2C:12–1 (Assaults).

2. Our law, in addition to N.J.S. 2A:170–26 (Assault; Assault and Battery) is now found in N.J.S. 2A:170–29, and in N.J.S. 2A:115–4. See *Larison v. State*, 49 N.J.L. 256 (Sup. Ct. 1887).

§ 2C:33–5. COMMENTARY

1. We have decided to recommend retention of a provision dealing with public drunkenness. There is no question but that the state has the power to treat such conduct criminally. *Powell v. Texas*, 392 U.S. 514, 88 Sup. Ct. 2145, 20 L. Ed. 2d 1254 (1968).

Notwithstanding much research and experimentation with non-penal disposition of drunks, we are far from a medical solution, and it is the police who will continue to encounter and deal with the vast majority of drunks and drug addicts. In most cases, the drunk will have been guilty of some other category of disorderly conduct, but it seems necessary to provide a basis for police action for those who are making a nuisance of themselves. We would vastly prefer a non-criminal remedy for getting intoxicated persons off the street. None now exists and, until one does, we believe a penal remedy must remain.

§ 2C:33-6. COMMENTARY

1. This is § 165.25 of the New York Code. It is severed from Loitering and Disorderly Conduct and treated more seriously because it is aimed at a form of theft by stealth. It is basically an inchoate or incipient theft offense used to control pickpockets.

§ 2C:33-7. COMMENTARY

1. *Introduction and Present Law.* This Section penalizes what might be called "alarming loitering." They are all that would be left in the law of the ancient offense of "vagrancy." Originally, as drafted, the MPC spoke in terms of "suspicion" that the person was about to engage in crime but this was changed to "alarm" for the safety of persons or property. This was done to save the section from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause. MPC P.O.D., p. 227 (1962).

2. Our law now is contained in four sections of the Disorderly Persons Act. N.J.S. 2A:170–1, 2, 3 and 4. There is some doubt about the constitutionality of the present laws under the vagueness doctrines. Compare *State v. Zito,* 54 N.J. 206 (1969) with *United States v. Margeson,* 259 F. Supp. 256 (E. D. Penn 1966) and *Karp v. Collins,* 310 F. Supp. 627 (D.N.J. 1970) *Reversed* U.S. , S. Ct. (1971). The *Zito* case read N.J.S. 2A:170–1 so as to meet the problems of vagueness and due process.

The components of many forms of the vagrancy statutes set forth above are punishable under specific provisions of the Code. Others cannot, consistently with the constitution, be continued. It cannot be allowed merely to create a crime of status based on past behavior.

3. *Loitering and Wandering.* Loitering statutes, whether or not they include provisions for police interrogation and compulsion on the loiterer to explain his presence, were designed to enable police to arrest persons suspected of having committed or being about to commit offenses. *State v. Zito,* 54 N.J. at 215 ("It reaches a criminal plan not yet pressed to the stage of an attempt.")

The Code requires that the police officer give the actor an opportunity to dispel any alarm which would otherwise be warranted.

> "Under prior drafts, failure to respond to police requests for identification and explanation were circumstances which might be taken into account in determining whether suspicion or alarm was warranted; but if there was enough without that to justify alarm, the policeman was entitled to arrest (and therefore incidentally search) even though a moment's delay for inquiry would have elicited an explanation which would have satisfied him.

"The final clause of the Section takes account of the fact that an incredible but true explanation may be given to the policeman. An arrest may be justified; but when it is subsequently made to appear that, despite the alarming circumstances and the incredible explanation, defendant was in fact engaged in lawful business or other activity, he ought not to be convicted. Indeed, the record of his arrest ought to be expunged." (MPC P.O.D., p. 227 (1962))

4. *Begging.* Municipalities may properly regulate the use of sidewalks to safeguard against annoying and importunate mendicants and merchants; but such legislation does not belong in the Penal Code. Other codes, dealing with traffic, or health and welfare, or regulating callings, would be the place for specific and detailed provisions necessary to make proper distinctions between the aggressive beggar and the immobile, silent beggar; between begging as a business and soliciting for the Red Cross, Disabled Veterans, or the Salvation Army; between begging and the "selling" of pencils or trinkets which the purchaser is not expected to take; between the person suffering a momentary embarrassment from having lost his wallet and the bum dunning passersby for coins with which to buy liquor, under the fraudulent pretense of needing carfare. (MPC T.D. 13, p. 65 (1961).)

§ 2C:33-8. COMMENTARY

1. The purpose of this Section is to prevent public inconvenience from unjustified obstruction of passage, while making it clear that mere assembly on sidewalks does not constitute an offense or subject the assemblers to police orders to move on or disperse. The key is the definition of obstruction—"to render impassable without unreasonable inconvenience or hazard." Thus, as long as passersby may with reasonable safety and convenience get through or past the crowd, picketing, speech-making, or idling in groups will not be criminal. Subsection b defines the role of the police in relation to gatherings which do obstruct. They are not to solve the traffic problem by suppressing the speaker, but by requiring the crowd to so move as to leave passage for members of the public. The speaker can be compelled to move only if public passage cannot be "readily" maintained by police handling of the crowd. Any broader authority gives the police too wide a discretion: they will tolerate or aid (by diverting traffic) a presidential candidate's speech that blocks a central city intersection, or an approved religious or patriotic procession, while harassing minority sectarians or "corner gangs."

§ 2C:33-9. COMMENTARY

1. This Section is intended to deal principally with offensive utterances which are not unreasonably loud, coarse, indecent or abusive as required by Section 2C:33-2. For example, to interject

atheistic speeches in a meeting of the devout, to taunt the Irish marching on St. Patrick's Day, or otherwise flout the sentiments of a lawful gathering so outrageously as to support an inference of purpose to disrupt the gathering—these are activities fraught with possibilities of imminent violence, a special, narrowly defined case for application of the "clear-and-present-danger" idea which we rejected as a general criterion of disorderly conduct. The situation is also distinguishable from other kinds of "disturbing speech" in that here we must balance the actor's freedom of speech against equally cherished freedoms of the persons who are meeting, namely, freedom of association, religion, and peaceful communication. Nevertheless, we do not go so far as to purport to reach any disturbance or interruption of a meeting. A purpose to prevent or obstruct the proceedings must be shown; otherwise the actor must have engaged in behavior which is itself disorderly. In such situations reliance would be placed on the right to eject the unwelcome person, with prosecution for assault or disorderly conduct if he resisted. The Section applies only to physical obstruction. The MPC provision (§ 250.8) would also cover psychological obstruction. The term "gathering" is intended to bring within the scope of the Section audience groups such as attendants at a theater or concert, in addition to "meetings" of groups for common participation in religious, political, or other endeavor.

2. Our present statute is N.J.S. 2A:170–28.

§ 2C:33–10. COMMENTARY

1. This Section is an attempt to generalize on the basis of a variety of existing statutes penalizing desecration. See N.J.S. 2A:107–1 through 5, relating to the flag; N.J.S. 2A:95–1, 2 and 3, relating to graves; N.J.S. 2A:122–10, relating to buildings; and N.J.S. 2A:122–12 relating to religious symbols.

We do not continue the policy as to the flag. We believe the existing Federal statutes to be sufficient in this area.

§ 2C:33–11. COMMENTARY

1. Cruelty to animals is a class of behavior which is widely penalized because of outrage to the feelings of substantial groups within the population. The obvious difficulty in defining cruelty cannot be solved by just using more words as do most statutes, including New Jersey's. Presently, N.J.S. 4:22–15 through 26 establish both a series of misdemeanors (punishment: fine of $250 and imprisonment for six months) and a penalty remedy in favor of the New Jersey Society for the Prevention of Cruelty to Animals. Further, in Title 2A, there are a series of unrelated Disorderly Persons offenses for various forms of cruelty to animals. See N.J.S. 2A:170–14 (Abuse of animals hired from livery stables); 2A:170–37 (Malicious mischief); 2A:170–39 (Poisoning Domestic Animals).

2. *Exceptions.* This provision was N.J.S. 4:22–16. See *New Jersey Soc. For Prev. of Cruelty to Animals v. Bd. of Educ. of City of E. O.,* 91 N.J. Super. 81 (App. Div. 1966) *aff'd.* 49 N.J. 15 (1967).

§ 2C:33–12. COMMENTARY

1. Subsection a was formerly N.J.S. 2A:156A–3.

2. Subsection b was formerly N.J.S. 2A:156A–4. We have added a new provision excepting from criminal penalties interceptions, disclosures and uses pursuant to an order under Section 2C:54–3.

All of Subsection b is subject to the good faith defense set forth in Section 2C:54–7, applicable to law enforcement officers.

3. Subsection c was formerly N.J.S. 2A:156A–5.

4. Subsection d was formerly N.J.S. 2A:156A–6.

5. Subsection e was formerly N.J.S. 2A:156A–19.

§ 2C:33–13. COMMENTARY

1. Nuisance is now a misdemeanor under N.J.S. 2A:130–3. The MPC contains no provision like this but the New York Code does (§ 240.45). This definition is not unlike that in our law as found in the cases. See *State v. Berman,* 120 N.J.L. 381 (E. & A. 1938); *State v. Williams,* 30 N.J.L. 102 (Sup. Ct. 1862); *Mayor and Council of Borough of Alpine v. Brewster,* 7 N.J. 42 (1951).

2. In sentencing, the Court may sentence as for a disorderly persons offense and, in addition, may impose the penalties set forth in Section 2C:56–1.

§ 2C:33–14. COMMENTARY

1. These provisions were N.J.S. 2A:149–1, 2 and 3. They were upheld over various attacks on constitutional grounds in *State v. Young,* 57 N.J. 240 (1971). The only change in substance which has been made is in Subsection b. The predecessor statute forbid the conduct by any person "other than a bona fide student therein or parent or legal guardian of such student or a teacher, administrator, or other school employer while in the performance of his duties." We have eliminated the exemption. If, in fact, the person enters with the requisite unlawful purpose, his status with the school should not excuse his conduct.

2. We recommend the reenactment of these provisions with a good deal of hesitancy. There is nothing in them which would not be adequately covered by more general provisions of the Code. It is, in general, undesirable to have special penal provisions, such as these, overlapping with the Code's general principles. Because these provisions were so recently enacted we believe the Legislature may want to continue them. It would be better not to do so.

§ 2C:33-15. COMMENTARY

1. This was N.J.S. 2A:170-54.1.

§ 2C:33-16. COMMENTARY

1. This provision was derived from N.J.S. 2A:170-65.

§ 2C:34-1. COMMENTARY

1. Lewd or indecent behavior is punishable in all jurisdictions. Generally, the prohibited conduct amounts to gross flouting of community standards in respect to sexuality or nudity in public. In New Jersey, however, both public and private acts are prohibited under N.J.S. 2A:115-1. As construed in *State v. Von Cleef,* 102 N.J. Super. 102 (App. Div. 1968) *rev'd. on other grounds,* 395 U.S. 814 (1969), the prohibition extends even to acts not witnessed by a third person. Adultery and fornication committed in secret are not, however, within the prohibition of this Section. "Lewdness imports some degree of sexual aberration of impurity and denotes gross and wanton indecency in sexual relations." *State v. Brenner,* 132 N.J.L. 607 (E. & A. 1945). See also *State v. White,* 129 N.J.L. 200 (Sup. Ct. 1942) *aff'd.,* 130 N.J.L. 527 (E. & A. 1943).

In keeping with our position on private sexual conduct, such private acts are excluded from this Section. Further, even the public acts prohibited by the Code are more limited than is generally the case under existing legislation. Sometimes legislation against indecency has been construed as applicable to cult nudism. This would not be so under our formulation since we require awareness of likelihood of offronting observers. Nor would our provisions reach debatable brevity of attire on the beaches, since we condemn "lewdness" rather than the less definite "indecency." Control of dress, if desirable, had best be accomplished by regulatory ordinances outside the scope of this Code.

§ 2C:34-2. COMMENTARY

1. *Background; General Policy Considerations.* The Code pursues the same policy as existing law in repressing commercialized sexual activity.

Although prostitution appears to respond to a widespread demand, and despite indications that a substantial proportion of prostitutes are victims of social and psychic conditions beyond their control, most students of the problem favor penal repression of commercialized sex. Prostitution is an important source of venereal disease, although some contend that the "amateurs" to whom men turn in lieu of prostitutes present a greater danger in this respect. It has been observed that

prostitution is a source of profit and power for criminal groups who commonly combine it with illicit trade in drugs and liquor, illegal gambling and even robbery and extortion. Prostitution is also a source of corrupt influence on government and law enforcement machinery. Its promoters are willing and able to pay for police protection; and unscrupulous officials and politicians find them an easy mark for extortion. Finally, some view prostitution as a significant factor in social disorganization, encouraging sex delinquency and undermining marriage, the home, and individual character.

Among important decisions embodied in the Code are the following: (1) the Section includes homosexual and other deviate sexual behavior within the definition of prostitution; (2) only sexual activity "for hire" is included; (3) the penalty provided for the prostitute is relatively mild as compared with penalties for "promoting" prostitution; (4) procuring, pandering, transporting, and other activities auxiliary to prostitution, which constitute separate offenses in current laws, are consolidated into a single offense of "promoting" prostitution, with a rational system of grading; (5) unrealistic and excessive maximum sentences are eliminated; (6) the offense of deriving support from a prostitute is converted into a presumption that a person so supported is guilty of promoting prostitution; (7) the patron of the prostitute is down-graded in guilt to a petty disorderly persons offense.

2. *Existing New Jersey Statutes.*

(a) *Crimes.*

2A:133–1. "Prostitution" defined (See *State v. Haskins,* 38 N.J. Super. 250 (App. Div. 1956) and *State v. Baldino,* 11 N.J. Super. 158 (App. Div. 1951).)

2A:133–2. Soliciting, procuring or engaging in prostitution; keeping, occupying or permitting use of place for prostitution (See *State v. Baldino, supra*)

2A:133–3. Taking, placing, harboring or enticing female into house of prostitution

2A:133–4. Compelling prostitution or immorality

2A:133–5. Placing female in custody of another for immoral purposes

2A:133–6. Procuring female for house of prostitution

2A:133–7. Forcing prostitution of wife

2A:133–8. Accepting earnings of prostitution (See *State v. Rogers,* 8 N.J. Super. 64 (App. Div. 1950) and *State v. Haskins, supra*).

2A:133–9. Parent or guardian consenting to taking of female for prostitution

2A:133–10. Attempting to detain female because of debt

2A:133–11. Permitting immoral relations with female under 18

2A:133–12. Transporting female for purpose of prostitution; venue of offense (See *State v. Jankowski*, 82 N.J.L. 229 (Sup. Ct. 1912) *aff'd.*, 83 N.J.L. 796 (E. & A. 1913).)

(b) *Disorderly Persons Act*

2A:170–5. Prostitution; soliciting unlawful sexual or indecent acts. (See *State v. Adams*, 77 N.J. Super. 232 (App. Div. 1962).)

3. *Sexual Activity.* This term as defined in Subsection a covers not only sexual intercourse but also homosexual and other deviate sexual relations. Our present criminal statute speaks in terms of "sexual intercourse" (N.J.S. 2A:113–1) but the Disorderly Persons Act includes "unlawful sexual intercourse or any other unlawful, indecent, lewd or lascivious act." (N.J.S. 2A:170–5.)

Since commercial prostitution offers and even features abnormal forms of sexual gratification, it is important to include this. Male as well as female prostitution is covered. The Section extends to sexual display not involving contact with the customers, for example, catering to the perverse desire to observe others in sexual activity.

4. *Hire; Promiscuity Without Hire Not Criminal.* There is general agreement among the states in proscribing sexual activity for hire, but there is substantial disagreement as to whether prostitution should be defined to include promiscuous intercourse whether or not for hire. New Jersey now explicitly defines prostitution to include promiscuous intercourse without hire. (N.J.S. 2A:133–1.) The Code changes this and confines the offense to sexual activity "for hire."

Among the reasons for undertaking to repress prostitution, the danger of spreading disease is the only one applicable to non-commercial promiscuity. Even on this score, non-commercial "promiscuity" appears to be less dangerous than commercial prostitution. Non-commercial prostitution involves indiscriminate acceptance of new sexual partners from time to time, but not intercourse with dozens of strangers daily. In any event, the health menace involved in amateur promiscuity seems to call for educational and medical remedies rather than penal law. The more serious dangers of professional vice are absent: necessity and means to corrupt law enforcement; incentive to coerce and exploit women; maintenance of criminal organizations and parasitic elements living on the proceeds of prostitution and therefore committed to promote the activity by finding new customers and new women to serve them.

5. *Solicitation in a Public Place.* Subsection a has been drafted to meet in part the views of those who are skeptical of the propriety or utility of using the criminal law to repress individual immorality. It does not purport to reach every engagement in sexual activity for hire.

Thus, the possibility of applying the Section to the private mistress whose lover contributes to her support is excluded. But we adopt, in paragraph (1), the position that professional prostitution is criminal even if carried on in private. Paragraph (2) adopts the idea that prostitution is also to be repressed when it manifests itself in public solicitation, which may be an annoyance to passersby and an outrage to the moral sensibilities of a large part of the public. The requirement of an actual solicitation, rather than loitering as required by MPC § 251.2, is taken from § 184–3 of the Proposed Federal Penal Code.

6. *Being an "Inmate."* Subsection a follows existing law in dealing explicitly with "being an inmate." See N.J.S. 2A:133–2(b) and (f) which do not use that term but which carry the same import. "Inmate" is defined in the Code so as to make it clear that it does not mean anyone who may be found in a house of prostitution, but only those who are connected with the house as prostitutes.

The point of making it an offense to be an inmate is to dispense with proof of a particular sexual episode or solicitation, when the woman is associated with the house in a way that amounts to a general holding out of her availability for sexual purposes. The term is therefore defined so that it is not even necessary that an "inmate" reside or carry on her activities in the "house." She may be a "call girl" whose assignations, perhaps in her own apartment, are arranged through an office. Such an office would be within the definition of "house of prostitution" in Subsection a, since it is a place where prostitution is promoted.

7. *Promoting Prostitution.* Subsection b creates a comprehensive single offense of promoting prostitution, embracing many different acts of collaboration with or exploiting of prostitutes. In present legislation (See N.J.S. 2A:133–3, through 12) these activities, or varying groups of them are set out as separate offenses.

Among the undesirable consequences of the present legislative practice are: possible cumulation of sentences based on separate convictions for what are really parts of a single criminal transaction, *e.g.*, procuring, transporting, receiving money; unfair double trials, as where a prosecutor proceeds for transporting after losing on a procuring charge, possibility of losing a conviction on appeal where the evidence, though sufficient to support conviction of one form of promotion, is held sufficient to establish the particular form of promotion charged. On the other hand, by enumerating acts which shall be deemed to constitute promotion, Subsection b obviates any question as to the sufficiency of these acts to warrant conviction under the Subsection.

In general, the subsidiary clauses of Subsection b are based on existing legislation. Clause (6), dealing with transportation that promotes prostitution, merits special comment. Transportation is especially important in organized prostitution because recruitment of prostitutes is concentrated in metropolitan centers from which they must be dis-

patched to the hinterland. Also, patrons' demand for novelty requires a constant shifting of prostitutes from one house or region to another.

Clause (7) adopts the principle now found in N.J.S. 2A:133–2b making the landlord criminally liable for knowingly letting premises for use in prostitution. It does not impose a duty of inquiry or criminal liability for negligence. In this respect, it follows our law. *State v. Mausert*, 85 N.J.L. 498 (E. & A. 1914); see *State v. Baldino, supra. Troutman v. State*, 49 N.J.L. 33 (Sup. Ct. 1886).

8. *Living Off Prostitutes.* Subsection d is based on common statutory provisions for punishment of those who derive their livelihood from the prostitution of others. Such laws were evolved to help prosecutors convict men believed to be engaged in promoting prostitution.

If there were sufficient evidence the man might be convicted of soliciting for the woman. But where evidence of soliciting or other actual complicity in prostitution is lacking, conviction can be had on proof merely that she supports him "in whole or in part."

Such legislation is insupportable in principle and goes well beyond any pragmatic justification which might be urged for it. In no other instance is criminal liability based on the bare fact that one is supported by another person who gains his livelihood illegally. True, a high statistical probability favors the inference that a man without other means of support must be collaborating in the prostitution of the woman who supports him. But this hardly warrants more than the presumption provided by Subsection d.

9. *Patronizing Prostitutes.* The individual who patronizes a prostitute is rarely punished in practice although he may be engaging in criminal activity under a variety of laws. Imposition of severe penalties is out of the question, since prosecutors, judges and juries would be likely to regard extra-marital intercourse for males as a necessary evil or even as socially beneficial. Accordingly, Subsection e classifies the offense as a petty disorderly persons offense.

10. *Penalties for Prostitution and Promoting Prostitution.* Prostitution is now punishable by imprisonment for up to three years if the crime is charged (N.J.S. 2A:133–2) although it can also be proceeded against as a Disorderly Persons Offense. *State v. Adams, supra.* The Code substantially downgrades this to a disorderly persons offense.

For promoting prostitution heavier penalties are appropriate. It is now either a misdemeanor or a high misdemeanor. The Code makes it either a crime of the third degree or of the fourth degree. See Subsection c.

§ 2C:34–3. COMMENTARY

1. This Section forbids loitering for the purpose of solicitation and being solicited. It does not require the element of "hire" required for Section 2C:34–2, the prostitution offenses. It does, however, require public alarm because, in our view, it is only when that element exists that the criminal law has any interest in the area. The provision is drawn from § 1853 of the Proposed Federal Criminal Code. The concept of offense or alarm to "others" is an effort to define a kind of public nuisance; it would not, for example, reach an isolated private proposal of sexual relations although the addressee might find the proposal offensive. On the other hand, loitering for the purpose of making proposals indiscriminately to persons in or near a public facility involves so high a likelihood of offending others that a restraint on such activity appears warranted.

We reject MPC § 251.3 which (1) does not require public alarm nor the threat thereof and (2) is limited to deviate sexual relations. We see no reason to limit the provision to homosexual solicitations if, in fact, public alarm is occasioned by the solicitation.

2. Soliciting is now covered by N.J.S. 2A:133–2 and N.J.S. 2A:170–5.

§ 2C:34–4. COMMENTARY

1. A "Commission to Study Obscenity and Depravity in Public Media", created by L. 1969, Ch. 121, recently reported and suggested substantial changes in the laws in this area. We agree with that Report that new legislation is needed in this field. Because the Legislature has submitted this issue to a separate study commission, we deem it inappropriate for us to make any recommendation in the area. Whatever statute relating to obscenity the Legislature choses to enact should be inserted at this point. Whatever administrative provisions relating to obscenity the Legislature chooses to enact should be inserted in Section 2C:53–1.

INTRODUCTORY NOTE TO CHAPTER 35

Most of this State's law controlling dangerous drug offenses is in N.J.S. 24:21–1 through 45, the New Jersey Controlled Dangerous Substances Act. There are, additionally, scattered throughout Title 2A, a series of offenses relating to dangerous drugs. We recommend the retention of the offenses stated in Title 24. Further, we except these provisions from our general policy of having the Code's provisions as to sentences and sentencing apply to all offenses wherever found in our law. See Sections 2C:1–5 and 2C:43–1. We do this

because the drug laws were so recently subjected to complete reformulation.

In this Chapter, we set forth those provisions now found in Title 2A and which should be retained.

§ 2C:35-1. COMMENTARY

1. This provision was formerly N.J.S. 2A:96-5 and 5.1. We have broadened it to make it applicable to all drugs and not to narcotics alone. See N.J.S. 24:21-1 *et seq.*

§ 2C:35-2. COMMENTARY

1. This was N.J.S. 2A:170-25.1. We have added the requirement that the plant must be "knowingly" grown and removed the adjective "narcotic" modifying "plant." The latter change is because our drug law no longer classifies marihuana as a narcotic.

§ 2C:35-3. COMMENTARY

1. This provision was formerly N.J.S. 2A:108-9. We have expanded it to include all drugs.

§ 2C:35-4. COMMENTARY

1. These provisions were N.J.S. 2A:170-77.3 to 77.5. They have been broadened to cover all controlled drugs and substances. N.J.S. 24:21-1 *et seq.*

§ 2C:35-5. COMMENTARY

1. These provisions were formerly N.J.S. 2A:170-25.9 through 13. They have been broadened to include all compounds having the requisite properties and not merely glues. Subsection c, formerly N.J.S. 2A:170-25.12, now covers only possession.

§ 2C:35-6. COMMENTARY

1. These provisions were N.J.S. 2A:170-77.8 through .11 and .15. The predecessors of Subsections a and b were amended by the recent changes to Title 24 and we have made an equivalent change to Subsection e.

2. Subsection e has been changed from its predecessor to (1) relate the deception provision to our theft law and (2) eliminate the forgery provision as unnecessary.

INTRODUCTORY NOTE TO CHAPTER 37

Gambling is a field requiring special study and consideration of many factors beyond the scope of the work of this commission. Because of this, we believe that the existing statutes dealing with gambling and related activity should remain basically unaltered by this Commission and, instead, should be the subject of individual study and revision by the Legislature. See "Recommendations . . . Concerning Legislation . . . To Curb The Power And Influence Of Organized Crime In New Jersey" by Frederick B. Lacey, United States Attorney for the District of New Jersey (January 20, 1970). With this in mind, we have simply incorporated the existing statutes at this point making changes only in the graduation provisions for sentencing purposes.

§ 2C:37-1. COMMENTARY

1. These provisions were formerly N.J.S. 2A:112-1 through 3 and 5 through 8, respectively. N.J.S. 2A:112-4 has been eliminated as unnecessary due to theh general sentencing provisions of the Code.

§ 2C:37-2. COMMENTARY

1. Subsection a through d were N.J.S. 2A:121-1 through 4, respectively. Subsection e was N.J.S. 2A:170-18. Subsections f and g were N.J.S. 2A:121-5 and 6, respectively.

§ 2C:37-3. COMMENTARY

1. This was formerly N.J.S. 2A:146-3. It is included at this point because it has been used mainly as an anti-gambling law. See *State v. Western Union Telegraph Co.*, 12 N.J. 468.

§ 2C:39-1. COMMENTARY

1. These definitions, applicable both to this Chapter and to the administrative provisions applicable to firearms control, were previously found in N.J.S. 2A:151-1 and 49. Several new definitions taken from New York Penal Code § 265.00 have been added.

§ 2C:39-2. COMMENTARY

1. Subsection a was formerly N.J.S. 2A:151-23, 31, 40 and 46, and N.J.S. 2A:170-17 and 25.7.

2. Subsection b was formerly N.J.S. 2A:151-48 and 55.

§ 2C:39–3. COMMENTARY

1. *Machine Guns: Subsection a.* This provision was N.J.S. 2A:151–50.

2. *Silencers: Subsection b.* This provisions carries forward the policy of N.J.S. 2A:151–14.

3. *Bombs, Etc.: Subsection c.* This provision was N.J.S. 2A:151–58 and 59.

4. *Explosives: Subsection d.* This provision was N.J.S. 2A:151–60.

5. *Loaded Firearms: Subsection e.* This provision, together with subsection f gradates the offenses relating to unlicensed possession of firearms. Under this Section, if the firearm is loaded, the offense becomes a crime of the third degree. Under Subsection f, the same is true if a purpose to use it unlawfully is shown. Otherwise it is a crime of the fourth degree.

6. *Firearms Possessed With a Purpose to Use: Subsection f. See* commentary to subsection e. See N.J.S. 2A:151–56.

7. *Weapons, In General: Subsection g.* This provision carries forward the policy of N.J.S. 2A:151–41 and 62.

8. *Defaced Weapons: Subsection h.* This provision is taken from New York Penal Code § 265.05.

9. *Knives With Purpose To Use: Subsection i.* This is New York Penal Code § 265.05. It changes existing law in requiring a purpose as to possession of knives which are not, in themselves, indicative of criminal purpose.

10. *Firearms in Educational Institutions.* This provision carries forward the policy of N.J.S. 2A:151–41.1 and 41.2.

11. *Certain Persons Not to Have Weapons: Subsection k.* This was N.J.S. 2A:151–8.

12. *Acquisition of Weapons or Explosives by Minors: Subsection l.* This was N.J.S. 2A:151–11.

§ 2C:39–4. COMMENTARY

1. Subsection a was N.J.S. 2A:151–50.
2. Subsection b was N.J.S. 2A:151–12 and 62.
3. Subsection c was N.J.S. 2A:151–14.
4. Subsection d was N.J.S. 2A:151–15.
5. Subsection e was N.J.S. 2A:151–9.
6. Subsection f was N.J.S. 2A:151–10.

§ 2C:39–5. COMMENTARY

1. This Section collects the various presumptions of criminal purpose now found in our law. We intend that these provisions shall be interpreted and applied by the courts in the manner set forth in *State v. DiRenzo,* 53 N.J. 360 (1969), and *State v. Bott,* 53 N.J. 391 (1969). In particular, we believe (1) the jury should not be told of the presumption and (2) the trial court should not be precluded by these statutes from granting a motion for judgment of acquittal in an appropriate case.

2. *Presumption as to Possession: Subsection a.* This provision replaces N.J.S. 2A:151–7 which we believe to be too broad. We use MPC § 5.06(1) in its place. New York Penal Code § 265.15 is similar. See *State v. Lewis,* 93 N.J. Super. 212 (App. Div. 1966); *State v. Humphreys,* 54 N.J. 406 (1969) *affirming and reversing* 101 N.J. Super. 539.

3. *Presumption As To Criminal Purpose: Subsection b.* This provision, taken from MPC § 5.06, replaces N.J.S. 2A:151–6 and 57. Again, New York Penal Code § 265.15 is similar.

4. *Presumption of Defacement.* This provision is § 265.15(5) of the New York Penal Code.

§ 2C:39–6. COMMENTARY

1. These provisions were N.J.S. 2A:151–43, 42 and 18, respectively. They have been carried forward without substantial change.

§ 2C:39–7. COMMENTARY

1. This provision was N.J.S. 2A:151–2.

§ 2C:39–8. COMMENTARY

1. This provision was N.J.S. 2A:151–3.

§ 2C:40–1. COMMENTARY

1. This provision was taken from § 270.10 of the New York Penal Code. Subsection a is a generalized provision similar to N.J.S. 2A:170–25.2.

§ 2C:40–2. COMMENTARY

1. This provision was taken from § 270.15 of the New York Penal Code. See N.J.S. 2A:170–25.5.

INTRODUCTORY NOTE TO SUBTITLE 3

This Subtitle of the Code deals with the sentencing of offenders convicted of crimes and offenses. By virtue of Section 2C:1–4c, it applies to all crimes and offenses defined by the State's statutes, both within and outside of the Code. It does not, however, apply to the new drug law. See Section 2C:43–1b.

While the Code here deals with sentencing in a comprehensive manner, we make much more limited recommendations for change in the areas of parole and correctional administration. Those areas are generally beyond the scope of our mandate. As noted elsewhere in our report, we recommend a complete study and revision of the correctional laws of this State. The appropriate portions of the product of such a study should be incorporated at this point and the Subtitle redesignated as "Sentencing and Corrections." For the present, we recommend only those changes which seemed immediately necessary to implement the policies of the Penal Code.

§ 2C:43–1. COMMENTARY

1. This Section reflects a number of important conclusions which have been drafted into the Code. It reflects 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 solely on the character of the offender. It also articulates the conclusion that, in addition to death or life imprisonment for the most serious offenses, such as murder, the classification of crimes for purposes of sentence into four categories of relative seriousness should exhaust the possibilities of reasonable legislative discrimination. 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. See *State v. Hicks*, 54 N.J. 390 (1969). At the present time, in general, criminal offenses are classified 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:151–60 and with N.J.S. 2A:142–1.

2. Any effort to rationalize the situation must result in the reduction of distinctions to a relatively few important categories. This is an important characteristic of every new penal code. We recognize that there is an arbitrary element involved in the selection of precisely five categories but, in our opinion, more are not needed and less would

be inadequate. 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. A limited group of distinct sentencing categories should represent the entire range of statutorily authorized punishment for crime. Perhaps of greater importance, once the Legislature has adopted such an orderly and rational classification system it must strictly adhere to it in enacting any future penal legislation. 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 (Tentative Draft 1968).

3. Paragraph b classifies as a crime of the third degree any high misdemeanor defined by statute other than the Code which is not repealed on enactment of the Code. Similarly, misdemeanors are classified as crimes of the fourth degree. Most existing crimes are, of course, now covered in Subtitle 2 of the Code. To the extent that crimes are now found outside of Title 2A, we believe that they should be incorporated into the Code in this fashion. We do however, make a special exception for the recently-enacted "New Jersey Controlled Dangerous Substances Act." Such an exception is undesirable and detracts from the general nature of the Code's sentencing provisions. The drug laws are, however, so new and continue to be sufficiently controversial that we believe it would be inappropriate to change them again so soon after enactment. We would, however, hope that at some future time the drug laws could be amended to incorporate the Code's sentencing provisions.

§ 2C:43-2. COMMENTARY

1. This Section makes it clear that sentences for all offenses must be imposed in accordance with the Code (Subsection a) 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 d.) N.J.S. 2A:152–2, which is to be retained, provides that convictions may not make or work corruption of blood, disinherison of heirs, loss of dower or forfeiture of estate. *Neiman v. Hurff*, 11 N.J. 55 (1953). It further abolishes benefit of clergy. We conceive Subsection a as sufficient to encompass this provision without specification because such "sentences," *i.e.*, punishments, are not authorized by this Chapter. That provision could, therefore, be repealed.

2. The possible dispositions for offenses are found in Subsection c: The court may (a) suspend the imposition of a sentence or (b) sentence the defendant. Sentences may be of four different sorts: (1) to pay a fine or make restitution or both (Section 2C:43–3); or (2) to be placed on probation with or without a short period of imprisonment; or (3) to imprisonment for a term (Sections 2C:43–5 through 8 or Section 2C:44–6); (d) to a fine, restitution and probation or a fine, restitution and imprisonment. Except as set forth in subsection c(2) there may be no sentence to probation and imprisonment.

3. *Suspended Sentence.* The Code provides only for suspension of sentence and not the imposition of a sentence and suspension of its execution. The reason for this is that if a suspension works out badly and the 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 more severe 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 a 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 T.D. 2, p. 13 (1954).

Under present 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 position is like that of the Code. This is desirable in allowing the total circumstances to be known to the sentencing court. By moving to a rule of not imposing a term and suspending it, however, the added factor of precluding reliance by the defendant is present. This seems desirable.

5. *Probation as a Sentence.* 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 T.D. 2, p. 13 (1954).)

This is a departure from New Jersey law at least on a theoretical level which does not regard probation as a sentence. See *Adamo v. McCorkle*, 26 N.J. Super. 562 (App. Div. 1952) *reversed on other grounds* 13 N.J. 61 (1953).

6. *Probation and a Short Term of Imprisonment.* Subsection c(2) includes the authorization of a sentence combining probation and imprisonment for not exceeding ninety days, upon conviction of an offense other than a petty disorderly persons offense. This provision is comparable to N.J.S. 2A:164–16.

7. It should be noted that under this Section the only exception to the provision allowing a suspended sentence or probation in lieu of a term of imprisonment is in murder cases. Thus, no other mandatory sentences are created. This position and the Code's replacement for mandatory sentences is discussed in connection with Section 2C:44–1.

§ 2C:43–3. COMMENTARY

1. This Section authorizes the sentencing court to impose a fine or to order restitution in 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 2C:44–2, the maximum amounts provided for should generally be sufficient for both deterrent and correctional purposes. Subsection f 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 maximum terms of imprisonment there are scattered throughout the New Jersey Statutes many maximum fines ranging in amount from $25 to $100,000.

3. In addition to the establishment of a rational classification scheme for fines, this Section departs from existing New Jersey law in that it permits depriving the offender of any pecuniary gain he derived from the offense and also of taking from him an additional amount equal to that gain. We envision that this provision will be particularly useful in 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). See also the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" 199 (1967). We require the sentencing Court to make a finding as to gain and permit the court to hold a hearing to do so. We do not use the words "the offense" found in MPC § 6.03(5). Instead we use "conduct constituting the offense." This change is intended to permit the sentencing court, in appropriate circumstances and to the extent permitted by notions of fairness and of notice, to look beyond the particular day or transaction charged. In this case, an entire business or transaction might be viewed as "the conduct constituting the offense." Unlike the MPC, we specifically allow the Court to order restitution to the victim up to the amount of the loss.

4. We make no provision in the Code for the Court to order the defendant to pay costs of prosecution. Rather, we recommend repeal of all such existing statutes. Requiring a defendant to pay all or part of the expense of prosecuting him smacks, in our judgment, of imposing a burden upon his exercise of his right to trial. The allowance, in this Section, of substantially higher fines and for relation to gain or loss should be adequate to impose sufficiently high money penalties upon any convicted offender. See ABA Minimum Standards of Criminal Justice, Probation § 3.2(e) (1970) and II Attorney General's Survey of Release Procedures: Probation 222-23 (1939). See also Commentary to Section 2C:45–1.

§ 2C:43–4. COMMENTARY

1. Subsection a provides that upon conviction of an offense, the Court may either suspend the sentence of a corporation or may sentence it to pay a fine or restitution authorized by Section 2C:43–3.

2. Subsection b provides certain important supplementary sanctions in the area of corporate crime. 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 T.D. 4, p. 202 (1956). We emphasize this alternative by authorizing the sentencing Court to request that the Attorney General institute appropriate civil proceedings against the corporation. Unlike the MPC § 6.04, we do not set forth either the standards to be applied or the procedures to be followed in such proceedings. We believe that appropriately left to the civil law.

3. Under our corporation law, 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). The 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. Our law is unclear as to the standard to be applied to determine forfeiture. We believe that, in such cases, the court will want to consider the standards found in MPC § 6.04(2)(a).

New Jersey now also has a special provision in this regard concerning the gambling laws which will be repealed. 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."

§ 2C:43–5. COMMENTARY

1. The Commission considered the Young Adult Offenders provisions of the MPC and of the Federal Youth Corrections Act (18 U.S.C. § 5006 *et seq.*). While we believe such a system of treatment for very young offenders (*i.e.*, less than 22) to be highly desirable, we also believe the establishment of such a correctional system to be beyond the scope of our mandate. That is also the case as to place of confinement. For that reason, we have generally incorporated the provisions of our existing reformatory law N.J.S. 2A:164–17 and 19 into Section 2C:43–5 as a sentencing alternative. We do, however, make three changes of substance as to eligibility: (1) the provision is so written as to equate the treatment of men with that of women; (2) the top age is reduced from 30 to 25; and (3) the limitation as to previous convictions is removed.

2. Both very long and very short terms are excluded from this Section. If a person is convicted of a crime of the first degree, he could only come within the provisions of Section 2C:43–5 if the sentencing Court exercised his discretion under Section 2C:43–11.

3. We eliminate the provision in existing law placing responsibility for release of reformatory inmates in the Board of Managers. This is intended to move that responsibility to the Parole Board. See Section 2C:43–9.

§ 2C:43–6. COMMENTARY

1. Sections 2C:43–6 and 2C:43–7 embody the main position of the Code with respect to sentences of imprisonment for crime. The sen-

tence terms which may be imposed under these provisions are as follows (terms are in years):

Degree of Crime	Ordinary Terms § 2C:43–6	Extended Terms § 2C:43–7
First	10 to 20	20 to Life
Second	5 to 10	10 to 20
Third	3 to 5	5 to 10
Fourth	Up to eighteen months	Does Not Apply

2. In establishing this framework, we have reached several conclusions as to the role of the Court in sentencing. 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, which occurs in practice, 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 T.D. 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.* We believe that the Court should play a major role in sentencing and that the matter should not be left entirely to the administrative penal-correctional agencies. 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 were considered 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 T.D. 5, p. 24 (1956). The same recommendation is made by the ABA Committee on Minimum Standards, 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) (Maxi-

mum and minimum differed by one day.) Under these Sections, once the Court has decided to imprison (§ 2C:43–1), it must also decide, within fairly strict limitations, the maximum length of imprisonment. Limited discretion as to the number of years of imprisonment is left to the Court. It should be noted that the court will no longer state a minimum; the minimum-maximum sentence now in use in New Jersey is abandoned.

We believe these provisions, when considered with the recommendations we make for immediate parole eligibility, to be the best balance of the need for the exercise of both judicial and administrative discretion. The Court has some discretion as to length of the term of imprisonment and the Parole Board can immediately, if appropriate, release. Thus, both disparity and inordinate length of confinement should be substantially corrected. See also Section 2C:43–11 giving the Court discretion to reduce the grade of the offense of which the defendant has been convicted and to sentence for a lesser offense.

We do not follow the MPC here which we believe to be too restrictive of the judiciary. See *Wechsler, Sentencing, Corrections and the Model Penal Code.* 109 *U. Pa. L. Rev.* 465, 475 (1961). *See also* ABA Report on Sentencing Alternatives and Procedures §§ 3.1 and 3.2, at 129–160 (Tent. Draft 1968).

4. *The Length Of The Terms.* We have changed the length of the terms somewhat from that found in MPC § 6.06. The most serious crimes not punishable by death, are given a term of between 10 and 20 years to which a separate parole term (Subsection b) of five years is added. This is somewhat less than our present maximum sentence for rape. Second degree crimes carry a term of between 5 and 10 years (plus a parole term of five years) which may be compared, as regards present law, with those high misdemeanors to which the Legislature has attached a maximum sentence in excess of seven years (*e.g.,* N.J.S. 2A:90–2 and 3). Third degree crimes carry a term of three to five years (plus a parole term of five) and are roughly equatable with our high misdemeanors. Fourth Degree crimes carry a sentence of up to 18 months (plus a parole term of one year) and may be compared with our misdemeanors. Eighteen months was chosen as the longest appropriate sentence to a local penal institution. See (§ 2C:43–10).

To all of the above, where authorized (§ 2C:44–3), extended terms may be added (§ 2C:43–7).

§ 2C:43–7. COMMENTARY

1. 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 the maximum term, within pre-

scribed 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. MPC T.D. 5, at 25 (1956). As will be seen in connection with Section 2C:44–3, the criteria for imposing extended terms is different under the Code from under existing law. Our equivalents are found in N.J.S. 2A:85–8 through 13 (the Habitual Offenders Law); N.J.S. 2A:164–3 *et seq.*, (the Sex Offenders Act); and N.J.S. 2A:151–5 (extra term for armed offenders).

§ 2C:43–8. COMMENTARY

1. The authorized period of confinement for disorderly persons offenses has been retained at six months to accord with the decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968) and *Baldwin v. New York*, U.S. , 90 Sup. Ct. 1886 (1970) because there is no right to trial by jury for such offenses. See Section 2C:1–4. This is existing law. N.J.S. 2A:169–4. To fill the gap between disorderly persons offenses and crimes of the third degree, we have added a new category to be known as crimes of the fourth degree. See Section 2C:43–1.

2. Sentencing for disorderly persons and for petty disorderly persons is to be determinate.

3. We have not included a provision equivalent to MPC § 6.09 which would authorize extended terms of imprisonment for disorderly persons offenses and petty disorderly persons offenses. Such longer terms are inappropriate, in our view because they make the penalties for these relatively minor offenses too substantial. Further, where such a sentence is to be imposed, a jury trial would have to be made available to the defendant. *Baldwin v. New York, supra.*

§ 2C:43–9. COMMENTARY

1. *First Release Of All Offenders On Parole.* Subsection a of this Section provides that any offender sentenced to imprisonment for an indefinite term must first be released conditionally on parole at or before the expiration of his sentence. MPC T.D. 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 maximum period that may be served in prison prior to conditional release. But whenever conditional release occurs there attaches a further period that 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.

A prison sentence 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 2C:43–5, 6 and 7 and 2C:44–6. 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.

2. This approach is a substantial variation from the system now in effect in this State. See 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). Under these Statutes, 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, 484 (1961).

The theory of parole is not, however, that it is an act of leniency by the Board 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 necessary 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. See *Wechsler*, *supra* at 484.

Professor Wechsler also answers the objections of some correctional authorities 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, 69 Colum. 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 T.D. 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 was among the highest in the country.

3. 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.

4. *Sentence Of Imprisonment Includes Separate Parole Term.* Section 2C:43–9b 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, 484 (1961).

5. *The Length of the Separate Term.* The parole term generally has a maximum of five years. In the case of persons sentenced as young adult offenders it is two years and for fourth degree crimes it is one year.

6. *Length of Recommitment and Reparole After Revocation of Parole.* A change in existing law is effected by Section 2C:43–9c concerning the period of time which an offender could be required to serve in prison or on reparole, following a revocation of parole. The longer of either the parole term or the maximum sentence, viewed from the date of conviction, governs. It is this period for which the offender may be re-imprisoned upon revocation of parole or subjected to supervision upon re-parole. Time served successfully upon parole prior to revocation serves to reduce the parole term and the maximum sentence 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 it is necessary to frame policy that reflects all the multiple objectives of the process of correction, and too much severity for what may be fairly minor violation seems to us to be unjustifiable. 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, 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. If 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 where a long period remains on the original sentence, must necessarily be short. 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 N.J.S. 30:4–123.24 and N.J.S. 30:4–123.27. See *Donnelly v. New Jersey State Parole Board*, 91 N.J. Super. 302 (App. Div. 1966). Both of these statutes are treated below in the proposed amendments to the Parole Act.

7. If the parolee is convicted of a new offense, committed while on parole, Section 2C:44–5 provides that the prison sentence for the new crime and the balance of the parole term shall run concurrently or consecutively as the court determines at the time of sentencing for the new offense. If the terms are consecutive, the remainder of the maximum of the parole term is added to the maximum of the new term. (MPC T.D. 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 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 d 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 the parole laws.

§ 2C:43-10. COMMENTARY

1. This Section is drafted in such a way as to essentially continue the present practice as regards the place of imprisonment of persons convicted of offenses.

2. Subsections a, b, and c are a redraft of N.J.S. 2A:164–15. Convictions for crimes result in sentences to State Prison except for sentences for crimes of the fourth degree and for youthful offenders where sentences may be to a county institution. Terms less than one year are to be served in county institutions.

3. Subsection d is a redrafting of N.J.S. 2A:164–18. Subsection e is from N.J.S. 2A:164–15. Subsection f is a redraft of N.J.S. 2A:164–23. N.J.S. 2A:164–22 is made unnecessary by Subsection a which allows a similar result.

§ 2C:43-11. 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 2C:2–11 (*DeMinimus* Infractions). No such power now exists in New Jersey and, typically, such cases are now dealt with by a plea of guilty or conviction of a lesser degree or grade of 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). Some jurisdictions have a similar procedure under which 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 as for a misdemeanor rather than a felony.

2. We think 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 criminal conviction on his record, certainly one of the motives of present practice in accepting a plea to a disorderly persons offense when a crime is charged. See *State v. Ashby, supra.* 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 T.D. 2, p. 29 (1954). See also ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and procedures § 3.7 197 (1967).

§ 2C:44–1. COMMENTARY

1. This Section establishes criteria for withholding or imposing a sentence of imprisonment and for placing the defendant on probation.

2. *Presumption of No Imprisonment: Section 2C:44–1a.* This Section expresses the general principle that non-imprisonment disposition is desirable unless there appears some particular reason for institutional commitment. It is made subject to subsection d which deals with those crimes in which a reverse presumption applies. The Court will under this provision "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 probable commit another crime during a probationary period; (b) the offender is in need of some special type of treatment that can most effectively be provided in a correctional institution; (c) imposition of a non-incarcerative sentence would depreciate the seriousness of the crime involved, or (d) the crime is characteristic of professional criminal activity.

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 served 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 (1968). If anything, our present statute seems to create a starting point in favor of imprisonment.

As to the specific factors set forth in this Subsection, see *State v. DiStasio,* 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 2C:44–2c should also be considered.

3. *Guidelines: Imprisonment vs. No Imprisonment; Section 2C:44–1b.* Because the Code vests such wide discretion in the Court, this subsection is included in an effort to formulate criteria to guide its exercise. These guides should serve to promote both the thoughtfulness and the consistency of dispositions. 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. MPC T.D. 2, pp. 34–35 (1954).

This enumeration of factors is also a 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 Subsection b(5). 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.) Subsection b(11). The majority held, however, that the factor found in subsection a(3) counterbalanced those considerations. See *State v. Ivan, supra; State v. DiStasio, supra.* 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, supra* at 18–19, specifically made reference to many factors found in Subsection b. These include: The circumstances surrounding the crime tending to partially excuse or temper the defendant's criminal conduct (Subsection b(4)); the fact that the defendant had no prior criminal record and came from a good family (Subsection b(7); and that the defendant was "a fit subject for rehabilitation" (Subsection b(10)). 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 Subsections b(3), (4), (5) and (8).

4. *Guidelines: Probation vs. Suspended Sentence.* Subsection c 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. *Presumption Of Imprisonment: Section 2C:44–1d.* The MPC takes the view, unlike the practice in this and many other states, that suspension or probation is authorized on *any* case except of course, if sentence of death or life imprisonment is ultimately prescribed. The drafters of the MPC explain their view in this way:

> "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 [2C:44–1]." (MPC T.D. 4, pp. 13–14 (1954).)

See also ABA Report, Sentencing Alternatives and Procedures, pp. 55-64 (Tent. Draft 1968). New Jersey now has instances of mandatory sentences. See, 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, supra* at 174) although the wisdom of their use has been severely criticised.

We agree with the MPC that mandatory sentences of imprisonment are extremely undesirable and that they should be abolished. We read the abolition of the mandatory sentence in the new dangerous drug law as a move in that direction. We also, however, recognize as valid the legislative interest in expressing its severe disapproval of some criminal conduct and the overriding need to deter such conduct.

For this reason, in this Subsection, we provide a vehicle for the Legislature to express to the sentencing court the view that, in general, imprisonment should follow upon the conviction of every offender who violates certain statutes. We leave, however, a residuum of power in the sentencing court not to imprison in those few cases where it would be entirely inappropriate to do so. This is done by creating a "presumption of imprisonment" when the statute defining the crime so provides. Further, as to statutes outside the Code which now define mandatory sentences, we make this provision control and interpret those provisions as meaning that there shall be a presumption of imprisonment.

§ 2C:44–2. COMMENTARY

1. The main purpose of this Section is to retard the merely routine imposition of a fine, at least when other types of disposition have been authorized. Thus, this Section rationalizes the instances in which a fine or restitution 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. *Fine or Restitution as the Sole Punishment: Section 2C:44–2a.* This Section provides that if the sentence is to be a fine or restitution alone, the Court must be of the opinion that it alone is both appropriate and 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. Valazquez,* 104 N.J. Super. 578 (App. Div. 1969).

3. *A Fine or Restitution as an Additional Punishment: Section 2C:44–2b.* Where a fine or restitution is to be imposed by the sentencing judge in addition to imprisonment or probation, this Subsection imposes limitations designed to assure that it will serve deterrent or correctional objectives. This is in accord with the statement of Chief Justice Weintraub concurring in *State v. Lavelle,* 54 N.J. 315, 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."

See also *State v. DeBonis,* 58 N.J. 168 (1971). 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 or restitution 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: Section 2C:44–2c and d.* These Sections establish several criteria for the imposition of a fine or restitution.

5. *Ability to Pay.* Subsection c establishes as the first criteria for imposition of a fine that it shall not be used unless "the defendant is or, given a fair opportunity to do so, will be able to pay" it. The imprisonment of persons unable to pay fines has been a problem of increasing concern. The United States Supreme Court has ruled that imprisonment for nonpayment of a fine cannot constitutionally increase the maximum term of imprisonment otherwise authorized by law for the offense (*Williams v. Illinois,* 399 U.S. 235, 90 Sup. Ct. 2018 (1970)) and that any imprisonment of indigent defendants for in-

ability (as opposed to willful refusal) to pay a fine violates the constitution. *Tate v. Short,* . . U.S. . . , 91 S.Ct. 668 (1971) ("Fines only" provision.). See also *Morris v. Schoonfield,* 399 U.S. 508, 509, 90 S.Ct. 2232, 2233 (1970) where Mr. Justice White, concurring, said:

> ". . . the same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."

This statement was adopted by the Court in *Tate v. Short, supra.* See also, *State v. DeBonis,* 58 N.J. 182 (1971). It is to meet the objections to the MPC provision (§ 7.02(3)) noted in the *DeBonis* case that we have added the words "Given a fair opportunity to do so" to this Subsection and added Subsection e. We do not, however, concur in the Court's interpretation of the MPC as stated in the *DeBonis* opinion.

6. *Preventing Restitution or Reparations.* Subsection c(2) 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 Subsection d 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.*

8. *Payment of the Fine.* Under Subsection d, the same criteria established to determine the amount of the fine are to be used to determine the manner of its being paid.

9. *Nonpayment.* Subsection e is taken from § 3302 of the Proposed Federal Criminal Code. It is drafted on the assumption that the sanction for nonpayment should not be decided upon until it occurs and the reasons for it are made known to the Court. In this regard, it is analogous to the Code provision which precludes imposition of a particular sentence and then suspension of its execution.

§ 2C:44–3. COMMENTARY

1. *Extended Terms; In General.* The concept of an extended term of imprisonment as a device for dealing with the more difficult criminal was discussed in connection with Section 2C:43–7. That Section establishes the authorized additional lengths of imprisonment terms for persons who, by virtue of the criteria set forth here, are subject to longer periods of control. 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, (4) a multiple offender, (5) a dangerous armed criminal. Subsections a through e state the minimal requirements for each of these findings but the existence of the minimal conditions do not make the finding necessary. Indeed, it is not 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.

The requirement of a finding of fact discussed above 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.

2. *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 T.D. 2, p. 42 (1954)). The Code calls for notice to the defendant and his right to be heard on the issue. Section 2C:44–6e.

There are five grounds for imposing extended terms:

3. *Persistent Offenders:* The first is that the defendant is a "persistent offender whose commitment for an extended term is necessary for protection of the public." The Court may not make that finding unless the defendant (a) is over twenty-one years of age and (b) has previously been convicted on at least two separate occasions of two crimes committed at different times when the defendant was at least eighteen years of age.

We emphasize that the Court is not obliged to make the finding under this Section and we anticipate that relatively few convictions will warrant the conclusion. The requirement of the crimes being committed at different times and of a finding of relative maturity will safeguard the defendant.

4. 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.) *aff'd.,* 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).

5. *Professional Criminals.* This subsection allows 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 defendant is over twenty-one years of age and "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."

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. While we do not believe the finding warranted by police reports alone, we propose that the inference that the defendant is a professional criminal 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 T.D. 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.

6. *Mental Abnormality:* The third ground for the imposition of an extended term is a finding of a mental abnormality. 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 T.D. 2, p. 43 (1954)). It is quite similar to the standard now found in our sex offender's law.

7. The counterpart of this provision in existing law is 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 orders the defendant to be committed to 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 is 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 charac-

terized 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. Div. 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. Transfer from a penal institution to a medical one is, of course, administratively possible. The Code does not, therefore, remove the medical aspects of the present Sex Offenders Act.

8. *Multiple Offenders:* The final ground for the imposition of an extended term is that the defendant is a "multiple offender." 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 T.D. 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.

9. *Dangerous Armed Criminals.* Subsection e replaces N.J.S. 2A:151–5 which permits an additional sentence for armed criminals as to certain offenses. We expand that provision to make its policy applicable to all crimes. We limit it, however, in two ways. First, we require that the use of the firearm or dangerous instrumentality give rise to an added risk of danger over the crime itself. Second, we require a finding of a substantial risk of personal injury. "Firearm" and "Dangerous Instrumentality" are defined in that part of the Code dealing with weapons.

§ 2C:44–4 COMMENTARY

1. *Prior Convictions.* Convictions in other jurisdictions are treated as convictions for the purpose of determining whether the defendant is a "persistent offender" under Section 2C:44–3a. Problems surrounding the definition and proof of prior convictions are considered in Subsections (a), (b) and (c) of this Section.

2. *Definition of the Grade of a Prior Conviction, Section 2C:44–4a.* Under this provision, the grade of a prior conviction is determined by the sentence authorized in the jurisdiction where it occurred, appraised under the grading criteria embodied in the Code. This establishes a uniform standard to determine whether a conviction under which a given type of sentence might have been imposed, was for a crime.

This provision is contrary to existing law in New Jersey. 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. We reject this position because, in addition to the difficulties of 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 T.D. 2, p. 47 (1954)).

3. *Exclusions From The Definition: Section 2C:44–4b.* Subsection b 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. 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 (Law Div. 1951) *aff'd.,* 16 N.J. Super. 171 (App. Div. 1955).

The second issue settled by Subsection b is the effect of a pardon upon the use of a prior conviction to find the defendant to be a persistent offender. It does not bar consideration of the fact of the conviction, unless granted on the ground of innocence. To give no weight to such an executive determination that the defendant did not commit the crime is, however, both unjust and anomalous.

4. *Proof Of The Prior Conviction: Section 2C:44–4c.* 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 works 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 competent evidence is 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) *aff'd.,* 15 N.J. Super. 426 (App. Div. 1952). In *State v. Winbush,* 54 N.J. Super. 283, 287 (App. Div. 1958), fingerprint evidence was used to identify the defendant as suggested by this provision of the Code.

5. *"Taking Into Account": Section 2C:44–4d.* Subsection d 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. Multiple county situations have caused difficulty in this State. See *State v. Gentile,* 41 N.J. 58 (1963).

The purpose of this provision 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 Section 2C:44–3. He also gains the benefit, however, of the limitations on consecutive sentences that the Code lays down. The advantage of this 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.

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.

The provision does not require the assent of the Prosecutor but, rather, gives the Court the power to reject the request. The Prosecutor should be notified and heard on the issue but he should not have a veto power. By giving the Prosecutor this opportunity, he should be able to prevent the power from being used as a forum-shopping search for an accommodating Judge.

See generally, ABA Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 5.2, p. 235 (Tent. Draft 1967).

§ 2C:44–5. 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 by the earlier sentence, the Code treats the various possibilities individually.

2. *Multiple Sentences, Sentences Imposed at the Same Time:* Section 2C:44–5a 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 offenses or out of a conviction for one offense 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: (1) a definite term to a local institution and a term to a state institution must run concurrently and service of the state institution sentence satisfies the definite; (2) the aggregate of consecutive definite terms may not exceed eighteen months; (3) the aggregate of any terms to State institutions may not exceed the extended term for the most serious crime committed; and (4) not more than one extended term may be imposed. The limitation found in paragraph (1) is intended to avoid the anomalies of (a) postponing a term for a crime until expiration of a sentence for a lesser offense or (b) the release of a criminal offender from State Prison to enter a local jail. MPC T.D. 2, p. 50 (1964). The limitation on cumulation beyond eighteen months for disorderly persons or petty disorderly persons offense, found in paragraph (2), is included because we believe it inappropriate to maintain a person in a local institution for a longer period.

3. *Present Law.* 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. 61 (1964); *In re DeLuccia,* 10 N.J. Super. 374, 380–816 (App. Div. 1950); *State v. Mahaney,* 73 N.J.L. 53, 56 (Sup. Ct. 1905) *aff'd.,* 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 Subtitle 1 of the Code. See *State v. Quatro,* 40 N.J. Super. 111 (L. Div.) *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 a(1) and (2). *State v. Owens,* 54 N.J. 153 (1969). *State v. Maxey, supra,* which allows consecutive life sentences and allows a term of years consecutive to a life sentence is inconsistent with Subsections a(3) and (4).

4. *Multiple Sentences, Sentences Imposed at Different Times:* Subsection b 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 offense. It does not, however, apply for sentences for offenses committed while in custody. As to persons already serving a prior term, three special rules apply: (1) The multiple sentences imposed must, insofar as possible, conform to subsection a. (2) 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. (3) 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 established power to make sentences run concurrently or consecutively when sentences are imposed at the same time (cited in the Commentary to Subsection a), establish that power for sentences imposed at different times. Subsection b(3), described above, is inconsistent with our present law. N.J.S. 30:4–123.24.

5. *Multiple Sentences: Sentence of Imprisonment for Offense Committed While on Parole: Subsection c.* 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 virture of revocation of parole are to be served concurrently unless the Court orders them to be run consecutively.

This is different from 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 than the one for which he was paroled."

In *State v. Grant,* 102 N.J. Super. 164, 170–71 (App. Div. 1968), however, it was held that this statute did not prevent the court from making the sentences run concurrently: The net effect of *State v. Grant* is that the new sentence will be consecutive to the term arising out of the revocation unless the sentencing Court specifies that they are to be concurrent. This is consistent with the Code in that the Court 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 2C:44–5d.* 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: Subsection e.* This Subsection establishes the rules for the calculation of the maximum terms for concurrent and consecutive sentences:

a. *Concurrent Sentences to Terms of Imprisonment:* In this situation, the shorter terms "merge in and are satisfied by" serving the longest term.

b. *Consecutive Sentences to Indefinite Terms.* In this situation, the terms are added to arrive at an aggregate term to be served which is the sum of all consecutive terms.

These provisions are consistent with our law. See N.J.S. 30:4–123.10, which determines maximums and minimums for the purpose of parole eligibility. See *State v. Maxey, supra; Faas v. Zink,* 48 N.J. Super. 309 (App. Div.) *aff'd.,* 25 N.J. 500 (1958).

8. *Multiple Terms of Suspension and Probation: Section 2C:44–5f.* This Subsection deals with situations where the second sentence is to be either a suspended sentence or a term of probation:

(1) Probation may not be imposed where a defendant is already serving a sentence of imprisonment or where he is to be given a new sentence of imprisonment, except where Section 2C:43–2c(2) permits imprisonment followed by probation.

(2) 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.

(3) and (4) 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. If it were, under Section 2C:44–5a, it would run concurrently or consecutively as the Court might determine.

9. *Offense Committed While Under Suspension of Sentence or Probation: Section 2C:44–5g.* 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:

(1) Service of a new term in excess of one year satisfies the prior probation or suspension.

(2) Service of a term of one year or less does not.

(3) A new probation or suspension runs concurrently or consecutively as the court determines.

§ 2C:44–6. COMMENTARY

1. Section 2C:44–6 contains a series of rules concerning procedure on sentencing, the pre-sentence investigation and report, and remand for psychiatric examination prior to sentencing.

2. *Pre-Sentence Investigation And Report; Requirement of; Section 2C:44–6a.* Under this provision, a pre-sentence investigation and report is made mandatory in those instances required by the Rules of Court and is made permissive in all others. The applicable Court Rule, 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.* Subsection b establishes the matters which should be covered by the report. The existing Court Rules (R. 3:21–2 and R. 7:4–6(a)) do not set forth any requirements in this regard. Our provision incorporates the substance of N.J.S. 2A:168–3. It differs from the MPC (§ 7.06) in that it does not make a physical and mental report mandatory. We intend that the requirements established by *State v. Leckis, supra,* will be met under this provision.

4. *Psychiatric Examination Prior to Sentencing; Section 2C:44–6c.* 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 be 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. N.J.S. 2A:164–1. This authority is carried over into Section 2C:44–9. Authority to have the defendant examined, found here in Subsection c, is now found in N.J.S. 2A:164–2.

5. *Disclosure of Contents of Pre-Sentence Report.* We intend this provision to be a legislative adoption of the rule of *State v. Kunz,* 55 N.J. 128 (1969), and the practice which has been established thereunder.

6. *Extended Terms; Right to a Hearing.* We establish the right to a hearing on the issue of the imposition of an extended term under Section 2C:44–3. 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 from the question

as to sentence within ordinary limits, as distinguished from the longer term. The Section has been framed upon this basis.

New Jersey has three situations involving what we cover as "extended terms." These are the Sex Offender's Act, the Habitual Offender's Act and the added term for use of a weapon during the commission of certain offenses. The procedures to be followed as to notice, right to be heard, etc., vary in each of these cases. This provision makes a common procedure apply to all reasons for imposing an extended term.

§ 2C:44–7. COMMENTARY

1. New Jersey now has procedures under which sentences which are legal but excessive may be corrected. 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). The Code leaves this power unaltered. Appellate courts in this State may reverse a judgment 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. 2:10–3. See *State v. Laws,* 51 N.J. 494, 498 (1968); *State v. Johnson,* 67 N.J. Super. 414 (App. Div. 1961). This provision is intended to express a Legislative will to continue that policy. It insures that all critical steps in the sentencing process are subject to judicial review. The actual standards for review and scope of review will continue to be developed in the cases. If appropriate in a given case, however, the power to modify a sentence should be construed as including the decision to imprison rather than to place on probation or suspend sentence, the amount of a fine, a refusal to reduce the degree of an offense, and a failure to declare a person immediately eligible for parole. See also ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Tent. Draft 1967).

§ 2C:44–8. COMMENTARY

This Section, which is taken from MPC § 7.08(1) 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 an offense 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 in Section 2C:44–6c as to commitment 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. We believe the provision to be a wise one. The range of discretion anticipated by Chapter 43, particularly as to the use of extended terms, makes desirable the availability of as much information as possible 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 Section is credited against any custodial term imposed.

§ 2C:45–1. COMMENTARY

1. Section 2C:43–2c authorizes the Court to suspend the imposition of sentence or to impose a period of probation as to any defendant other than a person convicted of murder. Subject to specific mandatory minimum sentences, present law allows suspension and probation in all cases except habitual narcotics offenders convicted of high misdemeanors. The standard found in the statute is "when it shall appear that the best interests of the public as well as of the defendant will be subserved thereby." N.J.S. 2A:168–1.

2. This Section is taken from MPC § 301.1. It follows prevailing American law in authorizing the Court to impose conditions on the suspension of sentences or admission to probation. Although some states allow correctional authorities to determine the conditions of probation, the drafters of the MPC view such a practice unfavorably since probation and its conditions should be a judicial decision. MPC T.D. No. 2, p. 142 (1954). New Jersey law is in accord with the MPC in that sole authority for imposing conditions in probation rests in the Courts. N.J.S. 2A:168–2 provides that the Court "shall determine and may, at any time, modify the conditions of probation, and may, among others, include any of the following:

> "That the probationer shall avoid injurious, immoral or vicious habits, shall avoid places or persons of disreputable or harmful character, shall report to the probation officer as directed by the court or probation officer; shall permit the probation officer to visit him at his place of abode or elsewhere; shall answer all reasonable inquiries on the part of the probation officer; shall work faithfully at suitable employment; shall not change his residence without the consent of the court or probation officer; shall pay a fine or the costs of the prosecution, or both, in one or several sums; shall make reparation or restitution to the aggrieved parties for the damage or loss caused by his offense; shall support his dependents."

We provide for the continuance of the present practice of Court-approved standardized conditions. If the Court chooses to impose particular conditions for probation, it must clearly set them out. They will not be found by implication. See *Lathrop v. Lathrop*, 50 N.J. Super. 525, 142 A. 2d 920. The commission of a crime while on probation automatically constitutes a violation of probation and every probationer is held to know this even when specific conditions for probation have not been prescribed. See *State v. Zachowski*, 53 N.J. Super. 431 (App. Div. 1958).

3. *Conditions Which May Be Imposed: Subsection b.* The Code follows existing law in setting forth a list of conditions which may be imposed by the Court in suspending sentence or in placing a person on probation:

a. *To Meet His Family Responsibilities.* One of the most common conditions in probation statutes is that the probationer support his dependents or other persons for whom he is legally responsible. The drafters of the MPC support such provisions as obviously "necessary in cases where an offender has deserted or abandoned his family or failed to support it." MPC T.D. No. 2, p. 142 (1954). The Code condition is phrased more broadly in the view that conditions other than mere support may properly be encompassed in the scope of the offender's obligation towards his family. This language in the Code provision includes, but goes beyond, the New Jersey statutory condition of "support dependents." It does not, however, change our law since the sentencing Court today uses the statutory conditions as guidelines and possesses full power to attach any condition it finds warranted presumably within some reasonableness standards inherent in any exercise of judicial discretion.

b. *To Find and Continue Gainful Employment Or Occupation.* The present statutory language is "shall work faithfully at suitable employment." The change of language would permit the sentencing Court to specify a particular employment or a general occupation. This provision should be used with care and only when appropriate. The drafters of the MPC correctly observe that "the development of habits of industry and vocational skills which make earning a living possible is indispensable in the rehabilitation of offenders." MPC T.D. No. 2, p. 142 (1954). Accordingly it is appropriate and common for the Court to require an offender being placed on probation to work at a specific employment or occupation.

c. *To Undergo Treatment, Including Institutionalization.* The power of the Court to condition probation on the defendant's submitting himself to treatment to restore his physical or medical health is not often directly expressed by statute but undoubtedly exists in general. MPC T.D. No. 2, p. 143 (1954). New York Penal Law § 65.10(2)(d) adopts this provision. Our law does not mention this as a general condition. Counties in this state are authorized, however, to establish and maintain facilities for drug therapy for persons who are confined in a county institution. N.J.S. 30:8–16.1. And the State Parole Board is empowered to parole any inmate serving a sentence to a narcotics treatment facility, institution, or hospital on the condition that the inmate remain therein and accept the treatment prescribed. N.J.S. 30:123.43. In both instances, though the individual has been sentenced to a term of incarceration, whereas under this provision a person may be in effect committed to a treatment facility without any actual sentence of incarceration. The condition not only may be

reasonable in many cases but, for some, the best possible response to the offender's conduct. We, therefore, explicitly recognize and support the treatment alternative with this condition of probation.

d. *To Pursue a Course Of Study Or Training.* This is not mentioned in the present New Jersey law but is clearly desirable for rehabilatative purposes. Our law recognizes this in the new work-release statute which permits certain inmates to be released to "work at paid employment" or "to participate in a training or educational program in the community." N.J.S. 2A:4–91.3.

e. *To Participate In a Facility For Probationers.* This is not mentioned in the present New Jersey law but several facilities of this kind are now operating in New Jersey. Such facilities are consistent with the increasing emphasis on community treatment of law violators. The concept of the probation residence facility began with the work-release and half-way house programs designed to ease the incarcerated person's re-entry into the community. The probation residence facility is intended to be a "half-way in" facility rather than one which is "half-way out." It is a correctional response between simple probation and full incarceration. See President's Commission on Law Enforcement And The Administration Of Justice, Task Force Report On Corrections, 40–41 (1967); ABA Standards Relating To Probation § 3.2(c)(vi) (1970); ABA Standards Relating To Sentencing Alternatives and Procedures § 2.4(a)(i) and (ii) (1968); See English Criminal Justice Act, 1948, §§ 3, 4 and 46. MPC T.D. No. 2, p. 143 (1954).

f. *To Refrain From Disreputable Places or Persons.* This condition is perhaps the most common for probation and is almost identical with our present law requiring the probationer to "avoid places or persons of disreputable or harmful character." We agree with the drafters of the MPC that "while conditions of this kind may be abusively imposed, we . . . must acknowledge such authority and rely for proper safeguards on the general requirement that conditions be reasonable and likely to assist the defendant to lead a law-abiding life." MPC T.D. No. 2, p. 144 (1954). See ABA Standards Relating To Probation § 3.2(c)(vii).

g. *Not To Possess Firearms Or Weapons.* Our State's gun registration laws probably make this condition unnecessary but it serves the useful purpose of explicitly reminding the probationer that he may not do so.

h. *To Make Restitution.* Our law now allows specifically for restitution to the aggrieved parties but does not contain any "ability to pay" limitation. The limitation is consistent with the similar limitation imposed on the imposition of fines in 2C:44–2c(1). Moreover, where the obligation to make restitution is imposed without such a limitation, it tends to fall on the defendant's family or friends. It is unfair "that an innocent person be burdened with paying for the results of an

offender's wrongdoing, but such is the loyalty of many families and such is their fear of the disgrace of imprisonment, that they will undergo any amount of hardship rather than have a son, husband, or father incarcerated for his offense." *Attorney General's Survey of Release Procedures, II, 238-9.*

i. *To Remain Within The Jurisdiction; To Notify Of Changes In Status.* Our law now provides that the probationer shall not "change his residence without the consent of the court or probation officer." The Code language departs from this because the defendant is subject to the requirement that the probationer not move out of the Court's jurisdiction. Thus, he must only notify the Court or his probation officer of his change of address or employment: permission in the first instance need not be obtained. The Code however, permits the Court to modify the conditions of probation and this could include a disapproval of a probationer's change of residence or employment.

j. *To Report, Permit Visits To Home and To Answer Inquiries.* This provision is in accord with existing law. It adds to the MPC the requirement that the defendant answer all reasonable inquiries. We see this as a necessary condition to permit adequate supervision.

k. *To Satisfy Special Conditions Imposed.* Although it is useful to set out in the statute the general conditions of probation, individual cases may require special conditions and the statutory scheme must maintain enough flexibility to meet the individual needs of each offender. See MPC T.D. No. 2, p. 145 (1954). The Code's formulation of the power of the Court to add conditions to the general list is carefully geared to the rehabilitation of the offender and further requires respect for his liberty and conscience. Such standards seem preferable to the present "among others" language of our law and will provide some guidance for whatever judicial review of probationary conditions occurs either in the course of an appealed revocation or under the review authority of Section 2C:44–8. See *State v. Moretti,* 50 N.J. Super. 223 (App. Div. 1957).

4. *Conditions Eliminated From Our Law.* Two conditions now found in our law are eliminated by this provision:

a. *Posting a Bond.* MPC § 301.1(2)(k) provides that the Court may require the defendant "to post a bond, with or without surety, conditioned on the performance of any of the foregoing obligations." Our law now allows the Court to order in addition to any other punishment, other than death, that the offender shall find "surety to keep the peace or be of good behavior, or both . . ." N.J.S. 2A:164–14. We recommend here the repeal of this provision and have not included the MPC draft of the similar condition. This action conforms with the ABA Standards Relating to Probation § 3.2(e) (1970). The ABA position, with which we agree, is explained as follows:

> "The posting of a bond or other surety as a condition of probation seems to stem from the fact that, in early years when proba-

tion was without statutory sanction, the nonappearance of violators left the court open to charges of acting extra-legally. Much as with the development of the bail system, the posting of money bond was seen as additional assurance that the offender would comply with the conditions of his release.

"The fact remains, however, that the relationship of the prospective probationer's ability to procure a money bond to the desirability of probation is likely to be very small indeed, and indeed so irrelevant as to lead the Advisory Committee to recommend that bonds never be employed. To the extent that financial sanctions are appropriate to the ends of probation, fines, restitution, family support, and other similar devices can perform the function. To the extent that the need is for assurance that the probationer will not violate his probation, a sophisticated system of supervision, combined with reports and visits, should obviate the need for additional financial inducements." (ABA Standards Relating To Probation, 49 (1970).)

b. *Paying Costs.* This Section also eliminates the authority now found in 2A:168–2 to require that the defendant as a condition of probation pay the costs of prosecution. We agree with the ABA position that such a requirement is unsound:

"There are a number of statutes in this country which still permit the imposition of costs of prosecution or probation as a condition.

* * * *

The Advisory Committee agrees with the Attorney General's survey that requiring payment of these costs as a condition of probation are unsound:

'The purpose of probation will be defeated from the very outset if those who would otherwise prove good probation material fail to meet the initial requirement of costs because of their poverty. The existence of such a requirement lends the weight of concrete evidence to the oft-repeated charge that American administration of criminal justice favors the rich over the poor because many persons who might otherwise succeed on probation are denied the benefits for lack of funds to pay the costs of the criminal action against them. Neither the effect which such a law will produce on the minds of those thus denied their liberty, nor the less immediate outcome of the failure to attempt rehabilitation are salutary for society. . . .' 2 Attorney General's Survey Of Release Procedures: Probation 222–23 (1939). But see Comment, Conditions of Probation Imposed on Wisconsin Felons: Cost of Prosecution and Restitution, 1962 Wis. L. Rev. 672. The point is equally sound

when costs are imposed on an offender who has the ability to pay. Fines, restitution, reparation, family support, and other such conditions which are within the ability of the probationer to pay can accomplish the purpose to the extent that responsibility can be induced through financial sanctions." (ABA Standards Relating To Probation, § 3.2(f), p. 50 (1970).)

5. *Probation Plus Imprisonment: Subsection c:* This provision is needed to implement Section 2C:43–2c(2) which allows probation plus imprisonment for not more than 90 days. Our law now allows probation plus imprisonment for a total term not to exceed that allowed in a county penitentiary or work house. N.J.S. 2A:164–16. The subsection provides that any imprisonment ordered as an incident to probation is a part of the sentence and is to be credited toward a subsequent sentence of imprisonment for a violation of the probation.

6. *Probationer To Receive Copy Of Section: Subsection d:* Several states have this requirement although our law does not seem to. It is required, however, by our law for parole conditions, N.J.S. 30:4–123.20, and there would appear to be no reason not to provide for a similar requirement by law for probation conditions. We add to the MPC provision one which requires defendant to acknowledge his consent to the conditions in writing.

§ 2C:45–2. COMMENTARY

1. This Section is a modified version of MPC § 301.2. The modifications carry forward the substance of our present law. The MPC would impose an automatic five-year maximum term for a felony and a two-year maximum term for lesser offenses. Our law now requires that the Court fix the term of probation or suspension at not less than one nor more than five years for crimes (N.J.S. 2A:168–1) and not to exceed three years for disorderly persons offenses (N.J.S. 2A:169–6). The automatic statutory period in the MPC is consonant with the Code's general sentencing posture which attempts to make sentences more uniform by restricting judicial discretion at sentencing. We do not believe, however, that the problem of sentencing disparity is sufficiently serious as to non-custodial dispositions to justify restriction of that judicial discretion now found in our law.

2. The one-year minimum term is imposed because it is our view that any correctional program of less than one year will be ineffective. The Court, despite this minimum, has full power, however, to discharge any probationer earlier under Subsection b and this power should operate to avoid any hardship this minimum period might create in very rare cases. Our law is now in accord. N.J.S. 2A:168–4. Language in present law such as "for good cause" which limits the Court's power to do so has been eliminated as unnecessary. It can be assumed that the Court will exercise any discretionary power granted to it only in appropriate circumstances.

3. Where probation is not imposed and the sentence is suspended the minimum period of one year is a way of insuring that the Court for a period of at least one year can modify its original disposition where subsequent events warrant a new appraisal.

4. Subsection b recognizes the necessity of giving the Court considerable flexibility in modifying the conditions of probation. Our law is in accord. NJ.S. 2A:168–2. We have incorporated into Subsection b the power our courts now possess to increase during the period of suspension or probation the maximum term within the statutory limits of Subsection a. N.J.S. 2A:168–4. The last sentence of this Subsection requiring the Court to eliminate any requirement that imposes an unreasonable burden on the defendant is intended to reinforce the reasonableness requirements of Section 2C:45–1 and to emphasize that modification is expected in some cases to operate to eliminate conditions which prove after imposition to be unduly burdensome.

5. Subsection c is intended to eliminate any question as to whether a formal order of discharge by the Court is needed when the period fixed by subsection a is completed. If the period so fixed expires without any further court proceedings being instituted, the defendant by operation of law is unconditionally discharged from correctional supervision and "shall have satisfied his sentence for the offense."

§ 2C:45–3. COMMENTARY

1. This Section is a modified version of MPC § 301.3. The Court must obviously have the power during the period of the suspension or probation to require the defendant to appear before it. The Code, therefore, authorizes the issuance of a summons or a warrant for this purpose. No reason appears for subjecting this authority to any limitation. MPC T.D. 2, p. 149 (1954). We do not think however that the power of probation officers to arrest without a warrant should be similarly plenary. N.J.S. 2A:168–4 now gives plenary power to probation officers to arrest:

> "At any time during the probation period . . . any probation officer, police officer, or other officer with power of arrest, upon the request of the chief probation officer, may arrest the probationer without a warrant; and a commitment by such probation officer setting forth that the probationer has, in his judgment, violated the conditions of his probation shall be sufficient warrant for the detention of such probationer in the county jail, house of detention or local prison, when designated in the commitment, until he can be brought before the court. Such probation officer shall forthwith report such arrest or detention to the court and submit to the court a report showing the manner in which the probationer has violated his probation."

The Code accordingly requires that when the arrest is without a warrant the officer have probable cause to believe that the defendant has failed to comply with a condition of the order or that he has committed another crime.

2. Subsection a(3) permits the Court "if satisfied that the defendant has inexcusably failed to comply with a substantial requirement" or "if he has been convicted of another offense" to revoke the suspension or probation. We have added to the Code's language a requirement of a summary hearing to carry forward present procedural requirements. See N.J.S. 2A:168–4. Our law is in accord with the Code's position that any revocation is a discretionary and not an automatic act by the sentencing Court. *State v. Moretti*, 50 N.J. Super. 223 (App. Div. 1956). Further, the *Moretti* case is in accord with requiring a "substantial" violation and not merely a "technical" one.

Theoretically, at least, a charge that the probationer has been guilty of a crime can be tried informally by the probation court upon the revocation issue, as a violation of condition; practically, if the charge is serious, it is more likely that the probation court will hold its action in abeyance pending an adjudication of the formal criminal proceeding. We think the latter practice preferable and the Code is framed accordingly, since it is the conviction of another crime rather than the fact of its commission that is made the basis for the revocation. The defendant's procedural rights are thus fully preserved.

While we do not think that charges of a fresh offense ought to be tried informally in the probation court, we recognize that there may be objections to continuing the defendant at liberty and on probation pending the adjudication of the charge. Hence, even though the new offense is bailable, the Code empowers the probation court to commit the defendant without bail, temporarily suspending the probation, in effect, until the issue is determined in the normal course.

It may be the case that, quite apart from the commission of a new offense, the conduct of the probationer that gives rise to the criminal charge involves an incidental violation of the conditions of the probation. In that event, we see no reason why the probation court should be required to defer its action. It it does, it may proceed thereafter even though the defendant is acquitted of the charge of crime. MPC T.D. 2, p. 150 (1954).

3. *Re-Sentencing After Revocation.* Subsection b authorizes the Court to impose any sentence it might have imposed originally after revocation of suspension or probation. This is consistent with our present law, N.J.S. 2A:168–4. Except when revocation is based on conviction of another crime, however, the Code seeks to limit the imposition of a sentence of imprisonment to cases where the violation indicates excessive risk that the defendant will commit another crime or there is studied judgment that such disposition is essential to vindicate the authority of the Court or the probation officer and that

it is not unjust to the defendant. Unless these minimal criteria are satisfied, the imposition of a fine (with the continuation of probation) or a stiffening of the conditions should suffice. See MPC T.D. 2, p. 150 (1954).

§ 2C:45–4. COMMENTARY

1. Present law requires a "summary hearing." N.J.S. 2A:168–4. See *State v. Zachowski*, 53 N.J. Super. 431 (App. Div. 1958); *State v. Louis*, 97 N.J. Super. 35 (App. Div. 1967); *State v. Pollastrelli*, 29 N.J. Super. 327 (App. Div. 1953); *State v. Haber*, 132 N.J.L. 507 (1945); *State v. Pascal*, 133 N.J.L. 528 (1946). We think that a relatively formal view ought to be followed and provide for written notice, counsel and a hearing upon evidence. This is an area where dangers of abuse are real and the normal procedural protection proper. That a defendant has no right to the suspension or probation does not justify the alteration of his status by methods which must seem, and sometimes are, unfair. It is not contemplated, however, that the rules of evidence must be enforced. This is a hearing before the Court. MPC T.D. 2, p. 152 (1954).

2. MPC § 301.4 includes the phrase "or increase the requirements imposed" by the order of suspension or probation in this provision. We do not want to require a formal hearing on every order of adjustment in situation imposed upon a defendant by his Probation Officer. Modification is, in our view, less serious to the defendant than revocation. Actual changes in imposed conditions should, however, be part of a revocation hearing, *i.e.*, the probation or suspension will be revoked unless a new condition is imposed.

§ 2C:46–1. COMMENTARY

1. The provision empowers the Court to make fines and restitutions payable in installments. It also allows the fines and restitution to be made a condition of probation. See *State v. DeBonis*, 58 N.J. 182 (1971) and *Tate v. Short*, U.S. , 91 S. Ct. 668 (1971) (particularly at footnote 5). N.J.S. 2A:168–2. Fines are made payable to the person authorized by statutes outside the Code. See *State v. DeBonis, supra.*

§ 2C:46–2. COMMENTARY

1. This Section on the consequences of non-payment of a fine is a necessary companion to Section 2C:45–2 on the criteria for imposing fines. The approach of MPC § 302.2 is to treat non-payment as a contempt of court. We reject the requirement of a finding of contempt for the reasons given in *State v. DeBonis*, 58 N.J. 168 (1971) and adopt, instead, the procedure there established:

". . . what may be done with a defendant who does not pay the fine in accordance with an installment plan?

"We stress again that we are not dealing with a mere debt. A fine, no less than a jail term, is imposed in the hope that it will correct the offender and deter him and others from transgressing. Unless the equal protection clause means that an indigent is licensed to commit with impunity any offense for which a man of means would be merely fined, it must be that if an offender is not reached by a fine because he is unable to pay it, he may be reached in some other way to achieve the required punitive aim. To that end he may be deprived of his liberty, unless, of course, there is some other, less painful way, to achieve the penological aim. And if he is jailed, it will not be because he is indigent, but because he committed an offense and there is no other way to reshape or to deter him. One must misread the Constitution to find that anyone is privileged to offend.

"The issue then is whether there is some other solution which is so plainly adequate for the penological objective that it would deny equal protection or due process to substitute imprisonment for an unpaid fine.

"We see no such available solution. A writ of execution is academically at hand, . . . but it is idle to say the State can achieve its punitive end by a levy when the hypothesis is that the defendant has nothing.

* * * *

"There being no evident solution adequate to satisfy the State's interest, imprisonment must therefore be a constitutionally permissible substitute for a fine if a defendant fails to pay the stipulated installments. The only question we see is whether the default must be contumacious. See, *In re Antazo*, 3 *Cal. 2d* 100, 115–117, 89 *Cal. Rptr.* 255, 264–265, 473 *P. 2d* 999, 1008–1009 (Sup. Ct. 1970). We think it need not. Again, we are not talking about the collection of a debt; the subject is punishment, and the aim is to inflict a therapeutic sting. Apart from conceptual difficulties implicit in contumacy as the test for substituted punishment, to exonerate a defendant because he cannot pay the fine would defeat the penological objective of the State and be tantamount to a grant of immunity from penal responsibility. The result would be the antithesis of the equality guaranteed by the equal protection clause.

"We note that the Model Penal Code (P.O.D. 1962) proposes that a defendant be not jailed if he shows his default was not contumacious, § 302.2(1) and (2), but the Code also proposes that a fine shall not be imposed unless 'the defendant is or will be

able to pay the fine.' *Sec.* 7.02(3). This, we take it, would mean that a jail sentence would be imposed initially if ability to pay did not appear affirmatively, thus denying a defendant an opportunity he might otherwise have to try to pay a fine. In thus preferring an immediate jail sentence to one which ensues upon a default in payment of the fine, the point apparently made is that the jail term is more likely to be just if it is fixed by the sentencing judge rather than by the mechanical application of a statutory formula which translates a fine into days of confinement. See, "Standards Relating to Sentencing Alternatives and Procedures," (A.B.A. 1967), pp. 122–124. This is so, and especially if the statutory formula is as absurd as the dollar-a-day formula. . . . The punitive impact of a fine of course depends upon a defendant's resources and that fact is lost in a conversion table. But we are not limited to such extreme alternatives. A better course than either is to permit the imposition of a fine notwithstanding doubts as to ability to pay in installments, and then upon default, to recall the defendant for resentence in the light of the defendant's individual circumstances.

"Hence we find the following course to be appropriate. If a defendant is unable to pay a fine at once, he shall, upon a showing of that inability, be afforded an opportunity to pay the fine in reasonable installments consistent with the objective of achieving the punishment the fine is intended to inflict. The installment payments may be collected as an incident of probation, but if probation is not otherwise warranted, the payments shall be made directly to the clerk of the court. If a defendant fails to meet the installments, he shall be recalled for reconsideration of his sentence. The court may reduce the fine, or suspend it, or modify the installment plan, or, if none of those alternatives is warranted, the court may impose a jail term to achieve the needed penological objective. If a jail sentence is thus substituted for the fine, the sentencing judge shall not be obliged to equate a day in jail with a statutorily stated dollar amount. On the contrary, such statutes must be deemed to prescribe only a minimum equivalency. The sentencing judge must impose a lesser jail term if it is adequate in the light of the total circumstances of the individual case."

2. When a corporation has been fined, this Section permits the Court to find the person authorized to make disbursements from the assets of the corporation liable for contumacious non-payment and hence subject to imprisonment.

3. The motion to start proceedings because of non-payment may be made by the prosecuting attorney, the official responsible for collection, or the Court on its own motion.

4. It is anticipated that persons committed to imprisonment and also ordered to pay a fine will have the ability to meet the fine. If the

fine remains unpaid when they are eligible for release upon parole or for an otherwise unconditional discharge, the fine should not serve as a basis for a refusal to release upon parole or to discharge from the institution absent a specific Court order under this section so directing. Present New Jersey law allows the State Parole Board to place a defendant owing a fine on parole subject to installment payment of the fine. N.J.S. 30:4–123.15. Whether the inmate should be continued in confinement or required to pay the outstanding fine should be a matter for the sentencing Court to decide in an appropriate proceeding under this Section and not for the parole authority. This part of the State Parole Act should be repealed.

§ 2C:46–3. COMMENTARY

1. This Section authorizes the sentencing Court to modify its order imposing a fine at any time upon motion of the defendant. This operates prospectively only to cancel any fine still outstanding or a portion thereof. Present New Jersey law authorizes the County Board of Freeholders to approve such a remission, which becomes effective only when approved by a County Judge. N.J.S. 2A:164–25. That provision operates as to persons incarcerated in a county institution. Since the Code fining scheme does not anticipate imprisonment for non-payment as a routine procedure, the intervention of the Board of Freeholders seems unwarranted. The sentencing Court should decide whether to fine, to imprison for non-payment, or to modify a fine it has imposed. In the absence of this provision, the Court would be able to modify its sentence only within 60 days generally under R. 3:21–10. If installment payment is authorized by the Court, the Court should be able to modify its payment schedule whenever the ends of justice will be served thereby.

INTRODUCTORY NOTE ON AMENDMENTS TO STATUTES RELATING TO PAROLE

As noted previously, the Commission does not conceive its mandate as extending to a general revision of the law of correction. In the area of parole, however, some changes are made necessary by virtue of the recommendations we make for changes in the law of sentences and sentencing. We believe these changes should be made with the enactment of the Penal Code and that, after a study of correction and a revision of the law of correction, a total revision of the law of parole should be worked into the Penal Code.

We recommend amendments to the following provisions in Title 30: N.J.S. 30:4–106, 30:4–123.2, 30:4–123.5, 30:4–123.10, 30:4–123.15, 30:4–123.16, 30:4–123.23, 30:4–123.24, 30:4–123.26, 30:4–123.27 and 30:4–123.30, N.J.S. 30:4–123.11 and 30:4–123.12 are to be repealed.

N.J.S. 30:4–106. COMMENTARY

1. This change is intended to bring all parole decisions as to state correctional institutions under the jurisdiction of the State Parole Board. We believe that a centralized, uniform system is most appropriate from a correctional viewpoint. In this regard, we disagree with the recommendation of the Governor's Management Commission which proposed the opposite, *i.e.*, having all parole decisions made by the Boards of Managers of the various institutions.

N.J.S. 30:4–123.2. COMMENTARY

1. This change is intended to make all members of the State Parole Board full-time public officials. We envision an expanded role for the Board and believe that its importance in the correctional system requires it to be full-time.

N.J.S. 30:4–123.5. COMMENTARY

1. These changes are made necessary by the change in N.J.S. 30:4–106 which gives the State Parole Board jurisdiction over all prisoners in state penal or correctional institutions. Previously, the Board dealt only with prisoners in State Prison and parole decisions were made, as to other institutions, by the Boards of Managers of the various institutions.

N.J.S. 30:4–123.10. COMMENTARY

1. This Section is new and replaces N.J.S. 30:4–123.10, 123.11 and 123.12.

2. *Parole Eligibility for New Offenders.* An individual sentenced under the Code will receive a prison sentence of a number of years. There will be no minimum. In addition to the prison sentence a separate parole period is imposed upon all offenders by operation of law. Release upon parole to serve that parole sentence is mandatory and is not governed by this provision. This Section controls discretionary release upon parole during the prison component of an individual's sentence.

In subsection a, we set forth our fundamental decision to establish immediate parole eligibility for all offenders except in the case of a sentence of life imprisonment. We believe this provision to be absolutely essential to our Code. The discretion of the Parole Board should, in our view, be as absolutely unfettered as possible in favor of granting parole.

As to sentences of life, however, we recognize a public desire to be assured that the offender will be incarcerated for at least some definite period of time. We actually believe fifteen years to be too long for this

purpose and would prefer to replace it with a period not in excess of ten years. This decision is however, intimately tied up with the issue of the abolition or limitation of the death penalty. For this reason we recommend retention of the eligibility provision for lifers at fifteen years (which approximates its present length) but suggest reconsideration by the Commission studying capital punishment.

It should be noted that, under this provision, consecutive sentences of life imprisonment have no meaning. We specifically overrule *State v. Maxey*, 42 N.J. 62 (1964).

The rule of subsection a applies to all persons sentenced to the state prison regardless of their prior criminal record. To the extent that periods of incarceration ought to be extended for habitual offenders, the extended term provisions of the Code should be employed. We believe that the paroling process ought to identify and release upon parole any inmate whose further incarceration is not consistent with the correctional goal. There is a time when an inmate should be transferred from custodial to community treatment. Our intention is to encourage the Parole Board to exercise its discretion to determine when such a transfer is appropriate in each inmate's case. Prior criminal records may be deemed relevant but should not be arbitrarily employed to effectuate a minimum period of incarceration which extends beyond the optimum period for the particular person. Limitations on parole eligibility based on prior offenses can seriously impair the paroling process. Present law, for example, prevents any hope of parole for a fourth-time offender until he has served $\frac{4}{5}$ of his sentence. N.J.S. 30:4–123.12. Yet, as the inmate matures in prison he may be ready for release after a much shorter period. If he has a good prospect for successful adjustment upon parole, his further incarceration is purely punitive, is very expensive and wasteful, and may actually impair rehabilitive chances.

3. *Parole Eligibility For Present Inmates.* Subsection a applies to all inmates of the state penal system. An inmate serving consecutive life sentences would, under its terms, be eligible for a release upon parole after serving 25 years of his sentences. At present, being paroled on the first life sentence produces a status of "cell parole" while the second life sentence is served. Any inmate presently in "cell parole" could be released upon parole by the Parole Board.

4. *Requirement Of Formal Order Denying Parole And Annual Re-Consideration.* Subsection b requires that the Parole Board consider the question of release upon parole as soon as practicable after his arrival and not later than six months after that time. If parole is denied, the board is directed to issue a formal order with the reasons therefor. Section 19 of the Parole Act now requires that the board promptly notify the inmate of its decision and of the date of next consideration. This new Section requires annual reconsideration. The requirement of written articulation of the reasons for a parole denial is

new. The law has been that the board need not rationalize its decisions and its practice has been simply to deny parole and set a date for next consideration. In *Monks v. New Jersey State Parole Board,* 58 N.J. 238 (1971), the Supreme Court held that the Parole Board Rule, which stated that the Board would not give reasons for its actions, was invalid:

> "The need for fairness is as urgent in the parole process as elsewhere in the law and it is evident to us that, as a general matter, the furnishing of reasons for denial would be the much fairer course; not only much fairer but much better designed toward the goal of rehabilitation. The Corrections Task Force has pointed out that well conducted parole hearings tend desirably to increase 'the involvement of inmates in the decisions which affect them and to confront them more directly with the information upon which a decision is being made.' President's Commission on Law Enforcement and the Administration of Justice; *Task Force Report: Corrections,* p. 64 (1967).
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> ". . . fairness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons. That course as a general matter would serve the acknowledged interests of procedural fairness and would also serve as a suitable and significant discipline on the Board's exercise of its wide powers. It would nowise curb the Board's discretion on the grant or denial of parole nor would it impair the scope and effect of its expertise. It is evident to us that such incidental administrative burdens as result would not be undue; the reported experiences in the jurisdictions which have long furnished reasons have given us no grounds for pause."

The Court ordered that the existing Rule be replaced with one "generally affording reasons for denial" which would, however, provide "reasonable exceptions as may be essential to rehabilitations and the sound administration of the parole system." We adopt and incorporate the rule of the *Monks* case. The requirement of written reasons for parole denial is intended to insure that the board guides its decisions by the policies of new Section 14. It is not our intention to make the parole denial the subject of judicial review; rather, the requirement of articulated reasons will, we believe, tend to make more visible and rational and perhaps predictable the important decision-making process of the parole authority. Inmates should be told exactly what facets of their behavior or circumstances must be changed before the board will consider favorably a release upon parole.

N.J.S. 30:4–123.11 AND .12. COMMENTARY

These provisions are repealed and all eligibility provisions are found in amended N.J.S. 30:4–123.10. See the Commentary to that provision.

N.J.S. 30:4–123.15. COMMENTARY

1. The language of the last sentence of the first paragraph of the existing statute has been changed to incorporate the good behavior reductions from the distrinct "parole term" provided for by the Code. The reference in the first paragraph to fines has been deleted.

2. *Parole Of Inmates With Outstanding Fines.* The second paragraph of the existing statute has been deleted. This paragraph authorized the parole board to release upon parole inmates with outstanding fines or costs assessed against them upon a payment schedule to be set by the parole board. The Code changes the New Jersey practice with respect to fines. See Sections 2A:46–1 to 3. In the event that an inmate has been subjected to both a fine and a period of incarceration, the Parole Board should consider his release whenever in its judgment it is warranted. Only the sentencing court will have the power to determine whether any sanction shall be imposed for the inmate's failure to meet the earlier fine imposed. That Court may establish a payment schedule or may decide to remit the outstanding fine. Most persons who are sentenced to a period of incarceration under the Code will not, at the time of their initial sentencing, have the present ability to meet a money fine. They will probably not, therefore, have a fine outstanding when they are considered for parole. As to inmates who do have fines outstanding which were imposed under former law, we believe that no good purpose is served by allowing that fine to interfere with the inmate's parole experience. Thus, for all present inmates we would recommend a legislative forgiveness of all outstanding fines for persons incarcerated in a state prison or a reformatory. In any event the Parole Board would no longer have the power or the obligation to deal with criminal fines. If they are outstanding against a parole candidate, the board should ignore the fine, grant the parole unless delay in granting the parole is warranted, and allow the trial court to determine what sanction if any to impose for the failure of the inmate to meet the fine.

N.J.S. 30:4–123.16. COMMENTARY

Present law permits the parole board to allow commutation time from the sentence. N.J.S. 30:4–123.16. This change is one of language only and is necessary to relate the commutation time to the distinct parole term which is provided for by the Code.

N.J.S. 30:4–123.23. COMMENTARY

1. *Revocation of Parole.* Subsection a of this Section continues the language of present law. The Board may revoke the parole and order the re-imprisonment of a parolee for a violation of any of the conditions of parole including conviction of another crime while on parole. Even as to the latter, however, the revocation is discretionary and not mandatory.

2. *Declaration of Delinquency Pending Revocation Determination.* Subsection b of the Section continues the language of present law which allows the Board, prior to revoking parole, to declare the parolee delinquent on parole but most permit him an opportunity to appear before the Board and show cause why his parole should not be revoked.

3. *Sanctions Short of Revocation.* Subsection c of this Section is new and is based upon MPC § 305.16. This paragraph provides that, except for the commission of a crime while on parole, it shall be the Board's policy not to revoke a parole for a violation of parole. Instead the board is empowered specifically to employ other sanctions short of revocation. Thus, the Board may order a variety of other detailed sanctions. There is no specific statutory counterpart in our present law. However, many technical violations today do not result in a revocation. Since revocation is never mandatory, it is possible for the Board now, instead of revocation, to change the parole conditions, give a warning, or forfeit good time reductions. The impact of this new Section would not thus greatly expand the board's present powers but would rather state a legislative preference that the Board exercise its discretion in favor of continuing the parole whenever possible.

This presumption against revocation does not apply when the parole violation is grounded on the commission of a crime, it continues to apply when the violation is only a disorderly persons offense. And, there is not intention to limit the discretion of the parole board if it choses not to revoke even for the commission of a crime. If the crime results in a suspended sentence or some other disposition short of incarceration, the board may well decide not to reimprison but to employ one of the sanctions available in this subsection and continue the community supervision of the offender.

N.J.S. 30:4–123.24. COMMENTARY

1. This provision is new and replaced former Section 24 of the Parole Act. The source is MPC § 305.17.

2. *Duration of Re-Imprisonment For Parole Violation.* Under present law a parolee whose parole is revoked for the commission of another crime while on parole forfeits all of the "street time" that he has served on parole. Thus, if the parole period were several years and the crime occurred near the end of this period, the parolee would be required to re-serve all of the time he had successfully served on parole. If the parole violation is for some reason other than commis-

sion of crime, then the re-imprisonment period dates back only to the declaration of delinquency while on parole and not to the first release on parole. This Section eliminates the present distinction between the two kinds of parole violation and would abolish the "street time" forfeiture provision of present law. Thus, for all parole violators the period of re-imprisonment will be the longer of the remainder of his maximum parole term or his original sentence after credit for time served on parole prior to the violation. See § 2C:43–9c.

This re-imprisonment provision is a necessary counterpart to our sentencing provisions which places the responsibility for the parole violator in the hands of the sentencing Court for the crime which constituted the grounds for parole revocation. Also, the Board can be expected, when considering a second offender's parole, to take into account the inmate's former parole experience.

The forfeiture of "street time" which present law requires results in many instances in unnecessarily excessive re-imprisonment, is highly demoralizing for the parolee who had a substantial period of satisfactory adjustment, and seems to us much too rigid a formula. It seems preferable to permit the Court sentencing for the crime to take into account the fact that the defendant was on parole in determining the proper sentence within the limits of his discretion. The Study Draft of the Federal Code follows this Section in eliminating the "clean time" forfeiture. Section 3403(3). Although the forfeiture rule was not uncommon, the preponderant rule in the United States in 1956 was stated by the drafters to be in accord with the rule of this Section. See MPC T.D. 5, p. 126 (1956).

3. *Re-Parole of Parole Violator.* The Board may re-parole at any time. It must consider that inmate for re-parole within six months after his reconfinement.

4. *Application To Present Parole Violators Now Incarcerated.* We believe that the benefits of the new rule as to non-forfeiture of "street time" should be applied to present parole violators who face periods of incarceration which extend beyond those which would be applied by Subsection a of this Section. Thus, the Section provides that with the inmate's consent the maximum term of his imprisonment as a parole violator shall be recomputed in accordance with the first subsection or set at six months following the effective date of this section whichever period shall be longer. The consent of the inmate is intended only to insure that incarceration will in no event be extended by application of this Section. The six months alternative is intended to allow the Parole Board time to recompute all the affected sentences.

The Section further provides that the period of incarceration eliminated by operation of this subsection shall constitute a term of parole. Thus, the impact of this subsection will be to transfer inmates from custody to community supervision for the excessive period of incarceration. This seems to us consistent with the goal that all inmates have some period of parole when they leave the correctional institution.

N.J.S. 30:4–123.26. COMMENTARY

This Section, prior to being amended, presumed that any parole re-imprisonment was consecutive to and not concurrent with the sentence for a new offense while on parole. The Code makes this decision explicitly one for the sentencing court to make. See Section 2C:44–5. This change is, thus, required to conform to the change of sentencing law.

N.J.S. 30:4–123.27. COMMENTARY

As in the case of the previous Section, the change in language from the existing statute is required to conform to the sentencing section which makes the question of consecutive or concurrent re-imprisonment for parole violations a matter for the sentencing court to decide at the time of sentencing for the crime committed while on parole.

N.J.S. 30:4–123.30. COMMENTARY

This Section has been redrafted to conform to the language and existence of the distinct parole term which the Code creates. The first paragraph will continue present law which allows the board to relieve the inmate from the obligation of reporting and which permits residence outside the State. The second subsection continues present law which allows the board to discharge unconditionally a parolee short of his maximum parole term, after serving two years minimum satisfactorily on parole. The third subsection makes the discharge mandatory after completion of the maximum parole term less reductions for good behavior. None of these changes are changes of substance.

INTRODUCTORY NOTE TO CHAPTER 51

This Chapter represents an effort to rationalize the collateral consequences of a criminal conviction. The disabilities which flow from a conviction and the procedures for their restoration are now scattered throughout our statutes. In the same way that a Penal Code controls sentencing, we believe it should be concerned with the effect of the conviction upon the future lives of the convicted person.

Many of the existing collateral consequences now occur in the law governing the issuance of licenses to engage in particular fields of employment. As to these, the Code partially incorporates existing law but establishes standards as to how that law is to be applied. (See Sections 2C:51–1 and 2.) Other collateral consequences, namely forfeiture of public office, jury service and voting are treated directly in this Chapter.

The importance of this chapter cannot be over-emphasized. The success of the criminal justice system in reducing crime rates will be largely dependent upon success in correcting offenders and guiding

their reintegration into the free community. This task is now impeded by haphazard and, irrational legal barriers to full citizenship for the ex-offender. See generally President's Commission on Law Enforcement and the Administration of Justice, Task Force Report, Corrections 32-34, 88-92 (1967).

§ 2C:51-1. COMMENTARY

1. The source of this Section is MPC § 306.1. It is the major foundation of the Code's effort to rationalize the collateral consequences of a criminal conviction and states the general rule that no person shall suffer any legal disqualification or disability because of his conviction for a crime unless consistent with four specific guidelines:

a. *Necessarily Incident to the Sentence.* Subsection a(1) preserves any disability which is necessarily incident to and results from the execution of the sentence. Thus, an individual sent to a prison would be unable to continue in public employment or to do other acts which are inconsistent with his incarceration.

b. *Provided by the Constitution or the Code.* Subsection a(2) recognizes that the Constitution or the Code may require a specific legal disability.

c. *Provided by a Statute Other Than the Code.* This subsection retains those provisions outside of the Code, such as those now found in our voting and election laws, which make disenfranchisement a penalty as part of the definition of the offense.

d. *Convictions "Reasonably Related" to the Deprivation.* Subsection a(4) allows a deprivation when it is provided in a judgment, order or regulation of a court, agency or official exercising jurisdiction conferred by law, when the commission of the offense or the conviction or the sentence is "reasonably related" to the competency of the individual to exercise the right or privilege of which he is deprived. This is the main provision of this Section. Our present law often contains blanket restrictions against employment in certain regulated areas of persons convicted of crimes. Conviction in some instances may be relevant to the public safety interests underlying the regulation but in many others it is not. The Commission believes that eliminating irrational barriers to employment will aid in promoting the reintegration of offenders into the community. Subsection a(4) is intended to legislate a rule of reason which would authorize the licensing agency to refuse to grant a license to an applicant whose criminal record and other circumstances indicate that he would endanger the particular industry or group protected by the agency's licensing power. Our present law sets forth varying standards. See, *e.g.*, N.J.S. 45:4A–15 (Beauty culture, denial upon conviction of a crime involving moral turpitude); N.J.S. 45:14C–22 (Plumbers; same); N.J.S.

33:1–25 (Liquor retailer; same); N.J.S. 45:4–40 (Barber; any crime).

The impact of these mandatory disabilities has been mitigated by the enactment in 1968 of the Rehabilitated Convicted Offenders Act. N.J.S. 2A:168–1 to 3. This Act provides that any licensing authority may employ a qualified person notwithstanding a legal disqualification caused by a conviction of a misdemeanor or a disorderly persons offense if the individual can demonstrate a satisfactory degree of rehabilitation. This is presumed by a certificate of rehabilitation from a probation or parole officer, from a pardon or from an order of expungement pursuant to N.J.S.A. 2A:164–28. This mitigation applies, however, only to crimes other than high misdemeanors and thus would reach only crimes of the third degree or lower under the Code's formulation. The Code provision extends the policy of 2A:168A to all crimes and dispenses with the requirement of a certificate of rehabilitation by removing the mandatory disqualification. The administrative agency involved might wish to solicit the written evaluation of a correctional person who was familiar with the correctional experience of the applicant. But the decision to so consult would be for the particular licensing board based on the appointment contemplated and the other circumstances of the applicant. Compare N.J.S.A. 11:23–2 which by a 1970 amendment allows the Civil Service Commission to examine or appoint persons convicted of any crime, including high misdemeanors, when the Commission is convinced that the applicant's degree of rehabilitation warrants the appointment. The appointing authority must consent to any such appointment.

Both N.J.S. 2A:168A–1 to 3 and N.J.S. 11:23–2 would be made unnecessary by enactment of this Section.

2. *Subsection b: Use Of A Conviction As Evidence.* This Subsection provides that use of a conviction as evidence to prove an issue or to impeach the credibility of the convicted person is not controlled by subsection a. This is part of the law of evidence and is not controlled by the Penal Code. See N.J.S. 2A:81–12 and *State v. Hawthorne,* 49 N.J. 130, 140 (1967).

§ 2C:51–2. COMMENTARY

1. *Present Law Respecting Public Employment After Conviction of Crime.* The most important statute in this field is N.J.S. 2A:135–9:

> "Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, *non vult* or *nolo contendere* to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or posi-

tion and cease to hold it from the date of his conviction or entry of plea.

"If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture."

See generally *Winne v. Bergen County,* 36 N.J. Super. 532 *reversed on other grounds,* 21 N.J. 511.

Forfeiture of municipal office or position by virtue of conviction of a crime is a complex, unclear area in our law. It is partially controlled by Civil Service law; partially, by the Faulkner Act (N.J.S. 40:69A–163 through 166); and, partially, by a series of provisions relating to particular fields. See, *e.g.,* N.J.S. 40:47–3 and 19 as to police and firemen. The Faulkner Act provision, N.J.S. 40:69A–166, uses a crime involving "moral turpitude" as the standard. See *Galloway v. Council of Clark Tp.,* 92 N.J. Super. 409 (App. Div. 1966); *Newark v. Department of Civil Service,* 68 N.J. Super. 416 (App. Div. 1961). Confusion has also arisen, in the area, as to whether the same standards apply to "employments" as to "offices" and "positions." See *Galloway v. Council of Clark Tp., supra,* and *Newark v. Department of Civil Service, supra.*

At least in theory, the Faulkner Act provision is a mandatory one. *Newark v. Department of Civil Service, supra.* The Faulkner Act was amended in 1966 to make persons convicted of offenses other than high misdemeanors eligible to apply for or be continued in public employment if the appointing authority and the Civil Service Commission (where the latter is applicable) conclude that the applicant has achieved a degree of rehabilitation sufficient to justify the employment. A 1970 amendment has expanded this discretion to include high misdemeanors as well. Laws of 1970, chapter 82, effective June 3, 1970. The rule of Section 2C:51–1a(4) incorporates the same discretion which the Faulkner Act now permits with respect to municipal employees.

4. *Forfeiture of Public Office Under the Code.* This Section mandates forfeiture of any public office position or employment, state or municipal upon conviction for any offense involving dishonesty or crime involving moral turpitude. Conviction of lesser offenses, *i.e.,* disorderly persons offenses, would result in forfeiture only if the offense involves or touches the public position. Finally, where the Constitution or a statute so provides, the office is forfeited. The forfeiture under Subsection b is immediate upon conviction in the trial court and will be stayed only by an order of a court for good cause shown. See N.J.S. 2A:135–9. If the person is ultimately exonerated, subsection b provides for restoration as does existing law under N.J.S. 2A:135–9.

§ 2C:51-3. COMMENTARY

1. *Voting Rights of Convicted Persons.* N.J.S. 19:4-1 now provides who is disqualified from voting by reason of a conviction of a crime:

> "No person shall have the right of suffrage—. . . .
>
> (2) Who has been or shall be convicted of any of the following designated crimes, that is to say—blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, robbery, conspiracy, forgery, perjury or subornation of perjury, unless pardoned or restored by law to the right of suffrage; or
>
> (3) Who was convicted prior to October 6, 1948, of the crime of polygamy or of larceny of above the value of $6.00; or who was convicted after October 5, 1948, and prior to the effective date of this act, of larceny of above the value of $20.00; or
>
> (4) Who shall hereafter be convicted of the crime of larceny of the value of $200.00 or more, unless pardoned or restored by law to the right of suffrage; or
>
> (5) Who was convicted after October 5, 1948, or shall be convicted of the crime of bigamy or of burglary or of any offense described in chapter 94 of Title 2A or section 2A:102-1 or section 2A:102-4 of the New Jersey Statutes or described in sections 24:18-4 and 24:18-47 of the Revised Statutes, unless pardoned or restored by law to the right of suffrage; or
>
> (6) Who has been convicted of a violation of any of the provisions of this Title, for which criminal penalties were imposed, if such person was deprived of such right as part of the punishment therefor according to law unless pardoned or restored by law to the right of suffrage; or
>
> (7) Who shall be convicted of the violation of any of the provisions of this Title, for which criminal penalties are imposed, if such person shall be deprived of such right as part of the punishment therefor according to law, unless pardoned or restored by law to the right of suffrage."

In addition to this statute, under various provisions in the election law (Title 19) violations may result in the Court ordering that the defendant be disenfranchised for given periods of time. In some instances, disenfranchisement is the only sanction permitted for election law violations.

2. The exclusion from the franchise of ex-offenders is a practice of considerable historical support. At early common law the offender was either executed or declared civilly dead. He could not contract, sue, hold or inherit property, or testify in a court of law. He was for-

ever branded a criminal and was sometimes banished from the community altogether. Of course, he could not vote because by his crime he had forfeited his citizenship.

One of the most difficult tasks of modern society is to successfully reintegrate the offender into the free community upon his release from incarceration. Denying to convicted persons a place in the electoral or political processes seems more appropriate to the era of civil death, a practice repudiated by nearly every state today, than to the rehabilatative ideal.

The Commission believes that exclusion from the franchise of otherwise qualified citizens because of a past conviction of crime is contrary to the State's commitment to rehabilitation of the offender and is unjustified by any compelling state interest. The past concern for the "purity of the ballot box" (*In re Smith,* 8 N.J. Super. 573 (Co. Ct. 1950)) rests upon an assumption of continuing dishonesty which we find unwarranted and self-defeating. Where the offense bears a rational risk to the integrity of the electoral process, a limited period of disenfranchisement may be an appropriate correctional sanction. We, therefore, recommend that our present law authorizing a court to withhold the franchise from persons convicted of an elections law violation (Title 19) remain. Where an individual is actually incarcerated numerous practical obstacles to his effective participation in the franchise justify excluding him during this period. This would be the effect of this section. An individual on parole would be eligible to vote if other constitutional and legal requirements were met.

N.J.S. 19:4–1, to the extent that it disenfranchises persons convicted of offenses other than election law violations, has been ruled unconstitutional by the United States District Court of New Jersey. *Stephens v. Yedmans,* F. Supp. , (October 30, 1970). A three-judge District Court found the selective disenfranchisement to violate the Fourteenth Amendment's guarantee of equal protection of the laws. In *Stephens*, plaintiff had been excluded from voting under N.J.S. 19:4–1 because of his conviction several years earlier of the crime of larceny of an automobile. The Court found that plaintiff met all of the qualifications for suffrage in the New Jersey Constitution except those in Article 2, Section 7, which provides:

> "The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right."

N.J.S. 19:4–1 was passed pursuant to this authority. The Court first found that decisions of the Supreme Court establish the proposition that "a state voter classification disenfranchising resident citizens must pass equal protection muster the equal protection clause of the fourteenth amendment." (F. Supp. at .) *Nixon v. Hernon, 273*

U.S. 536 (1927); *Nixon v. Canoon,* 286 U.S. 73 (1932); *Carrington v. Rash,* 380 U.S. 89 (1965). *Harper v. Virginia Board of Elections,* 383 U.S. 663, 670 (1966). The Court then reasoned as follows:

> "Clearly the Supreme Court has evidenced a tendency in franchise disqualification cases toward a stricter than usual scrutiny of the States' chosen classifications. *Kramer v. Union School District,* 395 U.S. 621 (1969) is an indication of the trend. Holding unconstitutional a New York statute which permitted only parents and property owners to vote in school board elections, the Court indicated that while some disenfranchising classifications might be valid, . . . the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. *Kramer v. United School District, supra* at 632. The 'exacting standard of precision' language appears also in *Cipriano v. City of Houma,* 395 U.S. 701, 706 (1968), which held unconstitutional a Louisiana statute limiting the franchise in revenue bond referendums to 'property taxpayers.' Most recently, in *Evans v. Cornman,* 398 U.S. 419 (1970), the Court, in holding unconstitutional a Maryland statute excluding from the franchise residents of federal enclaves, reiterated that while disenfranchising classifications may be permissible, they are under the fourteenth amendment decidedly suspect. They may only be justified if they bear a rational relationship to the achievement of a discernable and permissible state goal.
>
> * * * *
>
> We conclude, therefore, that the New Jersey statute which disenfranchises plaintiff must be judged by the exacting equal protection standards laid down by the Supreme Court in the voter disqualification cases referred to hereinabove. The disqualification must bear a rational relationship to the achievement of a discernable and permissible state goal."

After tracing the history of the New Jersey legislation, the Court concluded as follows:

> "The haphazard development outlined above has produced some remarkable contrasts in treatment. Most defrauders, including persons convicted of income tax fraud, remain eligible to vote. A public official convicted of extortion under state or federal law remains eligible. Embezzlers are eligible but those convicted of larceny are ineligible. Conviction of bribery of a judge or legislator, state or federal, is not disenfranchising. Conviction of an unsuccessful attempt at murder is not disenfranchising, although a conviction for murder is. Kidnapping, abduction, abortion,

carnal abuse, loan sharking, mayhem, prostitution, draft evasion, possession or carrying of bombs, and inciting to insurrection are additional examples of non-disenfranchising convictions. Thieves are disenfranchised. Receivers of stolen property are not. It is hard to understand why Bill Sikes should be ineligible for the franchise and Fagan eligible.

Location of the constitutional authority for the statute in the article on suffrage, and of the statute in the title on elections, suggests that the intended state purpose for the disenfranchisement has something to do with the purity of the electoral process. The courts of New Jersey have assumed as much. *Application of Marino, supra.* How the purity of the electoral process is enhanced by the totally irrational and inconsistent classification set forth in N.J.S. 19:4–1(2)–(5) is nowhere explained. We perceive no rational basis for the New Jersey classification. Certainly it cannot meet the exacting standard of precision required by the equal protection clause for a selective distribution of the franchise. We hold the classification set forth in N.J.S. 19:4–1(2) through (5) to be invalid under that clause."

The order in *Stephens* was that plaintiff be permitted to vote. The effect of the case is to make the disenfranchisement statute ineffective and to make all persons eligible to vote without regard to a criminal record except for elections violations cases. We believe this the proper policy to pursue rather than to write a new disenfranchising statute. We, therefore, recommend repeal of this much of N.J.S. 19:4–1.

As to persons presently disenfranchised under N.J.S. 19:4–1, we believe the enactment of this provision to have the effect of giving them the right to vote.

3. *Jury Service.* Our law now disqualifies from jury service any person who has been convicted of any "crime." N.J.S. 2A:69–1. The disqualification continues unless the individual obtains an order from the Governor restoring this "civil right or privilege." N.J.S. 2A:167–5. The permanent or indefinite disqualification of all persons who have been convicted of crimes reflects a legislative judgment that such persons are untrustworthy; their "criminal" character thus does not leave them after they have completed whatever sentence has been imposed. While many states allow persons with criminal records to serve on juries without any serious adverse effects, Congress in the 1968 Jury Selection Act provided that persons convicted of crimes subject to one year or longer of imprisonment could not serve on federal juries. 28 U.S.C. 1865(b)(5). In fact, Congress enlarged the disqualification so as to include persons with charges pending against them which might result in such incarceration. *Id.* The House Report on this bill indicated that the criminal disqualification was intended to guarantee some "probity" to the jury panel. H.R. 1076, 1968 U.S. Code and Admin. News 1792, 1796.

In revising the substantive criminal law the Commission has sought to implement a rehabilitative approach. A continuation of automatic and indefinite disqualification for jury selection of all "criminals" is fundamentally inconsistent with this objective. We, therefore, take a two-step approach: first, we continue to disqualify all persons who have not yet "satisfied" their sentence. This includes a suspended sentence, a period of probation, actual incarceration, and a parole term. Once the citizen is no longer under a correctional sanction he is immediately eligible in the case of an offense less than a crime and is eligible after five years in the case of a crime. We believe this to be an appropriate line to draw and to allow sufficient time for persons convicted of crimes to allow public confidence.

§ 2C:51–4. COMMENTARY

1. This Section is new and represents an effort to reconcile the important competing interests involved in the question of expungement or vacation of a past criminal conviction. It is MPC § 306.6.

2. *Present New Jersey Law.* Two statutes now apply in this area: N.J.S. 2A:164–28 (Suspended sentence or fine of not more than $1,000; expunging from record after 10 years; hearing; order and service thereof; fees; exceptions); N.J.S. 2A:169–11 (Expunging record of conviction as disorderly person; fee).

The expungment in either case would appear to be discretionary although the statutory language suggests that absent some reason the order should be granted: "if no material objection is made and no reason appears to the contrary, an order may be granted . . ." If the Court directs expungement, the clerk is directed to "expunge from the records all evidence of said conviction" and the person against whom such conviction was entered is "thereafter relieved from such disabilities as may have heretofore existed by reason thereof." There is no provision for affecting police or other enforcement agency records. Presumably the expungement would restore the offenders right to vote, to hold public office, to serve on juries, and enjoy other civil rights which his conviction deprived him of. Whether an order of expungement would relieve the person of his obligation to register as a narcotics offender under 2A:169A–2 was deemed not ripe for decision in *State v. Garland,* 99 N.J. Super. 383, 388 (1968).

The Attorney General has ruled that expungement does not have the attributes of a full pardon. Op. Atty. Gen., February 26, 1953, No. 5. Since a pardon has been interpreted not to permit the recipient to respond in the negative to questions about his conviction (1951-53 N.J. Ops. Att'y. Gen. 143), it would appear that the successful petitioner under the present expungement statutes would also be required to disclose his conviction. Once a record of conviction is expunged, however, it cannot be later introduced to prove the conviction. Op. Att'y. Gen., October 28, 1953, No. 44. The failure of the statute to

describe more clearly the intended effects of expungement and the ten-year period required to clear a criminal conviction, leaves the efficacy of the provisions very doubtful. See *Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 Wash. U.L.Q. 147, 166.

The expungement provisions are not expressly limited to first offender. Our courts have ruled, however, that since expungement is lawful only if there has been no subsequent conviction during the required period, in the case of a multiple offender no record of conviction, except possibly the last, can be expunged. *State v. Chelson,* 104 N.J. Super. 508, 510, 250A. 2d 445 (1969).

3. *The Need for Vacation of a Criminal Conviction.* The end goal of the criminal law today must be recognized as the successful reintegration of offenders into the free community. At a minimum this reintegration means that the ex-offender leads a law-abiding life and ideally it means that whatever talents and potential he possesses are given their fullest expression. A criminal conviction necessarily creates a powerful social stigma; the efficacy of the criminal sanction sometimes depends upon this stigma. At the same time, following the offender's discharge from correctional supervision, it is this stigma that very seriously interferes with his ability to find gainful and meaningful entry into the society as a responsible citizen. All of our states recognize this by providing some means for restoring civil and political rights. See *Rubin,* The Law of Criminal Correction 632-37 (1963). Our law permits the Governor to grant pardons and restore civil rights. See N.J.S. 2A:167–1 through 12. But even a pardon does not close the judicial eye to the fact that once the person pardoned had done an act which constituted an offense, and the pardon does not restore the person's character and does not obliterate the act itself. *Hozer v. State Department of Treasury,* 95 N.J. Super 196 (App. Div. 1967). This view of the pardon reflects the failure of our criminal justice system to have incorporated the fundamental moral imperative of forgiveness. *See Nussbaum,* First Offenders, A Second Chance 24 (1956). The convicted person forever labors under the handicap of his past error. His difficulty in finding employment of any kind is well-recognized and this difficulty apparently tends to increase directly with the skill level of the job sought. See *Gough, supra* at 153-154. The number of persons with some criminal record for a single, unrepeated offense is not known but is surely in the millions. A sound criminal justice system should provide a mechanism to forgive absolutely a reformed offender; to return to him if he deserves it an unstigmatized social status. We believe that the public policy expressed in this new provision should extend to any act of criminality which has been followed by a complete reformation of the individual. We also believe that absolute forgiveness should be available only for deserving citizens and that it should not be used as the means for initiating the possibility of successful reentry into the community.

Thus, we believe that the previous Sections of this Chapter which eliminate certain disabilities immediately upon discharge from correctional authority and which require a rational relation between the past conviction and the exercise of official discretion in such areas as regulated employment, are needed to begin the reintegration process. An order of vacation for a period of law-abiding behavior with limited effect may also play an important role in this process. And, then finally at some point in the offender's new life the criminal justice system should formally and absolutely return to him the social status he had before his conviction. The proposed Section authorizing expungement for first offenders is the method we propose to achieve this result as best the law can.

INTRODUCTORY NOTE TO SUBTITLE 4

Throughout the existing New Jersey statutes in Title 2A, there are provisions which are solely administrative in nature. These include filing for gun permits, destruction of gaming apparatus, etc. Since these provisions are not definitions of substantive offenses. we collect them as a separate Part rather than having them dispersed throughout the Code.

§ 2C:53–1. COMMENTARY

1. See Section 2C:34–4 and Commentary thereto.

§ 2C:54–1. COMMENTARY

1. Subsection a was formerly N.J.S. 2A:156A–1. Subsection b was formerly N.J.S. 2A:156A–2. These have been carried forward without substantial changes.

§ 2C:54–2. COMMENTARY

1. This provision was formerly N.J.S. 2A:158A–7. It is carried forward without substantial change.

§ 2C:54–3. COMMENTARY

1. These Sections were previously N.J.S. 2A:156A–8 through 18 and 20. They are carried forward without substantial change.

§ 2C:54–4. COMMENTARY

1. This Section was formerly N.J.S. 2A:156A–21. It is carried forward without substantial change.

§ 2C:54–5. COMMENTARY

1. These provisions were formerly N.J.S. 2A:156A–22 and N.J.S. 2A:156A–23, respectively. They are carried forward without substantial change.

§ 2C:54–6. COMMENTARY

1. This provision was formerly N.J.S. 2A:156A–24. It is carried forward without substantial change.

§ 2C:54–7. COMMENTARY

1. This provision was formerly N.J.S. 2A:156A–25. It is carried forward without substantial change.

§ 2C:54–8. COMMENTARY

1. This provision was formerly N.J.S. 2A:156A–26. It is carried forward without substantial change.

§ 2C:56–1. COMMENTARY

1. These provisions mesh with Section 2C:33–12b. They were formerly N.J.S. 2A:130–2, 4 and 5. No change in substance has been made.

§ 2C:58–1. COMMENTARY

1. These provisions were formerly N.J.S. 2A:151–19 through 22. See also Section 2C:39–1 for definitions applicable to this Section. The provisions have been carried forward without change in their substance.

§ 2C:58–2. COMMENTARY

1. These provisions were N.J.S. 2A:151–24 through 28. See also Section 2C:39–1 for definitions applicable to these provisions. They are carried forward without substantial change.

§ 2C:58–3. COMMENTARY

1. These provisions were N.J.S. 2A:151–32 through 39, respectively. See also Section 2C:39–1 for definitions applicable to these provisions. They are carried forward without substantial change.

§ 2C:58–4. COMMENTARY

1. These provisions were formerly N.J.S. 2A:151–44, 44.1, 44.2, 45 and 47, respectively. See also Section 2C:39–1 for definitions applicable to these provisions. They are carried forward without substantial change.

§ 2C:58–5. COMMENTARY

1. This provision was N.J.S. 2A:151–52 through 54. See also 2C:39–1 for definitions applicable to these provisions. They are carried forward without substantial change.

§ 2C:58–6. COMMENTARY

1. This provision was N.J.S. 2A:151–16. See also Section 2C:39–1 for definitions applicable to these provisions. It is carried forward without substantial change.

§ 2C:58–7. COMMENTARY

1. This provision was N.J.S. 2A:170–17. It is carried forward without substantial change.

§ 2C:58–8. COMMENTARY

1. This provision is taken from New York Penal Code § 265.25 and N.J.S. 2A:170–25.7.

§ 2C:58–9. COMMENTARY

1. This provision was taken from § 265.30 for the New York Penal Code. A similar provision was found in N.J.S. 2A:151–17.

§ 2C:58–10. COMMENTARY

1. This Section was N.J.S. 2A:151–57.1. Its violation is made a crime of the fourth degree by Section 2C:39–2.

§ 2C:60–1. COMMENTARY

1. See Section 2C:21–19e. This was N.J.S. 2A:99A–3.

§ 2C:62–1. COMMENTARY

1. These provisions were N.J.S. 2A:100–3 through 8. Subsections a through e are taken from §§ 3 through 6 of the Uniform Desertion and Nonsupport Act. They are carried forward without substantial change.

§ 2C:64-1. COMMENTARY

1. This provision was formerly N.J.S. 2A:152-6. It is carried forward without substantial change.

§ 2C:64-2. COMMENTARY

1. This provision was formerly N.J.S. 2A:152-7. It is carried forward without substantial change.

§ 2C:64-3. COMMENTARY

1. This provision was formerly N.J.S. 2A:152-8. It is carried forward without substantial change.