REPORT ON

THE PROPOSED NEW JERSEY PENAL CODE

DEPARTMENT OF LAW AND PUBLIC SAFETY

GEORGE F. KUGLER, JR.

Attorney General

DIVISION OF CRIMINAL JUSTICE

Evan William Jahos

Director

Prepared by Division of Criminal Justice

Appellate Section

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INTRODUCTION

In October 1971, the New Jersey Criminal Law Revision Commission issued its final report and recommended the enactment of a comprehensive penal code. Since that time, law enforcement officers throughout the State have carefully scrutinized the work of the Commission, as well they should, for the proposed Code drastically alters existing statutes and judicial precedent.

To some, the very idea of codification of the criminal law would appear to be an alien concept since New Jersey has never adopted a comprehensive penal code. Traditionally, our Supreme Court has served as the primary governmental agency in defining and developing many areas of the criminal law. Thus, statutory law has not heretofore embraced such subjects as those relating to principles of criminal liability, responsibility, justification or excuse.

The proposed Code not only defines criminal offenses, but also encompasses such topics as affirmative defenses, presumptions in sentencing, and administration of penal statutes. Moreover, many existing statutory offenses have been completely revised and others have been deliberately excluded in the Code. Significant is the basic concept, which is implicit in the Commission's recommendations, that the development of the criminal law rests within the legislative domain. While recognizing that our courts have "done well to keep the common law alive and fluid,"

the Commission has proposed a basic shift in governmental responsibility. The New Jersey Penal Code, Vol. I, pp. VIII-IX.

This is in accord with the view of our Supreme Court which has often reiterated the well recognized principle that "in the area of strict policy, the legislative will must control." New Jersey Sports and Exposition Authority v. Crane, 61 N.J.1,8, (1972). See also State v. Forcella, 52 N.J. 263,281-82 (1968), death penalty vacated in Funicello v. New Jersey, 403 U.S. 948 (1971). The legislative branch, duly elected by our citizens and unhampered by traditional principles of judicial self-restraint and the doctrine of stare decisis, must bear primary responsibility for the formulation of public policy. And no function is more basic to government than the protection of its citizens from criminal attack. Other freedoms guaranteed by our Constitution would be meaningless if there were no constituted authority to safeguard the individual from illegitimate suppression of his liberty.

But all too often, citizens have asked too much of our system of criminal justice. At times, we have "responded to difficult problems of social control by making the undesired conduct criminal." President's Commission on Law Enforcement and The Administration of Justice, Task Force Report: The Courts, p. 98. This has resulted in "a strong feeling" that "existing law has over-criminalized society." The New Jersey Penal Code, Vol. I, p. XII. It bears repeating that the criminal law is not the

sole method of insuring compliance with society's rules. Nor is government ultimately responsible for all individual evils. The objects of the criminal law must necessarily be confined to protection, deterrence and rehabilitation of the offender.

The proposed Code must be evaluated in accordance with these criteria. Assuming that the public has an actual, definable and workable interest in proscribing certain conduct, the Code must prohibit it in such a manner as to fully protect the individual and deter future violations. Rehabilitation of the offender, to the extent that it prevents future crimes, must also be embodied in the criminal law, but protection of the public remains the essential objective. Thus, when reviewing any given provision in the Code, we must consider whether the conduct proscribed is of such a nature as to pose a serious threat to society and is therefore a proper subject of governmental prohibition. If so, we must then decide whether the proposed legislation adequately protects against the public injury sought to be proscribed.

The enabling statute establishing the Criminal Law Revision Commission evidences a clear intent on the part of our Legislature to revise the penal law "so as to embody" modern principles of justice and to "eliminate inconsistencies, ambiguities" and "redundant provisions." N.J.S.1:19-4. Quite obviously, a detailed analysis of existing statutes and case law affords the opportunity to modernize our system of justice in order to make

it a viable instrument of public policy. Unfortunately, the doctrine of stare decisis has left many anachronistic common law principles extant. Piecemeal legislation to solve specific social problems has likewise prevented a systematic and exhaustive review of the criminal law. Sustained legislative consideration of all problems associated with the penal law permits a conceptual symmetry heretofore lacking.

The Office of the Attorney General generally endorses the recommendations of the Criminal Law Revision Commission. Conceptually, the proposed Code contains many welcome changes. For example, the rational grading of offenses more realistically relates punishment to the moral culpability of the offender and confers upon prosecutorial authorities expanded discretion in charging an accused and in plea bargaining. Restitution of an offender's ill begotten gains protects the victim and assists in rehabilitating the offender. The deletion of certain sex offenses from the purview of the criminal law is equally commendable.

That is not to say, however, that the proposed Code should be enacted in its present form. Many of the provisions recommended by the Commission are unworkable and not in the public interest. Corroboration in rape cases, for example, offends fundamental notions of fairness and discriminates against women. The de minimis infraction provision, which permits a judge to dismiss a properly returned indictment, constitutes an unwarranted intrusion

into an area generally considered to be within the discretion of prosecutors. The requirement that disorderly persons violations be considered lesser included offenses enhances the prospect of compromise jury verdicts. These and other provisions are fully described in this report.

Suffice it to say that each provision in the Code should be reviewed on its own merits. Merely because certain of these provisions are subject to criticism does not warrant wholesale rejection of the Code. Conversely, the Code should not be adopted in its entirety. While basic responsibility for the formulation and development of the criminal law rests in our Legislature, the courts will ultimately bear the burden of interpreting the Code. Ambiguous terminology should be deleted. Unworkable provisions should be modified. In no event should the enactment of the Code depend upon an "all or nothing" approach. Clearly, too much is at stake.

This report reviews and evaluates each of the chapters contained in the proposed Code. Special attention has been placed upon specific provisions which would, if enacted, frustrate proper law enforcement functions. In addition, the final section in this report concerns present statutory offenses which, it would appear, have no counterpart in the proposed Code.

GENERAL PROVISIONS

INTRODUCTION

The first Subtitle of the Proposed New Jersey Penal Code represents an entirely new concept in codification in this State. The purpose of the Subtitle is to codify those areas which are common to many, or all, of the offenses encompassed by the criminal law. See New Jersey Penal Code, p. xii. The evolution of these general provisions has heretofore been left to case law. However, as part of its goal to codify all of the criminal law of this State, the Commission has undertaken to include such general topics as: (1) Principles of Liability; (2) Justification; (3) Responsibility; (4) Inchoate Crimes; and, (5) Double Jeopardy and Collateral Estoppel and various other provisions.

Codification of the areas common to most criminal offenses or prosecutions is a welcome development. However, upon consideration of the aforementioned purposes of the criminal law, as well as the role of plea-bargaining and the traditional separation of powers doctrine, it is readily apparent that several sections of Subtitle One are in need of modification or deletion.

Prior to adopting a new Penal Code, it must be ascertained if the codified provisions would defeat the fundamental concepts of the criminal law or impair its effective administration. A provision of the Code should not be adopted merely because it sets forth what has heretofore been left to the judiciary to develop on a case-by-case basis. Rather, if

our courts are to be relieved of the responsibility of developing case law in these areas, then it is the duty of the Legislature to make certain that the provisions ultimately adopted are in harmony with the needs of the public, the prosecutorial authorities, and, those of potential defendants.

A. MENTAL RESPONSIBILITY

The Chapter of the proposed Code dealing with the concept of mental responsibility is in need of modification since it fails to comport with the needs of the public and those of the offender. See Section 2C:4-1 et seq.

1. Insanity Defense.

The common law defense of insanity had its genesis in the well known holding of M'Naghten's Case, 8 Eng. Rep. 718 (1843). The primary objective of the common law defense of insanity was to separate the "evil mind" from the "sick mind" for purposes of designating criminality. It is submitted that this purpose still remains viable.

The defense of insanity in New Jersey is derived from the M'Naghten rule. That rule states that a defendant is not criminally liable for an act when, at the time of its commission, he was laboring under such a defect of reason from a disease of the mind so 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 that what he was doing was wrong. See State v. Lucas, 30 N.J. 37, 68 (1959). The viability of the M'Naghten rule has been reiterated many times by our judiciary. See e.g., State v. Maik, 60 N.J.

205, 213 (1972).

The proposed Penal Code would abandon the M'Naghten rule and adopt a new test for determining criminal responsibility. See Section 2C:4-1. That test is whether at the time of the conduct the actor lacks substantial and adequate capacity as a result of mental disease or defect either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[1] The proposed change expands the cognition factor from requiring mere "knowledge" to requiring "appreciation" of the criminal act. The mental facility need not be "totally" impaired but rather "substantially" impaired. In effect, the proposed statute would include the impairment of volitional capacity as a defense to a criminal charge, whereas M'Naghten allows only the absence of the ability to reason as a defense. It is submitted that adoption of this test would only add to the already difficult task of determining legal insanity.

In assessing the test set forth in the proposed Code it would be well to consider the view expressed in the concurring opinion in State v. Lucas, supra, where it was stated that:

> "...[T]here is an irreconcilable conflict between the present thesis of the criminal law and the thesis I find implicit in the psychiatric view of man." Id. at 83.

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1. Section 2C:4-1

> a. A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial and adequate capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

> "...[T]hey move in opposite directions." Id. at 84.

The thrust of the psychiatric thesis, it was explained, is "to disregard all concepts of insanity as a defense... and to deal with all transgressors as unfortunate mortals... ." Ibid. However, it was noted that the criminal law has as its focus the "concurrence of an evil meaning mind with an evil doing hand." Id. at 82.

The obvious point is that under our present law it must be the legal rather than the psychiatric standard of culpability that should control the disposition of the insanity issue because the security of society may not be made to depend upon "a science which can produce such conflicting estimates of probable human behaviour." Id. at 86.

Although legal insanity as a defense may differ from psychiatric principles relating to mental illness, the distinction has obvious relevance, for the purpose of the criminal law is not to cure but to protect.

In State v. Maik, 60 N.J. 205 (1972), Chief Justice Weintraub recently noted that:

> "We need not discuss the competing concepts of legal insanity which others have projected since M'Naghten became the rule in this State. [Citations omitted]. For present purposes it is enough to say that all the doctrines that would excuse an offender from criminal accountability because of insanity have this common characteristic of attempting to distinguish the sick and the bad.
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> The point to be stressed is that in drawing

> a line between the sick and the bad, there is no purpose to subject others to harm at the hands of the mentally ill. On the contrary, the aim of the law is to protect the innocent from injury by the sick as well as the bad." Id. at 213

It is submitted that the M'Naghten test more adequately protects the innocent from injury by those who are mentally deranged by subjecting the legally insane individual to institutional treatment while the "bad" offender is incarcerated.

The thrust of the M'Naghten rule has not previously restrained the courts from accepting a complete psychiatric picture of the defendant. Rather, such information has been brought to bear on the degree of punishment rather than on the initial determination of insanity. Under M'Naghten the criminal responsibility of the offender is judged on his conscious rather than unconscious level, thereby preserving the concept of mens rea. Also, under M'Naghten, there is a selection of those mentally disabled persons whose punishment would aid and protect society because they were able to make a rational choice between right and wrong. See State v. DiPaolo, 34 N.J. 291 (1961) and State v. Sikora, 44 N.J. 457 (1965).

The two tests now under consideration (i.e., the legal test and the psychiatric test) should not be viewed in a vacuum. The practical result of adopting either of the proposed tests would be that the acquitted defendant would be committed to an appropriate institution. Section 2C:4-8 provides for mandatory commitment of one acquitted on the ground of insanity. On its surface this seems to satisfy the State's basic concern,

which is to see that those who commit offenses directed against society are not set free to perform the same activity again, regardless of the mental condition under which they labored. The commitment under the proposed Code is based upon a finding of "dangerousness." The mandatory commitment provision is apparently designed to alleviate criticism that a withdrawal from the M'Naghten standard would engender. However, it should be noted that N.J.S.A.2A:163-3 already provides for such commitment upon an acquittal by a jury on the grounds of insanity. Thus, the proposed Code would add little to the primary objective of protecting society, since those committed under Section 2C:4-8 after an acquittal based on the proposed test of mental responsibility could be released six months after commitment.

The interests involved in choosing between standards by which to determine criminal responsibility are clearly and precisely set forth in the Commentary to the proposed Code. There, it is stated:

> "What is involved is the drawing of a line between a 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 which the law should allow." See Commentary, p. 95.

It is submitted that the M'Naghten test did distinguish between those types of offenders in need of incarceration as contrasted to those in need of purely medical treatment. Thus, actors totally impaired at the time of the criminal act would be afforded the medical treatment necessary for their condition, while those whose criminal acts may be attributed only in part

to a condition of the mind would receive the necessary punitive correctional treatment for the conduct in question.

Lastly, it should be observed that while the new standard would do little to enhance the rehabilitation of the offender, or to safeguard the public, it would succeed in confusing the courts and juries as to whether a defendant was legally insane at the time of the commission of a criminal act. The test of legal insanity is at best difficult to apply. The standard set forth in the Code would tend to further confuse jurors rather than make their task less onerous.

2. Burden of Proof

Another undesirable feature of the Code's chapter dealing with criminal responsibility is the burden of proof which is placed upon the State. The drafters of the Code have made mental disease an affirmative defense which must be disproved beyond a reasonable doubt by the State. See Section 2C:4-3. Some have questioned whether this provision is in fact a "shift" in the burden of proof. However, the reported cases on this subject do indicate that the proposed Code's insanity defense does constitute a "shift' in the burden of proof, since, "[i]t is well settled that it is upon the defendant that the burden of proof and of going forward with the evidence as to insanity devolves." State v. Scelfo, 58 N.J.Super. 472, 480 (App.Div.1959). See also State v. Cordasco, 2 N.J. 189 (1949); State v. Molnar, 133 N.J.L. 327 (E.& A.1945); State v. Lynch, 130 N.J.L. 253 (E.& A.1943); and, State v. Overton, 85 N.J.L. 287 (E.& A.1913).

However, even though case law indicates that the Code is shifting the burden of proof to the State, this does not necessarily mean that the provision should be automatically rejected. The crucial question is whether there is a need for such a change. It is submitted that no compelling reason has been enunciated by the Commission for placing the burden of proof on the State. Without such a reason the provision should be rejected. The State's burden at trial is to prove that the defendant committed the crime beyond a reasonable doubt, rather than proving that the defendant was not insane at the time he committed the crime. Proof of insanity should be borne by the defendant by a preponderance of the evidence. This is especially so if the Legislature should deem it appropriate to adopt the standard of legal insanity now included in the Code. If both of the aforementioned provisions were adopted as set forth, an increase in the number of insanity defenses, as well as an unwarranted increase in the number of acquittals based on that defense, is forseeable. This would result in a decrease in the deterrent force of our criminal law, as well as an increase in the potential danger to the general public.

B. PRELIMINARY PROVISIONS

Chapter 1, entitled "Preliminary Provisions," perhaps more than any other area of the proposed Code, is in need of modification when viewed in light of the purposes of the criminal law as well as the indispensable tool of plea bargaining.

1. Effective Date

The drafters of the Code provide for a delay of one year between the enactment of the legislation and its effective date. This provision also permits the defendant to take advantage of any defense, mitigation or other reduction in the severity of the offense committed prior to the effective date if the prosecution is pending after the effective date of the Code. This provision would seem to be undesirable since it would give an unearned advantage to a defendant who has committed a crime prior to the effective date of the Code, but who is not tried until after its effective date. It is easily forseeable that a defendant in such a position would purposely seek a delay in the disposition of his case during the period between the passage of the Code and its effective date so that he might take advantage of any defenses, mitigations, or reductions in penalty. Effective plea bargaining as well as the orderly movement of the trial calendar would be unduly delayed. Further, it would seem that for purposes of rehabilitation, as well as for the public welfare, that one who is prosecuted for a crime committed prior to the effective date of the Code should be treated as if the statute were not in effect. This procedure is now being followed in narcotics cases where the offense was committed prior to the enactment of the Controlled Dangerous Substances Act and the offender is convicted subsequent to its enactment. See State v. Ford, 119 N.J.Super. 260 (App.Div. 1972) and N.J.S.A.24:21-40(d). In enacting the aforementioned act the Legislature specifically stated that its provisions

would not be applicable to violations of the narcotics laws which had occurred prior to its effective date. The Legislature should follow its previous example by making the provisions of the proposed Penal Code applicable only to offenses committed after its effective date.

2. Omissions from the Code

The Commission has specifically declined to incorporate the New Jersey Controlled Dangerous Substances Act, N.J.S.A.24:21-1, et seq., into the Code. It would seem that this omission is contrary to one of the primary reasons for enacting a penal code, i.e., codification of all criminal offenses within one document. Therefore, it is recommended that the new drug law be incorporated into the Code. This need is especially significant since many of the general provisions now under discussion would apply to one who offends the Controlled Dangerous Substances Act. This recommendation is especially relevant in view of the disparity of the sentencing provisions contained in the drug act as opposed to those contained in the proposed Code. It is submitted that the Legislature could, with relative ease, incorporate the new drug act into the proposed Code.

Another area in which the Code has failed to achieve the objective of codification, i.e., providing a single comprehensive source of research concerning all problems relating to the criminal law, is the abolition of all common law offenses and the retention of any common law defenses not enumerated in the Code. See Sections 2C:1-5 and 2C:2-5. The Commission has stated, "[t]here may be unusual defenses which should be retained if appropriate in a particular situation" and "we would

not wish to exclude them by implication." Commentary, p. 55. The failure of the Commission to abolish defenses not enumerated in the Code is unsatisfactory particularly in view of its rejection of the common law offenses, and thereby constitutes a serious defect which should be rectified by the Legislature.

Another area not covered by the Code is criminal or civil contempt.[2] The Code has left intact the power of the courts to punish for contempt. See 2C:1-4(c). However, the Commission has not codified this power. Nor has the Commission delineated the offense of contempt. It is felt that to be consistent with the goal of codification, the Commission should define the offense of contempt, as well as its sanctions, within the Code.

3. Powers of Local Municipalities - Preemption

Section 2C:1-5(d) precludes local governments from enacting any ordinances conflicting with any expressed or unexpressed provision or policy of the Code. The doctrine of preemption as enunciated in the Code should be modified. The power to define offenses constitutes one of the most basic obligations of government. To some extent, this power has been delegated to local governmental units. See, for example,

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2. The terms "civil" and "criminal" contempt are not being used here within their strict meanings. In New Jersey Dept. of Health v. Roselle, 34 N.J. 331 (1961) the Court rejected the customary distinction between these terms and held that the offense itself remains the same in every case. Id. at 347. The real distinction is between those offenses punishable summarily and those which must be punished as crimes. (N.J.S.2A:85-1). See In re Bueher, et al., 50 N.J. 501, 513 (1967).

N.J.S.A.40:49-1 and N.J.S.A.40:48-2. Local governments are integral units of the State, and correspondingly their legislative powers are necessarily restricted. Thus, "a municipality may not exert the delegated police powers in terms which conflict with a State statute, and hence a municipality may not deal with a subject if the Legislature intends its own action ... to be exclusive and therefore to bar municipal legislation." State v. Ulesky, 54 N.J. 26, 29 (1969).

However, in its present form the Code goes further than necessary since it would be nearly impossible for a local governmental body to ascertain whether a proposed ordinance would conflict with a policy which finds no expression in the Code. The inquiry required would resolve into determining that something omitted from the Code was excluded for a policy reason rather than by sheer inadvertence. It is felt that local lawmakers should not be burdened with such thorny judgments. Certainly, there are many areas where local considerations and problems dictate that the municipality enact an ordinance dealing with a subject matter that has been excluded from the Code. Therefore, the doctrine of preemption, at least to the extent advanced by the Code, should not be adopted.

4. Multiple Offenses and Convictions

One of the most glaring problems with the proposed Penal Code is the provision which precludes a defendant from being convicted of conspiracy to commit an offense and the resulting substantive offense. See Section 2C:1-7(a)(2).

The Commission's recommendation, that an individual not be convicted for both conspiracy and the substantive offense which is the subject matter of the criminal agreement, is contrary to the settled law of this State:

> "The gist of the offense of conspiracy lies, not in doing the act, nor affecting the purpose for which the conspiracy is formed, nor in attempting to do them but in forming of the scheme or agreement between the parties. [Citations omitted]. The offense depends on the unlawful agreement and not on the act which follows it; the latter is not evidence of the former [Citations omitted]. The combination itself is vicious and gives the public an interest to interfere by indictment." State v. Carbone, 10 N.J. 329, 337 (1952).

See also State v. Moretti, 52 N.J. 182, 186 (1968).

Under present law,one may be convicted of conspiracy and the substantive offense. See e.g., State v. Oats, 32 N.J Super. 435 (App.Div.1954). The proposed Code would dilute the deterrent value of the crime of conspiracy. The reason for this loss of deterrence is obvious. One who conspires to commit an offense which is subsequently committed could not be found guilty of both offenses. Therefore, under the Code, the proscription against conspiracy loses most of its deterrent effect. Correspondingly, the safety of the public would be unnecessarily jeopardized.

As noted by our Supreme Court in State v. Carbone, supra, the crime of conspiracy has been historically a separate and distinct offense from the substantive offense which is the subject matter of the conspiracy. One would be hard pressed to ascertain the reason why the Commission would treat a defendant

who has committed a crime without any planning equally with one who has carried out a crime subsequent to having conspired to commit that crime. On the basis of the foregoing, it is recommended that this section be deleted from the Code since the public welfare would not be served by its retention.

Another provision prohibiting multiple convictions for conduct arising out of the same episode is the Code's prohibition against separate convictions arising under both a general and a specific statute. See Section 2C:1-7(a)(4). Naturally, a single act may be proscribed by two separate statutes designed to prevent separate public harms. Yet, under certain circumstances two separate convictions may be sustained on the basis of this single act. The Code would prohibit this. As in the foregoing provision, prohibiting the conviction of conspiracy and the substantive crime conspired, the section under discussion would have a negative effect upon the deterrence of unlawful conduct as well as the welfare of the public. Further, it would seem that this provision would overrule several well reasoned decisions by our courts. For instance, in State v. Montague, 55 N.J. 387, 406 (1970), our Supreme Court upheld convictions of threatening a police officer's life and assault and battery upon that officer. The Court found that these offenses did not merge and that separate convictions were valid. This provision of the Code would overrule Montague and other lower court holdings having the same effect.

Another provision of the proposed Code would prohibit

multiple prosecutions for a continuous, uninterrupted course of conduct. See Section 2C:1-7(a)(5). This provision would be a serious hindrance to the fight against organized crime. It has been long held in this State that convictions for bookmaking on separate days may be upheld. See State v. Bogen, 13 N.J. 137, 139 (1953), and State v. Juliano, 52 N.J. 232, 234 (1968). The proposed Code would overrule the aforementioned decisions, and allow only one conviction for the offenses in question (bookmaking on separate days in the above cases). The Commentary specifically notes that it is the intention of the drafters to overrule Juliano and Bogen. See Commentary, p. 20. It is submitted that the Legislature should give consideration to whether these decisions should be rejected. As noted, the adoption of this provision would lessen the deterrence to engage in organized crime. Further, it may be questioned whether this provision would also be applicable to one who is "pushing drugs" on a daily basis. It is submitted that one who engages in a continuing course of criminal conduct should be subject to harsher penalties than one who engages in a single transaction. Therefore, the Legislature should delete this provision from the proposed Code.

A further limitation on the State's right to convict an individual of more than one offense, even though he may be guilty of several, is the mandatory joinder provision. See Section 2C:1-7(b). The mandatory joinder provision of the Code has no present counterpart in our rules of practice. This section would prohibit the State from bringing separate

trials for multiple offenses "based on the same conduct or arising from the same criminal episode" if such offenses are known to the appropriate law enforcement officials "at the time of the commencement of the first trial and are within the jurisdiction and venue of a single court." The penalty for the State's failure to prosecute all of the offenses known to its various law enforcement personnel in a single trial is a complete bar to subsequent prosecutions for any of these offenses.

An analysis of the mandatory joinder provision illustrates that this section would necessarily hinder law enforcement agencies, and may even result in the occasional wrongful release of an individual whose guilt is patent. The Commentary suggests that the primary purpose for the adoption of this rule is:

> "...[T]o prevent the State from bringing successive prosecutions based upon essentially the same conduct, whether the purpose in doing so is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he had been sentenced to imprisonment, or simply to harass him by multiplicity of trials." Commentary,p. 20.

It is submitted that the foregoing does not provide an adequate rationale for a mandatory joinder rule.

It is axiomatic that the first duty of a prosecutor is to see that justice is done. See Brady v. Maryland, 373 U.S. 83 (1963); State v. Farrell, 61 N.J. 99, 104 (1972); and, "Canon 5" of the Professional Canons of Ethics. The number of multiple trials based upon the same transaction which can be brought merely to satisfy the prosecutor's desire

to harass the defendant is finite. Certainly, in a situation where such action is taken by a prosecutor, the defendant has a civil remedy, or at the least a constitutional basis for a reversal of the conviction. Thus, it would seem that the very premise upon which the mandatory joinder provision is based is insubstantial.

The section in question seems to extend the rules of double jeopardy and collateral estoppel where such an extension is not constitutionally compelled. In those cases where multiple prosecutions would offend the rules of double jeopardy or collateral estoppel, then the constitutional safeguards will prevail. No need has been demonstrated for adding a further "safeguard".

Lastly, with regard to the mandatory joinder section, it should be noted that disorderly persons offenses would be subject to this provision. Therefore, a prosecution for an indictable offense in a County Court would bar a later prosecution for a disorderly offense in a Municipal Court, even though that offense would not be barred by rules of collateral estoppel. Recently, our Supreme Court noted that a defense of double jeopardy, which embodies collateral estoppel, is available to a defendant even though the first trial was in the Municipal Court. See State v. Ebron, 61 N.J. 207, 215 (1972). However, beyond the constitutional safeguards espoused in Ebron, no need appears for barring a subsequent prosecution in the Municipal Court subsequent to a County Court prosecution. This is especially true in the large counties, such as Essex, Bergen and Hudson, where it would be an almost impossible burden on the prosecutorial staff to keep abreast of all

of the potential municipal charges below, to avoid loss of a future conviction of disorderly offense which is not subject to collateral estoppel.

In view of the above, it is recommended that the provision requiring mandatory joinder be deleted from the Code. Certainly, the welfare of society, as well as the deterrent effect of the criminal law, is diminished while no corresponding benefits are realized.

Perhaps one of the most serious defects in the Code is Section 2C:1-7(d) which permits a county court judge to instruct the jury that it may convict the defendant of a disorderly persons offense as a lesser included offense to the charge in question. This provision specifically overrules the well reasoned decision of State v. McGrath, 17 N.J. 41 (1954). There, our Supreme Court held that a trial judge may not charge a jury regarding a lesser included offense if that offense is a disorderly persons offense. Rather, the Court found that the disorderly offense should be tried at the municipal court level. It is submitted that this practice should be continued.

One of the most obvious objections to allowing a county court to charge the jury that it might convict the defendant of a disorderly persons offense is the serious impediment placed upon the prosecutor's ability to engage in meaningful plea bargaining. A defendant would think twice before entering a guilty plea when he realizes that if he goes to trial the jury may only convict him of a disorderly persons offense. Coupled with the Code's new incentive to go to trial, is the always present possibility of an acquittal. Therefore,

the adoption of this provision would discourage effective plea bargaining, and thereby create a further impediment to the movement of the criminal trial calendar.

It is also submitted that allowing a jury to return a finding of guilt on a disorderly persons offense or a petty disorderly persons offense would lead to compromise verdicts in a large number of the cases tried before a jury. Adding disorderly offenses to the range of lesser included charges enhances the prospect of compromise verdicts so as to outweigh the benefits attendant upon the grading of offenses set forth in the Code.

Further, the Code would place the trial court in a quandary in making its determination whether to instruct the jury as to the elements of a disorderly persons offense. It is not inconceivable that a judge might decide to so charge in a case in which such instructions would be unwarranted. Also, it is not unrealistic to expect numerous appeals following decisions not to charge the jury as to a disorderly persons violation. Thus, this section should be deleted since it will fail to serve any of the purposes of the criminal law, while placing a heavy burden on the prosecutor and on the courts.

Moreover, the undesirability of Section 2C:43-11 which permits the court, at sentencing, to sentence as if the defendant were convicted of a disorderly offense, is compounded by this provision.

5. Double Jeopardy and Collateral Estoppel

The concepts of double jeopardy and collateral estoppel

have been codified in Sections 2C:1-8 and 9. The United States Supreme Court has declared that the constitutional guarantees of double jeopardy and collateral estoppel are both applicable to the states. See e.g. Ashe v. Swenson, 397 U.S. 436 (1970). In the two provisions now under discussion,the drafters of the Code have attempted to codify the existing constitutional principles as set forth by the United States Supreme Court. It is recommended that, while recognizing the important guaranties contained in the Fifth Amendment regarding multiple prosecutions, the provisions in the Code attempting to set forth the boundaries of the doctrines of collateral estoppel and double jeopardy should be deleted. It is felt that it would be unwise at this time to codify the concepts of double jeopardy and collateral estoppel since the United States Supreme Court has not yet provided clear standards to guide the prosecutorial authorities in the application of these principles. As of this date, the law with regard to double jeopardy is in a state of flux. Precise standards of application are impossible to define. It is to be noted that even the New Jersey Supreme Court has declined to establish concrete guidelines or rules, but rather has looked to the "underlying policies rather than technisms" in an attempt to give "primary considerations... to factors of fairness and fulfillment of reasonable expectations" in light of the constitutional mandate. See State v. Currie, 41 N.J. 531, 538-45 (1964).

The concepts of double jeopardy and collateral estoppel have been constantly evolving in this State. See e.g., State

v. Ebron, 61 N.J. 207 (1972). Codification of the law of double jeopardy could result in good faith failures in properly defining the limits of criminal conduct in drafting an indictment, thereby suppressing patent evidence of guilt. Such is not the purpose of the criminal law. It is to be emphasized that generally codification is the ideal. However, in certain areas of the law, such as double jeopardy, codification would restrict and hinder the reviewing court's ability to define the scope of the constitutional mandate within its proper boundaries. Since constitutional law is so rapidly changing in this area it would be foolhardy to attempt to codify the law as it now exists since tomorrow, or any day thereafter, the statute might be antiquated.

6. Bar to Prosecution in New Jersey.

The Code would also bar a prosecution in this jurisdiction for an offense which was the subject matter of a prosecution in another jurisdiction. See Section 2C:1-10. This provision directly contravenes several United States Supreme Court decisions, as well as the settled law of this State. In a trilogy of cases, the United States Supeme Court has upheld the doctrine of dual sovereignty: Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); and, United States v. Lanza, 260 U.S. 377 (1922).

In Lanza, a unanimous Court held:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with

> the same subject matter within the same territory. Each may without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give the liberty to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

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

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

The drafters of the Code have concluded that even though the dual sovereignty concept is constitutional, it should be abandoned. It is submitted that such a result would be undesirable.

As noted above in Cooper, the enactment of this provision could result in a frustration of the State's interest in enforcing its laws. Certainly two jurisdictions having equal sovereignty may also have an equal interest in punishing conduct detrimental to the citizens residing within their

jurisdictions. The interests of New Jersey in protecting its citizens from certain offenses might well be different from the interests of Pennsylvania. Furthermore, the enactment of this provision would result in a lessening of the deterrent effect that would otherwise obtain. Moreover, the Code's rejection of the dual sovereignty concept offers a convenient opportunity to shop for a forum more advantageous to a defendant's interest. It is not inconceivable that an accused would decide to plead guilty to an offense in New York in order to preclude a conviction in New Jersey where he would be subject to a harsher sentence.

The viability of the dual sovereignty concept has been questioned by some. In this regard it should be noted that, last term, although not affirmatively declaring that the concept is viable, the United States Supreme Court denied certiorari in several cases emanating from New Jersey which directly raised the issue of whether Bartkus v. Illinois, supra should be overruled. See Colonial Pipeline Co. v. New Jersey, ___ U.S. ___, 92 S.Ct. 72 (1972); Jacks v. New Jersey, ___ U.S. ___, 92 S.Ct. 76 (1971); Leuty v. New Jersey, ___ U.S. ___, 92 S.Ct. 77 (1971); and, Feldman v. New Jersey, ___ U.S. ___, 92 S.Ct. 76 (1971).

Lastly, with respect to Section 2C:1-10, it is interesting to to note that the federal government is currently evaluating a new Penal Code which contains a provision substantially identical to the one now under discussion. See Section 708 of the "Final Report of the National Commission on the Reform of the Federal Criminal Laws." In a comment to Section

708 the Commission which prepared the proposed Federal Code stated that:

> "A substantial body of opinion in the Commission while not in disagreement with the end to be achieved, favors deletion of this section because of strong doubts as to its constitutionality and because of the view that even if constitutional, it would be preferable as a matter of comity within the federal system, to permit the states to deal with the problem themselves rather than to force this result by Congressional action." See Final Report, supra, at 64.

The doubts raised by the Commission have been substantiated by many of the states, including New Jersey, in responding to Congress' request for an evaluation of the proposed Code.

C. GENERAL PRINCIPLES OF LIABILITY

The portion of the Code dealing with general principles of liability, i.e., defenses to criminal prosecutions, has several objectionable provisions which are in need of modification or deletion.

1. De Minimis Infraction Rule.

The most controversial provision in this chapter is the "de minimis infraction" rule contained in Section 2C:2-11. This section gives the judiciary the power to dismiss a criminal prosecution, even over the objection of a prosecutor, if the court feels that the offense was de minimis, i.e., insignificant; within a customary license or tolerance not expressly negated by the victim nor inconsistent with the law; or, where extraordinary and unanticipated mitigations for the conduct are present. The Commentary to the Code suggests that:

> "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 judical participation and not as a replacement for the traditional exercise of discretion by the prosecutor, the grand jury and the police." See Commentary, p. 75.

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

Since under this provision a trial court may dismiss an indictment on its own motion without the consent of the prosecutor, the prospects of entering into negotiations as to a possible plea of guilty are seriously diminished. The prosecutor must be given wide latitude in the area of plea bargaining, and to the extent that this section fails to accomplish this objective the public interest has not been well served.

Omitted from the de minimis provision is any method by which the prosecutor may bring matters to the court's attention which the State had utilized in determining whether to prosecute the defendant. Rather, the Code's terms are mandatory in that the court "shall" dismiss a prosecution if the criteria of the de minimis provision are met. This aspect of the provision is undesirable since there may be many cases where the State may seek to prosecute an individual even though the offense may be de minimis in nature. An excellent example of such a situation would be the prosecution of one engaged in organized crime whose criminal activities have for the most part gone undetected, aside from rumors circulating in the underworld. In such a situation the

court should not have the discretion to dismiss an indictment brought by the prosecutor when this indictment could serve as a tool in the fight against organized crime. Even if a provision were inserted into this section allowing the prosecutor to disclose information used by the State to bring an indictment, it would be unwise to compel him to do so in order to retain the viability of the indictment when that information may be confidential.

Another questionable aspect of this provision is the inability of the State to appeal from a dismissal based upon the de minimis section. Further, even if the prosecutor could appeal that decision, he would then have to lay bare his reasons for bringing the indictment, and possibly lose some resources which he would have wished to remain confidential for purposes of later prosecutions.

A more basic reason for deleting the de minimis provision is the shift of prosecutorial discretion to the judiciary. Article III, Par. 1 of the New Jersey Constitution provides that "powers of the government shall be divided among three distinct branches, the Legislative, Executive, and Judicial". Under this provision, "no person ... belonging to ... one branch" may exercise "any of the powers properly belonging to either of the others." While the section in question does not expressly violate the constitutional separation of powers doctrine it would seem to be an unwarranted intrusion into an area ordinarily within the executive branch, i.e., the prosecutor.

In In Re Friedland, 59 N.J. 209 (1971), our Supreme Court recently noted the interest of the prosecutor in determining whether a complaint should be dismissed. There the Court stated:

> "In the future, should an attorney wish to have complaints dismissed by his client he must first go before the prosecutor and a judge and make a full and open disclosure of the nature of the charges and the terms, if any, under which the dismissal is sought. The dismissal should not be consented to unless both the judge and the prosecutor are satisfied that the public interest as well as the private interests of the complainant will be protected. Obviously, a consent should never be given in a case such as the present one involving a vicious loanshark scheme enforced through threats and violence. Rather, the nature of the charges cried out for further public investigation and exposure." Id. at 220. (emphasis supplied).

So too, in a case considered by a trial court to be de minimis, the prosecutor should be satisfied that the public interest is protected and that further investigation and exposure are not necessary.

In State v. Winne, 12 N.J. 152, 174 (1953), our Supreme Court stated:

> "A county prosecutor, within the orbit of his discretion, inevitably has various choices of action and even inaction. This discretion applies as much to the seeking of indictments from the grand jury as it does in prosecuting or recommending a nole proseque after the indictment has been found, but he must at all times act in good faith and exercise all reasonable and lawful diligence in every phase of his work." Id. at 174.

A prosecutor's good faith decision to seek an indictment and to prosecute, should not be overridden by a trial court since the public interest may not be adequately served. Further, to subvert a prosecutor's obligation to respond to his public mandate, i.e., the protection of the public from criminal attack [State v. Bisaccia, 59 N.J. 43, 45 (1971)] would be to defeat the very purpose of government.

2. Entrapment.

The drafters of the proposed Code would change the law of entrapment as it now exists in this State. The Code would adopt the position advanced by the Model Penal Code by not requiring the innocence of the defendant to advance the defense of entrapment. This would expressly overrule State v. Dolce, 41 N.J. 422 (1964). There the Court stated:

> "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." Id. at 430. (Emphasis supplied)

This same view was adopted by the United States Supreme Court in Sherman v. United States, 356 U.S. 369 (1958) and Sorrells v. United States, 287 U.S. 435 (1932). It is felt that the Code's attempted revision of the law of entrapment in this State would not serve the purposes of the criminal law. The elimination of the criterion of innocence would not deter those disposed to criminal conduct from effectuating

their plans. As the Court in Dolce, supra, stated:

> "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." Id. at 432.

3. Ignorance or Mistake of Law or Fact.

The Code has made several changes in the defenses of ignorance of the law and mistake of fact. See Section 2C:2-4. As to mistake of fact the Code modifies existing law in that the mistake must be honest,rather than both reasonable and honest. See State v. Bess, 53 N.J. 10 (1968); State v. Fair, 45 N.J. 77 (1965); and State v. Chiarello, 69 N.J.Super. 479 (App.Div. 1961). The Commentary states that, "the jury will, of course, use the reasonableness of the mistake in evaluating the defendant's claim of honesty." Commentary, p. 53. It is submitted that the removal of the reasonableness standard from this area of the law will not adequately serve to restrain individuals from acting on their own beliefs. Further, it will detract from the purpose of restraint and deterrence in the criminal law. Lastly, it is submitted that the potential harm to the public is heightened by substituting the objective criterion of reasonableness with the subjective criterion of honesty.

The Code would also modify the defense of mistake of fact so that the perpetrator could be convicted of the offense which he would have committed if the facts had been as he mistakenly believed them to be. See Section 2C:2-

4. Under existing law the defense of mistake of fact will stand only if the mistake is of such a nature as to make the conduct non-criminal. See State v. Bess, supra, and State v. Fair, supra. See also, Commentary, p.53. It is submitted that this change in the law is unwarranted and fails to serve any compelling interest.

The defense of mistake of law is enlarged since if the mistake, reasonable or unreasonable, negates the culpability requirements of the criminal statute, it is a defense regardless of the requirements. The defense is not limited to "specific intent" situations, i.e., those situations where the mistake or ignorance of the law negates the particular culpability requirement under the statute. Here again, the Code would do away with the reasonableness standard. It is submitted that this change is unwarranted and contrary to our existing law. See e.g., State v. Bess, supra.

A further expansion of the rule concerning ignorance of the law is the establishment of exceptions to the well settled doctrine that "ignorance of the law does not excuse." These defenses would run contrary to established case law, and would not serve the public interest. See State v. Western Union Telegraph Co., 12 N.J. 468, 490-92 (1953); State v. Prusser, 127 N.J.L. 97 (Sup.Ct.1941); and State v. Atti, 127 N.J.L. 39, 44 (Sup.Ct. 1941), aff'd 128 N.J.L. 318 (E.& A.1942).

4. Intoxication

The Code's provision regarding intoxication as a defense (Section 2C:2-8) is for the most part a codification

of the common law rule relating to self-induced intoxication. However, pathological intoxication under the Code is now a complete defense. Pathological intoxication is defined as that state of intoxication grossly excessive in degree given the amount of intoxicant to which the actor does not know he is susceptible. Under the recent Supreme Court decision of State v. Maik, 60 N.J. 203 (1972) it is questionable whether pathological intoxication should be an affirmative defense in cases where that state is induced by the voluntary use of narcotics.

In State v. Maik, supra, our Supreme Court held that it is generally agreed that a defendant will not be relieved of criminal responsibility because he was under the influence of intoxicants or drugs voluntarily taken. Id. at 214. The Court recognized that there are qualifications to this view. One qualification is the unexpected or bizarre result of drugs taken for "medication." Ibid. (Emphasis supplied). However, the Court failed to indicate that drugs taken for other than medicinal purposes would qualify as an exception to the general rule. In fact, the Court inferred the contrary. The Court found that for purposes of determining legal insanity, the introduction of a controlled dangerous substance into one's body may result in a fixed state of insanity after the influence of this intoxicant has spent itself. It was inferred that this defense would be sufficient if it would otherwise satisfy the M'Naghten test. However, the Court seemed to indicate that if it was not dealing

with the defense of insanity resulting from a narcotic drug, then the defense of intoxication itself would not have sufficed. See State v. Maik, supra, at 214-216. It is submitted that the provision in the Code holding that pathological intoxication is an affirmative defense should be modified to exclude from its ambit those drugs which are taken contrary to the provisions of the Controlled Dangerous Substances Act. (N.J.S.A.24:21-1, et seq.).

5. Consent

The Code provides that the consent of a victim is a complete defense to a crime if the consent "negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense." See Section 2C:2-10. It must be noted at the outset that this language is vague and would conflict with the Commission's objective of clarity. Aside from its ambiguous overtones, this section should be seriously considered before enactment. As noted, one of the purposes of the criminal law is to protect the general public. Therefore, criminal conduct constitutes injury to the public as an entity as well as to its victim. The fact that a victim consents to the commission of a crime should not be conclusive. Of course, this recommendation in no way affects the common law development of the defense of consent which has several stated exceptions. See Commentary, pp. 73, 74.

D. PRINCIPLES OF JUSTIFICATION

Chapter 3 of the Code is concerned with the general principles of justification, i.e., defenses for conduct which would otherwise constitute an offense. At the present time all of New Jersey's statutory law in this area may be found in N.J.S.2A:113-6.[3] In actuality, New Jersey's justification defenses are found in the cases and, in fact, the words of the above cited statute are no longer followed. See State v. Fair, 45 N.J. 77, 90 (1965).

1. Honesty and Reasonableness in Assessing Justification

The principal fault with the chapter dealing with justification defenses is the availability of that defense to one who has failed to act reasonably. At present, justification defenses are only available to an accused who has a belief in the need to use force which is both honest and reasonable. In State v. Bess, 53 N.J. 10, 16 (1968) and State v. Hippleworth, 33 N.J. 300, 316-17 (1960), our Supreme Court held that the test to be employed in resolving the issue of force is both subjective and objective. Subjectively, the defendant must honestly believe that force is necessary in order to protect himself or others. Objectively, this belief must be reasonable under the circumstances existing at the time of the offense. If the defendant forms an honest

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3. Any person who kills another by misadventure, or in his or her own defense, or in the defense of 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.

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.

The proposed Code's modification of the defense of justification would eliminate the objective test, i.e., the determination of the reasonableness of the defendant's perceptions. As the Commentary to the Code states:

> "...[T]he Code's treatment of this problem is to make justification defenses available whenever the defendant believes in the need to act and not to require a finding of reasonableness in the formation of that belief." Commentary, p. 82-83. See also Section 2C:3-4.

Of similar import is the Code's elimination of the common law rule regarding the amount and degree of force which may be employed in protecting one's self or others. See State v. Fair, supra, and State v. Abbott, 36 N.J. 63 (1961). The above cited cases impose a standard of reasonableness both as to the need to use force and the amount of force necessary. Thus, if a defendant uses more force than appears reasonably necessary, the justification of self-defense is not permitted. However, under the proposed Code the degree of force necessary with respect to the issue of self-protection depends upon the perceptions of the defendant. The reasonableness of the defendant's conduct is no longer in issue under the Code.

The Commentary states that these recommended changes have been based upon the theory that "the defendant is entitled

to have his actual beliefs submitted to and considered by the jury." See Commentary, p. 83. The Commentary further states that:

> "We trust the jury to use the reasonableness of the belief [as to the degree of force required] as a factor in determining its actuality.
>
> * * *
>
> "The Code allows the actor to evaluate the degree of or the amount of force necessary." Commentary, pp. 83, 84.

The Code provides one exception to its elimination of the objective standard of reasonableness. Section 2C:3-9(d) provides that the defendant's recklessness or negligence in arriving at his belief as to whether, and what degree of, force is necessary deprives him of the justification for the use of force where "recklessness or negligence ... suffices to establish culpability." It is submitted that this exception is of slight impact since most crimes included in the Code require a specific intent such as "purposely" and "knowingly."

The proposed modifications of the traditional view of justification defenses are contrary to the objectives of the criminal law. The objective standard of reasonableness which has heretofore been applied by our courts should not be eliminated. To do so would have the effect of encouraging persons to "take the law into their own hands." If the objective standard does nothing more, it serves to restrain

persons from acting on their own beliefs since their perceptions will subsequently be reviewed by a jury. To eliminate the element of reasonableness is to detract from the policy of restraint and deterrence.

The policy of deterrence is not the only reason for subjecting an accused's conduct to an objective standard of reasonableness. The harm to the public is not lessened when the actor's conduct is based upon honest, but unreasonable, perceptions. In any event, citizens are injured by virtue of the unrestrained use of force. The imposition of an objective standard of reasonableness, as well as a subjective standard, both to the actor's perception and the degree of force employed, is not unfair and should be retained.

The chapter on justification defenses contains several provisions relating to defenses concerning public officers, see e.g., Sections 2C:3-3 and 2C:3-7. However, the Code does not define "public officer" and it is suggested that a definition of this term should be included in the definitions found in Section 2C:3-11.

2. Use of Deadly Force

The Code contains a new limitation on the use of deadly force by law enforcement personnel. Section 2C:3-7 provides that the use of deadly force may not be justified when the actor believes that the force employed may create a substantial risk of injury to innocent bystanders. The addition of this provision to the existing case law on this subject

is welcome since it will serve to protect innocent bystanders from the unnecessary use of deadly force by law enforcement personnel. However, a question arises as to whether the standard created by the Code is such that a law enforcement officer may not be able to make such a finite determination considering the amount of time within which he must make this decision. The question of whether the actor believes that the force employed creates no substantial risk of injury to innocent persons is subjective. It is recommended that the term "reasonably" be inserted into this provision so that the officer's conduct might later be gauged more accurately and fairly by an objective standard.

E. INCHOATE CRIMES

The proposed Code codifies the inchoate crimes which had previously been found in the case law. Generally this codification is helpful and beneficial since the areas of conspiracy and criminal attempt have always been confusing to all parties involved. However, certain provisions are in need of modification.

1. Attempt

In distinguishing between the crime of criminal attempt and mere preparation the Code has changed the test heretofore followed in this State. The current test is that "[t]he overt act or acts must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the

crime itself." State v. Schwarzbach, 84 N.J.L. 268 (E.& A.1913). In place of the "probable desistance" test outlined above, the Commission would substitute the Model Penal Code's "substantial step" test. See Section 2C:5-1(a)(3) and (b). The requirements under the proposed Code are: (1) the act must be a substantial step in the course of conduct planned to accomplish the criminal result; and, (2) the act must be strongly corroborative of the criminal purpose in order for it to constitute such a substantial step. The Code then goes on to enumerate certain situations in which attempts may be found if the requirements of liability are met: (1) lying in wait, searching or following; (2) enticements; (3) reconoitering; (4) unlawful entry; (5) possession of incriminatory materials; (6) materials at or near the place of the crime; and, (7) soliciting agents, innocent or otherwise, to commit a crime.

It would seem that the "probable desistance" test would cover most of the above enumerated situations. However, this codified specificity, although well set out, could limit the flexibility of the proposed Code's test. Further, the burden placed upon law enforcement agencies in proving that the act was a substantial step, as well as strongly corroborative of criminal purpose, is unnecessarily harsh. The "probable desistance" test, which has always met the approval of our courts, should not be so easily abandoned in favor of a test which could create undue confusion in the mind of an average juror, and thereby result in unnecessary

acquittals.

2. Renunciation

The defense of renunciation of criminal purpose, introduced into the Code in both attempt and conspiracy situations, seems to be repugnant to the purposes of the criminal law. If an individual has proceeded far enough in an endeavor so that the law may characterize his actions as criminal, it would be self-defeating to allow that individual to defend the charge of attempt or conspiracy lodged against him by claiming that he has voluntarily abandoned his criminal purpose. See Sections 2C:5-1(d) and 2C:5-2(e). Since the defendant has taken affirmative action to commit a criminal act, he should not be permitted to escape punishment by claiming that he has changed his mind. Indeed, the view that renunciation encourages termination in the final stages of a conspiracy or an attempt, is counterbalanced by the view that renunciation encourages the individual to commit his criminal actions in the first instance. The actor can always change his mind if he feels that the criminal enterprise will fail, and thereby escape liability by renunciating at the last moment.

3. Conspiracy

The Code's treatment of the law of conspiracy (Section 2C:5-2) is generally acceptable. However, certain areas are in need of revision. It has already been noted that the section providing that one may not be convicted of conspiracy, and the substantive offense which was the object of the

conspiracy, should be deleted. Further, the provision providing a conspirator with the defense of renunciation should be removed from the Code for the reasons set forth above.

In codifying the offense of conspiracy, the Commission has eliminated the crime of common law conspiracy. It is felt that this is not a wise departure from existing law since the common law rule permits conspiracies to be prosecuted as crimes even though their objectives are not criminal. See State v. Carbone, 10 N.J. 329 (1952). A common law conspiracy has been defined as a "confederacy of two or more persons wrongfully to prejudice another in his property, his person, or character or to injure public trade, or to affect public health, or to violate public policy, or to obstruct public justice... ." Johnson v. State, 26 N.J.L. 313, 321 (Sup.Ct.1857), aff'd 29 N.J.L. 453 (E.& A.1861). It is submitted that the rule permitting conspiracies to be prosecuted as crimes, even though their objectives are civil wrongs, should continue to be recognized since there are many instances in which the conspiratorial conduct is not proscribed as a penal offense, but where the civil wrong is of sufficient substance to merit penal sanctions. For example, it is beyond question that certain merchants conspire to defraud consumers, and therefore, they should be subjected to prosecutorial action even though the wrong committed is civil in nature. Therefore, it is submitted that the Code should retain the existing proscription against conspiracies which result in civil wrongs. This objective could be attained without doing

away with the unilateral approach to conspiracy which the proposed Code has wisely chosen to adopt.

The Commission has attempted to alleviate the widely disparate sentencing provisions for inchoate crimes. However, Section 2C:5-4(b), providing for mitigation of conspiratorial conduct should not be adopted. That section provides that the court may exercise its power under Section 2C:43-11 to impose a sentence for a crime or offense of a lower grade or degree, or in extreme cases, it may dismiss the entire prosecution. As noted in another portion of this report, it is strongly urged that the aforementioned section be deleted from the Code. As this section applies to conspiracy, it is especially offensive since it would allow one who has engaged in a conspiracy to escape the consequences of that crime if it is later found that the conspiracy was inherently unlikely to result or culminate in the commission of a crime, or that a particular defendant was peripherally related to the main unlawful enterprise. These "mitigating" factors do not serve the purpose of deterrence and are not in the public's interest.

Subtitle 1 of the Code has introduced into this State a completely new concept in the codification of the criminal law. Generally, it is felt that the codification of provisions which are applicable to most or all criminal offenses is beneficial. However, it is respectfully submitted that the Legislature take cognizance of the aforementioned

recommendations in view of the ultimate goals of the criminal law, which are also those goals to be achieved by the codification of the criminal law.

SENTENCING AND PAROLE PROVISIONS

The Office of the Attorney General supports the efforts of the Criminal Law Revision Commission in the area of sentencing, and in particular the establishment of five degrees [4] of crimes combined with two lesser non-criminal grades of offenses. [5]

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4. SECTION 2C:43-1. DEGREES OF CRIMES.

"a. Crimes defined by this Code are classified, for the purpose of sentence, into five degrees, as follows:

(1) capital crimes;
(2) crimes of the first degree;
(3) crimes of the second degree;
(4) crimes of the third degree; and
(5) crimes of the fourth degree.

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

(b) Notwithstanding any other provision of law, a crime defined by any statute of this State other than this Code and designated as a high misdemeanor shall constitute for the purpose of sentence a crime of the third degree. Notwithstanding any other provision of law, a crime defined by any statute of this State other than this Code and designated as a misdemeanor shall constitute for the purpose of sentence a crime of the fourth degree. The provisions of this Subsection shall not, however, apply to the sentences authorized by the "New Jersey Controlled Dangerous Substances Act," N.J.S.A.24:21-1 through 45, which shall be continued in effect."

5. SECTION 2C:43-8. SENTENCE OF IMPRISONMENT FOR DISORDERLY PERSONS OFFENSES AND PETTY DISORDERLY PERSONS OFFENSES.

"A person who has been convicted of a disorderly persons offense or a petty disorderly persons offense may be sentenced to imprisonment for a definite term which shall be fixed by the Court and shall not exceed six months in the case of a disorderly persons offense or thirty days in the case of a petty disorderly persons offense."

Under the Code the degrees of offenses are designed to correspond to the moral culpability of the offender. The philosophy of the proposed legislation is that the length and nature of the sentences of imprisonment should reflect both the seriousness of the crime and the character of the offender. Commentary, p. 311. The purpose in classifying the various offenses in degrees is to reduce the discretion of the sentencing court insofar as the sentence available for the crime, thereby reducing the disparity between sentences now plaguing our criminal justice system. See State v. Hicks, 54 N.J. 390 (1969). The effort to rationalize sentencing under the Code is reflected in a reduction in span of the minimum and maximum term of years available for sentencing for a given crime, depending upon the "degree" of the offense. This, in combination with the creation of a limited number of distinct sentencing categories, that is "degrees," would represent "the entire range of statutorily authorized punishment for crime." Commentary, p. 312.

In general, the approach of the Code is sound both from a prosecutorial and a defense point of view. As a result, the prosecutor generally has greater freedom to plea bargain within the confines of the particular crime charged, without compromising the legislative sanction. The offender derives the benefit of a punishment that is commensurate with his moral culpability and history, and with the demands of society. Other benefits would likely ensue. Since more

pleas would be entered, fewer offenders would elect to go to trial, thereby reducing criminal court congestion. Punishment could be imposed closer in time to the offense, thereby insuring a more visible correlation between crime and punishment. Since fewer offenders would be making demands on the criminal justice system, more time and energy could be devoted to pursuing investigations in those cases in which society has the greatest stake. In addition, the phenomenon of "jury nullification," i.e., a jury's refusal to convict solely because of its belief that the punishment for the crime charged is excessive, would likely diminish because of the greater latitude in verdicts offered.

The sentencing philosophy embodied in the Code is based upon five policy considerations. First, shorter sentences are more apt to serve the public interest than are longer sentences. Second, a mandatory parole period should be imposed to aid offenders in the transition from prison to an unsupervised life in society. Third, where protracted sentences are available, they should be discretionary with the courts. Fourth, society would be best served by a presumption against imprisonment in the majority of cases. And fifth, no mandatory sentences of imprisonment should exist, and at most, certain crimes may specifically include a presumption of imprisonment due to their heinous nature.

It is necessary to examine each of the foregoing considerations in light of the purposes of the criminal law, i.e., to prevent crime, to protect society, to reform

the offender and to impose waraanted retribution. The objects of the criminal law should be foremost in the minds of those who administer penal sanctions, for a civilized society is dependent upon government for its protection and survival.

Retribution is simply chastisement, ideally imposed in close proximity to the wrongdoing so that the punishment can be readily associated with the transgression. Most would agree that retribution, standing alone, is not a proper basis for sentencing, although quite recently, the subject was again explored by Chief Justice Burger in Furman v. Georgia, ___U.S.___, 92 S.Ct. 2726, ___L.Ed.2d.___(1972). Nevertheless, retribution may have a rehabilitative effect upon a prisoner and to that extent retributive sentencing is in accord with enlightened principles of penology. Many of the Code's provisions are geared to shortening the span of time between the wrong doing and the initiation of punishment. The development of degrees within the various crimes, many of which include disorderly persons and petty disorderly persons offenses, encourages plea bargaining thereby eliminating the need for trial in many more cases. Moreover, the various electives open to the prosecutor and the defendant render it more likely that the resulting punishment will fit the offense as well as the offender.

Generally, the prison sentences corresponding the various degrees of crimes[6] amd to the extended

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6. SECTION 2C:43-6. SENTENCE OF IMPRISONMENT FOR CRIME; ORDINARY TERMS.

"a. A person who has been convicted of a crime may be (Cont'd).

terms [7] are satisfactory when viewed from the standpoint of retribution. [8] It should be recalled that the social stigma and traditional disabilities associated with a criminal conviction are substantially lessened by the Code. See Sections 2C:51-1, 2C:51-3 and 2C:51-4. Therefore, any further

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6. (Cont'd).

sentenced to imprisonment, as follows:

(1) in the case of a crime of the first degree, for a term which shall be fixed by the Court between ten years and twenty years;

(2) in the case of a crime of the second degree, for a term which shall be fixed by the Court between five years and ten years;

(3) in the case of a crime of the third degree, for a term which shall be fixed by the Court between three years and five years;

(4) in the case of a crime of the fourth degree, for

b. By operation of law, there shall be added to the terms described in Subsection a the separate parole term described in Section 2C:43-9."

7. SECTION 2C:43-7. SENTENCE OF IMPRISONMENT FOR CRIME; EXTENDED TERMS.

"a. In the cases designated in Section 2C:44-3, a person who has been convicted of a crime may be sentenced to an extended term of imprisonment, as follows:

(1) in the case of a crime of the first degree, for a term which shall be fixed by the Court between twenty years and life imprisonment;

(2) in the case of a crime of the second degree, for a term which shall be fixed by the Court between ten and twenty years.

b. By operation of law, there shall be added to the terms described in Subsection a the separate parole term described in Section 2C:43-9."

8. This generalization is not to say that the specific punishments attributable to certain offenses should not be reexamined. These will be discussed in another section of this report.

reduction in the available terms of imprisonment is not recommended. The elimination of disabilities associated with conviction appears to increase the likelihood that a man can "outgrow" his past by leading a law-abiding life. The effect is to encourage rehabilitation of the offender.

The "Fines and Restitutions" provisions are welcome additions to the Code. [9] The imposition of increased pecuniary responsibility for criminal activity conduces particularly to the retributive object of the criminal law. The current fine schedule is inadequate in most cases to serve as a real

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9. SECTION 2C:43-3. FINES AND RESTITUTIONS.

> "A person who has been convicted of an offense may be sentenced to pay a fine or to make restitution not exceeding:
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> a. $10,000, when the conviction is of a crime of the first or second degree;
>
> b. $5,000, when the conviction is of a crime of the third or fourth degree;
>
> c. $1,000, when the conviction is of a disorderly persons offense;
>
> d. $500, when the conviction is of a petty disorderly persons offense,
>
> e. any higher amount equal to double the pecuniary gain to the offender or loss to the victim caused by the conduct constituting the offense by the offender. In such case the court shall make a finding as to the amount of the gain or loss, and if the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue for purposes of this Section."

Section 2C:43-4, "Penalties Against Corporations," authorizes the imposition of sentence in accordance with the foregoing section.

deterrent to crime. The Code's proposals raise the fines to levels which actually serve to "punish" on the basis of contemporary values.

For corporate crimes, however, it might be well to establish a separate schedule of higher fines, in addition to restitution, which would be more meaningful than those suggested in Section 2C:43-3. Corporations are liable only in pecuniary "damages"; they cannot be imprisoned. It is likely that a fine sufficient to punish an individual would be inadequate to punish a corporation, justifying the higher corporate fines. See In re Jersey City Education Ass'n, 115 N.J.Super. 42 (App.Div.1971), certif. den. 58 N.J. 605 (1971), cert. denied 404 U.S. 498 (1971). It is further suggested that this provision dealing with corporate fines be made comprehensive, to include for example, the offense of contempt of court. It is submitted that, in terms of retribution, unless corporations are dealt with separately, the penalty provisions of the Code will be of no real effect as to them.

The second major aspect of the criminal law, that of rehabilitating the offender, is notable. The Code espouses the general principle "than non-imprisonment disposition is desirable unless there appears some particular reason for institutional commitment." Based on that assumption, most offenses carry a presumption of non-imprisonment.[10] According to the provisions of the Code, custodial sentences

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10. Section 2C:44-1(a) provides:

"a. Except as provided in subsection d of this Section, (Cont'd)

should be imposed only in cases where "imprisonment is necessary for the protection of the public" because: (a) the offender will probably 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 "presumption of non-imprisonment" under the Code ignores the object of rehabilitating the offender. It cannot be stressed too strongly that the "presumption

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10. (Cont'd).

> the Court shall deal with a person who has been convicted of an offense without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:
>
> (1) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;
>
> (2) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution;
>
> (3) a lesser sentence will depreciate the seriousness of the defendant's crime in appraising its impact upon the general community whose standards and values have been violated; or
>
> (4) the offense is characteristic of organized criminal activity."

of non-imprisonment" merely returns the offender to the environment that helped cause the transgression in the first instance. Release of the offender upon conviction, without supervision, does nothing to enhance the prospect of rehabilitation. Even probation has proven disappointing in promoting rehabilitation. For those reasons, the Code's "presumption of non-imprisonment" is regarded as unsound. The preferred approach would be no general presumption at all.[11] Whether or not a custodial sentence is appropriate should rest in the discretion of the sentencing court. It might well be that the criteria listed Sn Section 2C:44-1(a) and (b)[12] could help guide

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11. It has been suggested by the Prosecutors' Association that a presumption of imprisonment should obtain in all situations involving the use of a firearm or other dangerous instrument for purposes of intimidation. Although the Office of the Attorney General does not recommend a general presumption of or against incarceration, it endorses the position of the Prosecutor's Association that a presumption of incarceration should apply when dangerous weapons have been employed in the commission of an offense.

12. See Note 7, supra, and Section 2C:44-1(b):

"b. The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:

(1) the defendant's conduct neither caused nor threatened serious harm;

(2) the defendant did not comtemplate that his conduct would cause or threaten serious harm;

(3) the defendant acted under a strong provocation;

(4) there were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;

(5) the victim of the defendant's conduct induced or facilitated its commission;

(6) the defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained;
(Cont'd).

the discretion of the trial court not only as to the type of sentence but as to its duration as well.

It might be that the drafters of the Code were responding to the situation now extant in the New Jersey penal and corrective institutions. However, the answer is to reform and modernize the correctional system, not to acknowledge its failure by automatically releasing most offenders to prey on the public once more. The need for correctional reform is of course imperative. Indeed, jail disorders mirror the depth of the problem. While violence can never be justified, it reflects real grievances. And a high rate of recidivism is the price we pay for the inability of the present correctional facilities and philosophy to reform the offender. All too often, incarceration in today's jails serves to breed more proficient criminals. The solution is not to abandon the correctional system, but rather to make it responsive to the objects of the criminal laws. Thus far this has not been the case.

The "presumption against imprisonment" is unlikely to serve the object of protecting society. If the result of immediate release, even with probation, is to return the offender to the very surroundings that spawned the initial transgression, he is unlikely to be less a menace to society than prior to his conviction. Probation cannot assure a change in that environment; only complete removal can guarantee such a change.

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12. (Cont'd)

> (7) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense."

It is unrealistic to suppose that the experience of conviction will itself so change the offending individual as to enable him to resist the same urges which previously led him astray. Yet, the Code's presumption of non-imprisonment clearly rests on such a perilous supposition. Under the Code the deterrent aspect of punishment would be lost for in effect there would be no punishment. Needless to say, the aim of retribution involved would be entirely nominal.

The parole provisions are a controversial aspect of the proposed Code. Under Section 2C:43-9, every offender must be "released conditionally on parole at or before the expiration of [his] term, ..." Thus, under the Code, parole is no longer "an exceptional act of grace bestowed on good risks and withheld from the bad." Rather, the premise is 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." Commentary, p. 319.

"Parole" under the Code is no longer considered a portion of the original sentence not required to be served in custody. Rather, it is a period of supervised release that is an incident of any prison sentence, but not a part of it. The parole term is statutory, five years for an adult offender and one or two years for a youthful offender depending upon the severity of the underlying crime. Revocation of parole would result in confinement until re-parole or ultimate discharge, which may or may not be within the limits of the

original prison sentence. Recommitment would be for the unexpired parole term or for the remaining portion of the maximum sentence giving credit for parole time, whichever is greater.

The most important and controversial factor of the Code's parole provisions is that the committed offender is immediately eligible for release upon confinement:

> "N.J.S. 30:4-123.10. PAROLE ELIGIBILITY; CONSIDERATIONS.
>
> a. Every person confined in a state penal or correctional institution shall be eligible for release on parole immediately upon confinement, except a person sentenced to life imprisonment who shall be so eligible after having been confined for fifteen years.
>
> b. The board shall consider the desirablility of parole of each inmate as soon as practicable after his confinement in a state institution, but in no case later than six months after his confinement, except in the case of a sentence of life imprisonment in which case he shall be considered at least sixty days prior to his first eligibility. Following such consideration, the board shall issue a formal order granting or denying parole. If parole is denied, the board shall state in its order the reasons therefor and the approximate date of next consideration. The board need not state any reasons for denial if to do so would impair a course of rehabilitative treatment of the inmate. The board shall reconsider its decision at least once every year thereafter until parole is granted.
>
> c. This Section shall apply to all persons now incarcerated in state penal and correctional institutions. The Board may, however, delay for a reasonable time consideration required

> by Subsection b of present inmates whose eligibility has been accelerated by subsection a. The Board shall promulgate procedures to implement this Subsection and shall notify affected inmates of their new parole consideration hearing dates."

While this broad ranging proposal is regarded as basically sound, it is urged that it be accompanied by a comprehensive study of the entire parole program. The drafters of the Code thought this study beyond their mandate. Irrespective of where the responsibility lies, it is necessary that a comprehensive study of the parole system be initiated. Too much lies in the balance to leave the program to chance.

It is obvious that immediate release on parole in some cases is inappropriate. The danger in the Code's proposal lies in the lack of standards, the absence of a record, the failure of notice to the prosecutor and the unlimited discretion reposed in the State parole board. Without some procedural safeguards and adequate standards, the same deficiencies arise with immediate parole as with the Code's "presumption of non-imprisonment."

Some general observations as to the feasibility of a flexible parole system are in order. Ideally, once the four desired objects of the criminal law have been realized, the offender should be released. This event does not occur automatically after the offender has served one-third of his maximum sentence. N.J.S.A.30:4-123.10-123.12. Nor are the objects of the criminal law realized in many instances immediately after sentencing. Parole eligibility is clearly a function of the widest ranging variable, i.e., the human element.

Any parole program, in order to be effective, requires responsiveness to the individual offender's situation considered in light of the objects of the criminal law.

A comprehensive study, and the promulgation of detailed guidelines would be required before the proposed parole system could reasonably hope to achieve equality in sentencing or be equipped to determine which offenders have achieved rehabilitation, warranting immediate release before completion of the currently required one-third of their maximum term.[13] Certainly, a full-time parole board is a necessity. Apart from having the express authority to supervise prison programs and prison records as well as to require physical or mental examinations, the Board requires guidelines within which it may function. These guidelines, because of the required detail, might best be promulgated through administrative regulation by the Parole Board itself. Included in these regulations should be a notice requirement mandating that the Board detail its findings and conclusions to the prosecutor in the event the Board reaches a favorable determination with respect to a particular offender. The prosecutor should then be afforded the opportunity to appear before the Board to oppose its recommendation. The State should also have the right of review from an adverse decision.

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13. There has been some suggestion by the Prosecutors' Association and other authorities that a smaller fraction of the maximum sentence, such as one tenth of the sentence, be served in custody before an offender is eligible for parole. The object of this alternative is to insure that even the best risks serve at least a portion of their prison sentence, thereby increasing the deterrent and retributive objects of the criminal law.

One additional factor, that of the elimination of minimum sentences, bears mention before embarking upon a critique of the remainder of the Code's sentencing provisions. Custodial sentences under the Code excluding incarceration under the youthful offender program, would be for a term of years, definite in duration. The "minimum-maximum," now requisite for a State Prison sentence under N.J.S.A.2A:164-17, would be eliminated.

Practically speaking, minimum sentences serve little purpose in today's sentencing structure. It is important only in terms of parole. For example, parole eligibility for a first offender currently begins after expiration of the minimum term or one-third of the maximum term, whichever comes first. N.J.S.A.30:4-123.10-123.12. The eligibility "fraction" of the maximum charges depending upon the criminal history of the offender.

The proposed provisions of the Code entirely change the standards of eligibility for parole. Therefore, the "minimum" sentence would not be meaningful. Moreover, in today's practice as a practical matter unless the minimum sentence was substantially less than one-third of the maximum sentence, the minimum term would be meaningless because of good behavior and work time credits. More often than not, the minimum sentences now imposed approach or exceed one-third the maximum term.

Certain specific sections which relate to sentencing must also be examined. The "taking into account" provision, allowing a

defendant to admit to other offenses in open court so that these offenses can be taken into account at sentencing, requires revision. Presently, these sections (Sections 2C:44-4d and 2C:44-3d(2)) require only the permission of the court. In the event the defendant is permitted to "admit" to other crimes, any future prosecution for these crimes admitted is forever foreclosed. These sections also should require the consent of the prosecutor upon reasonable notice within whose jurisdiction the prosecution would normally lie. This amendment is necessary so as to preclude forum shopping and to permit the prosecutor to control his cases. As amended, this section will provide a convenient means of eliminating cases consistent with the objects of the criminal law. Of course, defendant's incentive to admit other crimes in open court is to effectuate the application of the Code's liberal concurrent sentence doctrine. The balance struck should help reduce the criminal calendar backlog.

One of the most controversial sections of the Code is that provision which permits the sentencing court to modify a judgment, even one determined by a jury, to a lesser included offense and to impose sentence accordingly. Section 2C:43-11 provides:

> "If, when a person has been convicted of an offense, the Court, having regard to the nature and circumstances of the offense and to the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment for a lesser included offense and impose sentence accordingly."

Obviously, giving a court the power to find a lesser offense, notwithstanding the jury's finding of greater culpability, invades the jury's province as the trier of fact. There appears to be no justification for subjecting the views of the traditional fact finding body to review by the trial court irrespective of its expertise as compared to that of the jury in trying the facts. "[W]hether one views the jury as composed of twelve men of average intelligence or of twelve men of average ignorance,"[14] the system should remain inviolate, or it should be abandoned. Confidence and finality must lie with someone; traditionally, the jury has proven its worth as a pillar of American justice. Moreover, there is no evidence that members of the judiciary, or for that matter attorneys in general, can better sift through conflicting evidence to arrive at the truth in any given case.

It is submitted that the section described above is unnecessary, especially in light of the broad discretion vested in the parole board. A principal purpose of the Board is to adjust disparities in sentencing to the end that sentences be uniform throughout the state. Moreover, as to youthful offenders, a reformatory sentence is a viable alternative to a prison term.[15]

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14. Note, 35 Brooklyn L. Rev. 139, 140 (1968).

15. Section 2C:43-5 prohibits the sentencing of a youthful offender to the reformatory where conviction is had for a first degree crime. It is recommended that this distinction in the statute be eliminated so as to afford a sentencing court the discretionary right to sentence any youthful offender to the reformatory programs.

Under the forfeiture of public office section (2C:51-2), the loss of public office does not occur until after sentencing. Since the forfeiture is due to a breach of the public trust, it would appear that a public official's right to hold office should be suspended upon a verdict of guilty or upon the entry of a guilty plea, and not when formal sentence is imposed. It would also be of assistance if the terms, e.g., moral turpitude and dishonesty, were defined within the Code itself.

In general, the Code's approach to parole and sentencing are regarded as meritorious. In particular, the requirement that every incarcerated offender be subjected to a term of parole as a transitional aid is an excellent one. The rationalizing of sentences, reduction of the sentencing court's discretion and the plea bargaining advantages afforded by the Code are particularly significant. Enactment of these provisions in conjunction with a review of current correctional practice and parole procedures is recommended, subject only to the few caveats set forth above.

SUBSTANTIVE OFFENSES

INTRODUCTION

The comments which follow attempt to explain various offenses defined in the Code. Criticisms are interjected in order to indicate those aspects with which we differ, not to discredit the commendable performance of the Commission. Our analysis will not, by design, cover each and every new provision. For a thorough grasp of its content, there is no substitution for reading both the Code and the Commentary.

A. OFFENSES AGAINST THE PERSON

The drafters have altered both the structure and substance of our present homicide laws. It is instructive to first review the present status of the law.

Presently, homicide is either murder (first and second degree) or manslaughter. Murder is defined as an unlawful homicide accompanied by "malice." State v. Brown, 22 N.J. 405 (1950). Under N.J.S.A.2A:113-2, first degree murder involves four situations:

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

of his duties, or a person assisting such officer.

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

Second degree murder is a rather amorphous concept, consisting of those murders which are not of the first degree. N.J.S.A.2A:113-2. The punishment for that crime is imprisonment for no greater than 30 years. N.J.S.A.2A:113-4.

Manslaughter, which is not presently defined by statute, has been characterized as "the unlawful killing of another without malice, either express or implied, which may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act." State v. Brown, supra, at 411. Manslaughter is punishable by a fine not to exceed $1,000, or by imprisonment for not more than ten years, or both. N.J.S.A.2A:113-5.

The Code divides criminal homicide into three separate offenses: murder, manslaughter and negligent homicide. Sections 2C:11-3, 11-4, 11-5.

Murder is a crime of the first degree. A homicide is murder under the Code if it is committed "purposely," "knowingly," or "recklessly under circumstances manifesting extreme indifference to the value of human life." Also included are those homicides which occur during the commission of certain enumerated felonies. The drafters have replaced the

terms of art traditionally used by our courts in describing the requisite mental condition of the defendant. First degree murder has normally been defined in terms of being "willful, deliberate and premediated." State v. Washington, 60 N.J. 170 (1972). Although the Code implies that the words "purpose" and "knowledge" were intended to comply with the general rule that first degree murders must be "willful, deliberated and premeditated," it is apparent that those words cannot simply be substituted for the aforementioned traditional language. The description of one's mental state is not an easy task. It would seem imprudent to replace terms of art which have been carefully refined by the judiciary with new language which, despite the drafters' intentions, appears facially inadequate, requiring unnecessary judicial labor to define its meaning. The same rationale applies to the term "malice" which has also been eliminated from the Code.

The Code restricts the traditional New Jersey concept of felony-murder. Although it retains provisions similar to our present statutory law, the offense is modified by an affirmative defense allowing the defendant to prove that he did not cause the death, was not armed with a deadly weapon, did not have reasonable ground to believe that any other participant was so armed and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious injury.

The availability of an affirmative defense in a felony-murder situation is inconsistent with the enduring

principle that an aider and abettor is guilty as a principal for the crime committed. Furthermore, the restrictive aspect of the felony-murder provision contravenes the broadening trend set by our courts. The felony-murder doctrine, which arose from the common law, has never been weighed in terms of a defendant's forseeability of a homicidal risk. Its purpose was to deter those who entertained the intention of committing dangerous felonies. Thus, it has been used strictly against those who create such risk. We recommend the codification of traditional principles in this regard.

As noted above, criminal homicide constitutes murder under the Code if it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The Code also provides that criminal homicide constitutes manslaughter when it "is committed recklessly." Section 2C:11-4. The drafters imply that there is a hazy line between the reckless act which constitutes murder and that which constitutes manslaughter. Commentary, p. 156. It is the view here that the line is so hazy that the drafters' equation of reckless homicide with purposeful and intentional homicide should not be adopted. The former conduct would only be second degree murder under our present law.[16] We cannot agree that the less culpable offense should now be elevated to a crime of the first degree. Consequently, we recommend that such conduct be punished as manslaughter.

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16. State v. Gardner, 51 N.J. 444, 458-459 (1968).

At this juncture it is appropriate to comment upon the availability of the death penalty in the Code. At the time of this writing the viability of the death penalty in New Jersey is in serious doubt. Currently there is no death provision available as a penalty for murder. See State v. Funicello, 60 N.J. 60 (1972), where our Supreme Court, interpreting the language of a remand from the United States Supreme Court, voided the death penalty in our murder statute because of the statutory framework within which it existed. The Funicello case does not nullify the validity of the death penalty per se. However, the United States Supreme Court has recently questioned the application of the death penalty throughout our country in terms of the Eighth Amendment's prohibition against cruel and unusual punishment. Furman v. Georgia, __ U.S. ___, 92 S.Ct. 2726 (1972). The Court indicated that the death penalty could be imposed only in very limited circumstances. Furthermore, the Governor of New Jersey has appointed a commission to study the efficacy of the death penalty as a deterrent in light of its gravity. The commission has completed its hearings and its report is pending. Further comment on the death penalty is withheld until the issuance of that report and any subsequent action taken by the Governor.

As noted above, manslaughter, not now defined by statute, has been codified by the drafters. We must again be critical of the language employed by the drafters in distinguishing manslaughter from negligent homicide. What is the

difference between a homicide which is committed "recklessly" and one that is committed "negligently under circumstances manifesting extreme indifference to the value of human life"? The comments indicate the difference is that negligence is distinguished by a conscious disregard for the homicidal risk created by a defendant's conduct. Commentary, p. 165. We see no reason why the traditional offenses of voluntary manslaughter and involuntary manslaughter could not be substituted for the Code's "manslaughter" and "negligent homicide." The former concepts have already been crystalized by our courts and lend themselves to the categories created by the Code. See State v. Bonano, 59 N.J. 515, 523 (1972).

The Code makes it manslaughter to commit a homicide under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. Under present law voluntary manslaughter is a killing which occurs during the heat of passion resulting from reasonable provocation. Thus, unlike present law, the Code does not require that the victim's acts form the provocation for the homicide. Moreover, the provision takes into account the subjective reasonableness of the defendant, rather than the objective reasonableness of the ordinary man. Thus, it must be considered whether the defendant suffers from any mental or emotional defects which would cause him specifically to react in a different way from that of another person. We find the Code's formulation to be reasonable in theory, but potentially difficult in practice. It

is forseeable that evidence concerning a defendant's mental or emotional condition at the time of his commission of the homicide could consume a great deal of time and be difficult to advance. Perhaps this suggests that there ought to be a more definite standard as to when such a mental distrubance is an ameliorating factor.

The drafters are to be commended for their assimilation and simplification of the presently disjointed statutory offenses constituting assault, battery, aggravated assault, mayhem, and the like. Section 2C:12-1. The various statutes supplanted by the Code are: N.J.S.A.2A:148-6, 90-2, 90-1, 90-3, 90-4, 125-1, 99-1, 101-1, 129-1, 170-26, 170-27. Two subsections are divided into simple assault and aggravated assault. The offenses range from crimes of the first degree to crimes of the fourth degree.

One substantial change is noteworthy. Under our present law, the slightest touching or offensive contact constitutes a battery. State v. Maier, 13 N.J. 325 (1953). The Commission finds this rule unworthy noting that "mere offensive touching is not sufficiently serious to be made criminal, except in the case of sexual assaults..." Commentary, p. 175.

The Code has further streamlined present law by excising the offense of assault with the intent to commit another serious crime, e.g., murder or rape. N.J.S.A.2A:148-6, 90-2, 90-3, 125-1. Such offenses are treated as attempts

to commit the substantive crime and for the most part are graded as crimes of the second degree. Section 2C:5-4a.

It ought to be noted that the Code reduces the punishment for assaulting certain high government officials, with the intent to kill and "show hostility to government," from death or life imprisonment to a maximum ten years imprisonment as a crime of the first degree. Also, the specific reference to high government officials is eliminated and the offense is claimed to be covered by the omnibus assault provisions.

Section 2C:12-2 of the Code creates a new offense entitled "recklessly endangering." A potpourri of various misdemeanors and disorderly persons violations are condensed into one disorderly persons offense proscribing one from recklessly engaging in conduct which places or may place another person in danger of death or serious bodily injury. Examples of conduct proscribed by the new section would be triggering a false alarm, malicious tampering with railroads, a diseased person having sexual intercourse, and interfering with lifesaving. [17]

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

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17. See, e.g., N.J.S.A.2A:123-1, 128-1, 128-3, 128-4, 132-1, 137-1, 170-6, 170-9, 170-13, 170-16, 170-60, 170-25.2, 170-54.2, 170-69.4, and 170-69.

confined to actions calculated to cause serious alarm for one's personal safety as may arise from letters or anonymous telephone calls threatening death, kidnapping or the like. It is not meant to treat such offenses as extortion and bribery which are dealt with elsewhere in the Code.

We think that the drafters' treatment of kidnapping must be applauded. Under present New Jersey law, kidnapping is a high misdemeanor which subjects the offender to the possibility of a death penalty and, in any event, the imposition of a minimum thirty year prison sentence. N.J.S.A.2A:118-1. The kidnapping provision has been rewritten to prevent the imposition of the attendant severe penalty in a situation where such a punishment is not warranted. The language in our present statute is susceptible to a construction that only a slight removal for a short period of time is necessary. For example, it has been held by a trial court that forcing a person to lead a defendant's way out of a bank during a robbery constituted kidnapping. State v. Kress, 105 N.J. Super. 514, 522 (L. Div. 1969). However, our Supreme Court has recognized that the circumstances must be more substantial to warrant a kidnapping charge. See State v. Hampton, 61 N.J. 250, 275 (1972).

Under the Code, kidnapping occurs when one is removed from his place of "residence or business", or a substantial distance from the vicinity where he is found, or if he is unlawfully confined for a substantial period of time for certain specified purposes. There is no requirement for removal for a "substantial distance" or for a "substantial period" of time where the victim

is being held for ransom, reward or as a hostage.

We support the Commission's attempt to make the kidnapping penalties more commensurate with the offense committed. However, we note that the provision does have some ambiguous language. For example, a "hostage" under subsection a could also be a victim under subsection b.[18] Since the standards for finding kidnapping are less strict under subsection a, it would seem that either a further definition of "hostage" is in order or else subsection a should be strictly limited to holding for ransom or reward.

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18. The above mentioned subsections read as follows:

> "a. Holding for Ransom, Reward or as a Hostage. A person is guilty of kidnapping if he unlawfully removes another from the place where he is found or if he unlawfully confines another with he purpose of holding that person for ransom or reward or as a hostage.
>
> b. Holding for Other Purposes. A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes:
>
> (1) to facilitate commission of any crime or flight thereafter;
>
> (2) to inflict bodily injury on or to terrorize the victim or another; or
>
> (3) to interfere with the performance of any governmental or political function."

Kidnapping is a crime of the first degree under the Code unless the defendant voluntarily released the victim alive and in a safe place prior to his apprehension. We agree with the drafters' rationale 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."

The Code recommends the elimination of the death penalty as a punishment for kidnapping. As noted above, the future of the death penalty in New Jersey is in serious doubt and we reserve further comment.

In conjunction with prevalent progressive thinking, the Code has eliminated many archaic laws regulating the sexual conduct of consenting adults. Thus, fornication and adultery are no longer criminally sanctioned. We agree that consensual sexual conduct amongst adults constitutes a zone of privacy beyond which the government need not reach. We take issue, however, with the Code's distinction between aggravated rape, a crime of either the first or second degree, and rape, a crime of the third degree. Rape is aggravated only if,

> "(a) In the course thereof the actor inflicts serious bodily injury upon anyone, or (b) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties."

Under subsection b the Code finds it ameliorating if a man compels a woman to "submit by any threat that would prevent resistance by a woman of ordinary resolution," or if he "knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct." We perceive no distinction between the seriousness of the offenses listed in subsection a and subsection b; therefore, we would recommend that all these offenses be treated similarly. Rape is a grievous crime, no matter what manner of coercion or advantage is used, and all rape should be treated as a crime of the second or first degree.

We further note that similar distinctions are made in the Code's treatment of sodomy. The drafters rationalize that the more serious category involves those offenses which potentially encompass a graver threat to the physical well-being of the victim. Our sentiments are that more weight must be given to the innate atrocity of these offenses.

As with our present law, the Code often refers to the age of the victim in defining the degree of the sex crime. Under the Code, the age of consent is 16 years. Upon the rationale that an adolescent male may be as much a victim of immaturity as an adolescent female, the Code provides that there shall be a substantial age differentiation before a male can be prosecuted for corruption of minors or seduction. Thus, although the age of consent is 16, sexual intercourse or other deviate sexual conduct with a girl under 16 years old is punishable only if the male is four years older than the female.

As the drafters note, "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." Commentary, p. 198.

In the aggravated rape, aggravated sodomy, or sexual assault offenses, it is per se criminal if the female is under the age of 12 years. It is no defense to such a crime that the defendant reasonably believed the child to be older than 12. However, where the critical age is over 12 years old, e.g., 16 or 21, it is a defense for the actor to prove by a preponderance of evidence that he reasonably believed the child to be above the critical age.

The last provision is contrary to present New Jersey law which rejects as a defense the good faith belief of a defendant that the victim is over the critical age. We recommend the rejection of the mistake of age defense. Protection of minors is a major concern of the criminal law. It is the responsibility of adults to indulge in sexual activity with those of legal age. The protection of minors requires that there be a strict policy in enforcing sex offenses.

Finally, we reject the Code's requirement that a complainant's testimony must be corroborated before a defendant can be convicted of any sexual offense. Section 2C:14-6d. This rule runs contrary to the majority rule in the United States, as well as the rule in New Jersey. State v. Garcia, 83 N.J. Super. 345, 349-350 (App. Div. 1964). The requirement for corroboration not only makes convictions more difficilt,

it is also eminently unfair. If a woman is the victim of a sexual offense committed out of the presence of any eyewitness it would seem that she would have to be physically assaulted beyond the sexual offense in order for a conviction to be upheld. The Code's intention is to prevent those instances in which women, either out of frustration or anger, cry "rape." The determination as to whether a complainant is lying has been traditionally the province of the jury. We see no pressing reason for change.

B. OFFENSES AGAINST PROPERTY

The drafters have performed a herculean task in consolidating a host of divergent offenses under various sections. The following discussion will attempt to highlight what is significant.

The Code makes "aggravated arson" a crime of the second degree and "arson" a crime of the third degree. The provisions are set out in full below.[19] We can see no rational

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19. "a. Aggravated Arson. A person is guilty of aggravated arson, a crime of the second degree, if he starts a fire or causes an explosion with the purpose of:

(1) destroying a building or occupied structure of another; or

(2) destroying or damaging any property, whether his own or that of another, to collect insurance for such loss under circumstances which recklessly endager any building or occupied structure of another or place any other person in danger of death or bodily injury. (contd.)

basis for the distinction made by the commission between those who commit an act of arson for purposes of collecting insurance and those who do not. The elements of danger and the recklessness of conduct for both offenses are the same. We are not satisfied by the reasons for gradation set forth in the Commentary, p.204. We would recommend that all arson be treated as a crime of the second degree.

The Code's treatment of burglary and criminal trespass is marked by a return to the common law concept of those crimes resulting in a construction of their applicability. Under the common law, burglary was defined as breaking and entering a dwelling house at night with the specific intent to commit a felony therein. See State v. Butler, 27 N.J. 560 (1958). The enactment of N.J.S.A.2A:94-1, 2A:94-2, and 170-3 has greatly expanded the applicability of burglary to an entrance in day as well as night, with the intent to commit many more crimes. As noted by the Commentary: "...this overexpansion of burglary legislation is probably explicable as an effort to compensate for defects of traditional attempt law." Commentary, p.209.

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19 (cont'd)

> b. Arson. A person is guilty of arson, a crime of the third degree, if he purposely starts a fire or causes an explosion, on his own property or another's, and thereby purposely, knowingly, or recklessly places:
>
> (1) another person in danger of death or bodily injury; or
> (2) a building or occupied structure of another in danger of damage or destruction."

Burglarly now carries severe penalties, probably due to the fact that the offense was originally confined to violent nighttime assaults on a dwelling. Commentary, p. 209.

In attempting to restrict the applicability of the burglary provision, the drafters have narrowed the definition of the premises protected in the statutory proscription. Compare Section 2C:18-1 with N.J.S.A.2A:94-1. We think the Code goes too far, however, by disallowing the State to prosecute an offender for both burglary and the substantive offense intended by the defendant. See Section 2C:18-2(c). This provision was "designed to prevent the abusive practice of imposing consecutive sentences for burglary and for the actual theft." Commentary, p. 211. It is our view that multiple prosecutions may be warranted where separate public wrongs are involved. We therefore reject the drafters' rationale.

We agree with the Code's inclusion of a "surreptitious remaining" as an unprivileged entry within the definition of burglary. Since there is no real difference between a burglarious entry and an unprivileged secret remaining, the equation drawn by the drafters is reasonable.

Another restrictive aspect of the Code's definition of burglary is the affirmative defenses available. It is not a burglary, for example, to enter an unoccupied building, or one open to the public or one wherein the actor is present by privilege or license. "The gist of the burglary offenses here

envisioned is unlawful intrusion in occupied structures by dangerous characters." Commentary, p. 211.

In accord with the above philosophy, the gradation of burglary is commensurate to the danger attending it. It is unrelated to the gravity of the ultimate offense for which the burglary was committed. See Section 2C:18-2b.

Robbery is presently defined as the forcible taking of money, goods or chattels from the person of another by violence or by putting the victim in fear. N.J.S.A.2A:141-1. According to present law, the fear must induce a "reasonable apprehension of bodily injury." State v. Cottone, 52 N.J. Super. 36 (App. Div. 1958). Under the Code, robbery, while similar, assumes a subtle distinction by the use of the term "serious bodily injury." The Commentary ignores the change. The additional element adds nothing constructive to present law and we therefore recommend its excision.

The next area of discussion relates to the codification of theft offenses. The conjunction of variegated offenses runs the gamut, from disorderly persons offenses to crimes of the second degree.

Indictable offenses require that the theft exceed the value of $50. We feel that figure to be too low. In light of the burgeoning congestion of the county court calendars, the need for speedy disposition of relatively

minor offenses is self-evident. It is recommended that thefts returning value less than $200 be summarily disposed of in the municipal courts.

Most thefts are crimes of the third and fourth degrees. Theft by extortion is a crime of the second degree due to its organized crime overtones. Commentary, pp. 220-221. Specific offenses are made crimes of the third degree for various reasons; e.g., the amount of the theft is over $500; the property stolen is a firearm, an automobile, an airplane, or illegal drugs; the theft is from the person of the victim. See Section 2C:20-2B(2) for other specific thefts of the third degree. All other thefts are crimes of the fourth degree unless the value of the subject property is less than $50. Section 2C:20-2b(3).

As with other provisions of the Code, the chapter dealing with theft contains language difficulties. Section 2C:20-4, replacing for the most part, N.J.S.A.2A:111, requires that the actor "purposely" obtain property of another by deception. Under our present statute the thief must act "knowingly or designedly, with intent to cheat or defraud..." The Commentary does not indicate that the Code purports to change the requisite mens rea. We therefore find the alteration in language unnecessary and potentially troublesome in terms of judicial construction.

Some comment is due the new aspects of theft created by the Code. "Theft of Service," Section 2C:20-8, proscribes the retention of compensatory services by threat, force or deception to avoid payment for the service. Included services are specifically delineated by the statute. These offenses would now be prosecuted under N.J.S.A.2A:111-1, the language of which is much less specific. The new provision should therefore be retained.

Section 2C:20-6 provides that one who possesses property that is "lost, mislaid or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it." An affirmative duty is placed upon the possessor to take "reasonable measures" to return the property. "Reasonable measures" are gauged according to the difficulty in returning the items, the nature and value of the property and the reasonable expectation of compensation to the finder for expense and inconvenience borne by him. Commentary, p. 31.

The Code's treatment of receiving stolen property, Section 2C:20-7, is less restrictive in terms of mens rea and presumption of knowledge than the present statute, N.J.S.A.2A:139-1. Under the present law a receiver must "know" that the property is stolen. The Code provides that he must know that the goods have been "stolen" or "probably been stolen." The present statute creates a presumption that the defendant knows the goods were stolen if he possesses those goods within

one year of their theft. The Code expands the presumption where the defendant:

> (1) is found in possession or control of property stolen from two or more persons on separate occasions;
>
> (2) has received stolen property in another transaction within the year preceding the transaction charged;
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> (3) acquires the property for a consideration which he knows is far below its reasonable value; or
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> (4) being a person in the business of buying or selling property of the sort received, acquires the property without having ascertained by reasonable inquiry that the person from whom he obtained it had a legal right to possess and dispose of it.

We feel this provision is extremely beneficial from a prosecutorial standpoint.

The Code chapter on "Forgery and Fraudulent Practices" complies substantially with present statutory and case law. Some nuances will be discussed below.

Under Section 2C:21-1 the crime of forgery is broadened in the sense that the definition of the falsified "writing" is enlarged to include "any writing." Legal or evidentiary documents, as well as doctors' prescriptions, trademarks, credit cards, diplomas, private letters, records and diaries are included. The gist of the offense is not the defrauding of the person relying on the forgery, but the potential damage to the reputation of the purported author or the misrepresentation of his opinions and interests. Commentary, p. 238.

Section 2C:21-2, "Criminal Simulation," makes it a crime of the fourth degree to fraudulently make or alter

an object to give it the appearance of value that it does not have. This broadens present statutory law and is obviously intended to punish among other things, art frauds.

Under Section 2C:21-5, it is a disorderly persons offense to knowingly and fraudulently pass a "bad" check. No restriction on the amount of the instrument is included. Under present law, if the check exceeds $200, it is a misdemeanor, punishable by one year imprisonment. Otherwise, it is a disorderly persons offense. See N.J.S.A.2A:111-15 through 17; N.J.S.A.2A:170-50.4 through 50.6.

The rationale for the Code's lighter treatment of the offense seems to be that if, in fact, money is obtained by the passer, he may be prosecuted for the more serious crime of theft by deception. Commentary, p. 242. We think it reasonable to punish according to the amount of the check. We therefore recommend that if the check exceeds $200, the offense be designated a crime of the fourth degree. Cf. State v. Covington, 59 N.J. 536 (1971). (It must be noted here that the Commentary erroneously states that the offense is a crime of the fourth degree. Commentary, p. 242. This confusion must, of course, be resolved.)

Presently, a certificate of protest issued pursuant to a bad check constitutes presumptive evidence of the passer's knowledge of insufficient funds. State v. Pollack, 43 N.J. 34 (1964). In those cases where payment is refused for lack of funds, the Code restricts the presumption, giving the passer ten days to honor the checks before the presumption

exists. The presumption also exists if the issuer had no account with the drawee when the check or order was issued. Notably, the Code makes the presumption applicable to thefts committed by means of a bad check.

Section 2C:21-7 proscribes certain specified deceptive business practices. The Code is much more precise than present law as to what practices are prohibited. [20] In a broad attack on business frauds, the drafters have made it unnecessary to prove that the defendant actually obtained property by his deception. The rationale is that it should not be necessary to call angry consumers to testify against the defendant. Most of the forbidden practices may be uncovered by inspectors. It would be inefficient to compel the public to await consummated cheating before holding the defendant responsible. Commentary, p. 244. The Code incriminates fraudulent practices alone and places less emphasis upon the loss accruing to the consumer.

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

> "... The professional generally has reason and opportunity to know whether his weights are false, his goods adulterated or mislabeled, his financial statements and public advertising accurate. And it is more important

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

> that he be put to proof that he was unaware, since falsity of his measure is likely to victimize numerous customers." Commentary, p. 244.

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

Section 2C:21-15 proscribes the knowing misapplication of entrusted property or government property by a fiduciary or public officer. [21] It is intended to cover those situations where the fiduciary gains no personal benefit from his actions. This ought to be explicitly stated in the provision to distinguish this section from the theft provisions. Compare this provision with provisions in Chapter 30 of the Code, relating to misconduct in office, which are discussed below.

C. OFFENSES AGAINST THE FAMILY, CHILDREN AND INCOMPETENTS

The Commission has generally sought to protect familial institutions by broadening the reach of criminal provisions in some sections and by reducing the degree of the offenses, thus decreasing the corresponding penalites for minor breaches of the peace. Technical anachronisms based upon common law

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21. Present statutes covered by the new provisions are N.J.S.A. 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 monies or incurring obligations in excess of appropriations or amount limited by law.

concepts of marriage and the family have been eliminated.

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

> (1) the actor believes that the prior spouse is dead;
> (2) the actor and the prior spouse have been living apart for five consecutive years throughout which the prior spouse was not known by the actor to be alive;
> (3) a court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the actor does not know the judgment to be invalid; or
> (4) the actor reasonably believes that he is legally eligible to remarry.

The above exceptions are in derogation of prevailing case law in this State. See State v. DeMeo, 20 N.J. 42 (1955). At present, strict criminal liability is imposed and ignorance is no excuse. The offense of bigamy was initially intended to preserve the legal sanctity of marriage. Values have changed to some extent, however, and it may well be advantageous to society as a whole to encourage remarriage after the death or prolonged absence of a spouse. Thus, the Code proposes beneficial modifications of existing law more in keeping with current thought. These changes are welcome. [22]

The Commission has expanded protection against incestuous conduct. In several cases, our courts had restricted application of the present incest statute to instances of proven sexual intercourse. See State v. Masnik, 125 N.J.L. 34 (E & A1940), affirming 123 N.J.L. 355 (S.Ct.1939). "The gist of the offense of incest" was said to be "sexual intercourse." State v. Columbus, 9 N.J.Misc. 512 (S.Ct.1931).

As noted in the Commentary, under the proposed Code, marriage will support a conviction of incest. Marriage generally connotes the practice of sexual intercourse.

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

Moreover, "such marriages should be deterred in any event." Commentary, p. 258.

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

The Commission has deemed it "inappropriate ... to make any recommendations" as to changes in our present abortion law in light of the special commission which was created by concurrent resolution of the Legislature to study this problem. The Commission has stated, however, that existing statutes "are entirely inadequate to reflect present-day standards." Commentary, p. 259.

Our present statute does not fit the needs of modern day living and is unduly vague (although not in a constitutional sense). The problem has been further confused by a recent decision of a three-judge federal panel which has declared our statute unconstitutionally vague and in derogation of the Ninth Amendment's prohibition against invasion of privacy. [23] In essence, this decision overrules State v. Siciliano, 21 N.J. 249 (1956) which changed the common law rule requiring proof of a "quickened fetus"; i.e., movement. The federal decision holds that a woman

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

has a right of privacy sufficient to permit a decision to have an abortion prior to feeling movement of the fetus. The State has taken steps to appeal the federal court's decision. [24]

There is no question but that the State has an important interest in prohibiting certain types of abortion. Such a power clearly exists to protect the health, safety and morals of its citizens. The Supreme Court of the United States is considering the issue of the constitutionality of state abortion laws in the cases of Roe v. Wade, Docket No. 70-18 and Doe v. Bolton, Docket No. 70-40. Until the aforementioned legal issues are resolved, however, there can be no resolution of the problem.

The Code changes existing law with respect to non-support in several respects. New Jersey has adopted a "variation of the Uniform Desertion and Non-Support Act" which embraces willful desertion by a husband or father (N.J.S.A.2A:100-1) and non-support or desertion where the wife or child is destitute (N.J.S.A.2A:100-2). See State v. Greenberg, 16 N.J. 568 (1964); State v. Monroe, 30 N.J. 160 (1950). The Code provides:

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24. But see Eisenstadt v. Baird, 403 U.S. 322 (1972) (State may not prohibit distribution of contraceptives to unmarried individuals); see also Griswold v. Connecticut, 381 U.S. 479 (1965).

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

The Code "does not follow our law in providing that the crime occurs for either desertion or non-support." Commentary, p. 261. Thus, mere desertion does not suffice.

The Code penalizes only "persistent" non-support. This constitutes an important modification of existing law which only requires "willful" default. According to the Commission, "exemplary punishment is of doubtful efficacy in complex family situations where many forces, psychic, social, and economic may combine to excuse if not justify, the behavior." Commentary, p. 260. This is undoubtedly true, but does not justify modification of our present statutory scheme. The term "persistent" connotes not only willfulness, but also an abject refusal. Such an ambiguous term places a most difficult burden on prosecutorial authorities and should be deleted. The discretion conferred on prosecutors at present obviates the danger of a stringent and unjust application of our statute.

D. OFFENSES AGAINST PUBLIC ADMINISTRATION

The most significant achievement of the Code in the area of offenses against public administration is the reduction in overlapping, redundant provisions, coupled with

a consolidation of the numerous specific statutory provisions now existing into a comprehensive scheme of offenses. The proposals have reduced ambiguity by specifying the common law offenses of bribery, extortion, obstructing justice and misconduct in office in statutory language which enables laymen to know what conduct is criminally punishable. A resulting benefit to the prosecutor obtains since the problems of formulating indictments for common law offenses is eliminated. See State v. La Fera, 35 N.J. 75 (1961); State v. Begyn, 34 N.J. 35 (1961); State v. Winne, 12 N.J. 152 (1953); State v. Weleck, 10 N.J. 355 (1952); State v. De Vita, 6 N.J.Super. 344 (App.Div.1950).

The efforts of the Commission are best demonstrated by the bribery provision. Section 2C:27-2. The bribery section consolidates numerous specific statutes now delimiting the crime (N.J.S.A.2A:93-1 through 2A:93-6, 2A:103-1 and 2A:103-2 and 2A:105-1 and 2A:105-2) as well as the common law offense of bribery (N.J.S.A.2A:85-1). See State v. Begyn, supra; State v. Ellis, 33 N.J.L. 102 (Sup.Ct.1868). In addition to codifying current law, the Code expands the bribery proscription by enlarging the group which may be improperly "bribed;" the definition of public servant, Section 2C:27-1g, would include all public employees and not just "officials" as under current law. The Code further expands the purview of the bribery offense to include attempts to influence, or the influence of activities of even "ministerial" public servants. Section 2C:27-2c. Current law seems

to limit bribery to attempts to influence decision-making or discretionary functions of public servants. These extensions of the crime of bribery are desirable in light of the trust reposing in public employees and the public's virtual dependence on the performance by such officers of their duties.

One expansion of the scope of the crime of bribery may, however, be undesirable. The third paragraph of Section 2C:27-2 eliminates a traditional defense to the crime, to those persons who have been extorted by public officials after the person has complied with the extortionist. The Code justifies the failure to adopt this defense on the ground that such person should report the extortion to the authorities prior to acceding to the demands of the corrupt official. Commentary, p. 265. From the standpoint of improving public administration, it is far more desirable to eliminate recurring misconduct by a corrupt public official than it is to punish one person who succumbs to his extortion. This provision would, in effect, discourage persons who have been extorted by public officials from revealing this corruption. Therefore, it is submitted that the legislative exemption from prosecution now contained in N.J.S.A.2A:93-3 be continued.

Although the Code adequately specifies the offenses of bribery, it has virtually eliminated the gradation of different forms of the offenses now included in the specific

statutes which have been consolidated.[25] While acknowledging the desirability of gradation, the Commission has concluded that "[d]ifficulty in drafting a satisfactory set of legislative grading criteria" persuaded them not to attempt to do so for the offense of bribery. Instead, the drafters chose to rely on the power of the court to reduce the grade of the conviction. Commentary, p. 265-266. This power to reduce the grade of conviction under Section 2C:43-11 has been criticized in this report. Furthermore, such a practice might well create ambiguity as to what are lesser included offenses. The resulting scheme,failing to provide for a disorderly persons or petty disorderly persons offense in the bribery section, is contrary to the expressed purpose of the Code, that is, to achieve gradations to facilitate plea bargaining. The problem is further compounded by the failure to include all types of bribery within the chapter designated as bribery and corrupt influence. See Section 2C:28-5.

The Code formulates the offense of threats and other improper influence in official and political matters from the currently disjointed and incomprehensible legislation now controlling. Section 2C:27-3. Current regulation is achieved through the embracery and extortion statutes (N.J.S.A.2A:103-1 and N.J.S.A.2A:105-3 through 5), and the common law crimes of obstructing justice and extortion

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25. All bribery is made a crime of the third degree which substantially increases the punishment for many of the types of bribery in our current statutes. These increases are believed appropriate to further the objects of the criminal law, specifically to prevent crimes and to protect society.

(N.J.S.A.2A:85-1). See State v. Cassatly, 93 N.J.Super. 111 (App.Div.1966), and State v. Morrissey, 11 N.J.Super. 298 (App.Div.1951). In replacing the foregoing provisions, the Code has accepted the modern approach of extending protection against improper influence to administrative as well as judicial proceedings. The comprehensive offenses as defined by the Code in Section 2C:27-3a are as follows:

> "a. Offenses defined. A person commits an offense if he:
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> (1) threatens unlawful harm to any person with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter;
>
> (2) threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding;
>
> (3) threatens harm to any public servant or party official with purpose to influence him to violate his own legal duty; or
>
> (4) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with purpose to influence the outcome on the basis of considerations other than those authorized by law.
>
> It is no defense to prosecution under this Section that

> a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office or lacked jurisdiction, or for any other reason."

This codification reflects a legislative recognition of the undesirability of the exertion of improper influence short of bribery on any public officer. This comprehensive provision successfully discriminates between legitimate political opposition and prohibited threats, and therefore should prove an invaluable tool to aid in preserving the dignity of the democratic system.

The crime of soliciting by a public official for past behavior, currently punishable only as a common law offense of misconduct in office under N.J.S.A.2A:85-1, has been codified in Section 2C:27-4. See generally State v. Begyn, supra; State v. Lally, 80 N.J.Super. 502 (App.Div. 1963). This Section renders a public official criminally liable if he extorts or accepts compensation or reward after performing an official duty or exercising decision making power. This codification comports with the objects of the Commission as well as the goals of the criminal law.

In providing a comprehensive regulation of offenses against public administration, the Code establishes the currently undelineated offense of retaliation for past official action. Section 2C:27-5. Such conduct may have been included within the common law offense of obstructing justice, and would of course have been punishable if the "unlawful act" was itself an offense, for example as

an assault. However, to the extent that the provision specifically codifies the proscription and is in furtherance of maintaining the integrity of the judicial and decision-making process within government, it is recognized as beneficial and desirable.

The provision prohibiting gifts to public officials, Section 2C:27-6, is similar to the varied offenses of bribery. The only substantial difference is that the benefit in bribery must be directed to achieving a favorable determination or action on a pending decision or administerial duty. This Section has no such requirement. Further, this provision supplements the present conflict of interest law, N.J.S.A. 52:13D-1 et seq., by regulating and making criminal certain conduct by public officials pertaining to receiving benefits not lawfully due them. The Code effectively consolidates, in one provision, conduct which is currently fragmented in various statutory provisions. See Commentary, p. 268. Unfortunately, ambiguous exceptions to prosecution within the statute itself reduce the potential effectiveness of the provision and create the necessity of judicial construction. Section 2C:27-6e, enumerating those exceptions, is as follows:

> "e. Exceptions. This Section shall not apply to:
>
> (1) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled, or

> (2) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or
>
> (3) trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality."

It is recommended that subparagraphs (2) and (3) quoted above, relating to "benefits conferred on account of kinship or other personal, professional, or business relationships" and "trivial benefits ... involving no substantial risk of undermining official impartiality," be deleted. The ambiguity inhering in these subsections substantially undermines the effectiveness of this provision. Although the Commentary recognizes "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," they fail to include such conduct within the purview of the offenses against public administration. It is submitted that, to the extent that certain conduct deemed undesirable is not included within the criminal sanctions, the Commission has failed in its expressed obligation to codify the law. Moreover, this deficiency points to the need for additional gradation for the offenses of bribery, since many of the "lesser" offenses now included within the exceptions should fall into the disorderly persons or

petty disorderly persons categories.

The provision in the Code concerning trading in special influence, Section 2C:27-8b, seemingly includes within its proscription lobbyists, presently regarded as an acceptable method of influencing political decisions. As a consequence, those persons or groups hiring lobbyists would be punishable under Section 2C:27-8c. Although the proscription is limited in terms to exploitation of "special influence," "in order not to prejudice the legitimate activities of lawyers and other professional representatives," the drafters have failed to narrowly define the limits of the criminal conduct prohibited in this Section. See Commentary, p. 269.

The Code has established a new offense for failure to report a bribe. Section 2C:27-9. This section is commendable as it places on public officials the duty to report instances where persons have sought to compromise public administration. This expansion furthers the salutory goals of preventing crime and protecting soceity. It is believed that a public officer, in whom is reposed a public trust, should willingly accept this responsibility.

The proposed provisions dealing with perjury and falsification in official matters establishes a scheme of offenses which are graded according to the elements of the offense. Chapter 28 is exemplary of the legislative desire to achieve a logical and concise codification of the law. The sections within Chapter 28 include perjury,

false swearing, unsworn falsification, false reports, tampering with or obstructing justice and impersonating a public offical. These crimes are currently within the ambit of N.J.S.A.2A:131-1 et seq.

The elements of the offense of perjury under the Code are (1) a false statement, known to be false, (2) made under oath, (3) and material to the matter at hand. This definition is essentially similar to the current definition of perjury. See N.J.S.A.2A:131-1 through 2A:131-3; State v. Sullivan, 24 N.J. 18 (1957). If the falsification is under oath but is not material or is not in an official proceeding, the offense would be false swearing under the Code. Section 2C:28-2. If the element missing is "materiality," the offense is one of the fourth degree; however, if the falsification under oath is not in an official proceeding or is not made with the intent to mislead an official, it is a disorderly persons offense. If the falsification is not made under oath or affirmation but made with the intent to mislead a public servant, it would be deemed a crime of the fourth degree. Sections 2C:28-3 through 2C:28-5. The Code grades offenses, requiring materiality for the most serious offense but not requiring it for the less serious, consistent with current law. Any mistake as to the materiality of a falsification cannot serve as a defense under the Code. Section 2C:28-1b. Current law requires that the falsification be "corruptly" done.

As the Commentary points out, mistake as to materiality might negative that element. Commentary, p. 272. Thus, the Code has successfully eliminated an ambiguity now prevailing in the law.

Under the proposals here discussed, perjury may be proven by showing that two inconsistent statements were made. Section 2C:28-1e. Current New Jersey law permits proof of inconsistent statements only to establish false swearing. N.J.S.A.2A:151-5. However, in order to prove perjury under current law, it is necessary to plead and prove that one of the particular statements is false. In many situations it is impossible to prove which of the conflicting statements is false. Yet the existence of two inconsistent statements demonstrates a falsification which should be punished as perjury if the other elements of the crime are extant. The Commission is to be commended for the recognition of this fact. The utilization of inconsistent statements to prove perjury is limited by State v. Williams, 59 N.J. 493 (1971), which requires the State to prove that the second statement is false when that statement has been compelled in an official proceeding. The change of the evidentiary requirement by the Code for the crime of perjury is an important and desirable change in the law.

The Code proscribes "unsworn falsifications" made with the intention to mislead the authorities only if they are written. Section 2C:28-3a. It is submitted

that this limitation is unwarranted in light of the requirement of corroboration to prove the offense under this Section. See Sections 2C:28-3c and 2C:28-1f. It should be recognized that any statement, whether oral or written, made with the purpose to mislead a public servant in performing his function is socially undesirable and should be subject to penal sanction. This provision should be amended to that extent.

The Commission has designated as criminal a broad range of behavior designed to impede or defeat the lawful operation of government in Sections 2C:29-1 et seq. The common law crime of resisting arrest has been codified in Section 2C:29-2. Persons may not resist arrest even when the arrest is unlawful, provided that it is made "under color" of official authority. See State v. Washington, 57 N.J. 160 (1970); State v. Mulvihill, 57 N.J. 151 (1970); State v. Koonce, 89 N.J.Super. 169 (App.Div.1965). The Code makes resisting arrest a crime of the fourth degree if the person uses or threatens to use violence against a public servant or creates a substantial risk of causing physical injury to the public servant or another; otherwise it is a disorderly persons offense.

The Commission recognized that a person who aids another to allude apprehension or trial interferes with the processes of government and therefore should be held responsible for obstructing justice. The Code rejects the common law notion that a person who helps an offender

avoid justice becomes in some sense an accomplice in the underlying crime. Section 2C:29-3. See State v. Sullivan, 77 N.J.Super. 81 (App.Div.1962). This change is not one of mere form, for under the Code it is unnecessary to be concerned about the guilt or innocence of the person who is aided. The offense is complete, that is, an obstruction of justice has occurred, whether the person aided is guilty or not. The Code further eliminates the current exemption from prosecution provided to a husband or a wife of the person aided. Such a factor should be weighed in sentencing rather than in establishing the criminality of certain conduct. N.J.S.A.2A:85-2.

Under Section 2C:29-3, the person who aids an accused is guilty of a crime of one grade less than the offense the accused allegedly committed. The Code endeavors to specify the types of aid prohibited. Included in the list of prohibited aid is the volunteering of false information to a law enforcement officer. Section 2C:29-3g. This section should be in addition to the recommendation made in this report to include unsworn oral falsifications in Section 2C:28-3. The difference between the sections is that under paragraph g of Section 2C:29-3, providing the possibility of a more severe sanction, it is necessary to prove specific knowledge on the part of the actor as well as the specific intent to aid the person accused.

The common law offense of "compounding" and its statutory replacement (N.J.S.A.2A:97-1) penalize agreements based upon a consideration to refrain from giving information to law enforcement authorities concerning a crime. The Code excludes from the purview of the statute the situation where a victim of a crime agrees to drop prosecution if the offender restores property belonging to the victim or pays damage for the harm the victim has suffered. The common law and the current statute make no such exception. Restoration of or indemnification for the loss is the only governing standard in the proposed section. It should also be noted that the Code has no concealing or misprison statute. Thus, mere failure to report a crime is insufficient to render anyone criminally liable; specific affirmative acts are required to be proven in order to be held responsible.

The Code follows prevailing law in defining escape from official detention or constructive custody. See N.J.S.A.2A:104-6. This provision makes clear that it is not intended to extend to individuals on probation or parole. The Code does, however, effect a change as to the criminal responsibility on the part of custodial officials. Under current law, such an official could be penalized for permitting an escape even though there is only showing of simple negligence; the Code would require that criminal responsibility be imposed only in those situations where the official knowingly or recklessly caused or facilitated the escape.

See N.J.S.A.2A:104-2. Although it is recognized that any escape disserves the object of the criminal law to protect society, it is believed that the Code properly leaves simple negligence within the administrative sanctions rather than the penal provisions.

Another provision, Section 2C:29-1, within the chapter dealing with obstructing governmental operations bears mention. In this section the Code creates a catch-all provision supplementing the other more specific provisions dealing with particular methods of interfering with the administration of government. The language of this section is, as a result, broad. In order to ensure the language is not so broad that it could be construed to cover political agitation opposed to governmental policy or other exercises of civil liberties, this section has been restricted in scope to (1) violent or physical interference, (2) other acts which are "unlawful" independently of the purpose to obstruct the government. See Commentary, p. 280. Section 2C:29-1 is derived from and constitutes a consolidation of a number of statutory offenses as well as the common law crime of obstructing justice. See State v. Cassatly, supra; 1 Burdick, Law of Crimes, Section 283, p. 409 (1946); Perkins, Criminal Law, p. 422 (1957). It is recommended that insofar as this section is directed to instances where the conduct proscribed is already "unlawful" or involves violence, the offense should be criminal rather than a disorderly persons offense.

The chapter dealing with misconduct in office and abuse of office is separate and apart from the offenses previously described involving public office. In Chapter 30, the offenses are separated into three separate sections. The first section, Section 2C:30-1 dealing with official oppression, codifies a number of currently existing specific statutes, that is, N.J.S.A.10:1-8 (discriminatory exclusion from jury service), N.J.S.A.2A:106-1 (violating extradition procedures), N.J.S.A.2A:135-12 (discriminatory administration of relief), and N.J.S.A.2A:135-13 (exploiting relief recipients). The Commission recognizes that the broad nature of this section creates an overlap with the specific offenses of bribery, extortion, and obstruction of justice. This overlap, however, would seem to be easily remedied by the well known rule of judicial construction that specific offenses control over general proscriptions. Cf. State v. Bott, 53 N.J. 391 (1969).

The second section, 2C:30-2, codifies the common law offense of misconduct in office. Whereas the present law made violations of a duty by a public servant criminal, State v. Winne, 12 N.J. 152 (1953), the Code makes a violation of such a duty criminal only when the act or omission is coupled with an attempt to obtain a benefit or to injure some individual. This change is unfortunate. Moreover, it seems contrary to the remainder of the codification which generally increases the protection of the public from misuses of public trust. If the requirement of an

attempt to obtain a benefit or to injure some person is intended to include all violations of duty imposed by public office, it seems to be an unnecessary and confusing addition to the offense. If such language is not intended to encompass all violations of duty, the Code weakens the protection of the public by failing to proscribe all breaches of duty traditionally imposed on the holders of public office. This provision should be amended to eliminate the restrictions on prosecution.

The third section, 2C:30-3, creates a specific statutory offense for misuse of knowledge obtained as a result of holding public office. There is no similar provision within current New Jersey law. The presence of this section prohibiting use of "insider information" for an improper purpose is a welcome addition to the traditional ambit of public trust.

E. OFFENSES AGAINST PUBLIC ORDER, HEALTH AND DECENCY

Most of the offenses contained in Part 5 of the Code are relatively minor and consequently will not be discussed individually in this report. Certain observations directed to specific provisions, however, will be noted.

In Chapter 39 regulating the possession and purchase of firearms and other dangerous weapons, the Code intends to continue the current restrictive policy which has served as a model for other states that desire to achieve greater control over possession and utilization of weapons. See

e.g., Photos v. Toledo, 19 Ohio. Misc. 147, 250 N.E.2d 916 (1969). The Commission attempts to divide the criminal offenses from the licensing provisions, separating them into different parts of the Code. The criminal offenses are contained in Chapter 39 while the licensing provisions are in Chapter 58.

In Chapter 39, the Code unfortunately fails in its attempt to continue existing law. The proposal also neglects to fill the present gaps within the law, and in fact introduces new ambiguities and conflicts which do not exist in the current statutes.

Though seeming to bring order to what is currently a confusing maze of statutory provisions, the Code introduces new conflicts without a corresponding benefit in facilitating the use of firearms provisions. Some of the conflicts created are procedural while others are both procedural and substantive. In Section 2C:39-2a(1), dealing with violations of regulatory provisions, the Code uses the term "permits to purchase certain firearms (Section 2C:58-3)." The cited section, Section 2C:58-3, refers to both permits to purchase and purchaser's identification cards. The absence of a reference to purchaser's identification cards within Section 2C:39-2a(1) raises the question whether a violation of the regulatory provision with regard to purchaser's identification cards can be punished under Section 2C:39-2a(1). Another example of this type of procedural conflict created in the Code is found in Section 2C:39-3h which prohibits possession of

defaced firearms. The language "machine gun or firearm" is used on two occasions in the paragraph. Since a machine gun is included in the definition of a "firearm" in Section 2C:39-1e, the inclusion of "machine gun" appears inconsistent with the definition of "firearm." The duplicated meaning in the two terms may cause question as to the true definition of "firearm." A similar duplication of "machine gun" and "firearm" occurs in subsection d of Section 2C:39-4 dealing with defacing of firearms.

That these procedural conflicts can also result in substantive problems is demonstrated by Section 2C:39-3e. This section prohibits the possession of a loaded "firearm" without having first obtained a "permit to purchase or carry same pursuant to Section 2C:58-4." Section 2C:58-4 and 5 apply to permits to carry pistols or revolvers and licenses to possess machine guns respectively. The words "permit to purchase" which seem to refer to machine guns because of the cited section could be confused with a "permit to purchase a pistol." Section 2C:58-3. The permit to purchase a pistol certainly would not justify carrying the pistol especially when loaded. In order to alleviate any ambiguity within this section, the wording "without first having obtained a permit to purchase" should be changed to "without first having obtained a license to possess." See Section 2C:58-5.

The Code creates new conflicts in dividing the current statutory scheme into violations of regulatory

provisions and penalties for possessing weapons in Section 2C:39-2 and Section 2C:39-3. Under Section 2C:39-2a(1) possession of a rifle or a shotgun without obtaining a purchaser's identification card, carrying a pistol without obtaining a permit to carry, and possession of a machine gun without obtaining a license to possess are all punishable as crimes of the fourth degree as violations of regulatory provisions. Possession of these firearms could also be punished as crimes of the fourth degree under Section 2C:39-3g. For example, a person found with a pistol on the street without a permit to carry could be punished under Section 2C:39-2a(1) for violation of the regulatory provision in not obtaining a permit to carry, Section 2C: 58-4, and under Section 2C:39-3g for possessing a weapon without being licensed to do so under Section 2C:58-4. Compare Section 2C:39-2a(1) with Section 2C:39-3g. As to these three offenses the Code errs in attempting to establish both a regulatory violation and a substantive violation for, in reality, the substantive violation is the failure to comply with the regulatory provision.

It must be noted, however, that the two provisions do not completely duplicate one another. Section 2C:39-3g punishes possession of "any firearm or weapon." Regulatory provisions did not exist for all "weapons." Consequently, Section 2C:39-3g punishes possession of things not covered in the regulatory provision. On the other hand the regulatory provisions include the use of incendiary tracer ammunition, and manufacturing, wholesaling,

or retailing without a license which would not be circumscribed by the possession offense of Section 2C:39-3g. Therefore, it is not possible to eliminate either section. The specific provisions must be changed if the overlapping is to be eliminated.

Overlapping is created within Section 2C:39-3 itself. Section 2C:39-3i prohibits the possession of knives with the "purpose to use." Knives are within the definition of "weapon." See Section 2C:39-1p(3). The possession of a "weapon" without regard to "purpose to use", is punishable under Section 2C:39-3g dealing with possession of weapons in general. The possession of a knife, therefore, could be punished under both paragraphs "g" and "i". The apparent additional element of "knowing" possession in paragraph "g" does not serve to differentiate it from paragraph "i" because the additional element in "i", that is, "purpose to use", necessarily must include knowledge of the possession of the weapon.

The Code has introduced an overlapping provision and created a conflict by adding to present law paragraph "i", a provision from the New York Code. Since paragraph "i" is the more specific section judicial construction of the Code would probably result in punishment for possession of a knife only when a "purpose of use" could be demonstrated. This is clearly a change from present New Jersey law under N.J.S.A.2A:151-41c. See State v. Green, 116 N.J.Super. 515 (App.Div.1971). The requirement in paragraph "i"

that the weapon be possessed "with the purpose to use the same unlawfully against another" creates enormous problems of proof substantially limiting the effectiveness of the penalty. Furthermore, it is clear that possession of certain weapons, such as stilettos, dirks, and daggers should be unlawful per se. There should be no requirement to prove that possession was "with the purpose to use the same unlawfully against another" in order to criminally punish the possession of these knives.

The Code also creates problems by combining all the possession offenses for various types of weapons into one section, and then by establishing a general exemption for certain groups and people in Section 2C:39-6. This exemption section embodies what is now N.J.S.A.2A:151-43 and N.J.S.A.2A:151-42. The current provisions are intended only to exempt persons from punishment under N.J.S.A.2A:151-41 which deals with carrying a pistol or revolver without a permit to carry, carrying a rifle or shotgun without having obtained a firearms identification card or carrying any dangerous instrument. This statute is not as inclusive as the current consolidated possession offense, Section 2C:39-3. Consequently, there are a number of weapons included in Section 2C:39-3 for which the exemptions in Sections 2C:39-6 were never intended to apply. For example, Section 2C:39-3a prohibits possession of a machine gun. Under present law this is intended to be a blanket provision unless a license to possess is obtained. Since

the exemptions in Section 2C:39-6 apply to any offense within 2C:39-3, a member of a government or civilian rifle or pistol club would be exempted from punishment for possession of a machine gun. See Section 2C:39-6a(13). In addition, since the definition of "firearm" includes machine gun, 2C:39-1e, a person could carry a machine gun around his home and be exempted from punishment under Section 2C:39-3. See Section 2C:39-6b.

The machine gun is not the only weapon within Section 2C:39-3 to which the exemptions in Section 2C:39-6 should not apply. Possession of Molotov cocktails was intended to be a complete prohibition under present law. See N.J.S.A.2A:151-59. In addition, it would not seem to make sense to permit those persons exempted in Section 2C:39-6 to possess a silencer, a defaced firearm or a firearm in an educational institution. Thus it appears that the exceptions in Section 2C:39-6 have no reasonable relationship to some of the offenses which have been combined in Section 2C:39-3.

Although attempting to continue present law with respect to firearms, the Code alters a number of provisions which substantially decreases their effectiveness. The requirement that a person act "knowingly" is added to violations of the regulatory provisions (Section 2C:39-2) and possession of weapons and dangerous instruments (Section 2C:39-3). Current law did not require "knowing"

possession. The problem of proof inherent in demonstrating knowledge are most apparent in the current law pertaining to receiving stolen goods. N.J.S.A.2A:139-1; see State v. Rowe, 57 N.J. 293 (1970); State v. Di Rienzo, 53 N.J. 360 (1969). When dealing with inherently dangerous weapons it seems inappropriate to add the additional requirement of "knowledge" of possession. This type of offense seems singularly appropriate for strict liability as under present law. The requirement of knowledge seems to be contradictory to the presumptions of possession in Section 2C:39-5. This section creates a presumption that a weapon found in an automobile is possessed by all the occupants of the automobile. The presumption presently exists in New Jersey law but has unfortunately been narrowed under the Code. See N.J.S.A.2A:151-7; State v. Humphreys, 54 N.J. 406 (1969); Commentary, p. 310.

Present New Jersey law contains a blanket provision prohibiting certain people from possessing weapons. N.J.S.A. 2A:151-8; see Burton v. Sills, 53 N.J. 86 (1968). Because this provision is included within Section 2C:39-3 this provision is made subject to the exemptions in Section 2C:39-6. Present law certainly did not intend a mental defective to be permitted to carry a firearm merely because he was a member of a civilian rifle or pistol club or because he was carrying his firearm around in his home or at his place of business. These exemptions were never intended to apply to the blanket prohibition against certain persons possessing weapons.

The Code also fails to continue present law by changing the wording dealing with having a firearm on the street from "carrying" to "possession." "Carrying" is a term of art which has been defined in our case law and which includes possession in an automobile under present statutory law. See N.J.S.A.2A:151-41. Because the new term of "possession" is utilized it will be necessary to construe this new provision. Furthermore, since the present statute includes within "carrying," possession of the weapon anywhere in an automobile, at this point it is not clear whether possession will be construed to include all the situations which were previously covered by the term "carrying." But see Section 2C:39-5. The change from the term "carrying" to "possession" does not seem to have achieved any clarification or to have served any beneficial purpose. Consequently, it is deemed advisable to continue the term utilized in present New Jersey law.

The Code fails to solve some of the problems inherent in the current firearms provisions. The provision dealing with license to possess machine guns, Section 2C: 58-5, appears to be less restrictive than the current provisions for obtaining a permit to carry a firearm. See Section 2C:58-4; Siccardi v. State, 59 N.J. 545 (1971). In reality, it is virtually impossible to obtain a license to possess a machine gun except in extremely unusual situations. The statutory language for obtaining a license to possess a machine gun should be rewritten to reflect the realities of the present day use of the provision. As a practical

matter there are few requests for licenses to possess machine guns. However, this does not seem to justify leaving the statutory language in its present broad form.

The Code continues the present exemption for antique firearms, Section 2C:39-6c. Recently, firearms, intended to duplicate antique weapons and capable of being fired, have been manufactured. The provision permits persons to carry such firearms. They do not fire fixed ammunition and consequently are exempted under the section but they are still lethal weapons which should not be carried by persons either in their automobiles or on their person, especially when loaded.

Decisions construing the necessary evidence to sustain a conviction for carrying a pistol without a permit to carry (N.J.S.A.2A:151-41) have placed the burden upon defendant to come forward with proof that he has a permit to carry. The cases have recognized that it is difficult for the State to prove the negative, that is, that defendant does not have a permit to carry, and recognized that this fact is peculiarly within the knowledge of the defendant. See State v. Hock, 54 N.J. 526 (1969); State v. Blanca, 100 N.J.Super. 241 (App.Div.1968). It is believed that this decisional law should be included within current statutory law so as to ensure the Code is not interpreted to exclude this current practice. It would be extremely difficult to obtain convictions for illegal possession without the continuation of this evidential rule.

In addition, the courts have not construed the same requirement with respect to possession of a firearm without having obtained a permit to purchase. Possession of a pistol regardless of the place of possession, e.g. a home or business, is an offense if the possessor has not obtained a permit to purchase. See Section 2C:58-3 and Section 2C:39-2a(1). Because of the difficulty in showing the negative with respect to obtaining a permit to purchase, a similar requirement that defendant must show this fact as peculiarly within his knowledge should be applied here as well.

In Section 2C:39-2b the Code continues the language of the current New Jersey statute which punishes falsifications of applications for "a permit to carry a pistol, revolver or other firearm." A permit to carry can only be obtained for a pistol or revolver. Retention of the words "or other firearms" is surplusage and could only create confusion. It therefore should be eliminated.

The Code does change the law in a number of respects which are beneficial. Present New Jersey law prohibiting carrying a weapon, N.J.S.A.2A:151-41, prohibits carrying in a "public place." The Code does not retain this language. It is believed the language only creates problems as to what constitutes a public place. For example, is a rented motel room a public or private place? Certainly getting the weapon to the motel room required carrying it outside of the home or place of business and did not involve transporting for the purposes of hunting

or engaging in target practice. See Section 2C:39-6b. The Code eliminates this possible confusion as to the intent of the statute and properly makes possession, except by exempted persons or in those exempted places, a criminal violation.

In rearranging the possession sections, Sections 2C:39-3e, f and g, the Code eliminates the confusing reference to carrying a rifle or shotgun without obtaining a purchaser's identification card present in N.J.S.A.151-41b. The clear wording of the statute seems to exempt from punishment under the carrying provisions a person who carries a rifle or shotgun down the street if he is in possession of a purchaser's identification card. It is believed that this was never the intent of the Legislature. The purchaser's identification card has nothing to do with carrying a weapon but only insures that the person is not one of those who is to be excluded from carrying a weapon under N.J.S.A. 2A:151-8.

Carrying a rifle or shotgun is required by the Legislature to be done in the manner set forth in Section 2C:39-6b(3). Rifles and shotguns can only be carried unloaded contained in a closed and fastened case, gunbox, securely tied package, or locked in the trunk of the automobile in which the person is transporting the firearm. Rifles and shotguns were not intended to be permitted to be carried on the street merely because of possession of a purchaser's identification card. Consequently, the Code eliminates

any question with respect to the manner in which the person must possess a weapon in order to be exempted from punishment under Section 2C:39-3. It is also believed the aggravated penalty for possessing a loaded weapon when a purpose to use unlawfully can be proven is an improvement on the present law.

It is believed the many inconsistencies and conflicts in the Code require the redrafting of these provisions so that these weaknesses can be eliminated. In addition, it is believed that the noted deficiencies in the present law which have not been corrected by the Code should be included in any redrafting. If a redrafting is done, the indicated improvements made by the Code on the present statute should be retained.

In a number of sections within the offenses against public order, health and decency categories, the Code has failed to eliminate ambiguity, thereby making the provisions susceptible to constitutional challenge as being vague. See State v. Profaci, 56 N.J. 346 (1970); State v. Reed, 56 N.J 354 (1970). For example, Section 2C:33-2 provides that making "unreasonable noise" is a petty disorderly persons offense. The term "unreasonable" may well provoke extensive litigation. This same problem should be noted with the term "offensively coarse" in the same section. Greater clarity and precision is necessary to avoid ambiguity which could result in substantial and unnecessary litigation.

The Code has failed to achieve codification with respect to Section 2C:43-4 prohibiting harassment. This section includes the same conduct as proscribed in Section 2C:12-1a except that the latter provision requires an additional element of injury. The separation of these sections into different parts of the Code makes their use in plea bargaining more difficult. Furthermore, it is not known whether Section 2C:33-4 could be considered a lesser included offense of 2C:12-1. If not, pleading problems arise requiring alternative charges in the event injury can not be proven.

In Chapter 35, the Code lists several drug offenses. However, the Commission has failed to codify all the drug offenses into the proposal. Specifically, the Controlled Dangerous Substances Act is not included within the Code. One of the provisions which is included requires reexamination. Section 2C:35-1, dealing with hiring or using a child under the age of 18 in connection with trafficking in drugs, reduces the offense from a crime of the second degree to a crime of the third degree when the person is "addicted" to "morphine, cocaine, heroin, opium or any derivitive thereof, or marijuana." It is deemed inadvisable to reduce the offense because the person utilizing the child is himself addicted. Furthermore, there is certainly no justification for including "marijuana" among the other drugs which are addictive. Even if the Legislature were to accept the

Code's policy of reduction of penalty for those who are compulsive due to addiction, it would be inappropriate to include marijuana unless the statute was altered to specify that the use of marijuana would reduce the offense only if the controlled dangerous substance involved was marijuana.

The Legislature has recently excluded possession and sale of alcohol from the current provisions dealing with sniffing toxic vapors or fumes. L. 1971 c. 260. This recent legislative change broadening the scope of inhalants included but excluding alcohol should be considered in Section 2C:35-5.

Naturally, Section 2C:33-15 dealing with possession or consumption of alcoholic beverages by minors should be changed to reflect the recent reduction in the age of majority. It is also recommended that Section 2C:34-2e prohibiting the patronizing of prostitutes be omitted in its entirety.

The Commission has not reviewed gambling laws believing they require special study and consideration. Commentary, p. 308. Gambling constitutes one of the most important problems confronting law enforcement officers. Therefore, resolution of the many issues and inconsistencies involved must be one of our principal goals. In essence, the Commission has recommended retention of existing laws until further study is completed. We concur but add the admonition that such a study is necessary.

The Commission has effected certain changes in the penalty provisions of several offenses. Section 2C:37-

1b, keeping slot machines for gaming, is made a crime of the third degree. The present New Jersey statute makes this offense a misdemeanor. N.J.S.A.2A:112-2. Similarly, the offense of bookmaking, Section 2C:37-1c, is also made a crime of the third degree, whereas presently it is a misdemeanor. See N.J.S.A.2A:112-3.

It is felt that the current bookmaking statute is susceptible to gradation since the participants in this illegal activity have varying degrees of culpability. Section 2C: 37-1g prohibits permitting land to be used for a racecourse. This subsection continues current New Jersey law. However, because it disassociates gambling with the use of the land to permit racing this section seems to be antiquated in today's urbanized society.

The administrative provisions concerning gambling offenses continue two of the provisions presently within N.J.S.A.2A:152 dealing with money seized in gambling raids. However, the Code does not continue N.J.S.A.2A:152-9 which provides the procedure for disposition of the money after conviction on the gambling offense. Further, no procedure is proposed for ultimate forfeiture of the money. No reason is stated for the omissions within the Commentary to the Code. New Jersey law currently holds that a person cannot benefit from his own wrongdoing. However, Section 2C:43-3, Fines and Restitutions, does not clearly provide that the forfeiture of money seized in the gambling raid should be imposed as part of the sentence. If it is

contemplated that forfeiture of such money should be pursuant to civil remedies that are not at this time established, the Code's administrative provisions will not fulfill their function until such provisions are established outside the Code.

F. ADMINISTRATIVE PROVISIONS

The present wiretap statutes (N.J.S.A.2A:156A-1 et seq.) have been adopted almost verbatim by the Commission in Sections 2C:54-1 through 2C:54-8. We recommend the retention of these provisions with few changes.

Under Section 2C:54-3e(5) it is necessary that every wiretap order shall require that oral interceptions "be conducted in such a manner as to minimize or eliminate the interception" of non-criminal conversations. In State v. Dye, 60 N.J. 518 (1972) the New Jersey Supreme Court remarked that the present statute contained no standards to achieve minimization. Id. at 537. In upholding an unlimited wiretap between specified and duly authorized hours, the court held that in light of the inherent difficulties of administering wiretaps, it was consistent with the Fourth Amendment to suppress only irrelevant conversations intercepted in violation of the statutory requirement to "minimize or eliminate" the interception of non-criminal conversations. Id. at 536-542. It is recommended that the above principle be explicitly included in Section 2C:54-4, the Code provision relating to motions to suppress oral interceptions.

As pointed out in Dye, under R.3:5-7 of the present Rules of Court governing motions to suppress in search and seizure cases, such motions must generally be made within 30 days after the plea to the indictment. However, under our present wiretap statute and the Code, the prosecutor is not required to provide an accused with a copy of the application and order to wiretap until ten days before trial. See Section 2C:54-31. Thus, it would be impossible for a defendant to comply with the procedural rule if he only receives the order and application ten days before trial. The Code ought to be changed to rectify this problem.

In regard to Section 2C:54-3d, requiring the showing of "special need" to intercept wire communications over public facilities, it is recognized that "special need" may be established where the application to wiretap indicates that the subject was a member of a surreptitous gambling conspiracy and that usual investigative techniques are not likely to succeed. State v. Sidoti, 120 N.J.Super. 208 (App.Div. 1972).

COMPARISON OF THE SUBSTANTIVE PROVISIONS OF PRESENT TITLE 2A AND THE PROPOSED PENAL CODE.

The primordial concern in assaying any codification of an existing body of substantive law is whether it actually succeeds in codifying, that is, incorporating the whole of that body of law. The proposed New Jersey Penal Code purports to a codification of the substantive provisions of present Title 2A of the New Jersey statutues (N.J.S.A.2A:85-1, et seq.) Determining its success as a codification therefore requires a comparison of its provisions with those now embraced in Title 2A.

Analysis of the proposed Penal Code reveals that in several respects it does not completely assimilate the body of substantive law now found in Title 2A (Section 2C:5-1 et seq). Some of these omissions are clear and deliberate, and noted in the Commentary to the Code. However, in several areas, while the Code notes provisions corresponding to present Title 2A provisions, the Code provisions exhibit marked differences from existing law.

The Code (Section 2C:1-5), of course, abolishes common law crimes. No attempt has been made to codify all existing common law offenses, the thought being that further accretions should come from the Legislature rather than the courts. Commentary, p. 11. It is worth noting that all of the crimes specifically mentioned in N.J.S.A. 2A:85-1, appear to be duplicated in the Code.

However, the current exception of "husband or

wife of [the] offender" from the general proscription against "aiding or assisting certain criminals" now found in N.J.S.A.2A:85-1, would be eliminated in the Code Sections 2C:29-3 and 2C:29-4. The Code would make the fact of marital or blood relationship relevant only to possible mitigation of punishment. See Commentary, p. 285.

The Code's departure from the substance of the remaining portions of Chapter 85, e.g., -4, -5, -6, -8, -9 -10, -11, -12 and -13 reflects the Code's thoroughgoing overhaul of the present sentencing scheme, as elaborated earlier in this report. However, attention is directed to the procedure in N.J.S.A.2A:85-13 allowing sentencing as a multiple offender upon accusation. It is queried whether this most useful procedure may be duplicated under the Code Sections 2C:44-6c, 2C:44-3 and 2C:44-4.

As a counterpart of present N.J.S.A.2A:86-1 et seq., which deals with "abduction" of females for a variety of purposes relating to sexual misconduct, the Code offers Section 2C:13-1 et seq., the kidnapping chapter. The Code provisions have a more general thrust and focus on a different species of intent, though the actual acts, objectively viewed, would be similar. However, the subject matter of the present provisions is somewhat archaic and the omission might have been deliberate. No change is recommended since the Code appears to cover any serious transgression.

Common law adultery, N.J.S.A.2A:85-1, is abolished

by the Code, which limits the offense to situations involving minors and incompetents. Under present law, there is a provision, i.e., N.J.S.A.2A:89-5, devoted to "malicious burning of woods or cranberry bogs" which is not incorporated specifically in Chapter 17 of the Code (arson and related offenses). Such omission is considered appropriate.

"Assault" offenses are now covered in N.J.S.A.2A:90-1, et seq. Under N.J.S.A.2A:90-2, the offense of assault in conjunction with various felonies including intended homicide, burglary, kidnapping, rape, robbery, sodomy, or carnal abuse is specifically treated, and punished by a sentence of up to 12 years; whereas the Code counterpart, Section 2C:12-1 takes no special cognizance of the presence of felonious intent as a basis for attributing greater gravity to the act of assault. Rather, the approach of the Code is to regard such acts, for purposes of punishment, as "attempts". See Section 2C:5-1; Commentary, p. 175. Obviously, this change reflects a basic conceptual departure from existing law and its preoccupation with the concept of felonious intent. Under the Code, the assault is regarded as a lesser included offense, i.e., an "attempt" to commit the intended substantive offense. While from a logical standpoint the Code approach has much to commend it, the effect of this change would be to deprive prosecutors of an alternative theory to support substantial punishment, and thereby diminish the possibilities available for plea bargaining or jury verdicts.

N.J.S.A.2A:91-4 sets up a special offense relating to "overdrafts by bank officers." This statute clearly reflects a legislative judgment that such breaches of the sensitive fiduciary duty held by bank officers are of great gravity. On the other hand, Chapter 21 of the Code, the referenced provision, may not even permit prosecution of some such practices. In any event, it accords them no special gravity. Likewise, there is a serious question whether the practices proscribed in N.J.S.A.2A:91-5 through -8 relating to various other types of fraud against banks could be prosecuted successfully under the Code (e.g., Section 2C:21-4).

In the area of "bribery and corruption" now treated in N.J.S.A.2A:93-1, et seq., the Code makes several departures which bear further consideration. Perhaps the most critical is the limitation of the prohibition in Section 2C:27-6(d), "compensation for past official business," to the receipt by a "public servant" of "pecuniary benefits." Whereas, under N.J.S.A.2A:93-2, ("soliciting or receiving reward for official vote"), the receipt of "any money or valuable thing, reward or commission" is prohibited. It is suggested that the present approach which deals with a wide variety of tainted arrangements is clearly preferable.

Attention is also directed to the Code's elimination of the present "permanent disqualification from holding office," of convicted public officials under N.J.S.A.2A:93-5. While Section 2C:51-2 continues the existing forfeiture

of office upon conviction rule, Section 2C:51-1(a) appears to foreclose any further disqualification. The Code eliminates the facially defective "use" immunity provisions now found in N.J.S.A.2A:93-3 and N.J.S.A.2A:93-9, for which an adequate substitute is presently available in N.J.S.A.2A:81-17.2 (unaffected by the Code).

In the "burglary" area, now covered in N.J.S.A.2A:94-1, et seq. present law regards with special gravity (up to 40 years imprisonment), the "use of high explosives" for breaking and entering. The Code draws no distinction between such conduct and other forms of illegal entry. It is suggested that the Code should recognize this as a higher grade of offense.

At present, an entire chapter is devoted to "cemeteries," N.J.S.A.2A:95-1, et seq. Included therein are prohibitions against "grave desecration," N.J.S.A.2A:95-1, and "sale of grave markers as junk or scrap," N.J.S.A. 2A:95-3. The former is covered only partially, the latter not at all, by Code sections 2C:17-3 ("criminal mischief") and 2C:33-10 ("desecration of venerated objects"). Further study is suggested.

N.J.S.A.2A:96-1 et seq. embraces several offenses relating to "children." There appears to be no equivalent to N.J.S.A.2A:95-1, "concealment of birth of illegitimate child ...," although the Code refers to in Section 2C:24-4, "Endangering welfare of children," which appears to have no relevance at all in this connection. This Code provision is also offered as the counterpart of N.J.S.A.2A:

96-2 and -3, which relate to impairing the morals of a minor; the rather subjective notion on which the current law is bottomed seems at odds with the thrust of Section 2C:24-4, which focuses on the child's physical welfare. Section 2C:14-3, which deals only with sexual exploitation of minors does not fill the gap. Moreover, the Code in Section 2C:24-4 appears to stress adult non-feasance as a basis of liability, a departure from the active "contribution to the delinquency of minor" now required in N.J.S.A.2A:96-5.

Present law devotes a chapter, N.J.S.A.2A:97-1, et seq. to "compounding and concealing crimes." N.J.S.A.2A:97-2 would appear to impose an affirmative duty to come forward on any person with actual knowledge of the commission of certain serious crimes. Whereas the Code Section 2C:29-3 c, has a different thrust; it criminalizes only the suppression or concealment of evidence of crime. Thus, the Code would appear to punish only active conduct which already would amount to obstruction of justice under present law. While the Code approach seems sounder, it should be recognized that it involves a basic departure from the intention of existing legislation.

Included in the present chapter on "conspiracy," is a provision, N.J.S.A.2A:98-3, covering "disclosure of public bids." The referenced Code sections, 2C:5-2, and 2C:30-1, et seq. appear to deal only with those holding public office, although private individuals would come

within the proscription of N.J.S.A.2A:98-3.

The Code has no provision corresponding to N.J.S.A. 2A:99-2, "holding court at an unauthorized place." Nor do there appear to be any specific counterparts to present N.J.S.A.2A:99B-1, et seq., relating to crimes involving "dead bodies", although these might be considered "venerated objects" under the Code.

"Dueling," N.J.S.A.2A:101-1, would no longer be a specific offense under the Code, but would fall within the "assaults" proscription, e.g., Section 2C:12-2. Those acting as "seconds" in duels are not covered, and they would not be culpable under the Code, except perhaps as aiders and abettors if they instigated the combat. The Code's changes are deemed desirable.

In the area of "embezzlements etc."; N.J.S.A.2A:102-12.1 is notable in setting forth a series of inferences as will support convictions for conversions or embezzlement under the chapter. Slightly different inferences appear to be available under Code Section 2C:20-9. It should also be noted that the Code also includes a series of affirmative defenses; see Section 2C:20-2. The Code provisions appear to be soundly conceived.

The Code makes various departures from the present "embracery" provisions, N.J.S.A.2A:103-2. Most importantly, while N.J.S.A.2A:103-1 covers any form of attempt to corrupt or influence a jury extra-judicially, Section 2C:27-2 appears to be limited to the use of bribery, and Section

2C:27-3 appears to cover only the use of intimidation. Under the Code, no permanent disqualification from jury service attaches to a juror's acceptance of a bribe, etc., to influence his vote as now obtains under N.J.S.A.2A:103-2. It is suggested that an attempt be made to conform the Code more closely to existing law in this area.

The Code appears to take a new approach to "rescues," now found in N.J.S.A.2A:104-1, et seq., treating conduct such as that prohibited in N.J.S.A.2A:104-5 and -5, as aiding and abetting. Other offenses which amount to aiding various forms of escape, e.g., N.J.S.A.2A:104-7, N.J.S.A. 2A:104-9 and N.J.S.A.2A:104-6, are also embraced by aiding and abetting (the substantive offense is Section 2C:29-6). It is noteworthy that the Code has no counterpart to N.J.S.A.2A:104-11 which prohibits unauthorized personal communication with prisoners.

The Code in its treatment of the extortion area appears to have neglected any attempt to duplicate N.J.S.A.2A:105-5, which deals with the use of violence to force repayment of loans. The present provision, passed in 1968, provides for up to 30 years imprisonment and a fine of $100,000. Code provisions 2C:20-5, "theft by extortion" and 2C:21-19, "wrongful credit practices", the indicated counterparts, are clearly tangential to the central concern of N.J.S.A.2A:105-5. Moreover, they take no cognizance of the gravity of the present provision. It would appear imperative that attention be given to the need for incorporation

of a similar provision in the finalized Code.

The present law devotes a chapter, N.J.S.A.2A:107-1, to "offenses against the flag." Clearly the Code would regard the flag a "venerated object," within the embrace of Section 2C:33-10, and thus deal with its defacement as prohibited in N.J.S.A.2A:107-2. However, it does not appear that the present ban on the use of the flag for advertising would be covered in Section 2C:33-11. The omission is intentional and based on the conclusion that federal law in the area is sufficient. Commentary, p. 299. It should also be noted that the Code has no counterpart to N.J.S.A.2A:107-5, "influencing school pupils against saluting the flag," a provision which even more than the others in this chapter, is hard to square with the First Amendment.

In the "food and drug" area, now covered in N.J.S.A. 2A:108-1, et seq.,the Code makes several omissions, all deemed desirable, relating to practices which do not create any actual physical danger, e.g., N.J.S.A.2A:108-4, "falsely advertising margarine as butter," and N.J.S.A.2A:108-5, "falsely representing foods as Kosher." However, these practices, as well as the sale of poisons without labels, see N.J.S.A.2A:108-4, -5, -6, and -8 would appear to be punishable under Section 2C:21-7, "deceptive business practices." Under N.J.S.A.2A:108-7, a procedure is established for collection of fines imposed under the chapter; the Code fails to incorporate a similar practice. Most of

the present provisions appear to be special interest legislation of limited efficacy. The Code approach is preferred.

"Forgery and counterfeiting" now fall under N.J.S.A. 2A: 109-1, et seq. "Counterfeiting" is a federal crime and is largely left to the federal authorities under the Code. "Selling or possessing counterfeit promissory notes, ..." is now a state crime under N.J.S.A.2A:109-2, but it is doubtful that its subject matter would be adequately embraced by Section 2C:21-2. However, federal law again might prove adequate to cover any situation of the type now covered by N.J.S.A.2A:109-2. It is noteworthy that along with the bulk of the counterfeiting offenses which would be eliminated by the Code, the "presumption" as to the fraudulent character of a "scheme" would also be abandoned. The validity of such a "presumption" would in any case be open to serious doubt on due process grounds.

"Fornication," N.J.S.A.2A:110-1, would no longer be a crime under the Code.

"Frauds and cheats" are now the subject of an extensive chapter, N.J.S.A.2A:11-1, to N.J.S.A.2A:111-46. Several of the less prominent offenses set forth there would not appear to be particularly well covered in the Code. Obvious examples are "relief frauds," N.J.S.A. 2A:111-4, for which Sections 2C:20-4, and 2C:29-1, et seq. do not provide a ready substitute. Likewise, N.J.S.A. 2A:111-6, "obtaining money by fraudulent games or devices," is not fully embraced in Code Chapter 20. While the Code,

in Section 2C:21-18, prohibits the use of "slugs" in coin operated machines, it may not cover the use of other devices for accomplishing the same purposes, now clearly prohibited by N.J.S.A.2A:111-7.

"Incorporation for fraudulent purposes," N.J.S.A.2A:111-13 is cross-referenced to Section 2C:21-9, "misconduct by corporate official." However, the Code provision would apply only to directors or officers of existing corporations who exploit their position, while N.J.S.A.2A:111-13 deals with those who establish corporations for fraudulent purposes. A closer, though still not satisfactory replacement for N.J.S.A.2A:111-13 might be found in Section 2C:21-13b "offering a false instrument for filing."

"Credit," as defined for use in N.J.S.A.2A:111-15 and -16 ("bad checks" and "overdrafts") is not similarly defined by the Code. It is questioned whether the Code provides replacements in Sections 2C:20-3, 20-10, or Chapter 21, for N.J.S.A.2A:111-34 and 2A:111-35 which deal respectively with "renting a motor vehicle with intent to defraud" and "failing to return a rental motor vehicle." Under N.J.S.A.2A:111-37, in a civil action brought by one arrested for renting or leasing personal property through false pretenses, it is a complete defense to the claim that the representations made by the "arrestee" were in fact false. The Code has no equivalent provision. Likewise, service of a written demand by registered or certified mail is now a complete defense to a civil action brought

by one arrested on a "failure to return" charge, (N.J.S.A.2A:111-38) but is not duplicated in the Code. It should be noted that these provisions are under attack as "special interest" legislation and may be invalidated in the near future. Present N.J.S.A.2A:111-39 prohibits "dual contracts" for the sale of real property, but it is doubted that Code Chapter 21 would adequately cover such practices.

N.J.S.A.2A:112-4 now provides for dissolution of a corporation upon its conviction of various gambling offenses. The Code has no similar provision.

Homicide is presently covered by N.J.S.A.2A:113-1, et seq. While the Code does not incorporate a provision such as N.J.S.A.2A:113-6, "killing by misadventure...," this and other defenses now available would continue in force under the Code, Section 2C:2-5. "Attempts to kill by poisoning" are now covered specifically under N.J.S.A. 2A:113-7. Under the Code,apparently these would have to be treated under the "general assault" provision, Section 2C:12-1, or the "attempt" sections, 2C:5-1 and 5-4. The practical effect of this would be to reduce the gravity of the offense substantially (from 15 years maximum to a second degree crime). There appears to be no precise equivalent for N.J.S.A.2A:113-8, "advocating or threatening to take life" in the Code, although Section 2C:12-3, "terroristic threats" might support the prosecution of such conduct. The Code provision does not appear to raise any First Amendment problem though the present section does. The

Code has no counterpart to N.J.S.A.2A:113-9, which presently prevents admission of a judgment of criminal conviction for negligent or reckless homicide in a civil action. Here the Code may reflect a fresh judgment, which appears to be sound, that such a finding of guilt arrived at under more rigorous standards should at least be given evidentiary recognition in a civil trial.

The Code has no equivalent to N.J.S.A.2A:115-1, prohibiting "private lewdness" etc. None is recommended.

The Code departs from present law, N.J.S.A.2A:116-1, et seq. which criminalizes the unauthorized wearing of fraternity and military insignia, by limiting the offense to a situation where the wearer's intentions are fraudulent. See Section 2C:21-17. The change is supported.

N.J.S.A.2A:117-1, et seq. deals with offenses related to "insurance." The Code does not appear to incorporate an offense of the nature described in N.J.S.A.2A:117-2, "conducting unauthorized fire insurance business."

In the area of theft, the Code has no specific provisions dealing with either the "theft of trade secrets," N.J.S.A.2A: 119-5.3, or "the killing or detaining of homing pigeons," N.J.S.A.2A:119-6. While the latter is perhaps archaic, the former would appear to continue to require attention and it is recommended that it be treated specifically.

"Loansharking" is now covered in N.J.S.A.2A:119A-1, et seq.. It appears that Section 2C:20-5, "theft by extortion" rather than Section 2C:12-1, 2C:20-2 or 2C:21-19, provides the closer substitute for the offense described

in N.J.S.A.2A:119A-2, "use of force in connection with the payment of loans." However, it should be noted that presently such conduct would bring a 25 year sentence, but would be at most, a second degree offense under the Code. An upgrading of the Code offense would seem appropriate.

The Code has no provisions covering the offense of "libel," now covered in N.J.S.A.2A:120-1. However, it is recommended that this area be left to the civil law, as the Code would do. A chapter is presently devoted to "malicious mischief," N.J.S.A.2A:121-1 et seq. It is questionable whether Section 2C:17-3 actually embraces the subject matter of N.J.S.A. 2A:121-4, i.e., "destroying boundary marks."

In spite of the reference to Code Section 2C:24-7, "endangering the welfare of an incompetent person," there does not appear to be a counterpart to N.J.S.A.2A:124-2 prohibiting "marriage [to an] insane or feeble minded person," whereunder no element of endangerment to the incompetent need be proved.

"Riots," and related offenses are now covered by N.J.S.A.2A:126-1 et seq. It is notable that the affirmative defense to a homicide charge provided by N.J.S.A.2A:126-6 to one who kills a rioter is omitted by the Code, but would appear to be equally available as a defense under Section 2C:2-5.

A serious problem is its failure to provide any counterpart to N.J.S.A.2A:127-3, which imposes strict reporting duties upon one whe comes into "possession of

motor vehicles with trademark or serial number altered." The referenced fraud sections, 2C:20-7 and Chapter 21, are silent as to any similar reporting requirements. A change in the Code to this effect is urged.

The navigation chapter, N.J.S.A.2A:128-1, et seq., includes as an offense the "dumping of mud or refuse into the Hudson or Delaware Rivers," N.J.S.A.2A:128-5. In the absence of malevolent intent or special circumstances, such conduct is unlikely to fall within Section 2C:17-2, "causing or risking catastrophe" or 2C:17-3, "criminal mischief."

The Code eliminates the special provisions under N.J.S.A.2A:129-1, et seq. dealing with assaults on newspaper reporters in the course of their duties. But the general assault provision (Section 2C:12-1) would appear to offer these persons the same protection as members of the general public.

"Perjury and false swearing" are now embraced in N.J.S.A. 2A:131-1, et seq. While the indicated counterpart to N.J.S.A.2A:131-3, "using false oaths or depositions," namely Section 2C:28-3, is inapposite in that it only applies to unsworn statements, it appears that the substance of the present provision would fall within Section 2C:28-2, "false swearing."

The present "public health" chapter, N.J.S.A.2A:134-1, et seq. has several provisions, i.e., Sections 2A:134-2, -3, and -4, which criminalize various forms of pollution. Although it is likely that such practices

would still be banned under statutes imposing civil liability, there appears to be no warrant for abandoning criminal liability in the area. In fact the trend of the law would militate in favor of stricter penalites. At least a continuation of criminal liability is urged.

The present chapter entitled "Public officers and offices," N.J.S.A.2A:135-1, et seq. deals with various forms of official misfeasance, malfeasance and nonfeasance. See State v. Begyn, 34 N.J. 35 (1961). Present section N.J.S.A.2A:135-6 sets forth a rather elaborate scheme to govern the disposition of public bids by public officers. While the referenced Code Sections, 2C:20-9 and 2C:30-2 would appear to reach any realized harm which the present statute is ultimately aimed at, they would do nothing to insure the maintenance of good bidding practice, as set forth in that statute. It is recommended that the procedure itself be retained, if not in the Code, in another title. The effect then of Section 2C:30-2 particularly would be to criminalize failures to honor such requirements, as now obtains under N.J.S.A.2A:135-6.

Present N.J.S.A.2A:135-11 prohibits "unauthorized persons taking acknowledgements." The Code cross-references Sections 2C:21-1 and 24:14 (non-existent). Section 2C:21-1(2) includes in "forgery," "authentication" of writings purporting to be the act of another; but such conduct is different from that proscribed in N.J.S.A.2A:135-11, i.e., mere unauthorized acknowledgment of instruments, otherwise in

order. It is recommended that a provision to this effect be included in the Code. It should be noted that Section 2C:21-17, "wrongful impersonating" would be of no assistance in the absence of a pecuniary motive. There appears to be no equivalent under the Code to N.J.S.A.2A:135-12, "inquiry of applicant for relief as to religion, creed, etc. ..." While such conduct would clearly be proscribed under current civil rights legislation, consideration ought to be given to whether criminal sanction should continue to attach to such practices, even in the absence of actual "official oppression," i.e., Section 2C:30-1.

The present "railroad and railways" chapter, N.J.S.A. 2A:137-1, et seq. prohibits "willful omission or neglect," leading to the obstruction of trains. Both referenced Code Sections, 2C:17-3, "criminal mischief" and 2C:33-3c, "disorderly conduct," appear to require active wrongdoing, rather than a failure to act. Attention should be given to whether the Code should incorporate a similar provision.

Offenses generally relating to "receiving stolen property," are now covered in N.J.S.A.2A:139-1, et seq. Several specific provisions are treated only generally by the Code. The Code Section 2C:20-7 does not specifically deal with the receipt of "silk or silk fabrics," see N.J.S.A. 2A:139-2. Nor does the Code have any special penalty (i.e., high misdemeanor) provision dealing with the receiving of stolen motor vehicles, as now appears in N.J.S.A.2A:139-

3. However, it is suggested that none is required. Also, there does not appear to be any specific provision in the Code dealing with N.J.S.A.2A:139-4, "purchasing certain articles from children." Nothing in Section 2C:24-4, "endangering welfare of children," would appear to reach this practice and it might be well to study incorporation of a like provision in the Code.

N.J.S.A.2A:140-1, et seq. is a chapter devoted to "religion." Both of its provisions, i.e., "pretending to be Jesus Christ or a god," and "blasphemy" raise grave questions of constitutionality. Counterparts do not appear in the Code, but it is felt that the Code's "wrongful impersonating" section, 2C:21-17, is adequate to deal with any genuinely criminal conduct in the area.

Under the Code, the rather archaic definition of "seduction," see N.J.S.A.2A:142-1, et seq. is abandoned in favor of a broader protection to minors, including protection from seduction. As noted above in this report, the Code departs from the present law as to "sodomy," N.J.S.A.2A:143-1, et seq. in criminalizing only non-consensual acts, and acts with persons unable to consent.

"Treason and offenses against the government" are now dealt with in N.J.S.A.2A:148-1, et seq. The Code has abandoned much of the present law and offers no counterparts to N.J.S.A.2A:148-1, "treason"; -3, "maintaining foreign authority"; -5, "concealment of treason," etc.; -7 to -9 which deal with advocating "anarchy," nor any of

the provisions from -13 to 22 which deal with advocating and aiding "subversion." Apart from the fact that these provisions are of doubtful constitutionality, it would appear that the entire area of treason has been preempted by federal legislation.

The Code incorporates no "misprision of treason" provision, but Section 2C:29-4 which deals with "compounding" would appear to cover this area. Present N.J.S.A.2A:148-6, "threatening the President," etc., is of dubious constitutionality and carries an invalid death sentence which seems wholly inappropriate: it is not specifically covered by the Code, and federal legislation in the area would appear to adequately deal with the problem. It appears that much of present N.J.S.A.2A:148-10 to 12, i.e., advocating various assaults, etc., may be unconstitutional. The substantive problems involved appear to be adequately dealt with by Section 2C:33-1, "riot" and the assault provision, Section 2C:12-1, in conjunction with "aiding and abetting," without the constitutional problems attending present law. N.J.S.A. 2A:148-3 to -22, "advocating subversion," etc., are of dubious constitutionality and deal with a field now preempted by the federal government.

"Weapons and explosives" are treated in N.J.S.A.2A:151-1 to -63. While N.J.S.A.2A:151-2 prohibits pawnbrokers from dealing in weapons, its Code counterpart, Section 2C:39-7, only applies to guns, rather than all forms of weapons. N.J.S.A.2A:151-12, "manufacture or sale of dangerous instru-

ments," does not appear to find an adequate substitute in its referenced counterpart in Section 2C:39-3 or -4 of the Code (which deals only with machine guns). The substance of N.J.S.A.2A:151-15, "alteration of firearm serial numbers," does not appear to be incorporated in Section 2C:39-4. However, it might be treated under various fraud provisions of the Code in Chapter 21. With reference to N.J.S.A.2A:151-50, "sale, purchase or possession of machine guns," the corresponding Code Section, 2C:39-3a deals with the possession element but not the "sale, giving or loan" proscription. All of these matters bear further study.

"Sentence and imprisonment" are now dealt with under N.J.S.A.2A:164-1, et seq. N.J.S.A.2A:164-3, et seq., commonly known as the New Jersey Sex Offender Act, provides an integrated scheme whereby those found guilty of committing sex offenses may be treated according to their individualized needs. N.J.S.A.2A:164-3 provides that a person found guilty of certain specified crimes of a sexual nature must be sent to a diagnostic center for a period of sixty days. The Center performs a complete physical and mental examination and files a written report with the sentencing court. N.J.S.A.2A:164-4. If it appears from such report that the offender's conduct was characterized "by a pattern of repetitive, compulsive behavior, and if it was violent, or if there was an age disparity between him and his victim," the court must submit the offender

to a "program of specialized treatment for his mental and physical aberrations." N.J.S.A.2A:164-6. The period of probationary supervision or confinement to an institution cannot be for a period of time greater than that provided by law for the crime of which such person was convicted. N.J.S.A.2A:164-6. The Act further provides that the chief executive officer of an institution wherein such a person is confined must report in writing at least semi-anually to the Commissioner concerning the physical and mental condition of such person with a recommendation as to his continued confinement or consideration for release on parole. N.J.S.A.2A:164-9.

While the Commentary to Section 2C:44-3 indicates that "sex offenders" are included among those having a "mental abnormality," subjecting them to extended terms under Sections 2C:44-3 and 2C:43-7, the Code fails to spell out the procedure involved in equivalent detail, though the Commentary (pp. 331-332) clearly indicates that current practice as to sex offenders would prevail under the Code.

It does not appear that Code Sections 2C:43-7 and 2C:44-3 provide for the "arrangement of transfers of prisoners for treatment purposes" now found in N.J.S.A.2A:164-7, nor do Sections 2C:43-7 or 2C:43-3 make provision for the "allocation of costs related to maintaining persons in diagnostic centers," as now appears in N.J.S.A.2A:164-11. It is recommended that the question of cost allocation

be given further attention. The Code does not appear to have any "security to keep the peace" provision as in N.J.S.A.2A:164-14. However, such omission is consistent with the Code's new approach to sentencing probation and parole.

N.J.S.A.2A:170-1, et seq., the "disorderly persons" chapter contains 95 sections. The Code appears to offer counterparts to most of these provisions. However, the Code does omit certain offenses entirely and deals with others with imprecision. While Code Section 2C:33-7 does not precisely cover the substance of N.J.S.A.2A:170-1 "failure to give a good account," it appears to offer a more direct approach to the ultimate objective of public safety and avoids the vagueness of the present statute. The Code's omission of equivalents to N.J.S.A.2A:170-2, "being a common thief," etc. and N.J.S.A.2A:170-3 "being a pauper" is well grounded. Apart from the dubious constitutionality of the present provisions, Section 2C:33-7 offers a more efficient approach to the problem.

While the Code does not contain a specific prohibition of "fortune tellers," as in N.J.S.A.2A:170-7, the Code's fraud provisions would appear to provide an adequate response to the problem. The Code's omission of "spitting on the sidewalk," N.J.S.A.2A:170-10, appears to be in tune with modern thinking.

"Attempting to commit suicide," N.J.S.A.2A:170-25.6, would not be punishable under the Code. The change

is in line with the Code's general philosophy. While the Code provides no equivalent to N.J.S.A.2A:170-25.6, "membership in a paramilitary organization," the Code Sections, 2C:33-1 and 2C:33-2 relating to "riot" and "disorderly conduct" offer the public protection against the ultimate evil involved while avoiding constitutional problems.

The Code omits a "peeping tom" provision such as N.J.S.A.2A:170-31.1, but such conduct would be treated as trespass under Section 2C:18-3, which would appear to be an adequate response. The Code in Section 2C:17-3 does not actually cover the substance of N.J.S.A.2A:170-38, "dumping of junk on private property." The offense itself seems substantial enough to warrant its retention in the Code. While there are no actual counterparts to N.J.S.A.2A:170-5, 2A:170-53 and 2A:170-54.1 which relate to giving alcohol or cigarettes to minors, as well as permitting them in dance halls, the approach of the Code in Section 2C:24-4, to prohibit endangering the welfare of a minor seems entirely adequate.

There are several other rather obscure disorderly persons offenses for which the Code offers no counterparts. Among them are N.J.S.A.2A:170-69.2 which relates to "hawking, peddling, [etc.] ... goods ... on public beach or boardwalk," N.J.S.A.2A:170-69.7, "enclosure of junkyard by wall or fence," and "ticket scalping," N.J.S.A.2A:170-70. Likewise, there appears to be no counterpart in the Code for N.J.S.A.2A:170-75, which prohibits "soliciting the sale of funeral wreaths,"

or N.J.S.A.2A:170-76 which prohibits "exposing to view instruments to procure abortion." The Code also has no equivalents to N.J.S.A.2A:170-77 to 77.2b which deal with various offenses relating to the distribution of newspapers, magazines, circulars, etc. None of these offenses seem to be frequently prosecuted but further study is recommended to determine whether they should be retained in the Code.

Under the Code, there is no equivalent to N.J.S.A.2A:170-94, "failure of a State employee to surrender his identification upon leaving state employment." However, the Code in Section 2C:21-17, "wrongful impersonating" would appear to cover any misuse of such identification. It is suggested that mere failures to surrender identification should not be criminalized. N.J.S.A.2A:170-95 imposes a duty on one who finds a state identification badge to turn it in to the state or the local police. While the Code has no similar provision, Section 2C:20-6, relating to misplaced, lost or misdelivered property would seem to impose a similar obligation. It is not recommended that any addition to the Code be made to incorporate such a provision.

Chapter 20 of the Code includes various provisions relating to "shoplifting," as set forth in N.J.S.A.2A:170-97 to 101. However, the procedure for taking a suspect into custody, see N.J.S.A.2A:170-100, is not found in the Code. That provision serves to shield police and store

management from civil liability where they have acted reasonably in detaining suspected offenders. It is recommended that attention be given to the desirability of including a similar provision in the Code. It may well be that such provision unduly favors the shopkeeper and abridges the freedom of the suspect.

Unless all of the foregoing omissions are specifically considered and either accepted or rectified by the Legislature, the Code will not in the strict sense, amount to a codification. More critically, to adopt the Code in its present form without such consideration would mean wholesale abrogation of legislative judgments in several vital areas in favor of the judgments of an appointed committee.

CONCLUSION

In 1968, our Legislature established the Criminal Law Revision Commission to "study and review the statutory law pertaining to crimes, disorderly persons, criminal procedure and related subject matter." N.J.S.A.1:19-4. The articulated objective was to "revise and codify the law in a logical, clear and concise manner." N.J.S.A.1:19-4. Responding to its mandate, the Commission issued its final report and recommendations in October, 1971.

The enormity of the endeavor must be emphasized. Society's values change with the passage of time and a comprehensive penal code must of necessity reflect the adjustment of competing interests. It was thus incumbent upon the Commission in certain instances to reexamine centuries of well defined case law. Likewise, statutory law was to be reviewed and modernized. The Code has for the most part accomplished its purpose.

Nonetheless, unanimity in evaluating the proposed Code cannot be expected, for, as noted by the Commission, there is no "monopoly" on the truth. The great danger is that the proposed legislation will be considered as a single entity, and adopted or rejected in its entirety. Various provisions in the Code can be amended and others discarded without disturbing its essential harmony. Each provision should therefore be reviewed individually.

The criticisms and recommendations contained in this report fall into three related categories. First, the substantive soundness of several of the Commission's proposed provisions is questioned. For example, the corroboration doctrine in prosecution for sexual offenses has not been recognized in New Jersey's law. Currently, the doctrine is the subject of great criticism throughout the country. It is submitted that its adoption would not serve the public interest. The Code's presumption of non-imprisonment is also regarded as unsound. It would in effect return the offender to the same environment which contributed to the commission of the crime in the first place. Thus, neither rehabilitation of the offender nor prevention of future crimes would be affected. Likewise, the new affirmative defense to the charge of felony-murder, which depends upon the foreseeability of the homicidal risk, should be reexamined. It detracts from the policy of deterrence and diminishes the offender's responsibility for his criminal conduct.

Secondly, many of the provisions in the Code suffer from ambiguity and should be redrafted or deleted. The proposed first degree murder provision particularly reflects this infirmity. Further, the Code's provisions relating to firearms are unclear and redundant. The proposed insanity defense is confusing and should likewise be redrafted.

Finally, many provisions in the Code directly and indirectly affect the ability of prosecutors and judges to effectively perform their respective functions. The de minimis infraction provision impinges upon a prosecutor's discretion and subverts plea bargaining. The Commission's rejection of the Supreme Court's decision

in State v. McGrath, supra, has much the same effect. So too, the power of trial judges to mold judgments of conviction, i.e., to sentence offenders as if convicted of lesser included offenses, invades the province of petit juries. These and other provisions noted in the text of this report should be redrafted or entirely eliminated.

But, the principal vice of the Commission's proposal is that too much has been borrowed from the Model Penal Code. The Model Penal Code was formulated in 1962 by the American Law Institute and provides an excellent "plan for criminal law revision, a source of research material, and a guide to the development of modernization of the law. "Task Force Report: The Courts, "Substantive Law Reform" ch. 8, P.98 (1967). However, as noted by the Commission in the introduction to the New Jersey Penal Code, "[i]t was not intended to be a ready-made statute for adoption...." In New Jersey, our courts have done much to define and clarify the criminal law. When not specifically confined by the principle of judicial self-restraint and the doctrine of stare decisis, the courts of this State have molded the law in accordance with modern standards. It is submitted that in many instances, the Commission should have codified existing case precedent, thereby avoiding the necessity of future judicial construction of new legislative enactments.

The efforts of the Criminal Law Revision Commission should be applauded. On balance, the Code represents a rational and workable approach to contemporary problems. Nevertheless,

much needs to be done; there is a real need for modification and further consideration before this Code becomes law. We respectfully submit this report with the hope it will assist our Legislature in performing this responsibility. The Attorney General offers the services of his staff for purposes of assisting the Legislature in further evaluating and modifying the proposed New Jersey Penal Code.

David S. Baime
Michael R. Perle
John A. Brogan
Fred H. Kumpf
John De Cicco
Alfred J. Luciani