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THE NEW JERSEY CODE OF CRIMINAL JUSTICE:† ANALYSIS AND OVERVIEW

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In 1968, the New Jersey Legislature created a Commission "to study and review the statutory law pertaining to crimes, disorderly persons, criminal procedure, and related subject matter."[1] The purpose of the Commission was to prepare a revision of our criminal law "so as to embody" modern principles of justice and to "eliminate inconsistencies, ambiguities," and "redundant provisions."[2] The articulated objective of the enabling legislation was to "revise and codify the law in a logical, clear and concise manner."[3]

Pursuant to its legislative mandate, the Commission issued its final report in October 1971 and recommended the enactment of a comprehensive penal code. The efforts of the Commission were similar to those in other jurisdictions where codes have been enacted. Most notable in this context is the recent adoption of penal codes in California,[4] New York,[5] Illinois,[6] Wisconsin,[7] Connecticut,[8] North Dakota,[9] Louisiana,[10] Kentucky,[11] and Pennsylvania.[12] Congress is presently considering the enactment of a federal criminal code.

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† To be codified as N.J. STAT. ANN. §§ 2C:1-1 to 98-4 (West, eff. Sept. 1, 1979).

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[1] N.J. STAT. ANN. § 1:19-4 (West 1969).

[2] *Id.*

[3] *Id.*

[4] CAL. PENAL CODE §§ 1-80 to -14051 (West 1970).

[5] N.Y. PENAL LAW §§ 1.00-410.00 (McKinney 1967 & Supp. 1975).

[6] ILL. ANN. STAT. ch. 38, §§ 1-1 to 90-11 (Smith-Hurd 1961).

[7] WIS. STAT. ANN. §§ 939.01-949.18 (West 1958).

[8] CONN. GEN. STAT. ANN. §§ 53a-1 to -215 (West 1972).

[9] N.D. CENT. CODE §§ 12.1-01-01 to -33-04 (1976).

[10] LA. REV. STAT. ANN. §§ 14:1-:501 (West 1974).

[11] KY. REV. STAT. ANN. §§ 500.010-534.060 (Baldwin 1977).

[12] PA. CONS. STAT. ANN. §§ 101-7505 (Purdon 1973).

The very idea of codifying the criminal law would appear to be an alien concept since New Jersey has never previously adopted a comprehensive penal code. Traditionally, our supreme court has served as the primary governmental entity in defining and developing most areas of the criminal law.[13] The Code must be reviewed to determine whether it has achieved the purposes and objectives which any revision of the criminal law must embody. These goals include: (1) providing a single source of reference with regard to the penal law, (2) revising and clarifying elements of offenses and defenses, (3) modernizing all aspects pertaining to the criminal law, and (4) providing a comprehensive scheme of sentencing and corrections. Perhaps more significant is an evaluation of the Code with respect to the ultimate objects of the criminal law: (1) protection of the public, (2) deterrence of the offender and of would-be criminals, (3) rehabilitation of the offender, and (4) incapacitation of the individual offenders.[14]

An examination of the statutory revision reveals that the drafters were conspicuously aware of the various objectives of the criminal law and of the benefits of codification. Legal principles affecting criminal liability, such as duress, entrapment, and intoxication, are clearly defined. The law of justification, including self-defense, defense of others, and the use of force by law enforcement personnel, is codified,[15] and principles of criminal responsibility are clarified. The definition of substantive offenses has been modernized to comport with current societal attitudes. In this regard, the Code deletes from the purview of the criminal law certain consensual sexual offenses which recently have been declared unconstitutional.[16] Purely social gambling is decriminalized, and common law crimes are now specifically enumerated and defined.[17] In the area of sentencing, the rational grading of offenses more realistically relates punishment to the moral culpability of the

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[13] *See, e.g.*, State v. Savoie, 67 N.J. 439, 341 A.2d 598 (1975); State v. DeSantis, 65 N.J. 462, 323 A.2d 489 (1974).

[14] *See, e.g.*, State v. Ivan, 33 N.J. 197, 162 A.2d 851 (1960).

[15] The Code describes the situations in which a person may use force upon another without being criminally liable for his conduct. The critical sections of the Code are §§ 2C:3-4 to -7 which deal with self-defense, defense of others, defense of property, and use of force in law enforcement, respectively. Each provides a detailed listing of circumstances describing when, and to what extent, force may be used; each is also subject to the provisions of § 2C:3-9 which details the circumstances under which justification is not available. Little purpose would be served by a detailed analysis of each subsection. It is simply not possible to anticipate the infinite variety of situations which could arise under each provision, or to anticipate all possible omissions or flaws. Only the course of judicial decisions in actual cases will tell whether the codification has adequately dealt with this area which was previously within the exclusive domain of the common law.

[16] *See, e.g.*, State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977).

[17] N.J. STAT. ANN. § 2A:85-1 (West 1969). Misconduct in office is also dealt with under this section.

offender and confers expanded charging discretion upon prosecutorial authorities.

Although the Code is generally endorsed, many of its provisions are unworkable and not in the public interest. It is necessary, therefore, to evaluate its provisions on their merits. That certain portions of the Code are subject to criticism, however, does not warrant wholesale rejection of the Code.

As a prefatory note, this article does not address issues relating to sentencing. Professor Richard Singer has dealt with those problems elsewhere, in an excellent analysis,[18] and his views are endorsed here. Rather, this article focuses on theories of liability and on redefinitions of some of the more important crimes.

SUBTITLE 1. GENERAL PROVISIONS

The first subtitle of the New Jersey Code of Criminal Justice represents an entirely new approach to the formulation of general principles of substantive criminal law in New Jersey. Although the Code mirrors the Model Penal Code, development of this area has been left almost entirely to New Jersey's courts. The result has been a substantial body of case law which is widely accepted and well-understood by members of the bench and bar and, to a lesser extent, by the general public. The significance of the present codification is that it effects a wholesale change in the basic principles which underlie all of the criminal law. This change both in substance and in terminology cannot be overstated. Any serious shortcomings in this critical area of the Code will have an immediate disruptive effect on the criminal justice system and will ultimately result in a great disservice to the public it is designed to protect. Additionally, it would generate vast amounts of needless litigation, work a hardship on criminal defendants, 'and impose upon the Legislature the burden of amending unsatisfactory provisions. Hence, it is essential that this subtitle speak with the greatest possible clarity, certainty, and simplicity, yet simultaneously provide sufficient flexibility to meet unanticipated situations and to permit growth and development of the law. Obviously, on a substantive level, the provisions must deal intelligently and comprehensively with the general criminal law and must provide for substantial justice for both the defendant and the public.

For the most part, the Code meets these difficult, often conflicting, demands. Consequently, the provisions of subtitle I are generally satisfactory. One comment, however, applies to the entire subtitle and bears mention at the outset. It appears that the drafters intended to make this subtitle all-

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[18] Singer, *In Favor of Presumptive Sentences Set by a Sentencing Commission*, 5 CRIM. JUST. Q. 1 (1977).

inclusive and to deal explicitly with every conceivable situation which might arise under its provisions. As a result, many of the provisions are quite lengthy, are drafted in minute detail, and seek to make exceedingly subtle distinctions among various factual settings. While this detail is commendable in that it adds certainty and specificity to the Code, at times the results are unduly complex and cumbersome, and certain provisions may prove difficult to comprehend and to apply.[19] Admittedly, this problem may be inherent in any codification of the criminal law. This subtitle, however, would benefit considerably by re-drafting some of the more complex provisions in more general language and leaving their application in particular factual settings to judicial construction. The fact that such an approach may be contrary to the underlying rationale of codification results in a code which is more easily understood and applied than is the present Code.

Preliminary

Section 2C:1-1 provides for the transition from the current law to the Code and contains the general rules of construction applicable to the Code. The substantive provisions of the Code apply to all offenses committed after the effective date while the procedural provisions will govern in all cases pending on, or initiated after, the effective date. Additionally, the court, with the consent of the defendant, may impose sentence under the Code in any pending case and "shall" dismiss any prosecution for an offense which is no longer an offense under the Code.[20] The provisions dealing with statutory interpretation are non-controversial and generally consistent with traditional principles of statutory interpretation.

Section 2C:1-3 establishes the territorial jurisdiction of New Jersey law. The existing law in our state is "that an essential element necessary to the invocation of jurisdiction in criminal cases is that the crime be committed in the State in which the crime is tried."[21] Whether any particular conduct within our state is sufficient to constitute "commission" of an offense has been left to case law. The Code appears to broaden the jurisdiction of our courts to the constitutionally permissible limits. The exact parameters of this

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[19] *See, e.g.*, § 2C:1-3 (territorial applicability); §§ 2C:1-8 to -12 (provisions limiting multiple prosecutions); § 2C:2-3 (causal relationship); § 2C:2-6 (liability for conduct of another).

[20] Sections 2C:1-1d(1) and (2) further provide that any person who is under sentence of imprisonment on the effective date of the Code for an offense committed prior to the effective date "which has been eliminated from the code or who has been sentenced to a maximum term of imprisonment for an offense committed prior to the effective date which exceeds the maximum established by the code for such an offense" may petition to have the sentencing court review his sentence. The sentencing court may impose a new sentence, but that new sentence cannot exceed the original sentence.

[21] State v. McDowney, 49 N.J. 471, 474, 231 A.2d 359, 360 (1967).

provision are difficult to define in the abstract and must await resolution in concrete controversies. This provision adds more predictability and certainty to the area of law and is, with one exception, satisfactory.

Section 2C:1-3f provides that the court may dismiss, hold in abeyance, or place on the inactive list, a criminal prosecution where it appears "that such action is in the interests of justice because the defendant is being prosecuted for an offense based upon the same conduct in another jurisdiction and this state's interest will be adequately served by a prosecution in the other jurisdiction."[22] Though application of this provision should prove infrequent, it is felt that the provision is unwise and should be deleted. As the Commentary to this section notes,[23] this provision is unique in permitting application to criminal cases of a standard similar to the civil doctrine of forum non conviens. Omitted from this provision, however, is any method by which the prosecutor may bring to the court's attention matters relevant to the determination of whether the state prosecution should proceed. On a more fundamental level, it encroaches upon the traditional role of the prosecutor in exercising his discretion and control over pending criminal matters. The prosecutor should be the final arbiter of whether a pending or an actual prosecution in another jurisdiction sufficiently vindicates the state's interests so that further prosecution should not be sought.[24] Prosecutors have not only the power, but the responsibility to avoid further prosecution where the facts do not warrant it. The good faith of the prosecutor, along with traditional principles of double jeopardy and collateral estoppel, should afford a defendant ample protection from multiple prosecutions. In short, there appears no valid reason to place this traditionally prosecutorial function into the hands of the court.

Section 2C:1-4 reclassifies offenses either as crimes (those offenses for which imprisonment in excess of six months may be imposed) or as disorderly persons offenses (all others). Crimes are further categorized, only for

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[22] § 2C:1-3f.

[23] N.J. Criminal Law Revision Commission, The N.J. Penal Code, Vol. 2: Commentary 5 (1971) [hereinafter cited as Commentary].

[24] A.B.A. Standards, § 3.9 (as amended 1971), Discretion in the Charging Decision, provides in pertinent part:

> (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:
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> . . . .
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> (VII) Availability and likelihood of prosecution by another jurisdiction.

See also State *ex rel.* McKittrick v. Wallach, 353 Mo. 312, 321-24, 182 S.W.2d 313, 318-19 (1944); State v. Winne, 12 N.J. 152, 174, 96 A.2d 63, 74 (1953).

sentencing purposes,[25] but the classification of crimes as misdemeanors or as high misdemeanors is eliminated. While this reclassification is commendable, it is incomplete in that the Commission has specifically declined to incorporate the New Jersey Controlled Dangerous Substances Act[26] into the Code.[27] This omission seems contrary to a primary reason for enacting a Code, that is, codification of all criminal offenses within one document. Failure to incorporate the drug act will result in an awkward and cumbersome procedure whereby the entire criminal justice system will be functioning under two separate schemes of sentencing. It is recommended, therefore, that the new drug law be incorporated into the Code.

Section 2C:1-5 effects a major change in New Jersey law by abolishing all common law crimes. This modification is in accord with the prevailing trend of passing responsibility for the growth of the criminal law from the courts to the Legislature. It adds immeasurably to the certainty and to the specificity of the law, and provides clear notice to potential offenders of the nature of prohibited conduct. It is felt that these advantages far outweigh the only realistic harm which might result; that is, the inadvertent failure to include within the Code certain conduct justifying criminal sanctions. In subsection d, however, the preemption provision requires modification. This section precludes the enactment, by local governments, of any ordinance conflicting with "any provision of this Code or with *any policy of this State* expressed by this Code, whether that policy be expressed by inclusion of a provision in the Code or *by exclusion of that subject* from the Code."[28] While the basic principle is manifestly sound and well-established in New Jersey case law,[29] the wording of the italicized portion of the provision provides an unworkable standard for its application.

The requirement that a local ordinance must not be contrary to "any policy of this State . . . whether that policy be expressed by inclusion of a provision in the Code *or by exclusion of that subject* from the Code,"[30] places upon a local governing body a well-nigh impossible task of ascertaining whether a proposed ordinance would conflict with an abstract standard which finds no direct expression in the Code.[31] The inquiry would often focus on determining whether something was omitted from the Code through sheer

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[25] § 2C:1-4c; §§ 2C:43-1 to -10.

[26] N.J.STAT. ANN. §§ 24:21-1 to -45 (West Supp. 1978-1979).

[27] § 2C:1-4c.

[28] § 2C:1-5d. (emphasis added).

[29] *See* Inganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973); Township of Chester v. Panicucci, 62 N.J. 94, 299 A.2d 385 (1973); State v. Ulesky, 54 N.J. 26, 252 A.2d 720 (1969).

[30] § 2C:1-5d. (emphasis added).

[31] *Compare* Wagner v. City of Newark, 24 N.J. 467, 132 A.2d 794 (1957) *with* Inganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973).

inadvertence or for a policy reason. Local lawmakers cannot reasonably be expected to make such thorny judgments. So, too, a high degree of uncertainty would be injected into any local ordinance until such time as a court determines whether a particular ordinance meets this standard. In short, the standard provided by the final phase of subsection d is too nebulous to provide a meaningful guideline, and it should be deleted.

The time limitations placed on prosecutions by section 2C:1-6 are basically acceptable. This section provides that prosecution for a crime must commence within five years after its commission, while prosecution for a disorderly persons or petty disorderly persons offense must begin one year after its commission. A separate provision is included to deal with public officers and employees.[32]

Section 2C:1-8 deals with the permissible methods of prosecution when conduct constitutes more than one offense. Subsection a(2) provides that a defendant may not be convicted of more than one offense if "[o]ne offense consists only of a conspiracy or other form of preparation to commit the other." The Code takes the view that conspiracy to commit an offense, like attempt, may consist merely of preparation to commit that offense and that a conviction for either the conspiracy or the preparation adequately deals with such conduct.[33] It is submitted that both analytically, and as a matter of public policy, this position is wrong. An attempt has no collateral consequences beyond the possible completion of the crime attempted. If, in fact, the crime is completed, conviction and punishment for the completed offense protects the same values which the law of attempt seeks to protect. Hence, the law defines an attempt as the failure to complete the substantive crime and does not permit a conviction for both.[34] The crime of conspiracy, however, has ramifications beyond the possible completion of the substantive offense which is its objective. The United States Supreme Court long ago recognized this situation in *Callanan v. United States*.[35] Numerous

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[32] § 2C:1-6b(3). Under this provision, the time limitation is extended to seven years for "[a] prosecution for any offense set forth in 2C:27-2 [bribery in official and political matters], 2C:27-3 [threats and other improper influence in official and political matters], 2C:27-4 [compensation for past official behavior], 2C:27-5 [retaliation for past official action], 2C:27-6 [gifts to public servants], 2C:27-7 [unlawful compensation to public servants], 2C:27-8 [selling political endorsements], 2C:29-4 [compounding], 2C:30-1 [official oppression], 2C:30-2 [official misconduct], 2C:30-3 [speculating or wagering on official action or information], or any attempt or conspiracy to commit such an offense . . . ."

[33] *See* Commentary, *supra* note 23, at 18.

[34] *See* State v. Swan, 131 N.J.L. 67, 34 A.2d 734 (E. & A. 1943); State v. Schwarzbach, 84 N.J.L. 268, 86 A. 423 (E. & A. 1913).

[35] 364 U.S. 587 (1961).

> The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law. It has been long and consistently recognized by the Court

other courts have followed this rationale, and it has long been, and continues to be, the rule under both New Jersey and federal law, that a conviction may be had both for conspiracy and for the substantive offense.[36]

The Code gives insufficient consideration to the ancillary consequences which invariably accompany a criminal conspiracy. It is true that the Commentary states that there may be a conviction for both the conspiracy and the substantive offense if the prosecution shows that the conspiracy had additional criminal objectives.[37] This concession, however, is wholly insufficient. Conceptually, it should not be necessary to prove the existence of

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> that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.
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> . . . .
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> This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally makes possible the attainment of ends more complete than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crimes makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Id. at 593-94.

[36] *See, e.g.*, Dennis v. United States, 384 U.S. 855 (1966); Pinkerton v. United States, 328 U.S. 640, 643 (1946); Carter v. McClaughrey, 183 U.S. 365 (1902); United States v. Pappas, 445 F.2d 1194 (3d Cir.), *cert. denied*, 404 U.S. 984 (1971); State v. Carbone, 10 N.J. 329, 337, 91 A.2d 571, 574 (1952); State v. Johnson, 29 N.J.L. 453 (E. & A. 1861); State v. Oats, 32 N.J. Super. 435, 108 A.2d 641 (App. Div. 1954); State v. Chevencek, 127 N.J.L. 476, 23 A.2d 176 (Sup. Ct. 1941).

[37] Commentary, *supra* note 23, at 19. The Code itself does not contain this explicit proviso. Section 2C:1-8a(2) provides:

> When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
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> . . . .
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> One offense consists only of a conspiracy or other form of preparation to commit the other;
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> . . . .

Apparently the Commentary infers this result from the use of the word "only." If the merger of conspiracy into the substantive offense is to be retained as a feature of the Code, the wording of this section should be modified to explicitly provide for this exception. The present wording of the Code does not provide for this result in sufficiently clear terms and is open to conflicting interpretations.

other criminal objectives. The additional dangers which distinguish a criminal conspiracy from other inchoate crimes arise irrespective of whether there be one or numerous objectives.[38] "The combination itself is vicious and gives the public an interest to interfere by indictment."[39] Moreover, as a practical matter, it is doubtful whether the state can show additional objectives, since problems of proof are often considerable. If the state attempts to do so, such action would further inject side issues into an already complex area of the law, creating a risk of jury confusion and the undue consumption of time. Thus, as a practical matter, the exception does little to allay the flaws of the provision. To reiterate, there is no unfairness to a defendant from a conviction both for conspiracy and for the substantive offense which is its objective. The offense of conspiracy is designed to protect a distinct interest apart from that of any substantive offense; conviction and punishment for each should be permitted.

Section 2C:1-8a(3) provides that a conviction for more than one offense cannot stand if "inconsistent findings of fact are required to establish the commission of the offenses." This is the prevailing law in our state.[40] To avoid confusion, the Code might state explicitly that this proviso is not a bar to "inconsistent verdicts"; *i.e.*, a conviction on one count which is inconsistent with an acquittal on another count. Under such circumstances, the prevailing rule in this jurisdiction and in the majority of others is that the guilty verdict stands.[41]

Section 2C:1-8a(4) prohibits separate convictions arising both under a general and under a specific statute. Naturally, a single act may be proscribed by two separate statutes designed to prevent separate public harms. Under certain circumstances, however, two separate convictions may be sustained on the basis of this single act; the Code would prohibit this occurrence. As in the prohibition against convictions for both conspiracy and for the substantive crime which is its object, the section under discussion would have a negative effect upon the deterrence of unlawful conduct. Furthermore, this provision would seem to overrule several well-reasoned decisions by our courts. For instance, in *State v. Montague*,[42] the supreme court upheld convictions for threatening a police officer's life and for assault and battery upon that officer. The court found that these offenses did not merge and that

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[38] *See, e.g.*, U.S. v. Callanan, 364 U.S. 587 (1961).

[39] State v. Carbone, 10 N.J. at 337, 91 A.2d at 574.

[40] State v. Bell, 55 N.J. 239, 260 A.2d 849 (1970); State v. Emery, 27 N.J. 348, 142 A.2d 874 (1958).

[41] State v. Still, 112 N.J. Super. 368, 373, 271 A.2d 444, 446-47 (App. Div. 1970); *see* Dunn v. United States, 284 U.S. 390 (1932); Annot., 18 A.L.R.3d 259 (1968).

[42] 55 N.J. 387, 406, 262 A.2d 398, 407-08 (1970).

separate convictions were proper.[43] No valid purpose is served by the addition of this provision to the Code in its present form. Separate convictions should be permitted when the state has a valid interest in protecting against distinct harms.

Section 2C:1-8b is the mandatory joinder provision. This provision requires that all offenses charged against a defendant which arise from the same criminal episode, which are known to the prosecutor, and which are within the jurisdiction and venue of a single court, be disposed of in a single trial. Section 2C:1-8b, which had already been adopted as New Jersey law, has proven satisfactory to date.[44]

Section 2C:1-8d anticipated the supreme court decision in *State v. Saulnier,*[45] which overruled *State v. McGrath*.[46] The section permits conviction for an included disorderly persons offense in a trial on an indictment in county court. As the court noted in *Saulnier,* the decision in *McGrath* had long been subject to criticism; the proposed Code adopts "a more suitable judicial approach."[47] In view of the *Saulnier* decision,[48] the Code proposal is additionally attractive.

Section 2C:1-9 and -10 codifies general principles of double jeopardy and of collateral estoppel. Section 2C:1-9 precludes retrial for the same statutory offense based on the same facts as a former prosecution following acquittal, conviction, or other termination under the enumerated circumstances. Section 2C:1-10 enumerates the circumstances under which prosecution is barred by a former prosecution for a different offense. While the formulations are unobjectionable, the advisability of attempting any codification of this area of the law must be questioned. Constitutional doctrines are constantly changing, and as they do, so must the provisions or interpretation of the Code. As of this date, the law with regard to double jeopardy is in a state of flux, and precise standards of application are impossible to define. Even the New Jersey supreme court has declined to establish concrete guidelines or rules. The court instead 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.[49] So, too, the United States Supreme Court has "explicitly

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[43] *See also* State v. Hampton, 61 N.J. 250, 294 A.2d 23 (1972); State v. Craig, 48 N.J. Super. 276, 279, 137 A.2d 430, 432 (App. Div. 1958).

[44] *See* State v. Gregory, 66 N.J. 510, 333 A.2d 257 (1975).

[45] 63 N.J. 199, 306 A.2d 67 (1973).

[46] 17 N.J. 41, 110 A.2d 11 (1954).

[47] *See* Knowlton, *Criminal Law and Procedure,* 10 RUTGERS L. REV. 97 (1955).

[48] The court in *Saulnier* set forth guidelines for the trial of these offenses. In sustaining the convictions of an included disorderly persons offense in a trial on an indictment in county court, the court effectively met the objections raised in *McGrath*.

[49] *See* State v. Currie, 41 N.J. 531, 538-45, 197 A.2d 678, 680-86 (1964).

declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial."[50] This process of creating rules, however, is precisely what the Code attempts to achieve. Whether the Code will succeed in a task which the highest courts in New Jersey and the United States have declined to attempt because of its inherent difficulty can be determined only on a case by case basis after promulgation of the Code. One can anticipate neither the infinite variety of factual situations which might arise during litigation, nor the course the Supreme Court will follow in future decisions in this area. If these sections of the Code prove constitutionally inadequate, they will, in practice, be replaced by the constitutional guarantees as interpreted in future court decisions, and no real harm will result. If, however, the Code adopts more stringent standards then are constitutionally required, constitutionally valid prosecutions will be unnecessarily frustrated. In sum, there are serious misgivings about any attempt to codify this area of the law. If such a course is nevertheless deemed advisable, it is difficult to criticize the particular formulations proposed, since their viability can be determined only in the course of actual litigation.

Section 2C:1-11 bars prosecution in this jurisdiction for an offense which was the subject matter of a prosecution in another jurisdiction. Again, there is underlying doubt as to the advisability of any codification of this area of the law, and the remarks addressed to sections 2C:1-9 and -10 apply to this section, as well. Beyond that suggestion, the substance of the provision is undesirable.

In a trilogy of cases, the United States Supreme Court has upheld the doctrine of dual sovereignty.[51] In *State v. Cooper*,[52] the Supreme Court of

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[50] United States v. Jorn, 400 U.S. 470, 480 (1971).

[51] Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922).

The viability of the dual sovereignty concept has been questioned by some. *See, e.g.*, Note, 62 J. CRIM. L.C. & P.S. 29 (1971); Waller v. Florida, 397 U.S. 387 (1970). But recently the United States Supreme Court denied certiorari in several cases emanating from New Jersey which directly raised the issue of whether *Bartkus* should be overruled. *See* Colonial Pipeline Co. v. New Jersey, 404 U.S. 831 (1971); Jacks v. New Jersey, 404 U.S. 865 (1971); Leuty v. New Jersey, 404 U.S. 865 (1971); Feldman v. New Jersey, 404 U.S. 865 (1971). To this date the concept remains viable.

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.

260 U.S. at 382.

[52] 54 N.J. 330, 255 A.2d 232 (1969).

New Jersey was faced with the question of whether a conviction for 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.[53] Furthermore, the New Jersey court stated:

> [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 ideological 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 police in law enforcement.[54]

The actual impact of the Code cannot be determined until its terms are construed by the courts, and much depends upon the construction placed on paragraph a(1) which provides that a state prosecution is not barred if:

> [t]he offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil . . .

It seems clear, however, that the Code goes beyond the prevailing case law, both state and federal, in restricting state prosecution of one previously prosecuted in the federal district court.[55]

This provision in the Code is an undesirable departure from existing law. The state should not abrogate any more authority to control criminal behavior within its jurisdiction than is constitutionally mandated. In the final analysis, state officials have the primary task of safeguarding the citizenry from crime. To meet this responsibility, state authorities should have the broadest scope of the criminal process available to them. Traditional principles of due process and the proper exercise of prosecutorial discretion may be relied upon to preclude abusive application of this doctrine.[56] To the extent

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[53] *Id.* at 337, 255 A.2d at 235.

[54] *Id.* at 337-38, 255 A.2d at 236. The dual sovereignty concept is presently under review by our supreme court. State v. Ableman, 68 N.J. 484, 348 A.2d 525 (1975).

[55] *See* Commentary, *supra* note 23, at 32.

[56] *E.g.*, shortly after the Supreme Court decision in Abbate v. United States, 359 U.S. 187 (1959), Attorney General William P. Rogers issued a memorandum to United States Attorneys with the following directive:

> It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said [in *Bartkus* and *Abbate*] that although the rule of the *Lanza* case is sound law, enforcement officials should use care in applying it . . . . We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be

that this provision limits the existing jurisdiction of our courts, it is deemed unwise and should be modified.

General Principles of Liability

The first three sections of this chapter[57] codify the fundamental requirements for establishing criminal liability. Essentially, they reiterate prevailing case law and are generally satisfactory. The most significant change is one of terminology. Section 2C:2-2b provides for and defines four different kinds of culpability: purpose, knowledge, recklessness, and negligence.[58] A lack of

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state or federal, where the public interest is best served. If this is determined accurately, and if followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution should seldom arise. In such event, I doubt that it is wise to formulate detailed rules . . . . However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without . . . [the approval of an Assistant Attorney General after consultation with the Attorney General].

N.Y.Times, Apr. 6, 1959, at 1, col. 4 (city ed.).

This policy has been followed by subsequent administrations and has served as the basis for dismissal of convictions on the government's motion in several cases where federal prosecutions were inadvertently initiated after state prosecutions. *See* Marakar v. United States, 370 U.S. 723 (1962); Petite v. United States, 361 U.S. 529 (1960); Orlando v. United States, 387 F.2d 348 (9th Cir. 1967). The prosecutorial agencies of our state may be expected to exercise similar good judgment. *See generally* State v. Saulnier, 63 N.J. 199, 306 A.2d 67 (1973); State v. Hampton, 61 N.J. 250, 294 A.2d 23 (1972).

[57] §§ 2C:2-1 to -3.

[58] The terms are defined as follows:

(1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

(2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

(3) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.

consistency in the terminology used to define the mental elements for various crimes has resulted in considerable confusion and much litigation. The clarity and uniformity provided by the Code in this regard is commendable. Section 2C:2-4 significantly changes the prevailing law on ignorance or mistake of fact or law as a defense. Subsection a provides that such a mistake is a defense if the law so provides or if it negates the culpable mental state. With one exception, this rule appears consistent with prevailing case law.[59] Subsection b provides that this defense is not available "if the defendant would be guilty of another offense had the situation been as he supposed."[60] In such a case, however, the grade and degree of the offense is reduced to that "of which he would be guilty had the situation been as he supposed."[61] While it is questionable whether this provision will have frequent application, this subsection appears undesirable. There seems no sound reason to allow mitigation of the crime when a defendant, intending to commit one crime, commits instead a more serious one. Such mitigation adds confusion to the law and provides little countervailing benefit to the people. Subsection c[62] effects a wholesale change in existing law. This sub-

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(4) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. "Negligently" or "negligence" when used in this code, shall refer to the standard set forth in this section and not to the standard applied in civil cases.

§ 2C:2-2b.

[59] As to mistake of fact, *see* State v. Madden, 61 N.J. 377, 399-400, 294 A.2d 609, 620-21 (1972); State v. Bess, 53 N.J. 10, 247 A.2d 669 (1968); State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965); State v. Hudson County News Co., 35 N.J. 284, 173 A.2d 20 (1961); State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506 (App. Div. 1961). As to mistake of law, *see* State v. Hanly, 127 N.J. Super. 436, 445, 317 A.2d 746, 750-51 (App. Div.), *certif. denied,* 65 N.J. 578, 325 A.2d 711 (1974); Cutter ads. State, 36 N.J.L. 125 (Sup. Ct. 1873).

[60] § 2C:2-4b.

[61] *Id.*

[62] § 2C:2-4c provides:

A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(1) The statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(2) The actor acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (a) a statute, (b) a judicial decision, opinion, or judgment, or rule, (c) an administrative order or grant of permission, or (d) an official interpretation of the public officer or body

section permits a "mistake of law" in the broad sense of that term, that is, a lack of knowledge that one's conduct is unlawful, to constitute a defense. It is submitted that a "mistake of law" should constitute no defense to a criminal action. The provision as presently formulated is unsatisfactory and should be modified.

New Jersey presently rejects the defense of mistake of law.[63] "The reasons for disallowing it are practical considerations dictated by deterrent effects upon the administration and enforcement of the criminal law, deemed likely to result if mistake of law were allowed as a general defense."[64] The cases and commentators have noted that this defense would be a constant source of confusion to juries and would tend to encourage ignorance at a point where it is particularly important to the state that knowledge be as widespread as possible.[65] It is not overly cynical to suggest that instances where this defense can be raised in good faith will be few. In view of these considerations, it is submitted that the proposed "mistake of law" defense is ill-conceived and should not be adopted.

As noted, additional flaws in this provision must be remedied if this provision is to be enacted. Section 2C:2-4c(2) exculpates the actor if he relies upon "an official statement of the law, afterward determined to be invalid or erroneous, contained in (a) a statute . . . ." The term "statute" is defined in 2C:1-14a as including "the Constitution and a local law or ordinance of a political subdivision of the State."

Code section 2C:2-4c(2)(b) permits reliance on "a judicial decision, opinion, judgment, or rule." This provision is deficient, since there is no limit

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charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense; or

(3) The actor otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances which a law-abiding and prudent person would also so conclude.

The defendant must prove a defense arising under subsection c of this section by clear and convincing evidence.

[63] State v. Benny, 20 N.J. 238, 119 A.2d 155 (1955); State v. DeMeo, 20 N.J. 1, 120 A.2d 733 (1955); State v. Western Union Tel. Co., 12 N.J. 468, 97 A.2d 480, *appeal dismissed*, 346 U.S. 869 (1953); State v. Pruser, 127 N.J.L. 97,21 A.2d 641 (Sup. Ct. 1941); State v. Atti, 127 N.J.L. 127, 21 A.2d 209 (Sup. Ct. 1941), *aff'd o.b.*, 128 N.J.L. 318, 25 A.2d 634 (E. & A. 1942); State v. Najjar, 1 N.J. Super. 208, 63 A.2d 807 (App. Div.), *aff'd per curiam*, 2 N.J. 208, 66 A.2d 37 (1949); State v. Hanly, 127 N.J. Super. 436, 317 A.2d 746 (App. Div.), *certif. denied*, 65 N.J. 578, 325 A.2d 711 (1974). *But see* Cutter ads. State, 36 N.J.L. 125 (Sup. Ct. 1873).

[64] State v. Long, 44 Del. 262, 65 A.2d 489 (1949).

[65] *Id. See also* State v. Western Union Tel. Co., 12 N.J. 468, 97 A.2d 480, *appeal dismissed*, 346 U.S. 869 (1953); State v. Pruser, 127 N.J.L. 97, 21 A.2d 641 (Sup. Ct. 1941).

on the court upon which a defendant may claim he relied. Significantly, the analogous provision in the Illinois Criminal Code permits reliance only "upon an order or opinion of an Illinois Appellate Court or Supreme Court, or a United States appellate court later overruled or reversed."[66] Such a limitation is eminently sensible and should be incorporated into the Code. Under the present formulation, a person may rely upon an opinion from literally any court, including municipal courts.[67] These courts may issue a plethora of conflicting or ill-considered opinions, any of which, under the present provision, could be asserted as a defense. This provision is clearly undesirable and should be modified.

A defense of mistake of law may also be based upon "an administrative order or grant of permission."[68] The wording of this provision should be narrowed to specify more precisely which persons are authorized to give such statements on behalf of the state. Again, Illinois excludes this provision.[69]

Section 2C:2-5 provides for the retention of common law defenses. While this provision is not overly significant, it is anomalous for the Code to abolish common law offenses[70] but retain common law defenses. The rationale which justifies abolition of the former[71] dictates that the same course be followed with respect to the latter. The only common law defense anticipated by the Commentary is the defense of obedience to military orders.[72] A better practice would demand the drafting of an explicit provision rather than depending upon the vagaries of the common law. Furthermore, it is doubtful whether this provision is necessary to accomplish the stated purpose of the Commission, *i.e.*, to permit retention of an unusual defense not included within the Code. Application of the general principles of liability (chapter 2) and justification (chapter 3) seem to preclude convic-

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[66] ILL. ANN. STAT. ch. 38, § 4-8 (Smith-Hurd 1972).

[67] There were, as of 1971, some 523 separate municipal courts established pursuant to N.J. STAT. ANN. § 2A:8-1 (West Supp. 1978-1979), each distinctively shaped by both the personality of its judges and the community which it served. Moreover, 29 of the 402 municipal judges as of that date were laymen who retained their positions by virtue of a "grandfather clause." N.J. STAT. ANN. § 2A:8-7 (West 1952). *See* Merging Municipal Court, Report of the New Jersey Administrative Office of the Courts, 14 (1971). The supreme court has criticized these courts as "antiquated," and has noted it does "not command the complete confidence of the public." State v. Nash, 64 N.J. 464, 474, 317 A.2d 689, 694 (1974); State v. DeBonis, 58 N.J. 182, 188, 276 A.2d 137, 141 (1971). The inherent weakness of these courts is such that convictions are retried de novo in county court. N.J. COURT R. 3:23-8; State v. DeBonis, 58 N.J. at 188, 276 A.2d at 141. It seems clear that the Code should be modified, at least to preclude reliance on municipal court opinions.

[68] § 2C:2-4c(2)(c).

[69] ILL. ANN. STAT. ch. 38, § 4-8 (Smith-Hurd 1972).

[70] *See* notes 28-29 *supra* and accompanying text.

[71] *See* Commentary, *supra* note 23, at 11.

[72] Commentary, *supra* note 23, at 55.

tion of one with a valid common law defense, notwithstanding the fact that that defense was not expressly included in the Code. In sum, this provision may not be necessary, but since it appears unobjectionable, there is no substantial reason to oppose its enactment.

Section 2C:2-6 is a statement of the general principles of accountability for the conduct of another. For the most part, it follows existing law[73] of aiding and abetting and is generally satisfactory. Certain aspects of the provision, however, bear further comment. Subsection b(1) makes explicit the principle which is stated with less clarity in the second sentence of N.J. Stat. Ann. § 2A:85-14, that is, one who uses an innocent or irresponsible agent is guilty of the offense the agent commits. This doctrine is universally accepted and in accord with the New Jersey cases;[74] therefore, it should be adopted.

Subsection d provides that one who is legally incapable of committing an offense may nevertheless be guilty of the offense "if it is committed by another person for whose conduct he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity." This provision is in accord with prevailing case law[75] and is generally satisfactory, except for the final phrase, quoted above, which is not sufficiently clear and requires modification.

Subsection e relieves persons from accountability for the conduct of others in certain instances. Subsection e(1) provides that, unless the particular statute so states, the person who is a victim of the criminal act does not share the guilt of the actor. This statement appears to be true even though the

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[73] Current statutory authority may be found in N.J. STAT. ANN. § 2A:85-14 (West 1969):

> Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.
>
> Any person who wilfully causes another to commit a crime is punishable as a principal.

See also State v. Stein, 70 N.J. 369, 360 A.2d 347 (1977); State v. Madden, 61 N.J. 377, 294 A.2d 609 (1972).

[74] *See, e.g.*, State v. Lisena, 129 N.J.L. 569, 30 A.2d 593 (Sup. Ct.), *aff'd o.b.*, 131 N.J.L. 39, 34 A.2d 407 (E. & A. 1943); State v. Faunce, 91 N.J.L. 333, 102 A. 147 (E. & A. 1917); State v. Wyloff, 31 N.J.L. 65 (Sup. Ct. 1864).

[75] *See, e.g.*, State v. Warady, 78 N.J.L. 687, 75 A. 977 (E. & A. 1910); State v. Marshall, 97 N.J.L. 10, 116 A. 691 (Sup. Ct. 1922); State v. Goldfarb, 96 N.J.L. 61, 114 A. 143 (Sup. Ct. 1921); State v. Jackson & Kisinger, 65 N.J.L. 105, 46 A. 764 (Sup. Ct. 1900). Further, it appears this section would overrule holdings such as State v. Aiello, 91 N.J. Super. 457, 221 A.2d 40 (App. Div. 1966), in which the court held the defendant could not be convicted as an aider and abettor pursuant to a statute which prohibited the owner of a building from permitting the operation of a lottery because the defendant himself did not own the building. This result has been criticized and is probably wrong. *See* Commentary, *supra* note 23, at 58.

person is a willing victim and counseled commission of the crime. Thus, the victim of a blackmail plot who pays over money, even though he "aids" the commission of the crime, or the girl under the age of consent in a statutory rape situation, even though she solicited the criminal act, or a woman upon whom an illegal abortion has been performed, are not deemed guilty of the substantive offense. This subsection conforms to existing law and is unobjectionable.[76]

The same principle is extended in subsection e(2) to situations in which the person does not fit comfortably into the category of a victim. The Model Penal Code suggests several examples.[77] In many situations, the scope of criminal liability, if extended in this fashion, might make law enforcement more difficult. Particularly as the subsection applies to bribery, it is submitted that the victim should be guilty of the offense, as provided under existing law.[78] In any event, subsection a(2) permits the extension of liability to such persons by a statute defining the substantive offense; therefore, the subsection is unobjectionable.

Subsection a(3) permits an accomplice to escape liability for his acts if, prior to the commission of the offense, he satisfies the criteria for renunciation, as defined in section 2C:5-1d. One is not opposed in principle to this defense, but more affirmative action should be required of a defendant than is demanded under the proposed law.[79]

Subsection 2C:2-8 deals with the defense of intoxication. The general rule adopted is that "intoxication of the actor is not a defense unless it negatives an element of the offense." This rule is in accord with existing New Jersey law.[80] The Code also follows existing law, albeit using different terminology, by providing that intoxication may either exculpate or mitigate guilt if the defendant's intoxication prevents his having formed a mental state which is a requisite element of the offense.[81] Currently, voluntary intoxication may reduce first degree murder only to second degree murder, which carries a maximum term of thirty years imprisonment. Under the Code, there is but

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[76] *See In re* Vince, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949); State v. Thompson, 56 N.J. Super. 438, 444, 153 A.2d 364, 367 (App. Div. 1959), *rev'd on other grounds,* 31 N.J. 540, 158 A.2d 333 (1960).

[77] For example, should a man accepting a prostitute's solicitation be guilty of prostitution? Should a woman upon whom a miscarriage is produced be guilty of abortion? Should a bribe-maker be guilty of bribery? Model Penal Code, Comment at 35 (Tent. Draft No. 1, 1953).

[78] *See* State v. Begyn, 34 N.J. 35, 167 A.2d 161 (1961).

[79] A further discussion of this subject is found in the comments to § 2C:5-1d.

[80] *See* State v. Maik, 60 N.J. 203, 287 A.2d 715 (1972); State v. Sinclair, 49 N.J. 525, 544, 231 A.2d 565, 574-75 (1967); State v. Trantino, 44 N.J. 358, 209 A.2d 117 (1965).

[81] *See* State v. Maik, 60 N.J. 203, 287 A.2d 715 (1972); State v. White, 27 N.J. 158, 142 A.2d 65 (1958); N.J. STAT. ANN. § 2A:113-4 (West 1969).

one degree of murder; therefore, voluntary intoxication would reduce murder to manslaughter, a second degree crime for which an ordinary term of five to eight years may be imposed. There is a serious question whether such a lenient sentence satisfies the demands of public security. While conceptually, as well as for humanitarian reasons, the intoxication provision is advisable, it is urged that the maximum permissible sentence for a homicide committed while the actor is intoxicated should exceed that currently permitted.

One other aspect of this provision bears mention. Subsections d(1) and (2) provide that non-self-induced intoxication and pathological intoxication are affirmative defenses which, if proved, exculpate the actor. As noted by the Commentary,[82] instances where these defenses will be raised are rare, and no reported New Jersey case deals with either defense. These provisions are consistent with general legal principles of criminal responsibility, as both defenses tend to negate the criminal intent and criminal act required for the imposition of penal liability. This provision is also acceptable.

A most controversial provision in this chapter is the "de minimis infraction" rule contained in section 2C:2-11. This section gives a court the power to dismiss a criminal prosecution without the consent of the prosecutor[83] a) if the court finds the offense de minimis, that is, insignificant, within the customary license or tolerance neither expressly negated by the victim nor inconsistent with the law, or b) where extraordinary and unanticipated mitigations for the conduct are present.[84] Nevertheless, it is felt that this section would lend itself to apparent abuses.

Not all technical violations of the law should be prosecuted; the decision whether to prosecute should be left to the prosecutor. As noted in the comments to section 2C:1-3f, under current law, the decision to prosecute is solely a prosecutorial function.[85] While no express provision in our law permits dismissal on de minimis grounds, such power is clearly inherent in the office of the prosecutor. In *State v. Winne,*[86] the court quoted extensively from the decision of the Supreme Court of Missouri in *State ex rel. McKittrick v. Wallach*[87] as to the nature of the prosecutor's discretion. The language of

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[82] *See* Commentary, *supra* note 23, at 69.

[83] § 2C:2-11c does provide, however, that the court may not dismiss a prosecution without giving the prosecutor notice and an opportunity to be heard.

[84] 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 judicial participation and not as a replacement for the traditional exercise of discretion by the prosecutor, the grand jury and the police.

Commentary, *supra* note 23, at 75.

[85] *See* notes 22-23 *supra* and accompanying text.

[86] 12 N.J. 152, 96 A.2d 63 (1953).

[87] 353 Mo. 312, 182 S.W.2d 213 (1944).

that court goes far to negate the belief that a prosecutor cannot properly refuse to prosecute where guilt is clear. More explicit language appears later in *Winne* where the supreme court observed that:

> A county prosecutor within the orbit of his discretion inevitably has various choices of action and even of inaction. This discretion applies as much to the seeking of indictments from the grand jury as it does from prosecuting or recommending a *nolle prosequi* 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.[88]

Recent cases support the view that a prosecutor may refuse to present a matter to a grand jury even where there exists probable cause to believe that a criminal offense has been committed. While these decisions concern a prosecutor's discretion in determining which of several charges should be brought against an offender, by inference, they clearly support a prosecutor's right not to prosecute de minimis violations.[89] In short, it appears that prosecutors presently have the power to dismiss on grounds established in this section. It is submitted that no sound reason exists to transfer this power to the courts.

The courts already have the capacity to afford lenient treatment to those prosecuted for de minimis violations. They may impose lenient or probationary sentences, agree to a downgrading of the offense, or, on traditional principles of justification and culpability, grant an acquittal where the state's proof fails to make out an offense. So, too, the availability of pre-trial diversionary programs[90] and of a statutory expunction provision[91] ameliorates the harshness of a conviction for a minor offense. In sum, the existing law has adequate provisions for dealing with de minimis infractions, and there appears no valid reason for placing this function primarily on the courts.

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[88] 12 N.J. at 174, 96 A.2d at 74.

[89] *See* State v. Hampton, 61 N.J. 250, 275, 294 A.2d 23, 36-37 (1972); State v. States, 44 N.J. 285, 292, 208 A.2d 633, 636-37 (1965); *see also* Kingsley v. West Outdoor Advertising Co., 59 N.J. 182, 189, 280 A.2d 168, 172 (1971); State v. Reed, 34 N.J. 554, 572-73, 170 A.2d 419, 429 (1961); State v. Covington, 113 N.J. Super. 229, 273 A.2d 402 (App. Div.), *aff'd*, 59 N.J. 536, 284 A.2d 532 (1971); State v. White, 105 N.J. Super. 234, 251 A.2d 766 (App. Div. 1969); State v. Milano, 94 N.J. Super. 337, 228 A.2d 347 (App. Div. 1967).

[90] *See, e.g.*, N.J. COURT R. 3:28; N.J. STAT. ANN. § 24:21-27 (West Supp. 1978-1979).

[91] *See* N.J. STAT. ANN. § 2A:164-28 (West Supp. 1978-1979) (expungement of record of criminal convictions); N.J. STAT. ANN. § 2A:169-4 (West 1971) (expungement of record of disorderly persons convictions); N.J. STAT. ANN. § 24:21-28 (West Supp. 1978-1979) (expungement of record of drug offenses).

This chapter also deals with duress and entrapment.[92] Recent decisions of the state supreme court, however, place in doubt these provisions which this article will not address.

Inchoate Crimes

Section 2C:5-1 codifies the law of criminal attempt. Currently the definition of this crime appears exclusively in the case law:

> An attempt to commit a crime is an act done with intent to commit it beyond mere preparation but falling short of its actual commission.
>
> The overt act or acts must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself.[93]

In place of this "probable desistance" test, the Code lists three circumstances which constitute a criminal attempt. The most significant provision is subsection a(3) which adopts the "substantial step" test.[94]

The problem under the existing law has been the question of when preparation ceases and commission of the attempt begins. In the Code, the basic question becomes whether a particular act is "a substantial step" in the course of conduct which the defendant intends to culminate in the commission of the crime.[95] Thus, while the terminology has changed, this change does not simplify the inquiry; courts must still make essentially the same determination based on the facts of each case. Conceptually, this new test is deemed satisfactory, but there is a serious deficiency in the manner in which this provision is drafted. In its present form section 2C:5-1b, in its entirety, provides:

> b. Conduct which may be held [*sic*] substantial step under subsection a. (3). Conduct shall not be held to constitute a substantial step under subsection a. (3) of this section unless it is strongly corroborative of the actor's criminal purpose.

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[92] § 2C:2-9 (duress); § 2C:2-12 (entrapment).

[93] State v. O'Leary, 31 N.J. Super. 411, 417, 107 A.2d 13, 16 (App. Div. 1954); *see also* State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1968); State v. Welek, 10 N.J. 355, 91 A.2d 751 (1952); State v. Schwarzbach, 84 N.J.L. 268, 86 A. 423 (E. & A. 1913); State v. Thyfault, 121 N.J. Super. 487, 297 A.2d 873 (App. Div. 1972).

[94] § 2C:5-1a(3) provides:

> Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

[95] *Id.*

No other guideline is provided as to the type of conduct in question. The 1971 draft of this provision, however, was far more comprehensive and clearly preferable to the Code. In addition to the above quoted provision, the 1971 draft listed seven categories of conduct which, as a matter of law, were deemed sufficient to withstand a motion for judgment of acquittal.[96] This listing had the salutory effect of providing concrete examples of the type of conduct intended to fall within the purview of the statute. The provision as it presently exists contains only highly abstract language which provides little meaningful guidance. The deleted portion of the statute makes it clear that the attempt statute covers certain highly dangerous conduct which, on general principles of the law of attempt, might be held insufficient to constitute the crime.[97]

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[96] The prior draft provided as follows:

b. *Conduct Which May Be Held Substantial Step Under Subsection a (3).* Conduct shall not be held to constitute a substantial step under Subsection a (3) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(1) lying in wait, searching for or following the contemplated victim of the crime;

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

(3) reconnoitering the place contemplated for the commission of the crime;

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

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

(6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(7) soliciting an agent, whether or not innocent, to engage in specific conduct which would constitute an element of the crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

N.J. Criminal Law Revision Commission, The N.J. Penal Code, Vol. 1: Report and Penal Code §§ 2C:5-1b(1) to -1b(7) (1971).

[97] For example the Commentary states that this provision would overrule cases such as People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (Ct. App. 1927). In that case defendant and his confederates, all armed, were driving through the streets of an area of New York searching for one Rao, a payroll clerk, whom they planned to rob of about $1200. They were not able to find their victim and their suspicious activities attracted the police who apprehended them after a period of surveillance. The court of appeals reversed the conviction of attempted robbery on grounds that the defendants' acts constituted mere preparation.

Finally, the attempt provision follows existing law in New Jersey by rejecting the defense of impossibility, factual or legal.[98] Again, it is felt that this is the proper result, since the fortuitous circumstances (that the consequence sought could actually not occur) in no way detract from the culpability of the defendant. In sum, the Code's treatment of the law of attempt is generally satisfactory, except that it deletes the listing of the seven items contained in the earlier draft.

The renunciation provision, section 2C:5-1d, however, bears further comment.[99] Some have questioned the advisability of such a provision altogether on grounds that, "[k]nowledge that criminal endeavors can be undone with impunity may encourage preliminary steps that would not be undertaken if liability inevitably attached to every abortive criminal undertaking that proceeded beyond preparation."[100] Conceptually, there is some question whether remorse on the part of the defendant, after he has taken sufficient steps to complete a criminal attempt, should excuse the crime; with completed substantive crimes it does not. On the other hand, with inchoate crimes the actual injury, that is, the crime attempted, has not yet occurred; thus, there is a basis for distinguishing them. Additionally, the general common law rule is that neither voluntary nor involuntary abandonment is a defense.[101] The analogous doctrine of withdrawal in the law of

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Such conduct should be punished as an attempt. The defendants' criminal intent was plain and they had taken all steps within their power to commit the crime. The Code quite properly holds this to be an attempt. *See* § 2C:5-1a(1).

[98] *See* § 2C:5-1d; State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1968).

[99] Section 2C:5-1d provides:

> d. Renunciation of criminal purpose. When the actor's conduct would otherwise constitute an attempt under subsection a (2) or (3) of this section, it is an affirmative defense which he must prove by a preponderance of the evidence that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.
>
> Within the meaning of this chapter, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim. Renunciation is also not complete if mere abandonment is insufficient to accomplish avoidance of the offense in which case the defendant must have taken further and affirmative steps that prevented the commission thereof.

[100] Commentary, *supra* note 23, at 125.

[101] *See* I WHARTON'S CRIMINAL LAW § 226 (12th ed. 1932); PERKINS ON CRIMINAL LAW, 588-90 (1957). *But see* People v. Von Hecht, 133 Cal. App. 2d 25, 283 P.2d 764 (1955);

conspiracy is also rejected as a defense to that crime.[102] Furthermore, in the related area of aiding and abetting, New Jersey cases reject the defense of termination of complicity (renunciation) and require the defendant to cease acting in complicity as soon as he has knowledge of the criminal character of the conduct of the persons in his company.[103] In permitting this defense, the Code departs radically from existing law.

Nevertheless, the defense of renunciation should be re-instated. Imposition of a criminal sanction on one who voluntarily abandons his criminal efforts serves no useful purpose. It can be argued that the threat of punishment even after abandonment would tend to discourage one from desisting in the crime. Stated otherwise, if he is to be punished anyway, a defendant will have less incentive to stop short of consummating the offense. Furthermore, since the completed crime in fact did not occur, the public's interest in retribution is slight. On balance, the defense of renunciation serves a useful purpose and should be included in the Code.

Section 2C:5-2 codifies the law of conspiracy and makes several noteworthy changes in the existing law.[104] The most serious shortcoming in the Code's treatment of this area is the requirement that the conspiratorial objective be a crime. Presently, the New Jersey law holds that:

Weaver v. State, 112 Ga. 550, 42 S.E. 745 (1902); LeBarron v. State, 32 Wis. 294, 145 N.W.2d 79 (1966).

[102] *See* Abbate v. United States, 247 F.2d 410, 413 (5th Cir. 1957), *aff'd*, 359 U.S. 187 (1959). It may, however, have other consequences as to the withdrawing conspirator, such as starting the running of the statute of limitations as to his participation in the conspiracy (Hyde v. United States, 225 U.S. 347, 369 (1912)); preventing attribution to him of those substantive crimes committed after his withdrawal (Glazerman v. United States, 421 F.2d 547 (10th Cir. 1970), *cert. den.*, 398 U.S. 928 (1970)); and preventing admission into evidence against him the declarations of other conspirators made after his withdrawal (United States v. Keenan, 267 F.2d 118, 126 (7th Cir. 1959); (United States v. Augeci, 310 F.2d 817, 839 (2d Cir. 1962)).

[103] State v. DeFalco, 8 N.J. Super. 295, 299, 74 A.2d 338, 340 (App. Div. 1950).

[104] Under existing law, conspiracy may be prosecuted either as a common law or statutory offense. *See* N.J. STAT. ANN. §§ 2A:85-1 and 98-1 (West 1969), respectively. Also, conspiracies directed at public bidding may be prosecuted under N.J. STAT. ANN. §§ 2A:98-3 and -4 (West 1969). Conspiracies to violate the narcotics laws may be prosecuted under N.J. STAT. ANN. § 24:21-24 (West Supp. 1978-1979). The Code defines conspiracy as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

§ 2C:5-2a.

> It is not requisite, in order to constitute a conspiracy at common law, that the acts agreed to be done be such as would be criminal if done; it is enough if the acts agreed to be done, although not criminal, be wrongful, i.e., amount to a civil wrong. . . . [T]he gist of the offense of conspiracy lies, not in doing the act, nor effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. The offense depends on the unlawful agreement and not on the acts which follow it . . . .[105]

This holding is in accordance with the overwhelming weight of authority throughout the country.[106] It is submitted that this rule should be continued and that its modification by the Code is not in the public interest. Criminal sanctions against conspiracies[107] having as their object a broad variety of civil wrongs,[108] have been eliminated under the Code provisions, and none of these objectives would suffice to render a conspiracy criminal.

Furthermore, under the Code, conspiracies formed for the commission of disorderly persons offenses would not be criminal.[109] Since numerous offenses which are now crimes are downgraded to disorderly persons offenses in the Code, this process would further emasculate the law of conspiracy. For example, certain usury and larceny offenses would be disorderly persons offenses under the Code.[110] Conspiracy to commit any of these offenses would no longer be a crime. It is submitted that the underlying rationale of

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[105] State v. Carbone, 10 N.J. 329, 337, 91 A.2d 571, 574 (1952).

[106] *See* Model Penal Code § 5.03 App. B at 162-67 (Tent. Draft No. 10, 1960).

[107] *See, e.g.*, N.J. STAT. ANN. § 2A:98-1 (West 1969); Board of Educ. of the Borough of Union Beach v. N.J. Educ. Ass'n, 53 N.J. 229, 247 A.2d 867 (1965); State v. Naglee, 44 N.J. 209, 207 A.2d 689 (1965), *rev'd on other grounds*, 385 U.S. 493 (1966); State v. Ellenstein, 121 N.J.L. 304, 2 A.2d 454 (E. & A. 1938); State v. O'Brien, 136 N.J.L. 118, 54 A.2d 806 (Sup. Ct. 1947); State v. Continental Purchasing Co., 119 N.J.L. 304, 195 A. 827 (Sup. Ct.), *aff'd* 121 N.J.L. 76, 1 A.2d 371 (E. & A. 1938); State v. Bienstock, 78 N.J.L. 256, 73 A. 530 (Sup. Ct. 1909); State v. Nugent, 77 N.J.L. 84, 71 A. 485 (Sup. Ct. 1909); Patterson v. State, 62 N.J.L. 82, 40 A. 773 (Sup. Ct. 1898); State v. Hickling, 41 N.J.L. 208 (Sup. Ct. 1879); State v. Loog, 13 N.J. Misc. 536, 179 A. 623 (Sup. Ct. 1935), *aff'd*, 117 N.J.L. 442, 188 A. 918 (E. & A. 1936); State v. Minch, 10 N.J. Misc. 881, 160 A. 888 (Sup. Ct. 1932); State v. Western Union Tel. Co., 13 N.J. Super. 172, 80 A.2d 342 (Cumberland County Ct. 1951).

[108] Section 2C:1-4 provides that "[d]isorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State."

[109] Some examples of civil wrongs are: business torts, tortious interference with contract, price fixing, consumer fraud, certain offenses against the public health and welfare, malicious prosecution, and perversion of the voting laws.

[110] § 2C:43-11.

the law of conspiracy, that is, recognition of the greater danger to society from unlawful group activity, militates against adoption of the Code proposal. So long as a group engages in unlawful conduct of any sort, whether the conduct is civilly or criminally wrong, there is a danger to society beyond that which arises from the conduct of a single individual. The offense of conspiracy as presently formulated in the Code fails to take account of this fact and should be modified.

In section 2C:5-4b, the Code has attempted to alleviate the widely disparate sentencing provisions for inchoate crimes. This section provides that the court may impose a sentence for a crime or offense of a lower grade or degree. A similar provision with general applicability has been deleted from the Code.[111]

Section 2C:5-4b should also be deleted from the Code, because as this section applies to conspiracy, it is especially offensive. The section 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 if the particular individual was only peripherally related to the main unlawful enterprise.[112] These "mitigating" factors do not serve the purpose of deterrence and are not in the public interest. Rather, the degree of culpability of a given individual is a factor which traditionally has been, and will continue to be, considered by the court in sentencing a defendant for the particular crime he has committed. Rationally, it does not serve to work on expurgation of the crime altogether or to lessen its degree. The mitigation provision, as it presently exists, should be deleted.

SUBTITLE 2. DEFINITION OF SPECIFIC OFFENSES

Homicide

The Code alters both the structure and substance of current homicide laws. At present, homicide constitutes either first or second degree murder or manslaughter. Murder is defined as an unlawful homicide distinguished by an element of "malice."[113] Pursuant to N.J. Stat. Ann. §2A:113-2, first degree murder encompasses 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.

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[111] *See also* Comment on De Minimis Infractions, § 2C:2-11.

[112] State v. Brown, 22 N.J. 405, 126 A.2d 161 (1950).

[113] N.J. STAT. ANN. § 2A:113-2 (West 1969).

(3) Murder committed while resisting arrest or effecting or assisting an escape.

(4) Murder of a law enforcement officer acting in the execution of his duties, or a person assisting such officer.

Second degree murder is a rather amorphous concept, consisting of those murders which do not rise to the level of a first degree offense.[114] Manslaughter, not defined by the existing 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 of passion, or involuntary, but in the commission of some unlawful act."[115]

The Code divides criminal homicide into three separate offenses: murder, manslaughter, and death by auto.[116] Murder, a crime of the first degree, encompasses any homicide committed "purposely," "knowingly," or during the commission of certain enumerated felonies.[117] This offense encompasses both first and second degree murder under present law. A person convicted of murder may be sentenced either to a term of thirty years, of which fifteen years must be served before parole may be granted, or to a maximum term of thirty years.[118]

The Code replaces the terms of art traditionally used by our courts in describing the requisite mental condition of the defendant. First degree murder is now defined in terms of "willful, deliberate and premeditated" conduct.[119] Although the Code implies that conceptually the terms "purpose" and "knowledge" were intended to comply with the definition of first and second degree murder, they are not synonymous with the traditional concepts.[120] The description of a mental state is not an easy task, and it may be questioned whether terms of art which have been carefully refined by the judiciary should be replaced with standards heretofore alien to the law of homicide. The same rationale applies to the term "malice," which has also been eliminated from the Code.

Manslaughter, a crime of the second degree, is a homicide committed "recklessly" or "in the heat of passion resulting from a reasonable provocation."[121] The presently existing rule encompassing voluntary manslaughter is based upon an identically phrased "heat of passion" concept which has

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[114] State v. Brown, 22 N.J. 405, 126 A.2d 161 (1950).

[115] § 2C:11-2b.

[116] §§ 2C:11-3a(2) and (3).

[117] § 2C:11-3b.

[118] State v. Washington, 60 N.J. 170, 287 A.2d 1 (1972).

[119] Commentary, *supra* note 23, at 54-56.

[120] § 2C:11-4.

[121] *See, e.g.*, State v. King, 37 N.J. 285, 299, 181 A.2d 158, 165 (1962).

been well-refined by our courts.[122] This segment of the manslaughter provision remains a viable tool and is properly included in the new Code.

"Recklessness" is defined in section 2C:2-2b(3) as a conscious disregard of a substantial and unjustifiable risk, constituting "a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."

The last provision in chapter eleven creates an offense of purposefully aiding suicide.[123] If the aider's conduct actually causes a suicide or an attempted suicide, a crime of the second degree occurs; otherwise, the assistance constitutes a fourth degree offense.[124]

Assault; Reckless Endangering; Threats

The chapter integrates and simplifies the presently disjointed series of statutory offenses prohibiting assault, battery, aggravated assault, mayhem, and similar conduct.[125] The new Code delineates two broad categories of assault: (a) simple assault is a disorderly persons offense unless committed in a fight commenced by mutual assent, in which case it is a petty disorderly persons offense,[126] and (b) aggravated assault encompasses numerous provisions ranging in severity from crimes of the second degree to offenses of the fourth degree.[127] Simple assault is couched in terms of attempted or actual infliction of bodily injury, and aggravated assault is serious bodily injury as well as all assaults upon uniformed law enforcement officers while they are on duty.

One substantial change from the existing law is especially noteworthy. Currently, the slightest touching or offensive contact constitutes a battery.[128] The Code eliminates this rule, finding that "mere offensive touch-

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[122] § 2C:11-6.

[123] *Id.*

[124] This provision is closely related to the highly sensitive legal area involving mercy killing and the question of an individual's right to die. *See, e.g.*, *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (Morris County Ct. 1978). Although the excercise of sentencing discretion may prevent extreme injustice in particularly tragic cases, perhaps the gradation of these offenses should be reevaluated in light of the probable reluctance of juries to convict persons of wrongdoing under circumstances eliciting popular sympathy.

[125] The various statutes supplanted by this chapter of the Code are N.J. STAT. ANN. §§ 2A:90-1 to -4, :99-1, :101-1, :125-1, :129-1, :148-6 (West 1969), N.J. STAT. ANN. §§ 2A:170-26, -27 (West 1971).

[126] § 2C:12-1a.

[127] § 2C:12-1b.

[128] State v. Maier, 13 N.J. 235, 99 A.2d 21 (1953).

ing is not sufficiently serious to be made criminal, except in the case of sexual assaults. . . ."[129]

The Code has further streamlined the present law by excising the offense of assault with intent to commit another serious crime, that is, murder or rape.[130] Such offenses are treated as attempts to commit the substantive crime and, for the most part, are graded as crimes of the second degree.[131]

The Code also assimilates various New Jersey statutes in 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 of terrorizing another, or to cause evacuation of a building, or, in general, to cause public inconvenience by terror or alarm.[132] The scope of this provision is 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.[133] The term "public inconvenience," however, may be unduly broad and, thus, may be the subject of constitutional objections.

Burglary and Criminal Trespass

Burglary and criminal trespass are defined by the Code in sections 2C:18-2 and -3. Common law burglary was limited to a breaking and entering of a dwelling house at night with the specific intention of committing a felony therein.[134] Under the Code this offense has been greatly expanded. "Now it may be committed by entry alone, in day as well as night, and with intent to commit many more crimes."[135] The Code, for the most part, retains the desirable aspects of the present offense while discarding those features which have caused serious problems.

The designation of the premises protected by the Code's burglary law is more restrictive than under present law.[136] Under the definition provided

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[129] Commentary, *supra* note 23, at 175.

[130] These offenses were previously enumerated in N.J. STAT. ANN. §§ 2A:90-2, -3, :125-1, :148-6 (West 1969).

[131] § 2C:5-4a. *See* Commentary, *supra* note 23, at 147-48.

[132] This section is not meant to include such offenses as extortion and bribery which are dealt with elsewhere in the Code.

[133] § 2C:12-3.

[134] Commentary, *supra* note 23, at 108-81.

[135] *See* State v. Butler, 27 N.J. 560, 588, 143 A.2d 530, 546 (1958); State v. Hauptman, 115 N.J.L. 412, 180 A. 809 (E. & A. 1935).

[136] Commentary, *supra* note 23, at 209. *See* N.J. STAT. ANN. §§ 2A:94-1 (breaking and entering or entering), :94-2 (use of high explosives) (West 1969), N.J. STAT. ANN. § 2A:170-3 (West 1971) (presence in or near building with intent to steal).

in the Code, an occupied structure consists of "any structure, vehicle, boat, airplane or place adapted for overnight accommodations of persons. . . ."[138] The Code adds the requirement that the premises, other than a building, be adapted for overnight accommodations or for carrying on business. Nevertheless, the offense is broadened to include, as a purpose of the entry, the commission of any offense therein, rather than those set forth by the more restrictive provisions of N.J. Stat. Ann. § 2A:94-2. Lastly, the revision expands the offense of burglary to include not only the unauthorized entry, but the surreptitious remaining in a building or occupied structure for the purpose of committing an offense.[139] This latter inclusion is desirable since the evils inherent in the two modes of entry are indistinguishable with regard to the ultimate intended result.

The Code's grading of burglary offenses is unlike our present law.[140] The infliction of injury or being armed raises the gravity of the offense to the second degree.[141] Otherwise, it is a third degree crime.[142] While the penalties seem adequate, one flaw is that there is no distinction in gradation with regard to the ultimate offense intended by the perpetrator. One who enters with intent to rape, and one who enters with intent to commit larceny are treated alike.

The Code also limits the offense to one who enters with the intent to commit a crime "therein."[143] The limitation that the crime be committed on the premises may be unduly restrictive. As one commentator has aptly observed:

> Some definitions of burglary, after listing the elements mentioned above, add . . . [the term] "therein." This wording emphasizes the necessary causal relation between the burglarious intent and the forced entrance, but seems to inject an unnecessary limitation. While it would not be a burglary to break into another's dwelling at night merely to rest in preparation for a felony to be perpetrated elsewhere it would be burglary, if the purpose was to use the building as a place of concealment from which to shoot an enemy

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[137] § 2C:18-1; *see* Commentary, *supra* note 23, at 208-09.

[138] N.J. STAT. ANN. § 2A:94-1 (West 1969).

[139] § 2C:18-1.

[140] § 2C:18-2a (2).

[141] § 2C:18-2a(2).

[142] "Burglary is a crime of the third degree if the defendant's purpose was to commit a crime and is a crime of the fourth degree if the defendant's purpose was to commit a disorderly person's offense." § 2C:18-2b.

[143] § 2C:18-2a.

> as he passed by on the street, although under well-recognized rules the situs of such a murder would be in the street at the point where the bullet hit the victim and not the place inside the house from which the shot was fired. Hence burglary was committed where it was necessary to break into the building to reach the property to be stolen, although such property was not actually within the building itself; and also where the purpose was to commit a sexual offense in the seclusion available on the roof, which could be reached only by going through the house.[144]

According to the Commentary, the term "therein" was included to make it clear that the mere purpose to commit criminal trespass by intrusion into the premises does not satisfy the criminal purpose requirement for burglary.[145] The Code should be amended to expressly state this limitation and to delete the word "therein."

The Code establishes certain defenses to the crime of burglary. If, at the time of entry, the premises are open to the public,[146] or if the defendant is licensed or privileged to enter,[147] or if the building or structure is abandoned, there is no burglary.[148] The gist of the burglary offense under the statute is an unlawful intrusion, or entry without privilege, into occupied structures by potentially dangerous individuals.

The Code depicts unlawful entries made other than for the purpose of committing crimes as "criminal trespass." In this regard, section 2C:18-3 declares it a crime of the fourth degree to enter or surreptitiously remain in a dwelling.[149] It is a disorderly persons offense to so enter or remain in any other building or occupied structure.[150] This provision consolidates into a comprehensive statutory enactment, a number of existing disorderly persons offenses dealing with trespassing.[151] The affirmative defenses set forth in this section, with respect to premises open to the public, parallel those contained in the burglary section.[152]

Robbery

The offense of robbery has been redefined by the Code to include a broader range of violent thefts than those encompassed by the current

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[144] PERKINS ON CRIMINAL LAW 212.

[145] Commentary, *supra* note 23, at 211.

[146] § 2C:18-2a(1).

[147] *Id.*

[148] § 2C:18-2a.

[149] § 2C:18-3a.

[150] *Id.*

[151] *See, e.g.*, N.J. STAT. ANN. §§ 2A:170-31, -31.1, -33, -34 (West 1971), and N.J. STAT. ANN. § 2A:170-59 (West Supp. 1978-1979).

[152] § 2C:18-3c(1) to (3).

law.[153] Robbery is presently defined as the forcible taking of money, goods or chattels from the person or presence of the victim by violence or by putting him in fear. The fear must be a "reasonable apprehension of bodily injury."[154] The Code expands the offense by including those who in the course of a theft, injure another,[155] threaten "another," or purposely put him in fear of immediate bodily injury,[156] or commit or threaten immediately to commit any crime of the first or second degree.[157] Most robberies involve violence or the threat of it directed at the person being robbed. Under the Code's formulation, the law would apply not only where property is taken from the person put in fear, but also where it is taken from a third person who is not the recipient of the threat. Thus, a person holding a hostage, while demanding money from another not present, would be a robber.

The Code designates as robbery any violence employed "in the course of committing theft."[158] This expands the present law by defining it to include immediate flight following the theft. Employment of force during any phase of the crime, including flight, demonstrates that the offender poses a danger to society, which must be proscribed.

The robbery provision of the Code consolidates the offenses of assault with intent to rob and assault with an offensive weapon.[159] These crimes were intended to circumvent the asportation element traditionally required for robbery and to provide for enhanced penalties.[160] The Code now defines robbery to include an attempted theft accompanied by the enumerated types of assaults.

Robbery is a second degree crime under the Code.[161] It is raised to the first degree if in the course of the theft, a homicide is attempted by the actor. It is also first degree robbery if the actor purposely inflicts or attempts to inflict serious bodily injury, or if he is armed with, uses, or threatens use of a deadly weapon.[162] It may be questioned whether "serious bodily injury" should be defined so results do not vary from case to case. The Code at present neglects to define this phrase.

The changes in the robbery law are an appropriate response to the problem of violent street crimes. By placing primary emphasis on the actual or threatened harm to the individual, the Code properly seeks to deter the

[153] N.J. STAT. ANN. § 2A: 141-1 (West 1969).
[154] State v. Cottone, 52 N.J. Super. 316, 145 A.2d 509 (App. Div. 1958).
[155] § 2C:19-1a(1).
[156] § 2C:19-1a(2).
[157] § 2C:19-1a(3).
[158] § 2C:19-1a.
[159] *See* N.J. STAT. ANN. § 2A:90-2 and -3 (West 1969).
[160] Commentary, *supra* note 23, at 214.
[161] § 2C:19-1b.
[162] *Id.*

injury and intimidation normally inherent in such encounters. The gist of robbery should be the actual or potential violence entailed, regardless of its role in accomplishing the theft. The Code's innovations in this area, therefore, are worthy of serious consideration.

Theft and Related Offenses

The revisions of the law of theft are quite extensive. Under the Code, the grading of theft offenses ranges from a second degree crime to a disorderly persons offense.[163] Theft by unlawful taking or disposition is divided into movable and immovable property provisions.[164] The movable property category includes the taking or exercise of unlawful control.[165] This section replaces the common law larceny requirements of caption and asportation, as well as a great variety of current legislative terms. For immovable property, such as realty, the crime is the unlawful transfer of any interest of another to benefit the actor or another not entitled to such interest.[166]

The theft section is very comprehensive in scope and covers many areas, due to the broad definitions of property found in section 2C:20-1g. As noted by the Commentary:

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[163] § 2C:20-2. Consolidation of Theft & Offenses; Grading; Provisions Applicable to Theft Generally. a. Consolidation of Theft Offenses. Conduct denominated theft in this chapter constitutes a single offense. A charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the indictment or accusation, subject only to the power of the court to ensure fair trial by granting a bill of particulars, discovery, a continuance, or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

b. Grading of theft offense.

(1) Theft constitutes a crime of the second degree if the property is taken by extortion.

(2) Theft constitutes a crime of the third degree if:

(a) The amount involved exceeds $500.00;

(b) The property stolen is a firearm, automobile, boat or airplane;

(c) The property stolen is a controlled dangerous substance as defined in P.L. 1970, c. 226 (C.24:21-1 et seq.);

(d) It is from the person of the victim;

(e) It is in breach of an obligation by a person in his capacity as a fiduciary;

(f) It is by threat not amounting to extortion; or

(g) It is of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant.

(3) Theft not within the preceding paragraphs constitutes a crime of the fourth degree. If, however, the amount was less than $200.00 the offense constitutes a disorderly persons offense.

[164] § 2C:20-3.

[165] § 2C:20-3a.

[166] § 2C:20-3b.

> The crime here defined may be committed in many ways, i.e., by a stranger acting by stealth or snatching from the presence or even the grasp of the owner, or by a person entrusted with the property as agent, bailee, trustee, fiduciary, or otherwise. Thus offenses which formerly fell into such categories as larceny, embezzlement and fraudulent conversion are dealt with here. In contrast to most existing embezzlement legislation there is no effort to spell out the various relations of trust which can lead to liability. It is immaterial what relation the thief has to the owner or to the property.[167]

Theft by deception replaces several provisions now found in N.J. Stat. Ann. §§ 2A:111-1 to -51.[168] The culpability required is that one "purposely" acts so as to obtain property by deception. This replaces the present standard of acting "knowingly or designedly with intent to cheat or defraud."[169] The Commentary, while simplifying these elements, correctly indicates that this standard continues a high standard of proof as to the requisite mens rea.[170]

There are three types of deception embraced by section 2C:20-4. The first is "creating or reinforcing a false impression."[171] This replaces more specific language found in N.J. Stat. Ann. § 2A:111-1. "It is the falsity of the impression purposely created or reinforced, rather than of any particular representation made by the actor, which is determinative."[172] The second type of deception is preventing another from acquiring information which would affect his judgment of a transaction.[173] The third category is failing to correct a false impression when the deceiver created that impression or stood in a fiduciary relationship to the victim.[174] The latter two situations involve a form of nondisclosure. Passive nondisclosure is generally not a crime. When passive disclosure is coupled with one of the forms of deception specified above, however, criminal sanctions attach.

Theft by extortion, section 2C:20-5, consolidates various provisions of existing law. It differs from existing law in minor ways. For example, under section 2C:20-5f, the threat to withhold testimony with respect to another's legal claim or defense is included. There is apparently no corresponding statute in existence.

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[167] Commentary, *supra* note 23, at 222.

[168] § 2C:20-4.

[169] State v. Greco, 29 N.J. 94, 98, 148 A.2d 164, 167 (1959); *see* State v. Allen, 53 N.J. 250, 250 A.2d 12 (1969); State v. Fladger, 94 N.J. Super. 205, 208, 227 A.2d 528, 529 (App. Div. 1967).

[170] Commentary, *supra* note 23, at 224.

[171] § 2C:20-4a.

[172] Commentary, *supra* note 23, at 224.

[173] § 2C:20-4b.

[174] § 2C:20-4c.

Theft by extortion generally involves some form of coercion rather than of deception. The coercion need not be expressed but, rather, may be implied by surrounding circumstances.[175] All offenses specified are subject to the affirmative defense that the property obtained was honestly claimed as restitution, as indemnification for harm done, or as lawful compensation for property services.[176]

Section 2C:20-6 places an affirmative duty on one who innocently receives or finds property, either unintended for his receipt or excessive in amount or nature, to make reasonable efforts to return the property to the proper owner. This statute has no counterpart in New Jersey laws.

The section that governs receiving stolen property[177] thoroughly integrates the acts included in N.J. Stat. Ann. §§ 2A:139-1 to -4.[178] The Commentary emphasizes that "one who is found in possession of recently stolen goods may be either the thief or the receiver; but if the prosecution can prove the requisite thieving state of mind it makes little difference whether the jury infers that the defendant took directly from the owner or acquired from the thief."[179] Present law requires knowledge that the goods were stolen.[180] Under the Code either knowledge or a belief that the goods were "probably" stolen suffices for conviction.[181] Knowledge or belief is presumed, in certain circumstances, each of which is a valid indicator that the actor was not an innocent bystander.[182]

The offense of "Theft of Services" is a new addition to the criminal law.[183] Previously, such activity would have been prosecuted under our false pretenses statute as obtaining any gain, benefit, advantage, or other thing of value with intent to cheat or defraud.[184] The Code is more specific in its definition of the offense, and, therefore, is an improvement on current law.

Forgery and Fraudulent Practices

The crimes of forgery and related offenses are defined in section 2C:21-1. Forgery is an unauthorized alteration of any writing of another with knowledge or purpose to defraud or to injure.[185] Although the nature of the

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[175] Commentary, *supra* note 23, at 227.
[176] § 2C:20-5.
[177] § 2C:20-7.
[178] *Id.*
[179] Commentary, *supra* note 23, at 232.
[180] State v. Kimbrough, 109 N.J. Super. 57, 262 A.2d 232 (App. Div. 1970).
[181] Commentary, *supra* note 23, at 232-34.
[182] *See* § 2C:20-7b.
[183] § 2C:20-8.
[184] N.J. STAT. ANN. § 2A:111-1 (West 1969).
[185] § 2C:21-1a(1) to (3).

document forged may affect the grade of the crime,[186] "writing" is no longer limited to documents of a legal or evidentiary character.[187] "Writing" means "printing or any other method of recording any information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege or identification."[188] The definition makes punishable not only the harms caused by fraud, but also those harms caused by injuring the purported author of the writing in any way, as, for example, by misrepresentation, lost repute, etc. This definition obviates the need for a separate counterfeiting statute.

Forgery is a third degree crime if the forgery is of government instruments or of securities.[189] Otherwise forgery is a fourth degree crime.[190] Possession of forgery devices is a third degree crime.[191] The possession offense applies to the maker as well as to the possessor of any such device.[192] The existing penalties for many of the current forgery offenses, including counterfeiting, have been reduced by the Code. At present, such crimes are punishable as high misdemeanors with terms up to seven years and fines up to two thousand dollars.[193]

The Code comprehensively deals with offenses involving public and private records. Under section 2C:21-3a, it is a third degree crime if one, with a purpose to injure anyone, destroys any document for which the law provides public recording. If an instrument is offered for public filing and is known to contain false information, this action constitutes a disorderly persons offense.[194] The section proscribes falsifying or tampering with records, and consolidates a number of statutes dealing with certain aspects of these crimes.[195] The Code departs from existing law in distinguishing between financial statements and any other records.

It is a disorderly persons offense to knowingly and fraudulently pass a "bad" check.[196] No restriction on the amount of the instrument is included. If the "bad" check exceeds two hundred dollars, under present law, it is a misdemeanor, punishable by one year of imprisonment; otherwise, the

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[186] § 2C:21-1b.
[187] § 2C:21-1a.
[188] *Id.*
[189] § 2C:21-1b.
[190] *Id.*
[191] § 2C:21-1c.
[192] *Id.*
[193] N.J. STAT. ANN.§§ 2A:109-1 to -17 (West 1969) (forgery and counterfeiting).
[194] § 2C:21-3b.
[195] *Compare* § 2C:21-4 *with* N.J. STAT. ANN. §§ 2A:91-3 to -8, :111-9 to -12, :111-39, :119-4, :122-3 (West 1969); N.J. STAT. ANN. § 47:30-2 (West Supp. 1978-1979).
[196] § 2C:21-5.

act is a disorderly persons offense.[197] The rationale for the Code's lighter treatment of the offense is the fact that, if the money is obtained, the offender may be prosecuted for the more serious crime of theft by deception.[198] It is reasonable, however, to punish according to the amount of the check. If the check exceeds two hundred dollars, therefore, the offense should be designated a crime of the fourth degree.[199]

Presently, a certificate of protest issued pursuant to a bad check constitutes presumptive evidence of the passer's knowledge of insufficient funds.[200] In those cases where payment is refused for lack of funds, the Code restricts the presumption, giving the passer ten days to honor the check before the presumption attaches.[201] The presumption also exists if the issuer had no account with the drawee when the check or order was issued.[202]

Section 2C:21-6 makes knowing, improper use of credit cards a disorderly persons offense. Earlier versions of the Code provided that the crime was one of the third degree. The penalty now fixed by the Code fails to take into account the value of the goods or services obtained. Certain use of credit cards, however, conceivably can be prosecuted as forgery under section 2C:21-1.[203]

Certain specified deceptive business practices are proscribed by section 2C:21-7. The Code is more precise than present law as to what practices are prohibited.[204] In a broad attack on business frauds, the drafters have precluded any necessity to prove that the defendant actually obtained property by his deception. The rationale is that the prosecutor should not have to call angry consumers to testify against the defendant. Most of the forbidden practices may be uncovered by governmental inspectors. Compelling the public to await consummated cheating before holding the defendant responsible, would be undesirable.[205] The Code incriminates fraudulent practices 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[206] or the sale or

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[197] *See* N.J. STAT. ANN. §§ 2A:111-15 to -17 (West 1969); N.J. STAT. ANN. §§ 2A:170-50.5 and .6 (West 1971).

[198] Commentary, *supra* note 23, at 242.

[199] *See* State v. Covington, 59 N.J. 536, 284 A.2d 532 (1971).

[200] State v. Pollack, 43 N.J. 34, 202 A.2d 433 (1964).

[201] § 2C:21-5b.

[202] § 2C:21-5a.

[203] *See* State v. Gledhill, 67 N.J. 565, 342 A.2d 161 (1975).

[204] Some deceptive business practices are now prosecuted under N.J. STAT. ANN. §§ 2A:108-1 to -9, :111-22 to -24, :111-32, :150-1 (West 1969) N.J. STAT. ANN. § 2A:170-42, (West 1971).

[205] Commentary, *supra* note 23, at 244.

[206] § 2C:21-7a.

offer for sale of adulterated or mislabeled items is sufficient for conviction under the Code.[207] As noted in the Commentary:

> [T]he professional generally has reason and opportunity to know whether his weights are false, his goods adulterated or mislabeled, his financial statements and public advertising accurate. And it is more important that he be put to proof that he was unaware, since falsity of his measure is likely to victimize numerous customers.[208]

The defendant can raise an affirmative defense if, by a preponderance of the evidence it can be proved that his conduct was not "knowingly or recklessly deceptive."[209]

Misconduct by a corporate official is taken from a provision of the New York Code[210] which creates a crime when a director or an officer of a stock corporation acts other than in the manner provided by law in declaring dividends, discounting notes, repurchasing shares, or paying to any stockholder any part of the capital stock. A question arises whether the phrase "in the manner provided by law" refers to state or federal statutory law, administrative regulations, or to the internal by-laws of the corporation itself. This ambiguity should be clarified.

Section 2C:21-10, commercial bribery and breach of duty to act disinterestedly, consolidates a series of unrelated statutes in our present law.[211] This section generalizes from existing legislation dealing with commercial bribery of agents or fiduciaries and extends that principle to managers of any public or private institution or corporation, including labor organizations. Subsection a requires a conscious disregard of a known duty of fidelity before the crime is committed. Subsection b deals with a breach of duty by those in the business of making disinterested comment, suggestion, or selection, for example, critics. Subsection c makes the giver of the bribe guilty of a crime.

The proscription against rigging publicly exhibited contests expands existing law on the subject.[212] Included are nonsporting events and any form of corrupt interference, such as administering drugs to an athlete.[213] Liability is extended to participants in the staged contest.[214]

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[207] § 2C:21-7d.

[208] *Id.*

[209] § 2C:27-7.

[210] § 2C:21-9; Commentary, *supra* note 23, at 245; *see also* N.J. STAT. ANN. §§ 2A:111-12 and -13 (West 1969).

[211] *See* N.J. STAT. ANN. §§ 2A:91-1, :91-2, :93-7 to -9 (West 1969), N.J. STAT. ANN. § 2A:170-88 to -91 (West 1971 & Supp. 1978-1979).

[212] N.J. STAT. ANN. §§ 2A:93-10 to -14 (West 1969).

[213] § 2C:21-11.

[214] § 2C:21-11d.

The beneficial factor devolving from the new Code provisions on forgery and fraudulent practices is that the offenses set forth therein have been simplified and consolidated into a comprehensive regulatory scheme.

Bribery and Corrupt Influence

Section 2C:27-2 is the codification of the offense of bribery; a crime New Jersey has always recognized as part of its common law.[215] Further, a number of statutes which have been enacted extend the common law offense to various additional types of official and unofficial conduct or increase the penalty imposed for certain types of bribery.[216] The present inquiry must be, therefore, whether the codification materially alters the scope of the existing law, and, if so, whether that alteration is desirable.

At first appearance, section 2C:27-2 presents a sound change with a number of particularly appealing features. The scope of the section includes any "public servant" who is the intended or actual recipient of a bribe.[217] In section 2C:27-1g, "public servant" is defined to include not only a public officer but any employee of government. Specifically included in his definition are judges, legislators, and anyone participating in the governmental process, such as a juror, an advisor, or a consultant.

The section would reach those officials traditionally covered by the common law offense[218] as well as a class of public employees not heretofore included. The section also applies to party officials and voters.

A "party official" is defined in section 2C:27-1e as anyone who holds an elective or appointive post in a political party, whose post involves some responsibility for directing or conducting party affairs. While a voter is not defined, the term apparently refers to anyone who votes in a matter of concern, but this term should be specifically defined. The extended coverage provided by the section, as to the types of officials and individuals who may be bribed, is clearly desirable. The public must be served faithfully by all who participate in government, either as employees, as office holders, or as political leaders.

A second laudatory aspect of this area is its resolution of any question as to whether the mere solicitation of a bribe by a public servant constitutes an offense.[219] A public servant should be prohibited from initiating such corrupt behavior; the present proposal would establish that prohibition.

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[215] *See, e.g.*, State v. Ellis, 33 N.J.L. 102 (Sup. Ct. 1869); N.J. STAT. ANN. § 2A:85-1 (West 1969).

[216] *See* N.J. STAT. ANN. §§ 2A:93-1 to -14 (West 1969).

[217] *See* § 2C:27-1g; § 2C:27-2.

[218] *See* State v. Begyn, 34 N.J. 35, 43, 167 A.2d 161, 165 (1961); N.J. STAT. ANN. § 2A:93-1 to -4 (West 1969).

[219] *See* State v. Begyn, 34 N.J. 35, 48, 167 A.2d 161, 167 (1961).

Another important feature of this section is its extension to bribe offers which seek to affect ministerial actions and the exercise of discretion.[220] Stated otherwise, a public servant clearly should not be permitted to accept a fee or a reward in exchange for his failure to perform a duty of his position or for his conduct in violation of a certain duty. The Code specifically provides that such behavior would constitute bribery, regardless of the fact that the public servant had no lawful discretion in the matter.[221]

Finally, section 2C:27-2 provides that the offense of bribery is committed even if the public servant is not, in fact, qualified or authorized to act in the desired manner. This comports with existing law.[222] Furthermore, the prosecution apparently would not have to prove that the public servant had "apparent authority" to act as desired. This is an appropriate formulation. If the parties involved were willing to act under the assumption that the public servant could further the desired goal, that fact should be dispositive.

Despite the foregoing provision, the proposed section is seriously flawed. The first questionable feature of the section relates to the attempt to differentiate between bribery involving any public servant and bribery which touches official discretion in judicial or administrative proceedings.[223] This distinction exists to require that a "pecuniary benefit" be offered or be received in the majority of cases,[224] but a mere "benefit" is necessary for bribes related to judicial and administrative actions.[225] This variation is strongly opposed. If a "benefit" is sufficiently attractive to be the subject of a bribe offer or of an acceptance, then it should not matter, in the eyes of the law, whether the benefit is capable of easy translation into pecuniary terms.

The "pecuniary benefit" requirement should be abandoned. There may be, however, another purpose for retaining the present categorization. The existing law imposes a more severe penalty on judges, magistrates, and legislators than it does on other classes of bribe recipients.[226] In view of the extreme sensitivity of judicial, legislative, and quasi-judicial administrative proceedings, and in view of the importance of public confidence in such processes, maintaining greater sanctions in cases that reach those procedures may serve a legitimate purpose. The penalties are graded, therefore, to reflect these policies and values.

The next criticism of section 2C:27-2 concerns the second to the last paragraph. That paragraph is presumably intended to remove as a defense

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[220] *See* § 2C:27-2a and b.
[221] Commentary, *supra* note 23, at 264.
[222] State v. Ellis, 33 N.J.L. 102 (Sup. Ct. 1869).
[223] § 2C:27-2a and b.
[224] § 2C:27-2a.
[225] § 2C:21-2b and c.
[226] N.J. STAT. ANN. § 2A:93-1 and -2 (West 1969).

the fact that the offeror or briber acted under the effect of extortionate or coercive behavior on the part of the public official or his agents.[227] If this is the purpose of the provision, however, such intent is not reflected in the language. Rather, as presently worded, the section is totally unintelligible. To cure the problem, the words "solicited, accepted or agreed to accept a benefit" should be changed to "offered, conferred, or agreed to confer a benefit." The reason for this change is that the recipient of a bribe could not possibly claim in defense that the bribe was made because of the coercive conduct brought to bear on the briber.

Beyond a logical inconsistency of the above paragraph of section 2C:27-2, as written, there is some question as to whether statutory immunity should be granted to a coerced individual who pays the bribe demanded by the public official and later voluntarily informs the police of the offense, cooperating to secure the successful prosecution of the official. Currently, the law recognizes such an immunity for certain types of bribery offenses.[228] If the circumstances are sufficiently threatening, the individual should be provided with a complete defense. Further, the policy in favor of prosecuting the venal official, rather than the frightened individual, as well as the good faith of the prosecutor, would provide further assurance that unwilling victims would not be prosecuted under 2C:27-2. That paragraph of 2C:27-2 should be deleted because it serves no purpose and might needlessly confuse the law.

Finally, the existing statutory law has expanded the extent of bribery to cover the conduct of certain nonpublic officials. Most notably, labor officials, foremen, and participants in sporting events are subject to penalties similar to those provided for public officers.[229] These laws should be retained, and they should be added to the Code.

The following section in this chapter, section 2C:27-3, would create a class of offenses which are not expressly treated by existing law. Section 2C:27-3 is, in effect, a variation of the bribery prohibition and serves to prevent persons from subjecting public servants to undue influence by reason of threatened harm, as opposed to promised benefits. As with bribery, the present section is divided into several categories which depend upon the type of official action involved. Specifically, the first subsection relates to threats of "unlawful harm" with the purpose of influencing the exercise of discretion by any public servant, party official, or voter.[230] The second category concerns threats of any type of harm to influence the actions of a public servant with regard to a judicial or administrative proceeding.[231] The third subsec-

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[227] *See* Commentary, *supra* note 23, at 265.

[228] N.J. STAT. ANN. § 2A:93-3 (West 1969).

[229] N.J. STAT. ANN. §§ 2A:93-7, -8, -10 to -14 (West 1969).

[230] § 2C:27-3a(1).

[231] § 2C:27-3a(2).

tion proscribes threatening harm to any public servant to procure the violation of a "known legal duty."[232] The fourth and last classification prohibits privately addressing any entreaty or argument to a public servant in order to influence the outcome of an administrative or judicial proceeding on the basis of considerations other than those authorized by law.[233]

As noted, there are currently no parallel provisions explicitly prohibiting such conduct. Attempts to influence judges or magistrates in judicial proceedings could be treated as obstruction of justice under the common law.[234] With regard to intimidation of jurors, there is a statute which proscribes such activity.[235] There may be additional instances where the common law and the statutory crimes of extortion apply to threats against a public servant,[236] but such patchwork applications are obviously unsatisfactory. This section of the Code appears satisfactory, nevertheless, some discussion is required.

The first two subsections of section 2C:27-3 differentiate between "unlawful harm" and any other type of threatened harm. The purpose of this variance is to prevent undue restrictions on legitimate pressures in the political and governmental arena. To avoid restraints upon protected pressure activities, many of which would have overtones of free speech and expression, the drafters proscribe only threats of "unlawful harm" to influence the conduct of public servants.[237] In contrast, threats of any type of harm to influence a judicial or administrative decision are prohibited. Clearly, the judgment has been made that there can be no legitimate pressure brought to bear on such decisions. While that judgment is acceptable, the "unlawful harm" requirement of the majority of cases is not completely satisfactory. Since the Code contains no definition of the word "unlawful," it is questionable whether this attempted classification will pass muster against claims of vagueness. Unfortunately, there does not appear to be any clear-cut formulation which will prohibit all unwanted conduct without infringing on protected rights. It appears, therefore, that the present wording of subsections (1) and (2) of section 2C:27-3a is an acceptable compromise.

Subsection 2C:27-3a(4) prohibits a person from privately addressing arguments to one involved in a decision in a judicial or administrative case. While this proscription might otherwise run afoul of the first amendment right to free speech and expression, such overbreadth problems can be over-

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[232] § 2C:27-3a(3).

[233] § 2C:27-3a(4).

[234] State v. Cassatly, 93 N.J. Super. 111, 225 A.2d 141 (App. Div. 1966).

[235] N.J. STAT. ANN. § 2A:103-1 (West 1969).

[236] State v. Morrisey, 11 N.J. Super. 298, 78 A.2d 329 (App. Div. 1951); N.J. STAT. ANN. §§ 2A:105-3, -4, -5 (West 1969).

[237] *See* Commentary, *supra* note 23, at 267.

come by incorporating the qualification that the argument be addressed privately and that the intent be to influence the official to decide the case for non-lawful reasons. The remainder of section 2C:27-3 is acceptable.

The next section in chapter 27, 2C:27-4, prohibits a person from soliciting, accepting, or agreeing to accept a pecuniary benefit as compensation for past action as a public servant. Such activity appears to constitute common law misconduct in office (under N.J. Stat. Ann. § 2A:85-1) where the solicitation, acceptance, or agreement was undertaken at a time when the person was a public official, but there is currently no provision for such conduct by a former public servant. There is a strong need for this section, because the Code would abolish common law crimes.

As the Commentary prepared by the New Jersey Criminal Law Revision Commission noted, the solicitation of rewards for past official action not only corrodes the integrity of public servants but also impliedly requests future payments for continued favorable consideration of the payor.[238] Because of this two-fold corrupting effect, this offense is a serious one and should be treated accordingly.

There does not appear to be any problem with the breadth of section 2C:27-4. As with bribery, the requirement that the payment of the benefit be made as compensation for past actions would necessarily require that there be a mens rea element.[239] Any objection, therefore, that the section would unduly inhibit such lawful activities such as campaign fund raising, would not be well taken.[240]

Two other points of dissatisfaction with this section must be noted. Unlike the bribery section, 2C:27-4 applies only to the conduct of public servants and not to party officials or voters. The rationale for this distinction is difficult to comprehend. Certainly, the state has a compelling interest in promoting the fairness with which political parties are run and in preventing a voter from exercising his franchise in the expectation that a particular choice will be rewarded. This interest is no less strong where the solicitation of a reward occurs after the conduct in question than where the offer precedes that conduct. The section should be amended, therefore, to extend to party officials and voters.

Lastly, section 2C:27-4 employs the term "pecuniary benefit" to describe the compensation paid for the past conduct. The rationale for requiring that the benefit be easily converted into monetary terms is difficult to discern. Here, as with bribery, if the recipient or the offeror believes that a certain benefit is fit compensation for the past acts, then the law should be satisfied. Of import is the persuasive and corrupting impact of the benefit, not the

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[238] *Id.*

[239] *See* § 2C:2-2c(3).

[240] *Compare* United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974).

nature or amount of the benefit. The parties themselves are the best judges of what would suffice to compensate for the the completed act and, implicitly, to induce future favorable action. Whether that compensation is "pecuniary" should be irrelevant. The word "pecuniary" should be deleted from this section.

Section 2C:27-5 establishes as a fourth degree offense the act of any person who unlawfully harms another in retaliation for the unlawful service by the latter as a public servant. Such a provision is warranted to establish a criminal penalty for those unlawful retaliatory acts which are not otherwise punishable. Because of the existence of other criminal sections which proscribe various types of unlawful harms, the present gradation of this offense as a fourth degree crime appears adequate. The coverage of this provision, however, should be extended to party officials. The state has an interest in protecting the honest and conscientious activities of political officers and leaders. To allow reprisals against such individuals would seriously undermine free expression and association in political matters. In all other respects, this section is adequate.

The next offense defined by chapter 27 prohibits the giving of gifts to public servants by persons within the jurisdiction of the recipient.[241] The section is divided into four classes which depend upon the nature of the public servant and the type of official authority involved.[242] If the public servant was entitled to the benefit as a lawful fee,[243] if the benefit was bestowed for reasons of kinship or other personal reasons independent of the official status of the recipient,[244] or if the benefit is so trivial as not to present a real risk of undermining official impartiality,[245] the exceptions provide that there will be no liability.

Section 2C:27-7 represents an effort by the drafters to prevent one of the most blatant evasions of the bribery and corruption laws. Apparently, a common device for such evasion is to contract with a public servant for services and consultation on a matter which will later come before the public servant in his official capacity. Of course, this same result can be achieved if the public servant is offered a generous payment for goods or property or if the consultation fees are paid for services rendered on matters other than the one to come before him. The drafters recognize this fact.[246] Nevertheless,

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[241] § 2C:27-6.

[242] §§ 2C:27-6a (regulatory and law enforcement officials); -6b (officials concerned with government contracts and pecuniary transactions); -6c (judicial or administrative officials), -6d (legislative officials).

[243] § 2C:27-6e(1).

[244] § 2C:27-6e(2).

[245] § 2C:27-6e(3).

[246] *See* Commentary, *supra* note 23, at 269.

it does appear that such an obvious conflict of interest situation as is described by the proposed section should be prohibited.

If the purpose of any payment is to influence the decision or the action of a public servant, then the form of that payment, whether direct or indirect, should be of no legal consequence.[247] Presumably, the form of a particular corrupt transaction will not prevent the state from prosecuting under an appropriate section of the Code which prohibits the substance of that conduct. Thus, 2C:27-7 is not strictly necessary, but the section would have the effect of deterring one of the most clearly abusive practices.

Subsection b of 2C:27-7 declares it is an offense when anyone offers, confers, or agrees to confer compensation as prohibited in subsection a of that section. Notably, an individual would not be guilty under the second subsection unless he knew his actions to be unlawful. This highly unusual requirement is undoubtedly intended to protect those laypersons who, in good faith, consult attorneys or other professionals who are also public servants. While such an extraordinary element of scienter is generally opposed, unfairness may result if no protection is extended to those who innocently seek professional advice from persons who are also public servants. The persons who pay the compensation should be required to know that the recipient is a public servant and that his official authority touches the subject matter involved. An additional requirement should be that the compensation be paid corruptly, that is, non-innocently or in bad faith, with the intent to gain favor from the official in the matter involved. This middle ground would prevent prosecution of the nonculpable individual without holding the state to the extreme burden of proving knowledge of illegality. There should be a presumption, however, that the compensation was not paid innocently if the public servant is shown not to be engaged in an ongoing business which continuously offers service to the public, for example, as an attorney. Surely, the danger of unfair prosecution of an innocent person would diminish sharply with a public servant who is specially employed by a particular business or interest group.

The final section in chapter 27 attempts to curb the practice of making payments to individuals in return for their influence in securing the approval (or disapproval) of appointments or advancements in public service, the approval of the grant of a government benefit to any individual, or for any transaction.[248] Section 2C:27-8 is important in extending the coverage of the criminal law to the undesirable practice of influence peddling, which otherwise might not be proscribed. Thus, the section does not require that the recipient or the solicitor of the benefit be a public servant. Further, the

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[247] *See* State v. Smagula, 39 N.J. Super. 187, 120 A.2d 621 (App. Div. 1956).
[248] § 2C:27-8.

recipient or solicitor need have no official authority or control over the matter; he must only trade his influence over others in return for the forbidden compensation.[249] Current New Jersey law has a similar provision which prohibits even a private citizen from accepting a payment in return for efforts to influence governmental action.[250] The section would, in large part, continue a desirable aspect of existing statutory law. Moreover, subsection b would extend the coverage to include payments for the exercise of any "special influence" upon a public servant. There is no limitation placed upon the purpose for which such influence may be sought. Overbreadth problems appear to be avoided by the fact the "special influence" is defined to be influence apart from the merits of the transaction.[251] Also of assistance is the requirement that the benefit be paid to the recipient as compensation for the non-meritorious facet of the influence to be exerted. Apparently, legitimate professional activities as are continuously carried out by attorneys and lobbyists would not be hampered by this section.

Further, this section employs the term "pecuniary benefit" in describing the unlawful compensation to be paid.[252] There is no reason to make this largely imaginary, but potentially troublesome, distinction between a mere benefit and a pecuniary one. With this modification, the section under discussion appears acceptable.

Prior to this final revision of the Code, chapter 27 contained a final provision, section 2C:27-9, which imposed an obligation on public servants to report to the proper authorities any offer of a benefit which is unlawful under the terms of this chapter. It is submitted that the high degree of trust reposed in public servants more than justifies imposition of an affirmative reporting obligation. The Code does not make this necessary demand.

A public servant, however, should not be subjected to possible prosecution for mere negligence or ignorance. Rather, an offense should be found only where the official "purposely" fails to report an unlawful offer of benefit. In this way, the state would have to prove that the official was aware of this offer and of its unlawful nature but chose to withhold this knowledge from the proper authorities. To require this much of our public servants would not constitute an unreasonable request. Further in view of the fact that several sections of chapter 27 apply to party officials as well as to public servants, the reporting requirement should not be restricted to public servants. Party officials should also be required to report offers of compensation which are unlawful by the terms of this chapter.

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[249] Commentary, *supra* note 23, at 269.

[250] N.J. STAT. ANN. § 2A:93-6 (West 1969); State v. Ferro, 128 N.J. Super. 353, 360 A.2d 177 (App. Div. 1974).

[251] § 2C:27-8b defines special influence as the "power to influence through kinship, friendship or other relationship, apart from the merits of the transaction."

[252] § 2C:27-8c.

Misconduct in Office; Abuse of Office

Section 2C:30-1 proscribes official oppression. This section encompasses individuals who, acting or purporting to act in an official capacity, and knowing that their conduct is illegal, subject another to various specified forms of mistreatment (arrest, search, dispossession, lien)[253] or who deny or impede another in the exercise of any right or privilege.[254] The penalty imposed is one of the third degree.

The conduct proscribed by this section currently falls within the ambit of misconduct in office, which, as a common law indictable crime has been incorporated into our statutory scheme by N.J. Stat. Ann. § 2A:85-1. Common law misconduct in office has been defined as "corrupt misbehavior by an officer in the exercise of his duties or while acting under color of his office."[255] The question then arises as to the meaning of "under color of his office." In *State v. Silverstein*,[256] a sheriff was indicted for misconduct arising out of an abuse of the bail bond system. The defendant argued that, inasmuch as a sheriff had no legal authority to accept bail, the sheriff could not be charged with misconduct in office. The supreme court rejected this argument stating:

> [w]hen a public officer undertakes or assumes to perform certain public duties by virtue of his office and as if incident to his office, and he willfully engages in unlawful behavior which violates the duties undertaken or assumed, he will not be heard to say that such duties were not required by, or incidental to, his office, but were assigned by law to some other public office not held by him.[257]

The Code provision circumvents this problem by utilization of the phrase "*purporting* to act in an official capacity."[258]

Section 2C:30-2 proscribes official misconduct. Under the Code, a public servant commits misconduct in office when in order to secure a benefit for himself or another, or to deprive another of a benefit:

> a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or

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[253] § 2C:30-1a.

[254] § 2C:30-1b.

[255] PERKINS ON CRIMINAL LAW 413 (1957); State v. Begyn, 34 N.J. 35, 49, 167 A.2d 161, 168 (1961).

[256] 41 N.J. 203, 208, 195 A.2d 617, 619 (1963).

[257] *Id.* at 208, 195 A.2d at 619.

[258] § 2C:30-1 (emphasis added); *See* Commentary, *supra* note 23, at 290.

> b. He knowingly refrains from performing a duty which imposed by law or which is inherent in the nature of his office.[259]

Violation of this section results in a penalty of the fourth degree.

This provision essentially reiterates the common law offense, with one unfortunate exception. Whereas the present law criminalizes violations by a public servant of his prescribed duties, the Code would render those violations criminal only when the act or omission was coupled with an attempt to obtain a benefit or to injure some individual. Thus the public official who out of sheer laziness fails to perform his duties escapes all liability.

It is recommended, therefore, that the phrase "with corrupt purpose to obtain a benefit for himself or another or to injure another or to deprive another of benefit" be eliminated, and that the broader common law formulation be adopted. Such a change would be more in keeping with the remainder of the Code which generally increases the protection of the public against abuses by public officers.

Section 2C:30-3 proscribes speculating or wagering on official action or information. This provision creates a specific statutory offense for the misuse of confidential knowledge obtained as a result of holding public office[260] or for speculating on the basis of official action which the individual is in a position to influence.[261] This offense is a crime of the second degree.[262] This provision has no equivalent in current New Jersey law.

Section 2C:30-3 is satisfactory as written. As the Commentary notes,[263] however, an official who has an investment antedating his public service would, under this section, be permitted to sell his holdings in anticipation of adverse developments of which he has "inside" knowledge. The Commentary suggests that this problem could be remedied by means of administrative regulations regarding the extent to which public officials may, upon taking office, retain holdings in fields, subject to action of their governmental units. This suggestion should be implemented.

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[259] §§ 2C:30-2a and b.

[260] § 2C:30-3a.

[261] § 2C:30-3b.

[262] § 2C:30-3. If the amount of money acquired or sought to be acquired is less than $200.00, then it is a crime of the third degree. *Id.*

[263] Commentary, *supra* note 23, at 292.