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# A Prosecutor Looks at the Criminal Code

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# A PROSECUTOR LOOKS AT THE CRIMINAL CODE

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## I. INTRODUCTION

On March 15, 1973, the substantive criminal law of the State of North Dakota was dramatically changed by legislative action through approval of a Criminal Law Revision Bill.[1] The revision, which is referred to as the "North Dakota Criminal Code" replaces the majority of Title 12 of our present North Dakota Century Code and will now be referred to as Title 12.1. Senate Bill No. 2049[2] relating to "sexual offenses" was approved by the Legislative Assembly on March 28, 1973, and Senate Bill No. 2044[3] relating to "tobacco sales to minors" was approved by the Legislative Assembly on March 10, 1973. The three Senate bills, taken together, constitute the most complete revision of the North Dakota substantive criminal law which has ever been accomplished. The new Criminal Code becomes effective on July 1, 1975.

Revision of the substantive criminal law of the State was directed by House Concurrent Resolution No. 3050 during the 1971 legislative session. This resolution directed the Legislative Council to review and revise the substantive criminal statutes. It is important to recognize that the 1971 Legislative Assembly felt that the present substantive criminal statutes were the product of piecemeal legislation over a substantial period of time; that, disparities and inequities in sentences and sentencing procedures were among chief causes of the growing disenchantment with the national and state criminal justice systems; and, that the state system of criminal justice required reviewal with a view toward a comprehensive revision em-

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1. Senate Bill No. 2045 reported in N.D. SESS. LAWS ch. 116 (1973).
2. N.D. SESS. LAWS ch. 117 (1973).
3. *Id.*, at ch. 118.

bracing every phase from criminal prevention through correction and rehabilitation.[4] The Legislative Council was directed to conduct the review and revision during the 1971-72 Legislative Interim. This study was assigned to the Committee on Judiciary "B" consisting of both legislative and citizen members.[5]

It is a generally accepted view that the substantive criminal law has been in need of substantial revision. Many criminal statutes are archaic and do not reflect the present social standards of the state. This need for revision has been reflected in other jurisdictions.[6] The law is not and should not be static. It should move forward cautiously in light of human experience. All of us interested in the criminal justice system, and particularly prosecutors, want to embrace a substantive criminal law which is acceptable from a social point of view. It is submitted that this standard can only be attained through regular review and revision. However, it is recognized that all those interested in the criminal justice systems, and particularly prosecutors, will be hesitant to accept the present criminal code revision if only because of their unfamiliarity with the New Code. Too often lawyers and judges, as others, resist change simply because the change is new and demands a new educational effort. It is hoped that attorneys and judges will view the new Code as a progressive and innovated approach to problems in the field of criminal justice and will not discard the revision simply because of its unfamiliarity.

The revised North Dakota Criminal Code is based upon the proposed Federal Criminal Code, hereinafter referred to as FCC. It should be noted that the proposed Federal Criminal Code, finalized on January 7, 1971, was drafted by a distinguished group of lawyers, judges and criminologists and provided the starting basis for the North Dakota code revision. The FCC is annotated with comments and two volumes of Working Papers have also been published.[7]

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4. House Concurrent Resolution No. 3050, N.D. SESS. LAWS (1971).

5. The legislative members of the Committee were: Senators Howard A. Freed, Chairman, and Jack Page; Representatives Myron Atkinson, Peter S. Hilleboe, James Kieffer, Jack Murphy and Grace Stone.

Citizen members of the Committee were: Supreme Court Judge Ralph Erickstad; District Judge W. C. Lynch; Kirk Smith, Judge of Grand Forks County Court with Increased Jurisdiction; Municipal Judge Harry J. Pearce; Professor Thomas Lockney, School of Law, University of North Dakota; Messrs. Rodney S. Webb and Albert A. Wolf, Attorneys at Law.

6. Substantial revisions of criminal codes have been accomplished in the states of Ohio, Kentucky, Colorado, Illinois, Idaho and New York, as well as other states. The American Law Institute has recognized the need for criminal law revision by its publication of the MODEL PENAL CODE in 1962. Congress has recognized the need for criminal law revision by formation of the National Commission on Reform of Federal Criminal Laws and the publication by that Commission of the "Federal Criminal Code" in 1971.

7. The Working Papers to the Proposed Federal Criminal Code will provide excellent background for understandingg the meaning of the law. These documents can be purchased for the sum of $8.25 by writing to the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The National Commission's FINAL REPORT [NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971)] issued January 7, 1971 is available from the same source for $1.75.

Staff comments, which reflect the views of the North Dakota Legislative Interim Committee, will also be published and will provide a background to determine legislative intent.

This article will attempt to review highlights of the new Criminal Code and no effort will be made to completely digest all material. Generally speaking the new Code represents a progressive new approach to the criminal justice system which prosecutors can adopt; it should be apparent, however, that there are portions of the Code with which prosecutors will not agree and which perhaps should be modified if a legislative consensus develops.

## II. SUBSTANTIVE REVISION

### A. Sentencing

Perhaps the most important aspect of the Criminal Code revision deals with offense classification.[8] Three classes of felony are provided and two classes of misdemeanor.[9] Prosecutors will be particularly interested in knowing that the terms "felony" and "misdemeanor" have been maintained; it has been felt that these terms should be retained in view of their historic meaning and reference to other sections of the Code, e.g. extradition proceedings. Crime classification will also facilitate future revision of the criminal law and uniformity of punishment for similar grade offenses.

The classification system substantially lowers maximum punishments from the present law. Some criticism of the Code will be made on this account; however, it is submitted that the classification system is more reflective of present actual sentences. The Code eliminates the death penalty. Provision is made for extended sentences after a finding that the offender is dangerous, a professional criminal or a persistent offender.[10]

The extended sentence range permits a doubling of the maximum sentence for imprisonment for Class B and Class C felonies and in the case of a Class A felony permits a sentence of up to life imprisonment.

The Code enumerates sentencing alternatives which shall be considered by the Court.[11] Of particular interest to prosecutors is the fact that "restitution" is an alternative which the Court may

8. N.D. CENT. CODE § 12.1-32-01 (effective July 1, 1975) FINAL REPORT, *supra* note 7, § 3002.

9. The 1973 Legislature directed a continuation during the 73-74 Interim of the substantive criminal law revision. It should be noted that the continuing study assiggned to Interim Committee Judiciary "A" has recommended a sixth classification of crime, that sixth classification being "infraction" which class would not demand any incarceration type punishment. It has been the Committee's thought that this type of classification would be in response to the case of Argersinger v. Hamlin, 407 U.S. 25 (1972), which provided for court-appointed counsel in any indigent case where incarceration could result.

10. N.D. CENT. CODE § 12.1-32-09 (effective July 1, 1975).

11. N.D. CENT. CODE § 12.1-32-02 (effective July 1, 1975).

now consider. Specific statutory reference to restitution should solve the dilemma that is presently facing prosecutors and defense counsel alike in our Courts since it is recognized that different judges in different jurisdictions throughout the State have conflicting views as to their authority to provide for restitution or restoration of damaged property in their sentences. The use of appropriate work details is also provided as a sentencing alternative.

The Code also enumerates factors which shall be accorded weight in making sentence determinations.[12] The codification of these factors should be helpful to the Court, without limiting the Court, and will be reflective of circumstances which the Court is now taking into account.

Mandatory parole components are provided for in those instances where an offender has served the whole term of imprisonment following conviction of a felony or a Class A misdemeanor.[13] The purpose of this provision is to insure that those persons who most need a period of parole because they may not have been rehabilitated during imprisonment will serve a period of controlled supervision following imprisonment. Criticism has been made of our present system which sometimes releases an unreformed criminal to society simply because he has "served his debt" and may, in some degree, be corrected by this provision. The parole board maintains authority to terminate the mandatory parole if, in their judgment, no need exists for the continued supervision.

The Code also provides clarification of what civil rights are lost or retained by a convicted person and dictates the method for restoration of rights.[14]

B. Standards of Culpability

Five standards of culpability or mens rea are provided in the Code:[15] "intentionally," which is the highest standard and which would relate to the most serious criminal offense such as murder; "knowingly"; "recklessly"; "negligently"; and, "willfully." If a statute does not specify any particular culpability, the standard required shall be "willfully." Proof of any lesser standard of culpability is satisfied by proof of the higher standard of culpability. An interesting sidelight to the discussion of culpability relates to the defense of "intoxication" where it is provided that self-induced intoxication is reckless with respect to an element of an offense even though disregard, thereof, is not conscious.[16]

12. N.D. CENT. CODE § 12.1-32-04 (effective July 1, 1975). FINAL REPORT, *supra* note 7, § 3101(3).
13. N.D. CENT. CODE § 12.1-32-10 (effective July 1, 1975).
14. N.D. CENT. CODE ch. 12.1-33 (effective July 1, 1975).
15. N.D. CENT. CODE § 12.1-02-02 (effective July 1, 1975). FINAL REPORT, *supra* note 7, § 302.
16. N.D. CENT. CODE § 12.1-04-02(2) (effective July 1, 1975).

### C. Defenses

Chapter 12.1-04 of the North Dakota Century Code contains defenses to criminal charges. The Code recognizes that a person under the age of seven years is incapable of the commission of crime and bars prosecution of a person less than sixteen years of age as an adult. This provision is in accord with current North Dakota law contained in the Uniform Juvenile Court Act.[17]

The insanity defense is materially changed in the new Criminal Code.[18] Essentially, the Code adopts the legal tests of sanity propounded by the American Law Institute. The mental disease or defect defense incorporates the M'Naghten Rule followed in North Dakota and adds the so-called "irresistiblle impulse" theory to the statutory defense. The statutory definition does not include abnormality manifested only by repeated criminal anti-social conduct. The Code requires notification from the defendant when evidence of mental disease or defect is to be submitted as a defense. This notice provision may be in conflict with Rule 12.2, North Dakota Rules of Criminal Procedure, since the times provided for are not consistent. Generally, however, prosecutors need notificalion of an insanity defense in order to properly prepare for trial.

Chapter 4 also provides a procedure of examination when a defendant, as a result of mental disease or defect, lacks capability to understand the proceedings against him or to assist in his own defense. This provision is essentially procedural and should not have been included in the Criminal Code. However, the Chapter also provides for civil commitment of defendants acquitted on grounds of mental disease or defect. It is felt that by this statute, the Code recognizes a need for public protection even though conviction cannot be achieved.

### D. Justification — Use of Force

Chapter 5 deals with justification or excuse and defines the scope of the defenses of "mistake of law" and "entrapment." Limits on the use of force are provided for.[19] The peace officer's justification in the use of deadly force is too severely limited by this

17. N.D. CENT. CODE ch. 27-20 (1960).

18. N.D. CENT. CODE § 12.1-04-03 (effective July 1, 1975). FINAL REPORT, *supra* note 7, at § 503. An alternative to this section, referred to in a consultant's report at page 234 of the Working Papers, is as follows: "Mental disease or mental defect is a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense". The advantage of the alternative would be its integration with the culpability provisions of the Code; however, this alternative has been opposed on the ground that it would be confusing and perhaps immoral to attribute "guilt" to a manifestly psychotic person.

19. N.D. CENT. CODE § 12.1-05-07 (effective July 1, 1975). FINAL REPORT, *supra* note 7, § 607.

portion of the Code. The new Code limits the justified use of deadly force by peace officers to those "felonies involving violence." It is submitted that a peace officer should not be required to judge or anticipate the use of violence by a fleeing felon and should be protected by the same law which protects a private citizen in his dwelling house or place of work. A private citizen is not as severely limited in the use of deadly force as is the peace officer under the provisions of the new Code.

The new Code provides for affirmative defenses which must be established by a preponderance of the evidence.[20] Examples of this type of defense are mistake of law, duress, and entrapment.[21] The use of the affirmative defense does not reward ignorance since it requires good faith and puts the burden on the defendant. Entrapment does not exist when a law enforcement agent merely affords a person an opportunity to commit an offense; some inducement is required. The concept of the affirmative defense, though it does not relieve the State of its overall burden of proof, does reflect a realistic view toward prosecution.

E. Homicide — Assault

Chapter 12.1-16 defines three types of criminal homicide: murder, manslaughter and negligent homicide. Degrees of murder and manslaughter are eliminated from the Code. This is a progressive approach eliminating petty and procedural distinctions in grades of homicide. The felony-murder rule is retained in the Code, but the misdemeanor-manslaughter rule is omitted. Persons involved in auto accidents which result in death may no longer be subjected to manslaughter prosecution, but rather to negligent homicide.

Simple assault, without bodily injury, will no longer be criminal.[22] Assault cases which do not involve injury will be left to civil remedy.

F. Theft

All theft offenses in the classical sense and as enumerated in Chapter 12.1-23 have been combined into one crime simply referred to as "theft."[23] It is submitted that this consolidation is one of the most significant aspects of the new Code. Gradation of the

20. N.D. CENT. CODE § 12.1-01-03(3) (effective July 1, 1975). FINAL REPORT, *supra* note 7, § 103(3).

21. Considerable committee discussion was had relative to these defenses. It was generally thought that the defense of mistake of law would probably not be available to those charges which represented acts which in themselves were wrong, constituting "malum in se" but rather would only be available in the "malum prohibitum" situation.

22. N.D. CENT. CODE § 12.1-17-01 (effective July 1, 1975). FINAL REPORT, *supra* note 7, § 1611. Assault is defined in the Code to include battery and distinction between the two terms is eliminated.

23. The Code refers to eleven previously distinct offenses, such as larceny and embezzlement, as being combined under the general term "theft".

various degrees of theft has been maintained to reflect values of the populace of this State. A special section is maintained relating to the offense of "unauthorized use of a vehicle."[24]

G. Sex Offenses

Chapter 12.1-20 completely revises the North Dakota law relative to sexual offenses. Generally, sexual contact between consenting adults will no longer be the subject of criminal sanction. The law maintains rigorous penalties for sexual contact which involves violence of the person or is committed upon minors, incompetents or other persons when their power to appreciate their conduct or resistance is impaired. All reference to gender is eliminated from the Chapter; this is a remarkable change from the present law which generally referred to a sexual offense victim as being only a female. Children of less than fifteen years of age are presumed incapable of consenting to any sexual act. Adults are subject to penalty for sexual contact with children less than fifteen years of age. The crime of adultery is maintained, but severely limited in its practical application since prosecution can only be had on the complaint of a spouse and must be commenced within one year of commission. Fornication is maintained as an offense, but is severely limited in that it is only criminal when committed in a public place.

The revision of this portion of the law is responsive to the social values and needs of our society in that it removes from the field of criminal sanction the "victimless crime" and yet maintains strong criminal prohibition of the forceable and revolting type of sexual contact.

## III. CONCLUSION

The revised Criminal Code cuts the volume of our substantive criminal law to approximately one-third of its present size. Archaic and out-of-date criminal offenses are eliminated. New terms and procedures are found in the Code. The new Code will demand an educational involvement of judges, prosecutors and defense counsel.

Many of the provisions of the new Criminal Code are not in conformity with this author's views as a prosecutor. However, on the whole, the new Criminal Code represents the product of great study on the part of a number of participants from throughout this State and has been based upon a national study of great merit.

Hopefully the North Dakota Revised Criminal Code will serve our State well and perhaps be a guide to other states in the revision of the substantive criminal law.

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24. N.D. CENT. CODE § 12.1-23-06 (effective July 1, 1975). FINAL REPORT, *supra* note 7, § 1736.