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A Hornbook to the North Dakota Criminal Code

North Dakota Supreme Court

A HORNBOOK TO THE NORTH DAKOTA CRIMINAL CODE

INTRODUCTION

The revision of the substantive criminal laws of North Dakota was ordered by the Legislative Assembly in 1971.[1] The revision was carried out by the Committee on the Judiciary "B." The committee was composed of legislators as well as judges and attorneys serving as citizen members.[2] The committee presented the 1973 Legislative Assembly with Senate Bill 2045, the main body of the revision, and three alternative sex crime bills.[3] The main body of the revision and one of the sex crime alternatives were approved and become effective on July 1, 1975.[4]

Committee Counsel originally presented the members with two methods of approaching the revision. Either working through the present criminal code and revising in that order or using an already developed model criminal code as a starting point.[5] The former was originally adopted,[6] however, in the fourth committee session, the Proposed Federal Code was accepted as model for the revision process.[7]

The committee was concerned with providing a legislative his-

1. H. CON. RES. 3050, 1971 N.D. Sess. Laws 1392.
2. N.D. LEGISLATIVE COUNCIL, Report 80 (1973).
3. 1973 N.D. JOURNAL OF THE SENATE 1244-46.
4. 1973 N.D. Sess. Laws chs. 116, 117.
5. *Minutes of the Committee of Judiciary "B", N.D. Legislative Council,* June 28, 1971 at 3. [Hereinafter cited as *Minutes "B"*].
6. *See Minutes "B", supra* note 5, June 28, 1971 at 3-4 and Sept. 20-21, 1971 at 3-17.
7. *Minutes "B", supra* note 5, Jan. 24-25, 1972 at 28. Professor Kraft, UND School of Law, made the original suggestion. Mr. Wolf supported the proposal on the grounds that 1.) legislative approval would be more likely, 2.) future federal case law would be an aid to judicial construction, and 3.) committee work would go faster. *Id.*, at 26-27. Mr. Wolf's second justification may not come to pass. What this "Hornbook" refers to as the Proposed Federal Code is the result of six years of study by a commission established by the Congress. It has been introduced as S.1 and is currently in committee. The administration has offered an alternate Federal criminal law revision as S.1400. The two proposals differ in many respects. For example, S.1400 establishes a death penalty and eliminates the insanity defense except where the insanity precludes the finding of a mental element of the offense; while S.1 has no death penalty and establishes an insanity defense very close to that proposed by the American Law Institute. For detailed comparisons refer to *Hearings on S.1, 716, 1400 and 1401, before the Subcommittee on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess., pt. V (1973).

While the committee may be subject to some criticism for over devotion to the Proposed Federal Code, they did accomplish a badly needed major revision of North Dakota criminal law in a relatively short time and small expense by adopting the combined views of some of the most knowledgeable persons in the field of criminal law. The committee is to be congratulated for their fine work.

tory to facilitate judicial interpretation of the Code.[8] Toward this end, minutes were kept at each of the meetings.[9] This "Hornbook" has drawn heavily on these minutes in discussing the revised criminal code. The documents associated with the Proposed Federal Code have also been used where coverage in the minutes was brief.[10]

This raises the issue of what impact these materials have on judicial interpretation in North Dakota. It is apparent that only statutes of unclear meaning are subject to judicial interpretation.[11] The United States Supreme Court has stated "the meaning of the statute must, in the first instance, be sought in the language. . .(of) the act. . . , and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."[12] Such statements have been subject to criticism on the grounds that if the meaning was so plain there would be no litigation on the point.[13] Where statutes are ambiguous North Dakota courts may refer to, among other things, objectives of the legislation, and legislative history.[14]

Statements in committee minutes have been infrequently used by state courts in the process of judicial interpretation; but a majority approve of the procedure.[15] The dearth of application may be due more to lack of records rather than judicial reluctance.[16] The federal courts have made frequent use of committee hearings as aids to interpretation.[17]

Reports and notes of commissions established to prepare revisions of statutory law are often referred to as aids to statutory construction.[18] In that the Committee on Judiciary "B" was composed in part of voting citizen members selected because of their expertise in the field and that it was specifically directed to revise North Dakota's criminal law, it resembles a law reform commission more than a legislative committee. Bridging the gap between federal documents and state law presents no difficulty in North Dakota. In *Sorlien v. N. D. Workman's Compensation Bureau*[19] the North Da-

8. *Minutes "B", supra* note 5, Sept. 20-21, 1971 at 11.
9. Copies of the minutes are available for examination at the UND Law Library.
10. NATIONAL COMMISSION ON THE REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) and WORKING PAPERS (1970). A caveat to total reliance on such materials may be had by reference to the Uniform Commercial Code and its official Comments. It has been claimed that these comments, in some cases, expand or restrict the code provision beyond or within the statutory language. Part of this may be the insertion, by draftsmen, of their own views despite contrary commission consensus. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, 12 (1972).
11. Gibson v. First Nat'l Bank of Bismarck, 97 N.W.2d 671, 674 (N.D. 1959). *See* N.D. CENT. CODE § 1-02-05 (1959).
12. Caminetti v. United States, 242 U.S. 470, 485 (1917).
13. 2A C. SANDS, STATUTES & STATUTORY CONSTRUCTION 48-49 (4th ed. 1973).
14. N.D. CENT. CODE § 1-02-39 (Supp. 1973).
15. 2A C. SANDS, *supra* note 13, at 209.
16. *See* Rausch v. Nelson, 134 N.W.2d 519, 523 (N.D. 1965).
17. *E.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 464 (1892).
18. 2A C. SANDS, *supra* note 13, at 208.
19. 84 N.W.2d 575 (N.D. 1957).

kota Supreme Court referred to a United States Senate Report as an interpretive aid when construing North Dakota social security statutes which were drawn from a federal counterpart.[20]

This "Hornbook" was written with three purposes in mind. First, to analyze major portions of the revised criminal code (New Code)[21] and suggest appropriate alterations; second, to facilitate its implimentation by providing interested persons with a comparison between the New Code and the Old Code; and finally, to aid attorneys and judges in the interpretation of the New Code by providing references to legislative materials in an accessible format.[22] The Old Code has more case law precedent behind it than any other body of North Dakota law.[23] It is hoped that this project will facilitate the development of case law dealing with the New Code.

20. 84 N.W.2d at 577-78. *See also* Dawson v. Tobin, 74 N.D. 713, 734, 24 N.W.2d 737, 747 (1946).

21. Throughout, the revised code will be referred to as the New Code and the statutory scheme which it replaces will be referred to as the Old Code.

22. To the extent that any of these goals are realized the student authors are indebted to: Mr. John Graham, Legislative Council; Professor Larry Kraft, UND School of Law; Professor Thomas Lockney, UND School of Law; Mr. Owen Anderson, Special Projects Editor; and Dean Robert K. Rushing, UND School of Law.

Student contributors are: Mr. Ken Dalsted, Violence to the Public Order and Firearms; Mr. James Henrichsen, Detention, Arson and Sexual Offenses; Mr. Robert Johnson, Inchoate Crimes, Homicide and Sexual Offenses; Mr. Joseph Larson, Robbery and Burglary; Mr. Robert Manley, Introduction, Sentencing and Culpability & Complicity; Mr. Dale Sandstrom, Responsibility and Justification & Excuse; Mr. Keith Wolberg, Theft and Forgery & Other Frauds.

23. *Minutes "B", supra* note 5, June 28, 1971 at 3.

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Hornbook to the North Dakota Criminal Code (Continued)

I. SENTENCING

Among the objectives of the New Code are:

> By definition and grading of offenses, to define the limits and systematize the exercise of discretion in punishment and to give fair warning of what is prohibited and of the consequences of violation;
>
> To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders;
>
> * * *
>
> To prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.[1]

To impliment these purposes, offenses are divided into five classes each with a maximum penalty.

1. Class A felony, for which a maximum penalty of twenty years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.
2. Class B felony, for which a maximum penalty of ten years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.
3. Class C felony, for which a maximum penalty of five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
4. Class A misdemeanor, for which a maximum penalty of one year's imprisonment, a fine of one thousand dollars, or both, may be imposed.
5. Class B misdemeanor, for which a maximum penalty of thirty days' imprisonment, a fine of five hundred dollars, or both, may be imposed.[2]

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1. N.D. CENT. CODE § 12.1-01-02(2), (3), (5) (effective July 1, 1975).
2. N.D. CENT. CODE § 12.1-32-01 (effective July 1, 1975).

Perhaps the most discussed aspect of the criminal code revision was the proposal that the New Code include a penalty for offenses less serious than class B misdemeanors for which a fine, but not imprisonment, would be appropriate punishment. *See Minutes of the Committee on Judiciary "B", N. Dak. Legislative Council*, Jan. 24-25, 1972 at 9-10, Sept. 21-22, 1972 at 18-20 [hereinafter cited as *Minutes "B"*]. The proposal is not included in the New Code.

The Committee on the Judiciary "A" has the assignment of revising the criminal statutes not changed by S. Bill No. 2045, Forty-third Legislative Assembly of North Dakota (1973), and serving as a forum for revision of that bill. *Minutes of the Committee on Judiciary "A",,N. Dak. Legislative Council*, May 28, 1973, app. A at 1 [hereinafter cited as *Minutes "A"*]. In response to these duties it has been proposed that N.D. CENT. CODE § 12.1-32-01 (effective July 1, 1975) be amended to include an additional class of offense. The new addition is labeled infraction and is subject to a fine of up to $500 or for the second infraction within one year a sentence of up to thirty days as well as the fine. N.D. CENT. CODE § 12.1-32-01(6) (proposed by Committee on Judiciary "A"). It is probably appropriate to alter the culpability statutes to include infractions. This was done in earlier drafts

This is a substantial change from the current statutory scheme in which the penalty is either set out in the chapter defining the crime or established by reference to the felony-misdemeanor dichotomy.[3] Thus, the severity of punishment is determined either by reference to a system recognizing only two classes of crimes or without reference to any classification system at all. The latter arrangement has been attacked as resulting in sentences which are the products of different generations' differing moral judgments.[4]

The maximum penalties set forth are in terms of periods of imprisonment and monetary amounts of fines. The universal availability of fines suited to the seriousness of the offense and the absence of minimum sentences are distinct changes from current statutes.[5]

The classification system in the revised criminal code is similar

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of the New Code but was deleted when the concept was excised from the New Code. *Minutes "B", supra* Mar. 2-3, 1972 at 18, Sept. 21-22, 1972 at 18, 20.

It has also been proposed that the New Code be amended to include provisions for a special fine structure for organizations. The proposed fine structure is as follows:

1. For a class A felony, a maximum fine of fifty thousand dollars.
2. For a class B felony, a maximum fine of thirty-five thousand dollars.
3. For a class C felony, a maximum fine of twenty-five thousand dollars.
4. For a class A misdemeanor, a maximum fine of fifteen thousand dollars.
5. For a class B misdemeanor, a maximum fine of ten thousand dollars.

N.D. CENT. CODE § 12.1-32-01.1 (proposed by Committee on Judiciary "A").

3. Under current law every offense declared a felony is punishable by imprisonment in the penitentiary for from one to five years and/or a fine of up to $1,000 except where a different punishment is provided for by law. N.D. CENT. CODE § 12-06-10 (1960). The provision for misdemeanors follows the same form with imprisonment set at up to one year in the county jail and maximum fine at $500. N.D. CENT. CODE § 12-06-14 (1960). An overview of title 12 reveals at least 19 different punishment categories in terms of imprisonment in the penitentiary.

N.D. CENT. CODE § 12-27-13—first degree murder—life term
N.D. CENT. CODE § 12-18-06—use of explosives to commit a crime—20 to 40 years
N.D. CENT. CODE § 12-27-17—second degree murder—10 to 30 years
N.D. CENT. CODE § 12-31-11—attempted robbery—up to 30 years
N.D. CENT. CODE § 12-42-01—kidnapping—5 to 20 years
N.D. CENT. CODE § 12-27-18—first degree manslaughter—5 to 15 years
N.D. CENT. CODE § 12-09-01—preventing meeting of legislative assembly—5 to 10 years
N.D. CENT. CODE § 12-19-04(3)—riot in disguise—2 to 10 years
N.D. CENT. CODE § 12-19-04(4)—directing a riot—not less than 3 years
N.D. CENT. CODE § 12-14-01(1) (Supp. 1973)—perjury in felony trial—up to 10 years
N.D. CENT. CODE § 12-14-01(2) (Supp. 1973)—perjury in a misdemeanor trial—up to 5 years
N.D. CENT. CODE § 12-14-01(3) (Supp. 1973)—perjury in other situations—up to 3 years
N.D. CENT. CODE § 12-30-11—indecent liberties—1 to 15 years
N.D. CENT. CODE § 12-30-11—second conviction of indecent liberties—not less than 5 years
N.D. CENT. CODE § 12-31-08—first degree robbery—not less than 1 year
N.D. CENT. CODE § 12-31-09—second degree robbery—1 to 10 years
N.D. CENT. CODE § 12-40-06—larceny of an automobile—1 to 7 years
N.D. CENT. CODE § 12-22-11—adultery—1 to 3 years
N.D. CENT. CODE § 12-30-02—attempted suicide—1 to 2 years
N.D. CENT. CODE § 12-34-01—arson of a dwelling—2 to 20 years

Applicable fines run a similar gamit.

4. *A Hornbook to the Code*, 48 WASH. L. REV. 149 (1972-73).

5. Current law has no coherent system relating the amounts of fines to the gravity of the offense. For example, assault with a deadly weapon with intent to kill is punishable by a fine of up to $200 [N.D. CENT. CODE §§ 12-06-26, 12-26-07 (1960)], assault with intent to kill not utilizing a deadly or dangerous weapon is punishable by a fine of up to $500 [N.D. CENT. CODE § 12-26-09 (1960)] and aggravated assault and battery is punishable by a fine of up to $1,000 [N.D. CENT. CODE § 12-26-10 (1960)]. It is apparent from an examination of note 3 *supra* that minimum sentences set by statute are the rule rather than the exception.

6. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, FINAL REPORT §§ 3002, 3201, 3301 (1971) [hereinafter cited as *Final Report*].

to that in the Proposed Federal Code.[6] It appears to be a notable stride toward implementing the above mentioned objectives.[7]

The New Code sets out the following sentencing alternatives:

a. Deferred imposition of sentence.
b. Probation.
c. A term of imprisonment, including intermittent imprisonment.
d. A fine.
e. Restitution for damages resulting from the commission of the offense.
f. Restoration of damaged property, or other appropriate work detail.
g. Commitment to an appropriate licensed public or private institution for treatment of alcoholism, drug addiction, or mental disease or defect.[8]

The court may impose any one or a combination of the above. It is specifically stated that these alternatives do not exclude unconditional release. Apparently none of the sentencing alternatives may exceed the durational limits set out for imprisonment.[9] While the current statutory scheme does not specifically set out all the above alternatives as presently available, those that are not could be imposed as conditions of deferred imposition of sentence.[10]

The revised criminal code provides for liberal credit against sentences for any detention relating to the offense charged.[11] Current law has no such provision. The Proposed Federal Code is substantially similar to the New Code in this respect.[12]

The language of the Proposed Federal Code[13] is adopted by the New Code[14] in delineating a special sanction for organizations. The

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7. A multi-tiered statutory scheme correlating gravity of offenses to severity of punishment is especially important in North Dakota because of the lack of provisions for appellate review of sentences. The North Dakota Supreme Court recently reitterated the position that provided a sentence is within statutory limits, the Supreme Court has no power to review the term imposed. State v. Holte, 87 N.W.2d 47, 49-50 (N.D. 1957). While the Board of Pardons may review and commute sentences such is exterior to the judicial process. N.D. CENT. CODE § 12-55-05 (1960). A motion favoring the concept of appellate review carried in the legislative committee which drafted the revised criminal code but no action was taken pursuant to it in the New Code. *Minutes "B", supra* note 2, Aug. 25, 1972 at 57.

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

9. *Id.* Refer to note 59 *infra* for details of typographical errors which make this interpretation unclear.

10. Current North Dakota law allows the court to defer imposition of sentence for up to five years or while the obligation exists in abandonment or non-support cases. N.D. CENT. CODE § 12-53-13 (Supp. 1973). During this period the court retains the power to revoke the order deferring imposition for violation of its conditions. State v. Jackman, 93 N.W.2d 425, 429 (N.D. 1958). For example in that case the conditions of the order deferring imposition of sentence included that the defendant seek employment, refrain from use of intoxicating beverages, and obey the laws of the state including city ordinances. *Id.* at 428.

11. N.D. CENT. CODE § 12.1-32-02(2) (effective July 1, 1975).

12. FINAL REPORT *supra* note 6, § 3205.

13. *Id.* § 3007.

14. N.D. CENT. CODE § 12.1-32-03 (effective July 1, 1975).

sanction would allow the court to require an organization convicted of an offense to give notice of the conviction to the persons or class of persons who ostensibly suffered injury because of the offense.[15] Current law has no comparable provisions.

A series of fourteen factors are suggested to judges as appropriate for consideration in sentencing decisions under the New Code.[16] The provision emphasizes that such are not controlling on the court's discretion[17] and need not be referred to in the required statement of reasons for imposing the sentence issued.[18] These factors are duplicates of those in the Proposed Federal Code. The difference is that the federal provisions are tied to a provision giving preference to sentences not involving imprisonment.[19]

A. FINES

While fines are traditional items in a court's sentencing repertoire, they have recently encountered Constitutional difficulties. The problems relate to inability to pay fines resulting in imprisonment because of poverty.[20] In an attempt to circumvent such difficulties, the New Code provides that the court shall consider among other factors the defendant's monetary situation in determining whether to impose a fine. In this vein courts are authorized to allow payment of fines in installments.[21]

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15. *Id.*

16. N.D. CENT. CODE § 12.1-32-04 (effective July 1, 1975).

    1. The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property.
    2. The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property.
    3. The defendant acted under strong provocation.
    4. There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct.
    5. The victim of the defendant's conduct induced or facilitated its commission.
    6. The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained.
    7. The defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense.
    8. The defendant's conduct was the result of circumstances unlikely to recur.
    9. The character, history, and attitudes of the defendant indicate that he is unlikely to commit another crime.
    10. The defendant is particularly likely to respond affirmatively to probationary treatment.
    11. The imprisonment of the defendant would entail hardship to himself or his dependents.
    12. The defendant is elderly or in poor health.
    13. The defendant did not abuse a public position of responsibility or trust.
    14. The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise cooperated.

    Id.

17. *Id.*

18. N.D. CENT. CODE §§ 12.1-32-02(5), -04 (effective July 1, 1975).

19. FINAL REPORT *supra* note 6, § 3101.

20. In Tate v. Short, 401 U.S. 395 (1971) the practice of imposing a fine and converting it to a term of imprisonment because of the defendants' inability to pay the full amount due was declared unconstitutional. The decision was based on equal protection considerations. *Id.* at 398.

21. N.D. CENT. CODE § 12.1-32-05(1,2) (effective July 1, 1975).

The imposition of an alternative sentence to be served if the fine is not paid is specifically prohibited by the New Code.[22] However, current North Dakota law, unrepealed by the New Code, allows the court to direct that the defendant be imprisoned until the fine is paid. The period must be specified and may not exceed one day for each two dollars due.[23] Such a provision seems very close to alternative sentences in terms of result and might be Constitutionally infirm under some circumstances.[24] In lieu of alternative sentences the New Code allows imprisonment for a short period provided the defendant fails to establish his default as excusable.[25] The provisions of the New Code relating to fines are substantially similar to those in the Proposed Federal Code.[26]

B. PROBATION

Probation is a relatively more recent addition to the sentencing bill of fare. Under current North Dakota law probation may be imposed in two ways. The first involves suspended execution of sentence. The court pronounces the sentence, but its execution is held in abeyance.[27] If the offense is a misdemeanor, the court may place the defendant on probation.[28] If the offense is a felony, the court must do so.[29] In the case of a felony the court loses all jurisdiction over the offender to the Parole Board. The Board may set rules and regulations for the offender and may revoke the suspension and terminate the probation for violation of these rules or the terms and conditions imposed by the court. This automatically imposes the original sentence.[30] In the case of a misdemeanor, the court retains

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22. N.D. CENT. CODE § 12.1-32-05 (effective July 1, 1975).

23. N.D. CENT. CODE § 29-26-21 (1960).

24. If N.D. CENT. CODE § 29-26-21 (1960) is intended to impose a substitute punishment, it is contrary to the apparent intent of N.D. CENT. CODE § 12.1-32-05(2) (effective July 1, 1975). If it is intended as a method of collection, it is probably constitutionally infirm if applied to those unable to pay the fine. The provision in N.D. CENT. CODE § 29-26-21 (1960) that such imprisonment does not discharge the fine cuts against the collection theory. However, N.D. CENT. CODE § 12-44-33 (Supp. 1971), which provides that five dollars shall be credited to the defendant's fines for each day of labor performed while serving a jail sentence, supports the collection service concept. *See* Note, *Imprisonment of Indigents for Nonpayment of Fines or Court Costs; the Need for Legislation that Will Provide Protection to the Poor*, 48 N.D. L. REV. 109 (1971-72).

25. In Tate v. Short, 401 U.S. 395 (1971) it was specifically stated that the imprisonment of a defendant with the means to pay who fails to do so is subject to no constitutional infirmity. *Id.* at 400.

26. FINAL REPORT *supra* note 6, §§ 3301-3304.

27. N.D. CENT. CODE § 12-53-01 (1960).

28. N.D. CENT. CODE § 12-53-04 (Supp. 1973).

29. N.D. CENT. CODE § 12-53-06 (Supp. 1973).

30. N.D. CENT. CODE §§ 12-53-06, -11 (Supp. 1973); John v. State, 160 N.W.2d 37, 42 (N.D. 1968). North Dakota practices in relation to revocation of probation under these circumstances conforms with the mandates of Gagnon v. Scarpelli, 93 S. Ct. 1756 (1973). That case requires a preliminary and a final hearing with substantial procedural safeguards especially at the final hearing. *Id.* at 1761-62. North Dakota practice exceeds these guidelines in that a full record is made of both hearings. While there is no statutory authority to appoint counsel, contact is maintained with the Public Defender's Office. Personal communication with Irvin M. Riedman, Chief Probation and Parole Officer and Clerk of the Board of Pardons and the Parole Board. Revocations of probation by the Parole Board are appealable to the District Court. N.D. CENT. CODE § 28-32-19 (1960).

jurisdiction. If the offender violates the conditions, the court may continue the probation under the same or different conditions or may revoke the order suspending the execution of the original sentence.[31]

The second method under current law involves deferred imposition of sentence. A judgment of conviction is pronounced, but sentencing is held in abeyance.[32] If sentencing is deferred, the offender must be placed on probation under the supervision of the Parole Board, except in the case of a misdemeanor when the court specifically waives direct supervision.[33] The court retains jurisdiction over the offender in relation to revocation or modification of the probation.[34]

The New Code has retained these methods of imposing probation[35] as well as adding another. The method is simply a direct sentence to probation. The court may impose such conditions of probation as it deems appropriate and may alter these conditions upon notice to the probationer.[36] The sentence is five years for a felony and two years for a misdemeanor. The court may terminate the probation with a discharge prior to the statutory time period.[37]

The court retains jurisdiction over the probationer. If the probation conditions are violated, the court may invoke any sentence originally available.[38] The only explicitly stated mandatory condition of probation is "that the defendant not commit another offense during the period for which the sentence remains subject to revocation."[39] The New Code sets out fifteen conditions of probation which a court may impose. It is specifically stated that the court's

31. N.D. CENT. CODE § 12-53-03 (1960), -04 (Supp. 1973); N.D.R. CRIM.P. 32(f)(2).

32. N.D. CENT. CODE §§ 12-53-13, -14 (Supp. 1973); John v. State, 160 N.W.2d 37, 42-43 (N.D. 1968).

33. N.D. CENT. CODE § 12-53-14 (Supp. 1973).

34. N.D. CENT. CODE § 12-53-17 (1960); N.D.R. CRIM.P. 32(f).

35. None of the statutes appropriate to the imposition of probation under the two methods are repealed by the New Code. *See* S. Bill 2045, § 41, Forty-third Legislative Assembly of North Dakota (1973); N.D. CENT. CODE § 12.1-33-04(1) (effective July 1, 1975). The New Code specifically authorizes the court to impose deferred imposition of sentence, but includes no specific limitations on the sentence other than the general rule that no sentence may exceed the durational limits set out in the Code. N.D. CENT. CODE § 12.1-32-02(1) (effective July 1, 1975). The unrepealed Old Code provisions relating to deferred imposition of sentence use the term suspended imposition of sentence. N.D. CENT. CODE §§ 12-53-13, -14 (Supp. 1973). This creates a condition of potential confusion with suspended sentences under N.D. CENT. CODE §§ 12-53-04, -06 (Supp. 1973). The two were distinguished in John v. State, 160 N.W.2d 37 (N.D. 1968) which adopted the terms deferred imposition for the former and suspended for the latter. This has become common usage throughout North Dakota. Thus this discussion proceeds from the point of view that the deferred imposition of the New Code is identical to and subject to the same limitations as the deferred imposition of the Old Code. In any case, this should be statutorally clarified. See text accompanying notes 47-53.

36. N.D. CENT. CODE §§ 12.1-32-02(1)(b), -07(1), (4) (effective July 1, 1975).

37. N.D. CENT. CODE § 12.1-32-06(1), (2) (effective July 1, 1975).

38. N.D. CENT. CODE § 12.1-32-07(4) (effective July 1, 1975). Revocation of probation for violation of conditions under such circumstances requires a hearing in open court with substantial procedural safeguards. N.D.R. CRIM.P. 32(f)(2).

39. N.D. CENT. CODE § 12.1-32-07(1) (effective July 1, 1975).

options are not limited to these suggestions.[40] Two of these conditions which may be imposed at the option of the court relate to required visits by and reports to a probation officer.[41] This would seem to indicate that supervision by the Parole Board is not an automatic condition of a sentence to probation. However, the New Code amends N.D. CENT. CODE § 12-53-14 (Supp. 1973) as follows:

> In the event the court shall suspend the imposition of sentence of a defendant, the court shall place the defendant on probation during the period of suspension. During the period of probation the defendant shall be under the control and management of the parole board, subject to the same rules and regulations as apply to persons *sentenced to probation or* placed on probation under suspended sentence as provided in this chapter.
> (added portion underlined.)

While this can be interpreted as mandating Parole Board supervision over those who are sentenced to probation, it would be a strange and ambiguous method of requiring such especially considering the above discussed optional conditions of probation relating to supervision.[42]

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40. N.D. CENT. CODE § 12.1-32-07(2) (effective July 1, 1975). The conditions are as follows:

> a. Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;
> b. Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose;
> c. Attend or reside in a facility established for the instruction, recreation, or residence of persons on probation;
> d. Support his dependents and meet other family responsibilities;
> e. Make restitution or reparation to the victim of his conduct for the damage or injury which was sustained, or perform other reasonable assigned work. When restitution, reparation, or assigned work is a condition of the sentence, the court shall proceed as provided in section 12.1-32-08;
> f. Pay a fine imposed after consideration of the provisions of section 12.1-32-05;
> g. Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the court or probation officer;
> h. Refrain from excessive use of alcohol, or any use of narcotics or of another dangerous or abusable drug without a prescription;
> i. Permit the probation officer to visit him at reasonable times at his home or elsewhere;
> j. Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer;
> k. Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment;
> l. Report to a probation officer at reasonable times as directed by the court or the probation officer;
> m. Submit to a medical examination or other reasonable testing for the purpose of determining his use of narcotics, marijuana, or other controlled substance whenever required by a probation officer;
> n. Refrain from associating with known users or traffickers in narcotics, marijuana, or other controlled substances; and
> o. Submit his person, place of residence, or vehicle to search and seizure by a probation officer at any time of the day or night, with or without a search warrant.

Id.

41. N.D. CENT. CODE § 12.1-32-07(2)(i), (j) (effective July 1, 1975).

42. The interpretation requiring mandatory supervision of persons sentenced to probation is strengthened by the New Code amendment to the duties of parole officers. It provides that the duties of parole officers include:

The first thirteen optional conditions of a sentence to probation are drawn directly from the Proposed Federal Code.[43] The last three relate to submission to medical checks for drug use, warrantless searches of residence and person, and prohibition of association with known drug users.[44] The provisions "were, in part, inserted upon the suggestion of Mr. Riedman," Chief Probation and Parole Officer and Clerk of the Board of Pardons and the Parole Board.[45]

The provision requiring submission to warrantless searches would seem to run directly afoul of the American Bar Association probation standards which provide that conditions should not be "unduly restrictive of his liberty."[46] However, the North Dakota Supreme Court in *State v. Schosser*[47] upheld the validity of a similar condition imposed on a probationer under deferred imposition of sentence.[48] Such conditions of probation have been questioned on practical as well as legal grounds. It has been persuasively argued that searches under such waivers impede the rehabilitative process

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1. To have supervision over and to look after the welfare of persons who have been paroled from the penitentiary and of persons who have received *sentences to probation or* suspended sentences and have been placed upon probation (((after having been convicted of a felony)));

N.D. CENT. CODE § 12-55-07 (effective July 1, 1975) (added portion underlined, excised portion in parentheses). The minutes of committee discussion relating this section are rather cryptic.

> The Committee discussed Section 18 of the bill, and the fact that it would result in the extension of Parole Board jurisdiction to supervision of persons paroled after misdemeanor convictions. Mr. Riedman stated that he favored such supervisory authority, but, practically speaking, could not get the money for the 25 new agents which would be necessary in order to handle parolees. Mr. Wolf suggested that the supervisory authority could be extended to the extent that funds were available.
>
> IT WAS MOVED BY MR. WOLF that the following language be added to Section 18: "to have supervision over and to look after the welfare of persons who are on probation after conviction of a misdemeanor to the extent that resources and personnel are available;". THIS MOTION DID NOT RECEIVE A SECOND.
>
> Mr. Webb noted that misdemeanants are now being supervised by parole agents after conviction of a misdemeanor under the procedures allowing deferred imposition of sentence. After further discussion, no action was taken to amend Line 7, Section 18.

Minutes "B", supra note 2, Sept. 21-22, 1972 at 24. It appears, based on Mr. Wolf's motion, that the term parole was used when probation was intended. Thus it seems the Committee intended to require supervision of all offenders sentenced to probation. The proposed Federal Code has no such requirement and the requirement violates the American Bar Association Probation Standards. ABA, STANDARDS RELATING TO PROBATION § 1.1(c) (1970). Furthermore, as was noted in Committee, such wide use of supervision suffers from practical funding difficulties.

43. FINAL REPORT, *supra* note 6, § 3103.

44. N.D. CENT. CODE § 12.1-32-07(2)(m), (n), (o) (effective July 1, 1975).

45. *Minutes "B", supra* note 2, Sept. 21-22, 1972 at 23.

46. ABA, STANDARDS RELATING TO PROBATION § 3.2(b) (1970).

47. 202 N.W.2d 136 (N.D. 1972). It should be noted that the New Code provides for warrantless searches by probation officers, while the above case referred to searches by any law enforcement officer. N.D. CENT. CODE § 12.1-32-06(2)(0) (effective July 1, 1975). The suggested limitation in the New Code would help limit the danger of police harassment. *See* People v. Bremmer, 30 Cal. App. 3d 1058, 1063-64, 106 Cal. Rptr. 797, 800-01 (Ct. App. 1973).

48. *Id.* at 139. The court relied heavily on People v. Mason, 5 Cal. 3d 759, 97 Cal. Rptr. 302, 388 P.2d 630 (1971), *cert. denied* 405 U.S. 1016 (1972) which proceeded primarily on an *"advance* waiver of Fourth Amendment rights" theory. *Id.* at 765, 97 Cal. Rptr. at 305, 388 P.2d at 633 (emphasis in original). The "contract theory" of advance waiver has been vigorously attacked as an incomplete analogy on the grounds that public policy should deny the enforcement of contracts made under coercion. Note, *Probation Conditions*, 1 AM. J. CRIM. L. 235, 239, 245-46 (1972).

which the probation was meant to foster.[49] Similarly, the dissenting Justices in *People v. Mason*[50] stated: "It is high time that we recognized that a person must have the freedom to be responsible if he is to become responsibly free."[51]

North Dakota's probation system presents an unusual situation. The New Code adopts a modern arrangement in substantial harmony with the American Bar Association recommendations.[52] However, the suspended execution and deferred imposition of the Old Code are still retained.[53] This creates a complex and potentially cacophonous area in the North Dakota sentencing structure. Similar systems have been attacked as containing "subtle terminological differences" which accomplish "nothing of functional significance."[54]

The characteristics of the mandatory probation associated with deferred imposition of sentence are so similar to the sentence to probation that there is scant purpose in retaining it. The New Code should be amended to provide that deferred imposition does not require a condition of probation while still retaining the time period limitation of five years.[55] Probation under suspended execution of sentence should also be abandoned.[56] The requirement of automatic imposition of the original sentence[57] creates a serious lack of flexibility. While a pre-determined sentence may act as a deterent to probation violations, this can also be accomplished by an admonition from the sentencing judge that the maximum sentence would be available in case of revocation.[58] The deterence factor is out weighed by the fact that different kinds and degrees of probation violations should be dealt with by a flexible variety of sanctions.

The New Code's provisions relating to probation are substantially similar to those in the Proposed Federal Code.[59] There is, however, one major difference. In the Proposed Federal Code probation is explicitly designated as a starting point for judical inquiry into sen-

49. Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129, 134-35 (1969-70).

50. 5 Cal. 3d 759, 97 Cal. Rptr. 302, 388 P.2d 630 (1971), *cert. denied*, 405 U.S. 1016 (1972).

51. *Id.* at 770, 97 Cal. Rptr. at 309, 388 P.2d at 637.

52. *See* ABA, STANDARDS RELATING TO PROBATION (1970); Comparative Analysis of ABA Standards for Criminal Justice with N.D. Laws, Rules and Practice, P-1 to P-28 (1973).

53. Refer to text accompanying notes 27-35.

54. ABA, STANDARDS RELATING TO PROBATION 25 (1970).

55. N.D. CENT. CODE § 12-53-13 (Supp. 1973). Refer to note 35 *supra*.

56. This recommendation was included in a draft of the New Code, but the Committee voted to delete the revocation of the appropriate portions of the Old Code. *Minutes "B"*, *supra* note 2, Sept. 21-22, 1972 at 22. Countervailing considerations include the possibility that the Parole Board will be less likely than judges to impose imprisonment for relatively minor probation violations. Personal communication with Irvin M. Riedman, Chief Probation and Parole Officer and Clerk of the Board of Pardons and the Parole Board. It should be noted that approximately ten times as many offenders are placed on probation under deferred imposition of sentence as under suspended execution of sentence. *Id.* This seems to indicate a judicial preference for retention of jurisdiction over probationers.

57. N.D. CENT. CODE § 12-53-11 (Supp. 1973).

58. FINAL REPORT, *supra* note 6, at 281.

59. FINAL REPORT, *supra* note 6, ch. 31.

tencing alternatives. Probation is favored unless substantial reasons exist for the imposition of more severe sentences.[60] The New Code does not make any similar explication while relating the probation provisions; however, the inference of a similar trend might be drawn from the section on "factors to be considered in sentencing decision."[61] The determination to be made is "the desirability of sentencing an offender to imprisonment" but, each of the factors is phrased negatively, limiting the moral or social evil of the offense.[62] This section is drawn directly from the Proposed Federal Code.[63]

C. RESTITUTION & REPARATION

The specific authorization of sentences requiring restitution or reparation is new to North Dakota. Prior to imposing such sentences, the court must conduct a hearing to determine the offender's ability to make payments or restore property, the victim's "reasonable damages" which are specifically limited to "fruits of the criminal offense and expenses actually incurred as a direct result of the criminal action," as well as probability of the sentence serving a rehabilative purpose.[64] The New Code provides that if restitution or reparation is a condition of probation the court may direct that the award may be enforced as a civil judgment.[65] There are no explicit provisions for collection under a direct sentence to restitution or reparation. Thus a contempt citation is the only available means of enforcement.[66]

D. SPECIAL OFFENDERS

The classification of offenses in the New Code is a reflection of the concern that many authorized prison terms are too severe. However, it is acknowledged that in some cases long prison terms are necessary for public protection.[67] The response in the New Code is the authorization of "extended sentences" for "dangerous special

60. *Id.* at 277-78. *See* NATIONAL COMMISSION ON THE REFORM OF FEDERAL CRIMINAL LAW, II WORKING PAPER. 1269, 1307 (1970) [hereinafter cited as WORKING PAPER].

61. N.D. CENT. CODE § 12.1-32-04 (effective July 1, 1975).

62. *Id.*

63. FINAL REPORT, *supra* note 6, § 33101.

64. N.D. CENT. CODE § 12.1-32-08(1) (effective July 1, 1975). There are apparently two typographical errors in N.D. CENT. CODE § 12.1-32-02 (effective July 1, 1975). The first provides that restitution or reparation "shall be imposed in the manner provided in section 12.1-32-07." That section deals with probation, while -08 deals with reference subject. The second provides that the duration of sentences may not exceed the terms in "section 12.1-32-08." That section deals with restitution and reparation while -09 deals with terms of imprisonment. The source of the errors is an altered numbering in the final bill and a retention of the referencing numbers from an earlier draft. *See Minutes "B", supra,* note 2, Sept. 21-22, 1972 at 2. This should be corrected despite N.D. CENT. CODE § 1-02-06 (1959) which provides that such errors shall be disregarded in statutory construction.

65. N.D. CENT. CODE § 12.1-32-08(1) (effective July 1, 1975).

66. *Minutes "B", supra* note 2, Sept. 21-22, 1972 at 18.

67. II WORKING PAPERS, *supra* note 60 at 1269.

offenders" convicted of felonies.[68] Prior to imposing such a sentence the court must find that the convicted offender is "a dangerous, mentally abnormal person," "a professional criminal," "a persistant offender," "especially dangerous because he used a firearm, dangerous weapon, or destructive device," or a second-offender where the current offense "seriously endangered the life of another person" and the prior offense was similar in nature.[69] The only comparable provisions in the Old Code relate to increased sentences for second, third, and fourth offenses.[70]

The court may not find the offender a "dangerous, mentally abnormal person . . . unless the presentence report,[71] including a psychiatric examination, concludes that the offender's conduct has been characterized by persistent, aggressive behavior, and that such behavior makes him a serious danger to other persons."[72] The court has the power to order the commitment for diagnostic testing, at an appropriate institution, of any convicted offender for up to 30 days. The commitment may be extended for an additional period of up to 30 days.[73] Similar grounds for extended sentences have been questioned on the basis of diagnostic inadequacy in behavioral sciences.[74]

The statutory test for "professional criminal" is "substantial income or resources derived from criminal activity."[75] "Substantial source of income" is defined as exceeding the return from a year's labor at the minimum wage and "fifty per cent of the offender's declared adjusted gross income."[76] Such a finding may be supported by a showing that the offender holds or controls wealth which

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68. N.D. CENT. CODE § 12.1-32-09 (effective July 1, 1975). The extended terms are as follows:

> a. If the offense for which the offender is convicted is a class A felony, the court may impose a sentence up to a maximum of life imprisonment.
> b. If the offense for which the offender is convicted is a class B felony, the court may impose a sentence up to a maximum of imprisonment for twenty years.
> c. If the offense for which the offender is convicted is a class C felony, the court may impose a sentence up to a maximum of imprisonment for ten years.

Id.

69. *Id.*

70. N.D. CENT. CODE § 12-06-18 to -21 (1960).

71. Presentence reports contain:

> any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

N.D.R. CRIM. P. 32(c)(2). Presentence reports are prepared by probation-parole officers. Currently three officers have this as their primary duty. Personal communication with Irvin Riedman, Chief Probation and Parole Officer and Clerk of the Board of Pardons and the Parole Board.

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

73. N.D. CENT. CODE § 12.1-32-02(4) (effective July 1, 1975).

74. Smith, *Recognizing and Sentencing the Exceptional and Dangerous Offender*, 35 FED. PROB., Dec. 1971 at 3, 10.

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

76. *Id.*

is not explained as having a non-criminal source. Evidence for such a finding must be shown in the presentence report.[77]

Persistent offenders are defined as having two prior class B or above felony convictions; or two convictions below class B, both of which were committed while an adult and at different times, plus a class B or above felony conviction. Convictions overturned on review, found invalid at the hearing required prior to the imposition of an extended sentence, or pardoned on grounds of innocence may not be considered in the persistent offender determination.[78]

The initiation of special dangerous offender proceedings rests with the prosecutor. If the defendant is over eighteen years of age, the prosecutor may file notice with the court at a reasonable time prior to the trial or the acceptance of a guilty plea. This may not be disclosed to the jury under any circumstances, nor to the presiding judge prior to adjudication without consent of the parties. The notice is subject to inspection by the defendant and his counsel.[79]

After determination of guilt and prior to sentencing a hearing is held. The court is instructed to obtain a presentence report "except in the most extraordinary of cases."[80] Examination of the presentence report by the parties is allowed except in "extraordinary" cases when the court may withhold all or a portion of it.[81] At the hearing, the offender is entitled to compulsory process and the right of cross-examination. The standard of proof is preponderance of the information presented at the hearing, at trial and in so much of the presentence report relied on by the court.[82]

The degree of judicial review available for the determinations at the hearing is not clear. The statute makes no explicit mention of such. However, the requirements relating to the recording of findings, information relied on and bases for the particular sentence[83] may indicate that some sort of review process is anticipated despite North Dakota's lack of appellate review of sentences.[84]

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77. *Id.*
78. *Id.*
79. N.D. CENT. CODE § 12.1-32-09(3) (effective July 1, 1975).
80. N.D. CENT. CODE § 12.1-32-09(4) (effective July 1, 1975).
81. *Id.* The limitations on this practice are as follows:
> In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court.

Id.
82. *Id.*
83. *Id.*
84. Refer to note 7 *supra*. N.D. CENT. CODE § 29-28-06(5) (Supp. 1973) provides for review of "an order made after judgment affecting any substantial right of the party." This could be construed to include a finding that the defendant was subject to an extended sentence.

E. PAROLE COMPONENTS

The New Code provides for mandatory parole components based on the sentence imposed. They do not come into effect unless the offender has "served the whole term of imprisonment to which he was sentenced."[85] The purpose of the provision is to prevent an offender whose conduct has been such that he was denied parole from being released without supervision. It was the original intent of the drafters that violation of such parole would subject the offender to imprisonment for the remainder of the parole component or one year which ever was greater.[86] Such a provision did not find its way into the New Code. The current law relating to breach of parole, unrepealed by the New Code provides that the Parole Board may confine a parolee "in the penitentiary as provided in his sentence." It further provides that "the Warden shall receive and reimprison such person in accordance with the terms of his *original sentence*."[87] Thus, unless the parole component was considered a part of all original sentences, the Parole Board would have no way of enforcing its regulations in such a case. The New Code provides that either the Board of Pardons or Parole Board may terminate the mandatory parole component.[88]

The Proposed Federal Code is similar in that "parole is conceived as the natural transition between every prison sentence and complete freedom."[89] The language differs because the Proposed Federal Code applies parole components to indefinite sentences and to parole prior to completion of the full term of imprisonment.[90] The New Code makes no provisions for indeterminite sentences and repeals the Old Code provisions relating thereto.[91] The New Code follows the Proposed Federal Code in that provisions for good behavior sentence reduction are repealed.[92] Thus the desire for an early parole will be the chief motive for good behavior.[93]

F. MULTIPLE OFFENSES

The New Code draws heavily on the Model Sentencing Act[94] in relation to sentences for multiple offenses.[95] If the offenses are a

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85. N.D. CENT. CODE § 12.1-32-10 (effective July 1, 1975).
86. *Minutes "B"*, *supra* note 2, Sept. 21-22, 1971, app. A at 3.
87. N.D. CENT. CODE § 12-59-15 (Supp. 1973) (emphasis added).
88. N.D. CENT. CODE § 12.1-32-10 (effective July 1, 1975). Credence is lent to theory that the mandatory parole component is intended to be part of the original sentence by doubts expressed in Committee that the Parole Board could constitutionally "terminate sentences." (referring to mandatory parole components). *Minutes "B"*, *supra* note 2, Sept. 21-22, 1972 at 23.
89. II WORKING PAPERS, *supra* note 57, at 1331.
90. FINAL REPORT, *supra* note 6, §§ 3201, 3403.
91. N.D. CENT. CODE §§ 12-59-13, -13.1 (Supp. 1973).
92. N.D. CENT. CODE ch. 12-54 (1960), FINAL REPORT, *supra* note 6, at 300.
93. FINAL REPORT, *supra* note 6, at 300.
94. ADVISORY COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME & DELINQUENCY, MODEL SENTENCING ACT §§ 19-22 (1963).
95. *Minutes "B"*, *supra* note 2, Sept. 22-23, 1972 at 12-13.

"single criminal episode," the sentences run concurrently. If they are not, the sentences run concurrently unless otherwise ordered by the court.[96] The merger of any sentence imposed on a probationer or parolee with his term of supervision is mandated by the New Code. Similarly, a sentence imposed on a person already imprisoned by a North Dakota court is merged with the original sentence unless specifically ordered to the contrary.[97]

Under the New Code the aggregate term of consecutive sentences is apparently intended to be limited to the maximum term allowed for special dangerous offenders.[98] This provision was derived from Kentucky law.[99] The New Code limits consecutive sentences for misdemeanors to one year except when the offender is guilty of two or more class A misdemeanors committed separately and each with "a substantially different criminal objective."[100] In such a case the consecutive sentences may not exceed the limits for a class C felony.[101] The New Code emphasizes merger and concurrent sentences as do the Proposed Federal Code[102] and the American Bar Association standards.[103] The emphasis is based on the therapeutic theory of penology. The treatment plan should prepare the offender for a smooth merger into outside society rather than the sort of a consecutive sentence.[104]

G. JUVENILES

The New Code leaves the provisions of the Uniform Juvenile Court Act[105] intact. Similar treatment is given to provisions relating to the North Dakota Industrial School.[106] The New Code provides that a minor convicted of a felony may be sentenced to the county jail or the state industrial school.[107] This is a rewording of the Old Code to take care of changed institutional names and thresholds of adulthood.[108]

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96. N.D. CENT. CODE § 12.1-32-11(1) (effective July 1, 1975).
97. N.D. CENT. CODE § 12.1-32-11(2) (effective July 1, 1975).
98. N.D. CENT. CODE § 12.1-32-11(3) (effective July 1, 1975). This subsection seems to suffer from a typographical error similar to those described in note 59 *supra*. The subsection limits the maximum term by reference to § 12.1-32-08, however, that section refers to restitution and reparation. An earlier draft used the reference to "section 8" which at that time described extended sentences. *Minutes "B", supra* note 2, Sept. 21-22, 1972 at 13. The reference was carried over to the final draft without correction for section number changes.
99. *Minutes "B", supra* note 2, Sept. 21-22, 1972 at 13.
100. N.D. CENT. CODE § 12.1-32-11(4) (effective July 1, 1975).
101. *Id.*
102. *See* FINAL REPORT, *supra* note 6, § 3204.
103. *See* ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 3.4, 3.5 (1968).
104. ADVISORY COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME & DELINQUENCY, MODEL SENTENCING ACT 34 (1963).
105. N.D. CENT. CODE ch. 27-20 (Supp. 1973).
106. N.D. CENT. CODE ch. 12-46 (Supp. 1973).
107. N.D. CENT. CODE § 12.1-32-13 (effective July 1, 1975).
108. N.D. CENT. CODE § 12-06-13 (1960).

II. CULPABILITY & COMPLICITY

A. CULPABILITY

The scheme of culpability in the New Code is based on the terms intentionally, knowingly, recklessly, negligently, and willfully.[109] Their definitions are drawn substantially from the Proposed Federal Code.[110] Intentionally and knowingly subdivide willfully as defined by the Old Code.[111] Recklessly requires "conscious disregard" of risk such as to be "a gross deviation from acceptable standards of conduct."[112] According to the comments to the Proposed Federal Code it is thus clearly distinguished from the tort concept of recklessness.[113] Negligently requires the same "gross deviation," but only in reference to an "unreasonable disregard."[114] The "gross deviation" standard serves to distinguish it from tort negligence.[115] The Old Code definition of negligence is much more closely related to tort negligence than the criminal standard of negligence set out in the New Code.[116]

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109. N.D. CENT. CODE § 12.1-02-02(1) (effective July 1, 1975). Their definitions are as follows:

> a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so;
> b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so;
> c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication;
> d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; and
> e. "Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.

Id.

110. FINAL REPORT, *supra* note 6, § 302.

111. " 'Willfully,' when applied to the intent which an act is done or omitted, implies simply a purpose or willingness to commit the act or omission referred to . . . ." N.D. CENT. CODE 12-01-04(1) (1960). The New Code distinguishes the person "who wills" (intentionally, from the person "who is merely willing." FINAL REPORT, *supra* note 6, at 29.

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

113. FINAL REPORT, *supra* note 6, at 29. This distinction might be difficult to make in some fact situations. "Reckless disregard of safety" has been defined in terms of "knowing or having reason to know" facts which would set a reasonable man on notice of an unreasonable risk exceeding simple negligence. RESTATEMENT (SECOND) OF TORTS § 500 (1965). Thus, there is no need that the actor realize the danger, he need only fail to heed facts which would notify a reasonable man. *Id.*, comment c at 589. In contrast, under the New Code the disregard must be "conscious." N.D. CENT. CODE § 12.1-02(1)(c) (effective July 1, 1975).

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

115. FINAL REPORT, *supra* note 6, at 29. Tort negligence is that which falls below standards established to protect others from "unreasonable risk of harm." RESTATEMENT (SECOND) OF TORTS § 282 (1965). The "unreasonable disregard" of the New Code's negligence make it closely akin to that portion of tort recklessness which is not included in the criminal recklessness of the New Code.

Under North Dakota law, gross negligence is the "want of slight care and diligence." N.D. CENT. CODE § 1-01-17 (1959). The concept finds application in North Dakota's "guest law." N.D. CENT. CODE ch. 39-15 (1972). Gross negligence has been judicially defined as showing indifference to consequences which should have been foreseen. *E.g.* Holcomb v. Striebel, 133 N.W.2d 435 (N.D. 1965). Thus, gross negligence is close to criminal negligence as defined in the New Code.

116. The Old Code states that such terms "import a want of such attention to the nature

If the required degree of culpability is not specified and the offense is not specifically excused from culpability requirements, then the degree of culpability required is willfully, i.e., intentionally, knowingly, or recklessly. Unless otherwise provided, the required degree of culpability is needed with respect to every element of the offense unless related solely to grading or statutorily required to "in fact" exist. An exception is that where the required degree of culpability is intentionally the degree need only be knowingly as to attendant circumstances.[117]

B. ACCOMPLICES

The New Code provides that accomplices are criminally liable for the conduct of the actor who committed the offense. A person is an accomplice if he, with the requisite culpability, caused another to commit an offense; or if he intended that an offense be committed and aided another in its commission or failed to make the efforts required by his legal duty to halt the commission. A co-conspirator is also an accomplice if he is associated with the offense under the conditions described above.[118] It is further provided that the term accomplice is not applicable to those made not accountable for the conduct of others in the statutes describing the offense.[119] The fact that the actor, whose conduct the accomplice is being held liable for, has not been punished for the crime is not a defense for the accomplice. Neither is the fact that the accomplice is not of the class of persons capable of directly committing the offense. These "defenses" may be available if so provided in the description of the offense.[120]

The New Code provisions, taken directly from the Proposed Federal Code,[121] replace the traditional principal and accessory dichotomy. Principal includes both the actor and generally those in the accomplice category.[122] Accessories are those persons who aid and conceal the perpetrator of a felony with knowledge that he has com-

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or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." N.D. CENT. CODE § 12-01-04(2) (1960).

117. N.D. CENT. CODE § 12.1-02-02(3) (effective July 1, 1975).

118. N.D. CENT. CODE § 12.1-03-01(1) (effective July 1, 1975). It should be noted that this statute rejects the conspiracy doctrine of Pinkerton v. United States, 328 U.S. 640 (1946). That case held that membership in a conspiracy is sufficient to create liability for all offenses committed in its furtherance. Under the New Code mere membership is not enough to predicate liability for more than conspiracy. *See* I WORKING PAPERS, *supra* note 57, at 155-57.

119. N.D. CENT. CODE § 12.1-03-01(1) (effective July 1, 1975). This exception includes those expressly or by implication made not accountable because they are victims or otherwise. *Id.*

120. N.D. CENT. CODE § 12.1-03-01(2) (effective July 1, 1975).

121. FINAL REPORT, *supra* note 6, § 401.

122. *See* N.D. CENT. CODE § 12-02-04 (1960).

mitted a felony.[123] The New Code provisions relating to "hindering law enforcement" replace the accessory category.[124]

C. LIABILITY OF AGENTS & CORPORATIONS

Under the New Code a person who acts in the name of a legal entity or in its behalf is criminally liable as if he were acting in his own name or in his own behalf.[125] If an organization fails to perform a legally required act, any person with "primary responsibility for the subject matter" is accountable as if the duty was his.[126] Individuals who act as accomplices of such legal entities are subject to punishment prescribed for natural persons guilty of the offense.[127] The Old Code has no similar provisions.

The New Code provides a detailed scheme of corporate liability drawn from the Proposed Federal Code.[128] Corporations are liable for acts of agents within their scope of employment when the acts are misdemeanors or offenses which do not require culpability. If the offense is more serious, scope of employment and authorization are required.[129] The Old Code does not have a comparable scheme.

III. RESPONSIBILITY

A. JUVENILES

The New Code bars[130] prosecution of a person as an adult "if the offense was committed when the person was less than sixteen years of age."[131] This is consistent with the Uniform Juvenile Court Act which North Dakota has adopted.[132] The New Code, unlike the Proposed Federal Code, does not lower the age to fifteen for certain serious crimes.[133] Likewise, the New Code does not contain the Proposed Federal Code's specific provision barring trial as an adult without a court order, if the person was less than eighteen years old at commission.[134]

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123. N.D. CENT. CODE § 12-02-05 (1960).
124. *See* N.D. CENT. CODE § 12-08-03 (effective July 1, 1975); FINAL REPORT, *supra* note 6, at 106.
125. N.D. CENT. CODE § 12.1-03-03(1) (effective July 1, 1975). The actual statute uses "legally accountable": rather than criminally liable. The statutory language might be extended to include civil liability. This was pointed out in Committee but a motion which would have limited the accountability to "unlawful conduct" failed to pass. *Minutes "B"*, *supra* note 2, March 2-3, 1972 at 25.
126. N.D. CENT. CODE § 12.1-03-03(2) (effective July 1, 1975).
127. N.D. CENT. CODE § 12.1-03-03(2) (effective July 1, 1975).
128. FINAL REPORT, *supra* note 6, § 402.
129. N.D. CENT. CODE § 12.1-03-02 (effective July 1, 1975).
130. FINAL REPORT, *supra* note 6, at 38.
> Being under age is denominated a bar; the prosecution need not introduce any evidence as to a defendant's age unless the issue has been raised. By making lack of age a bar, the question of when the issue is to be decided is left to procedural provisions.

131. N.D. CENT. CODE § 12.1-04-01 (effective July 1, 1975).
132. N.D. CENT. CODE ch. 27-20 (1960).
133. The Proposed Federal Code lowers the ages of permissible prosecution to fifteen for murder, aggravated assault, rape and aggravated involuntary sodomy. FINAL REPORT, *supra* note 6, at 38.
134. *Id.*, § 501. This is provided, however, by the Uniform Juvenile Court Act, N.D.

Unlike the Proposed Federal Code, the New Code provides: "Persons under the age of seven years shall be deemed incapable of commission of an offense defined by the Constitution or statutes of this state."[135] This is intended to deny the person liability even in juvenile court.[136] An almost certainly unintended effect of this provision may be to exempt from criminal liability corporations and other entities during the first seven years of their existence.[137]

The Old Code holds children under the age of seven incapable of committing a "crime," but with no exemption for liability by way of juvenile "offense."[138] The Old Code establishes a rebuttable presumption that children over seven years but under the age of fourteen are incapable of knowing the wrongfulness of their acts and therefore incapable of committing a crime.[139] These Old Code age provisions are essentially the common law rule.[140]

The Uniform Juvenile Court Act, however, has effectively barred prosecution as an adult for any offense committed by a person under sixteen years of age, with permissible juvenile court waiver for adult prosecution if the person was sixteen or seventeen years old at commission.[141]

B. INTOXICATION

The New Code provides for a "defense" of intoxication only if the intoxication "negates the culpability required as an element of the offense charged."[142] If, however, the defendant would be held to have acted "recklessly" had he been aware of the risk, and if he

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CENT. CODE § 27-20-34 (1960).

Kent v. United States, 383 U.S. 541, 554 (1966), held that a juvenile court cannot waive its jurisdiction over a youth to a criminal court "without hearing, without effective assistance of counsel, without a statement of reasons."

135. N.D. CENT. CODE § 12.1-04-01 (effective July 1, 1975).

136. *Minutes "B", supra* note 2, March 2-3, 1972 at 27.

137. N.D. CENT. CODE § 12.1-01-04 (25) (effective July 1, 1975) provides for the New Code: " 'Person' includes, where relevant, a corporation, partnership, unincorporated association, or other legal entity."

The language of the Proposed Federal Code is clearly not relevant to corporations or the like, since it is, in every provision, by reference to "prosecution as an adult," applicable only to natural persons. FINAL REPORT, *supra* note 6, at 38.

The Old Code provision, N.D. CENT. CODE § 12-02-01(1) and (2) (1960), likewise, by reference to "children," makes it clear that it is only relevant to natural persons.

The New Code provision, "Persons under the age of seven years shall be deemed incapable of commission of an offense. . .," contains no reference clearly indicating relevance only to natural persons. N.D. CENT. CODE § 12.1-04-01 (effective July 1, 1975). Arguably, references to "persons" are relevant to corporations unless they are clearly not relevant.

138. N.D. CENT. CODE § 12-02-01(1) (1960).

139. N.D. CENT. CODE § 12-02-01(2) (1960). The North Dakota Supreme Court interpreted this provision in State v. Fisk, 12 N.D. 589, 591, 108 N.W. 485, 486 (1906):

> The state may overcome the presumption, but to do so, it must show by clear proof that the accused knew the wrongfulness of the act when he committed it. In the absence of such proof the presumption of incapacity must prevail. The burden is upon the state in such cases to prove knowledge of the wrongfullness of the act as an independent fact.

Id.

140. State v. Fisk, 15 N.D. 589, 591, 108 N.W. 485, 486 (1906); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 351 (1971).

141. N.D. CENT. CODE § 27-20-34(1) (1960).

142. N.D. CENT. CODE § 12.1-04-02(1) (effective July 1, 1975).

would have been aware of the risk had it not been for his *self-induced intoxication*, then he shall be held to have acted "recklessly."[143]

The intoxication section as proposed by the interim committee and adopted by the Legislature provides a number of problems. First, contrary to the statutory label, intoxication should not properly be considered a "defense."[144] The courts have long recognized that when intoxication negates a necessary element of culpability, no crime has been committed.[145] This section codifies the judicially recognized admissibility of evidence of intoxication to this end, and denies any defense of intoxication which is not established by the section. It provides no "defense."[146]

Second, the New Code does not preclude intoxication from being considered a "mental disease" within the meaning of the insanity defense.[147] Third, the New Code does not define "intoxication."[148]

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143. N.D. CENT. CODE § 12.1-04-02(2) (effective July 1, 1975); *see* N.D. CENT. CODE § 12.1-02-02(1) (effective July 1, 1975); FINAL REPORT, *supra* note 6, at 39.

144. A defense is a factor which exonerates a defendant from criminal liability for an offense which has been committed. *See* Carter v. Eighth Ward Bank, 33 Misc. 128, 67 N.Y.S. 300 (1900).

145. State v. Koener, 8 N.D. 292, 295, 78 N.W. 981, 983 (1899).

146. Certain background may explain the origin of this problem. The interim committee worked from the Proposed Federal Code § 502 which recognizes intoxication defenses in cases of intoxication which is "not self-induced" and of the so-called "pathological intoxication," when "by reason of such intoxication the actor at the time of his conduct lacked substantial capacity either to appreciate its criminality or to conform his conduct to the requirements of law." FINAL REPORT, *supra* note 6, § 502. The committee rejected this language in favor of alternate language cited in the "comment" on the section. *Id.*, at 39. This decision was apparently based on a fear of great judicial problems with a defense of "pathological intoxication" and on a belief that the alternate language was more like the existing North Dakota law and therefore more likely to meet legislative approval. *Minutes "B", supra* note 2, March 2-3, 1972 at 29-30. The Proposed Federal Code, while acknowledging that "[e]vidence of intoxication is admissible whenever it is relevant to negate or establish an element of the offense charged," leaves no doubt that this is not in the realm of defenses.

147. The Proposed Federal Code specifically excludes intoxication as a "mental disease". FINAL REPORT, *supra* note 2, § 502(1). This omission from the New Code is apparently a result of the interim committee's attempt to follow the proposed "alternate" suggested in the "comments". FINAL REPORT, *supra* note 2, at 39. It is not clear, however, that the interim committee correctly interpreted the "comment":

> An alternative to this section preferred by some members of the Commission is as follows: "Intoxication is a defense to the criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of intoxication of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense charged except as provided in subsection (2)." Under this alternative subsections (3) and (4) would be omitted. [The subsection references are to those of Proposed Federal Code § 502.]

The alternative provides that subsections (3) and (4) as contained in Proposed Federal Code § 502 be omitted. Reasonably, the subsections (1) and (2) of § 502 would be retained and the "core" language of the alternative added. Somehow, the interim committee apparently concluded they also were supposed to eliminate subsection (1) of § 502, and hence the language precluding consideration of intoxication as a "mental disease" was lost.

148. The language of Proposed Federal Code § 502, which the interim committee deleted, provides: " 'intoxication' means a disturbance of mental or physical capacities resulting from the introduction of alcohol, drugs or other substances into the body". FINAL REPORT, *supra* note 6, § 502 (4a). In no way was the deletion necessary to effectuate the "alternate". *See* note 11, *supra*. Nevertheless, the deletion apparently was based not on a rejection of the definition, but on an unreasoning adherence to an unexplained remark in the "comments," which seem to imply that it is necessary to effectuate the alternate. FINAL REPORT, *supra* note 6, at 39.

Fourth, the New Code uses, but fails to define, "self-induced intoxication."[149]

Perhaps the most important change provided by this section is to increase the culpability of an intoxicated person regarding findings of "recklessness." A state of mind which is not culpable in a sober person can be culpable in a person under "self-induced intoxication."[150] Thus the impact of this section is to deny defenses[151] and to extend the criminal liability of the intoxicated.[152]

The Old Code and North Dakota case law hold that intoxication is not a defense.[153] Evidence of intoxication is, however, admissible for three purposes: to show no crime has been committed, by negating the existence of a necessary intent;[154] if some crime has been committed, to determine which crime has been committed;[155] and to determine if the defendant was capable of criminal conduct.[156]

C. MENTAL DISEASE OR DEFECT

One of the areas of greatest controversy in drafting the New Code was the "insanity" or "mental disease or defect" defense.[157]

Both the New and the Old Codes utilize a M'Naughten test, while the New Code provides that the defense may also be established un-

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149. For explanation of this problem, see note 148, *supra*. The language in Proposed Federal Code § 502, which the interim committee deleted, provides: " 'self-induced intoxication' means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would otherwise afford a defense to a charge of crime". FINAL REPORT, *supra* note 6, § 502 (4b).

150. N.D. CENT. CODE § 12.1-04-02(2) (effective July 1, 1975).

151. N.D. CENT. CODE § 12.1-04-02(1) (effective July 1, 1975).

152. N.D. CENT. CODE § 12.1-04-02(2) (effective July 1, 1975).

153. "No act committed by a person while in a state of voluntary intoxciation shall be deemed less criminal by reason of his having been in such condition." N.D. CENT. CODE § 12-05-01. In considering this statute, the North Dakota Supreme Court stated "if the defendant did in fact commit the crime with which he was charged, his intoxicated condition would not avail, either to justify or excuse him." State v. Koerner, 8 N.D. 292, 294, 78 N.W. 981, 982 (1899). Apparently, Dakota Territory recognized an intoxication defense similar to that of the Proposed Federal Code, see note 146 *supra*. Regarding intoxication as "a defense, or excuse, or justification" was not precluded when the defendant "has lost control of his will." People v. Odell, 1 Dak. 189, 194, 46 N.W. 601, 603 (1875). Since the statutory language was unchanged, this was apparently eliminated by the above cited language in *Koerner*.

154. "[I]t rests on the underlying principle that the ultimate object of judicial inquiry in every criminal prosecution is to determine whether a crime has been committed. . . ." State v. Koerner, 8 N.D. 292, 297, 78 N.W. 981, 983 (1899).

155. "[W]henever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

N.D. CENT. CODE § 12-05-01 (1960).

156. "There is no degree of intoxication, however great, which, of itself, is recognized as rendering one incapable of forming a criminal intent. But there may be a mental condition amounting to a species of insanity, superinduced by long and excessive use of intoxicating liquors, which amounts to a legal incapacity to commit crime. In such a case the jury passes upon the existence of that condition, and, if the condition exists wherein the accused is legally irresponsible, the law holds him guiltless of crime." State v. Koerner, 8 N.D. 292, 297, 78 N.W. 981, 983 (1899). This can more aptly be considered a species of insanity defense than a species of intoxication defense.

157. *See Minutes of Committee on Judiciary "B", N. Dak. Legislative Council* (1971-72).

der an irresistable impulse test.[158] The Old Code follows the traditional M'Naughten test formation,[159] holding incapable of committing a crime:

> Mental deficients, incapable of knowing the wrongfulness of the act charged against them;
>
> Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness. . . . [160]

In practical application of the statute, the North Dakota Supreme Court has used the following:

> The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act.[161]

The Proposed Federal Code "mental disease or defect" formulation followed exactly by the New Code,[162] closely adheres to the American Law Institute's Model Penal Code formulation.[163] The New Code provides:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Lack of criminal responsibility under this section is a defense.[164]

The "M'Naughten" test of the New Code meets many objections to the traditional formulation.

> Most significant is the fact that the A. L. I. test only requires a lack of "substantial capacity." This is clearly a departure from the usual interpretation of M'Naughten and irresistable impulse, whereby a complete impairment of cognitive capacity and capacity for self-control is necessary.[165]

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158. N.D. CENT. CODE § 12.1-04-03 (effective July 1, 1975); N.D. CENT. CODE § 12-02-01 (3) and (4) (1960).

159. The rule was originally established in M'Naughten's Case, 10 Cl&F, 200, 210, 8 Eng.Rep. 718, 722 (1843):

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.

Id.

160. N.D. CENT. CODE § 12-02-01(3) (1967). Prior to 1967 the subsection simply stated: "Idiots."

161. N.D. CENT. CODE § 12-02-01(4) (1960).

162. State v. Throndson, 49 N.D. 348, 363, 191 N.W. 628, 634 (1922).

163. FINAL REPORT, *supra* note 6, § 503.

164. N.D. CENT. CODE § 12.1-04-03 (effective July 1, 1975).

165. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, 292 (1972).

The test also substitutes "appreciate" for "know," and "criminality" for "wrongfulness."[166]

The "irresistable impulse" provision of the New Code[167] is specifically disallowed by the Old Code:

> A morbid propensity to commit prohibited acts existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts forms no defense to a prosecution therefor.[168]

The major alternative approach, for the "mental disease or defect" section, considered by the interim committee was, essentially, elimination of the insanity defense, with mental condition becoming a factor to be considered in the imposition of sentence after conviction.[169] Under this approach, the New Code would have provided:

> 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.[170]

Since there is no offense in the absence of an essential element, this is really not a defense to a *committed* crime.

The alternate approach, doing away with the defense, was also considered and rejected by the drafters of the Proposed Federal Code.[171]

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166. The substitution of "criminality for 'wrongfulness' " in the Proposed Federal Code was made "to include cases where the perpetrator appreciates that his conduct was criminal, but because of delusion believes it to be morally justified." I WORKING PAPERS, *supra* note 6, at 231 (1970).

167. N.D. CENT. CODE § 12.1-04-03 (effective July 1, 1975).

168. N.D. CENT. CODE § 12-05-02 (1960).

169. *Minutes "B", supra* note 2, January 24-25, 1972 at 25.

170. *Minutes "B", supra* note 2, May 11-12, 1972 at 5-6.

171. FINAL REPORT, *supra* note 6, at 41, provides pro and con comments on this alternative:

> Against this alternative and in favor of § 503 [adopted by North Dakota's New Code] as it appears in the text, it is argued that a person maniacally "intent" on committing murder or other crime would satisfy all the culpability requirements specified elsewhere in the Code. Yet he might be hopelessly insane under uncontradicted psychiatric testimony, his insanity manifesting itsef precisely in the crazed intent to kill or a mad illusion as to a justification for killing. It is further argued against the alternative that any effort to refer the mental illness issue to the general formulations on culpability could lead only to a confusing and contradictory judicial interpretation of the culpability requirements, as judges were forced, without legislative guidance, to develop a jurisprudence related to mental illness under the rubrics of "intent", "knowledge", and "recklessness". Opposition to the alternative also rests on the view that it would be immoral and inconsistent with the aim of a criminal code to attribute "guilt" to a manifestly psychotic person.
>
> In favor of the alternative, it is argued that it integrates the insanity and culpability provisions of the Code, and avoids the logical difficulty of finding "culpability" present but nevertheless exonerating on the ground of mental illness. Those who favor this view also believe it would facilitate jury consideration of guilt, since only one standard of culpability would be employed. Far from artifically limiting medical testimony, the alternative would direct it into intelligible legal channels and lead hopefully to the end of confusing dual notions of "medical" and "legal" insanity.

Id.

IV. JUSTIFICATION AND EXCUSE

The New Code,[172] substantially following the Proposed Federal Code,[173] provides that behavior that is otherwise proscribed by law is, under certain circumstances, justified or excused;[174] and that unless otherwise provided, such justification or excuse is a "defense," not an "affirmative defense."[175]

Even though a person is justified or excused "in using force against another," if he "recklessly or negligently injures or creates a risk of injury to other persons," the justifications afforded by this chapter of the code[176] are "unavailable in a prosecution for such recklessness or negligence."[177] In other words, although in specific cases certain uses of force may be justifiable or excusable, there is no blanket protection from all consequences of the use of such force.

A person is never justified in "using more force than is necessary and appropriate under the circumstances."[178]

The justifications and excuses provided in this chapter[179] apply only to criminal law, in no way affecting remedies at civil law.[180]

While the New Code essentially follows the Proposed Federal Code, federal adoption of the Proposed Federal Code would in some cases permit assertion of Federal Code justifications and excuses in state and local prosecutions.[181]

Significantly, there is no provision for the so-called "choice of

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Vance Hill, chief proponent of the alternative, provided the interim committee with additional rationale for its adoption, noting "that it is difficult for the layman to understand why a defendant is acquitted by reason of insanity, where the facts indicate that it is perfectly clear the defendant committed the offense charged." *Minutes "B", supra* note 2, March 2-3, 1972 at 30.

172. N.D. CENT. CODE § 12.1-05-01(1) (effective July 1, 1975).

173. FINAL REPORT, *supra* note 6, § 601.

174. A justification is a circumstance which actually exists and which makes harmful conduct proper and noncriminal. An excuse is a circumstance for which the Code excuses the actor from criminal liability even though the actor was not "justified" in doing what he did. . . .

Id.

175. The "comment," FINAL REPORT, *supra* note 6, at 44, notes:

"All justifications and excuses are either defenses (the burden of disproof is on the prosecutor) or affirmative defenses (the burden of proof is on the defendant)."

176. N.D. CENT. CODE ch. 12.1-05 (effective July 1, 1975).

177. N.D. CENT. CODE § 12.1-05-01(2) (effective July 1, 1975).

178. N.D. CENT. CODE § 12.1-05-07(1) (effective July 1, 1975). According to N.D. CENT. CODE § 12.1-05-12(1) (effective July 1, 1975), " 'Force' means physical action, threat, or menace against another, and includes confinement."

179. N.D. CENT. CODE ch. 12.1-05 (effective July 1, 1975).

180. N.D. CENT. CODE § 12.1-05-01(3) (effective July 1, 1975). In FINAL REPORT, *supra* note 6, at 44, the "comment," which deals with the same language as contained in the New Code, states that "[c]onduct may be justified in a criminal context but may nevertheless subject the actor to civil suit or dismissal from his job, or other noncriminal sanction."

181. While N.D. CENT. CODE § 12.1-05-01 (effective July 1, 1975) adopts the exact language of the Proposed Federal Code § 601(1), (2) and (3), it omits Proposed Federal Code § 601(4) which provides:

> The defenses of justification and excuse may be asserted in a state or local prosecution of a federal public servant, or a person acting at his direction, based on acts performed in the course of the public servant's official duties.

FINAL REPORT, *supra* note 6, § 601.

This would over-ride any stricter state or local standards.

evils" rule.[182] The absence of the provision apparently is not the result of evaluation by the Interim Committee, but rather of pervasive adherence to the Proposed Federal Code.[183]

A. EXECUTION OF A PUBLIC DUTY

Under the New Code, execution of a public duty can act as a justification for both public servants and private citizens. "Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."[184] The phrase "by law," apparently includes federal as well as state and local law.[185]

If a public servant directs a person to assist him, that person is justified in using force to carry out the public servant's direction, "unless the action directed by the public servant is plainly unlawful."[186] The choice of the word "directed" may create problems as to the limitations on this justification.[187]

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182. Essentially, a "choice of evils" rule would justify the use of force if necessary to avoid a greater harm. FINAL REPORT, *supra* note 6, at 43. The Model Penal Code includes the rule. MODEL PENAL CODE § 3.02 (1962). The "comment" on this section, FINAL REPORT, *supra* note 6, at 43, notes that "some Commissioners believe that a penal code is seriously deficient if it does not explicitly recognize that avoidance of greater harm is, if not a duty, at least a privilege of the citizen." Nevertheless, the "comment" indicates, at 43, that the rule is not included

> . . . on the view that, while its intended application would be extremely rare in cases actually prosecuted, even the best of statutory formulations (see N.Y.Pen.L. § 35.10) is a potential source of unwarranted difficulty in ordinary cases, particularly in the context of the adoption of the broad mistake of fact and law provisions found in the Code.

The prevailing Commission view, "comment" at 43, is to rely, not on statutory codification, but on "case-by-case prosecutive discretion." Apparently, those favoring this approach are content merely to "hope" that this discretion will not be abused, and to "hope" that it will serve the cause of justice.

183. The *Minutes "B"*, *supra* note 2, March 2-3, 1972 at 44, indicate that at least some members felt the interim committee was relying too much on "National Commission infallibility":

> Judge Smith then noted that perhaps all the provisions of Chapter 600 of the proposed FCC [Federal Criminal Code; N.D. CENT. CODE 12.1-05 (effective July 1, 1975)] were more comprehensive than was necessary in North Dakota. IT WAS MOVED BY JUDGE SMITH AND SECONDED BY MR. WEBB that Chapter 600 of the proposed FCC be deleted, and that the present North Dakota statutes dealing with justified or excusable use of force be substituted for Chapter 600.
>
> The Committee discussed this motion at length, and it was noted that Chapter 600 was an integral part of the scheme of the proposed FCC. JUDGE SMITH, WITH THE CONSENT OF HIS SECOND, WITHDREW HIS MOTION in favor of an indication on the record that he did not think the Committee should blindly accept any of the provisions of the proposed FCC simply because they had been drafted by a National Commission.

Id.

184. N.D. CENT. CODE § 12.1-05-02(1) (effective July 1, 1975).

185. The "comment" on this language in FINAL REPORT, *supra* note 6, at 44, which states:

> The phrase "by law" includes state law, so that a state sheriff, for example, who levies execution on a shipment of goods in interstate commerce is not guilty of theft under the federal code. Federal supremacy prohibits a person from relying on a state law which he knows contradicts federal law.

Id.

186. N.D. CENT. CODE § 12.1-05-02(2) (effective July 1, 1975).

187. The interim committee follows the language of Proposed Federal Code § 602(2) for this subsection, except for the substitution of the word "directed" for the words "being taken" in the proviso "unless the action *being taken* by the public servant is plainly unlawful." The *Minutes "B"*, indicate no discussion or explanation of this change contained in the draft by Committee Council and adopted by the Committee. Nevertheless, the change

A person is justified in using force in making a citizen's arrest or preventing an escape, if the appropriate public servant is not available. Such use of force is limited, however, to felonies involving force or violence, and to crimes committed in the person's presence which he would be justified in using force to prevent.[188] The reference to crimes the person is justified in using force to prevent alludes primarily to the justifications of self-defense, defense of others and defense of premises and property.[189]

The federal commentators note:

> This section determines only the question of criminal liability in using force in such circumstances and does not establish the authority to make the arrest or affect questions as to civil liability. Accordingly, it is the basis for excusing the use of force even when the actor is mistaken as to the underlying facts.[190]

The Old Code justifies the use of force by a public officer in the performance of any legal duty, and by other persons assisting the officer or acting at his direction.[191] This is essentially as is provided in the New Code, except that the New Code adds the limitation regarding directions of the officer which are plainly unlawful.[192] The Old Code also allows the use of force in making a citizen's arrest.[193]

The Old Code justifies force in cases of "any felony,"[194] while the New Code limits force to felonies involving force or violence and extends the justification to certain crimes committed in the person's presence.[195]

Use of "deadly force"[196] is justified when expressly authorized

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may be a significant one, and it does cause problems. The important question is *which* action must be plainly unlawful to deny justification? In the Proposed Federal Code, it is "the action being taken by the public servant," which, it would seem, reasonably includes the directions the public servant gives, as well as his overall course of action. Under this interpretation, if either the overall course of action of the public servant or the directions he gives are plainly unlawful, then justification is denied. Under the New Code, the important consideration is "the action directed by the public servant." Under this language, is it only the action directed which matters? If the specific action directed by the public servant is not inherently unlawful, is the person justified, even if the public servant's overall course of action is plainly unlawful? Or is the lawfulness of the direction to be evaluated in light of the overall course of action?

188. N.D. CENT. CODE § 12.1-05-02(3) (effective July 1, 1975).

189. *See* FINAL REPORT, *supra* note 6, at 45.

190. FINAL REPORT, *supra* note 6, at 45. *See* N.D. CENT. CODE § 12.1-05-08 (effective July 1, 1975), which deals with excuse based on mistake of fact.

191. N.D. CENT. CODE § 12-26-03(1) (1960).

192. N.D. CENT. CODE § 12.1-05-02(1) and (2) (effective July 1, 1975).

193. N.D. CENT. CODE § 12-26-03(3) (1960). The term "justified" is not used, but the section provides that the use of such force is "not unlawful." *Id.*

194. *Id.*

195. N.D. CENT. CODE § 12.1-05-02(3) (effective July 1, 1975).

196. Defined as:

> "Deadly force" means force which a person uses with the intent of causing, or which he knows to create a substantial risk of causing, death or serious bodily injury. A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force. . . .

N.D. CENT. CODE § 12.1-05-12(2) (effective July 1, 1975).

by law,[197] such as imposition of a death sentence.[198] Deadly force is justified:

> When used by a public servant authorized to effect arrests or prevent escapes, if such force is necessary to effect an arrest or to prevent the escape from custody of a person who has committed or attempted to commit a felony involving violence, or is attempting to escape by the use of a deadly weapon, or has otherwise indicated that he is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay. . . .[199]

Recognizing, however, that a guard may not know the grounds on which a prisoner is detained, the New Code justifies the guard's use of deadly force necessary to prevent an escape, unless the guard knows the prisoner is *not* a person described in the above language.[200] The New Code also justifies deadly force when "used by a person who is directed or authorized by a public servant," except if the person knows that "the public servant is himself not authorized to use deadly force under the circumstances."[201] Public servants may also be justified in using deadly force under the other New Code justifications.[202]

This "public duty" justification of deadly force in the New Code essentially adopts the corresponding provisions of the Proposed Federal Code,[203] but eliminates the separate "riot" subsection[204] because "it might not present an adequate restriction on the use of unreasonable force in the course of a riot."[205]

The Old Code justifies deadly force when necessarily employed in arresting or recapturing a person who has committed any felony,[206] while the New Code requires a felony involving violence.[207] The Old Code permits deadly force if necessary to overcome "actual resistence to the execution of some legal process or to the discharge of any other legal duty,"[208] but the New Code, except as already noted, does not justify deadly force in such cases except in self-defense.[209]

This adopts the language of the Proposed Federal Code except for the deletion, probably as redundant, of one sentence:

> Intentionally firing a firearm or hurling a destructive device in the direction of another person or at a moving vehicle in which another person is believed to be constitutes deadly force.

FINAL REPORT, *supra* note 6, § 619(b).

197. N.D. CENT. CODE § 12.1-05-07(2)(a) (effective July 1, 1975).
198. FINAL REPORT, *supra* note 6, at 50.
199. N.D. CENT. CODE § 12.1-05-07(2)(d) (effective July 1, 1975).
200. N.D. CENT. CODE § 12.1-05-07(2)(e) (effective July 1, 1975). *See* FINAL REPORT, *supra* note 6, at 51.
201. N.D. CENT. CODE § 12.1-05-07(2)(g) (effective July 1, 1975).
202. *See* N.D. CENT. CODE § 12.1-05-03 through § 12.1-05-06 (effective July 1, 1975).
203. FINAL REPORT, *supra* note 6, at 48-50.
204. FINAL REPORT, *supra* note 6, at 49.
205. *Minutes "B"*, March 2-3, 1972 at 43.
206. N.D. CENT. CODE § 12-27-04(3) (1960).
207. N.D. CENT. CODE § 12.1-05-07(2)(d) (effective July 1, 1975).
208. N.D. CENT. CODE § 12-27-04(2) (1960).
209. *See* N.D. CENT. CODE § 12.1-05-07(2)(b) (effective July 1, 1975).

B. SELF-DEFENSE

The New Code provides that a person is justified in using force in self-defense against "imminent unlawful bodily injury, sexual assault, or detention."[210] A person is not justified, however, in using force to resist arrest, execution, or other performance of duty by a public servant who is acting under color of law, "but excessive force may be resisted."[211] Justification for resisting such a public servant is denied even if it is later established that the resisted action was in fact unlawful.[212]

Under the New Code, a person who has intentionally provoked another is not justified in causing bodily injury or death to that other person;[213] nor is he justified if he was the initial aggressor or entered into mutual combat, unless the force he is resisting is clearly excessive or he has clearly withdrawn from the encounter and the other combatant continues to use force, and then he is only justified in using "defensive"[214] force. This is essentially the common law rule.[215]

The Old Code justifies the use of force in self-defense by a person about to be injured, "if the force or violence used is not more than sufficient to prevent such offense."[216] Unlike the New Code, the Old Code does not deny justification for resisting unlawful arrest or process.[217] North Dakota case law permits the resisting of excessive force by public servants. The North Dakota Supreme Court, in *State v. Carter*,[218] held that

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210. N.D. CENT. CODE § 12.1-05-03 (effective July 1, 1975).

211. N.D. CENT. CODE § 12.1-05-03(1) (effective July 1, 1975). For this section, the New Code follows the language of the Proposed Federal Code. FINAL REPORT, *supra* note 6, at 45 (1971). The motivation for the Proposed Federal Code's elimination of the general right to resist unlawful arrest is provided in I WORKING PAPERS, *supra* note 60, at 264:

> This right to resist arrest has been severely criticized in recent years. We propose to do away with this privilege to use force to resist an arrest by a public servant. There are ample nonviolent remedies against improper official action. The law should not sanction any rule which would lawfully put an officer's safety at stake when he seeks to make an arrest.

At the state level, permitting resistance of excessive force was a controversial interim committee concern. Committee minutes indicate that Mr. Wolf felt the language "excessive force may be resisted" was questionable since it might allow persons being subjected to arrest to use a subjective standard in determining whether to resist a peace officer. The insertion of the qualifying language "only with force sufficient to prevent such excessive force" was finally rejected by a 5 to 4 vote, the majority feeling that N.D. CENT. CODE § 12.1-05-07(1) (effective July 1, 1975), dealing with limits on the use of force, takes care of the situation. *Minutes "B", supra* note 2, March 2-3, 1972 at 33.

212. *Id.*, at 33, states that Committee Council "noted that the language . . . prevents a person from using force to resist even an unlawful arrest." The "comment," FINAL REPORT, *supra* note 6, at 45, on the same language in the Proposed Federal Code notes that the section makes the "legality of the arrest irrelevant. The purpose of this change is to discourage self-help for the resolution of such an issue."

213. N.D. CENT. CODE § 12.1-05-07(2)(a) (effective July 1, 1975).

214. N.D. CENT. CODE § 12.1-05-03(2)(b) (effective July 1, 1975).

215. FINAL REPORT, *supra* note 6, at 45.

216. N.D. CENT. CODE § 12-26-03(3) (1960). N.D. CENT. CODE § 12-27-05.1 (Supp. 1973) justifies the use of "any means reasonably necessary" in self-defense.

217. N.D. CENT. CODE §§ 12-26-03(3) (1960); 12-27-05.1 (Supp. 1973).

218. 50 N.D. 270, 195 N.W. 567 (1923).

> [S]hould an officer use more force than is necessary to effect. . .an arrest and detention, then the person arrested would have a right to resist under the law of self-defense.[219]

The New Code justifies the use of deadly force "in lawful self-defense . . . if such force is necessary to protect the actor . . . against death, serious bodily injury, or the commission of a felony involving violence. The use of deadly force is not justified if it can be avoided.[220] There is no justification for deadly force if safety for the actor and others can be achieved by retreat "or other conduct involving minimal interference with the freedom of the person menaced."[221] Except, there is no duty of retreat for a peace officer in the performance of his duty or for those assisting him,[222] nor is there a duty of a person to retreat from his own dwelling or place of work, "unless he was the original aggressor or is assailed by a person who he knows also dwells or works there."[223]

The Old Code justifies homicide by a person "[W]hen resisting any attempt to murder him or to commit any felony upon him. . . .;"[224] and justifies a person protecting himself "by any means reasonably necessary."[225] North Dakota case law also recognizes that "once the defendant has an opportunity for safe retreat, he is no longer acting in self-defense," nor is violence following pursuit after one who has fled justifiable by the pursuer on the grounds of self-defense.[226]

North Dakota case law does require, for self-defense, "reasonable apprehension of immediate and impending injury."[227]

> Previous threats alone, unaccompanied with any present hostile demonstrations, either real or apparent, neither justify nor excuse nor mitigate a killing. Neither does mere apprehension of future danger.[228]

Case law denies justification when "the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased for the purpose of wreaking vengeance upon him. . . ."[229] The case law does, however, recognize an "imperfect" class of self-defense:

> But it is also the rule that if the defendant did not provoke the quarrel with a felonious intent, but to commit only a battery, amounting to a misdemeanor, and during the pro-

219. *Id.* at 283, 195 N.W. at 571.
220. N.D. CENT. CODE § 12.1-05-07(2)(b) (effective July 1, 1975).
221. N.D. CENT. CODE § 12.1-05-07(2)(b)(1) (effective July 1, 1975).
222. N.D. CENT. CODE § 12.1-05-07(2)(b)(1) (effective July 1, 1975).
223. N.D. CENT. CODE § 12.1-05-07(2)(b)(2) (effective July 1, 1975).
224. N.D. CENT. CODE § 12-27-05(1) (1960).
225. N.D. CENT. CODE § 12-27-05.1 (1971).
226. State v. Lehman, 44 N.D. 572, 584-85, 175 N.W. 736, 740 (1919).
227. State v. Carter, 50 N.D. 270, 283, 195 N.W. 567, 571 (1923).
228. United States v. Leighton, 3 Dak. 29, 31, 13 N.W. 347 (1882).
229. State v. Carter, 50 N.D. 270, 283, 195 N.W. 567, 571 (1923).

> gress of the controversy or fight found it necessary to take the life of the deceased, in order to save his own, then he can avail himself of such defense to reduce the crime from murder to manslaughter.[230]

C. DEFENSE OF OTHERS

The New Code justifies the use of force against another person to defend any third person[231] who would be justified in defending himself.[232] This justification is denied to a person who has "by provocation or otherwise, forfeited the right of self-defense."[233] Both the records of the interim committee[234] and those of the federal drafters,[235] whose work was followed, stipulate that defense of strangers and defense of one's own family are equally justified.

The Old Code[236] provides for essentially the same justification for defense of others as is provided in the New Code, with the omission of a specific provision for forfeiture by provocation. Despite this statutory omission of the Old Code, North Dakota case law would seem to recognize the principle of forfeiture of such justification.[237]

The New Code, following the Proposed Federal Code,[238] provides that deadly force may be used in the course of lawful defense of others when necessary to protect the third person "against death, serious bodily injury, or the commission of a felony involving violence."[239] There is a duty of the actor to seek to cause the protected person to retreat if safety can be obtained by retreat.[240]

While the New Code justification of deadly force in lawful defense of others extends to any person so defended,[241] the Old Code restricts justification of such employment resulting in homicide to the lawful defense of the actor's "husband, wife, parent, child, master, mistress, or servant,"[242] or "his family" or "another who is being the victim of aggravated assault, armed robbery, holdup, rape,

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230. State v. Swift, 53 N.D. 916, 927, 208 N.W. 388, 392 (1926).
231. N.D. CENT. CODE § 12.1-05-04 (effective July 1, 1975).
232. N.D. CENT. CODE § 12.1-05-04(1) (effective July 1, 1975).
233. N.D. CENT. CODE § 12.1-05-04(2) (effective July 1, 1975). I WORKING PAPERS, *supra* note 60, at 265:

"The proviso is necessary in order not to foreclose prosecution where a person provokes an attack to secure an opportunity to inflict 'defensive' injury."

234. *Minutes "B"*, *supra* note 2, March 2-3, 1972 at 34. The minutes record that Committee Council noted that the section "allows both defense of strangers and the defense of one's own family on the same basis." No committee discussion is indicated. *Id.*
235. FINAL REPORT, *supra* note 6, at 46.
236. N.D. CENT. CODE § 12-26-03(3) (1960), § 12-27-05(2) (1960), and § 12-27-05.1 (Supp. 1973).
237. State v. Carter, 50 N.D. 270, 283, 195 N.W. 567, 571 (1923), denies justification if "the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased for the purpose of wreaking vengeance upon him." While the specific justification referred to in this case is self-defense, the doctrine would, nevertheless, seem applicable.
238. FINAL REPORT, *supra* note 6, at 48.
239. N.D. CENT. CODE § 12.1-05-07(2)(b) (effective July 1, 1975).
240. N.D. CENT. CODE § 12.1-05-07(2)(b) (effective July 1, 1975).
241. N.D. CENT. CODE § 12.1-05-07(2)(b) (effective July 1, 1975).
242. N.D. CENT. CODE § 12-27-05 (1960).

murder, or any other crime involving serious force or violence."[243] Although the Old Code provides no explicit statutory requirement to seek to cause the retreat of the threatened party if it will result in safety to all concerned, this would be a reasonable interpretation of the general requirement that the force be necessary.

D. USE OF FORCE BY PERSONS WITH PARENTAL, CUSTODIAL, OR SIMILAR RESPONSIBILITIES

The New Code, drawing on the Proposed Federal Code,[244] by parents, teachers and other persons having custodial responsibility toward a minor, and by the guardian of an incompetent person. The force must be for the purpose of the child's welfare or discipline, but need not be "necessary," so long as it is "reasonable."[245] "The force used must not create a substantial risk of death, serious bodily injury, disfigurement or gross degradation."[246] The Old Code justifies a similar use of force toward a child, but the force must be not only reasonable, but also necessary, and moderate in degree.[247]

The New Code does not justify or excuse the use of deadly force which results in homicide.[248] The Old Code classifies as "excuseable homicide" the death of a child resulting by accident or misfortune in lawfully correcting the child "by lawful means, with usual and ordinary caution and without any unlawful intent."[249] It is unlikely, however, that the "homicide" "excused" under the Old Code, is homicide at all under the New Code, since the intent is a necessary element of the New Code crime.[250]

Under both the New and the Old Codes, a common carrier may justifiably use force to maintain order.[251] Deadly force for such purpose is not justified under either Code.[252]

The New Code justifies the use of non-deadly force to prevent suicide or to avert serious bodily injury to another.[253] Similarly, the Old Code justifies non-deadly force in preventing

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243. N.D. CENT. CODE § 12-27-05.1 (Supp. 1973).
244. FINAL REPORT, *supra* note 6, § 605.
245. N.D. CENT. CODE § 12.1-05-05(1) and (2) (effective July 1, 1975).
246. N.D. CENT. CODE § 12.1-05-05(1) and (2) (effective July 1, 1975). This sentence replaces the more permissive language of the Proposed Federal Code: "[The force used] must not *be designed to cause or known to* create a substantial risk. . . ." (emphasis added), FINAL REPORT, *supra* note 6, § 605.

Apparently, if the force used does in fact create such a substantial risk, the justification would be denied under the New Code. *See* N.D. CENT. CODE § 12.1-05-05(1) and (2).
247. N.D. CENT. CODE § 12-26-03(4) (1960).
248. N.D. CENT. CODE § 12.1-05-07 (effective July 1, 1975).
249. N.D. CENT. CODE § 12-27-03(1) (1960).
250. *See* N.D. CENT. CODE ch. 12.1-16 (effective July 1, 1975).
251. N.D. CENT. CODE § 12.1-05-05(3) (effective July 1, 1975); and N.D. CENT. CODE § 12-26-03(5) (1960).
252. *See* N.D. CENT. CODE § 12.1-05-07 (effective July 1, 1975); and N.D. CENT. CODE § 12-27-05 (1960).
253. N.D. CENT. CODE § 12.1-05-05(5) (effective July 1, 1975); *see* N.D. CENT. CODE § 12.1-05-07 (effective July 1, 1975).

> an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of reason, from committing an act dangerous to himself or to another. . . .[254]

Not contained in the Old Code is the New Code's specific justification of the use of force, by a duly licensed physician or a person acting at his direction, to administer a recognized form of treatment[255] if the treatment is administered in an emergency,[256] or with "the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision,"[257] or by court order.[258] The force employed by the physician or his assistant in such situations may include "deadly force,"[259] "if such force is necessary to administer a recognized form of treatment to promote the physical or mental health of a patient."[260]

E. DEFENSE OF PREMISES & PROPERTY

The New and the Old Code justify the use of force by a person to prevent or terminate trespass or other unlawful interference with property.[261] Under the Old Code, the property must be the person's own property[262] or "in his lawful possession,"[263] but under the New Code, there is no requirement that the person employing force have any interest in the property![264]

> The New Code adds the explicit statutory requirement that . . . the person using such force first [request] the person against whom such force is to be used to desist from his interference with the premises or property, except that a request is not necessary if it would be useless or dangerous to make the request; or substantial damage would be done to the property sought to be protected before the request could effectively be made.[265]

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254. N.D. CENT. CODE § 12-26-03(6) (1960); *see* N.D. CENT. CODE § 12-27-05 (1960).
255. N.D. CENT. CODE § 12.1-05-05(4) (effective July 1, 1975).
256. N.D. CENT. CODE § 12.1-05-05(4)(a) (effective July 1, 1975).
257. N.D. CENT. CODE § 12.1-05-05(4)(b) (effective July 1, 1975).
258. N.D. CENT. CODE § 12.1-05-05(4)(c) (effective July 1, 1975). This provision was discussed at length by the interim committee and it is the specific intent of the committee "that a physician is protected in operating upon a competent adult, when such operation is ordered by a court." *Minutes "B"*, *supra* note 2, March 2-3, 1972 at 44.
259. FINAL REPORT, *supra* note 6, at 51, notes that this justification is.

> . . . necessary because "deadly force" is defined . . . as force, i.e., physical action, which the actor knows creates a substantial risk of death or serious bodily injury. Major operations create this risk.

Id.
260. N.D. CENT. CODE § 12.1-05-07(2)(f) (effective July 1, 1975).
261. N.D. CENT. CODE § 12.1-05-06 (effective July 1, 1975); N.D. CENT. CODE § 12-26-03 (1960); N.D. CENT. CODE § 12-27-05.1 (Supp. 1973).
262. N.D. CENT. CODE § 12-27-05.1 (Supp. 1973).
263. N.D. CENT. CODE § 12-26-03 (1960).
264. N.D. CENT. CODE § 12.1-05-06 (effective July 1, 1975).
265. N.D. CENT. CODE § 12.1-05-06 (effective July 1, 1975). For the purposes of the justification chapter, the New Code provides that:

> "Premises" means all or any part of a building or real property, or any

This New Code requirement, essentially following Proposed Federal Code,[266] while not explicitly stated in the Old Code,[267] might be a reasonable interpretation of the requirement that the employment of force be "necessary."[268]

The drafters of the New Code chose not to include the Proposed Federal Code restriction that "the use of force is not justified to prevent or terminate a trespass if it will expose the trespasser to substantial danger of serious bodily injury."[269]

The New Code justifies employment of deadly force only by:

> . . .a person in possession or control of a dwelling or place of work, or a person who is licensed or privileged to be there, if such force is necessary to prevent commission of arson, burglary, robbery, or a felony involving violence upon or in the dwelling or place of work and the use of force other than deadly force for such purposes would expose anyone to substantial danger or serious bodily injury. . . .[270]

The Old Code justifies homicide by any person resisting any attempt to commit any felony "upon or in any dwelling house in which he is,"[271] and in addition justifies all force "reasonably necessary" to protect his real or personal property.[272] Interestingly, the Old Code seems to provide a broader justification for homicide in defense of premises than it does for the employment of lesser force.[273]

F. MISTAKE OF FACT

If a person is mistaken as to the facts of a situation, and if the facts had been as he believed them to be his conduct would have been justified or excused, then, under the New Code, he *is* excused.[274]

> structure, vehicle, or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein.

N.D. CENT. CODE § 12.1-05-12(3) (effective July 1, 1975).

266. FINAL REPORT, *supra* note 6, at 47.

267. *See* N.D. CENT. CODE § 12-26-03 (1960); N.D. CENT. CODE § 12-27-05.1 (Supp. 1973).

268. I WORKING PAPERS, *supra* note 60, at 260.

269. The federal commentators clarify the import of this provision: "For example, a ship's captain may not justifiably use force to remove a stowaway from his ship in mid-ocean." FINAL REPORT, *supra* note 6, at 48.

The interim committee rejected the proposed language fearing that "trespass" might be confused with burglary, and because adequate restraint was considered imposed by the requirement of N.D. CENT. CODE § 12.1-05-07(1) (effective July 1, 1975), that the force be "necessary and appropriate." *Minutes "B", supra* note 2, March 2-3, 1972 at 38.

270. N.D. CENT. CODE § 12.1-05-07(2)(c) (effective July 1, 1975). For the purposes of the justification chapter, the New Code provides that:

> "Dwelling" means any building or structure, though moveable or temporary, or a portion thereof, which is for the time being a person's home or place of lodging.

N.D. CENT. CODE § 12.1-05-12(4) (effective July 1, 1975).

271. N.D. CENT. CODE § 12-27-05 (1960).

272. N.D. CENT. CODE § 12-26-05.1 (Supp. 1973).

273. Homicide justification may be predicated on presence, under N.D. CENT. CODE § 12-27-05 (1960), while the justification for employment of lesser force requires ownership, N.D. CENT. CODE § 12-27-05.1 (Supp. 1973), or lawful possession of the property, N.D. CENT. CODE § 12-26-03 (1960).

274. N.D. CENT. CODE § 12.1-05-08 (effective July 1, 1975).

If, however, negligence or recklessness suffices to establish culpability for the offense, a negligently or recklessly held belief will not excuse the offense.[275] Excuse based on mistake of fact is a "defense" or an "affirmative defense" "according to which type of defense would be established had the facts been as the person believed them to be."[276]

The language of the New Code excuse provision adopts[277] with only the slightest changes, Proposed Federal Code § 608 (1).[278] Not included in the New Code is Proposed Federal Code § 608 (2) which provides:

> A person's conduct is excused if it would otherwise be justified or excused under this Chapter but is marginally hasty or excessive because he was confronted with an emergency precluding adequate appraisal or measured reaction.[279]

There is no comparable mistake of fact provision in the Old Code.[280] North Dakota case law has recognized that a "justification" can be extended to cover certain "mistake of fact" situations, at least in cases of self-defense.[281]

The Old Code does provide that no crime is committed in the case of ignorance or mistake of fact "which disproves any criminal intent."[282] In view of the further provision that "ignorance of the law does not excuse from punishment for its violation,"[283] the Old Code is really only providing that, if a specific intent is necessary for an offense, in the absence of the intent there is no offense. This would

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275. *Id.*
276. *Id.*
277. FINAL REPORT, *supra* note 6, at 52.
278. *Id.*, § 608(1).
279. In FINAL REPORT, *supra* note 6, at 52. The federal commentators note that the provision "incorporates a famous insight by Mr. Justice Holmes in Brown v. United States, 256 U.S. 335 (1921) ('Detached reflection cannot be expected in the presence of an uplifted knife.')" *Id.*

The interim committee consideration leading to rejection of the provision indicates concern over lack of adequate definition of "marginally hasty or excessive." Judge Erickstad explained that he voted for deletion because he believes

> . . . that the essence of subsection 2 is covered in subsection 1, since the question of whether a person acted negligently or recklessly would be based in part on a determination as to whether that person was faced with an "emergency.

Minutes "B", supra note 2, March 2-3, 1972 at 45.

280. During committee consideration that Committee Council stated that these New Code mistake of fact provisions "would replace the essence of Section 12-27-03 although its provisions are not exactly opposite to the provisions of Section 12-27-03." *Minutes "B", supra* note 2, March 2-3, 1972, at 45.

In fact, the only similarity in the two provisions is that each deals with "excuse." N.D. CENT. CODE § 12-27-03 (1960) deals with excuse based on accident or misfortune, with no reference to mistake of fact.

281. State v. Hazlett, 16 N.D. 426, 442, 113 N.W. 374, 380 (1907), recognizes a subjective test for mistake of fact in self-defense:

> [T]he circumstances must be viewed from the standpoint of the defendant alone, and that he will be justified or excused if such circumstances were sufficient to create in his mind an honest and reasonable belief that he was in such imminent danger.

Id.

282. N.D. CENT. CODE § 12-02-01(5) (1960).
283. *Id.*

be the case even without such a specific provision. Therefore, the absence of such a specific provision in the New Code is without apparent consequence.

G. MISTAKE OF LAW

While the Old Code provides that ignorance of the law does not excuse from punishment for its violation,[284] the New Code establishes as an affirmative defense "a person's good faith belief that conduct does not constitute a crime," provided the person acted in "reasonable reliance" on a statement of the law.[285] The statement of the law must be contained in a "statute or other enactment;"[286] a "judicial decision, opinion, order, or judgment;"[287] an "administrative order or grant of permission;"[288] or an "official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration, or enforcement of the law. . . ."[289]

The drafters of the Proposed Federal Code,[290] whose version of this section the New Code adopts, express their intention that the mistake of law defense is "not available for infraction where proof of culpability is generally not required."[291]

H. DURESS

The New Code establishes the affirmative defense of duress where "the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or to another."[292] If, however, the offense is not a felony, compulsion by force or threat of force is sufficient.[293] A finding of compulsion, within the meaning of this section, is precluded unless "a person of reasonable firmness" would be rendered "incapable of resisting the pressure."[294] The language thus requires, subjectively, actual compulsion and, objectively, adequate compulsion.

The duress defense is not available, under the New Code, if the person "willfully placed himself in a situation in which it was foreseeable that he would be subjected to duress."[295] If the defendant

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284. N.D. CENT CODE § 12-02-01(5) (1960).
285. N.D. CENT. CODE § 12.1-05-09 (effective July 1, 1975). The federal commentators note: In most instances, it would be unreasonable for a layman to fail to consult a lawyer, and would not be in good faith if he failed to make full disclosure to him of all revelvant facts.
FINAL REPORT, *supra* note 6, at 53.
286. N.D. CENT. CODE § 12.1-05-09(1) (effective July 1, 1975).
287. N.D. CENT. CODE § 12.1-05-09(2) (effective July 1, 1975).
288. N.D. CENT. CODE § 12.1-05-09(3) (effective July 1, 1975).
289. N.D. CENT. CODE § 12.1-05-09(4) (effective July 1, 1975).
290. FINAL REPORT, *supra* note 6, § 609.
291. FINAL REPORT, *supra* note 6, at 53.
292. N.D. CENT. CODE § 12.1-05-10(1) (effective July 1, 1975).
293. *Id.*
294. *Id.* The drafters of the Proposed Federal Code, whose version of this section the New Code adopts, note regarding this section that " 'reasonable firmness' to resist commission of a crime would vary with the nature of the crime."
I WORKING PAPERS, *supra* note 60, at 276.
295. N.D. CENT. CODE § 12.1-05-10(2) (effective July 1, 1975).

was negligent in placing himself in such a situation, the defense is likewise not available "whenever negligence suffices to establish culpability for the offense charged."[296]

The Old Code, which recognizes duress "consisting of an actual compulsion by use of force or fear"[297] (a subjective test), does not require the additional, objective—"person of reasonable firmness" —test.[298] Further, the Old Code, unlike the New, does not require threats of imminent death or serious bodily injury for a duress defense in felony cases, nor does the Old Code establish the "willful or negligent" exceptions found in the New Code.[299]

Under the New Code, there is no requirement that the compulsion be created by another person; rather, "compulsion" apparently covers apprehension regardless of the source of the threat.[300]

I. ENTRAPMENT

The New Code permits the affirmative defense of entrapment[301] when a law enforcement agent "induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense."[302] This follows the language of the Proposed Federal Code.[303]

The test for entrapment is an objective one, based on proscribed behavior of law enforcement agents.[304] The question is not whether the agent's behavior actually caused the specific individual

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296. *Id.*
297. N.D. CENT. CODE § 12-05-04 (1960).
298. *See* N.D. CENT. CODE § 12-05-04 (1960).
299. *Id.*
300. *See* FINAL REPORT, *supra* note 6, at 54.
301. N.D. CENT. CODE § 12.1-05-11(1) (effective July 1, 1975).
302. N.D. CENT. CODE § 12.1-05-11(2) (effective July 1, 1975).
303. FINAL REPORT, *supra* note 6, at 58.
304. At the federal level, this section offers statutory enactment of the minority position stated by Mr. Justice Roberts in Sorrells v. United States, 287 U.S. 435 (1932) and by Mr. Justice Frankfurter in Sherman v. United States, 356 U.S. 369 (1958). Frankfurter stated:

> The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the "intention" to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of "the creative activity" of the law-enforcement officials.

Id. at 382.

The majority of the court in both *Sorrells* and *Sherman* has favored the subjective test. In *Sorrells* Mr. Chief Justice Hughes for the majority stated:

> [T]he defense of entrapment is not simply that the particular act was committed at the instance of government officials. . . . The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. . . . [a]nd if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.

Sorrells v. United States, 287 U.S. 435, 451 (1932).

The Hughes theory for recognition of entrapment is based on imputed legislative intent:

to commit the offense, but whether such behavior would be likely to cause a "normally law abiding person" to commit it.[305]

If the law enforcement agent merely affords an opportunity to commit the offense, there is no entrapment.[306] "Law enforcement agents," for the purposes of this section, include personnel of federal, state and local law enforcement agencies and persons cooperating with them.[307] Such agents have been held, in federal decisions, to include paid informers,[308] those acting under promise of immunity,[309] and those acting under expectation of leniency.[310]

Although the Old Code does not statutorily authorize the entrapment defense, North Dakota case law does seem to recognize the defense.[311]

V. INCHOATE CRIMES

A. ATTEMPT

The New Code's treatment of criminal attempt, criminal facilitation, criminal solicitation and criminal conspiracy closely parallels the approach of the Proposed Federal Code.[312] The Old Code devotes a chapter[313] specifically to "attempt"; several additional prohibitions of attempt are scattered through the Old Code.[314] The intention under the New Code is to have all attempts prosecuted under the one section dealing specifically with criminal attempt.[315]

One must "do an act" or "engage in conduct" in order to be

> We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and punish them.

Id. at 448.

The Roberts-Frankfurter theory is based soly on governmental wrongdoing:

> The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle policy.

Sorrells v. United States, 287 U.S. 435, 459 (1932).

305. N.D. CENT. CODE § 12.1-05-11(2) (effective July 1, 1975).

306. *Id.*

307. N.D. CENT. CODE § 12.1-05-11(3) (effective July 1, 1975).

308. Cratty v. United States, 163 F.2d 844 (D.C. Cir. 1947).

309. Hayes v. United States, 112 F.2d 676 (10th Cir. 1940).

310. Sherman v. United States, 356 U.S. 369, 373-74 (1958).

311. In State v. Currie, 13 N.D. 655, 661, 102 N.W. 875, 877 (1905), the North Dakota Supreme Court held that:

> [A] detective may aid in the commission of the offense in conjunction with a criminal, and that the fact will not exonerate the guilty party. Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense. The defendant must act freely of his own motion. . . .

Id.

312. FINAL REPORT, *supra* note 6, at 67-74.

313. N.D. CENT. CODE ch. 12-04 (1960).

314. *E.g.*, N.D. CENT. CODE §§ 12-16-05 (Supp. 1973) (attempt to escape from prison), 12-27-32 (1960) (attempt to kill by administering poison), 12-31-11 (1960) (attempted robbery), 12-34-05 (1960) (attempt to burn property), and 12-37-07 (Supp. 1973) (attempt to extort).

315. N. DAK. LEGISLATIVE COUNCIL, REPORT 85 (1973).

guilty of an attempt. Under the Old Code the act must be "done with intent to commit a crime."[316] Under the New Code a person must act "with the kind of culpability otherwise required for commission of a crime,"[317] and "intentionally"[318] engage in certain conduct.

Under the Old Code, the act done must be one tending to effect the commission of the crime.[319] Under the New Code, the conduct must be such that it "in fact, constitutes a substantial step toward commission of the crime."[320] The definition[321] of "substantial step" is intended to prevent a conviction based on the accused's mere declaration of his criminal intent.[322]

With wording identical to that of the Proposed Federal Code,[323] the New Code[324] eliminates the defense of impossibility. The draftsmen of the Proposed Federal Code quote a summary of the reasons for this position:

> In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result, the actor's dangerousness is plainly manifested.[325]

A person who acts believing his act is illegal although it actually is legal is not guilty of an attempt.[326]

One who acts with the intent of aiding another person to commit a crime and who would be an accomplice if the crime were committed is guilty of criminal attempt under the New Code.[327] This subsection of the New Code and similar language in the Proposed Federal Code[328] do not require that the conduct strongly corroborate the

316. N.D. CENT. CODE § 12-04-01 (1960).
317. N.D. CENT. CODE § 12.1-06-01 (effective July 1, 1975).
318. *Id.* This term refers to the conduct, and does not imply an addition to the standard of culpability for the attempted crime. *Minutes "B", supra* note 2, April 6-7, 1972 at 6. The identical use of the term in the Proposed Federal Code is designed to exclude from attempt liability "attempts" where the result of the accused's conduct—even if that result is unintended—is an element of the crime "attempted." For example, "The mere performance of the negligent act is not an attempt to commit negligent homicide, even though death could have resulted." I WORKING PAPERS, *supra* note 60, at 354 n.6 (1970).
319. N.D. CENT. CODE § 12-04-01 (1960). This section also provides that one may be convicted of attempt when the intended crime itself was perpetrated, unless the court acts to direct prosecution for the completed crime.
320. N.D. CENT. CODE § 12.1-06-01 (effective July 1, 1975).
321. "A 'substantial step' is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime." *Id.*
322. I WORKING PAPERS, *supra* note 60, at 357. The language, identical in the New Code and the Proposed Federal Code, would "require that the conduct itself corroborate that the actor means what he said." *Id.* "The requirement is that it have the *corroborative* quality, not that it independently prove the actor's guilt." (Emphasis in original). *Id.* at 358.
323. FINAL REPORT, *supra* note 6, § 1001.
324. N.D. CENT. CODE § 12.1-06-01 (effective July 1, 1975).
325. MODEL PENAL CODE § 5.01, Comment at 31 (Tent. Draft No. 10, 1960), quoted in I WORKING PAPERS, *supra* note 60, at 361.
326. N.D. CENT. CODE § 12.1-02-01 (effective July 1, 1975). I WORKING PAPERS, *supra* note 60, at 361.
327. N.D. CENT. CODE § 12.1-06-01 (effective July 1, 1975).
328. FINAL REPORT, *supra* note 6, § 1001.

firmness of the accused's intent,[329] nor do they prohibit an act other than aiding.[330]

The maximum punishment provided for attempt in the Old Code is generally one-half of the maximum punishment for the attempted crime.[331] Under the New Code,[332] classification of—and, thus, the punishment for—criminal attempt is the same as that of the offense attempted, with two exceptions: (1) if the attempted crime is a class A felony, the attempt is a class B felony,[333] and (2) if the attempt did not "come dangerously close to commission of the crime"[334] the attempt to commit a class B or C felony is reduced to an offense of the next lower class.[335]

B. FACILITATION

The New Code,[336] like the Proposed Federal Code[337] but unlike the Old Code,[338] defines and prohibits criminal facilitation. Conviction of this crime requires proof that the accused "knowingly"[339] pro-

329. N.D. CENT. CODE ch. 12.1-03 (effective July 1, 1975) defines the liability of an accomplice; those liability provisions are applied to this attempt subsection. *See* I WORKING PAPERS, *supra* note 60, at 360.

330. Soliciting and commanding are covered in N.D. CENT. CODE § 12.1-06-03 (effective July 1, 1975).

331. N.D. CENT. CODE § 12-04-02 (1960). A variation provided for in this section is that where the attempted offense is punishable by less than four years' imprisonment in the penitentiary the maximum punishment for the attempt is one year's imprisonment in the county jail. Other sections (e.g., those cited in note 314 above) dealing with attempts provide for punishments which often depart from this pattern. If another crime is committed during the attempt, the individual may be punished for that crime. N.D. CENT. CODE § 12-04-03 (1960).

332. N.D. CENT. CODE § 12.1-06-01 (effective July 1, 1975). The identical provision in the Proposed Federal Code is consistent with both the present Federal law and the penal philosophy that it is the actor's "anti-social disposition" or "dangerousness" rather than merely the result of his act which determines the appropriate sentence. I WORKING PAPERS, *supra* note 60, at 364-66.

333. This makes the maximum term of imprisonment equal to one-half of the maximum for the attempted offense. The maximum terms for a class A felony and for an attempt to commit a class A felony are, respectively, thirty and fifteen years in the Proposed Federal Code, FINAL REPORT, *supra* note 6, § 3201, and twenty and ten years in the New Code, N.D. CENT. CODE § 12.1-32-01 (effective July 1, 1975).

334. N.D. CENT. CODE § 12.1-06-01 (effective July 1, 1975). This is a version of the dangerous proximity doctrine. FINAL REPORT, *supra* note 60, at 68. It is meant to cover persons who had engaged in the last proximate act in the commission of a crime. I WORKING PAPERS, *supra* note 60, at 366. This issue is determined at sentencing to avoid confusing the jury with the preponderance of the evidence standard when the jury is making the initial determination of guilt or innocence. *Id.*, at n. 35.

335. Under the New Code, the maximum sentence is reduced by half if the attempted crime is a class B felony—from ten years to five; while if the attempted crime is a class C felony the maximum term is reduced from five years to one year. N.D. CENT. CODE § 12.1-32-01 (effective July 1, 1975). Under the Proposed Federal Code, the maximum sentence is reduced from fifteen years to seven if the attempted crime is a class B felony, and from seven to one if the attempted crime is a class C felony. FINAL REPORT, *supra* note 6, § 3201.

336. N.D. CENT. CODE § 12.1-06-02 (effective July 1, 1975).

337. FINAL REPORT, *supra* note 6, § 1002.

338. The Old Code prohibits conduct which is, in effect, facilitation: *e.g.*, N.D. CENT. CODE §§ 12-16-11 (1960) (prohibiting certain acts done to "effect or facilitate the escape of a prisoner"), and 12-33-05 (1960) (prohibiting the furnishing of a weapon or drug to aid a suicide).

339. Defined in N.D. CENT. CODE § 12.1-02-02 (effective July 1, 1975). He must know that the other person intends to do a criminal act; it is not sufficient that he knows of the planned act without knowing that it is illegal. I WORKING PAPERS, *supra* note 60, at 161. It appears that here ignorance of the law is a defense.

vided "substantial"[340] assistance to one who intended to commit a felony;[341] and that this person employed that assistance in committing "the crime contemplated, or a like or related felony."[342] Facilitation is "an included offense to accomplice liability."[343]

The accused has an effective defense if he is by statute not accountable for the underlying felony; but it is not a defense that the person whose conduct was facilitated was acquitted, was convicted of a different offense, or is not subject to justice.[344]

If the facilitated crime is a class A felony, facilitation is a class C felony; otherwise it is a class A misdemeanor.[345]

C. SOLICITATION

Under the Old Code, one who advises and encourages the commission of any crime is a principal in that crime.[346] The New Code provides a special section[347] covering criminal solicitation of a felony.[348] The draftsmen of the parallel section of the Proposed Federal Code suggest that:

> [S]olicitation may be viewed as an attempt to form a conspiracy. The solicitee either has not yet agreed (although he has committed an overt act, such as coming back for further discussions) or he has agreed but no overt act has been committed sufficient to make the crime a conspiracy.[349]

Conviction of criminal solicitation requires proof of four elements. First, that the accused commanded, induced, entreated or otherwise attempted to persuade[350] another to act as principal or accomplice in the commission of a particular felony.[351] Second, that

340. N.D. CENT. CODE § 12.1-06-02 (effective July 1, 1975). This is determined by analysis of the circumstances of the individual case. I WORKING PAPERS, *supra* note 60, at 161. One factor which must be considered is "the ready lawful availability from others of the goods and services provided." N.D. CENT. CODE § 12.1-06-02 (effective July 1, 1975). This requirement of the Proposed Federal Code was questioned, but was carried over into the New Code. *Minutes "B", supra* note 2, April 6-7, 1972 at 8. The accused must have known that his assistance was substantial. I WORKING PAPER, *supra* note 60, at 161. Proof of this knowledge would, it seems, be difficult.

341. The draftsmen of the Proposed Federal Code indicate that the accused need not know that the intended crime is classed as a felony. I WORKING PAPERS, *supra* note 60, at 161.

342. N.D. CENT. CODE § 12.1-06-02 (effective July 1, 1975).

343. FINAL REPORT, *supra* note 6, § 1002. The distinction between the two offenses is "shadowy." I WORKING PAPERS, *supra*, note 60, at 160. The draftsmen of the Proposed Federal Code expect that, "[F]acilitators will be charged as accomplices, but that the facilitation offense will be available for conviction of the lessor offense in borderline cases." *Id.* at 161.

344. N.D. CENT. CODE § 12.1-06-02 (effective July 1, 1975).

345. *Id.*

346. N.D. CENT. CODE § 12-02-04 (1960). The Old Code also has specific provisions covering offenses of this general type; *e.g.*, N.D. CENT. CODE §§ 12-09-10 (1960) (solicitation of bribery), 12-14-14 (1960) (subornation of perjury), and 12-38-22 (1960) (soliciting swindling).

347. N.D. CENT. CODE § 12.1-06-03 (effective July 1, 1975).

348. The requirement that the crime solicited be a felony is more restrictive than the "any crime" provision of the Old Code. *Minutes "B", supra* note 2, April 6-7, 1972 at 9.

349. FINAL REPORT, *supra* note 6, at 69-70.

350. There must be an "instigation," not just "mere encouragement." *Id.*

351. The limitation to a *particular* felony is an attempt to avoid free speech problems. *Id.*

he so acted "with intent to promote or facilitate the commission of that felony, under circumstances strongly corroborative of that intent."[352] Third, that the solicitee committed "an overt act in response to the solicitation."[353] Fourth, that the accused would not be the victim of the offense, that his conduct is not "inevitably incident" to the commission of the offense, and that he is not statutorily exempted from guilt.[354] The fact that the person solicited could not be guilty of the crime is not a defense.[355]

Solicitation of a class A felony is a class B felony; of a class B felony, a class C felony; and of a class C felony, a class A misdemeanor.[356] The New Code follows the grading system of the Proposed Federal Code, which was set up with special concern for the "unsuccessful" solicitor, since if successful he would be punished under statutes dealing with the completed crime.[357]

D. CONSPIRACY

The Old Code,[358] New Code[359] and Proposed Federal Code[360] deal specifically with criminal conspiracy. Unlike the Old Code, the New Code does not deal specifically with out-of-state conspiracy to commit treason against the state,[361] nor with protection for peaceable assemblies.[362]

Conviction of criminal conspiracy under the New Code requires proof: first, that the accused agreed[363] "to engage in or cause conduct;"[364] second, that this particular conduct "in fact, constitutes an

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"The problem is in preventing legitimate discussion or agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime." I WORKING PAPERS, *supra* note 60, at 375. The limitation to a *felony* allows prosecution of only those "whose conduct threatens a serious harm." *Id.* at 374.

352. N.D. CENT. CODE § 12.1-06-03 (effective July 1, 1975). The words "promote or facilitate" are used to include solicitations of accomplices. I WORKING PAPERS, *supra* note 60, at 371. More than "mere words of the accused" is required. *Id.* at 372.

353. N.D. CENT. CODE § 12.1-06-03 (effective July 1, 1975). The draftsmen of the Proposed Federal Code rejected an alternative which would have required an overt act by the accused. I WORKING PAPERS, *supra* note 60, at 373-74.

354. N.D. CENT. CODE § 12.1-06-03 (effective July 1, 1975). One who could not be liable as an accomplice would, thus, not be liable for solicitation. I WORKING PAPERS, *supra* note 60, at 376.

355. N.D. CENT. CODE § 12.1-06-03 (effective July 1, 1975).

356. *Id.*

357. I WORKING PAPERS, *supra* note 60, at 378-79.

358. N.D. CENT. CODE ch. 12-03 (1960).

359. N.D. CENT. CODE § 12.1-06-04 (effective July 1, 1975).

360. FINAL REPORT, *supra* note 6, § 1004. Most of the language in the New Code section cited above is drawn from and so is identical to the language of this portion of the Proposed Federal Code.

361. N.D. CENT. CODE § 12-03-02 (1960). *Minutes "B", supra* note 2, Sept. 20-21, 1971 at 4.

362. N.D. CENT. CODE § 12-03-03 (1960).

363. The agreement must be with one or more others, but may be implicit rather than explicit. N.D. CENT. CODE § 12.1-06-04 (effective July 1, 1975). If the accused "knows or could expect" that a co-conspirator has conspired or will conspire with a third person for the same purpose, he is deemed to have agreed with that third person also. *Id.* "It is not unreasonable to ask one who joins with an ongoing criminal enterprise to run the risk of having an unknown number of associates." I WORKING PAPERS, *supra* note 60, at 391-92. Such a rule avoids findings of multiple conspiracies when members join separately and so reduces evidentiary problems. *Id.* at 392.

364. N.D. CENT. CODE § 12.1-06-04 (effective July 1, 1975).

offense or offenses;"[365] and third, that a person with whom he has agreed has done "an overt act to effect an objective of the conspiracy."[366]

The New Code specifies that a conspiracy continues[367] until its "objectives"[368] have been "accomplished, frustrated or abandoned."[369] The conspiracy is abandoned if no conspirator has committed an overt act to effect the conspiracy's objectives during the period of limitations.[370] For individual abandonment, "[I]t should be sufficient if the conspirator makes a timely declaration of withdrawal to his co-conspirator or the duly constituted law enforcement authorities."[371] The fact that all other alleged participants in the conspiracy were acquitted, convicted of a different offense or not otherwise subject to justice is no defense.[372] Conspiracy is classified and punished in the same manner as attempt.[373] A conspirator may, of course, be liable as an accomplice.[374]

E. DEFENSES

Definitions and affirmative defenses for the inchoate crimes are provided in the last section of Chapter 12.1-06.[375] The definition of an offense in the chapter does not apply to another defense defined in that chapter.[376] The definitions of "attempt" and "conspiracy" used in Chapter 12.1-06 are to be applied whenever those terms are used outside the chapter.[377] This is not true of the terms "facilitate" and "solicit."[378]

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365. *Id.* Under the Old Code the conduct apparently need not always be criminal. N.D. CENT. CODE § 12-03-01 (1960). The Proposed Federal Code requires that the conduct be criminal, although existing Federal law does not have that limitation. FINAL REPORT, *supra* note 6, at 71.

366. N.D. CENT. CODE § 12.1-06-04 (effective July 1, 1975). The act shows that the conspiracy "is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." Yates v. United States, 354 U.S. 298, 334 (1957). A "substantial step" is not required. FINAL REPORT, *supra* note 6, at 71. The act may range from an act which would be innocent in the absence of a conspiracy [Yates v. United States, 354 U.S. 298, 333-34 (1957)], to the actual commission of the offense agreed upon. Pinkerton v. United States, 328 U.S. 640 (1940). The New Code eliminates the exception to the overt act requirement present in the Old Code, N.D. CENT. CODE § 12-03-04 (1960). *Minutes "B", supra* note 2, April 6-7, 1972 at 10.

367. Duration is important because of its impact on the liability of original and new co-conspirators, the admissibility of statements by co-conspirators, and the application of the statute of limitations. I WORKING PAPERS, *supra* note 60, at 393.

368. Defined to include "escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it." N.D. CENT. CODE § 12.1-06-04 (effective July 1, 1975).

369. *Id.*

370. *Id.*

371. I WORKING PAPERS, *supra* note 60, at 395.

372. N.D. CENT. CODE § 12.1-06-04 (effective July 1, 1975).

373. *Id.* Conspiracy is, thus, treated "as a species of multi-party attempt." FINAL REPORT, *supra* note 6, at 72.

374. N.D. CENT. CODE § 12.1-03-01 (effective July 1, 1975).

375. N.D. CENT. CODE § 12.1-06-05 (effective July 1, 1975).

376. *Id.* Thus, for example, "[O]ne cannot be guilty of an attempt to attempt, or a conspiracy to solicit." FINAL REPORT, *supra* note 6, at 74.

377. N.D. CENT. CODE § 12.1-06-05 (effective July 1, 1975).

378. FINAL REPORT, *supra* note 6, at 74.

Affirmative defenses are provided to charges of criminal attempt, criminal solicitation and criminal conspiracy.[379] The accused must—if the affirmative defense is to be successfully relied upon—have acted[380] "under circumstances manifesting a voluntary and complete renunciation of his criminal intent,"[381] and must have avoided or prevented the commission of the crime attempted, solicited or contemplated by the conspiracy.[382]

VI. HOMICIDE

Chapter 12.1-16 of the New Code differs greatly from Chapter 12-27 of the Old Code, but is substantially identical to the homicide provisions of the Proposed Federal Code.[383] The New Code chapter has only three sections, while the Old Code chapter has thirty-seven sections. This reduction is in large part the result of the elimination of degrees of murder and manslaughter and the use of terms and offense classifications defined elsewhere in the New Code, with no need for specialized treatment within the chapter on homicide.

There is no need in the New Code chapter for sections[384] dealing with excuse and justification, as those concepts are dealt with in an earlier chapter.[385] Neither is there need for sections defining,[386] or listing classifications of,[387] homicides; each of its three sections defines a separate class. These classes are murder,[388] manslaughter,[389] and negligent homicide.[390]

All three codes[391] agree in requiring as an element of the crime of homicide the death of a "human being"—a person who has been born and is alive.[392]

A. MURDER

Both the New Code and the Proposed Federal Code consolidate

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379. But not for facilitation, as its definition requires commission of the crime. *Id.*

380. Mere abandonment of an attempt is sufficient, but only if it avoided the commission of the attempted crime. N.D. CENT. CODE § 12.1-06-05 (effective July 1, 1975).

381. The New Code in this section also provides standards for the terms "voluntary and complete." The renunciation must not be motivated by a belief that detection or apprehension has become more probable or the crime more difficult, nor is a decision to postpone the crime or substitute another victim or objective considered a renunciation. *Id.* There must be a "repentance" or "change of heart"; "lack of resolution" or "timidity" is not sufficient. I WORKING PAPERS, *supra* note 60, at 363.

382. N.D. CENT. CODE § 12.1-06-05 (effective July 1, 1975). "The defense encourages voluntary abandonment of a crime prior to the causing of harm and also serves to moderate the potentially broad scope of the inchoate offenses." FINAL REPORT, *supra* note 6, at 74.

383. FINAL REPORT, *supra* note 6, §§ 1601-1603.

384. N.D. CENT. CODE §§ 12-27-02 to -06 (1960).

385. N.D. CENT. CODE ch. 12.1-05 (effective July 1, 1975).

386. N.D. CENT. CODE § 12-27-01 (1960).

387. N.D. CENT. CODE § 12-27-02 (1960).

388. N.D. CENT. CODE § 12.1-16-01 (effective July 1, 1975).

389. N.D. CENT. CODE § 12.1-16-02 (effective July 1, 1975).

390. N.D. CENT. CODE § 12.1-16-03 (effective July 1, 1975).

391. N.D. CENT. CODE § 12-27-01 (1960); N.D. CENT. CODE § 12.1-16-01 (effective July 1, 1975); FINAL REPORT, *supra* note 6, §§ 1601-1603.

392. The term is so defined in the Proposed Federal Code, FINAL REPORT, *supra* note 6, § 109 (p) but the corresponding section in the New Code, N.D. CENT. CODE § 12.1-01-04 (effective July 1, 1975), omits the term.

first and second degree murder. Murder is a class A felony under the New Code.[393] The two degrees of murder are consolidated in part because of the elimination of the death penalty—for which such a distinction is necessary—and also because of the blurring of the distinction based on premeditation—a distinction which ignores the fact that a premeditated killing is not always the more heinous killing.[394]

Under the Old Code,[395] homicide is murder under three circumstances; these are paralleled in the New Code,[396] but with imporant changes. The Old Code deals first with a killing committed with premeditation,[397] while the New Code follows the Proposed Federal Code in dealing first with a death caused "intentionally or knowingly"[398] and in using those modern terms rather than "malice aforethought"[399] as a test for murder. Premeditation is not an element of proof under the New Code.

Second, the Old Code deals with an act done without premeditation but "imminently dangerous to others and evincing a depraved mind, in disregard of human life."[400] The New Code eliminates the reference to a "depraved mind,"[401] and covers deaths caused "under circumstances manifesting extreme indifference to the value of human life."[402] In addition to covering "generally all sorts of extreme recklessness of life,"[403] the Proposed Federal Code and the New Code use this language to cover "transferred intent"—where the defendant killed someone other than his intended victim. Proof that an act was done with an intent to kill is proof of extreme indifference to the value of human life.[404]

393. N.D. CENT. CODE § 12.1-16-01 (effective July 1, 1975). The maximum twenty years' imprisonment possible under the New Code, N.D. CENT. CODE § 12.1-32-01 (effective July 1, 1975), is within the ten to thirty years' imprisonment provided for murder in the second degree under the Old Code, N.D. CENT. CODE § 12-27-14 (1960). The life sentence—and limited death sentence—provisions for murder in the first degree contained in the Old Code N.D. CENT. CODE § 12-27-13 (1960), are eliminated.

394. FINAL REPORT, *supra* note 6, 173-74; II WORKING PAPERS, *supra* note 60, at 824.

395. N.D. CENT. CODE § 12-27-08 (1960).

396. N.D. CENT. CODE § 12.1-16-01 (effective July 1, 1975).

397. A premeditated killing is murder in the first degree under the Old Code, N.D. CENT. CODE § 12-27-12 (1960). As it has no degrees of murder, the New Code eliminates the term and its definition. That definition, N.D. CENT. CODE § 12-27-09 (1960), allows a design formed "instantly" before the killing to be considered premeditation; similar treatment of the term in federal courts has been cited as a factor destroying the usefulness of degrees of murder. II WORKING PAPERS, *supra* note 60, at 823.

398. These terms are defined in N.D. CENT. CODE § 12.1-02-02 (effective July 1, 1975).

399. An error in the use of this term—in a standard federal homocide charge—resulted in the reversal of a murder conviction. Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967). Such problems, and the elimination of the term in several recent state codes, were noted by the draftsmen of the Proposed Federal Code. II WORKING PAPERS, *supra* note 60, at 825.

400. N.D. CENT. CODE § 12-27-08 (1960). Such an act is murder even if there is no actual intent to injure others. N.D. CENT. CODE § 12-72-10 (1960).

401. The New Code also eliminates the special provision, N.D. CENT. CODE § 12-27-07 (1960), for jury consideration of an accused's domestic or confidential relationship with the person killed, where determinations of cruelty or depraved mind are involved. As the New Code does not have degrees of murder or manslaughter it does not require definitions thereof with references to torture, as in N.D. CENT. CODE § 12-27-12 (1960), or cruelty, as in N.D. CENT. CODE § 12-27-17 (1960).

402. N.D. CENT. CODE § 12.1-16-01(2) (effective July 1, 1975).

403. FINAL REPORT, *supra* note 6, at 174.

404. *Id.* But this may be an oversimplification, in light of views expressed earlier. The

Third, under the Old Code[405] an act or omission punishable by imprisonment in the penitentiary can give rise to the application of a felony-murder rule. Only certain specified crimes result in application of the rule under the New Code.[406] Most of these crimes are those which result in conviction of murder in the first degree under the Old Code.[407] The New Code eliminates mayhem as an underlying crime,[408] and adds treason, kidnapping, felonious restraint, and escape to the list of specified underlying crimes.[409]

The New Code's section[410] departs from the wording of the corresponding section of the Proposed Federal Code[411] in two areas. It eliminates certain uniquely national crimes—war against the United States, armed insurrection, espionage and sabotage—as underlying crimes to which the felony-murder rule is applied. It also eliminates, probably as surplus, the statement that the presence of extreme emotional disturbance for which there is a reasonable excuse shall render inapplicable the murder provisions other than the felony-murder rule.

The New Code's felony-murder rule provides a number of limitations on, and clarifications of, its application: the rule covers one who commits or attempts to commit one of the nine crimes specified; the person killed must be someone other than one of the participants in the crime; and, the person accused or another participant in the crime must have caused the death "in the course of and in furtherance of" the underlying crime or "immediate flight therefrom."[412] If the accused was not the only participant in the underlying crime, an affirmative defense to the application of the felony-murder rule is available.[413] There is, however, "a heavy burden on the defendant to establish his lack of culpability."[414]

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doctrine was rejected as "both conceptually unsound and unnecessary." I WORKING PAPER, *supra* note 60, at 132. Liability for such a killing was to be determined "on the ordinary basis of whether the offender had acted recklessly or negligently." II WORKING PAPERS, *supra* note 60, at 825.

405. N.D. CENT. CODE § 12-27-08 (1960).

406. N.D. CENT. CODE § 12.1-16-01(3) (effective July 1, 1975).

407. N.D. CENT. CODE § 12-27-12 (1960). The crimes specified in both this section and the New Code are sodomy (aggravated involuntary sodomy in the New Code), rape, arson, robbery, and burglary.

408. To which the "felony-first-degree-murder" rule would be applied under N.D. CENT. CODE § 12-27-12 (1960).

409. N.D. CENT. CODE § 12.1-16-01 (effective July 1, 1975).

410. *Id.*

411. FINAL REPORT, *supra* note 6, § 1601.

412. N.D. CENT. CODE § 12.1-16-01(3) (effective July 1, 1975).

413. The accused must show that he: (a) did not commit, solicit, command, induce, procure, counsel, or aid in the homocidal act; (b) was not armed with a weapon "which under the circumstances indicated a readiness to inflict serious bodily injury"; (c) reasonably believed no other participant was so armed; and (d) "reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury." N.D. CENT. CODE § 12.1-16-01(3) (effective July 1, 1975).

414. FINAL REPORT, *supra* note 6, at 174. Under a rejected alternate draft of the Proposed Federal Code, the defendant need raise only a reasonable doubt as to his recklessness. II WORKING PAPERS, *supra* note 60, at 826. Under the New Code, the defendant must support his affirmative defense by a preponderance of the evidence. *Minutes "B", supra* note 2, May 11-12, 1972 at 51.

B. MANSLAUGHTER

The "misdemeanor-manslaughter rule" of the Old Code[415] is eliminated in the manslaughter section of the New Code.[416] Under that section,[417] which is identical to the manslaughter provision in the Proposed Federal Code,[418] a person commits manslaughter if he causes the death of another "recklessly,"[419] or "under the influence of extreme emotional disturbance for which there is reasonable excuse." In order for the necessary "recklessness" to be found, "proof that the defendant was *aware* that he was unjustifiably risking life or limb is required."[420] Manslaughter is a class B felony in the New Code.[421]

The term, "heat of passion," in the Old Code's definition of manslaughter in the first degree[422] is replaced by the more flexible test of the New Code and the Proposed Federal Code. The arbitrary limitations[423] which developed under the old "sudden quarrel or heat of passion" test are removed, but the excuse for the disturbance must be reasonable and the defendant must not have culpably brought it about.[424] The New Code's treatment of a killing under such circumstances results from a recognition that one who kills only under the influence of extreme emotional disturbance is not so great a threat, nor so likely to be deterred by severe sanctions, as is a cold-blooded killer.[425]

Under the Old Code, an unnecessary killing perpetrated "while resisting an attempt by the person killed to commit a crime or

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415. N.D. CENT. CODE § 12-27-17(1) (1960). The draftsmen of the Proposed Federal Code termed this rule "arbitrary and undesirable." FINAL REPORT, *supra* note 6, at 175.

416. This effectively eliminates the reported practice, under the Old Code, of using the "misdemeanor-manslaughter" rule in motor vehicle homicides rather than the negligent homocide statutes, N.D. CENT. CODE §§ 12-27-35 to -37 (1960), which were enacted to cover motor vehicle homicides. *Minutes "B"*, *supra* note 2, Nov. 22-23, 1971 at 33.

417. N.D. CENT. CODE § 12.1-16-02 (effective July 1, 1975).

418. FINAL REPORT, *supra* note 6, § 1602.

419. Defined in N.D. CENT. CODE § 12.1-02-02(c) (effective July 1, 1975).

420. FINAL REPORT, *supra* note 6, at 175. Under the Old Code, "culpable negligence" may bring a conviction of manslaughter in the second degree. N.D. CENT. CODE § 12-27-19 (1960). Under the Proposed Federal Code, "criminal negligence" without knowledge of the risk to life leads to a negligent homocide conviction. II WORKING PAPER., *supra* note 60, at 827.

421. N.D. CENT. CODE § 12.1-16-02 (effective July 1, 1975). The maximum ten years' imprisonment under the New Code, N.D. CENT. CODE § 12.1-32-01(2) (effective July 1, 1975), is at the midpoint of the five to fifteen years' imprisonment provided for manslaughter in the first degree under the Old Code, N.D. CENT. CODE § 12-27-18 (1960), and is twice the maximum provided for manslaughter in the second degree, N.D. CENT. CODE § 12-27-20 (1960).

422. N.D. CENT. CODE § 12-27-17(2) (1960).

423. Draftsmen of the Proposed Federal Code listed some such limitations. (a) "[M]ere words, however, aggravating are not sufficient to reduce the crime from murder to manslaughter." Allen v. United States, 164 U.S. 492, 497 (1896); (b) "[The passion] must spring from some wrongful act *of the party slain* [emphasis added]. . . ." Collins v. United States, 150 U.S. 62, 65 (1893); (c) Deeply felt affronts—*e.g.*, mentally deficient man called a "black nigger." Fisher v. United States, 328 U.S. 463 (1946)—do not count; (d) Nor does a delayed reaction—victim returned to her first husband after living for more than a year with defendant; shortly thereafter he drove to her office and shot her. Bell v. United States, 47 F.2d 438 (D.C. Cir. 1931). II WORKING PAPERS, *supra* note 60, at 828-29 nn. 8-10.

424. FINAL REPORT, *supra* note 6, § 1602.

425. II WORKING PAPERS, *supra* note 60, § 827-28.

after such attempt shall have failed" is manslaughter in the first degree.[426] There is no special provision in the New Code to cover such killings. Nor do the New Code and Proposed Federal Code provide—as does the Old Code—specialized treatment of certain unusual causes of death.[427] An act which results in a death is instead examined in relation to the requirements of culpability[428] and fitted into one of the three classes of homicide. Both these codes also eliminate the rule, present in the Old Code,[429] that in order for a killing to be murder or manslaughter the death must occur within a year and a day after the causal act was done.

C. NEGLIGENT HOMICIDE

The negligent homicide section in the New Code[430] is drawn from the Proposed Federal Code[431] and is not, in contrast to the Old Code,[432] limited to motor vehicle homicides. The New Code section covers *any* homicide caused "negligently."[433]

Under the Proposed Federal Code and the New Code, the negligence involved is greater than simple negligence.[434] Such negligence "may exist where the offender did not know of the risk to life but was gravely derelict in failing to recognize it. . . ."[435] Negligent homicide is a class C felony under the New Code.[436]

VII. UNLAWFUL DETENTION

Kidnapping, a crime which was only a misdemeanor at common law, has today become one of the most severely punished offenses.[437] The New Code defines the restraint offenses into three categories;

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426. N.D. CENT. CODE § 12-27-17 (1960).

427. The Old Code deals individually with deaths caused by a mischievous animal. N.D. CENT. CODE § 12-27-23 (1960); by negligent operation of a steam engine, N.D. CENT. CODE § 12-27-24 (1960); by an intoxicated physician, N.D. CENT. CODE § 12-27-25 (1960); by a spring gun or exploding device, N.D. CENT. CODE § 12-27-26 (1960); or by overloading a boat or vessel, N.D. CENT. CODE § 12-27-34 (1960).

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

429. N.D. CENT. CODE § 12-27-27 (1960).

430. N.D. CENT. CODE § 12.1-16-03 (effective July 1, 1975).

431. FINAL REPORT, *supra* note 6, § 1603.

432. N.D. CENT. CODE §§ 12-27-35 to -37 (1960).

433. The term is defined in N.D. CENT. CODE § 12.1-02-02(d) (effective July 1, 1975). It is a greater degree of negligence than simple negligence, as understood in tort law. *Minutes "B", supra* note 2, Nov. 22-23, 1971 at 34.

434. It must be "a substantial and not merely a marginal default such as suffices for civil liability." II WORKING PAPERS, *supra* note 60, at 830. The New Code section was referred to as "in effect a gross negligent homocide statute." *Minutes "B", supra* note 2, May 11-12, 1972 at 50. The Old Code provision covers deaths resulting from driving in "reckles disregard of the safety of others." N.D. CENT. CODE § 12-27-35 (1960).

435. II WORKING PAPERS, *supra* note 60, at 827.

436. N.D. CENT. CODE § 12.1-16-03 (effective July 1, 1975). The maximum five years' imprisonment under the New Code, N.D. CENT. CODE § 12.1-32-01 (effective July 1, 1975), is the same as the maximum under the Old Code, N.D. CENT. CODE § 12-27-36 (1960), for negligent homicide, and under N.D. CENT. CODE § 12-27-20 (1960), for manslaughter in the second degree.

437. Note, *A Rationale of the Law of Kidnapping*, 53 COL. L. REV. 540, 542 & n.11 (1953). North Dakota is one of only five states which does not provide for life imprisonment or death for kidnapping. *Id.*

kidnapping,[438] felonious restraint[439] and unlawful imprisonment.[440] These replace the lone section on kidnapping in the Old Code.[441] The New Code section on unlawful detention is similar to the Proposed Federal Code with the exception that the New Code deletes the section on usurping control of aircraft.[442]

The section on kidnapping in the New Code is somewhat more restrictive than that in the Old Code.[443] The New Code defines kidnapping as an abduction with intent to do one of the following: (a) hold for ransom, (b) use as a hostage, (c) hold in involuntary servitude, (d) terrorize, (e) commit a felony or (f) interfere with any governmental function.[444] If the actor does not intend one of the above, the offense is felonious restraint.[445] The New Code carefully delineates the crime of kidnapping so as to exclude the possibility that the innocently motivated transportation of another or minor restraint might be prosecuted to maximum penalties.[446] Therefore, kidnapping embraces only the most serious cases of unlawful restraint. By allowing for such variables as the actor's intent, the extent of the force used, the ultimate outcome, and certain defenses, the drafters have provided for offenses ranging from a class A misdemeanor to a class A felony.

A. KIDNAPPING

Kidnapping is a class A felony, unless the actor voluntarily releases the victim alive and in a safe place prior to trial. In that case it is a class B felony.[447] The Old Code provides a maximum

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438. N.D. CENT. CODE § 12.1-18-01 (effective July 1, 1975).
439. N.D. CENT. CODE § 12.1-18-02 (effective July 1, 1975).
440. N.D. CENT. CODE § 12.1-18-03 (effective July 1, 1975).
441. N.D. CENT. CODE § 12-42-01 (1960). In the Old Code, the crime is spelled "kidnaping". THE MODEL PENAL CODE and the Proposed Federal Code spell the crime "kidnapping". THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 720 (W. Morris ed. (1969) states that kidnapping is spelled correctly in either form. "Kidnapping" is the form adopted by the New Code. See also II WORKING PAPERS, *supra* note 60, at 853.
442. The reason the drafters deleted this section is that "skyjacking" is preempted by federal law for all offenses, except for intrastate flights of civil aircraft. *Minutes "B", supra* note 2, May 11-12, 1972 at 59.
443. The essential elements of kidnapping are that a person willfully kidnaps another, with intent to cause him, without authority of law, to be detained against his will. State v. Taylor, 70 N.D. 201, 293 N.W. 219 (1940).
444. N.D. CENT. CODE § 12.1-18-01 (effective July 1, 1975).
445. N.D. CENT. CODE § 12.1-18-02 (effective July 1, 1975). *See* FINAL REPORT, *supra* note 6, at 184.
446. II WORKING PAPERS, *supra* note 60, at 857. "[T]he broad list of kidnapping purposes beyond kidnapping for ransom is based on the assumption that the victim suffers a substantial loss of liberty from the culprit's acts, not just a brief restraint imposed for the purpose of committing another crime."

> It should be emphasized that every extension of kidnapping beyond kidnapping for ransom depends for its justification on the strict definition of remove and confine, the modification of the basic penalty here proposed, and the provisions of this Code restricting cumulation of punishments. In any other circumstances, it might be desirable to confine kidnapping to seizure for ransom. MODEL PENAL CODE § 212.1, Comment at 18 (Tent. Draft No. 11, 1969).

Id. at 857 n.15.
447. N.D. CENT. CODE § 12.1-18-01 (effective July 1, 1975).

penalty of 20 years imprisonment.[448] It has been questioned whether the offender who releases his victim prior to trial should receive a less severe penalty than the offender who doesn't release his victim, because the culpability of both offenders at the outset of the offense is the same.[449] Such a provision is based on encouraging the kidnapper to release his victim safely prior to trial because of the graduated sentencing provided by the New Code.[450]

To successfully prosecute the crime of kidnapping under the New Code it is necessary to find substantial movement from where the victim was apprehended. For example, if a person were restrained while robbers proceeded with a robbery, the crime would not be kidnapping. However, if they confined the victim to a place where he is not likely to be found, even if it is in his own home, the crime would be kidnapping.[451]

B. FELONIOUS RESTRAINT

North Dakota presently has no statute which specifically prohibits those actions defined in the New Code under felonious restraint, a class C felony.[452] Under the Old Code these actions must be prosecuted under the kidnapping statute,[453] if at all. This section of the New Code may also be used to upgrade the offense of simple unlawful imprisonment when committed under terrorizing circumstances, which would include any form of abduction.[454]

Regardless of the cause of unlawful restraint, whether an honest mistake or a practical joke, a person who knowingly restrains another takes upon himself a high responsibility for that person's safety; the felony punishment seems appropriate when the restrained person is kept in conditions which are dangerous to him.[455] This section also provides a penalty for involuntary servitude, which is presently proscribed by the Constitution and the federal peonage and slavery enactments.[456]

C. UNLAWFUL IMPRISONMENT

The New Code provisions for unlawful imprisonment are also new offenses to North Dakota, since the Old Code does not speak to the detention of others, other than when done under "color of law".[457] The line between criminal and noncriminal restraint is de-

448. N.D. CENT. CODE § 12-42-01 (1960). The Old Code does not make a distinction for safe release prior to trial.
449. II WORKING PAPERS, *supra* note 60, at 863, 864.
450. *Id.*
451. For cases which do not amount to kidnapping, prosecution can be taken for either felonious restraint or unlawful imprisonment, whichever is appropriate. *Id.* at 858-60.
452. N.D. CENT. CODE § 12.1-18-02 (effective July 1, 1975).
453. N.D. CENT. CODE § 12-42-01 (1960).
454. FINAL REPORT, *supra* note 6, at 184.
455. II WORKING PAPERS, *supra* note 60, at 859.
456. U.S. CONST. amend. XIII, § 1, 18 U.S.C. §§ 1581-1588 (1948).
457. N.D. CENT. CODE § 12-17-06 (1960). *See Minutes "B", supra* note 2, May 11-12, 1972.

termined by the definition of the word "restrain" as used in the New Code.[458] Any removal unlawfully and without consent from a person's residence or business is criminal; all other movement must be a substantial movement or for a substantial period to be criminal.[459]

It is an affirmative defense to unlawful imprisonment under the New Code that the offender is the parent of the restrained person and that restrained person is under the age of 18 years.[460] This is a new defense to North Dakota as there are no defenses specifically enumerated in the Old Code.[461]

VIII. ROBBERY

The New Code's robbery provision, identical to the Proposed Federal Code,[462] is not at substantial variance with the Old Code, which is declaratory of the common law.[463] The larcenous element and the element of force remain the significant factors of the offense. Change, rather, is manifested in the scope of the crime and the constitution of force.[464]

Robbery, according to the New Code, occurs if "in the course of committing a theft . . . a [person] inflicts or attempts to inflict bodily injury upon another, or threatens or menaces another with imminent bodily injury."[465] Present are two elements: (1) the

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458. 'Restrain' means to restrict the movement of a person unlawfully and without consent, so as to interfere substantially with his liberty by removing him from his place of residence or business, by moving him a substantial distance from one place to another, or by confining him for a substantial period. Restraint is 'without consent' if it is accomplished by: (a) force, intimidation, or deception; or (b) any means, including acquiescence of the victim, if he is a child less than fourteen years old or an incompetent person, and if the parent, guardian, or person or institution responsible for the general supervision of his welfare has not acquiesced in the movement or confinement. N.D. CENT. CODE § 12.1-18-04(1) (effective July 1, 1975).

459. N.D. CENT. CODE § 12.1-18-04(1) (effective July 1, 1975).

460. N.D. CENT. CODE § 12.1-18-03(2) (effective July 1, 1975).

461. *See* N.D. CENT. CODE § 12-42-01 (1960).

462. Recently enacted or proposed robbery statutes containing similar substantive changes [to North Dakota] include:
N.Y. REV. PEN. LAW §§ 160.00-160.15 (McKinney 1967); PRELIM. REV. COLO. CRIM. LAWS §§ 40-9-1, 40-9-2 (1964); PROPOSED CONN. PEN. CODE §§ 19-20, 91-6 (Comm. Rep. 1967); PROPOSED IOWA CRIM. CODE REV. § 711.1 (1967 Draft); MICH. REV. CRIM. CODE §§ 3301-3310 (Final Draft 1967); OHIO CRIM. LAW REV. PROJ., Draft of Robbery Statute, Memo No. 38-1, Oct. 10, 1968; PROPOSED CRIM. CODE FOR PA. § 1501 (1967); MODEL PENAL CODE § 222.1 (P.O.D. 1962).
II WORKING PAPERS, *supra* note 60, at 903 n.1.

463. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 692-704 (1972); R. PERKINS, CRIMINAL LAW 279-285 (2d ed. 1969); W. CLARK & W. MARSHALL, LAW OF CRIMES § 12.09 (7th ed. 1967). N.D. CENT. CODE § 12-31-01 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." This is the common law definition of robbery. Under common law, "[r]obbery consists of all six elements of larceny—a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished by means of force or putting in fear." W. LAFAVE & A. SCOTT, CRIMINAL LAW 692 (1972).

464. II WORKING PAPERS, *supra* note 60, at 903-06.

465. N.D. CENT. CODE § 12.1-22-01 (effective July 1, 1975).

use of force (2) in the course of committing a theft. These elements are substantially the same as the common law elements of the offense,[466] and as such, retain the original thrust of the offense—to penalize the use of force rather than the successful taking of property.[467]

A. IN THE COURSE OF A THEFT

The most substantial change made by the New Code is the increased range of the crime afforded by the second element "in the course of committing a theft" phraseology.[468] This verbiage brings within the parameters of the offense the use or threat of force during escape; a factor resulting from defining the phrase as "an attempt to commit theft, whether or not the theft is successfully completed, or in immediate flight from the commission of, or an unsuccessful effort to commit, the theft."[469] Thus even if the offender uses no force to obtain the property, he would be guilty of robbery if he uses or threatens force in order to make good his escape.[470]

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466. *Minutes "B", supra* note 2, June 20-21, 1972 at 35 states that "[t]he definition of robbery is fairly simple, but does not work any radical changes from the definition of robbery in Section 12-31-01." *See* II WORKING PAPERS, *supra* note 60, at 903. The New Code, just as the "MODEL PENAL CODE § 221.1, defines robbery in terms of the use of force or fear in the course of committing a theft, without any stated requirement that the taking be from the person or presence of the victim." (W. LAFAVE & A. SCOTT, CRIMINAL LAW 696 n.26 (1972)). The impact of deleting a taking "from the person or presence of the victim" as a requirement is apparently one of coverage and not one of substance. Moreover robbery coverage is extended to all property under the control of the victim, regardless of the whereabouts of the property, that the victim could have retained possession of but for the force used to overcome his resistance.

467. *See Minutes "B", supra* note 2, June 20-21, 1972 at 35; FINAL REPORT, *supra* note 6, at 204; II WORKING PAPERS, *supra* note 60, at 903. The II WORKING PAPERS, *supra* note 60, at 903 state that "[t]he element of force, more than the crime's larcenous element, is still the significant fact, both in definition and in grading robbery." A reason for this is suggested in the comments to the MODEL PENAL CODE:

> The ordinary citizen feels himself able to guard against surreptitious larceny, embezzlement, or fraud, to some extent, by his own wits or caution. But he abhors robbers who menace him or his wife with violence against which he is helpless or . . . . In addition, the robber may be distinguished from the stealthy thief by the hardihood which enables him to carry out his purpose in the presence of his victim and over his opposition—obstacles which might deter ordinary sneak thieves.

MODEL PENAL CODE § 222.1 comment at 69 (Tent. Draft No. 11, 1960).

468. II WORKING PAPERS, *supra* note 60, at 905. The MODEL PENAL CODE also uses the "in the course of committing a theft terminology in defining robbery." MODEL PENAL CODE § 221.1 (1962).

469. N.D. CENT. CODE § 12.1-22-01 (effective July 1, 1975).

See Carter v. United States, 223 F.2d 332, 334 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 949 (1956), holding, in a case of felony-murder, that a robbery was still in progress though there was a slight interval between the time money was taken by force and a policeman was informed of the robbery, began his pursuit, and was shot by the robber:

> We have no doubt that the appellant had not secured to himself the fruits of the robbery, but was still feloniously carrying away the stolen money when [the policeman] began the chase. The delay was so slight that the bandit had not been able to reach a place of seeming scurity.

Our proposal extends this concept so as to establish that the crime of robbery can *begin* at some time during this point of escape as well as continue until the escape is successful.

II WORKING PAPERS, *supra* note 60, at 906 n.10.

470. II WORKING PAPERS, *supra* note 60, at 906.

This result is specifically contrary to the Old Code.[471] It is justified, though, because "the thief's willingness to use force against those who would restrain him in flight strongly suggests that he would have employed it to effect the theft had there been need for it."[472]

But the terminology "in the course of committing a theft" does not extend coverage to future acts of force committed at some indefinite period of time.[473] The words "immediate flight" in the definition of "in the course of committing a theft" refer to the period of "asportation"—the period of time between the point at which the robber has taken the property until the point at which "hot pursuit" is broken off, or the perpetrator has, [at least] temporarily, . . . secured his loot."[474] Therefore, a thief's use of force after "hot pursuit" has broken off could not be construed as robbery.

The "in the course of committing a theft" terminology also requires a theft of property as defined by the new consolidated theft provision.[475] A crucial requirement for such is the specific intent to permanently deprive an owner of his property[476]—the same requirement that exists for common law larceny.[477] Consequently, without intent to steal, robbery cannot occur. Therefore, no taking under a belief of right or taking for temporary use could constitute robbery, even if attendant circumstances satisfy the force requisite.[478]

When specific intent is required for a crime, as here, it is a fundamental principle of criminal law that the criminal act and criminal state of mind concur to form criminal conduct.[479] This concept of concurrence of act and intent is adhered to with one exception in both the New Code and at common law, each taking an ex-

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471. N.D. CENT. CODE § 12-31-02 (1960). Which provides:

> To constitute robbery, the force or fear must be employed either to obtain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery.

Id.

Because the Old Code is declaratory of the common law, hereinafter, reference to one will have equal applicability to the other unless otherwise stipulated.

472. MODEL PENAL CODE § 222.1, Comment 2 at 70 (Tent. Draft No. 11, 1960) cited at II WORKING PAPERS, *supra* note 60, at 906.

473. II WORKING PAPERS, *supra* note 60, at 906.

474. *Id.*

475. *See* N.D. CENT. CODE § 12.1-23-02 (effective July 1, 1975) and the section on theft in this hornbook article.

476. N.D. CENT. CODE § 12.1-23-02 (effective July 1, 1975). That section provides that "the intent to deprive the owner thereof" must be present. *Id.*

477. State v. Fordham, 13 N.D. 494, 101 N.W. 888 (1904); distinguished in State v. Thompson, 68 N.D. 98, 277 N.W. 1 (1938); W. CLARK & W. MARSHALL, LAW OF CRIMES § 12.10 (7th ed. 1967); W. LAFAVE & A. SCOTT, CRIMINAL LAW 693-94 (1972); R. PERKINS, CRIMINAL LAW, 280 (2d ed. 1969); Note, *Criminal Law—Forcible Taking of Money Under Bona Fide Claim of Debt Held Not Robbery*, 27 ROCKY MT. L. REV. 248-49 (1955). The specific intent required in robbery is the specific intent to steal.

478. W. CLARK & W. MARSHALL, LAW OF CRIMES 883-84 (7th ed. 1967); W. LAFAVE & A. SCOTT, CRIMINAL LAW, 693-95 (1972); Note, *Criminal Law—Forcible Taking of Money Under Bona Fide Claim of Debt Held Not Robbery*, 27 ROCKY MT. L. REV. 247 (1955).

479. W. CLARK & W. MARSHALL, LAW OF CRIMES § 5.02 (7th ed. 1967); J. HALL, PRINCIPLES OF CRIMINAL LAW, 185-90 (2d ed. 1960); W. LAFAVE & A. SCOTT, CRIMINAL LAW, 701 (1972).

ception in different circumstances. The New Code defines robbery as including use of force during flight,[480] a time when the act of theft and the intent to steal are not in concurrence. The common law holds, although few cases are present on the following circumstances, that when a thief is responsible for a victim's incapacity, even though incapacity precedes the intent to steal—thus no concurrence of intent and act—subsequent appropriation of the victim's property is robbery.[481] In short, this constitutes a "continuing" force concept, a concept totally inapplicable to New Code robbery.[482] This inapplicability results by definition, because by definition, the crime of robbery occurs the "moment a threat is made or force is used to obtain property." In brief, this is a statement of the concurrence concept. It is clear that an actor who incapacitates another by whatever means, whether intentional or not, with no intent to steal (or intimidates another without an intent to steal), and then takes advantage of his victim by taking the latter's property is not a robber.[483]

B. USE OF FORCE

The use of force element, as defined in the New Code is the "inflict[ion] or attempt to inflict bodily injury upon another or [the] threaten[ing] or menac[ing] of another with imminent bodily injury."[484] This proscribes "the use or threat of force only if someone is actually injured or threatened with injury or actual in-

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480. FINAL REPORT, *supra* note 6, at § 1721(3)(a).

481. W. CLARK & W. MARSHALL, LAW OF CRIMES, 884 (7th ed. 1967); W. LAFAVE & A. SCOTT, CRIMINAL LAW, 701-02, n.58 (1972); Note, *Robbery—Mental Element at Time of Force or Putting in Fear*, 49 DICK. L. REV. 119-22 (1945); Note, *Robbery—Corpse as Victim*, 8 WAYNE L. REV. 439-40 (1962). The theory for holding this circumstance robbery

> seem[s] to be predicted upon the idea that an unlawful force is set in motion at a given point in time and that that force continues so long as the victim remains incapacitated. If the thief takes advantage of this helplessness, which he has created by his unlawful act, by stealing from the victim, the courts will deem it robbery. Apparently, they feel that since the force "continues", the required coincidence of act and intent can take place whenever the thief decides to steal from the helpless victim. The courts, however, do not speak in such terms, and so perhaps their reasoning is yet untold.

Note, *Robbery—Corpse as Victim*, 8 WAYNE L. REV. 440 n.14 (1962).

482. The "continuing force" concept has been commented on in the following manner:

> The doctrine applied in these cases [where incapacitation precedes the intent to steal] in order to obtain a conviction for robbery is very analogous to the tort principle of trespass ab initio which has been expressly repudiated by the criminal law. "Two elements of act and intent must co-exist. So, if the defendant does an act in a non-criminal state of mind, a later arising criminal intent cannot be referred back to that act so as to make it criminal . . .; the doctrine of trespass ab initio has no place in the criminal law." "To constitute a crime, act and intent must concur."

Note, *Robbery—Mental Element at Time of Force or Putting in Fear*, 49 DICK L. REV. 122 (1945).

488. If the incapacitation is legally justifiable, (e.g., self-defense) only theft is chargeable; otherwise, theft plus whatever the circumstances warrant (e.g., assault, battery, manslaughter, etc.) is chargeable. The II WORKING PAPERS 906 n.9 illustrate this point by stating: "[I]t would not be robbery . . . if the culprit, motivated by a purpose other than that of theft, renders an opponent unconscious in an assault, and, belatedly deciding to take the victim's money, does so without further use of force. This would be theft added to the aggravated assault, but not robbery.

484. N.D. CENT. CODE § 12.1-22-01 (effective July 1, 1975).

jury is attempted in the course of stealing property."[485] Consequently, as in the present majority view,[486] pickpocketing and snatching cases are eliminated from robbery coverage.[487] In terms of policy, this is based upon the idea that when coercion of the victim is absent, these types of "forceful" takings present "no special dangers of violence." "The victim is not aware of the crime and no conduct is compelled from him," and their seriousness may be better measured in terms of theft through the amount of property taken.[488]

Force, as proscribed here and in present law, may be actual or constructive.[489] Actual force is the felonious taking of another's property by violence[490] ("inflict[ion] or attempt to inflict bodily injury").[491] This also includes an internal application of force through alcohol or drugs—analogous is the perpetration of battery by the administration of poison.[492]

Constructive force is the "threaten[ing] or menac[ing] [of] another with imminent bodily injury"[493] "for the purpose of overcoming resistence to the relinquishment of property."[494] It "includes nonverbal and implicit threats" as well as verbal threats of immediate bodily injury.[495] Non-verbal and implicit threats which can be sufficient to prove constructive force include:

> [a] [s]ilent display of a weapon, brandishing of a fist while taking the victim's property, surrounding the victim with hostile persons, . . . [or] a hostile tone of voice accompanied by a demand for property . . . .[496]

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485. II WORKING PAPERS, *supra* note 60, at 905.

486. W. CLARK & W. MARSHALL, LAW OF CRIMES, 889-90 (7th ed. 1967); W. LAFAVE & A. SCOTT, CRIMINAL LAW 696 (1972); R. PERKINS, CRIMINAL LAW, 282-83 (2d ed. 1969). W. CLARK & W. MARSHALL, *supra*, illustrate.

> [I]t is not robbery to obtain property from the person or in the presence of another by a mere trick, and without force, or to pick another's pocket without using more force than is necessary to lift the property from the pocket. Nor is it robbery to suddenly snatch property from another, when there is no resistance, and no more force, therefore, than is necessary for the mere act of snatching, or to strike property from another's hand and then snatch it up and run off with it.

487. FINAL REPORT, *supra* note 6, at 204; II WORKING PAPERS, *supra* note 60, at 905.

488. II WORKING PAPERS, *supra* note 60, at 905.

489. Thus the two modes of robbery: "(a) by violence to the person, or (b) by putting him in fear of some immediate injury." R. PERKINS, CRIMINAL LAW, 283 (2d ed. 1969).

490. W. CLARK & W. MARSHALL, LAW OF CRIMES §§ 12.13-12.14 (7th ed. 1967); W. LAFAVE & A. SCOTT, CRIMINAL LAW, 698 n.41 (1972). W. LAFAVE & A. SCOTT, *supra* 697, provides an example.

> [O]ne may commit robbery by striking his victim with fist or weapon and then, having thus rendered the victim unconscious or dazed or unwilling to risk another blow, taking his property away from him.

491. N.D. CENT. CODE § 12.1-22-01 (effective July 1, 1975).

492. W. LAFAVE & A. SCOTT, CRIMINAL LAW, 698 (1972); R. PERKINS, CRIMINAL LAW, 283 (2d ed. 1969); Note, *Robbery—Corpse as Victim*, 8 WAYNE L. REV. 439 (1962).

493. N.D. CENT. CODE § 12.1-22-01 (effective July 1, 1975).

494. II WORKING PAPERS, *supra* note 60, at 905.

495. *Id.*

496. *Id. The Committee on Judiciary "B", N. Dak. Legislative Council*, upon query . . . whether a factual situation involving a person who did not "threaten" his victim, but rather politely asked for property on the person of the victim was

This category includes the display of "unloaded guns, toy pistols, pen knifes and the like" when used to facilitate a robbery or escape.[497] In like manner, pretense of having a "dangerous weapon available for use in order to accomplish the robbery," or escape therefrom, is a form of menacing with immediate bodily injury.[498]

Moreover, the language defining constructive force contains the phrase, "imminent bodily injury," a phrase which adds an element of time and subject matter limitation to the definition. Hence the requirement that the victim be put in fear of immediate physical harm, rather than put in fear of some future harm.[499] Present North Dakota law defines robbery to include putting a person in fear of a future unlawful injury if the threat is directed towards "the person or property of the person robbed, or of any relative of his or member of his family."[500] The New Code eliminates both threats of future physical harm and threats of harm to property; the threat must be of immediate physical harm. The rationale for the change is that thefts by threat of infliction of harm at some later time or threat of harm to property (extortion) pose smaller risks of violence and are already covered by the consolidated theft provisions.[501]

Another departure from the Old Code and common law notion of constructive force in robbery, is the elimination of the classes of persons to which a threat must be directed before robbery can exist.[502] The New Code stipulates that any human being can be the subject of the threat. It holds that the moment a threat of imminent bodily injury is directed toward anyone in order to coerce the holder of property to relinquish that property, robbery has been committed.[503] Justifying this change is the Model Penal Code commentary, which states:

> robbery . . . when the victim was aware that he was in danger if he did not turn over the property . . . noted [that] this would be robbery, since the "threat" would either be considered as implied, or else would be covered by the word "menaces" . . . .

Minutes "B", note 2, June 20-21, 1972, at 39.

The federal drafters commented:

> *See*, e.g., United States v. Baker, 129 F. Supp. 684, 687 (S.D. Cal. 1955), holding that defendant's demand to a bank teller, when asking for the teller's cash, to "do as I say there won't be any trouble," constituted an attempt at robbery. R. PERKINS, CRIMINAL LAW 239 (1957), *quoting* 4 BLACKSTONE, COMMENTARIES 242, states: "[It] is enough that so much force or threatening by word or gesture be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent."

II WORKING PAPERS, *supra* note 60, at 905 n.7.

497. *Id.* at 908.

498. *Id.*

499. FINAL REPORT, *supra* note 6, at 204; II WORKING PAPERS, *supra* note 60, at 904.

500. N.D. CENT. CODE § 12-31-04 (1960).

501. II WORKING PAPERS, *supra* note 60, at 904. N.D. CENT. CODE § 12.1-23-02 subsection 2 (effective July 1, 1975) supersedes the old extortion provision. N.D. CENT. CODE § 12.1-23-05 subsection 1 (effective July 1, 1975) provides that theft accomplished by means of a "threat . . . to inflict serious bodily injury on the person threatened or on any person" is a class B felony. The same penalty is imposed for robbery by threat of serious bodily injury. N.D. CENT. CODE § 12.1-22-01 (effective July 1, 1975).

502. W. LAFAVE & A. SCOTT, CRIMINAL LAW 699 (1972).

503. II WORKING PAPERS, *supra* note 60, at 904-06.

> if the threat is in fact the effective means of compelling another to give up property, the character of the relationship between the victim and the person whom he chooses to protect is immaterial.[504]

Lastly, no requirement exists for both the presence of actual and constructive force. The elements of force, as in present law, are framed in the alternative.[505] Therefore, if there is an attempt or an infliction of bodily injury there need be no putting in fear through threat or intimidation.[506]

C. GRADING

Robbery penalties under the New Code are predicated upon the "dangers posed to the victim."[507] In so doing, the New Code recognizes the crime's great potentiality for violence and bodily injury to ordinary citizens; the crime's likelihood of sudden terrifying or violent encounters with which ordinary citizens are ill equipped to cope; the perpetrator's willingness to harm or threaten injury to others for pecuniary gain. The New Code further acknowledges that pecuniary loss is not the important or the significant consideration when violence has occurred.[508] This frames robbery as a crime against the person, committed in callous disregard of the right to remain safe and secure in person. It is no longer a crime against property.

Robbery is graded into three levels of culpability.[509] The first level of culpability is a Class A felony and requires the use of "deadly force". "Deadly force" is deemed present in three situations: first, "if the actor fires a firearm;" second, if he "explodes or hurls a destructive device;" and third, if he "directs the force

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504. MODEL PENAL CODE § 206.3, Comment at 74-75 (Tent. Draft No. 2, 1954). The federal drafters provide amplification.

> The important considerations should be whether the actor intends to coerce the owner into parting with his property by the threats he uses and whether under the circumstances the threat is or might be effective. There is no purpose served by calling it robbery if threats are directed against the wife or child of the owner, but something else if the same threats are directed toward the owner's fiance or a child of a complete stranger who happens to be present. (MICH. REV. CRIM. CODE § 3310, Comment at 258 (Final Draft 1967).)

II WORKING PAPERS, *supra* note 60, at 905 n.6.

505. That is, (inflicts or attempts to inflict bodily injury upon another) *or* (threatens or menaces another with imminent bodily injury).

506. W. CLARK & W. MARSHALL, LAW OF CRIMES, 894 (7th ed. 1967); W. LAFAVE & A. SCOTT, CRIMINAL LAW, 698 (1972).

507. II WORKING PAPERS, *supra* note 60, at 903.

508. *Id.* at 907.

509. In comparing the New Code grading system to the Old Code's, the Committee on Judiciary "B" states that the New Code system "is similar to the present gradation in Title 12, which breaks robbery into two degrees, punishing first-degree robbery by a maximum of life imprisonment, and second-degree robbery by a maximum of ten years. Present law also provides that if two or more persons commit the robbery, they shall be punishable by a maximum of life imprisonment . . . ." *Minutes "B", supra* note 2, June 20-21, 1972 at 35-36. The Old Code distinguishes first degree from second degree robbery by defining first degree robbery as "the use of force, or by putting the person robbed in fear of some immediate injury to his person" and second degree robbery as robbery "accomplished in any other manner," N.D. CENT. CODE § 12-31-07 (1960).

of any other dangerous weapon against another."[510] It is irrelevant whether or not actual injury occurs.[511] Any effort to seriously injure another displays a "willingness to carry out . . . [a] threat of death or serious injury," and thus warrants Class A felony status.[512]

The second level of culpability is classified as a Class B felony and occurs in four situations: first, "if the robber possesses or pretends to possess a firearm, destructive device or other dangerous weapon"[513] "the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury;"[514] second, if he "menaces another with serious bodily injury;" third, if he "inflicts bodily injury upon another;" and fourth, if he "is aided by an accomplice actually present."[515] The first situation (possession of a firearm, destructive device or other dangerous weapon) "manifests the dangerousness of the robber, even if the weapon is not displayed."[516] Pretense of having such an article to facilitate robbery or escape "constitute[s] a form of menacing another with serious injury."[517] Even "unloaded guns, toy pistols, pen knives and the like," although possession is not indicative of "an intent or readiness to inflict serious injury," when displayed "constitute a form of menacing with serious injury."[518] In the second situation, "menacing another with serious injury" "displays a willingness and readiness to hurt the victim."[519] Although this manifests less culpability than the use of actual force to overcome the victim's resistance "overt threat[s] of great injury . . . evidence the dangerous character of the culprit."[520] The dangerousness of the robber in the third situation (infliction of bodily injury) is self-evident. The final situation (robbery with accomplices) warrants a high penalty because "where two or more persons commit the crime it indicates greater planning and therefore a greater likelihood that the criminals are professionals. There is also more likelihood that violence may erupt, since each criminal reinforces the other."[521]

The third level of culpability has Class C felony status and arises "[w]hen no actual injury is inflicted, and no serious injury is menaced. . . ."[522]

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510. N.D. CENT. CODE § 12.1-22-01 subsection 2 (effective July 1, 1975).
511. II WORKING PAPERS, *supra* note 60, at 907.
512. *Id.*
513. N.D. CENT. CODE § 12.1-22-01 subsection 2 (effective July 1, 1975).
514. N.D. CENT. CODE § 12.1-22-01 subsection 3(b) (effective July 1, 1975).
515. N.D. CENT. CODE § 12.1-22-01 subsection 2 (effective July 1, 1975).
516. II WORKING PAPERS, *supra* note 60, at 908.
517. *Id.*
518. *Id.*
519. *Id.* at 907.
520. *Id.*
521. *Id.* at 908-09.
522. *Id.* at 909.

> Though this conduct is serious enough, it is unlikely that anyone committing it without attempting or threatening to seriously injure another, without a weapon and without accomplices, deserves the highest penalties.[523]

IX. ARSON & OTHER PROPERTY DESTRUCTION OFFENSES

The New Code consolidates under arson[524] those offenses in the Old Code which were classified under arson[525] and a portion of those classified under malicious offenses against property.[526] These New Code sections include arson,[527] endangering by fire or explosion,[528] failure to control or report a dangerous fire,[529] release of destructive forces,[530] criminal mischief[531] and tampering with or damaging a public service.[532]

A. ARSON

The offense of arson as contained in the New Code,[533] is broader than the arson offense under the Old Code. The Old Code is limited to destruction by burning,[534] whereas, the New Code includes both destruction caused by fire and also by explosion.

While human endangerment is the principal concern of the arson section of the New Code, it makes no explicit distinction in the offense based on human presence in the danger zone. "That policy is based on the view that the means employed usually pose dangers of conflagration, total destruction or irreparable damage, human endangerment due to firefighting efforts, or significant pecuniary loss, human inconvenience, or suffering."[535]

The New Code section on arson does not extend to the burning of the actor's own property, which is arson under the Old Code.[536] The drafter's rationale for not including the burning of one's own property as arson is that "[s]ince most destruction of one's own property, if done with criminal intent, is done to perpetrate an insurance fraud;"[537] they believe it would be better dealt with under the "theft by fraud" provisions of the New Code.[538] If the actor had

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523. *Id.*
524. N.D. CENT. CODE ch. 12.1-21 (effective July 1, 1975).
525. N.D. CENT. CODE ch. 12-34 (1960).
526. N.D. CENT. CODE ch. 12-41 (1960).
527. N.D. CENT. CODE § 12.1-21-01 (effective July 1, 1975).
528. N.D. CENT. CODE § 12.1-21-02 (effective July 1, 1975). This section applies to endangering of persons as well as property in excess of $5,000.
529. N.D. CENT. CODE § 12.1-21-03 (effective July 1, 1975).
530. N.D. CENT. CODE § 12.1-21-04 (effective July 1, 1975).
531. N.D. CENT. CODE § 12.1-21-05 (effective July 1, 1975).
532. N.D. CENT. CODE § 12.1-21-06 (effective July 1, 1975).
533. *See generally* N.D. CENT. CODE ch. 12.1-21 (effective July 1, 1975).
534. *Minutes "B", supra* note 2, June 20-21, 1972 at 5.
535. FINAL REPORT, *supra* note 6, at 194. *See* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT 186 (1970).
536. N.D. CENT. CODE § 12-34-01 (1960).
537. REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL, FORTY-THIRD LEGISLATIVE ASSEMBLY 88 (1973). *See Minutes "B", supra* note 2, June 20-21, 1972 at 5.
538. *Id.*

the requisite criminal intent, his actions could also be prosecuted under the attempted murder or murder provisions. If prosecution under these two provisions was not possible or proved too difficult, the actor could be prosecuted under the New Code section on endangering by fire or explosion.[539]

Arson in the New Code is a class B felony for intent to destroy a building.[540] The Old Code makes a distinction in sentencing depending on whether the offense pertains to a dwelling house or adjoining building or whether it pertains to another type of building. Therefore, for arson of a dwelling house or adjoining building the New Code provides for a ten year reduction in sentence from the Old Code. The penalty for the burning of all other buildings remains at ten years.[541]

Arson has not been graded in terms of the value of the property destroyed because the offense would then be measured by the results of the offender's act, rather than his actual culpability or intent. The Federal drafters felt that anyone who used a means which could be so disastrous and indiscriminate with human life should be faced with a stiff penalty, such as a class B felony, and rely on judicial discretion for the sentencing of minimal acts.[542]

The arson section in the New Code requires the actor to have intent to destroy, whereas, endangering by fire or explosion requires only that the actor have intent to start the fire or explosion.[543] The Old Code merely requires the actor to have intent to burn in both situations.[544] Thus the New Code raises the standard of proof required for a conviction of arson.

B. ENDANGERING BY FIRE OR EXPLOSION

Endangering by fire or explosion is a section of the New Code which is not contained in the Old Code. The New Code classifies the offense as a class B felony if the actor places another person in danger of death under circumstances manifesting extreme indifference to human life. In all other cases it is a class C felony.[545]

The New Code section on endangering by fire or explosion prohibits intentionally starting or maintaining a fire or causing an explosion and thereby recklessly causing damage to property of another

539. N.D. CENT. CODE § 12.1-21-02 (effective July 1, 1975). This section "covers intentional settings of fires or explosions to one's own property as well as another's, because recklessness as to the consequences is the key factor rather than, as in the arson provision, intent to destroy." II WORKING PAPERS, *supra* note 60, at 880.

540. N.D. CENT. CODE § 12.1-21-01 (effective July 1, 1975).

541. N.D. CENT. CODE §§ 12-34-01 and 12-34-02 (1960). The maximum penalty for burning a dwelling house or adjoining building under the Old Code is 20 years with a maximum penalty of 10 years for burning all other types of buildings.

542. II WORKING PAPERS, *supra* note 60, at 879.

543. *Minutes "B"*, *supra* note 2, June 20-21, 1972, at 6. *See* N.D. CENT. CODE § 12.1-21-01 (effective July 1, 1975).

544. N.D. CENT. CODE § 12-34-01 (1960).

545. N.D. CENT. CODE § 12.1-21-02 (effective July 1, 1975).

in excess of $5,000.[546] The $5,000 limitation, which is patterned after the Proposed Federal Code, seems to be set rather high, especially in light of the Old Code which provides that it is an offense when the property has a value over $25.[547]

Endangering by fire or explosion in the New Code includes not only those offenses in which a building or structure has been burned, but also those entirely independent of the burning of a building since the building is not the essence of the offense, but rather it is the endangering of human life which this section is intended to prohibit.[548]

C. FAILURE TO CONTROL OR REPORT A FIRE

The New Code makes it an offense to fail to control or report a fire if the offender started it or it was started with his assent.[549] Under such a section a passerby or even a person charged with protecting the property would have no legal obligation to report or control the fire.[550] This is not new law to North Dakota, however, because it consolidates two sections of the Old Code and clarifies the responsibilities of the offender.[551]

D. RELEASE OF DESTRUCTIVE FORCES

The catastrophe provisions of the New Code are new law for North Dakota.[552] Since catastrophe is defined as an event which causes serious bodily injury to 10 or more persons or damage to 10 or more separate buildings or structures, or property loss in excess of $500,000, there is some doubt whether these limits, which are modeled after the Proposed Federal Code,[553] might not be excessive for a sparsely populated and rural state such as North Dakota. The question has also been posed as to whether such a provision is necessary at all in North Dakota since these offenses could be prosecuted individually under other provisions of the New Code.[554] How-

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546. *Id.*

547. N.D. CENT. CODE § 12-34-03 (1960). *See Minutes "B", supra* note 2, June 20-21, 1972, at 6. "The $5,000 limitation poses a policy question for the Committee, because the present offense of arson of personal property occurs when that property exceeds $25 in value . . . ." " . . . The Committee may wish to reduce the $5,000 limitation . . . ."
Id.

548. II WORKING PAPERS, *supra* note 60, at 880.

549. N.D. CENT. CODE § 12.1-21-03 (effective July 1, 1975).

550. "Consideration was given to extending liability under this provision to persons responsible for the safekeeping of the property as well as to persons setting dangerous fires. This was rejected on the ground that conviction of crime is an unnecessary and harsh sanction for default in employment responsibilities." FINAL REPORT, *supra* note 6, at 196.

551. N.D. CENT. CODE §§ 18-08-01 and 18-08-03 (1960). These sections when read together make it a misdemeanor for a person to permit a lawfully set fire to spread. For a description of a lawfully set fire, see N.D. CENT. CODE § 18-08-02 (1960).

552. N.D. CENT. CODE § 12.1-21-04 (effective July 1, 1975).

553. FINAL REPORT, *supra* note 6, § 1704.

554. These offenses could be prosecuted under the arson provisions of the New Code. N.D. CENT. CODE § 12.1-21-01 (effective July 1, 1975). *See also Minutes "B", supra* note 2, June 20-21, 1972 at 6.

ever, it would seem that there are other valid reasons for this statute, for as the federal drafters stated: "This . . . offense, . . ., is proposed to deal with widespread destruction or injury caused not only by fire or explosion but also by other dangerous and difficult-to-confine forces and substances."[555]

Intentionally causing a catastrophe is a class B felony and if anyone were to be killed during the catastrophe the actor could be prosecuted for murder.[556]

E. CRIMINAL MISCHIEF

The New Code section on criminal mischief would replace several sections of the Old Code which are contained in the chapter on malicious offenses against property.[557] Unlike arson, the emphasis of the criminal mischief provisions is not on the method of destruction, but rather on the resultant damage regardless of the means employed.[558] In the New Code the offense is graded in terms of dollar amount of damage; it being a class C felony to intentionally cause loss in excess of $5,000, while it is a class A misdemeanor to intentionally cause loss in excess of $500 and a class B misdemeanor to cause loss up to $500.[559] The Old Code provisions allow for punishment up to 3 years for destroying works of art or literature, while providing a one year penalty for destroying real or personal property of another.[560] The Old Code also provides for civil penalties of treble damages for destroying property.[561] The New Code does not mention treble damages, however, it was the North Dakota drafters' intention not to preclude civil liability.[562]

F. INJURY TO PUBLIC SERVICE FACILITIES

The New Code section on tampering with or damaging a public service[563] consolidates various sections of the Old Code which make it a felony to break or obstruct a water or gas pipe,[564] or destroy railroad property[565] and a misdemeanor to destroy telegraph or telephone lines,[566] and also includes additional types of public service facilities not included in the Old Code. The New Code delineates

555. FINAL REPORT, *supra* note 6, at 197.
556. N.D. CENT. CODE § 12.1-16-01 (effective July 1, 1975).
557. N.D. CENT. CODE §§ 12-41-01 to 12-41-04 and §§ 12-41-06 to 12-41-13 (1960).
558. II WORKING PAPERS, *supra* note 60, at 883. This is a general property damage statute and is hinged on the resultant damage by any means.
559. N.D. CENT. CODE § 12.1-21-05 (effective July 1, 1975). Note, however, that method and culpability also affect grading; it is a class C felony if tangible property of another is damaged by an explosive or destructive device and it is a class A misdemeanor if the actor *recklessly* causes loss in excess of $5,000.
Id.
560. N.D. CENT. CODE § 12-41-03 (1960).
561. N.D. CENT. CODE § 12-41-10 (1960).
562. N.D. CENT. CODE § 12.1-21-05 (effective July 1, 1975).
563. N.D. CENT. CODE § 12.1-21-06 (effective July 1, 1975).
564. N.D. CENT. CODE § 12-41-05 (1960).
565. N.D. CENT. CODE § 49-17-03 (1960).
566. N.D. CENT. CODE § 8-10-08 (1959).

penalties from a class C felony for intentional destruction to a class B misdemeanor for acts done with culpability less than knowingly or recklessly.[567]

Consent is a defense which is new to North Dakota[568] as it is not specifically provided for in the Old Code. Rather, it is implied in the many sections[569] which state "willfully and maliciously." The thrust of the New Code would be to put the burden of consent on the defendant, whereas under the Old Code, the prosecution has the burden of proving "willfully and maliciously" which would impliedly negate consent.[570]

The definition of "vital public facility" in the New Code includes six specific types of installations.[571] This somewhat limits the definition and it has been suggested that it could be considerably broadened if it were to include a phrase such as "including but not limited to" or "and other similar installations."[572] If it were so broadened it would not only include those six specific installations but also those installations which are of similar function but not specifically mentioned in the statute.

The effect of the chapter on arson in the New Code is to consolidate four chapters of the Old Code into one in the New Code. The New Code, patterned after the Proposed Federal Code, is much broader and easier to work with than the Old Code.

X. BURGLARY[573]

A. ELEMENTS

Burglary under the Old Code, a statutory derivative of the com-

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567. N.D. CENT. CODE § 12.1-21-06(2) (effective July 1, 1975).
The offense is a class C felony if the actor engages in the conduct intentionally, and a class A misdemeanor if the actor engages in the conduct knowingly or recklessly. Otherwise it is a class B misdemeanor.

Id.

568. N.D. CENT. CODE § 12.1-21-07 (effective July 1, 1975).

569. N.D. CENT. CODE §§ 12-34-01, -02, -05, -06 (1960).

570. "This section makes consent an issue which the defendant must introduce into the case rather than one which the prosecution must negate in every case in the first instance." FINAL REPORT, *supra* note 6, at 199 (1971).

571. These include "a facility maintained for use as a bridge (whether over land or water), dam, tunnel, wharf, communications installation, or power station." N.D. CENT. CODE § 12.1-21-08(3) (effective July 1, 1975).

572. *Minutes "B"*, *supra* note 2, June 20-21, 1972 at 8 where Professor Lockney, Assistant Professor of Law at the Unversity of North Dakota and a citizen member of the Committee on Judiciary "B" states, " . . . the definition could be amended so that it reads 'vital public facility' includes, but is not limited to." Judge Pearce noted that he did not feel that the definition of vital public facility is needed at all, but if it is to be retained, Professor Lockney's suggestion would be an improvement. *Id.* There is a question as to whether such a broadening of the statute would have constitutional implications, however, Professor Lockney's suggestion was that "vital public facilities" be named in the statute with examples of unnamed "vital public facilities" also given.

573. "Although other legal systems impose minor penalties for housebreaking and violation of the dwelling, there is nothing resembling Anglo-American burglary in other legal codes. . . . In foreign codes a 'burglar' is only guilty if he completes what he set out to do." Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 424, 427 (1951); Also Note, *Reformation of Burglary*, 11 WM. & MARY L. REV. 211 (1969).

mon law,[574] requires the fulfillment of five elements.[575] There must be (1) a breaking and (2) entering (3) of any structure (4) in which property is kept (5) with the intent to steal or commit a felony.[576] These elements are aimed primarily at the protection of property.

The New Code, identical to the Proposed Federal Code,[577] comprehensively deals with the willful entry or surreptitious failure to leave buildings when there is a criminal intent. The offense is, also, divided into two grades, differentiated by the presence or absence of agravating circumstances.

There are five requisite elements under The New Code. An actor must (1) willfully enter or surreptitiously remain (2) in a building or occupied structure, or separately secured or occupied portion thereof (3) at a time when the premises are not open to the public (4) and the actor is without license, invitation or privilege (5) and intends to commit a crime therein.[578]

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574. Common law burglary is defined as the breaking and entering of the dwelling house of another in the nightime with the intent to commit a felony. W. CLARK & W. MARSHALL, LAW OF CRIMES 983 (7th ed. 1967); W. LAFAVE & A. SCOTT, CRIMINAL LAW 708 (1972); R. PERKINS, PERKINS ON CRIMINAL LAW 192 (1969).

575. N.D. CENT. CODE § 12-35-02 (1960). A burglar under the Old Code is "any person who:

1. Breaks into the dwelling house of another by forcibly bursting or breaking the wall or an outer door, window, or shutter of a window of the house, or the lock or bolt of the door, or the fastening of the window or shutter;
2. Breaks into any dwelling house of another in any manner with the intent to commit a crime;
3. Breaks into the dwelling house of another being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present;
4. Breaks into the dwelling house of another by unlocking an outer door by means of false keys, or by picking the lock;
5. Enters the dwelling house of another in the nighttime through an open door, window, or other aperture not made by him and breaks any inner door, window, partition or other part of the house with intent to commit a crime;
6. Being lawfully in a dwelling house, in the nighttime breaks an inner door of the dwelling house with intent to commit a crime;
7. In the nighttime breaks the outer door, window, shutter or other part of the dwelling house of another to get out of the same after having committed a crime in such dwelling house;
8. Breaks into and enters at any time a building within the curtilage of a dwelling house, but not forming any part thereof; or
9. Breaks into and enters at any time any building or any part of a building, booth, tent, railroad car, motor vehicle or trailer, vessel, or other structure or erection in which any property is kept, with intent to steal or to commit a felony,

is guilty of burglary and shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years."

Id.

576. This differs from the common law in that no time limitation is present (in the nighttime).

577. Proposed State revisions of burglary and criminal trespass laws, similar to those here proposed, include: N.Y. REV. PEN. LAW §§ 140.00-140.35 (McKinney 1967); PRELIM. REV. OF COLORADO CRIM. LAWS §§ 40-5-1 to 40-5-3, 40-6-4 (1964); PROPOSED CONN. PEN. CODE §§ 110-120 (1969); PROPOSED DEL. CRIM. CODE §§ 510-518 (1967); MICH. REV. CRIM. CODE §§ 2601-2615 (Final Draft 1967); PROPOSED CRIM. CODE FOR PA. §§ 1401-1403 (1967); DRAFT OF TEXAS PENAL CODE REVISIONS § 221.1 (1967). The proposals derive from MODEL PENAL CODE art. 221 (P.O.D. 1967).

II WORKING PAPERS, *supra* note 60, at 892.

578. N.D. CENT. CODE § 12.1-22-02 (effective July 1, 1975).

A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the

The first element abolishes the breaking concept present in the Old Code.[579] An "entry, by whatever means," is sufficient.[580] Gaining admittance through an open window or door or through an improperly gained key as well as insertion of a hand or instrument into a building will suffice.[581] The first element will also be satisfied by a "surreptitious remaining." This occurs when an actor enters a building lawfully, but remains through stealth or fraud.[582]

The second element limits the types of premises which are the subject of burglary. While the Old Code includes a dwelling, "booth, tent, railroad car, motor vehicle or trailer, vessel" or structure in which property is kept,[583] the New Code limits the offense to buildings and occupied structures. The term building is used to denote a permanent structure still in use while an occupied structure is a structure used by people.[584] However, they must be "types of premises in which individuals seek most to be secure in person and property."[585] This means abandoned property or dilapidated structures which clearly have no further usefulness can not be subject to burglary coverage.[586] Specifically not subject to burglary are storage structures for goods in the stream of commerce.[587] "Railroad cars,

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actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.

Id.

579. II WORKING PAPERS, *supra* note 60, at 892; *Minutes "B", supra* note 2, June 20-21, 1972 at 24, 26.

580. II WORKING PAPERS, *supra* note 60, at 894.

581. *Id.*

582. The word "surreptitious" or "surreptitiously" has been defined in the following manners: e.g., "[A]n act done fraudulently or without proper authority." Taylor v. S & M Lamp Co., 190 Cal. App. 2d 700, 12 Cal. Rptr. 323, 326 (1st Dist. 1961); "[D]one . . . acquired . . . etc., by stealth, or without proper authority . . . clandestine; . . . . (2) Acting, or doing something, clandestinely; stealthy." Application of Joiner, 180 Cal. App. 2d 250, 4 Cal. Rptr. 667, 670 (2d Dist. 1960); "[F]raudulently obtained. Falsely crept in. Obtained by falsehood, fraud or stealth, by suppression or concealment of facts." Eastman v. New York, 134 F. 844, 852 (2d Cir. 1904).

583. N.D. CENT. CODE § 12-35-02 (1960).

584. II WORKING PAPERS, *supra* note 60, at 895; N.D. CENT. CODE § 12.1-22-06 (effective July 1, 1975):

> 1. "Occupied structure" means a structure or vehicle:
>
> (a) Where any person lives or carries on business or other calling; or
>
> (b) Which is used for overnight accommodation of persons. Any such structure or vehicle is deemed to be "occupied" regardless of whether a person is actually present.

585. II WORKING PAPERS, *supra* note 60, at 893.

See, e.g., Henderson v. United States, 172 F.2d 289 (D.C. Cir. 1949), holding that entry of an enclosed porch constitutes entry of the victim's apartment.

II WORKING PAPERS, *supra* note 60, at 893 n.5. LaFave and Scott's *Criminal Law* hornbook provides another example:

> The [Model Penal] Code provision covers entry of a "building or occupied structure" which has not been abandoned, thus eliminating the prospect of a burglary conviction for such acts as stealing from an unoccupied phone booth, car or cave.

W. LAFAVE & A. SCOTT, CRIMINAL LAW 716-17 (1972).

586. II WORKING PAPERS, *supra* note 60, at 895.

In James v. United States, 238 F.2d 681 (9th Cir. 1956), a burglary conviction was reversed on a holding that an unoccupied house, in which the owner did not live and did not intend to live, was not a dwelling house.

II WORKING PAPERS, *supra* note 60, at 895 n.9.

587. II WORKING PAPERS, *supra* note 60, at 894. The New Code defines storage structure as "any structure, truck, railway car, or aircraft which is used primarily for the storage or transportation of property." N.D. CENT. CODE § 12.1-22-06 (effective July 1, 1975).

vessels, airplanes, trucks" and other vehicles carrying freight are examples.[588] "Passenger cars, enclosures such as fenced yards" and "storage structures are [also] excluded from burglary coverage. . . ."[589]

Thirdly, premises open to the public are beyond burglary consideration during the hours in which they are open to the public. This includes department stores, supermarkets, shopping centers and banks.[590] The lawful entrance into such places is not made unlawful by a criminal mind.[591] There can be accountability only for those acts thereafter performed on the premises.[592] Thus, a shoplifter could not be guilty of burglary.

The fourth element excludes licensed, invited or privileged entrances from consideration. As above, criminal intent is inapplicable when entrance is properly authorized. Consequently, guests, delivery personel, repairmen or any person properly authorized to be on the premises could never be guilty of burglary.

Finally, there is the intent requirement. Under the Old Code an intent to steal or commit a felony is required.[593] Under the New Code, the intent to commit any crime is sufficient,[594] including the intent to commit a misdemeanor.[595] In effect, a blanket provision covering unlawful intrusions of unclear purpose is formed.[596]

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588. II WORKING PAPERS, *supra* note 60, at 893.

589. *Id.* at 894.

590. *See* MODEL PENAL CODE § 221.1 Tent. Draft No. 11 at 58 (1960). It states in part:
A person is "privileged" to enter, . . . if by license, custom or otherwise, the general public is invited or permitted to enter; and it is not intended that a proprietor of a store might enlarge the applicability of the burglary law by posting notices that shoplifters are not welcome.
Id.

591. II WORKING PAPERS, *supra* note 60, at 894 n.7.
See Wyche v. Louisiana, 394 F.2d 927 (5th Cir. 1967), concerning a State cnarge of aggravated burglary in that defendant entered public premises with intent to assault another, and did so assault him. The Fifth Circuit held that the entry could not be deemed unlawful, because it was authorized under the Federal law, *i.e.*, the Civil Rights Act. At most, therefore, defendant committed a simple assault, and could not be held for burglary. *See also* Mills v. United States, 228 F.2d 645 (D.C. Cir. 1955), holding that if defendant entered an office and took property from it believing he had the owner's permission to do so, he could not be guilty of "housebreaking." *But cf.* Alford v. United States, 113 F.2d 885, 887 (10th Cir. 1940), holding that a scheme to take funds from a bank customer's safety deposit box, by false representations, "is an offense in the nature of burglary, entry of a bank with intent to commit a felony or larceny therein, except that forcible entry is not made an element."
Id.

592. II WORKING PAPERS, *supra* note 60, at 894.

593. N.D. CENT. CODE § 12-35-02 (1960).

594. II WORKING PAPERS, *supra* note 60, at 893. *Minutes "B", supra* note 2, June 20-21, 1972 at 24.

595. II WORKING PAPERS, *supra* note 60, at 893. "[T]he crime intended to be committed does not include unlawful entry or presence crimes, such as criminal trespass or stowing away." FINAL REPORT, *supra* note 6, at 200.

596. II WORKING PAPERS, *supra* note 60, at 892-93.
See e.g., Hiatt v. United States, 384 F.2d 675 (8th Cir. 1967), *cert. denied*, 390 U.S. 998 (1968), holding that evidence of the defendant's breaking into a sealed railroad car, his effort to flee on warning from an accomplice, his false story, and his possession of pliers and a flashlight were enough to prove his entry with intent to steal; Washington v. United States, 263 F.2d 742, 745 (D.C. Cir. 1959), *cert. denied*, 359 U.S. 1002 (1959), holding that the fact

At common law and under the Old Code, there could be no burglary if the intent was formed after completion of the breaking and entry. The intent had to exist at the time of the breaking and entry—whether formulated before or at the breaking.[597] In similar manner, the New Code requires that entry be made with the requisite intent.[598] A criminal intent formed after entry would not constitute burglary.

B. GRADING

The theoretical basis for burglary under common law was the protection of the right of habitation.[599] Statutory provisions today, like the Old Code, are not based upon the protection of the habitation.[600] Their basis is founded upon the protection of property and the prevention of personal injuries.[601] Also inherent is the underlying desire to apprehend offenders before fulfillment of their criminal intent.[602]

Ostensibly, "protection of the sanctity of persons and property" provides the theoretical basis for the New Code provision.[603] The primary aim is to prevent confrontations leading to violence.[604] Justification for this burglary provision, then, would be predicated upon the significantly greater danger of an incidental crime occurring

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defendant accosted a girl in the house he illegally entered did not preclude a jury finding that his original intent was to steal: "[T]he unexplained presence of appellant in the darkened house near midnight, access having been by force and stealth through a window, is ample without more to allow an inference that he was there to steal." Both of these cases might more easily have been resolved if the required proof of intent was not limited to proof that the intended crime was, specifically, larceny. Further, reliance on a burglary provision, rather than the law of attempt, makes it easier to deal with concepts such as impossibility of successful commission of the crime. *Cf.* Pinkney v. United States, 380 F.2d 882, 885 (5th Cir. 1967); "It was not necessary to prove the contents of the safe, nor would it make any difference if the safe had been proved to be empty. The elements of the offense charged are the entry and the holding of an intent to commit larceny at the time of entering. Success or failure of the venture is immaterial."

II WORKING PAPERS, *supra* note 60, at 893 n.3.

597. Note, *Crimes Against The Habitation*, 21 BROOKLYN L. REV. 50, 57-58 (1955); Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1016 (1951).

598. N.D. CENT. CODE § 12.1-22-02 (effective July 1, 1975).

599. Note, *Burglary: Punishment Without Justification*, 1970 U. ILL. L.F. 391, 394 (1970); Note, *Reformation of Burglary*, 11 WM. & MARY L. REV. 211 (1969). Note, *Statutory Burglary—The Magic Of Four Walls And A Roof*, 100 U. PA. L. REV. 411, 433 (1951) illustrates the concept of the right of habitation as follows:

> The theory behind common law burglary was not so much to protect the dwelling as a building but to protect its security. This security was far more than the safety of the occupant behind locked doors; it represented the indefinable idea, existent in all climes at all times, that the home, as contrasted to the house, was inviolable; that whatever terrors raged in the outer world, every individual exercised his greatest freedom in that place where he conceived and built his family, a place to which he imparted part of his own soul.

Accord, 43 A.L.R.2d 831, 834 (1955).

600. Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 431 (1951); Note, *Reformation of Burglary*, 11 WM. & MARY L. REV. 211, 213 (1969).

601. Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 428-32 (1951); Note, *Reformation of Burglary*, 11 WM. & MARY L. REV. 211, 213 (1969).

602. Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 438 (1951).

603. II WORKING PAPERS, *supra* note 60, at 894.

604. *See* II WORKING PAPERS, *supra* note 60, at 895-96.

against the person under circumstances of confrontation, than the commission of the same crime under other circumstances. Sanctity and security of the person and not of property is the main focal point. The theft provision protects the right of property. With this in mind, it is submitted that the New Code ought to apply only to those situations in which a grave danger of an incidental crime against the person is present.[605]

With the major danger of burglary posed as "[t]he risk of a violent encounter with an intruder who is bent on criminality upon enclosed premises," the New Code grades the crime "in accordance with the degree of accentuation of that possibility."[606] Consequently, two grades defined through aggravating circumstances serve to determine the potential penalty. First, aggravation occurs if "the offense is committed at night and is knowingly perpetrated in the dwelling of another."[607] Secondly, it occurs if "in effecting entry or while in the premises or in immediate flight therefrom, the actor:

(1) "inflicts or attempts to inflict bodily injury or physical restraint on another;"

(2) "menaces another with imminent serious bodily injury;"

(3) "is armed with a firearm or destructive device;" or,

(4) possesses a weapon "which under the circumstances indicates an intent or readiness to inflict serious bodily injury."[608]

If the burglary involves one of these, the offense is a class B felony. All other situations reside within the second grade and merit class C felony status.[609]

These aggravation factors present a deterrent to a violent crime. By instituting higher penalties for harmful or threatening conduct, it "may induce the culprit to take measures to avoid dangerous confrontations with other persons."[610] Supportive is the likelihood for there to be planning and preparation prior to commission of the offense.[611]

Although the New Code specifies no other considerations in determining penalty imposition, judicial sentencing discretion is of paramount importance. The Interim Committee on Judiciary "B" expressly recognized this. "The Chairman noted that in most instances the fact that penalty classifications are somewhat high will be offset by the proper exercise of judicial sentencing discretion."[612]

605. *See* Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1025-26 (1951).
606. II WORKING PAPERS, *supra* note 60, at 895-96.
607. N.D. CENT. CODE § 12.1-22-02 (effective July 1, 1975).
608. *Id.*
609. *Id.*
610. II WORKING PAPERS, *supra* note 60, at 896.
611. *Id.*
612. *Minutes "B"*, *supra* note 2, June 20-21, 1972 at 26.

This sentencing discretion ought to be applied to levy lighter penalties when the offender has perpetrated a crime in a manner not likely to lead to crime against the person. First in this category is the burglary of an unoccupied building. If the building is unoccupied, a substantially smaller danger of personal injury to others is present.[613] A second grouping is entry effected by insertion of a body part or instrument. Entry gained thereby threatens less personal danger because of the burglar's greater opportunity to flee and thus smaller incentive to resist.[614]

The third is the absence of confederates. The threat to society and the safety of the individual is diminished when there are no confederates because moral support and courage reinforcement as well as combination of effort are absent.[615] Such distinctions serve to steer burglary away from violent confrontations. This is consistent with the ends of the new burglary code.

In the final analysis, the New Code "treats burglary as a most serious offense in itself."[616] Although this analysis may result, and has resulted in the past, in disproportionate cumulative sentences,[617] proper application of the provisions on sentencing and multiple prosecutions should avoid this undesirable and unjust result.[618]

XI. THEFT

A. CONSOLIDATION OF THEFT OFFENSES

The key feature of this section of the New Code,[619] drawn substantially from the Proposed Federal Code,[620] is the inclusion of sev-

613. Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1029 (1951). This Note also states:

> Reason indicates . . . that the presence of occupants can often be determined. And differentiation on the basis of occupancy would tend to channel burglaries toward unoccupied dwellings.

Id., at 1030.

614. *Id.*, at 1030.

615. Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 529 (1951).

616. II WORKING PAPERS, *supra* note 60, at 896.

617. In II WORKING PAPERS, *supra* note 60, at 895 n.11 it is stated that:

> In United States v. Carpenter, 143 F.2d 47, 48 (7th Cir. 1944), the defendant received separate terms for entering an interstate freight car, larceny, receiving and conspiracy. Despite the apparent harshness of the sentence, the court held:
>
> > Congress defined and penalized every conceivable form of act, every gradation of the process of burglarizing interstate commerce, when it enumerated these many acts. It intended to make criminal any act therein recited. If two of the acts in any category were disclosed, two crimes were committed.
>
> Similarly, breaking into a Post Office with intent to commit larceny has been held to be a separate crime from larceny itself. Morgan v. Devine, 237 U.S. 632 (1915). Under the bank robbery statute (18 U.S.C. § 2113), however, it has been held that entry of a bank with intent to commit robbery or larceny is a lessor included crime to completion of a robbery or larceny in the bank. Prince v. United States, 352 U.S. 322 (1957).

618. II WORKING PAPERS, *supra* note 60, at 896.

619. N.D. CENT. CODE § 12.1-23-01 (effective July 1, 1975).

620. FINAL REPORT, *supra* note 6, § 1731-41.

eral common law and Old Code offenses[621] under a general heading of theft. The major change effected by the consolidation is expressed in the principle "that the theory underlying the proscription is irrelevant so long as the defendant has been adequately forewarned as to the proof with which he must contend."[622]

Theft itself is divided into three categories: Theft of Property;[623] Theft of Services;[624] and Theft of Property Lost, Mislaid, or Delivered by Mistake.[625]

In addition to the theft sections, the New Code delineates three separate crimes that involve less serious, but nonetheless improper, dealing with the property of another. These related offenses include Unauthorized Use of a Vehicle,[626] Misapplication of Entrusted Property,[627] and Defrauding Secured Creditors.[628] Theft is "characterized by an intent to deprive the owner of his property permanently or substantially so,"[629] whereas the less serious offenses involve "borrowing of property under circumstances hazarding loss or damage."[630]

The consolidation provision of the New Code has several advantages over the Old Code. First, the "fair apprisal" nature of the criminal charge should "accomplish the law enforcement objectives of excluding the technical defense based on miscategorization and increasing the efficiency of the criminal process consistent with fairness."[631] Furthermore, the provisions are designed to "cover the wide variety of means by which the inventiveness of the criminal mind can operate."[632]

The accused also benefits from the changes made in the classification of theft. Most notably, he possesses a clear defense of double jeopardy under the New Code should he be charged with theft and acquitted; he cannot be charged twice on two theories of

621. The offenses covered by the theft section of the New Code "include the separate offenses heretofore known as larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, misappropriation of public funds, swindling, and the like." N.D. CENT. CODE § 12.1-23-01(1) (effective July 1, 1975).

622. FINAL REPORT, *supra* note 6, at 205. "The defendant may be found guilty of theft under such an indictment, information, or complaint if his conduct falls under sections 12.1-23-02 to 12.1-23-04, so long as the conduct proved is sufficiently related to the conduct charged that the accused is not unfairly surprised by the case he must meet." N.D. CENT. CODE § 12.1-23-01(2) (effective July 1, 1975). This is designed to eliminate defenses which have arisen because of technical difficulties with the common law definitions of larceny, embezzlement, and obtaining money and property by false pretenses.

623. N.D. CENT. CODE § 12.1-23-02 (effective July 1, 1975).

624. N.D. CENT. CODE § 12.1-23-03 (effective July 1, 1975).

625. N.D. CENT. CODE § 12.1-23-04 (effective July 1, 1975).

626. N.D. CENT. CODE § 12.1-23-06 (effective July 1, 1975).

627. N.D. CENT. CODE § 12.1-23-07 (effective July 1, 1975).

628. N.D. CENT. CODE § 12.1-23-08 (effective July 1, 1975).

629. FINAL REPORT, *supra* note 6, at 205. North Dakota has adopted the Proposed Federal Code theft provisions almost verbatim; hence, the frequent references to the Commission papers.

630. *Id.*

631. II WORKING PAPER, *supra* note 60, at 945.

632. *Id.* at 944.

theft, e.g., both taking and retaining the same property.[633] Furthermore, if the variance between the conduct charged and the offense proved is too great, it might be argued either that the accused has been unfairly surprised or that the grand jury had not authorized a prosecution such as the one attempted.[634]

While the consolidation of theft is innovative in criminal codes, it is hardly a radical departure from the popular conception of the generic term "stealing". With its balance of advantages to the criminal justice system and to the accused, the consolidation provision is a welcome feature in the New Code.

B. THEFT OF PROPERTY

Throughout this section of the New Code, the culpability requirement is "knowingly . . . with intent to deprive the owner thereof."[635] Neither the Old Code nor the New Code makes explicit reference to "permanent" deprivation in the definition of the offense.[636] However, that element of permanency which is ordinarily associated with the concept of theft is included in the definition of "deprive"[637] and is also manifested in deprivation which involves a high risk of loss to the owner. Such high risk of loss typically occurs where there is (1) an appropriation of the major value of the property, (2) a withholding of property with the intent to ransom it back to the owner, or (3) a disposal of the property or an interest in property which makes restoration highly unlikely (an embezzlement situation).[638]

The theft section of the New Code prohibits any unauthorized control over the property of another;[639] this singular treatment has been effected through the definitions of "obtain" and "deprive."[640] When considered together, the two words are basically equivalent to the phrase "takes or exercises . . . control."[641] Thus, three of the most troublesome Old Code offenses—larceny,[642] embezzlement,[643] and obtaining property by false pretenses[644]—which fit within this

633. FINAL REPORT, *supra* note 6, at 206.
634. II WORKING PAPERS, *supra* note 60, at 946. Refer to note 622, *supra*.
635. N.D. CENT. CODE § 12.1-23-02(1), (2), (3) (effective July 1, 1975).
636. N.D. CENT. CODE § 12-40-01 (1960).
637. N.D. CENT. CODE § 12.1-23-10(2) (effective July 1, 1975). Deprive ". . . adds the element of permanency about the acquisition that is normally associated with the concept of theft, but it does not limit the definition to permanent deprivation only." II WORKING PAPERS, *supra* note 60, at 920.
638. II WORKING PAPERS, *supra* note 60, at 920-21. "Owner" describes any entity that has the interest in the property which the actor is not entitled to violate. N.D. CENT. CODE § 12.1-23-10(7) (effective July 1, 1975).
639. *Id.* at 922.
640. To "obtain" means to "bring about a transfer or purported transfer of an interest in the property, whether to the actor or another . . . ." N.D. CENT. CODE § 12.1-23-10(5) (effective July 1, 1975). The initial acquisition may have been either lawful or unlawful.
To "deprive" means essentially the exercise of control in the absence of a privilege to do so. N.D. CENT. CODE § 12.1-23-10(2) (effective July 1, 1975).
641. N.D. CENT. CODE § 12.1-23-02(1) (effective July 1, 1975).
642. N.D. CENT. CODE § 12-40-01 (1960).
643. N.D. CENT. CODE § 12-36-01 (1960).
644. N.D. CENT. CODE § 12-38-04 (1960).

definition are clearly included in the New Code theft section.[645]

The New Code also forbids obtaining property by "threat or deception,"[646] thereby replacing the standard definition of extortion.[647] Reflecting the desire to proscribe as much conduct as possible within the paragraph, the New Code enumerates twelve types of threats,[648] while the Old Code lists only four.[649] Perhaps the greatest expansion in the definition of threat lies in the explicit recognition of broadened personal rights.[650]

Union dues are expressly excepted from the definition of threat.[651] The Federal drafters indicate that "the last sentence of the paragraph defining threat bars the use of a defense to a charge of theft by threat that the charge should have been bribery."[652]

The Theft of Property section[653] also covers the activities involved in receiving, retaining and disposing of stolen property.[654] The actor must know that the property has been stolen and have the intent to deprive the owner thereof.[655]

Two new concepts are introduced into North Dakota law by the Theft of Property section in the New Code.

First, the scope of the old larceny offense is increased by the additional proscription against unauthorized transfers of interest in real property.[656] Larceny in the Old Code includes only the taking of personal property.[657] The drafters of the Proposed Federal Code, which has provisions identical to the New Code on this topic, separately stated the unauthorized transfer of interests in real property for two reasons: (1) to make it clear that an unauthorized transfer of an interest in real property was meant to be included in theft

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645. "Between the two terms—'obtain' and 'deprive'—the entire range of conduct between an initial acquisition and a withholding after a proper acquisition is included." II WORKING PAPERS, *supra* note 60, at 922.

646. N.D. CENT. CODE § 12.1-23-02(2) (effective July 1, 1975).

647. "Extortion is the obtaining of property from another with his consent, induced by wrongful use of force or fear, or under color of official right." N.D. CENT. CODE § 12-37-01 (1960). A necessary element is some form of threat by which fear is induced. State v. Anderson, 66 N.D. 522, 528, 267 N.W. 121, 124 (1936).

648. N.D. CENT. CODE § 12.1-23-10(11) (effective July 1, 1975). While robbery requires an inflicted injury or an attempt to inflict injury or threatening or menacing another with imminent bodily injury, N.D. CENT. CODE § 12.1-22-01(1) (effective July 1, 1975), threat as it relates to theft "means an express purpose, however communicated, to: (1) cause bodily injury *in the future* to the person threatened *or to any other person*; . . ." N.D. CENT. CODE § 12.1-23-10(11)(i) (effective July 1, 1975). (Emphasis added).

649. N.D. CENT. CODE § 12-37-02 (1960).

650. Especially N.D. CENT. CODE § 12.1-23-10(11)(vi) and (xii) (effective July 1, 1975), where the threats involved may also give rise to recovery in tort for invasion of privacy.

651. N.D. CENT. CODE § 12.1-23-10(11)(xi) (effective July 1, 1975).

652. FINAL REPORT, *supra* note 6, at 221. *See* N.D. CENT. CODE § 12.1-23-10(11)(xii) (effective July 1, 1975).

653. N.D. CENT. CODE § 12.1-23-02(3) (effective July 1, 1975).

654. The paragraph replaces N.D. CENT. CODE § 12-40-19 (Supp. 1973) which provided for a minimum punishment of one year and a maximum of five years of imprisonment in the state penitentiary for buying and receiving, with the requisite knowledge and intent elements, personal property in excess of one hundred dollars value.

655. N.D. CENT. CODE § 12.1-23-02(3) (effective July 1, 1975).

656. N.D. CENT. CODE § 12.1-23-02(1) (effective July 1, 1975).

657. N.D. CENT. CODE § 12-40-01 (1960).

of property, and (2) to support the distinction between real and personal property.[658] That it is a *transfer of an interest* in real property avoids interference with trespass and "other traditional real property remedies."[659]

The second new[660] concept is found in the New Code definition of deprive: that is, "to withhold property or to cause it to be withheld . . . under such circumstances that a major portion of its economic value, or its use and benefit, has in fact been appropriated; . . . ."[661]

Whether a major portion has in fact been appropriated is a question for the jury in the individual case; the jury must decide "the extent of risk involved in the particular use of the property."[662] The culpability of the actor then turns on the extent "to which he created or intended to create a danger to the property [so] that it would be permanently deprived from its owner."[663]

The degree of likelihood that the property will not be restored is determined objectively from the circumstances; the jury must conclude that the necessary risk of loss was involved to merit a conviction of theft.[664]

Because of the requirement that the property has "in fact been . . . appropriated,"[665] the jury need not inquire into the possibility of restoration.[666] "The crucial factual inquiry will be exactly what use the actor intended when he took" unauthorized control of the property.[667] In other words, the jury must determine "the degree of culpability manifested by the actor in exposing the property to the risk he created,"[668] and the risk created is a question of fact.

C. THEFT OF SERVICES

An actor commits theft of services either (1) by intentionally[669] obtaining services which he knows are available only for compensa-

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658. II WORKING PAPERS, *supra* note 60, at 915-16.
659. *Id.*, at 917.
660. Arguably, the concept of deprivation of economic value is not strictly new to North Dakota law. N.D. CENT. CODE § 12-41-07 (1960) makes the removal of materials which reduce the value of a building by more than twenty dollars a felony, regardless of the actual value of the property taken; if the value lost is less than twenty dollars, the taking is a misdemeanor. But the application of the concept in the New Code is of so great a change in degree that it virtually equals a change in kind.
661. N.D. CENT. CODE § 12.1-23-10(2) (effective July 1, 1975).
662. II WORKING PAPERS, *supra* note 60, at 921.
663. *Id.*
664. *Id.*
665. N.D. CENT. CODE § 12.1-23-10(2)(i) (effective July 1, 1975).
666. II WORKING PAPERS, *supra* note 60, at 921.
667. *Id.* Thus, "[t]he circumstances which led to the particular form of unauthorized control are relevant to [the defendant's] culpability—to the existence of the required mental elements and to the grading of the particular offense—but are not relevant to the issue of whether the objective conduct—the actus reus, to use the technical term—has occurred." *Id.*, at 915.
668. *Id.*, at 921-22.
669. "Intentionally" has been defined as " . . . a purpose to bring about a (permanent) transfer of an interest in property which the actor knew he was not entitled to infringe without consent." II WORKING PAPERS, *supra* note 60, at 924.

tion by means which are designed to avoid payment, whether deception, threat, false token or other methods are used; or (2) by diverting disposition of services to which he is not personally entitled to his own use or to the use of another who is not entitled to them.[670]

The definition of "service"[671] in the New Code assumes something of demonstrable and determinable value. If the service is not ordinarily a thing of value, the culpability of the actor depends upon whether criminal means are used to obtain the service. "Thus, merely deceiving a neighbor for the purpose of obtaining his 'services' in driving one into town would not be an offense" under this section of the New Code.[672]

Failure to pay or to make arrangements to pay when compensation for services is ordinarily due immediately upon their rendition establishes a prima facie case that the services were obtained by deception.[673] One who "refuses to pay because he honestly considers the service to be poor can present evidence which would warrant withholding the case from the jury."[674]

The Theft of Services section expands the former larceny classification under the rationale that there "appears to be no good reason to distinguish takings upon the basis of tangibility."[675] This is a welcome consolidation of offenses which have been punished under specific criminal fraud provisions of the Old Code.[676] Certainly, the importance of services should be recognized in criminal codes in more than a piece-meal fashion. In addition, a theft of services section reflects a movement away from the narrow theoretical structures of common law theft as merely an offense against property.

D. THEFT OF PROPERTY LOST, MISLAID OR DELIVERED BY MISTAKE

In the thefts of property and services the actor himself is responsible for the initial loss to the owner. In contrast, under this

670. N.D. CENT. CODE § 12.1-23-03 (effective July 1, 1975). The typical offense under the second paragraph of the section would involve a government official using public employees for non-public work. Thus, it amounts to an exercise of control for improper disposition of services.

671. " 'Services' means labor, professional service, transportation, telephone, mail or other public service, gas, electricity and other public utility services, accommodations in hotels, restaurants, or elsewhere, admission to exhibitions, and use of vehicles or other property." N.D. CENT. CODE § 12.1-23-10(9) (effective July 1, 1975).

672. FINAL REPORT, *supra* note 6, at 207.

673. N.D. CENT. CODE § 12.1-23-03 (effective July 1, 1975).

674. FINAL REPORT, *supra* note 6, at 207. And, since a prima facie case is raised instead of a presumption, the jury need not be told of the special provision. "The purpose . . . is to get the case to the jury if such facts can be shown and to let the jury draw whatever inferences the evidence will support without special instructions on the subject." II WORKING PAPERS, *supra* note 60, at 938.

675. FINAL REPORT, *supra* note 6, at 207.

676. N.D. CENT. CODE § 12.1-23-03 (effective July 1, 1975). This section specifically replaces three sections of the Old Code: N.D. CENT. CODE §§ 12-40-17 (1960) (larceny of passenger ticket), 12-38-11 (1960) (evasion of hotel bill), and 12-38-13 (1960) (obtaining tourist camp accommodations by fraud). *Minutes "B"*, *supra* note 2, June 20-21, 1972, at 36.

New Code section[677] the actor is culpable when he learns of the nature of the property and then knowingly disposes of or retains it "with intent to deprive the owner."[678]

The actor must know either that the property has been lost or mislaid[679] or that the property was misdelivered due to mistaken identity of the receiver or a mistake as to the nature or quantity of the property.[680] Beyond the special knowledge requirement in each situation, the actor must form an intent to deprive the owner of the property and fail to take "readily available and reasonable measures to restore the property to the person entitled to have it."[681]

The provisions of this section apply only after the actor has learned of the special nature of the property. The critical issues are then (1) whether or not the actor has the requisite intent to deprive and (2) whether or not he has failed to take reasonable measures to restore the property to the owner.[682] The mere lapse of time is not the essential determining factor.

After an actor has learned of the nature of the property, he has a duty to take reasonable steps to restore it to the owner;[683] failure to take such measures would raise at least an inference that the requisite intent to deprive was present.[684]

A penalty to encourage the return of property is not inconsistent with the underlying theory of theft as the taking or exercising of unauthorized control over the property of another.

E. GRADING OF THEFT OFFENSES

The drafters of the Proposed Federal Code used three principles in grading theft offenses: (1) the nature of the conduct, (2) the

677. N.D. CENT. CODE § 12.1-23-04(10) (effective July 1, 1975). This section specifically replaces two sections of the Old Code:

N.D. CENT. CODE §§ 12-40-08 (1960) (concealing lost goods) and 12-40-09 (1960) (appropriation of lost property).

678. N.D. CENT. CODE § 12.1-23-04 (effective July 1, 1975).

679. N.D. CENT. CODE § 12.1-23-04(1) (effective July 1, 1975).

680. N.D. CENT. CODE § 12.1-23-04(2) (effective July 1, 1975).

681. N.D. CENT. CODE § 12.1-23-04 (effective July 1, 1975). The Study Draft of the Proposed Federal Code defined "reasonable measures" as either notifying the owner, if he is ascertainable, or notifying a police officer that the actor has the property. But this was deleted from the final draft of the Proposed Federal Code as "unnecessary and limiting." II WORKING PAPERS, *supra* note 60, at 939. "Variables such as knowledge of who is the owner and the value of the property preclude setting forth a satisfactory definition of 'reasonable measures.' " FINAL REPORT, *supra* note 6, at 208.

682. II WORKING PAPERS, *supra* note 60, at 939.

683. N.D. CENT. CODE § 12.1-23-04 (effective July 1, 1975).

684. Intent is not so difficult a problem as is knowledge. The Old Code has a similar knowledge requirement; *see* N.D. CENT. CODE § 12-40-09 (1960). The annotator to the Century Code has included a reference to State v. McCarty, 47 N.D. 523, 182 N.W. 754 (1921). Perhaps more applicable to a determination of knowledge under both the Old Code and the New Code is a case in which the defendant was charged with receiving stolen goods, State v. Marcovitz, 63 N.D. 458, 248 N.W. 481 (1933). The North Dakota Supreme Court noted, "In attempting to solve this problem of knowledge, the jury cannot avoid taking into consideration what a man of defendant's age, intelligence, and business ability would do and learn." 63 N.D. at 465-66, 248 N.W. at 485. But "the test of a man's culpability is what he himself knew and thought . . . ." 63 N.D. at 466, 248 N.W. at 485. Knowledge that property is lost, mislaid, or misdelivered is, of course, also a function of the extrinsic and readily observable circumstances of the situation.

value or character of the property, and (3) the status of the thief.[685] North Dakota has adopted similar grading standards.

Under the New Code theft is a Class B felony if the value of the property or services stolen exceeds ten thousand dollars. Similarly, if the theft is committed by threats to inflict serious bodily injury to the victim or to any other person, or by a threat to commit a Class A or B felony, the theft is punished as a Class B felony.[686]

Theft is characterized as a Class C felony if the value of the property exceeds one hundred dollars.[687] In special circumstances, theft of property or services not exceeding one hundred dollars in value can also be a Class C felony.[688]

The character of the property stolen may also result in a Class C felony status, notwithstanding value: firearms, ammunition, explosives or destructive devices, automobiles, aircraft or other motor-propelled vehicles;[689] counterfeiting materials and equipment;[690] a key or other device stolen with the purpose of using it to gain access to property intended to be appropriated, the value or nature of which would meet felony standards.[691] The reasoning is that such property is often stolen merely as a prelude to the commission of another crime; the value of the property ceases to be its most significant feature.[692] Since theft of government documents can disrupt the orderly functioning of government, it is a Class C felony.[693]

All theft not previously categorized is graded as a Class A mis-

685. FINAL REPORT, *supra* note 6, at 210.

686. N.D. CENT. CODE § 12.1-23-05(1) (effective July 1, 1975). A Class B felony is punishable under the New Code by a maximum incarceration of ten years, a fine of not more than ten thousand dollars, or both. N.D. CENT. CODE § 12.1-32-01(2) (effective July 1, 1975). For extortion the Old Code provides a one to five year penitentiary term. N.D. CENT. CODE § 12-37-03 (1960). For grand larceny requiring a property valuation in excess of one hundred dollars under the Old Code, the penalty is from a minimum of three months in the county jail to a maximum of ten years in the state penitentiary, or a fine of not less than five hundred dollars nor more than one thousand dollars, or a combination of both. N.D. CENT. CODE § 12-40-40 (1960).

687. N.D. CENT. CODE § 12.1-23-05(2)(a) (effective July 1, 1975). A Class C felony is punishable by a maximum sentence of five years or a maximum fine of five thousand dollars, or a combination of the two. N.D. CENT. CODE § 12.1-32-01(3) (effective July 1, 1975). Under the Old Code petty larceny merits a fine varying from ten dollars to one hundred dollars or imprisonment in the county jail for not more than thirty days. N.D. CENT. CODE § 12-40-05 (1960).

688. N.D. CENT. CODE § 12.1-23-05(2)(b) (effective July 1, 1975) makes theft by threat committed by a public official or other individual a Class C felony if the value exceeds fifty dollars; theft committed by a public servant in the course of his duties where the value stolen exceeds fifty dollars is also a Class C felony, N.D. CENT. CODE § 12.1-23-05 (2)(c) (effective July 1, 1975). So, too, the "professional fence is always a felon because he is vital to making theft lucrative." FINAL REPORT, *supra* note 6, at 211. This comment refers to the section in the Proposed Federal Code which is adopted in this state in N.D. CENT. CODE § 12.1-23-05(2)(f) (effective July 1, 1975).

689. N.D. CENT. CODE § 12.1-23-05(2)(d) (effective July 1, 1975). Treating theft of a car as a felony in all instances avoids difficult problems of valuation, a virtually irrelevant issue since, regardless of the thief's intention to use the vehicle for mere transportation or to re-sell it, "there is a substantial invasion of ownership rights. . . ." II WORKING PAPERS, *supra* note 60, at 949.

690. N.D. CENT. CODE § 12.1-23-05(2)(g) (effective July 1, 1975).

691. N.D. CENT. CODE § 12.1-23-05(2)(i) (effective July 1, 1975).

692. FINAL REPORT, *supra* note 6, at 211.

693. N.D. CENT. CODE § 12.1-23-05(2)(e) (effective July 1, 1975).

demeanor;[694] however, if the value does not exceed fifty dollars and the theft was (a) not committed by threat, (b) not committed within a confidential or fiduciary relationship, or (c) not committed by a public servant in the course of his duties, the offense is further reduced to a Class B misdemeanor.[695]

If "the actor has completed all of the conduct which he believes necessary on his part to complete the theft except receipt of the property,"[696] the attempt is punishable as though the offense had been completed. The belief of the actor that he has done all that is necessary to fully carry out the theft distinguishes this equally-graded attempt from lesser-graded attempts.[697]

The additional rationales support grading attempted theft equally with the completed offense. First, the culpability, and hence the need for rehabilitation of the actor, is just as great regardless of the naivete of the victim.[698] Second, the traditional definition of theft included conduct that has typically been characterized as attempted theft.[699] And, finally, making both the attempt and its completion punishable to the same degree will eliminate the defense that the victim in fact did not relinquish the property because of the deception or threat.[700]

In determining the grade of the offense, the amount of the property or the services stolen "shall be the highest value by any reasonable standard. . . ."[701] The change from the common law concept of theft as an offense merely against property to the modern emphasis on culpability of the actor creates several perspectives from which the value could be measured,[702] but the standard used must be "fair under the circumstances."[703]

In a departure from the Old Code, under the New Code if it is proven that several thefts were committed "pursuant to one scheme

694. N.D. CENT. CODE § 12.1-23-05(3) (effective July 1, 1975).
695. N.D. CENT. CODE § 12.1-23-05(4) (effective July 1, 1975). This subsection applies if the prosecutor so classifies the offense in the charge or if a preponderance of the evidence at sentencing establishes the required factors.
696. N.D. CENT. CODE § 12.1-23-05(5) (effective July 1, 1975).
697. *See* N.D. CENT. CODE § 12.1-06-01 (effective July 1, 1975). The actor's conduct in equally-graded attempt situations has come "dangerously close" to completion of the offense. FINAL REPORT, *supra* note 6, at 211.
698. II WORKING PAPERS, *supra* note 60, at 923.
699. *Id.*
700. *Id.* at 924.
701. N.D. CENT. CODE § 12.1-23-05(6) (effective July 1, 1975).
702. They include:
> what the actor actually stole, i.e., the actual value of the property involved; what the actor believed he was stealing, i.e., the value of the diamonds he thought he was stealing rather than the rhinestones he actually stole; what the actor hoped he was stealing, i.e., the $500 he hoped was in the mailbag rather than the $30 that was actually there [This viewpoint was deleted from the Study Draft of the Proposed Federal Criminal Code]; or what the actor could reasonably have anticipated to be there, even though he never particularly addressed the value issue in planning his theft.

II WORKING PAPERS, *supra* note 60, at 954.
703. *Id.*

or course of conduct, whether from the same person or several persons,"[704] the series may be charged as one theft and the amounts aggregated to determine the grade of the theft. "The court is not being permitted to aggregate unproven offenses; what is permitted is for the court to consolidate six misdemeanor charges, for example, into one felony sentence."[705]

In general, "the range of grading of the theft offenses under [the New Code] is slightly higher than the range under current North Dakota law."[706] Considering, however, "the emphasis placed on either the tremendous [in reference to the $100,000 division point, later reduced to $10,000] value of the property stolen or the risk of commission of a serious offense or infliction of serious bodily injury, . . ." the classification appears justified.[707]

F. RELATED OFFENSES

The lesser degree of seriousness, offenses involving "borrowing of property under circumstances hazarding loss or damage,"[708] manifests itself in three sections of the New Code.

1. *Unauthorized Use of a Vehicle*

Under the New Code, if an actor "takes, operates, or exercises control over an automobile, aircraft, motorcycle, motorboat, or other motor-propelled vehicle of another,"[709] knowing that he is doing so without the consent of the owner, he is guilty of unauthorized use of a vehicle. The offense is a Class C felony if the vehicle is an aircraft or if the cost of restoring and retrieving the vehicle exceeds five hundred dollars; otherwise, it is a Class A misdemeanor.[710]

Including this section in the New Code has the effect of precluding felony charges and convictions in joyriding cases.[711] That purpose is present in the Old Code in diluted form. There felonious larceny of an automobile or motorcycle is defined as requiring that the vehicle be taken with intent to deprive the owner thereof, but indicates that a taking without the owner's express or implied consent is presumptive evidence of such intent.[712] If an actor operates a vehicle without the consent of the owner but without the intent

704. N.D. CENT. CODE § 12.1-23-05(6) (effective July 1, 1975).
705. II WORKING PAPERS, *supra* note 60, at 955.
706. *Minutes "B"*, *supra* note 2, June 20-21, 1972 at 37.
707. *Id.*
708. FINAL REPORT, *supra* note 6, at 205.
709. N.D. CENT. CODE § 12.1-23-06 (effective July 1, 1975).
710. N.D. CENT. CODE § 12.1-23-06(3) (effective July 1, 1975). Use of an aircraft is a felony "not only because of the greater danger posed by an aircraft in the hands of one who may not know much about flying and who is trying to avoid detection, but also because of the generally greater value of a plane and the greater distance that can be . . . covered." FINAL REPORT, *supra* note 6, at 212.
711. FINAL REPORT, *supra* note 6, at 212.
712. N.D. CENT. CODE § 12-40-06 (1960).

to deprive the owner thereof, he is guilty under the Old Code of a misdemeanor.[713]

This section of the New Code relates to three basic situations: (1) the simple unauthorized taking of a vehicle, (2) the borrowing for one's personal use of a vehicle in his custody for repair, and (3) the retention of a vehicle far past the time agreed for return.[714] "In the last two types of cases, the use or retention must be a 'gross deviation' from the custody agreement for the conduct to be criminal,"[715] and that is a jury question.

In each instance, the actor must know that the owner did not consent. Despite the absence of actual consent if the actor reasonably believes that the owner would have consented had he known of the intended use, such is a statutory defense.[716] The jury determines the reasonableness of the belief.[717]

The crucial factor differentiating this section from the theft sections is the absence of an intent to permanently deprive. The jury will draw its inferences in major part from what it is that the actor does with the vehicle: where he abandons it, whether he abandons it, and other factors.[718]

2. *Misapplication of Entrusted Property*

The misapplication of entrusted property section[719] of the New Code is the second of a two-part approach designed to resolve problems posed by the mishandling of funds by public employees and others. Centered upon the definition of deprive with its focus on a disposal of property in such a manner as to make its restoration unlikely, the first tier involves the offense of theft and is supple-

713. N.D. CENT. CODE § 12-40-07 (1960). The Unauthorized Use of Vehicle section in the New Code "does not require an intent to deprive the owner of his vehicle, while Section 12-40-06 [of the Old Code] does so require. To that extent, . . . [the New Code section] would provide an easier burden of proof on the prosecution; however, the maximum potential penalty is reduced correspondingly from seven years' imprisonment to one year imprisonment, unless the value of the use of the vehicle and the cost of restoration exceeds $500, in which case the maximum punishment under . . . [the New Code] would be the same as current North Dakota law." *Minutes "B"*, *supra* note 2, June 20-21, 1972 at 38.

714. II WORKING PAPERS, *supra* note 60, at 940.

715. *Id.*

716. N.D. CENT. CODE § 12.1-23-06(2) (effective July 1, 1975).

717. It is hoped by the drafters of the Proposed Federal Code that this defense will keep family arguments and disputes between friends out of court. They also suggest that the "difficulty of disproving defendant's alleged reasonable belief may warrant converting this defense to an 'affirmative defense,' which would put the burden of proof on the accused." FINAL REPORT, *supra* note 6, at 212.

718. The jury determination, except in the case of aircraft, will include a finding of value lost in retrieving and restoring the vehicle, thus classifying the offense as either a misdemanor or as a felony.

In addition, the circumstances of the case may present possible charges of theft of property or of theft of services. In the former situation, the intent to deprive the owner of his property might be shown from the actions of the accused. II WORKING PAPERS, *supra* note 60, at 940. "Obtaining the use of a car rental agency's car by fraudulent means and running up a $501 bill is a felonious theft of services . . . [while] similar use of the car of a private individual would be felonious unauthorized use [if the cost of retrieval and restoration exceeded $500]." FINAL REPORT, *supra* note 6, at 212.

719. N.D. CENT. CODE § 12.1-23-07 (effective July 1, 1975).

mented by a provision[720] making failure to account upon demand a prima facie case of theft.[721]

With the risk of loss or damage again the operative concept, this section treats as a Class A misdemeanor "any disposition of entrusted property that is not authorized and that at the same time exposes the property to a risk of loss or detriment."[722] Two types of knowledge must occur: the actor must realize that he is disposing, using, or transferring an interest in the property in a manner that has not been authorized, and he must know that such action involves "a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted."[723]

The differentiating factor between the charges of theft and of misapplication of entrusted property is loss of control over use of the property. While theft involves loss of control, the misdemeanor of misapplication of entrusted property does not, "but on the other hand does involve exposure of the property to a risk of loss."[724]

3. *Defrauding Secured Creditors*

Under the New Code, if an actor "destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent to prevent collection of the debt represented by the security interest,"[725] he is guilty of a Class A misdemeanor provided the value of the property exceeds fifty dollars; in all other cases the offense is a Class B misdemeanor.[726]

The interplay of the exclusion of security interest from the definition of property[727] and the judgment that interference with security interests is a valid subject for the criminal law led to this section. Because of the belief "that resisting the collection of a debt is not to be classed at the same level with appropriation of property interests of another,"[728] defrauding secured creditors is treated as a misdemeanor.

The specific intent requirement "focuses the offense more to-

720. N.D. CENT. CODE § 12.1-23-09(2)(a) (effective July 1, 1975).
721. FINAL REPORT, *supra* note 6, at 213.
722. II WORKING PAPERS, *supra* note 60, at 974.
723. N.D. CENT. CODE § 12.1-23-07 (effective July 1, 1975).
724. II WORKING PAPERS, *supra* note 60, at 974.
725. N.D. CENT. CODE § 12.1-23-08(1) (effective July 1, 1975).
726. N.D. CENT. CODE § 12.1-23-08(2) (effective July 1, 1975).
727. N.D. CENT. CODE § 12.1-23-10(6) (effective July 1, 1975). Because security interests are not included in the definition of "property", "the 'theft' provisions would not include the intentional defeating of a security interest without a section similar to Section 12.1-23-08.... Title 12 does not contain a similar offense definition; however, Sections 13-01-11 and 13-01-12 provide that it is a misdemeanor to fraudulently convey property to hinder or delay creditors or to remove or dispose of property to defraud creditors." *Minutes "B"*, *supra* note 2, June 20-21, 1972 at 39.
728. FINAL REPORT, *supra* note 6, at 213.

wards theft-like conduct than toward conduct which has the appearance of steps taken to postpone the payment of a debt."[729]

Leaving the definition of security interests to the judiciary, the drafters of the Proposed Federal Code nonetheless note that such interests "would ordinarily include workmen's and commercial liens."[730]

F. DEFENSES AND PROOF AS TO THEFT AND RELATED OFFENSES

Subsection 1 of this section[731] of the New Code "delineates the outer limits of the theft offenses, dealing with matters handled today by the exercise of prosecutive discretion."[732]

The claim of right defense, where "[t]he actor honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him. . ."[733] seems redundant, especially since "knowingly" modifies all elements of the crime of theft, unless a legislative intent to the contrary is expressed.[734] The drafters of the Proposed Federal Code concluded that the redundancy was out weighed by the need to have the defense made explicit.[735]

Its inclusion does have procedural consequences. The subsection does not require that "the prosecution . . . disprove the defense unless and until the issue has been raised by evidence which is sufficient to raise a reasonable doubt on the point."[736] The prosecution still has to prove each element of the offense beyond a reasonable doubt, so whether the subsection is viewed as a redundancy or as a special defense seems to have little effect.[737]

The benefit in the claim of right defense is that it protects a person who asserts a claim against another in compensation for a wrong done to him. Such a claim would fulfill the technical definition of extortion, except that under Section 12.1-23-09(1)(a) an actor is excused if he acts with claim of right to some property and with a belief "that he was entitled to act as he did in order to get it."[738]

If the victim of the offense is the spouse of the actor ("spouse"

729. II WORKING PAPERS, *supra* note 60, at 974. *See also* MODEL PENAL CODE § 224.10 (1962) which requires that the actor intend "to hinder the enforcement of . . . [the security] interest."
730. FINAL REPORT, *supra* note 6, at 213.
731. N.D. CENT. CODE § 12.1-23-09 (effective July 1, 1975).
732. FINAL REPORT, *supra* note 6, at 214.
733. N.D. CENT. CODE § 12.1-23-09(1)(a) (effective July 1, 1975).
734. N.D. CENT. CODE § 12.1-02-02(3)(a) (effective July 1, 1975).
735. II WORKING PAPERS, *supra* note 60, at 944.
736. *Id.*
737. *Id.* "In both instances, the defendant will have to offer some proof of the defense in order to get an instruction and in order to get the jury to consider the matter seriously; and in both instances, once the issue is in the case, it is the prosecution that must bear the burden of proving beyond a reasonable doubt that the defendant knew he was dealing with the property of another and that he had no right to act as he did." *Id.*
738. *Id.* at 943. *Cf.* MICH. REV. CRIM. CODE § 3247(2) (Final Draft 1956) and MODEL PENAL CODE § 223.4 (P.O.D. 1962) which contain special exceptions related to extortion. *Id.*

includes "persons living together as man and wife"), and the property taken constitutes property "normally accessible to both spouses", such facts may be pleaded as a defense.[739] This subsection "is intended to keep certain family arguments out of . . . courts."[740]

A prima facie case of theft arises in certain situations.[741] "Those who regularly handle the money of others . . . are all placed under a high duty of care and exposed to the possibility of a successful theft prosecution if they cannot account for the money entrusted to them."[742]

Where the prosecution establishes that a "dealer" ("a person, whether licensed or not, who has repeatedly engaged in transactions in the type of property involved"[743]) has acquired property for a value far below its reasonable worth, a prima facie case arises that the person knew the property was stolen.[744] This subsection does not exclude submitting the issue of knowledge where other common fact situations, such as possession of recently stolen goods, "imply culpable knowledge," given other "facts and circumstances."[745]

XII. FORGERY & OTHER FRAUDS

A. *Forgery or Counterfeiting*

Chapter 24 of the New Code consolidates several sections of the Old Code[746] into one offense known as "forgery" or "counterfeiting."[747] The consolidation is effected by the definition given to the term "writing,"[748] a definition which strains the English language

739. N.D. CENT. CODE § 12.1-23-09(1)(b) (effective July 1, 1975).

740. FINAL REPORT, *supra* note 6, at 214.

741. They include occasions where a public official or anyone associated in any way "with a financial institution has failed to pay or account upon lawful demand for money or property entrusted to him as part of his official duties or if an audit reveals a shortage or falsification of his accounts." N.D. CENT. CODE § 12.1-23-09(2)(a) (effective July 1, 1975). Since a prima facie case, not a presumption is used, the jury is not told of the special provision. "The purpose . . . is to get the case to the jury if such facts can be shown and to let the jury draw whatever inferences the evidence will support without special instructions based on this statute." II WORKING PAPERS, *supra* note 60, at 938.

742. II WORKING PAPERS, *supra* note 60, at 931.

743. N.D. CENT. CODE § 12.1-23-09(2)(b) (effective July 1, 1975).

744. *Id.*

745. FINAL REPORT, *supra* note 6, at 215.

746. Generally, all of Chapter 38 of Title 12 of the Old Code is replaced by this section, N.D. CENT. CODE § 12.1-24-01 (effective July 1, 1975). N.D. CENT. CODE § 12-39-28 (1960) is replaced by the criminal mischief section in the New Code, N.D. CENT. CODE § 12.1-21-05 (effective July 1, 1975).

747. N.D. CENT. CODE § 12.1-24-01 (effective July 1, 1975). The sources of definitions for this Chapter include both N.D. CENT. CODE §§ 12.1-23-10 (effective July 1, 1975) (theft) and 12.1-24-04 (effective July 1, 1975) (forgery and counterfeiting). "Forgery and counterfeiting, as commonly understood, involve essentially the same conduct with different instruments as their vehicle. . . . Short of inventing a new generic term that would displace both [terms] . . . the best solution appears to be to continue to permit either term to be used, but to remove the possibility that any legal consequences will follow the choice of one word over another." II WORKING PAPERS, *supra* note 60, at 964.

748. N.D. CENT. CODE § 12.1-24-04(2) (effective July 1, 1975). " 'Writing' is there defined to include any kind of document (and objects such as coins as well) which is a 'symbol or evidence of value, right, privilege or identification which is capable of being used to the

but which simplifies the statute and takes cognizance of the idea that "essentially the same features make a coin as appropriate a subject of forgery as paper money."[749] The broad scope of included instruments facilitates covering "all forms of doctoring or falsifying of instruments which make them appear to be what they are not."[750]

Two types of conduct are proscribed: "knowingly and falsely mak[ing], complet[ing] or alter[ing] any writing . . ."[751] and "[k]nowingly utter[ing] or possess[ing] a forged or counterfeited writing."[752] In each type the actor must act "with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such deception or harm by another person. . . ."[753]

Since uttering and possession are continued explicitly as criminal conduct, there is "some risk of convicting innocent possessors,"[754] but the special knowledge and intent requirements should preclude any such convictions.[755]

If "[t]he actor forges or counterfeits an obligation or other security of the government. . . ."[756] or commits the offense "pursuant to a scheme to defraud another or others of money

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advantage or disadvantage of the government or any person.' " FINAL REPORT, *supra* note 6, at 223.

749. II WORKING PAPERS, *supra* note 60, at 963.

750. FINAL REPORT, *supra* note 6, at 223.

" 'Falsely makes' covers the classic counterfeiting situation, as well as many other instances of forgery. The term . . . is meant in its more common meaning (as in 'making' a pie)." The writing must be indicated to have been made by someone other than the actor and the other must either not exist or have not authorized the making. FINAL REPORT, *supra* note 6, at 229.

If the document is altered and the intent to deceive or harm is shown, the materiality of the alteration has no relevance to culpability. Thus, the section makes no reference to materiality.

Id.

751. N.D. CENT. CODE § 12.1-24-01(a) (effective July 1, 1975).

752. N.D. CENT. CODE § 12.1-24-01(b) (effective July 1, 1975). "The term 'utter' is broadly defined in [Section 12.1-24-04(8)] to mean, in effect, any use of a writing which has the effect of giving it currency." II WORKING PAPERS, *supra* note 60, at 964.

753. N.D. CENT. CODE § 12.1-24-01 (effective July 1, 1975). Because they are clearer and more inclusive, the words "intent to deceive or harm" are substituted for the more familiar "intent to defraud." "The object of the deception or harm—the government or another person—need not, of course, be the party with whom the actor is immediately dealing." II WORKING PAPERS, *supra* note 60, at 963.

"With knowledge that he is facilitating such deception or harm" is included to cover the situation where an actor is making, completing or altering the instrument for use of another. FINAL REPORT, *supra* note 6, at 223.

754. FINAL REPORT, *supra* note 6, at 223.

755. Possession includes "receiving, concealing or any other exercise of control over the writing in question. Lawful possession is not included within the offense as defined because of the requirement that the possession be for the purpose of deceiving or harming another. Other uses of the term in related sections of this proposal also require a mens rea that will exclude innocent conduct." II WORKING PAPERS, *supra* note 60, at 964.

But the consultant to the Proposed Federal Code noted that unless the possession statutes of this type are designed to sanction conduct that does not fulfill the definition of attempt or introduced as the basis for grading distinctions, "there would seem to be no clear purpose supporting their inclusion in a Criminal Code." *Id.* at 965.

756. N.D. CENT. CODE § 12.1-24-01(2)(a) (effective July 1, 1975). "The term 'obligation or other security of this state' means a bond, certificate of indebtedness, coupon, fractional note, certificate of deposit, a stamp or other representative of value of whatever denomination, issued pursuant to a statute." N.D. CENT. CODE § 12.1-24-04(10) (effecive July 1, 1975).

or property of a value in excess of ten thousand dollars,"[757] his offense is punishable as a Class B felony. In five situations, where neither of the Class B felony requirements are met, the actor commits a Class C felony. They include an offense committed under "color of office";[758] forgery or counterfeiting of foreign money or uttering any forged governmental obligation;[758a] forging or counterfeiting from "instruments designed for multiple reproduction;"[759] forging or counterfeiting government documents;[760] and "a scheme to defraud . . . others of money or property of a value in excess of one hundred dollars."[761] All other cases are classified as Class A misdemeanors.[762]

B. FACILITATION OF COUNTERFEITING

Anyone who knowingly makes or controls any "implement or thing uniquely associated with or fitted for the preparation" of any forged security or tax stamp or government document is guilty of facilitation of counterfeiting.[763] This subsection is intended "to apply only to implements uniquely associated with the preparation of [forged] documents—implements which are not normally put to legitimate use."[764]

The New Code forbids the knowing photographing or copying of money or other governmental security or obligation[765] or of any thing uniquely associated with the preparation of such documents.[766] Likewise, the knowing sale or possession of any such illegal copies is an offense.[767]

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757. N.D. CENT. CODE § 12.1-24-01(2)(a)(2) (effective July 1, 1975).

758. N.D. CENT. CODE § 12.1-24-01(2)(b)(1) (effective July 1, 1975). "The combination of breach of trust and holding a position which can be so easily capitalized on to commit offenses of this character is believed to justify such a classification." II WORKING PAPERS, *supra* note 60, at 966.

758a. N.D. CENT. CODE § 12.1-24-01(b)(2) (effective July 1, 1975).

759. N.D. CENT. CODE § 12.1-24-01(2)(b)(3) (effective July 1, 1975). This subsection "is aimed at the professional forger. One who makes false documents by use of sophisticated equipment of the sort described poses a danger to society much greater, it is felt, than the offender who forges a single signature or completes a blank check without authority." FINAL REPORT, *supra* note 6, at 224.

760. N.D. CENT. CODE § 12.1-24-01(2)(b)(4) (effective July 1, 1975). Here the integrity of the government is the value protected. II WORKING PAPER, *supra* note 60, at 966.

761. N.D. CENT. CODE § 12.1-24-01(2)(b)(5) (effective July 1, 1975). This punishment classification is predicated on the judgment that "the volume of criminal activity is an appropriate index to its level of culpability. . . ." II WORKING PAPERS, *supra* note 60, at 967.

762. N.D. CENT. CODE § 12.1-24-01(2)(c) (effective July 1, 1975). "Thus, the maximum punishments under Section [12.1-24-01] run from 15 years' imprisonment to one year imprisoment. The present maximum punishment for forgery in North Dakota is 10 years' imprisonment, so the FCC [Federal Criminal Code] gradation is not radically different." *Minutes "B"*, *supra* note 2, June 20-21, 1972 at 45.

763. N.D. CENT. CODE § 12.1-24-02(1) (effective July 1, 1975).

764. FINAL REPORT, *supra* note 6, at 225. "There is the same redundancy [in this section] . . . that has been of concern in other contexts. . . . [I]f the conduct covered by these sections for some reason has not proceeded far enough towards the objective of forgery to constitute an attempt, then questions could be raised either about the soundness of the general attempt provisions (if the conduct *should* be criminal) or about whether the conduct should be made criminal." (Emphasis in original). II WORKING PAPER., *supra* note 60, at 968.

765. N.D. CENT. CODE § 12.1-24-02(2)(a)(1) (effective July 1, 1975).

766. N.D. CENT. CODE § 12.1-24-02(2)(a)(2) (effective July 1, 1975).

767. N.D. CENT. CODE § 12.1-24-02(2)(b) (effective July 1, 1975).

"[I]f the implement or the impression relates to . . . counterfeiting . . . an obligation or security of the government . . . [the offense is a Class B felony;] [o]therwise, it is a class C felony."[768] In all such cases, "authorization by statute or by regulation is a defense."[769]

C. DECEPTIVE WRITINGS

Knowingly issuing a writing without authority to do so or knowingly uttering and possessing a deceptive writing with intent to deceive or harm the government or another person is an offense.[770] " 'Without authority' includes conduct that, on the specific occasion called into question, is beyond any general authority given by statute, regulation, or agreement."[771] Thus, someone who knowingly acts in excess of his authority is functionally equivalent to one who acts without any authority at all; the actual, not the apparent, authority is the key determinative.[772] Basically, "the act of issuing an instrument without authority is judged to be comparable to uttering forged or counterfeit documents."[773] That the instrument is genuine on its face does not affect the culpability; "the essence of the offense is the breach of authority and the misuse of documents that purported to be something that they were not."[774]

A "deceptive writing" is one which has either been "procured by deception" or "issued without authority."[775] This offense is "separated from forgery, because the latter has traditionally dealt only with instruments which are themselves defective."[776] Whether procured by deception or issued without authority, the writing in each case is "in some sense 'false,' *i.e.*, it is not in all respects what it appears to be."[777]

"The offense is a class B felony if it is committed pursuant to a scheme to defraud . . . others of money or property of a value in excess of ten thousand dollars."[778] It is a Class C felony if the scheme involves defrauding others of a value in excess of one hun-

768. N.D. CENT. CODE § 12.1-24-02(4) (effective July 1, 1975).
769. N.D. CENT. CODE § 12.1-24-02(3) (effective July 1, 1975). Under this subsection, "the government need not negative the fact of authorization until the issue has been raised." FINAL REPORT, *supra* note 6, at 226.
770. N.D. CENT. CODE § 12.1-24-03 (effective July 1, 1975).
771. N.D. CENT. CODE § 12.1-24-04(3) (effective July 1, 1975).
772. II WORKING PAPERS, *supra* note 60, at 969. Since the authenticity of the document is not at issue and the people who rely on the document will not be injured, it might be argued that deceptive writings are not similar to forgery. But it is clear that "an agency relationship should [not] insulate from criminal liability one who would clearly be a forger if that relationship did not exist."
Id. at 969-70.
773. FINAL REPORT, *supra* note 6, at 226.
774. *Id.*
775. N.D. CENT. CODE § 12.1-24-04(13) (effective July 1, 1975).
776. FINAL REPORT, *supra* note 6, at 227.
777. *Id.*
778. N.D. CENT. CODE § 12.1-24-03(2) (effective July 1, 1975).

dred dollars,[779] or if the offense is made possible by one's office as a public servant or an employee of a financial institution or under color of office.[780] Otherwise it is a Class A misdemeanor.[781]

D. MAKING OR UTTERING SLUGS

"Mak[ing] or utter[ing] a slug with intent to deprive a supplier of property or service sold or offered by means of a coin machine or with knowledge that he is facilitating such a deprivation by another person is an offense under the New Code.[782] If it involves slugs exceeding fifty dollars in value it is a Class A misdemeanor.[783] Otherwise the making or uttering is a Class B misdemeanor.[784] A slug is "a metal, paper, or other object . . . used in a coin machine as an improper but effective substitute for a genuine coin, bill, or token. . . ."[785]

Other than adding paper to the Old Code sections on the subject,[786] this section adds nothing to North Dakota law. It does raise the recurrent conceptual difficulty that the section is redundant, especially since the gradation is similar to the theft provisions.[787] Clearly this section could be eliminated from the New Code and the offense it describes would still be covered under theft by deception or its attempt. It was included in the Proposed Federal Code because "its principal jurisdictional base (machines designed to receive United States currency) goes beyond general Federal jurisdiction over theft offenses."[788] No such rationale exists for the retention of the provisions in North Dakota.

XIII. VIOLENCE TO THE PUBLIC ORDER

A. RIOT

The thrust of the New Code's riot sections is to modernize the law in light of psychological and sociological changes in society and changes which have taken place in the organization, mobilization and communications aspects of the modern law enforcement agency. While the New Code is substantially the same as the Proposed Federal Code, certain variations are present reflecting needs of a less urbanized area.

The proposed code approaches the crime of riot in a three stage

779. N.D. CENT. CODE § 12.1-24-03(2)(b) (effective July 1, 1975).
780. N.D. CENT. CODE § 12.1-24-03(2)(a) (effective July 1, 1975).
781. N.D. CENT. CODE § 12.1-24-03(2) (effective July 1, 1975).
782. N.D. CENT. CODE § 12.1-24-05(1) (effective July 1, 1975).
783. N.D. CENT. CODE § 12.1-24-05(2) (effective July 1, 1975).
784. N.D. CENT. CODE § 12.1-24-05(2) (effective July 1, 1975).
785. N.D. CENT. CODE § 12.1-24-05(3)(a) (effective July 1, 1975).
786. N.D. CENT. CODE §§ 12-38-15, 12-38-16, and 12-38-17 (1960) also classify the offenses as misdemeanors.
787. FINAL REPORT, *supra* note 6, at 231.
788. II WORKING PAPERS, *supra* note 60, at 971.

fashion: acts preparatory to a riot; acts during a riot; and acts contrary to official action.

Under the New Code, riot is defined as: "a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct create grave danger of damage or injury to property and persons or substantially obstructs law enforcement or other governmental function."[789] The present definition is aimed primarily at direct injury and potential injury to persons and property and does not concern itself specifically with obstruction of governmental functions.[790] The problem of imposing criminal liability for riot stems from defining the boundries of the First Amendment, "the line past which dissent and protest [become] an intollerable burden on a minimum need for order."[791] Both the New and Old Code definitions appear to satisfy the strictures established by the Supreme Court by requiring a "grave or imminent lawless action."[792]

B. ACTS PREPARATORY TO A RIOT

An individual is guilty of intent to riot under the New Code if he:

"a) Incites or urges five or more persons to create or engage in a riot; or

b) Gives commands, instructions, or directions to five or more persons in furtherance of a riot."[793]

The New Code section of Incitement to Riot attempts to encompass all activities which occur prior to and are catalytic to a resulting riot. Included in these activities are the old crimes of rout[794] and unlawful assembly.[795] Rout and unlawful assembly presently

789. N.D. CENT. CODE § 12.1-25-01(2) (effective July 1, 1975).

790. N.D. CENT. CODE § 12-19-03 (1960): "Any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution, by six or more persons acting together and without authority of law, is riot."

791. II WORKING PAPERS, *supra* note 60, at 1006.

792. State v. Russell, 66 N.D. 272, 264 N.W. 532 (1936). Strikers attempted to prevent other employees from working, the court required and found clear and undisputed evidence that there was force and violence and language which amounted to threats accompanied by the "immediate power of execution." *Id.* at 534.

Likewise, in Brandenburg v. Ohio, 395 U.S. 444 (1969) where a leader of the Klu Klux Klan was convicted under an Ohio criminal syndicalism statute, the court reversed the conviction holding the Constitutional guarantee of free speech and free press did not permit a state to forbid the advocacy of the use of force as a violation of law; except, where such advocacy was directed to inciting or producing "imminent lawless acion" and was likely to incite or produce such action. *Id.*

793. N.D. CENT. CODE § 12.1-25-01(1) (effective July 1, 1975).

794. N.D. CENT. CODE § 12-19-05 (1960). Whenever three or more persons acting together make any attempt to do any act which would be riot if actually committed, such assembly is a rout. *Id.*

795. N.D. CENT. CODE § 12-19-06 (1960). Whenever three or more persons assemble with intent or with means and preparations to do an unlawful act which would be riot if actually committed, but do not act toward the commission thereof, or whenever such persons assemble without authority of law and in such a manner as is adapted to disturb the public peace or excite public alarm, such assembly is an unlawful assembly. *Id.*

carry misdemeanor penalties[796] as does simple riot in most instances.[797] One exception, in the case of riot, is a rioter who, "directed, advised, encouraged or solicited other persons who participated in the riot to acts of force or violence. . . ."[798] Such actions would result in a felony conviction under the Old Code where a riot did in fact occur.[799]

As with other riot sections, the legislative committee apparently sought a reduction of penalties as responsibility and culpability diminished.[800] The New Code continues to appreciate the distinction in potential danger between urging and inciting nonviolent, yet illegal, group action on the one hand and directing and commanding large numbers of participants on the other. First, the offense is a Class C felony if the individual commands, instructs, or directs a riot and the riot involves one hundred or more individuals.[801] Second, the New Code provides for convictions of attempt, solicitation or conspiracy[802] to commit the offense of incitement to riot only if the person engages in conduct likely to result in a riot.[803] Finally, in all other cases, it is a Class A misdemeanor.[804] For example, one who incites a small group of persons to riot, but there is little danger of a riot materializing at the time, could only be convicted of a misdemeanor. In addition, it was noted by the legislative committee that, "one of the potential life imprisonment penalties (under the New Code) applies if a murder, maiming, robbery, rape, or arson was committed in the course of a riot.[805] This is in accord with present law[806] and the consultants report on the Proposed Federal Code, both of which provide that, should such events occur, they be prosecuted as such and not prosecuted under the riot provisions.

Another change in the law is the required number of partici-

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796. N.D. CENT. CODE § 12-19-07 (1960).
797. N.D. CENT. CODE § 12-19-04(5) (1960).
798. N.D. CENT. CODE § 12-19-04(4) (1960).
799. *Id.*
800. *Minutes "B"*, *supra* note 2, June 20-21, 1972 at 54.
801. N.D. CENT. CODE § 12.1-25-01(4) (effective July 1, 1975). A staff memorandum to the National Commission on Reform of the Federal Criminal Law in discussing the number of participants to be required for the basic crime of riot states, "The critical number in the 20th Century should be the number of participants that would constitute a nonroutine mob confrontation . . . ." II WORKING PAPERS, *supra* note 60, at 988. Recognizing the increased danger to public safety which results as the number of participants in a riot increases, the drafters felt that the sanctions should reflect this danger. Setting the number of rioters at one hundred for conviction of the inciter of a Class C felony is a policy question for the legislature. However, it must be observed that the federal drafters were thinking in terms of the capabilities of an urban police force. Such a figure might overly tax the capabilities of the majority of the police forces in North Dakota cities.
802. N.D. CENT. CODE §§ 12.1-06-01, -03, -04 (effective July 1, 1975).
803. N.D. CENT. CODE § 12.1-25-01(3) (effective July 1, 1975).
804. N.D. CENT. CODE § 12.1-25-01(4) (effective July 1, 1975).
805. *Minutes "B"*, *supra* note 2, June 20-21, 1972 at 54.
806. N.D. CENT. CODE § 12-19-04(1) (1960).
807. II WORKING PAPERS, *supra* note 60, at 1017. *See also* FINAL REPORT, *supra* note 6, at 242.

pants. Presently, three persons must be involved in an unlawful assembly or a rout and six involved in a riot.[808] The New Code[809] adopts the Federal Code[810] proposal which requires five persons to be involved in the riot. The legislative committee decided to follow the Proposed Federal Code since "the selection of any minimum number of persons to be defined as a riotous group was essentially an arbitrary process."[811]

C. ACTS DURING A RIOT

Under the New Code, "A person is guilty of a Class C felony if he:

a) Knowingly supplies a firearm or destructive device for use in a riot;

b) Teaches another to prepare or use a firearm or destructive device with intent that any such thing be used in a riot; or

c) While engaging in a riot, is knowingly armed with a firearm or destructive device."[812]

Part (c) is similar to present North Dakota law which provides for imprisonment for anyone carrying a firearm or dangerous weapon in the course of a riot.[813] Parts (a) and (b) create new law in North Dakota as presently there is no proscription against the supplying of weapons to rioters or instruction in their use.[814] The legislative committee, in adopting the Federal Code wording, apparently relied on the comments of the federal drafters. Thus, under part A, an inciter of a riot, who supplied firearms, could be convicted of a Class C felony as an accomplice to any person who used the firearm in the course of a riot.[815] Recognizing the Constitutional limitations, the final draft of the Federal Code requires that the "teaching" be done with the specific intent to be used in a riot.[816] Likewise, parts (a) and (c) require that the accused "know-

808. N.D. CENT. CODE §§ 12-19-03, -05, -06 (1960). See notes 794 and 795, *supra*.
809. N.D. CENT. CODE § 12.1-25-01 (effective July 1, 1975).
810. FINAL REPORT, *supra* note 6, § 1801(1).
811. *Minutes "B", supra* note 2, June 20-21, 1972 at 55.
812. N.D. CENT. CODE § 12.1-25-02(1) (effective July 1, 1975).
813. N.D. CENT. CODE § 12-19-04(3) (1960). "Every person guilty of participating in a riot shall be punished as follows: . . . (3) If such a person carried, at the time of such riot, any species of firearm or other deadly or dangerous weapon, or was disguised, by imprisonment in the penitentiary for not less than two years nor more than ten years." *Id.*
814. *Minutes "B", supra* note 2, June 20-21, 1972 at 54.
815. FINAL REPORT, *supra* note 6, at 242.
816. FINAL REPORT, *supra* note 6, at 243. (1) (b) The New Code follows exactly. N.D. CENT. CODE § 12.1-25-02(1)(b) (effective July 1, 1975). The basic wording of these sections was derived from the riot provisions of the Civil Rights Act of 1968, 18 U.S.C. § 231-232. The consultant to the drafters of this section questioned whether part (b) should be included in light of " . . . first amendment problems (need for clear and present danger) that, arise in connection with any proscription of "teaching," and the practical consideration that, whenever a punishable riot is actually facilitated by such teaching, the teacher will be implicated as an accomplice or criminal facilitator." FINAL REPORT, *supra* note 6, at 243. However, in United States v. Featherston, 461 F.2d 1119 (5th Cir. 1972) the court rejected first amendment arguments as to the vagueness of 18 U.S.C. § 231(a)(1). The statute, by requiring

ingly supply" and "knowingly be armed" for conviction.[817] Something more than mere negligence is required in the supplying of arms to a possible rioter. "As a general principle, negligence should not be enough to convict of a felony."[818]

The sanctions imposed by the New Code for possession of a weapon in the course of a riot represent a substantial reduction from the Old Code. The New Code establishes a maximum of five years imprisonment and/or a fine of $5,000;[819] the Old Code, however, provides for a sentence of not less than two years nor more than ten years.[820] Retribution does not appear to be the goal of the proposed code.[821] Crowd psychology and sociology of a riot suggest that the use of force or threats of sanctions tend to expand rather than control riot velocity and frequency by means of actions and reactions causing counter productive results.[822]

Like the New Code section on inciting riot, the section on engaging in a riot separates that activity into degrees of culpability.[823] The legislative committee in adopting the Federal Code approach, attempted to differentiate between degrees of culpability by identifying the leaders and participants in the riot from those individuals merely present at the scene. The Old Code is directed at crowd dispersal at the scene of an unlawful assembly, rout or riot and makes no distinction for those individuals who are present by accident.[824] Under the New Code, mere presence at the riot is specifically exempted as not a violation of the statute.[825] The inclusion of such an exemption prevents "round-up" type operations at the riot scene which envelope rioters as well as those individuals present for legitimate purposes.[826] One who engages in a riot is guilty of a

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the "teacher to know or have reason to know" that the instruction will lead to unlawful use in or in furtherance of a civil disorder, does not cover inadvertant conduct. The defendant must have acted with intent or knowledge that the information disseminated would be used in furtherance of a civil disorder, thus creating a clear and present danger.

817. FINAL REPORT, *supra* note 6, at 243. N.D. CENT. CODE § 12.1-25-02(1)(a)(c) (effective July 1, 1975).

818. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, Study Draft 232 (1970).

819. N.D. CENT. CODE § 12.1-32-01(3) (effective July 1, 1975). N.D. CENT. CODE § 12.1-24-02(1) (effective July 1, 1975) imposed a Class C felony upon conviction.

820. N.D. CENT. CODE § 12-19-04(3) (1960).

821. II WORKING PAPERS, *supra* note 60, at 1010. The consultant's report to the Commission indicates that the general purpose section of the proposed code omits retribution as an official objective of post conviction sanctions. The concept of increased sanctions is based on the belief that they will deter potential offenders. The consultant continues to say that this concept is based on two faulty assumptions; first, that a riot occurs in a "normal period" when there are sufficient police both to enforce the law and act as a viable deterent; and second, that the rioter has a "choice" to psychologically disassociate himself from the crowd behavior pattern of which he is a part. *Id.* at 1011.

822. *Id.* at 1012.

823. N.D. CENT. CODE § 12.1-25-03(2) (effective July 1, 1975).

824. N.D. CENT. CODE §§ 12-19-08, -09 (1960).

825. N.D. CENT. CODE § 12.1-25-03(2) (effective July 1, 1975).

826. FINAL REPORT, *supra* note 6, at 244. The drafters of the Federal Code identified four considerations in arriving at the proposed classification of engaging in a riot:

> 1) the desirability of Congressional guidance to law enforcement, prosecuting and judicial officials in discriminating among the mass of persons involved in a serious riot;

Class B misdemeanor under the New Code.[827] Here again the New Code sanctions represent a lessening of potential penalties from current law wherein simple riot is punishable as a misdemeanor.[828]

D. ACTS CONTRARY TO OFFICIAL ACTION

Finally, the New Code deals with official actions directed toward control of a riot: "A person is guilty of a Class B misdemeanor if, during a riot . . . or when one is immediately impending, he disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot."[829] This section consolidates a series of Old Code provisions directed at crowd dispersals, riot suppression and powers of law enforcement officials.[830] The basic thrust of the two codes is much the same. One significant provision omitted from the New Code and the Proposed Federal Code is the requirement that: ". . . [e]very endeavor must be used . . . to induce or force the rioters to disperse before an attack is made upon them by which their lives may be endangered."[831] Such a requirement is essential in a riot condition, in which escape or dispersal routes are either nonexistant, not visible in the midst of a panicked mob, to give those willing to disperse a knowing physical possibility of responding to the dispersal order.[832]

The Proposed Federal Code requires that the public safety order be made by one having supervisory authority over at least ten persons. The New Code requires that the order be given by the senior law enforcement official on the scene.[833] This apparently gives authority to others with an interest in stopping the riot who might not be a law enforcement officer; e.g., a city mayor.[834] The New Code deletes the ten subordinates requirement of the Proposed Federal Code which is designed for more urban areas.[835]

A person who disregards a proper order to leave a place of riot,

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2) the availability of summary procedures for disposing of a large number of "petty offenses";

3) the considerable risk that a person may be convicted as a "participant" when he may have been only a person who came on the scene with a view of peaceful protest or demonstration, or an innocent observer trapped in a pressing mob; and,

4) the diminshed culpability which has been pointed out as characterizing participation in crowd actions.

Id.

827. N.D. CENT. CODE § 12.1-25-03(1) (effective July 1, 1975).
828. N.D. CENT. CODE § 12-19-04(5) (1960).
829. N.D. CENT. CODE § 12.1-25-04 (effective July 1, 1975).
830. N.D. CENT. CODE §§ 12-19-08, -09, -17, -19, -22 (1960).
831. N.D. CENT. CODE § 12-19-22 (1960); *see Minutes "B", supra* note 2, June 20-21, 1972 at 54.
832. II WORKING PAPERS, *supra* note 60, at 1027. The consultant to the drafters of the Fededal Code urged the inclusion of such a provision in light of the practical realities under a riotous condition. *Id.*
833. N.D. CENT. CODE § 12.1-25-04 (effective July 1, 1975).
834. *Minutes "B", supra* note 2, June 20-21, 1972 at 55.
835. *Id.*

rout or unlawful assembly is guilty of a misdemeanor under the Old Code.[836] Under the New Code it is a Class B misdemeanor.[837] The Federal Code makes such an offense an "infraction" which results in arrest, fine and/or probation, but not jail sentence.[838] The reasoning behind this reduction in sentencing appears to be the result of "one of the great lessons of recent riot experience: the need for expediting the handling of large numbers of minor participants."[839]

E. DISORDERLY CONDUCT

The disorderly conduct section of the New Code basically consolidates current statutes by dealing with public fighting, unreasonable noise, obscene language and gestures, obstruction of traffic or use of a public facility, persistent following, loitering to solicit sexual contact and finally a catchall provision covering the creation of hazardous or alarming conditions which serve no useful purpose.[840]

The basic thrust of the New Code is that there must be specific intent to:

> harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed. . . .[841]

Under the Old Code such an intent requirement is present only for a conviction for injury to the public peace,[842] disturbing a lawful meeting[843] and injury to public morals[844] which require a willful act or one which grossly disturbs the public peace. Not repealed by the New Code is a statute which provides:

> Any person who commits an act which disturbs the peace or constitutes disorderly conduct is guilty of a misdemeanor.[845]

This section lacks any intent requirement and appears to be in conflict with the aim of the New Code. Consideration should be given to its repeal when the New Code takes effect.

The wording of the New Code and Proposed Federal Code is derived from the New York disorderly conduct statute.[846] The three

836. N.D. CENT. CODE § 12-19-08 (1960).
837. N.D. CENT. CODE § 12.1-25-04 (effective July 1, 1975). This results in substantially the same penalty.
838. FINAL REPORT, *supra* note 6, at 271.
839. II WORKING PAPERS, *supra* note 60, at 987.
840. N.D. CENT. CODE § 12.1-31-01 (effective July 1, 1975).
841. *Id.*
842. N.D. CENT. CODE § 12-19-01 (1960).
843. N.D. CENT. CODE §§ 12-19-02, 12-11-23 (1960).
844. N.D. CENT. CODE § 12-22-01 (1960).
845. N.D. CENT. CODE § 5-01-05.3 (Supp. 1973).
846. N.Y. PENAL LAW § 240.20 (McKinney 1967); *See also* MODEL PENAL CODE § 250.23 (Proposed Official Draft, 1962). In a critique of the new New York penal law a commentator has stated:

statutes are substantially the same with two basic exceptions. First, conviction under the New York statute and Proposed Federal Code result in a violation or infraction.[847] The New Code imposes a Class B misdemeanor sentence which compares to the misdemeanor sentence imposed by present law. It was the feeling of the Committee that the offense should be classified as a crime or excluded from the criminal code.[848] Second, the Proposed Federal Code requires a complaint by a private citizen before an arrest may be made for use of obscene language or gestures, persistent following or loitering to solicit sexual contact.[849] The federal drafters viewed the section as a preventive measure to control harassment of the general public, not to protect the sensitivities of police officers.[850] There is no such public complaint requirement in the Old Code nor is it included in the New Code. However, as a practical matter, such a complaint may be necessary for convictions, since the purpose of a disorderly conduct statute is to protect the public from what it considers dangerous or offensive conduct.[851]

XIV. FIREARMS[852]

A. SUPPLYING ARMS FOR CRIMINAL ACTIVITY

These New Code[853] and the Proposed Federal Code Provisions[854] do not attempt a complete revision of firearm statutes, but rather

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> It must be emphasized that in all cases of disorderly conduct one fundamental precondition must always be satisfied: there must be an 'intent to cause public inconvenience, annoyance or alarm,' or at the very least, the defendant must have been 'recklessly' creating the risk thereof.

I. Schwartz, HIGHLIGHTS OF THE NEW PENAL LAW 32 (1967).

The thrust of this comment was carried forth in People v. Hill, 60 Misc. 2d 277, 303 N.Y.S.2d 265, 269 (1969) where the court stated:

> It must be kept in mind that the prime purpose of the statute . . . is to preserve public order and peace. To sustain a conviction the offensive conduct must be *public* in nature and must cause *inconvenience, anoyance* or *alarm* to a substantial segment of the public, or be of such nature and character that it would appear beyond a reasonabe doubt that the conduct created a risk that a breach of the peace is imminent. . . . Perhaps more important, it must be established beyond a reasonable doubt that the accused *intended* to breach the peace. (Emphasis in original).

847. N.Y. PENAL LAW § 240.20 (McKinney 1967); FINAL REPORT, *supra* note 6, § 1861.

848. *Minutes "B", supra* note 2, July 20-21, 1972 at 15.

849. FINAL REPORT, *supra* note 6, § 1861(4).

850. *Id.* at 269-70.

851. In State v. Lanfenberg, 99 N.W.2d 331 (N.D. 1959) the defendants were prosecuted under what is now N.D. CENT. CODE § 12-19-01 (1960) which requires for conviction a willful and wrongful act which "grossly disturbs the public peace." The defendants were arrested after a physical combat on a deserted street in Fargo, North Dakota. The police learned of the fight only after a local hospital had treated one of the participants for minor cuts. No one but the participants saw the incident and no citizen reports were received by the police department. The court said that under the statute, there must be proof that the public peace was actually and grossly disturbed and that the tranquility or sense of security of any resident of Fargo was disturbed by the incident.

852. The scope of this discussion is necessarily limited to a comparative analysis of the three Codes and makes no attempt to consider the desirability of stringent gun control laws in general. The question of gun control is a complex and emotional issue which can be more appropriately considered in an independent study.

853. N.D. CENT. CODE ch. 12.1-26 (effective July 1, 1975).

854. FINAL REPORT, *supra* note 6, §§ 1811, 1812, 1813 and 1814.

seek to implement and adapt the existing statutory scheme into that of the New Code.[855] The Old Code's gun control regulations are embodied in Title 62 of the Century Code and pertain primarily to licensing[856] and authorized ownership.[857] Presently, the code prohibits the delivery of a pistol ". . . to any person if there is reasonable cause to believe that person is prohibited by law from possession of a pistol."[858] This prevents the sale of firearms to persons under the age of seventeen, drug addicts, alcoholics, persons emotionally unstable or persons convicted of certain felonies in the last ten years.[859] This general limitation is contained in the New Code;[860] however, it is only partially effective in achieving the objective of the New Code to control "conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which governmental protection is appropriate."[861] To meet this need, the New Code expands upon the regulatory prohibition in Title 62. Under the New Code, it is a Class C felony for one to "knowingly suppl[y] a firearm, ammunition therefore, destructive device, or explosive to a person who intends to commit a crime of violence or intimidation with the aid thereof or while armed therewith . . . ."[862] Thus, in addition to the limitations under present law, the New Code seeks to place an additional duty or responsibility on the buyer and seller to refrain from procuring or selling firearms, destructive devices or explosives with "knowledge" of the buyer's criminal intent.[863]

B. ILLEGAL FIREARMS BUSINESS

In implementing present regulatory law, the New Code provides that, "A person is guilty of an offense if he knowingly supplies or

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855. *Minutes "B", supra* note 2, July 20-21, 1972 at 18. In adopting the federal draft, the committee was advised by counsel that the new section would not replace existing sections in Title 12, but could either complement or replace sections in Title 62. By referencing the New Code provisions of Title 62, the committee elected to use the New Code sections to implement rather than replace Title 62. The Federal Code section derives much of its wording from and implements the regulatory provisions found in Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. app. § 1201-1203) and the Gun Control Act of 1968 (18 U.S.C. §§ 921-928 Title I, 26 U.S.C. §§ 5091-5872 Title II). II WORKING PAPERS, *supra* note 60, at 1047-48.

856. N.D. CENT. CODE §§ 62-91-05 to -08, -15 to -18; 62-02-02, -04 to -05 (1960).

857. N.D. CENT. CODE §§ 61-01-04 (Supp. 1973), 62-01-09, -11, -12, 61-02-03 (1960).

858. N.D. CENT. CODE § 62-01-12 (1960).

859. N.D. CENT. CODE §§ 62-01-04 (Supp. 1973), 52-01-11 (1960).

860. N.D. CENT. CODE § 12.1-26-02(1) (effective July 1, 1975).

861. N.D. CENT. CODE § 12.1-01-02 (effective July 1, 1975).

862. N.D. CENT. CODE § 12.1-26-01(a)(b); § 12.1-26-01(2) (effective July 1, 1975) provides that a crime of violence or intimidation are such crimes as defined in chapters 12.1-16 through 12.1-25 of this title when the crime is a felony. *See Minutes "B", supra* note 2, July 20-21, 1972 at 18.

863. N.D. CENT. CODE § 12.1-02-02(1)(b) (effective July 1, 1975) provides: "For the purposes of this title, a person engages in conduct: . . . b) 'knowingly' if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so."

procures a firearm, ammunition, or explosive material to . . . a person prohibited by regulatory law from receiving it."[864] Thus, if it is known that the ultimate possessor, whether the buyer or an intended third party, is restricted by present law from obtaining such a weapon, a sanction is provided even though no additional crime is contemplated. The Proposed Federal Code is similarly intended for use in connection with the present regulatory scheme which is directed at the control of firearms and explosives in interstate and foreign commerce as well as acquisition by small categories of individuals similar to those presently restricted under North Dakota law.[865] In discussing this New Code section, there was some question within the legislative committee whether or not the definitions of firearms as found in Title 62 of the Old Code should be revised at this time.[866] The final result is somewhat confusing as the section specifically adopts the definition of firearms to "pistols." Also adopted was the New Code Section 12.1-01-04(10) which is to be used in this title unless a different meaning is plainly required. This New Code section greatly expands the definition of firearms to include any weapon, not just a pistol which, "will expel or is readily capable of expelling a projectile by the action of an explosive. . ."[867] The main regulatory prohibitions under present law speak in terms of pistols only, and make no restrictions on the sale or purchase of other types of firearms to persons considered unsuited for ownership of such weapons. The question evolves: what result if a person knowingly sells a shotgun to someone prohibited by regulatory law from receiving a fireram? It appears that only under the latter definition would he be in violation of the statute and subject to its sanctions. This conflict should be resolved.

The New Code follows the Proposed Federal Code system of grading offenses which ". . . endeavors to embrace the distinction in present law that dealings in firearms by or supplying arms to certain categories of unsuitable persons is more serious than dealing by or supplying to persons of other categories.[868] "The offense

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864. N.D. CENT. CODE § 12.1-26-02 (effective July 1, 1975).

865. *Compare* 18 U.S.C. § 922 (f) and (g) (1970) *with* N.D. CENT. CODE § 62-01-04 (Supp. 1973).

866. *Minutes "B", supra* note 2, July 20-21, 1972 at 19.

867. This definition is similar to that found in 18 U.S.C. § 921 (3) which was specifically adopted by the North Dakota Legisature in 1969 when enacting Chapter 62-05, *Purchases of Rifles and Shotguns in Contiguous States.*

868. II WORKING PAPERS, *supra* note 60, at 1055.

is . . . a Class C felony if the offender was not licensed to deal in the materials supplied, or if he engaged in the transaction in a manner indicating his willingness to continue to take such action. In other cases it is a Class A misdemeanor."[869] An example of such a misdemeanor would be minor procedural violations of regulatory licensing statues. In adopting this approach, the federal drafters felt "there should be more discrimination than is provided under existing law in distinguishing between felonies and misdemeanors."[870] The Old Code, for the most part, similarly determines the harshness of the penalty by the seriousness of the offenses. However, the Old Code contains a "catch-all" which provides for felony convictions for any provision in which no specific sanction is imposed.[871] The New Code's blanket Class A misdemeanor for violations of regulatory law, with respect to sales to restricted individuals or licensing requirements not evidencing an intentional violation, assures penalties more consistant with the gravity of the violation.[872]

C. TRAFFICKING IN LIMITED USE FIREARMS

Both the New Code and the Proposed Federal Code deal specifically with the trafficking in and receiving of limited use firearms.[873] As with other New Code firearm provisions, this section is intended for use with an existing regulatory scheme which utilizes licensing, control over sale, receipt, and possession of limited use firearms to achieve its objectives.

Under the Old Code, the regulatory prohibitions deal with, 1) licensing procedures and, 2) limitations on who may sell, possess, or receive a proscribed weapon.[874] The Old Code provides that anyone who sells, gives, loans, furnishes, delivers, purchases, has or

869. *Minutes "B", supra* note 2, July 20-21, 1972 at 18-19.

870. FINAL REPORT, *supra* note 60, at 249.

871. N.D. CENT. CODE § 62-01-20 (1960). The specified punishment is imprisonment in the penitentiary for not less than one year nor more than ten years. *Id.*

872. In commenting on the proposed classification of sanctions in the firearms sections, the federal drafters observed that "the proposed sections endeavor, with respect to those present firearm offenses which appear to be appreciably dangerous in and of themselves, to provide felony treatment for the basic offense, but a misdemeanor version where it is clear that the offense did not, in fact, involve any risk of physical harm or severe obstruction of firearm control measures." II WORKING PAPER, *supra* note 60, at 1051.

873. N.D. CENT. CODE § 12.1-26-03(2) (effective July 1, 1975) defines trafficking to mean, transfers to another person, possession with intent to transfer to another person, makes or manufacturers, or imports, or exports; "limited-use firearms" are those weapons defined in N.D. CENT. CODE § 62-02-01: " 'machine gun, submachine gun or automatic rifle' . . . shall mean and include a weapon, mechanism, or instrument not requiring that the trigger be pressed for each shot, and having a reservoir, belt, or other means of storing and carrying ammunition which can be loaded into the weapon, mechanism, or instrument and fired therefrom at a rate of five or more shots to the second."

874. N.D. CENT. CODE chs. 62-01, -02, -03 (1960) *as amended* (Supp. 1973).

possesses a limited use firearm is guilty of a felony.[875] The New Code, through its definition of trafficking, clarifys the meaning of such a "sale" under present regulatory law to include within its scope a manufacturer, importer or exporter as well as retail or an individual transfer.[876]

There exists few, if any, legitimate private uses of such weapons. The federal drafters concluded that such weapons are:

> intended to be totally suppressed among the civilian population, fewer violations are trivial, and there is justification for embracing more conduct than that identified . . . under [prior sections'] felony sanctions.[877]

By defining regulatory law to mean Chapter 62-02, the New Code does not contemplate absolute "total supression." Present regulation permits possession of such weapons, in the civilian sector in North Dakota, by those licensed to possess for his own protection or the protection of his servants and employees,[878] and those licensed to deal in such firearms.[879] Under the New Code, it is a Class C felony to traffic in or receive a limited use firearm with "knowledge" that it is being transferred to the buyer in violation of regulatory law.[880] Thus, even though a buyer had a valid license, if he knows the seller violated regulatory law in the procurement and sale, he too is held accountable. The Old Code provides for a maximum of ten years imprisonment and/or three thousand dollars fine for possession, sale, or delivery of a limited use firearm without a license.[881] Again, there is a significant difference in potential sentences between the New and Old Codes.

D. POSSESSION OF EXPLOSIVES IN GOVERNMENT BUILDINGS

The New Code makes it a Class A misdemeanor for a person to possess an explosive, or destructive device in a government building without the written consent of the government agency or person responsible for managing the building.[882] The drafters of the sub-

875. N.D. CENT. CODE § 62-02-06 (1960).
876. N.D. CENT. CODE § 12.1-26-03(2)(a) (effective July 1, 1975).
877. FINAL REPORT. *supra* note 6, at 250.
878. N.D. CENT. CODE § 62-02-03, -05 (1960).
879. N.D. CENT. CODE § 62-02-07(1) (1960).
880. N.D. CENT. CODE § 12.1-26-03(1) (effetcive July 1, 1975).
881. N.D. CENT. CODE § 62-02-06 (1960).
882. N.D. CENT. CODE § 12.1-26-04 (effective July 1, 1975). A "destructive device" is defined as " . . . any explosive, incendiary or poison gas bomb, grenade, mine, rocket, missile, or similar device." N.D. CENT. CODE § 12.1-26-04(7) (effective July 1, 1975). An "explosive" is defined as " . . . gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breaks), detonators, and other detonating

stantially similar Proposed Federal Code section felt that Congress did not intend to penalize inadvertant, technical violations and suggested that an affirmative defense that the explosive material was possessed for a lawful prupose which would not undermine the enforcement scheme since, under that scheme, the burden of proof would be on the defendant.[883] The North Dakota Legislative Committee did not specifically include such an affirmative defense. However, in discussing the proposed section, the Committee on Judiciary "B" felt that, "[t]his section is new law and is designed as a deterent to deliberate bombings, allowing law enforcement officials to apprehend offenders prior to the actual planting or utilization of such explosives."[884] Thus, the technical or inadvertant violation does not appear to fall within the drafter's intent in adopting the federal draft.

The Proposed Federal Code and the New Code do not deal with the actual bombing of a government building in this section; rather, these sections deal with the prevention of such acts. The current law has three types of preventive statutes. First, licensing statutes provide that a license is required to possess any sort of bomb loaded with explosives or poisonous or dangerous gases.[885] Second, state law prohibits the making, keeping or carrying of explosives within or through a city or village in violation of law or city ordinance.[886] But, if there are no such ordinances and state licensing laws and regulations are complied with, there may be no violation under this statute. Third, any attempt to destroy or burn a building with explosives requires that the explosive material be placed or distributed in, upon, against or near a building with intent to destroy it.[887] The attempt, successful or not, is a felony.[888] The thrust and sentencing of the New Code recognizes the potential danger involved and is operative prior to what is classified as an attempt. It provides for a conviction of an individual who has not made any "ac-

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agents, smokeless powders, and any chemical compounds, mechanical mixture, or other ingredients in such proportions, quantities or packaging that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, or material or any part thereof may cause an explosion. N.D. CENT. CODE § 12.1-26-04(8) (effective July 1, 1975).

883. FINAL REPORT, *supra* note 6, at 251.

884. *Minutes "B"*, *supra* note 2, July 20-21, 1972 at 19.

885. N.D. CENT. CODE § 62-02-02 (1960).

886. N.D. CENT. CODE § 12-18-02 (1960).

887. N.D. CENT. CODE § 12-18-05 (1960).

888. *Id.* Old Code attempt law provides that any person who, with intent to commit any crime, breaks into or enters a building and commits or attempts to commit a crime by the use of an explosive is subject to a felony conviction and imprisonment from twenty to forty years. N.D. CENT. CODE § 12-18-06 (1960). Whether the crime of "destroying the building" would be a "crime" contemplated by this statute has not been determined in the courts.

tual, planting, or utilization of such explosive," but has advanced to the point, by entering the public building with the explosive, that he has created a public safety hazard.

XV. SEXUAL OFFENSES

These sections in the New Code presented the drafters with more discussion and differences of opinion than any other portion.[889] So divergent were the views of the drafters that this portion was not attached to the main revision bill,[890] but was rather presented to the legislature in the form of three alternative bills[891] to supplement the main bill.

Alternative No. 1 is similar to the Old Code in penalties while its format is patterned after the Proposed Federal Code. Alternative No. 2 is the most progressive of the three bills, and Alternative No. 3 is a compromise between the other two alternatives. Alternative No. 3 was passed by the legislature.[892]

All three alternatives will be discussed in the context of the Old Code and the Proposed Federal Code.[893] Bigamy and incest will be discussed independently, since they were identical in all three alternatives and similar to the Old Code. Prostitution will also be discussed separately since it was contained in the main revision bill.

A. GENERAL PROVISIONS

All three alternatives begin with provisions regarding an actor's mistake as to the age of the victim. If criminality depends on a victim's being younger than fifteen, neither the actor's ignorance of the child's age nor his reasonable belief that the child was over fourteen is a defense.[894] However, if criminality results from the victim's being a minor, the actor's reasonable belief that the victim

889. *Minutes "B", supra* note 2, June 20-21, 1972; *Minutes "B", supra* note 2, July 20-21, 1972. This section seems to be the most troublesome to legislators the country over. As Anthony Yturri states in commenting on Oregon's newly revised criminal code:

> Probably no single part of the New Code presented a more difficult—or explosive—policy question than did the sex offenses article. An 'agonizing reappraisal' was made of statutes denouncing adultery and fornication, statutes that had remained in force since 1864, as well as statutes prohibiting consensual sodomy, lewd cohabitation, and seduction. We had to decide to what extent conduct that is generally considered repugnant or immoral, but which does not produce demonstrable harm to others, should be made criminal.

Yturri, *The Three R's of Penal Law Reform*, 51 ORE. L. REV. 434 (1972).

890. S. Bill 2045, Forty-Third Legislative Assembly of North Dakota (1973).

891. S. Bills 2047, 2048, 2049, Forty-Third Legislative Assembly of North Dakota (1973). Bill 2047 is hereinafter referred to as Alternative No. 1, Bill 2048 is hereinafter referred to as Alternative No. 2, and Bill 2049 is hereinafter referred to as Alternative No. 3 or as the New Code, N.D. CENT. CODE ch. 12.1-20 (effective July 1, 1975). These alternatives were formulated to permit the presentation of differing views and to improve the chances for passage of the main bill. *See Minutes "B", supra* note 2, Aug. 24-25, 1972 at 12, 15-16; *Minutes "B", supra* note 2, Sept. 21-22, 1972 at 33-35.

892. N.D. Session Laws, ch. 117 (1973).

893. Refer to Appendix "A" for a comparison chart of the three alternatives, the Old Code and the Proposed Federal Code.

894. Alternatives No. 1, 2 and 3 § 12.1-20-01(1)(a) (1973).

was an adult is an affirmative defense.[895] The Proposed Federal Code has a similar provision,[896] but the critical ages are ten and sixteen.[897]

Under the New Code, then, mistake as to age would be a defense to a charge of corruption of minors,[898] but would not be a defense for statutory rape.[899]

The drafters of the Proposed Federal Code did not allow a mistake as to age as a defense where the critical age is ten, as any likely mistake "would still have the child below the age of puberty."[900] This rationale does not support the New Code provision, where the critical age is fifteen.[901]

All three alternatives provide a broad exclusion for conduct with the actor's spouse.[902] This exclusion does not, however, apply if the spouses are living apart under a decree of judicial separation[903] or if the spouse is charged as an accomplice "in an offense which he causes another person to perform."[904]

The New Code[905] thus continues the inter-spousal rape immunity provided in the Old Code,[906] and expands it to cover fellatio, cunnilingus and anal intercourse.[907] The New Code's marital immunity provision[908] closely parallels the Proposed Federal Code,[909] but does not extend to "persons living as man and wife."[910]

The definition of "sexual act" in Alternatives 2 and 3 (the New Code) excludes conduct between spouses.[911] The Proposed Federal

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895. Alternatives No. 1, 2 and 3 § 12.1-20-01(1)(g) (1973).
896. FINAL REPORT, *supra* note 6, § 1648(a).
897. *Id.* at 192.
898. N.D. CENT. CODE §§ 12.1-20-01(6), 12.1-20-05 (effective July 1, 1975).
899. N.D. CENT. CODE §§ 12.1-20-01(a), 12.1-20-03 (effective July 1, 1975).
900. II WORKING PAPERS, *supra* note 60, at 873.
901. The drafters of the Proposed Federal Code chose age ten in an attempt to set the critical age prior to the onset of puberty. *Id.* at 869-70. They state, "As the child attains puberty, . . . bona fide mistakes in age can be made." *Id.* at 873.
902. Alternatives No. 1, 2 and 3 § 12.1-20-01(2) (1973).
903. *Id.*
904. *Id.* Note that the quoted phrase, with its use of the term, "causes," is very similar to a portion of the New Code's general accomplice liability section. N.D. CENT. CODE § 12.1-03-01(1)(a) (effective July 1, 1975). Does the fact that language paralleling to other portions of that section is not included in the exception to the exclusion mean that a spouse is exempted if he "aids" rather than "causes an offense against his spouse?" *See* N.D. CENT. CODE § 12.1-02-05 (effective July 1, 1975).
905. N.D. CENT. CODE § 12.1-20-01(2) (effective July 1, 1975).
906. N.D. CENT. CODE § 12-30-01 (1960).
907. *Id.* These acts are included in the Old Code's definition of sodomy; there is no marital exemption provided for that offense. N.D. CENT. CODE § 12-22-07 (1960).
908. N.D. CENT. CODE § 12.1-20-01(2) (effective July 1, 1975).
909. FINAL REPORT, *supra* note 6, § 1648(2).
910. *Id.* This was intended to extend the immunity to "persons intentionally living in common-law relationships." FINAL REPORT, *supra* note 6, at 192.
911. Alternatives No. 2 and 3 § 12.1-20-02(1) (1973); N.D. CENT. CODE § 12.1-20-02(1) (effective July 1, 1975). It was in the context of this definition that elimination of the inter-spousal immunity was suggested. *Minutes "B", supra* note 2, June 20-21, 1972 at 18. The severe damage to reputation which could arise from an inter-spousal sex offense charge was pointed out, together with a suggestion that the victimized spouse should have an assault charge available; committee action favoring continued immunity resulted. *Id.* at 18-19.

Code excludes conduct between husband and wife from its definition of "deviate sexual intercourse."[912]

All three alternatives follow the Proposed Federal Code[913] in barring prosecution of most[914] sex offenses unless a complaint is made within three months of the act's occurrence.[915] If the victim is a minor[916] or otherwise incompetent, the three months are computed from the time a "competent person specifically interested in the victim, other than the alleged offender, learned of the offense."[917]

B. SEXUAL IMPOSITIONS

1. *Gross Sexual Imposition*

Alternative No. 1 defines rape in the traditional manner of forced sexual intercourse with the woman as victim, a class A felony in most instances.[918] This definition is similar to the Old Code.[919] Alternative No. 1 also defines aggravated involuntary sodomy as forced deviate sexual intercourse, an offense of the same degree as rape.[920] Both of these sections are similar to the Proposed Federal Code.[921]

Alternatives No. 2 and 3 (the New Code) define a new offense, gross sexual imposition, which includes rape and other forced sexual acts with either sex as victim. Gross sexual imposition is also a class A felony.[922] This section in all alternatives, whether entitled rape or gross sexual imposition, proscribes intercourse obtained through the drugging or intoxification of the victim without the victim's knowledge, so as to render the victim incapable of apprising himself or herself of the situation.[923] The Old Code delineates rape by degrees depending on the offender's age and in all cases provides for a minimum sentence of one year while setting no maximum.[924] The Old Code also placed on the prosecution the burden of proving that an actor under the age of 14 was physically capable

912. FINAL REPORT, *supra* note 6, § 1649(g).
913. *Id.* at § 1648(3).
914. The offenses exempted are adultery (which has its own time limit), unlawful cohabitation, incest, and bigamy. N.D. CENT. CODE §§ 12.1-20-01(3), -09 to -11, -13 (effective July 1, 1975).
915. Alternatives No. 1, 2 and 3 § 12.1-20-01(3) (1973). It should be noted that a "substantial body of opinion" among the drafters of the Proposed Federal Code opposes the requirement for prompt complaint. FINAL REPORT, *supra* note 6, at 192.
916. This provision in Alternative No. 1 applied to victims under age sixteen. Alternative No. 1 § 12.1-20-01(3) (1973).
917. Alternatives No. 1, 2 and 3 § 12.1-20-01(3) (1973).
918. Alternative No. 1 § 12.1-20-03 (1973). Rape is a Class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if the victim is under 15, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise rape is a Class B felony.
919. N.D. CENT. CODE § 12-30-01 (1960).
920. Alternative No. 1 § 12.1-20-05 (1973).
921. FINAL REPORT, *supra* note 6, §§ 1641, 1643.
922. Alternatives No. 2 and 3 § 12.1-20-03 (1973); N.D. CENT. CODE § 12.1-20-03 (effective July 1, 1975).
923. Alternatives No. 1, 2 and 3 § 12.1-20-03 (1973).
924. N.D. CENT. CODE §§ 12-30-04 to -09 (1960).

of penetration.[925] This presumption has been eliminated by the New Code.[926]

Alternatives No. 2 and 3 (the New Code)[927] introduce, as does the Proposed Federal Code,[928] "the important distinction between ravishment by a stranger and the troublesome category of rape by a 'boyfriend'."[929] This latter category hinges on the degree of sexual liberties previously permitted the boyfriend and punishable only at the class B felony level,[930] rather than at the very highest level as in the former case.

2. *Classifications*

Alternative No. 1 has two separate classes of intercourse—sexual and deviate sexual.[931] Alternatives No. 2 and 3 place these two types of intercourse in the same category—sexual act.[932] There is logic behind such categorizing because the penalties for the offenses of sexual intercourse and deviate sexual intercourse are the same. The use of the word "deviate" serves no purpose other than to connote abnormal sexual intercourse and is not the meaning the drafters intended.[933] Rather, they intended to include such acts as fellatio, cunnilingus and anal intercourse.[934]

In Alternative No. 1[935] and the Proposed Federal Code[936] the difference between rape and gross sexual imposition is a matter of degree, depending on the amount of force used.[937] The difference be-

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925. N.D. CENT. CODE § 12-30-02 (1960). It is presumed that a child under fourteen is not physically capable of consummating the crime of rape, and physical ability to commit the crime must be proved as an independent fact. State v. Fisk, 15 N.D. 589, 108 N.W. 485 (1906). An act of sexual intercourse accomplished with a female under the age of 18 years and not the wife of the perpetrator, is always rape; but the act may be rape in the first, second or third degree. The degree depends solely upon the age of the defendent. State v. Running, 53 N.D. 896, 208 N.W. 231 (1926).

926. N.D. Sess. Laws ch. 117, § 4 (1973).

927. Alternatives No. 2 and 3 § 12.1-20-03(2) (1973); N.D. CENT. CODE § 12.1-20-03(2) (effective July 1, 1975).

928. FINAL REPORT, *supra* note 6, § 1641(2).

929. FINAL REPORT, *supra* note 6, at 188.

930. Alternatives No. 2 and 3 § 12.1-20-03(2) (1973).

931. Alternative No. 1 § 12.1-20-02(1), (2) (1973).

932. Alternatives No. 2 and 3 § 12.1-20-02(1) (1973).

933. *Id. Minutes of the Committee on Judiciary "B", North Dakota Legislative Council,* October 26-27, 1972 at Appendix "B".

> The use of deviate sexual intercourse seems to be a new expansion of the word intercourse—by definition sexual intercourse means coitus or copulation; this can only be done by the generative organs in a male and a female being joined. It has no relation to the mouth, anus, etc. The only way deviate sexual intercourse could happen would be probably the more bizarre type—e.g., a male and female hanging from the 18th floor of the State Capitol by their toes and singing "Home on the Range" while copulating.

934. *Id.* NORTH DAKOTA LEGISLATIVE COUNCIL REPORT, 95 (1973). Fellatio, cunnilingus and anal intercourse are used by the drafters to conote sexual contact between human beings consisting of contact between the mouth and the penis, the mouth and the vulva, and between the penis and the anus respectively.

935. Alternative No. 1 § 12.1-20-03, -04 (1973).

936. FINAL REPORT, *supra* note 6, §§ 1641, 1642.

937. *Minutes of the Committee on Judiciary "B", North Dakokta Legislative Council,* June 20-21, 1972 at 15.

tween aggravated involuntary sodomy[938] and involuntary sodomy[939] also depends on the force involved. Alternatives No. 2 and 3 eliminate the need for four classifications by combining the classifications of rape and aggravated involuntary sodomy used in Alternative No. 1 which were both class B felonies into gross sexual imposition and combining the classifications of gross sexual imposition and involuntary sodomy used in Alternative No. 1 which were both class C felonies into sexual imposition.[940]

3. *Sexual Imposition*

The New Code provides for the offense of sexual imposition when the victim is compelled to submit to a sexual act "by any threat that would render a person of reasonable firmness incapable of resisting."[941] This offense was termed gross sexual imposition in Alternative No. 1 and there involved only a male forcing sexual intercourse upon a female.[942] Alternatives No. 2 and 3 (the New Code) use the term "sexual act" and the victim may be of either sex.[943]

The threat involved is not the threat of "immediate and great bodily harm" of the Old Code's rape section,[944] or the "threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being" of the New Code's gross sexual imposition section.[945] It is a nondeadly threat, such as threat of injury to reputation.[946]

The crime is a "substantial physical and psychological abuse of another human being,"[947] but does not warrant the highest felony penalty since it involves less physical danger to the victim.[948]

4. *Sexual Assault*

Sexual assault is defined in all of the alternatives as offensive sexual contact with another, a class B misdemeanor.[949] Under the Old Code this is not punishable under sexual offenses unless the victim is less than 18, in which case it would be punishable by up to 15 years imprisonment.[950]

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938. Alternative No. 1 § 12.1-20-05 (1973); FINAL REPORT, *supra* note 6, § 1643.
939. Alternative No. 1 § 12.1-20-06 (1973); FINAL REPORT, *supra* note 6, § 1644.
940. Alternative No. 2 and 3 § 12.1-20-03 and § 12.1-20-04 (1973). *See* REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL, FORTY-THIRD LEGISLATIVE ASSEMBLY 93 (1973).
941. N.D. CENT. CODE § 12.1-20-04 (effective July 1, 1975).
942. Alternative No. 1 § 12.1-20-04 (1973).
943. Alternatives No. 2 and 3 § 12.1-20-04 (1973).
944. N.D. CENT. CODE § 12-20-01(4) (1960).
945. N.D. CENT. CODE § 12.1-20-03(1)(a) (effective July 1, 1975).
946. II WORKING PAPER., *supra* note 60, at 870-71.
947. *Id.* at 87.
948. FINAL REPORT, *supra* note 6, at 188.
949. Alternative No. 1 § 12.1-20-10 (1973); Alternatives No. 2 and 3 § 12.1-20-07 (1973); N.D. CENT. CODE § 12.1-20-07 (effective July 1, 1975). FINAL REPORT, *supra* note 6, § 1647.
950. N.D. CENT. CODE § 12-30-11 (1960).

C. SEXUAL ACTS WITH MINORS OR WARDS

1. *Statutory Rape*

Statutory rape under the Old Code is sexual intercourse with a female not the actor's wife who is less than 18.[951] This would include intercourse with a female under 18 even if the male is also under 18 and it was part of a teenage love affair, or even if in fact the girl had seduced the boy.[952] Statutory rape under all three alternatives is a sexual act with a person under 15.[953] Technically, this is the only section which pertains to statutory rape; however, the section on corruption of minors will apply when the victim is a minor and the actor is an adult.[954] There was considerable discussion in the Committee as to whether these age levels are appropriate or whether they should be lowered, possibly as low as ten for statutory rape, so as to conform with the Proposed Federal Code.[955] Considering the trend toward an earlier onset of puberty and recent studies which indicate earlier sexual experimentation by young children, it would seem that 15 is the maximum figure at which this age level should be set, with an age level set at 12, a more practical figure.[956] Since a given age level is intended to express a strong social condemnation of sexual acts with children, even those that are nonforceful; such conduct is graded as a class A felony.[957]

2. *Corruption of Minors*

The Proposed Federal Code does not define corruption of minors as dependent solely on the age of the victim but rather on a five year difference in the age of the offender and the victim, when the victim is under 16.[958] Thus, it is not an offense for young adults to

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951. N.D. CENT. CODE § 12-30-01(1) (1960).

952. State v. Nagel, 75 N.D. 495, 29 N.W.2d 665 (1947). State v. Klein, 200 N.W.2d 288 (N.D. 1972).

953. Alternative No. 1 § 12.1-20-03(1)(d) (1973). This offense under this alternative is, of course, limited to a male having coitus with a female victim. *Id.*; Alternatives No. 2 and 3 § 12.1-20-03(1)(d) (1973); N.D. CENT. CODE § 12.1-20-03(1)(d) (effective July 1, 1975).

954. Alternative No. 1 § 12.1-20-08 (1973); Alternatives No. 2 and 3 § 12.1-20-05 (1973).

955. *Minutes "B", supra* note 2, June 20-21, 1972 at 19.

956. "[A]ll the studies show that many girls now are reaching sexual maturity at age 11 and many boys at age 12, where the average used to be a year or two later." Statement by Dr. William V. Lewit, Professor of psychiatry and pediatrics, quoted in N.Y. TIMES, Oct. 7, 1968 at 49, col. 4. *See* II WORKING PAPERS, *supra* note 60, at 871.

"The potential physical and psychic injury which an act of sexual intercourse may cause to a prepubescent child is great. Moreover, the act of engaging in sexual relations with a young child is indicative of a mental aberration. Thus, anyone so subjecting a child should be made susceptible to a lengthy term of imprisonment. However, choosing the proper age below which we may condemn nonforceful intercourse with a child as a major crime is difficult; there is no agreement on such an age, even in current law reform proposals in the States. We here propose to set the crucial age at 10 years, as it was in the common law, because despite the indication that twelve is the commonest age for the onset of puberty, it seems wise to go well outside the average or model age, and it is known that significant numbers of girls enter the period of sexual awakening as early as the tenth year." II WORKING PAPERS, *supra* note 60, at 869, 870 quoting MODEL PENAL CODE § 207.4, Comment at 252 (Tent. Draft No. 4, 1955).

957. FINAL REPORT, *supra* note 6, at 188.

958. FINAL REPORT, *supra* note 6, § 1645(1).

engage in sexual activity among generational peers.[959] However, if the victim is under the age of ten, the actor could be prosecuted under the statutory rape provision.[960] This is a practical approach because it is more readily enforceable than a statute which defines an offense, which the police do not enforce and are not expected to.[961]

Alternatives No. 2 and 3 (the New Code) provide for an offense, under the corruption of minors provisions, if the actor is an adult and the victim is a minor.[962] A comparison of the statutes shows that the Proposed Federal Code is narrowly defined and provides for a stiff class C felony,[963] whereas, the two alternatives provide a broader definition and provide for a lesser class A misdemeanor.[964] The Proposed Federal Code defines corruption of minors as a person more than five years older than the victim engaging in sexual intercourse or deviate sexual intercourse with a victim who is less than 16.[965] Alternatives No. 2 and 3 (the New Code) define corruption of minors as an adult engaging in a sexual act with a minor.[966] It appears that the Federal alternative might be more appropriate if the goal is to prevent corruption of minors because under its provisions it is not a crime for teenage lovers to engage in sexual acts where one of the partners has just turned 18 and the other partner is 17. This situation would subject the older partner to punishment under the New Code.[967]

3. *Sexual Abuse of Wards*

In all three alternatives and the Proposed Federal Code, sexual abuse of wards has been changed so that either a male or female may be the victim, whereas, under the Old Code only the female could be the victim. Alternatives No. 2 and 3 (the New Code) and the Proposed Federal Code provide for a maximum one year punishment for sexual abuse of wards.[968] The Old Code provides for

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959. FINAL REPORT, *supra* note 6, at 190.

960. FINAL REPORT, *supra* note 6, § 1641(1)(c).

961. As a representative of the F.B.I. stated: "The Criminal Code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability, changing social concepts, etc. The result is that the Criminal Code becomes society's trash bin." THE TASK FORCE ON THE ADMINISTRATION OF JUSTICE, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 107 (1967).

962. Alternatives No. 2 and 3 § 12.1-20-05 (1973); N.D. CENT. CODE § 12.1-20-05 (effective July 1, 1975).

963. FINAL REPORT, *supra* note 6, § 1645.

964. Alternatives No. 2 and 3 § 12.1-20-05 (1973). *See* Appendix "A".

965. FINAL REPORT, *supra* note 6, § 1645.

966. Alternatives No. 2 and 3 § 12.1-20-05 (1973); N.D. CENT. CODE § 12.1-20-05 (effective July 1, 1975). For the conduct to be criminal under Alternative No. 2, however, the actor must be at least three years older than the other person. Alternative No. 2 § 12.1-20-05 (1973).

967. N.D. CENT. CODE § 12.1-20-05 (effective July 1, 1975); Alternative No. 3 § 12.1-20-05 (1973).

968. Alternatives No 2 and 3 § 12.1-20-06 (1973); FINAL REPORT, *supra* note 6, § 1646; N.D. CENT. CODE § 12.1-20-06 (effective July 1, 1975).

a sentence of up to 15 years. None of the alternatives provide for a defense or a reduction of maximum sentence under this section for cases in which the ward may have been the aggressor.[969]

D. MISCELLANEOUS SEXUAL OFFENSES

1. *Fornication*

Fornication, adultery and unlawful cohabitation were discussed with diverging views by the state drafters[970] who showed a wide range of opinions. None of these are classified as offenses in the Proposed Federal Code.[971]

Fornication under the Old Code is punishable by 30 days imprisonment.[972] Alternative No. 1[973] is very similar to the Old Code, while Alternatives No. 2 and 3 take a middle ground, providing that fornication is an offense only if done in a public place.[974] Alterna-

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969. *See* Alternative No. 1 § 12.1-20-09 (1973); Alternatives No. 2 and 3 § 12.1-20-06 (1973).

970. *Minutes "B", supra* note 2, June 20-21, 1972 at 16, 17. One Committee member stated that " . . . regardless of his personal views, he felt deletion of the crimes of fornication, adultery and unlawful cohabitation could risk chance of passage of the proposed new Criminal Code." *Id.* In response to a similar plea made by Oregon Criminal Law Revision Commission members, Herbert W. Titus stated:

> . . . I came away from the Commission's minutes with the distinct impression that those Commission members who often argued that the Legislature would never 'buy' a particular reform measure were camoflaging their real reasons for opposition. Even if they were not, there can be no question that they were playing the game 'by ear' since the Commission had made no efforts systematically to seek opinions of the public on any matter before them. Their 'hunches' may well have been right, but one would hope that a law revision commission would have eliminated not only as much guesswork as possible but also would have set for itself a higher goal than simply reflecting current 'public opinion.'

Titus, *Criminal Law Revision in Oregon: A New Game Plan?* 51 ORE. L. REV. 566 (1972).

Indeed, a plea was made by Professor Lockney, Assistant Professor of Law at the University of North Dakota and a citizen member of the Committee on Judiciary "B", that the Committee should draft a resolution which "should also specifically call for a continuing study of sexual offense definitions, including the possibility of doing attitudinal surveys to determine the actual feelings of the populous concerning sexual offenses." *Minutes "B", supra* note 2, Sept. 21-22, 1972 at 31. No survey, however, was ever conducted.

971. FINAL REPORT, *supra* note 60, at 187-193. Withdrawing criminal sanctions against private sexual conduct between consenting adults has also been recommended in Great Britain (THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, 187-191 (Stein and Day, Authorized American Edition 1963)) and in the United States (MODEL PENAL CODE, Art. 213 (Proposed Official Draft, 1962)). Karl Menninger states in his introduction to THE WOLFENDEN REPORT that:

> Many people assume that what the law calls a crime, the church calls a sin, and psychiatry calls sickness. But there is, presently, a marked tendency to to correct this equation. This report is especially valuable, declared the former Archbishop of Canterbury, Geoffrey Fisher, because it makes clear distinction crime and sin. "Certainly some things are sins," said he, "which need not be considered crimes." Indeed it is better from many standpoints that they not be considered crimes. But can an act be both a sin and a sickness even when no longer a crime? Menninger, Introduction, in THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 6 (Stein and Day, Authorized American Edition 1963).

For the latest trends in consensual sexual activity *see generally* PLAYBOY, October, 1973, at 84. For a short, objective review of the PLAYBOY article see TIME, October 1, 1973, at 63.

972. N.D. CENT. CODE § 12-22-08 (1960).

973. Alternative No. 1 § 12.1-20-11 (1973).

974. Alternatives No. 2 and 3 § 12.1-20-08 (1973). Note, however, that the protection provided to the sensibilities of the public is limited, as both an express exemption and the definition of "sexual act" serve to exclude public intercourse by a married couple from this prohibition. Alternatives No. 2 and 3 § 12.1-20-01(2), -2(1) (1973).

tive No. 3 (the New Code) adds a provision which may be somewhat more difficult to enforce, because it provides that it is a Class B misdemeanor for a minor to engage in a sexual act.[975]

2. *Adultery*

Adultery under the Old Code is punishable by up to 3 years imprisonment.[976] Alternatives No. 1 and 3 (the New Code) provide that it is a class A misdemeanor,[977] while Alternative No. 2 and the Proposed Federal Code do not make adultery an offense.[978] Under the Old Code a single man who has intercourse with a married female is also guilty of adultery.[979] This provision would be removed by all of the alternatives. No prosecution will be instituted under either the Old Code or the New Code without a complaint from the spouse within one year.[980]

3. *Unlawful Cohabitation*

Unlawful cohabitation under the New Code is a Class B misdemeanor,[981] while under the Old Code it is punishable by up to one year imprisonment.[982] The drafters felt that while there is no intrinsic evil in unlawful cohabitation it should remain an offense, because a couple could hold themselves out as man and wife for the purpose of committing fraud.[983] While this may be a valid reason for not deleting unlawful cohabitation from the law, as the New Code presently reads there is no mention of fraud, but rather only the traditional "openly and notoriously."[984] While the intent of the drafters may have been meritorious; the New Code does not prohibit that which they intended.

4. *Sodomy & Homosexual Activity*

Alternative No. 1 provides that deviate sexual intercourse with a consenting adult is a Class A misdemeanor.[985] Alternatives No. 2

975. Alternative No. 3 § 12.1-20-08 (1973); N.D. CENT. CODE § 12.1-20-08 (effective July 1, 1975). The potential for discriminatory enforcement was pointed out in Committee. *Minutes "B", supra* note 2, June 20-21, 1972 at 17.

976. N.D. CENT. CODE § 12-22-11 (1960).

977. Alternative No. 1 § 12.1-20-12 (1973); Alternative No. 3 § 12.1-20-09 (1973); N.D. CENT. CODE § 12.1-20-09 (effective July 1, 1975).

978. NORTH DAKOTA LEGISLATIVE COUNCIL REPORT 94 (1973); *See Minutes "B", supra* note 2, June 20-21, 1972 at 17.

979. N.D. CENT. CODE § 12-22-09 (1960). It was brought up in Committee that should the Old Code provisions on adultery be retained, "a single female who has intercourse with a married man should also be guilty of the offense." *Minutes "B", supra* note 2, June 20-21, 1972 at 17.

980. N.D. CENT. CODE § 12-22-10 (1960); N.D. CENT. CODE § 12.1-20-09(2) (effective July 1, 1975).

981. N.D. CENT. CODE § 12.1-20-10 (effective July 1, 1975).

982. N.D. CENT. CODE § 12-22-12 (1960).

983. *Minutes "B", supra* note 2, June 20-21, 1972 at 17. For suggestions this be treated as fraud rather than as a sex offense, *see Id.* and *Minutes "B", supra* note 2, Aug. 24-25, 1972 at 15.

984. N.D. CENT. CODE § 12.1-20-10 (effective July 1, 1975). "A person is guilty of a Class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person." *Id.*

985. Alternative No. 1 § 12.1-20-07 (1973). Note that conduct with an actor's spouse is excluded. Alternative No. 1 § 12.1-20-01(2) (1973).

and 3 (the New Code) do not prohibit homosexual activity unless performed in a public place.[986] The Proposed Federal Code does not prohibit sodomy.[987] The Old Code section on sodomy is similar to Alternative No. 1; the offense is punishable by up to ten years imprisonment even when performed between a consenting husband and wife in their own home.[988]

5. *Deviate Sexual Act*

Deviate sexual acts are prohibited under the Old Code's sodomy provision.[989] The Proposed Federal Code includes any form of sexual intercourse with an animal in its definition of "Deviate Sexual Intercourse."[990] All three alternatives would make such a class A misdemeanor.[991] The alternatives are then a middle ground which the drafters took for what are sometimes termed victimless crimes.

E. THE ALTERNATIVE CHOSEN

The basic import of the New Code chapter on sexual offenses is to codify and narrow the interpretation of the sections and provide for as great or greater punishment for the most serious offenses while deleting or reducing the punishment for those offenses which are of lesser magnitude. The alternative chosen for the New Code is basically a middle ground stance between the conservative Old Code and the Proposed Federal Code.

F. BIGAMY

The New Code provides that a person is guilty of bigamy, a class C felony, if he marries a person while married to another.[992] This would apparently apply to both heterosexual and homosexual marriages[993] contracted in this state. It would not apply to marriages contracted in other states with subsequent cohabitation in North Dakota, which is an offense under the Old Code.[994] The New Code does not mention the intent of the actor and presumably one could be convicted under this provision without knowingly committing bigamy.[995]

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986. Alternatives No. 2 and 3 §§ 12.1-20-02(1), -08 (1973); *Minutes "B"*, *supra* note 2, October 26-27, 1972, at Appendix "B"; N.D. CENT. CODE §§ 12.1-20-02(1), -08 (effective July 1, 1975).

987. II WORKING PAPERS, *supra* note 60, at 869, 872.

988. N.D. CENT. CODE § 12-22-07 (1960). The crime of sodomy as defined by this section is much broader than the common-law offense and includes carnal knowledge by or with the mouth. State v. Nelson, 36 N.D. 564, 163 N.W. 278 (1917).

989. N.D. CENT. CODE § 12-22-07 (1960). Provides for up to 10 years imprisonment for these acts.

990. FINAL REPORT, *supra* note 6, § 1649(b).

991. Alternative No. 1 §§ 12.1-20-02(4), -15 (1973); Alternative No. 2 § 12.1-20-02(3), -11 (1973); Alternative No. 3 § 12.1-20-02(3), -12 (1973).

992. N.D. CENT. CODE § 12.1-20-13 (effective July 1, 1975).

993. Such unisexual marriages are increasing, even with formal ceremony. *Homosexuals in Revolt*, LIFE, December 31, 1971 at 62. *But see* Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed* 409 U.S. 810 (1972).

994. N.D. CENT. CODE § 12-22-02 and § 12-22-04 (1960).

995. N.D. CENT. CODE § 12.1-20-13 (effective July 1, 1975).

The New Code provides three affirmative defenses to bigamy. They are: 1) when the actor believes his spouse to be dead and the spouse has been absent for five years, 2) where the spouse has voluntarily absented himself from the United States for five years and 3) a court's judgment voiding or annulling the former marriage.[996] These defenses are basically the same as those allowed by the Old Code with the deletion of the defense which is allowed when the actor's spouse has been sentenced to life imprisonment.[997] This is a wise change since the fact that one's spouse has been sentenced to life in prison does not abrogate the laws of divorce.[998] Bigamy is a class C felony punishable by a maximum of five years in prison. The Proposed Federal Code has no provisions which pertain to bigamy.

G. INCEST

The New Code[999] is nearly identical to the Old Code[1000] in prohibiting marriage, cohabitation, and sexual intercourse between: parents and children including grandparents and grandchildren of every degree; brothers and sisters of half as well as whole blood; uncles and nieces or aunts and nephews of half as well as whole blood; and first cousins of half as well as whole blood. Neither the Old Code nor the New Code preclude relations with stepchildren. The Proposed Federal Code does not include a section on incest.

The New Code reduces the maximum penalty for incest from ten years[1001] to five years[1002] by making it a class C felony.

A defense is implicit in the New Code,[1003] as in the Old Code,[1004] in that the actor must have knowledge that the other person is within the said degree of relationship.

H. PROSTITUTION

The New Code[1005] drawn substantially from the Proposed Federal Code,[1006] focuses primarily on those who promote, facilitate or earn their living by inducing or forcing a person to engage in prostitution.[1007] The offense is explicitly graded so as to provide that only the owners, managers and supervisors of a brothel or prosti-

996. N.D. CENT. CODE § 12.1-20-13(2) (effective July 1, 1975).
997. N.D. CENT. CODE § 12-22-03(4) (1960).
998. Indeed conviction of a felony is grounds for divorce. N.D. CENT. CODE § 14-05-03(6) (Supp. 1971).
999. N.D. CENT. CODE § 12.1-20-11 (effective July 1, 1975).
1000. N.D. CENT. CODE § 12-22-06 (1960), § 14-03-03 (1971).
1001. N.D. CENT. CODE § 12-22-06 (1960).
1002. N.D. CENT. CODE § 12.1-20-11 (effective July 1, 1975).
1003. *Id.*
1004. N.D. CENT. CODE § 12-22-06 (1960).
1005. N.D. CENT. CODE ch. 12.1-29 (effective July 1, 1975).
1006. FINAL REPORT, *supra* note 6, §§ 1841-1843, 1848, 1849.
1007. II WORKING PAPERS, *supra* note 60, at 1191.

tution business are guilty of a class C felony.[1008] Those who have lesser roles such as maids and drivers are guilty of only a class A misdemeanor.[1009] Such a distinction is necessary to prevent the complicity provisions of the statute from being used to make all aiders and abettors guilty of a felony.[1010] The Old Code[1011] delineates these offenses, although not to the extent found in the New Code.

The New Code is based on the view that the act of the perpetrator of the offense, the prostitute, is deserving of a lesser penalty than the act of an accomplice. Indeed, the prostitute is often regarded as the victim of a victimless crime.[1012]

The New Code provides for a misdemeanor penalty for professional prostitutes. It is not intended to be applied to promiscuous women who engage in several love affairs, mistresses who accept gifts from their boyfriends or women who allow themselves to be picked up at a bar. It does include call girls who take telephone calls in their homes or streetwalkers who await an offer for sexual activity.[1013] It is also intended to be applied to persons who live off a prostitute's earnings, thereby encouraging continued prostitution.[1014] The New Code classifies prostitution as a class B misdemeanor[1015] whereas, under the Old Code it is punishable by up to five years.[1016]

In accord with the Proposed Federal Code and the Old Code, the New Code does not classify patronizing a prostitute as a punishable offense.

The New Code allows the testimony of a spouse to be received against his or her spouse, to prove offenses "involving that spouse's prostitution,"[1017] thereby creating a statutory exception to the general common law rule and the Old Code.[1018] The privilege may still be invoked by a spouse who is being prosecuted for a crime not involving his spouse.[1019]

1008. *Id.* at 1194.
1009. *Id.*
1010. *Id.*
1011. N.D. CENT. CODE §§ 12-22-14, -15, -22, -23, -25 to -29 (1960).
1012. *Minutes "B"*, *supra* note 2, July 20-21, 1972 at 22.
1013. Note 3 *supra* at 1196.
1014. N.D. CENT. CODE § 12.1-29-02(1)(d) (effective July 1, 1975).
1015. N.D. CENT. CODE § 12.1-29-03 (effective July 1, 1975).
1016. N.D. CENT. CODE § 12-22-17 (Supp. 1973).
1017. N.D. CENT. CODE § 12.1-29-04 (effective July 1, 1975).
1018. N.D. CENT. CODE § 31-01-01 (1960). It has been held that a wife cannot invoke a spouse's privilege to refuse to testify concerning her husband's role in prostituting her. Wyatt v. United States, 362 U.S. 525, 530 (1960).
1019. *See* N.D. CENT. CODE § 12.1-29-04 (effective July 1, 1975). FINAL REPORT, *supra* note 6, at 266.

APPENDIX A

Comparison of Sexual Offenses and Punishments

	Old Code	*Alternative No. 1*	*Alternative No. 2*	*New Code Alternative No. 3*	*Proposed Federal Criminal Code*
Definitions	12-30-01	12.1-20-02	12.1-20-02	12.1-20-02	18 § 1649
	Rape—Sexual intercourse with female not actor's wife who is under 18 or prevented from resisting.	1. Sexual intercourse. 2. Deviate sexual intercourse—sodomy. 3. Sexual contact. 4. Deviate sexual act—necrophilia or bestiality.	1. Sexual act—sexual intercourse—sodomy, fellatio, cunnilingus. 2. Sexual contact. 3. Deviate sexual act—necrophilia or bestiality.	1. Sexual act—sexual intercourse—sodomy, fellatio, cunnilingus. 2. Sexual contact. 3. Deviate sexual act—necrophilia or bestiality.	1. Sexual intercourse. 2. Deviate sexual intercourse—sodomy, fellatio, cunnilingus, bestiality. 3. Sexual contact.
Rape	12-30-04	12.1-20-03	12.1-20-03	12.1-20-03	18 § 1641
	Rape Rape in first degree if actor is over 20 unless victim is less than 18 in which case actor must be over 24. If actor is over 17 and less than 20—second degree. If actor under 17—third degree rape. All punishable by not less than one year—no maximum for first and second, three year maximum for third.	Rape Sexual intercourse with female only as victim. Class A felony if victim injured, or is under 15, or is not a voluntary companion and has not previously permitted sexual liberties. Otherwise Class B felony.	Gross Sexual Imposition Forced sexual act. Male or female as victim. Class A felony if victim injured, or is under 15, or is not a voluntary companion and has not previously permitted sexual liberties. Otherwise Class B felony.	Gross Sexual Imposition Forced sexual act. Male or female as victim. Class A felony if victim injured, or is under 15, or is not a voluntary companion and has not previously permitted sexual liberties. Otherwise Class B felony.	Rape Sexual intercourse with female only as victim. Class A felony if victim injured or is under 10, or is not a voluntary companion and has not previously permitted sexual liberties. Otherwise Class B felony.
Sexual Imposition	*No Section*	12.1-20-04	12.1-20-04	12.1-20-04	18 § 1642
	See Rape	Gross Sexual Imposition Sexual intercourse compelled by threat. Female only as victim. Class C felony.	Sexual Imposition Sexual act compelled by threat. Either sex as victim. Class C felony.	Sexual Imposition Sexual act compelled by threat. Either sex as victim. Class C felony.	Gross Sexual Imposition Sexual intercourse compelled by threat. Female only as victim. Class C felony.

	Old Code	*Alternative No. 1*	*Alternative No. 2*	*New Code Alternative No. 3*	*Proposed Federal Criminal Code*
Aggravated Involuntary Sodomy	*No Section*	12.1-20-05	*No Section*	*No Section*	18 § 1643
	See Sodomy	*Aggravated Involuntary Sodomy*	*See Gross Sexual Imposition*	*See Gross Sexual Imposition*	*Aggravated Involuntary Sodomy*
		Deviate sexual intercourse with either sex as victim. Class A felony if victim is injured, under 15, or not a voluntary companion and has not previously permitted sexual liberties. Otherwise Class B felony.			Deviate sexual intercourse with either sex as victim. Class A felony if victim is injured, under 10, or not a voluntary companion and has not previously permitted sexual liberties. Otherwise Class B felony.
Involuntary Sodomy	*No Section*	12.1-20-06	*No Section*	*No Section*	18 § 1644
	See Sodomy	*Involuntary Sodomy*	*See Sexual Imposition*	*See Sexual Imposition*	*Involuntary Sodomy*
		Deviate sexual intercourse compelled by threat. Class C felony.			Deviate sexual intercourse compelled by threat. Class C felony.
Sodomy	12-22-08	12.1-20-08	*No Section*	*No Section*	*No Crime*
	Carnal knowledge of animal, bird, dead person, fellatio, or cunnilingus. Punishable up to 10 years.	Deviate sexual intercourse with consenting adult. Class A misdemeanor.	*See Fornication*	*See Fornication*	
Corruption of Minors	*No Section*	12.1-20-08	12.1-20-05	12.1-20-05	18 § 1645
	See Rape	Adult engaging in sexual intercourse with minor. Class C felony.	Adult engaging in sexual act with minor. Class C misdemeanor.	Adult engaging in sexual act with minor. Class C misdemeanor.	Person 5 years older than victim engaging in sexual intercourse or deviate sexual intercourse with victim less than 16. Class C felony.
Sexual Abuse of Wards	12-30-10	12.1-20-09	12.1-20-06	12.1-20-06	18 § 1646
	Sexual intercourse with female ward. Punishable from 1 to 15 years.	Sexual intercourse with ward. Class C felony.	Sexual act where victim is in custody of offender. Class A misdemeanor.	Sexual act where victim is in custody of offender. Class A misdemeanor.	Sexual intercourse with ward. Class A misdemeanor.
Sexual Assault	12-30-11	12.1-20-10	12.1-20-07	12.1-20-07	18 § 1647
	Indecent liberties with person under 18 which does not amount to rape. Punishable from 1 to 15 years.	Offensive sexual contact. Class B misdemeanor.	Offensive sexual contact. Class B misdemeanor.	Offensive sexual contact. Class B misdemeanor.	Offensive sexual contact. Class B misdemeanor.

APPENDIX A (Continued)

	Old Code	*Alternative No. 1*	*Alternative No. 2*	*New Code Alternative No. 3*	*Proposed Federal Criminal Code*
Fornication	12-22-08	12.1-20-11	12.1-20-08	12.1-20-08	*No Crime*
	Sexual intercourse by an unmarried person. Punishable by up to 30 days.	Sexual intercourse with another not spouse. Class B misdemeanor.	Sexual act in public place. Class A misdemeanor.	Sexual act in public place. Class A misdemeanor. Minor engaging in sexual act. Class B misdemeanor.	
Adultery	12-22-09	12.1-20-12	*No Crime*	12.1-20-09	*No Crime*
	Married person engaging in sexual intercourse with another not his spouse. Punishable up to 3 years.	Married person engaging in sexual intercourse or deviate sexual intercourse with another not his spouse. Class A misdemeanor.		Married person engaging in sexual act with another not his spouse. Class A misdemeanor.	
Unlawful Cohabitation	12-22-12	12.1-20-13	12.1-20-09	12.1-20-10	*No Crime*
	Living openly and notoriously as husband and wife when not married. Punishable to 1 year.	Living openly and notoriously as married couple when not married. Class A misdemeanor.	Living openly and notoriously as married couple when not married. Class B misdemeanor.	Living openly and notoriously as married couple when not married. Class B misdemeanor.	
Deviate Sexual Act	*No Section*	12.1-20-15	12.1-20-11	12.1-20-12	*No Crime*
	See Sodomy	Intercourse with animals or dead persons. Class A misdemeanor.	Intercourse with animals or dead persons. Class A misdemeanor.	Intercourse with animals or dead persons. Class A misdemeanor.	