Referenced in NJ Current Law

COMMENTS UPON THE NEW JERSEY PENAL CODE

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I. INTRODUCTION

In the early 1950's, the American Law Institute began a major study designed to establish a Model Penal Code.[1] This study continued for nearly ten years before the Institute adopted its final draft. It was an attempt to correlate the learning and expertise of lawyers, judges, law professors, social workers, and social and behavioral scientists in order to provide a model for consideration by the several state legislatures. The Code's success is demonstrated by the number of new codes which have been based in whole or in part upon it.[2]

The New Jersey codification effort began in 1968 with the report of the Joint Legislative Committee to Study Crime and the System of Criminal Justice in New Jersey[3] and the subsequent adoption of its proposal to establish a commission.[4] This commission was mandated to propose a code "to modernize the criminal law . . . to embody principles representing the best in modern statutory law, to eliminate inconsistencies, ambiguities, outmoded and conflicting, overlapping and redundant provisions and to revise and codify the law in a logical, clear and concise manner."[5]

After working for more than a year the commission submitted its fourth and final draft and the report[6] to the Governor and the legislature in October 1971.[7] The commission draft was studied and revised for several years before it was finally enacted in 1978 and codified in Title 2C of New Jersey Statutes Annotated.[8]

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1. For a discussion of the Model Penal Code Project, see Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952). *See also* Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L.C. & P.S. 524 (1955).

2. *See, e.g.*, N.J. CODE OF CRIMINAL JUSTICE, N.J. STAT. ANN. § 2C (Supp. 1979); N.Y. PENAL LAW § 15.20 (McKinney 1975); VT. STAT. ANN. tit. 13 § 4801 (1974).

3. JOINT LEGISLATIVE COMMITTEE TO STUDY CRIME AND THE SYSTEM OF CRIMINAL JUSTICE IN NEW JERSEY, 192D SESS., REPORT 17-18 (1968).

4. 1968 N.J. Laws ch. 281 (repealed 1978).

5. *Id.*

6. The expenditure of time involved was a very costly contribution for the private practitioners on the commission, a sacrifice which has received little note.

7. In order to permit a less costly printing of the bill when introduced, the commission issued its final report in two volumes. The first volume was the proposed Code and the second contained the comments.

8. N.J. STAT. ANN. § 2C (Supp. 1979) (effective Sept. 1, 1979).

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II. Background: The Goals of a Revision

The purpose of criminal law is to effect social control through deterrence, incapacitation, and reformation.[9] One problem is that the effectiveness of these methods can not be demonstrated in concrete terms.[10] Furthermore, the courts have no particular ability to determine or evaluate the facts upon which the appropriateness of these methods may depend. Finally, there is an unascertainable element of retribution in most sentencing decisions. Since criminal conduct normally reflects some individual or social maladjustment, effective social control can be achieved only in the grossest terms through the use of criminal sanctions.

The most obvious goal of a new code, therefore, is to deal rationally with the outer limits of what should be criminal. The history of criminal law has been one of legislative reaction to specific concerns rather than one of developing rational principles. As a result, criminal sanctions have been applied with no real service to the goal of social control, or only at an exorbitant cost to individuals.[11] Aside from the inherent injustice arising from overly broad use of the criminal process, the failure to limit properly the scope of the criminal law results in the costly waste of law enforcement and judicial resources. Moreover, the police must use very aggressive tactics to ferret out and arrest violators of many of the so-called "crimes," often at an unacceptable cost to individual rights and the police-community relationships so necessary to the enforcement of more significant crimes.

A second goal of a new code is to achieve greater individual justice through a closer relation between guilt and culpability, requiring workable definitions of the various culpability factors.[12] These factors must be related precisely to each element of an offense, defense, or mitigation, and all unnecessary limitations upon individual culpability should be eliminated. In addition to bearing upon the achievement of

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9. *Cf.* State v. Ivan, 33 N.J. 197, 199–200, 162 A.2d 851, 852 (1960) (suggested purposes of punishment: retribution, deterrence, rehabilitation, protection of public). *See also* N.J. Stat. Ann. § 2C:1-2.

10. N.J. Criminal Law Revision Commission, II Final Report: Commentary 3–4 (1971) (quoting State v. Ivan, 33 N.J. at 201-02, 162 A.2d at 853-54) [hereinafter cited as II Final Report: Commentary].

11. "Nothing has been more widely recognized in modern criminal law scholarship than the danger of creating more evil by ill-considered use of the criminal law than is caused by the target misconduct." Schwartz, *The Proposed Federal Criminal Code, reprinted in* Kadish & Paulsen, Criminal Law and Its Processes 40 (3d ed. 1975).

12. The Code delineates minimum levels of culpability stating that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . ." N.J. Stat. Ann. § 2C:2-2. These four kinds of culpability are defined precisely in the Code, *id.* §§ 2C:2-2(b)(1) to -2(b)(4), and are based upon the proposals found in Model Penal Code § 2.02 (proposed Official Draft 1962), as was the commission proposal.

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individual justice, culpability factors also relate to the control factors of deterrence, reformation, and incapacitation.

A third goal of a new code is to establish a rational and related framework with overriding basic principles and accurate definitions. Such a code gives notice and the appearance of justice to people involved in the criminal process. Equally important, precise definitions limit the overlap of crimes. The undue multiplication of offenses relative to a factual occurrence unnecessarily broadens unchecked prosecutorial discretion far beyond what is necessary for the enforcement of criminal law.

Finally, a code must arrive at a viable formula for the allocation of sentencing power among the various decisionmaking bodies. While sentencing alternatives and methods remain an area of confusion and dispute, the legislature should define criminal conduct and evaluate the relationship between social harm and sanction requirements in maximum terms.[13] Within these limits the amount of discretion to be permitted and its allocation between judicial and administrative bodies are still the subject of heated argument. As the trend in criminal sanctions has moved from fixed terms to judicial discretion, discontent with unexplained variations in sentencing has led to restrictions being placed upon judges. One early consequence of these restrictions was to shift substantial discretion from judges to parole boards. Parole board decisions, or the lack thereof, have come under attack, and a movement to limit or destroy such administrative discretion has begun.[14]

III. THE GENERAL PROVISIONS

A. *Introduction*

Historically, the general provisions of criminal law have been developed judicially with little legislative correction or innovation.[15] One of the major contributions of the new Code is the codification of the general provisions[16] relating to specific offenses, such as culpability factors, justifications, defenses, and liability for acts of another. Although precise definitions of crimes are needed to give notice of proscribed behavior, prevent official harassment, and establish a defi-

13. *See, e.g.*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 14-15 (1967).

14. *See generally* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1126-29 (1952).

15. The need for codification of the general part was recognized by the commission. N.J. CRIMINAL LAW REVISION COMMISSION, I FINAL REPORT: REPORT AND PENAL CODE ix (1971) [hereinafter cited as I FINAL REPORT: PENAL CODE].

16. The codification in this area appears in the first five chapters of the new statute. N.J. STAT. ANN. §§ 2C:1-1 to 5-6.

nite standard of guilt,[17] history demonstrates that the need for a concrete legislative statement of the general provisions is much less important to citizens or law enforcement personnel. To the extent that basic policy decisions are made in formulating the general part, however, they should be made by the politically responsive branches of government. The need for legislative determination appears to be especially relevant to criminal matters involving the coercive power of the state. Despite the desirability of a legislative determination, it must be recognized that codification often limits the power of the courts to deal with particular problems and freezes the solutions for an unforeseeable length of time. Therefore, to the extent that legislative reaction to needed change may be sluggish, codification of restrictive or undesirable solutions will inhibit change and growth.[18]

B. *Specific Problems in the General Provisions*

1. The Requirement of Reasonableness

The common law required mistakes of fact or law to be reasonable before they could be a defense.[19] Reasonable belief was also required before justifications were acceptable.[20] The imposition of an objective requirement effectively divorced liability from culpability and transformed culpability crimes into crimes of negligence. For example, if an actor kills in an actual but unreasonable belief that killing is necessary for self-defense, the actor is negligent in forming the belief. He nonetheless will be guilty of an intentional killing if the negligence defense is unavailable. Negligence is an unusual form of culpability both because it inflicts criminal sanctions upon persons whose sole dereliction is that they are not of average intelligence or awareness,[21] and because in most instances deterrence and other intermediate goals of the criminal law have little effect upon such persons.

The common law imposed guilt upon objective rather than subjective culpability because of the fear that too many people would be able to assert these defenses even though they did not actually have the requisite subjective belief.[22] As a practical matter, it is unlikely

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17. This is, of course, a constitutional requirement, although the precise requirement for clarity is usually shrouded in a mass of words. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162-71 (1972). As is frequently the case, the constitutional standard represents the bare minimum rather than the desirable goal.

18. A good example of freezing an unfortunate decision into statutory form is the adoption of M'Naghten's rule as the test for responsibility. N.J. STAT. ANN. § 2C:4-1.

19. *See* J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 756 (1940).

20. *See, e.g.*, II FINAL REPORT: COMMENTARY, *supra* note 10, at 82-87 (use of force in self-defense and defense of another required "reasonable and honest belief").

21. *But see* WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 122 (2d ed. 1961).

22. *See* O. W. HOLMES, THE COMMON LAW 48 (1881).

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that the jury would find that the accused had the unreasonable belief based solely upon his own testimony, since the interest of the defendant as a witness is transparent. If sufficient extrinsic evidence of the defendant's belief exists, however, the jury should be permitted to find mere negligence. The jurors as factfinders should be trusted to determine subjective culpability without the added factor of reasonableness.

The problem with respect to the reasonableness requirement is most obvious in the chapter dealing with justification, where the legislature inserted the requirement of reasonableness as an element.[23] Section 2C:3-9(b) provides that in cases where the actor recklessly or negligently arrives at the belief required by the justifications, the actor is guilty of an offense which requires recklessness or negligence. By its terms, the literal effect of this section is to limit a defense that does not exist. Once again, assume an unreasonable belief in the necessity of killing in self-defense. Under the self-defense section, the defense is not available because it requires a reasonable belief. In these circumstances the actor commits murder because to him it is a purposeful killing. If section 2C:3-9(b) applies, however, the act is a criminal homicide only insofar as the killing is reckless, because the generalized negligent homicide has been replaced by a death by automobile statute.[24] The significant difference is that the justification focuses upon its own elements, and the absence of one such element negates the defense, while section 2C:3-9(b) focuses upon the definition of the crime once the actual belief is established.

2. The Test of Responsibility

After starting to abolish the defense of lack of criminal responsibility, the legislature took an almost unbelievable turn by enacting the M'Naghten rule.[25] New Jersey continues to ask the impossible questions of whether the defendant knew the nature and consequences of his act and whether he knew that this act was wrong. Other than New Jersey, there is not a single jurisdiction that has adopted the M'Naghten rule in recent years.[26] The attack on the rule has been broad based and quite persuasive.[27] The test is absolute in an area

23. *See* N.J. STAT. ANN. § 2C:3-2 to 11.
24. N.J. STAT. ANN. § 2C:11-2(a).
25. N.J. STAT. ANN. § 2C:4-1 (stating the insanity defense).
26. The New Jersey Legislature, in adopting the M'Naghten rule, resists the marked trend towards adoption of alternative approaches, in particular that of the Model Penal Code. *See, e.g.*, United States v. Currens, 290 F.2d 751 (3d Cir. 1961); N.Y. PENAL LAW § 15.20 (McKinney 1975); VT. STAT. ANN. § 4801 (1974); II FINAL REPORT: COMMENTARY, *supra* note 10, at 98. *See also* ARK. STAT. ANN. § 41-601 (1977); United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (rejecting Durham and adopting the Model Penal Code proposal).
27. *See, e.g.*, Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) (Bazelon, J.); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 280-83 (2d ed. 1972) [hereinafter cited as

where all answers are relative.[28] It is moralistic when the issue is the utility of the criminal law as a method of control. It is cognitional when the primary focus is operational.[29] It is phrased in terminology that limits the ability of experts to testify.[30] It is limited to a "disease" of the mind, without regard to a "defect."

While the commissioners had recommended adopting a slightly modified Model Penal Code test of responsibility, with the addition of the word "adequate,"[31] it is beyond the scope of this general comment to detail the reasons for rejecting the rule of M'Naghten. It is sufficient to note that some people who lack substantial and adequate capacity to appreciate the wrongfulness of their conduct or to conform it to the requirements of law will be convicted of crimes under the narrower M'Naghten test. If these persons lack the capacity required by the commissioners' proposed test, there is no moral or utilitarian reason to convict them.[32] Since there is neither moral culpability nor hope for deterrence, mental care rather than incarceration seems to be the appropriate remedy.

3. Liability for the Acts of Others

Both the commission and the legislature generally followed the changes in the law of conspiracy contained in the Model Penal Code,[33] although in one significant respect the legislature departed from the Model Code by making one person liable for the conduct of another when both are engaged in a conspiracy.[34]

LAFAVE & SCOTT]; Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955); II FINAL REPORT: COMMENTARY, *supra* note 10, at 95-100. *But see* State v. Lucas, 30 N.J. 37, 87 (1959) (Weintraub, C. J., concurring) (defense of M'Naghten rule). Consider, however, that to the extent the Chief Justice's opinion relies upon the need for legislative action, it does not seem to be relevant to the codification effort.

28. In contrast, the commission proposal required that the actor lack "substantial and adequate capacity. . . ." II FINAL REPORT: COMMENTARY, *supra* note 10, at 97. The term "substantial" comes from the Model Penal Code § 4.01 and "adequate" from the Vermont statute, VT. STAT. ANN. tit. 13 § 4801 (1974).

29. California has managed to establish that the concept of operative knowledge includes the inability to conform under M'Naghten although M'Naghten appears to be purely cognitive. *See* People v. Wolff, 61 CAL. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). *See also* LAFAVE & SCOTT, *supra* note 26, at 280-81.

30. *But see* LAFAVE & SCOTT, *supra* note 26, at 282-83.

31. I FINAL REPORT: PENAL CODE, *supra* note 15, § 2C:4-1(a). "A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial and adequate capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

32. See LAFAVE & SCOTT, *supra* note 27, at 281-82 (1972).

33. The Model Penal Code and the commission, for example, defined liability individually so that unknown reservations in the mind of the other party would not be a defense for the party who in fact agreed. *See* II FINAL REPORT: COMMENTARY, *supra* note 10, at 131-32; MODEL PENAL CODE § 503.

34. N.J. STAT. ANN. § 2C:2-6(b)(4) ("A person is legally accountable for the conduct of another person when . . . he is engaged in a conspiracy with such other person.").

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The need for such a broad provision governing vicarious liability is not apparent, but the dangers are obvious. If a person bears any substantial relation to a crime, he will be subject to the accomplice liability provisions. These provisions are broad enough to encompass the conduct of leaders of criminal organizations or participants in the planning and execution of crimes. Liability for the conspiracy as distinct from the substantive offense also continues to exist. Thus there seems to be no need to multiply the potential for punishment by making conspirators liable for each and every substantive offense committed by a large criminal group, no matter how remote the person was from the substantive crime nor how tangential his relationship to the conspiracy.

4. Entrapment

New Jersey case law had adopted the federal test for entrapment,[35] which focuses upon whether or not the defendant was otherwise innocent and whether or not the intent to commit a crime originated with the police or the defendant. The new Penal Code adopts the view espoused by a minority of the United States Supreme Court.[36] This test makes it entrapment to employ "methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are willing to commit it."[37] The latter test is the better one because it prevents the introduction of highly prejudicial evidence demonstrating the accused's propensity to commit crime, and it applies the same standard of police conduct for everyone. Moreover, it reflects the fact that it is the police conduct that is important, not the character of the accused.[38]

Because the guilt of the actor is unaffected by the issue of entrapment,[39] the sole rationale for the defense is, like the exclusionary rule for unconstitutionally obtained evidence, to control police conduct. Police officers should not be paid to elicit conduct that the legislature has deemed to be criminal.[40] In sumptuary crimes, however, the police claim that it is necessary to provide the opportunity for crime

35. *See* State v. Dolce, 41 N.J. 422, 197 A.2d 185 (1964).

36. See Sherman v. United States, 356 U.S. 369 (1958), and United States v. Russell, 411 U.S. 423 (1973), for a development of the differing positions.

37. N.J. STAT. ANN. § 2C:2-12.

38. *See* Sherman v. United States, 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring).

39. This is demonstrated by the fact that the same persuasion by a private person would be no defense to the charge. In entrapment cases the normal situation is that the accused believes the officer to be a private person. Therefore, the difference between a defense or no defense depends upon the existence of a fact unknown to the actor.

40. "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime. . . ." Sherman v. United States, 356 U.S. 369, 372 (1958) (Warren, C.J.).

as a detection method. Without disputing that assertion, the line between acceptable and unacceptable behavior should rest upon the conduct of the police rather than the character of the defendant.

The statute differs from the commission report in one significant respect in that it provides that entrapment is to be decided by the jury;[41] the commission recommended that it be decided by the judge.[42] Unless additional procedural changes are made, decision by the jury makes entrapment a trial issue, which appears to limit the defendant's right to demand that the state prove him guilty beyond a reasonable doubt.[43] It is not at all clear why a defendant should be required to forego this right to proof beyond a reasonable doubt in order to claim entrapment even if the defenses are inconsistent. Secondly, the entrapment defense and the exclusionary rule of evidence both focus upon an evaluation of police conduct in the light of society's needs. The mere fact that one merely excludes evidence while the other precludes conviction neither obviates the greater expertise of judges nor the need for principled rather than ad hoc determinations.[44] Finally, there seems to be no constitutional need for a jury trial since the entrapment defense is new and it is neither related to the defendant's guilt nor to the jury's role in evaluating a defendant's substantive conduct in the light of societal mores.[45] Nevertheless it should be noted that the change in the test for entrapment eliminates the gravest difficulty with a jury determination—the introduction at trial of evidence of the defendant's criminal propensity.

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41. N.J. STAT. ANN. § 2C:2-12(b) ("The issue of entrapment shall be tried by the jury.").

42. N.J. STAT. ANN. § 2C:2-12; II FINAL REPORT: COMMENTARY, *supra* note 10, at 78 ("[T]he issue of entrapment should be tried to the court rather than to the jury."). The commission's recommendation would have changed the New Jersey law since the issue is tried by the jury. *Id.*

43. *Cf.* Traynor, C.J., in People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965). Even if a formal admission of guilt is not required, the jurors are probably unable to keep the defenses separate in their minds.

44. Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands.

Sherman v. United States, 356 U.S. 369, 385 (1958) (Frankfurter, J., concurring).

45. The requirement of the jury probably started when, in Sorrells v. United States, 287 U.S. 435 (1932), Chief Justice Hughes made the defense depend upon an implied exception to the statute. This was done, no doubt, to justify the refusal to permit a conviction when the actor had done precisely what the statute condemned. In *Sorrells*, the Chief Justice in referring to the implied exception doctrine, said "it obviates the objection to the exercise by the court of a dispensing power in forbidding the prosecution of one who is charged with the conduct assumed to fall within the statute." 287 U.S. at 449. Such considerations have little to do with the normal function of a jury. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

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IV. Particular Crimes

A. *The Law of Homicide*

The Penal Code simplifies the definition of murder through the removal of the issue of capital punishment, making it unnecessary to distinguish between degrees.[46] A straightforward statement of culpability was made possible by the Code's precise definition of the kinds of culpability factors.[47]

The statute departs significantly from the commission report in two respects. The first is the elimination of reckless murder.[48] This is highly desirable since a homicide is murder if it is committed knowingly.[49] The element of "recklessness" requires personal awareness of the risk and a conscious disregard of it,[50] while the term "knowingly" requires the actor to be "practically certain that his conduct will cause such a result."[51] These two factors codify degrees of culpability for homicide: the more stringent one of "knowingly" is more suitable for murder because of its greater sanction; "recklessness" killings are properly made manslaughter.[52]

The second change is the enlargement of the felony murder doctrine, which seems both unnecessary and unjustified. The statute extends the liability of the person committing the underlying felony to a killing by a third person.[53] The commission's proposal would have limited the felon's liability to killings committed by him "or another participant."[54] The difference is that if *A* and *B* begin to rob a bank and a bank guard shoots and kills an innocent bystander, *A* and *B* are guilty of murder under the statute, but not under the commission's proposal. Liability under the severe felony murder rule must be based upon the assumption that deaths arise out of the listed felonies

46. Degrees of murder were first introduced in the Pennsylvania murder statute to limit the application of the death penalty. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).

47. N.J. STAT. ANN. § 2C:2-2(b). See note 12 *supra*.

48. *Compare* N.J. STAT. ANN. § 2C:11-3 *with* I FINAL REPORT: PENAL CODE, *supra* note 15, § 2C:11-3.

49. N.J. STAT. ANN. § 2C:11-3(a)(2).

50. N.J. STAT. ANN. § 2C:2-2(b)(3).

51. N.J. STAT. ANN. § 2C:2-2(b)(2).

52. N.J. STAT. ANN. § 2C:11-4(a)(1). This provision was subsequently amended to divide manslaughter between aggravated manslaughter and reckless manslaughter, depending upon the presence of "circumstances manifesting extreme indifference to human life."

53. N.J. STAT. ANN. § 2C:11-3(a)(3). Perhaps the best criticism of the felony murder doctrine as embodied in the statute is found in Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958), and in State v. Canola, 73 N.J. 206, 374 A.2d 20 (1977).

54. I FINAL REPORT: PENAL CODE, *supra* note 15, § 2C:11-3(a)(4). The commission discussed at length the utility of the felony murder rule, and it was this writer's position that it should have been abolished, as the English did in the Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11. § 1 (1957).

often enough to justify holding criminals to having foreseen them.[55] Nonetheless, the fact remains that the harsh sanctions for murder are imposed upon an unintended consequence even when the felons themselves have not killed anyone.

Two factors somewhat limit the statute governing felony murder. If the person killed by the third party is one of the participants in the crime, the other participants are not guilty of murder.[56] While liability for this conduct would be questionable, there is no merit in imposing liability contingent upon the aim of third persons reacting to the felony. In the hypothetical above, *A* would be guilty of murder if the bank guard shot and killed an innocent bystander, but not if the guard killed *A*'s accomplice. Since the guard was shooting at *A* or *B* it is hard to understand why the fact that he missed them and hit an innocent bystander reflects any increased culpability on the part of *A* and *B*. The second limitation upon felony murder is the express defense provided for the felon who did not commit the act that caused the death or did not "solicit, request, command, importune, cause or aid" in its commission, if certain additional requirements are met.[57] This defense was first articulated by the Model Penal Code and was a part of the commission's recommendation. Although it is desirable in itself, it does little to alleviate the problem created by the statute's undue extension of liability.

The statute creates two forms of manslaughter: the first is an unintentional but reckless homicide;[58] the second replaces the commission's complicated proposal with a straightforward "heat of passion resulting from a reasonable provocation."[59] The legislature's formulation ignores the commission's attempt to define reasonableness,[60]

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55. See Judge Conford's disposal of that argument in State v. Canola, 73 N.J. 206 (1977). *But see* Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958) (Jones, C.J.) (co-felon not guilty of murder where policeman justifiably kills other felon).

56. "[I]f any person causes the death of a person other than one of the participants . . . ." N.J. STAT. ANN. § 2C:11-3(a)(3).

57. *Id.* § 2C:11-3(a)-(d). There are in fact four requirements for the defense. It is an affirmative defense if the defendant:

> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
>
> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Id.

58. N.J. STAT. ANN. § 2C:11-4(a)(1).

59. N.J. STAT. ANN. § 2C:11-4(a)(2).

60. The commission proposed to add: "The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." I FINAL REPORT: PENAL CODE, *supra* note 15, § 2C:11-4(a)(2). See the discussion in II FINAL REPORT: COMMENTARY, *supra* note 10, at 159.

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REPORT: PENAL CODE, *supra* note 15,
: COMMENTARY, *supra* note 10, at 159.

and neither the statute nor the commission's proposal requires "adequate" as opposed to "reasonable" provocation.[61] The legislature has given the jury greater freedom to determine reasonableness without being confined by arbitrary legal rules.

The final important change in the commission's homicide proposals was the replacement of negligent homicide with a death by automobile provision.[62] The restriction of criminal sanctions for negligence to deaths involving automobiles is a worthwhile contribution; however, in doing so, the legislature unfortunately has reenacted the jargon of the original death by auto section.[63] In the past, the New Jersey courts have struggled to make "carelessly and heedlessly, in a willful or wanton disregard of the rights or safety of others" mean something that is not contradictory on its face.[64] Even assuming that these decisions make the standard intelligible, the relation of these words to the Code's definition of culpability and reckless manslaughter is unclear.[65] Though it would seem to be an unjust result, it is not clear whether a reckless or knowing homicide by auto is limited to the death by auto section, or whether it could constitute a greater offense. In addition, the statute adds an anglicized *non vult* statement which might be better left to the rules of procedure.[66]

B. *Sex Offenses*

The law pertaining to sex offenses was completely reformulated by the commission, and then revamped once more by the legislature. Nevertheless, certain improvements survived the revisions. Consensual sex acts between adults in private were excluded from criminal conduct.[67] The Code imposes criminal liability in instances when

Impotency would be a part of the actor's situation. *But see* Bedder v. Director of Public Prosecutions, 2 ALL E.R. 801 (1954) (objective reasonable man standard applied).

61. The most obvious application of the requirement of adequate provocation was to hold mere words insufficient provocation as a matter of law. *See* State v. King, 37 N.J. 285, 181 A.2d 158 (1962).

62. N.J. STAT. ANN. § 2C:11-5(a).

63. The original death by auto statute was codified at N.J. STAT. ANN. § 2A:113-9.

64. *See, e.g.*, Justice Brennan's opinion in *In re* Lewis, 11 N.J. 217, 94 A.2d 328 (1953).

65. It is not clear whether death by auto is the equivalent of negligence defined by the statute in N.J. STAT. ANN. § 2C:2-2(b)(4). It would have been better to have defined the crime in the terms defined by the statute. Given Justice Brennan's opinion in *In re* Lewis, the liability would not be substantially broadened by use of the negligence definition, and consistency in meaning would have been achieved.

66. See N.J. CT. R. 3:9-2 permitting the judge to limit a plea of guilty to any offense by not permitting it to be used as evidence in a civil proceeding. The statute also deals with compelled joinder. N.J. STAT. ANN. § 2C:1-8(b). *Cf.* N.J. CT. R. 3:15-1(b). The statutory provisions and the rules are not inconsistent, but the courts, through annual meetings and constant committee study are more likely to be able to keep the rules ahead of developing problems. As to the fact that the state constitution gives the supreme court power over rules of procedure, see R. KNOWLTON & D. COBURN, NEW JERSEY CRIMINAL PROCEDURES § 1:8, at 8 (1976) [hereinafter cited as KNOWLTON & COBURN].

67. This was done by drafting statutory provisions which did not include such conduct. This deletion includes consensual adultery. This is one of the reasons it was felt that a relatively

force, taking advantage, and age factors are involved. Several differences between the commission report and the legislation are worthy of comment, however. Unlike the commission report, the statute applies the criminal law to conduct between spouses.[68] The exclusion of spousal conduct today cannot be based upon any waiver or implied consent doctrine. To the extent that such an exception might have been based upon some concept of ownership, it also would be unacceptable today. Questions as to the utility of such a provision relate to the difficulties of proof within the intimate marital relationship.[69] Force which left significant, visible bodily damage obviously would suffice to convict for assault or aggravated assault, but in the absence of such evidence great confidence in the factual resolution seems unwarranted. Moreover, the danger exists that threats of prosecution might give one spouse an undue weapon in marital disputes. Because rape is both reprehensible and dangerous, it may be a good time to find out whether these fears are merely idle speculation. It should also be noted that prosecutors will use an informed discretion to determine whether prosecution is justified on the facts of a particular case. Nonetheless, a continuing evaluation of the impact of this change should be undertaken.

Another difficult area in sexual assault cases concerns the admission of evidence of the victim's past sexual activities. This problem centers about the claimed relevance of such evidence as opposed to its obvious prejudicial impact upon the jury and its denigration of the victim. Like Rule 4 of the Rules of Evidence,[70] the statute requires a balancing of need against the potential for harm.[71] The statute is more specific, however, in that it requires the issue to be raised before trial, presumably to assure that the jury will be kept unaware of the problem or to preclude exploration of collateral issues during the trial.[72] The statute specifically delineates the factors to which past sexual activity can be relevant[73] and the considerations to be weighed

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broad pre-emption statute which prohibits local governments from enacting ordinances which conflict with or are pre-empted by "any policy of this State expressed by this code . . ." was necessary. N.J. STAT. ANN. § 2C:1-5(d) (Supp. 1979). *See* II FINAL REPORT: COMMENTARY, *supra* note 10, at 13 (1971).

68. The commission proposal expressly precluded liability between husband and wife for rape offenses by saying "female not his wife. . . ." I FINAL REPORT: PENAL CODE, *supra* note 15, §§ 2C:14-1(a),(b). With respect to sodomy, deviate sexual intercourse is defined as conduct "between human beings who are not husband and wife." *Id.* § 2C:14-2(a). The statute omits any such limiting words. N.J. STAT. ANN. §§ 2C:14-1 to 14-7.

69. The difficulty of proof has also led to restrictions upon the offense of interspousal theft. *See* N.J. STAT. ANN. § 2C:20-2(d).

70. Rules of Evidence, N.J. STAT. ANN. § 2A:84A, Rule 4 (1976).

71. N.J. STAT. ANN. § 2C:14-7.

72. *Compare* N.J. STAT. ANN. § 2C:14-7(a) *with* N.J. CT. R. 3:5-7 and reasons for the motion to suppress contained therein. *See* KNOWLTON & COBURN, *supra* note 66, at 73.

73. Past sexual conduct "shall not be considered relevant unless it is material to negating the element of force or coercion or to proving that the source of semen, pregnancy or disease is a person other than the defendant." N.J. STAT. ANN. § 2C:14-7(c).

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on the other side.[74] Finally, by requiring clear and convincing proof to support admission of the evidence if the sexual activity was more than one year before the alleged offense, the statute effectively precludes consideration of stale evidence.[75] As a practical matter, given the limits of relevancy established by the statute, it is difficult to imagine how situations in which the conduct was more than a year old could be considered.

The legislature also changed the commission report's provision relating to age factors. Contrary to the trend, the first version of the statute that went into effect expressly provided that even a reasonable belief that the victim was over the critical age of 13 was no defense.[76] But this statute was not as harsh as it appeared to be for two reasons: if the child was under 13, her youth would be obvious;[77] and, in addition, the statute applied only when the actor was at least four years older.[78] If the critical age was higher than 13, a special relationship to the woman had to be present before criminal liability would be imposed. It was assumed that the special relationship would have given notice of the woman's age and that in most cases it would involve the potential for "taking advantage" which might justify the sanction even without the express age factor.[79]

C. *Burglary*

In *Davis v. Hellwig*[80] the New Jersey Supreme Court noted that the crime of burglary could be committed by a person entering with intent to shoplift from a store that was open and doing business. Because there is no reason to believe that such a person should be subjected to the severe sanctions of the burglary statute in addition to those of the theft statute, the anomaly of *Davis* has been obviated by the new Code.[81] Incidentally, double punishment is still possible, since the

74. At an in camera hearing the court must find "that the probative value of the evidence . . . is not outweighed by its collateral nature or the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. . . ." N.J. STAT. ANN. § 2C:14-7(a).

75. N.J. STAT. ANN. § 2C:14-7(b).

76. N.J. STAT. ANN. § 2C:14-5(c). Note that the commission proposed that a reasonable mistake concerning a child below the age of 12 was no defense but that such a mistake was a defense for other ages. I FINAL REPORT: PENAL CODE, *supra* note 15, § 2C:14-6(a).

77. See note 76 *supra*.

78. N.J. STAT. ANN. §§ 2C:14-2(a)(1), 14-2(b).

79. N.J. STAT. ANN. §§ 2C:14-2(a)(2), 14-2(b)(4). The legislature's refusal to permit reasonable mistake of fact as to the woman's age as a defense to statutory rape is flatly contrary to the trend in other jurisdictions. Although the provision was not unduly harsh when the critical age was set at 13, the legislature subsequently raised the age of consent to 16. Insofar as 16 is generally the critical age, a reasonable mistake of fact should be a defense to statutory rape.

80. 21 N.J. 412, 122 A.2d 497 (1956).

81. This appears from the fact that, while "breaking" is not required, the entry is not criminal if the "premises are at the time open to the public. . . ." N.J. STAT. ANN. § 2C:18-2(a)(1).

new Code omitted a provision in the commission report that prevented multiple convictions.[82]

V. Sentencing Provisions

A. *Introduction*

The problem of sentencing mainly involves the allocation of power among three branches of government. Even though the various discretionary schemes created since the demise of fixed and mandatory sentences have proven difficult to control, certain abstract guidelines are generally accepted. One of these is the need for legislative determination of substantive crimes and maximum penalties. The creation of sentencing alternatives, such as fines, restitution, probation, or imprisonment, and the creation of the various correctional institutions are also a legislative function. Finally, the legislature must allocate decisionmaking responsibility between the judicial and executive branches. General dissatisfaction has been expressed with respect to both judicial and executive decisions. The courts have tried to rectify sentencing disparities by using procedures that make rational decisions more likely,[83] but these reforms have proven inadequate, given the breadth and predictive nature of the decision making process and the institutional pressures bearing upon it.

The sentencing provisions of the Model Penal Code were based upon the premise that sentencing decisions should be made by the body acting closest to the point in time at which the decision must be made.[84] In other words, while sentencing decisions are always predictive in nature, they are better informed when they are based upon all of the facts that have accumulated up until the very moment the decisions have to be made. Though logically desirable, a system based upon that idea clearly would still suffer the defects arising from the fact that sentencing decisions are necessarily predictive in nature. Institutional pressures and differing views of the applicability of de-

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82. The commission suggested a provision which read: "A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense." I Final Report: Penal Code, *supra* note 15, § 2C:18-2(c).

83. In New Jersey, excessive sentences may be corrected. *See* II Final Report: Commentary, *supra* note 10, at 339. A presentence investigation and report are required to develop facts for consideration in sentencing. N.J. Ct. R. 3:21-2 (Pressler ed. 1978). Additionally, the facts used in sentencing must be disclosed to the defendant. The sentencing court must state its reasons for imposing this sentence. N.J. Ct. R. 3:21-4(e). Finally, as a further protection the defendant is entitled to counsel at the sentencing hearing. State v. Jenkins, 32 N.J. 109, 112, 160 A.2d 25, 27 (1960). *Cf.* Mempa v. Rhay, 389 U.S. 128 (1967) (felony-defendant must be afforded counsel at deferred sentencing stage).

84. *See, e.g.*, N. Morris, The Future of Imprisonment 28-50 (1974); Kastenmeir & Eglit, *Parole Release Decision-making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U. L. Rev. 477 (1973); Cohen, *Abolish Parole: Why Not?* 46 N.Y.S.B.J. 517 (1974).

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terrence, incapacitation, and reformation to the facts of particular cases also will inevitably hinder the development of a rational and coherent sentencing system.

B. *The Judicial Discretion*

Under the prior New Jersey statutes sentencing courts had broad discretion[85] to impose penalties ranging from probation or fines to long prison sentences. This discretion was exercised without formal guidelines, although the appellate courts' review of sentences, aided by judicial seminars, did establish some relevant factors as well as some uniformity of results. If imprisonment was imposed, for example, the judge was required to establish minimum and maximum terms within the range permitted by the statute.[86]

The commission report attempted to limit judicial discretion in a variety of ways including the establishment of presumptions regarding imprisonment, fines, and restitution,[87] as well as the criteria for overcoming them.[88] The Model Penal Code does not require a minimum and maximum sentence, but it does require the judge to mete out sentences within a statutory range.[89] Under certain circumstances the commission report would have allowed the judge to enter judgment for a lesser included offense.[90] Finally, the result of the judge's discretion in establishing the term was subject to immediate alteration by the parole board, unless the sentence was one of life imprisonment.[91] In other words, the highly speculative nature of the decision was accounted for by permitting another body to make a release decision based upon information available to it at a later date.

The statute codifies some of the methods of the commission report but with several significant changes and additions. It carries the presumptions one step further by presuming specific terms of incarceration for each category of crime.[92] Although this provision significantly limits judicial discretion, the criteria for change are amorphous

85. *See* KNOWLTON & COBURN, *supra* note 66, at 265.
86. N.J. STAT. ANN. § 2A:164-17 (1971).
87. I FINAL REPORT: PENAL CODE, *supra* note 15, §§ 2C:44-1 to -2. Additionally, the commission recognized a presumption in favor of imprisonment where a statute outside of the Code provided for a mandatory sentence. Certain statutes within the Code also carried a presumption of imprisonment. *See id.*, II FINAL REPORT: COMMENTARY, *supra* note 10, at 325-27 (1971).
88. I FINAL REPORT: PENAL CODE, *supra* note 15, §§ 2C:44-1 to -2; II FINAL REPORT: COMMENTARY, *supra* note 10, at 324-28.
89. I FINAL REPORT: PENAL CODE, *supra* note 15, § 2C:43-6.
90. *Id.* § 2C:43-11.
91. See the proposed amendment to N.J. STAT. ANN. § 30:4-123.10. FINAL REPORT: PENAL CODE, *supra* note 15, at 168. A person sentenced to life imprisonment would not be eligible for release on parole until fifteen years after confinement.
92. N.J. STAT. ANN. § 2C:44-1(f).

enough to allow judges to change the presumptive terms. Another major change in the sentencing provisions recommended by the commission involved the continuation of a form of the old sex offender statute. Persons convicted of listed sex crimes may be given a program of specialized treatment recommended by the Adult Diagnostic Center if the Center found that the defendant's conduct "was characterized by a pattern of repetitive, compulsive behavior."[93] The new system differs from the old one in that the judge is required to sentence the offender under the regular provisions as well.[94] Further, a special classification board must recommend an offender's release to the state parole board before it may grant parole.[95] Good behavior time and work time are not available under a special sentence as they are under a traditional sentence.[96] For several reasons, the commission did not recommend the retention of the sex offender statute.[97] The idea that sex offenders progress to more vicious or dangerous offenses is simply not true; nor is there any reason to believe that sex criminals have a greater need for treatment than other offenders. Finally, society's failure to provide adequate treatment facilities is grossly unfair to persons subject to the special treatment provisions.

C. *Parole*

Both the commission report and the statute provide for a separate parole term for each sentence to assure that all prisoners will have an adjustment period between imprisonment and complete freedom.[98] Under the prior system a person who was not paroled until the maximum sentence was served was unconditionally released. Under the new Code, however, every prisoner will have to serve a parole term of some sort. This obviously assumes that parole serves a purpose in helping former inmates to adjust to society. Of course, the amount of assistance given in this regard depends upon the number and the effectiveness of parole officers, but society has once again failed to devote sufficient resources to assure success. Nevertheless, the alternative of unconditional release does not provide sufficient

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93. N.J. STAT. ANN. § 2C:47-3.
94. N.J. STAT. ANN. § 2C:47-3(b).
95. N.J. STAT. ANN. § 2C:47-5.
96. N.J. STAT. ANN. § 2C:47-6. Monetary compensation is provided, however, instead of remission of sentence for work performed.
97. An extended term provision incorporated some of the terminology but applied to more than just sex offenders. *See* I FINAL REPORT: PENAL CODE, *supra* note 15, § 2C:44-3. See comments by the commission in volume II at 329. Transfer within the institutions is, of course, administratively possible.
98. N.J. STAT. ANN. § 2C:43-9(b). For the commission's parole recommendations, see II FINAL REPORT: COMMENTARY, *supra* note 10, at 319.

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hope for adjustment in enough cases to make it preferable to the new approach.

Both the Model Penal Code and the commission report recommended the use of broad administrative discretion within the statutory and judicial limits with respect to parole decisions. Parole decisions are made at the time that they are necessary and the parole board has more evidence concerning a defendant than either judges or legislators. While unhappiness with parole board decisions has led to criticism of the parole system, it seems that expert and effective decision making can be obtained only by allowing for the discretion to make the necessary decisions.

D. *Sentencing Alternatives*

Under the new Code, restitution is made a sentencing alternative as well as a possible condition for probation.[99] This change in the status of restitution should bring it into greater use, especially with respect to acquisitive crimes, for which it seems a particularly appropriate remedy.[100]

Diversion is another alternative way of proceeding,[101] although in a strict sense diversion is not a punishment alternative since it arises before the trial which establishes guilt. Rather, it is an alternate mode of proceeding in lieu of the criminal process. This is a worthwhile concept but it is hardly new except insofar as it has now been made statutory. The New Jersey Supreme Court has had rules dealing with the system, but the legislative formulation may add lustre and increased acceptability to the device, leading to its more frequent use.

Finally, it should be noted that the habitual offender statute is no longer in force. The court instead has the power to sentence an offender to an extended term upon the finding of certain facts.[102] These fact requirements are broader than the existence of prior convictions required by the traditional habitual offender statute.

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99. N.J. STAT. ANN. § 2C:43-3.

100. N.J. STAT. ANN. § 2C:43-3(f) expressly limits restitution to the amount of the victim's loss. Therefore, to obtain any punitive effect, a fine or imprisonment would have to be imposed. The same section provides that restitution "shall be in addition to any fine which may be imposed. . . ." *Id.*

101. N.J. STAT. ANN. § 2C:43-14 authorizes the supreme court to formulate rules of pretrial intervention so that those individuals best suited to rehabilitation and supervision may receive these benefits without standing trial. These rules would be subject to legislative cancellation or change. N.J. STAT. ANN. § 2C:43-18. *Compare* this authorization of pretrial intervention *with* N.J. CT. R. 3:28.

102. N.J. STAT. ANN. §§ 2C:44-3(a), (b). The two most important facts to be considered in sentencing are whether the defendant is a persistent offender or a professional criminal.

VI. Decriminalization

The basic premise that consensual sex acts between adults in private should not be criminal is widely accepted today. Thus, as previously mentioned, neither the commission's report nor the statute provides for the punishment of such conduct. This serves to repeal the crimes of fornication and sodomy as well as adultery. The legislature went further than the commission report in some respects, however. The political body presumably was better able to determine what would be acceptable than the commission, and several provisions that the legislature eliminated from the criminal code indeed should have been taken out. Public drunkenness is a case in point.[103] Both the commission and the legislature saw no reason to make this an offense. Nonetheless, some alternative needs to be developed to deal with the problem. Because the legislature did not follow the commission's lead in making public drunkenness an offense, it is reasonable to suppose that the legislature will provide another means of assuring the protection of the intoxicated person and the public. Finally, loitering was an offense that was wisely decriminalized under the new Code. Clearly section 2A:170-1 was difficult to accept even after Chief Justice Weintraub's attempt to make it respectable.[104] The Model Penal Code draftsmen and the commissioners tried with little success to develop a defensible statute on loitering[105] that would be definite enough to give notice, provide a standard of guilt, and prevent official harassment. To its credit, the legislature abandoned the effort. It also deleted many additional sections in a valiant effort to bring criminal law back into a meaningful framework. This was probably its most significant accomplishment.

VII. Conclusion

A criminal code is the product of the political process. During the deliberations of the commission there were heated debates in which each commissioner was on the losing side many times. Thus the fact that the final proposal was unanimously adopted did not mean that

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103. The commission proposal, based upon the ALI Model Penal Code § 250.6 (1975), is found in I Final Report: Penal Code, *supra* note 15, § 2C:33-5. For the commission's proposal to make public drunkenness a criminal offense, see I Final Report: Penal Code, *supra* note 15, § 2C:33-5. The proposal was made because there was no adequate noncriminal method of dealing with the problem. II Final Report: Commentary, *supra* note 10, at 296 (1971).

104. State v. Zito, 54 N.J. 206, 254 A.2d 769 (1969). For a discussion on the constitutional problems underlying loitering statutes, see People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied*, 414 U.S. 1093 (1973).

105. It was gratifying to find that loitering to solicit sexual activity and jostling, which were proposed as criminal offenses by the commission, see I Final Report: Penal Code, *supra* note 15, §§ 2C:33-6, 34-3, were not enacted as such by the legislature.

ex acts between adults in pri-
ccepted today. Thus, as previ-
sion's report nor the statute
onduct. This serves to repeal
s well as adultery. The legisla-
report in some respects, how-
was better able to determine
mmission, and several provi-
om the criminal code indeed
nkenness is a case in point.[103]
e saw no reason to make this
ive needs to be developed to
legislature did not follow the
lrunkenness an offense, it is
re will provide another means
icated person and the public.
is wisely decriminalized under
l was difficult to accept even
pt to make it respectable.[104]
commissioners tried with
statute on loitering[105] that
e, provide a standard of guilt,
credit, the legislature aban-
additional sections in a valiant
o a meaningful framework.
accomplishment.

political process. During the
were heated debates in which
de many times. Thus the fact
y adopted did not mean that

MODEL PENAL CODE § 250.6 (1975), is
15, § 2C:33-5. For the commission's pro-
e, see I FINAL REPORT: PENAL CODE,
cause there was no adequate noncriminal
T: COMMENTARY, *supra* note 10, at 296

9). For a discussion on the constitutional
Berck, 32 N.Y.2d 567, 300 N.E.2d 411,

t sexual activity and jostling, which were
I FINAL REPORT: PENAL CODE, *supra*
by the legislature.

any commissioner believed that each and every provision was the best one possible. Each commissioner had to determine whether the disagreements so outweighed the advances made as to warrant a dissent in particular or general terms. The length of the legislative consideration also demonstrates genuine concern over problems that undoubtedly merit argument. The end product is necessarily an accommodation of many different viewpoints. The Code as enacted is, nevertheless, in many ways a major improvement over existing law. As the legal community gains experience under it, a more significant evaluation will be forthcoming.

Referenced in ~~etc~~ ND current law may have some sentences cut off