The Proposed New Mexico Criminal Code

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A codification of the criminal laws of New Mexico—the first in the State’s history—has been submitted to the 1961 session of the legislature. Any such codification is a difficult task at best; to bring unity and order out of a century’s accumulation of legislation requires reconciling enactments passed at different times, by different legislatures, with different conceptions of the purpose of criminal justice and the seriousness of various crimes. And since ours is a heterogeneous society, without any clear consensus on these subjects, any solutions that the codifiers adopt is likely to meet a certain amount of opposition. The present proposal not only is subject to these inevitable hazards, but has also been beset by some peculiar boggles of its own.

I. History of the Project

The Criminal Law Study Committee was created by chapter 233 of the Laws of 1957, and given the task of preparing a complete revision of New Mexico’s criminal statutes. It was composed of seven members of the legislature with one full-time staff assistant. The committee began its work in June, 1957.

At its first meeting, the committee unanimously decided to work for a “complete revision of the New Mexico Criminal Code, rather than to attempt to retain the present law with amendments.” If this could not be achieved within the two years for which the committee was created, it would recommend that its life be continued, “rather than to present a hasty or ill-considered legislative program.”

This objective was held to for only half the task, however. The first 14 arti-
cles were the product of three years' careful labor. The remaining 17 were turned out in one month. There seem to be two reasons for this rather amazing change of pace. The first is a natural desire and perhaps a feeling of compulsion to get done with the job. The last articles dealt with less serious crimes, which the committee thought needed less attention.

The second and apparently more decisive factor, however, has been a change in committee membership. In 1959, two new members took their places on the committee, neither of whom was in sympathy with the objective toward which the committee had been working; both believed that the existing law should be retained, with amendments. Although only two on a committee of seven, they were practicing lawyers, whereas three of the other five were not; and they were lawyers with more experience in criminal practice than the other two lawyer-members. Their opinion therefore carried more weight than it otherwise might have done. As a result of the difference of opinion within the committee, and the consequent confusion concerning the essential purpose of the work, the staff assistant who had worked in the project from the beginning, Mrs. Annette R. Shermack, resigned in May 1960. An assistant Attorney General was put in charge of the staff work, but this arrangement proved unsatisfactory, and Mr. Edwin W. Stockly, an attorney practicing in Los Alamos, who had been retained to work part-time, was given the task. In compliance with the Committee's new time-schedule, he completed the rest of the code during the month of July, 1960. Considering the amount of time at his disposal, Mr. Stockly did a commendable job. But of course it was impossible in that time to do more than a paste-and-scissors job; filling in the uncompleted portions by wholesale adoption of existing New Mexico provisions or copying of provisions from other sources, with a minimum of coordination with the general principles previously accepted. In consequence, some inconsistencies and unintended surprises appear in the draft submitted, as will be pointed out below.

The proposal is to submit the code for adoption at this legislative session, but with an effective date of April, 1963. This would allow two years in which defects and objections could be brought to light and perhaps remedied by the next legislature before the code actually went into effect.

This proposal has perhaps more reason behind it than might appear at first sight. A more normal procedure would be to prepare as well-considered and finished a product as possible before offering it for enactment, rather than to urge enactment with the hope that defects and objections can be taken care of before the measure becomes effective. But this logical procedure becomes less clearly preferable when one learns that during the three and one-half years that the committee has been at work it has not been able to get either the bar or any-

3. Thus as background for the task of establishing a system of sanctions, Mrs. Shermack, the committee staff assistant, prepared a 53-page paper on "Control of Offenders," which provides useful information on the actual administration of our state prison and the functioning of probation and parole.
one else to take a serious interest in what it was doing. One of the committee's first acts was to circularize the members of the State Bar informing them of the project and asking cooperative assistance in making suggestions and recommendations. The State Bar appointed a committee for the purpose, and this committee was given a standing invitation to attend meetings and was sent copies of work sheets and minutes of meetings. But bar members appeared at only two or three meetings before the committee decided on its present strategy last summer. The decision to submit the code in its present form for legislative adoption is perhaps a desperate measure to serve notice on members of the bar, and on others, that if they have criticisms or objections to offer, they had better do so now.

II. General Provisions

The main purpose of any codification is to bring order and system out of a wilderness of specific provisions, by establishing certain unifying basic principles. European codes have a "general part" which sets forth fundamental principles or doctrines applicable to all the specific crimes, and a "special part," classifying the specific offenses. The proposed code is not formally divided into two such parts, but the first four articles do in fact deal with general principles, and the last twenty-six with specific crimes.

A. Classification of Crimes and Penalties: One of the least orderly aspects of an uncodified body of criminal statutes is the uneven and irrational variation in penalties attached to the several crimes. The different penalties may represent different legislative responses to pressures from special interest groups, to temporary public hysteria in reaction to one sensational crime, or to the pet theory of one strong-willed legislator. Older statutes may reflect a judgment about the seriousness of a certain crime widely different from the current view. Such statutes therefore prescribe punishments not only quite different from those prescribed by more recent enactments in neighboring states, but also different from the current popular standard in that state itself, as reflected in newer statutes defining somewhat similar crimes. Here we see piecemeal legislation at its worst.

The proposed code would classify all crimes covered by it into four degrees of felony and two degrees of misdemeanor. (Secs. 1-9 and 2-2.) This would provide a scale on which to measure the seriousness of any specific crime and to assess the penalty, and eliminate the necessity of describing the penalty for each crime. The committee has throughout made use of the work done by similar committees elsewhere and codifications adopted in other states. Most resort was had to the Model Penal Code being prepared under the aegis of the American Law Institute (so far as that code has been drafted), and the Wisconsin Code, adopted in 1955. The classification of crimes and penalties adopted is that of the Model Penal Code (Secs. 1.04 and 6.01), except that the New
Mexico code would add the category of "capital" crime. In this the committee was simply accepting the present fact, that New Mexico does include capital punishment among the permissible penalties. But the legislature is free to discard this vestigial relic of more barbarous times, and this writer hopes that it will do so, by striking this provision out of the proposed code.

Statistical studies have clearly demonstrated that the death penalty has not the slightest effect on the crime rate. On the contrary, it is a handicap to efficient administration of justice, because a trial in which life is at stake is highly sensationalized, takes more time to empanel a jury, costs more to try, results in more delays and fewer convictions, panders to morbid curiosity and holds an absorbing and unhealthy fascination for emotionally unstable persons. Almost all the rest of the civilized world has long since abandoned it, and so have nine of our own states, some of them more than a century ago. Even in the states retaining it, the number of executions is going down steadily. Where the penalty is still carried out, it operates in a shockingly discriminatory way. Of the few who are actually executed, almost all are poor, almost all are men, and a disproportionately high number are Negroes. Warden Lawes of Sing Sing said that he escorted 150 persons to their deaths; 150 of them were poor, 149 were men.

The code not only retains capital punishment but makes it mandatory. Sec. 2-3 says:

When a person has been convicted of a capital felony as defined by the Criminal Code, the court shall sentence that person to death.

Capital felonies under the code are premeditated and deliberate homicide and kidnapping. Kidnapping is not capital if the jury recommends clemency (Sec. 8-1), but if a defendant is found to have committed a premeditated and deliberate homicide, neither the jury nor the court is given any discretion about the penalty. (Of course, a jury can always refuse to return a verdict finding such a capital homicide, but the law should be based on the assumption that juries will—or at least may—accept the court's instructions and do their duty.)

Even 20 years ago, 35 states had abolished the mandatory death penalty for first degree murder. Today, it has been abolished almost everywhere. For New Mexico to adopt the committee's proposal would be a seriously regressive step. To say that juries may avoid imposition of the death penalty by refusing to con-

4. Alaska, Hawaii, Delaware, Maine (except for murder committed in prison), Michigan (except for treason), Minnesota, North Dakota (except for murder committed while serving a sentence for murder), Rhode Island (except for murder while under life sentence), and Wisconsin. Among the ten states that in 1958 had the fewest murders, are four of these abolition states: Minnesota, North Dakota, Rhode Island and Wisconsin.

vict of a capital felony (even though the evidence shows all the elements of such a crime) is a cynical invitation to juries to disregard the law as given them in the judge's instructions. Only by such violation of its sworn duty could the jury prevent the defendant's execution.

With this and a few other exceptions, the code generally adopts the principle that the trial court should have broad discretion in sentencing. The code rejects (as does the Model Penal Code) the device of shifting authority to determine the actual length of sentence to be served to a correctional authority such as an Adult Authority.

Sentences would no longer be indeterminate, but would be definite. The code declares that for each degree, the court shall sentence to imprisonment "for a maximum term fixed by the court not to exceed" a stated maximum for each degree (life or 99 years for a first degree felony; 10 years for second degree; five years for third degree). Sentences for misdemeanor may be for a definite term, not to exceed one year for misdemeanor or six months for petty misdemeanor.

No minimum term is authorized for any crime. The length of time that the convict actually serves would be determined by the parole board; the board, it is felt, is in the best position to determine when an inmate should be released and allowed to serve the rest of his term on conditional parole. This seems sound. Statutory minima are hardly consistent with the discretion, now commonly given, to place on probation without any imprisonment. Arbitrary minima fixed by statute tend to corrupt the administration of justice by fostering circumvention. A judge who must choose between imposing the statutory minimum of imprisonment or none, may place an offender on probation without any imprisonment, even though he may believe that a short prison term would have been warranted.

In 1878, Sir John Holker, then Attorney General of England, in introducing a draft for a penal code (never adopted by Parliament), said:

Minimum punishments were a great evil, and I am happy to say that these punishments have been to a very considerable extent set aside by recent legislation; and now a very large discretion is confided to judges, and they are enabled, upon their view of the circumstances, to mitigate the punishment almost to any extent. I think that is right.⁶

The road to reform is arduous. The 1878 draft code was never adopted by Parliament, and in New Mexico, the legislature in 1961 will probably be told by some that this reform advocated in 1878 (and earlier) is still too extreme. It is not.

The sentencing judge's discretion is extended (Sec. 2-14) to entering judgment for a lesser degree of felony or for a misdemeanor if, "having regard to the nature and circumstances of the crime and the history and character of the

defendant," the court believes that sentencing in accord with the code would be unduly harsh. Reduction of degree occurs now, under the practice of accepting a plea of guilty to a lesser offense in lieu of a contested prosecution for a greater offense. This practice has some undesirable effects. The offender who is allowed to "cop a plea" loses respect for the judicial system and is less likely to respond to efforts at rehabilitation. The parole board, when it ultimately considers his case, will spend time looking behind the offense for which he was ostensibly sentenced, to consider the actual circumstances constituting the more serious crime, of which he was not convicted.7

B. Reserving or Suspending Sentence: The sentencing court is also given broad discretion to reserve or suspend sentence. In some states "reserved" sentence is much more used than suspension, because it is more effective in persuading the convicted offender to comply with the conditions of his release. Suspension, on the other hand, has the advantage—in theory, at least—that it imposes sentence at the time closest to the commission of the offense, when the testimony on which it is based is most fresh in the judge's mind, and when the pronouncing of sentence may make the most impression on the offender. Under reserved sentence, the sentence imposed may be influenced more by the nature of the violation of the terms of release than by the nature of the original crime. Because these and perhaps other considerations make a clear-cut choice between the two procedures difficult, the code authorizes the continued use of both. Both are in use now in New Mexico.

To make this procedure truly effective, the legislature would have to strengthen our probation and parole system. Probation officers now have the duty to prepare pre-sentence reports (Sec. 13-8-13) such as the court would need in order to exercise the discretion the code would give (Sec. 2-14) to enter judgment in a lesser degree of crime, "having regard to the nature and circumstances of the crime and the history and character of the defendant." But few of our probation officers have had professional training. Nor do the prison or the parole board have the professionally trained personnel necessary to make individual determinations when an inmate is ready to be released, and to make necessary preparations for his taking a legitimate place in free society—particularly by helping him find a job—and to supervise him at least during the first crucial months after release.

C. Flexibility versus Inflexibility: Notwithstanding the code's general acceptance of the principle that the trial court should have a broad discretion, not only as to whether or not the offender should be sentenced to imprisonment, but also as to the length of any imprisonment, it departs from this principle in a number of provisions wherein the trial court is not only restricted but deprived

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7. This seems, in fact, to be a regular part of the parole board's inquiry. In 1958, the parole director prepared an outline for the use of the board in considering eligibility for parole. Of the first three questions on the list, all of which deal with "The Crime," one is "Was man tried on lesser charge than actually committed?" "Control of Offenders," prepared by Annette R. Shermack, at p. 33.
of any discretion whatever. One of the most serious of such provisions (apart from the mandatory death penalty already mentioned) is that retaining the extremely severe "felony-murder" and "misdemeanor-manslaughter" rules now found in the New Mexico statutes. This will be discussed below, in connection with the specific provisions covering homicide. A less significant example is the provision for sentencing for offenses committed while the accused is an inmate of a penal institution. The second sentence, says Sec. 2-9, must be consecutive to the sentence being served. This rigid requirement was apparently adopted at the request of the prison warden. It is not only in conflict with the code's general principle calling for flexibility and discretion, but is also contrary to the best present-day thought on the subject. The Model Penal Code, for example, not only leaves some discretion with the judge whether sentences should run concurrently or consecutively, but provides that they shall normally run concurrently (Sec. 7.06). "Where consecutive service of terms has been made mandatory," says the comment, "as with prior violators in New York, the results have been unsatisfactory."

It is true that since the code sets no minima for sentences, a judge could fix a very low penalty for the second offense—one day, if he wished—and so the second, consecutive, sentence could be made to add almost nothing to the first. But for criminal code drafters no less than for those they would seek to restrain, honesty is the best policy. It would be better frankly to give judges discretion whether to make the second sentence concurrent or consecutive, instead of inviting them to adopt evasive practices.

One of the worst examples of inflexibility is found in the code's provision for dealing with "persistent offenders"—that is, with recidivists or habitual criminals. This is important enough to deserve a few paragraphs of comment.

D. Sentencing of Persistent Offenders: The code undertakes to make increased penalties for second and subsequent convictions mandatory, not discretionary. For a fourth offense, it provides a mandatory maximum of life imprisonment. (Sec. 2-8). This was one of the sections that had not been drafted before April, 1960; it is part of the hasty job done in July of that year, and merely reflects the present New Mexico law. It does not even follow the code's own fundamental distinctions between degrees of crimes. A person who commits four third-degree felonies is subject to life imprisonment no less than the man who commits four first-degree felonies.

It may be that these mandatory provisions are subject to the power given to enter judgment for a lesser degree of crime, and to reserve or suspend sentence (Secs. 2-14, 2-16) but this is not made clear.

These habitual criminal acts of the mandatory type developed after the first World War, as a result of pressure from various crime commissions. Those who urged their adoption were convinced that they would practically eliminate serious crimes. No statistical validation for this belief has been found,

8. See text infra at 135-36.
but studies do demonstrate that they operate to increase the proportion of charges that were reduced to minor offenses. Professor Sutherland in 1939 wrote:

In the year 1927 28.6 per cent of the charges under the fourth offender act in New York were reduced to misdemeanors, while only 16.1 per cent of all felony charges were thus reduced. Furthermore, it is probable that the professional criminals for whom this law was designed were not much affected by it, and that the occasional criminals were the principal victims of the law. Finally, prison riots have often been ascribed to the presence of a large number of these habitual offenders sentenced to prison for life.

The previous criminal record is unquestionably an important consideration in determining the treatment a criminal should receive. It should not be the only consideration.\(^{10}\)

Here as elsewhere, inflexible provisions lead to nullification. A study of ten years' operation of the Kansas habitual criminal act showed that only 457 of the 4,822 prisoners received were sentenced as habituals, although 1,993 had previous convictions for felony and should have been sentenced as habituals. Of these 1,993, 733 should have received life sentences. In other words, 3 out of 4 men who under the act should have received double or life sentences were in fact sentenced as though they were first offenders.\(^{11}\)

At the same time, these acts can be used to coerce pleas of guilty in doubtful cases; prosecutors sometimes persuade defendants with prior records to plead guilty rather than run the risk of the full penalty of the habitual law. The Model Penal Code, therefore, proposes that the use of the extended term should not in any case be made mandatory on the court, and that like the ordinary term, it should bear a relationship to the gravity of the offense for which it is imposed. As the draftsmen of that code have said: "Experience has shown that sanctions of this kind are more effective when they are both flexible and moderate; highly afflictive, mandatory provisions become nullified in practice." The word "shall" in this section (2-8) of the proposed New Mexico code should be changed to "may."

Our proposed code also differs from the Model Code in that only prior convictions would give occasion for increased punishment, whereas the Model Code (Sec. 7.03) allows imposition of an extended term also for professional criminals (who may have escaped previous conviction) and for offenders who present special problems of control because of seriously abnormal mental condition.

Dispute over whether the accused does in fact have a record of prior convictions would be determined under the code by jury verdict. This retains the present rule in New Mexico and in most other states. It might be better to let

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10. Sutherland, Principles of Criminology 531-32 (3d ed. 1939).
the court decide this matter. That is what the Model Penal Code would do, on the reasoning that "since the issue bears entirely on the nature of the sentence rather than on guilt or innocence, we see no reason why a jury trial should be accorded in a system where questions of sentence otherwise are for determination by the court."¹²

E. Mental Element: Modern codes, such as that of Wisconsin and the Model Penal Code, proceed on the assumption that the mental element in crimes can usually be more accurately defined than by using such ambiguous adverbs as "maliciously," "willfully" and "wantonly." The proposed New Mexico code takes the same view. It says (Sec. 3-2) that except where the definition of a crime imposes absolute liability, no one shall be convicted unless he acted with "intent," "knowledge," or "negligence," as the law may require, with respect to each material element of the crime. This reduces the mental elements even more than does Sec. 2.02 of the Model Code, which has four mental states: "purposely," "knowingly," "recklessly," or "negligently." Since "purposely" seems to refer to the same mental state as "intent," the difference is that the New Mexico code omits "recklessly."

The distinction between "intent" and "knowledge" is a rather narrow one. Both presuppose that the requisite external circumstances are known to exist. For many crimes, such knowledge is all that is required to make the act "intentional," but for some we require more; we do not hold a person guilty unless he also consciously aimed to achieve the particular result. To express this requirement we usually use the term "specific intent." To make this differentiation, the terms "intent" and "knowledge" are useful.

But a wider distinction seems to exist between "knowledge" and "recklessness." As the Model Code uses the term, it involves conscious risk-creation. It is distinguishable from mere negligence in that in negligence there should have been awareness of a substantial risk; whereas in recklessness there was such awareness.¹³ Under the proposed code, persons who act knowing that there is a probability that dangerous consequences will follow the act can be found guilty only of negligence, the same as persons who did not know but should have known. Without knowing the rationale on which the committee acted, it is difficult and perhaps unfair to judge whether this proposal to reduce the four commonly recognized mental states to three is desirable.

F. Parties: Whoever is a "party" to a crime may be charged and convicted even though he did not directly commit it and although the person who did commit it has not been prosecuted or convicted, or has been acquitted. (Sec. 3-10.) This accords with the modern trend of legislation, to deprive the distinction between principals and accessories of its common law significance. But


the New Mexico draft contains no definition of a "party." The Model Penal Code, Sec. 2.06, takes two pages to delineate when a person is liable for the conduct of another, or for complicity.

Allowing conviction of an accomplice even though the person directly responsible has been acquitted goes further than some states have gone; those states dispense only with requiring the principal's previous conviction. The proposal will allow inconsistent verdicts. This is certainly undesirable; the only answer perhaps is that found in the comment to the Model Penal Code, that such inconsistencies "are intrinsic to the jury system and appear to be a lesser evil than granting immunity to the accomplice because justice has miscarried in the charge against the person who committed the crime."14

G. Time Limitation: Another area in which general rules would replace specific ones is that of statutory limitations. Sec. 1-11 would substitute a list of time limitations arranged by the degrees of felony and misdemeanor instead of the present specific provisions by crimes. (Sec. 41-9-1.) No radical changes in present limitations, however, would actually be effected.

H. Insanity: The committee devoted some time to considering the proper "test" of mental irresponsibility for crime, but the draft as it stands at the time of this writing omits any provision on the subject. This is perhaps just as well. Historically, defining the degree of mental illness that will suffice to relieve a defendant of criminal responsibility has been the task of the courts. The tests so formulated have been the subject of vast and unceasing controversy,15 but whether legislative efforts could give us anything more satisfactory is dubious. This is especially true in New Mexico. Unless the committee and the legislature are willing to join the District of Columbia in adopting the so-called Durham rule (that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect,")16 there is nothing to be gained by any legislative definition. Our present judicially-created test, adopted by the

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This writer has, repeatedly and at length, expressed his preference for the Durham rule. The Urge to Punish (1956); In Favor of the Durham Rule, in Nice, Crime and Insanity, ch. IX (1958); The Flowering of New Hampshire, in Symposium, "Insanity and the Criminal Law—A Critique of Durham v. United States," 22 U. Chi. L. Rev. 317, 356 (1955). It has been strongly urged in cases before the courts of at least eight other states and two federal circuits other than the District of Columbia, but without success. Howard v. United States, 232 F.2d 274 (5th Cir. 1956); Sauer v. United States, 241 F.2d
New Mexico Supreme Court in 1954 in the Allen White case,¹⁷ is probably the best formulation of the more traditional tests to be found in any state:

The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind . . . (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it.

1. Liability of Corporations: Sec. 3-11 simply provides that a private corporation may not be convicted of a crime unless the conduct was performed by an agent acting within the scope of his employment, or the crime consisted of an omission to do something which the corporation is required to do by law. This is a very simple provision—too simple to give specific answers to the various problems involved. The extent to which criminal sanctions should be imposed on corporations raises difficult issues, which have never been adequately analyzed, of the objectives to be attained. We must recognize, for example, that imposing such sanctions results in a kind of vicarious liability: the burden of a fine imposed on the corporation for the act of its agent falls on (usually) innocent stockholders. Or it may be passed on to even more clearly innocent customers. A fine paid by a public utility is very likely to be passed on to consumers. The operations of individuals who hide behind the corporate veil need reexamination in the light of data supplied by studies such as Sutherland's White Collar Crime.¹⁸ Non-punitive controls as an alternative to criminal sanctions also deserve more thought than they have been given. The specificity with which a code would have to speak, if it were to try to meet these and other problems is illustrated by the Model Penal Code, with its three pages of proposed legislation (Sec. 2.07) and almost ten pages of comment. In the earlier, careful, work of the committee, these problems were marked for study. The possibility of making enlarged use of injunctive remedies and quo warranto proceedings was also contemplated. The section as drawn, however, obviously abandons all these concerns.


¹⁸. (1949).
III. Specific Crimes

The comments just made concerning the proposed code's general provisions are not comprehensive. They are limited to the most significant or most controversial sections. Similarly, the following comments will not undertake to deal with each of the crimes covered by the code, nor will they follow the order in which the code treats them. Attention will merely be called to some of the more important provisions.

A. Homicide: All homicides are divided into four degrees:

Capital ("deliberately and with premeditation intended to cause the death of the person killed or another");

First degree ("with intention to cause the death... or without intention to kill while the actor is committing or attempting to commit a felony");

Second degree ("if his conduct is knowingly performed");

Third degree ("if his conduct is negligently performed, or without negligence while he is committing a misdemeanor").

At one time, the committee had approved a formulation under which a homicide would be capital only if "the actor deliberately intended to cause the death of the person killed or another," and would be a felony of the first, second or third degree depending upon the culpability with which the crime was committed, as defined in (now) Secs. 3-3 through 3-5—that is, depending on whether it was done with (1) intent, (2) knowledge or (3) negligence.

The present wording changes this orderly and rational classification in two important respects: it adds the concept generally called "felony-murder" to first degree, and "misdemeanor-manslaughter" to third degree homicide. The committee thereby preserves two of the most widely criticized common law concepts of the criminal law.

B. The "Felony-Murder" Rule: The provision that a killing is first degree felony if done "without intention to kill while the actor is committing or attempting to commit a felony" represents the "felony-murder" rule in its most extreme form. In many states, the formula is more liberal. In some, for example, it is limited to cases in which the defendant knew or should have known that the act committed in the course of the felony was likely to cause death or serious bodily injury. Judge James Fitzjames Stephen so restricted the English common law rule as long ago as 1887.19 A middle-ground formula would limit the rule to killings in the course of "dangerous" felonies—either applying a "reasonable man" test of dangerousness or specifically naming certain dangerous offenses in the statute. The oldest felony-murder statute, that of Pennsylvania,20 follows the latter device, and so do the statutes of 31 other states.21

21. Various felony-murder statutes are summarized in Arent and McDonald, the Felony-Murder Doctrine and its Application under the New York Statutes, 20 Cornell L.Q. 288, 294-96 (1935).
The only justification for any felony-murder rule is the purpose of deterring or incapacitating a dangerous type of criminal—one who undertakes a violent felony. But as already said, the New Mexico formulation is not limited to "violent" or "dangerous" felonies. Where so limited, it is dubious whether the rule accomplishes its purpose. Such felonies carry the threat of serious penalties in themselves. If that threat does not deter a person, will he be deterred by the threat of a murder prosecution if death happens to occur, when he does not intend or expect that any death should occur? Furthermore, will juries convict if the killing was accidental? Nullification of the written rules is itself an evil, which we should try to avoid, for it increases disrespect for all law. "The general murder provisions would seem to be adequate to impose the more severe penalties on those persons who should be convicted of murder." \(^\text{22}\)

The whole trend of criminal law has been to make refinements distinguishing different kinds of homicide. Yet, here is a crude rule-of-thumb, attaching severe sanctions—those otherwise imposed only for intentional killings—where there was no intent to kill, merely because death occurred, perhaps in the commission of a felony which in itself was not dangerous to life.

Where courts have any discretion in the matter, they have refused to apply the rule to such extreme cases. In a famous case, the Kentucky court offered a striking illustration. "Under our statute," it said, "the removal of a cornerstone is punishable by a short term in the penitentiary, and is therefore a felony. If, in attempting this offense, death were to result to one conspirator by his fellow accidentally dropping the stone upon him, no Christian court would hesitate" to say that the homicide would be manslaughter rather than murder. \(^\text{23}\)

In a leading Michigan case, the defendant had sold liquor under circumstances which made it a felony, to a purchaser who became drunk and died from exposure. The court refused to hold that such a merely accidental death constituted murder. \(^\text{24}\)

Under the New Mexico wording, which the code would perpetuate, the court would have no choice; no matter what the felony, a death caused by its commission, or attempted commission, is deemed the same as an intentional killing.

If it is considered necessary to retain the felony-murder concept at all, it should at least be limited by adding words to the following effect: "unless such other felony was not dangerous of itself and the method of its perpetration or attempt did not appear to create any appreciable human risk." \(^\text{25}\)

C. "Misdemeanor-Manslaughter": Much the same objection can be lodged against the provisions of sub-section D of section 6-1, that a killing is third-degree felony if the conduct is "without negligence while he is committing a


\(^{23}\) Powers v. Comm., 110 Ky. 386, 61 S.W. 735, 742 (1901).

\(^{24}\) People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924).

\(^{25}\) This wording is adapted from the recommendation of Prof. Rollin Perkins, Criminal Law 36 (1957).
misdemeanor." This is a restatement of what is known as the "misdemeanor-manslaughter rule," that a killing in the commission of an unlawful act not amounting to felony constitutes manslaughter. This was a common-law concept, and it is found in the statutes of many states, including New Mexico,26 but it has been criticized on similar grounds as has the felony-murder rule. Misdemeanors are of various kinds. Some entail no foreseeable danger that anyone is likely to be killed thereby. Here again, courts have had to wrestle with cases where strict application of the rule would be harsh. Suppose a defendant, while hunting, accidentally shoots and kills another. The circumstances are such that he would not normally be held responsible for the killing. But he was hunting on the land of another without first obtaining written permission from the owner, which in that state is declared to be a misdemeanor. Is he to be held guilty of homicide?27 Or suppose a person driving his automobile with all due care skids when his car passes over some ice and causes a death. Nothing in the circumstance of the accident would normally lead to criminal liability—but it happens that the defendant's driver's license had, without his knowledge, expired three days before, and driving without a valid driver's license is a misdemeanor.28 Or consider another actual case: while defendant, a policeman, was handling his revolver, it accidentally discharged, killing someone. At the time, the policeman was committing the misdemeanor of failing to arrest persons who were gambling in his presence. Does this make him guilty of homicide?29 Under the strict wording of section 6-1, the court would apparently have no discretion in any of these cases. All would have to be held guilty, unless the court could find some ingenious escape, such as reading a requirement of "proximate cause" into the statute. But if there is one thing we should be justified in asking of a new codification, it is that it state the law in a way that courts can in good conscience enforce it as written, and not feel impelled to evade it.

D. Killing "Knowingly": Sec. 6-1C uses peculiar wording: it makes an unlawful killing "a second degree felony if his conduct is knowingly performed." The "conduct" here is not limited to a felony or even to a misdemeanor. It seems unlikely that the committee meant to impose absolute liability for any killing that results, no matter how unlikely or accidentally, from any conduct knowingly undertaken. But what it does mean is unclear. The clause seems to be an ill-considered substitute for a carefully-drawn provision that the committee at one time had considered, which would have made a criminal homicide a felony of the first, second, or third degree "dependent upon the degree of culpability with which the crime is committed according to Sec. 3.9 (now 3-7) of the Criminal Code . . ." Sec. 3.9 (now 3-7) says:

29. People v. Mulcahy, 318 Ill. 332, 149 N.E. 266 (1925).
When the degree of a particular crime depends upon the degree of culpability with which it is committed, the following order shall be determinative of the degree of culpability: (A) intent, (B) knowledge and (C) negligence.

E. The "Unwritten Law": One further point on homicide perhaps deserves mention. Section 6.3 restates our present section 40-24-14, making the so-called "unwritten law" a complete defense for cuckoldered husbands who kill the other man caught in the act. In most states, such adultery is a mitigating circumstance merely, reducing the killing from murder to manslaughter. Whether it is to be a "complete defense" as the code proposes or be given mitigating effect only, the time would seem to have come when we should give wives equal protection. What reason is there to think that wives catching their spouses in flagrante delicto get less furious than husbands? And suppose the defendant kills not only the third party, but also, or instead, kills the guilty spouse? The common law rule made the killing of either one in heat of passion merely manslaughter. This too might be called equality of a sort.

F. Statutory Rape: This crime is defined to consist of intercourse with a female under the age of 16 (Sec. 13-3). The offense is made a third degree felony, except that if the defendant is 20 years of age or older it is a second degree felony. This would reduce the penalty from that provided by existing law, which makes statutory rape subject to the same penalty as forcible rape—one to 99 years (Sec. 40-39-1). It goes less far, however, than the committee at one time contemplated; an earlier draft of the code would have made the offense a misdemeanor, or, when committed by one 20 years of age or older, a third degree felony. When the age of consent was ten, as at common law, a legal presumption that the girl could not give intelligent consent because she could not understand the nature of the act made some sense. When the age is raised to 16 (or, as in some states, 18 or even 21) the presumption becomes ludicrous. And it leads to some harsh results. Ploscowe cites a case "in which the defendant was convicted of rape as a result of sexual intercourse with a girl by the name of Liddie. The latter, though not quite sixteen years of age, was married, but was being prostituted by her husband. The defendant was one of several men who had visited and had sexual intercourse with her. Neither Liddie's marriage nor her lack of chastity, nor the fact that the sexual intercourse grew out of a prostitutional situation sufficed to save the defendant from a long prison sentence." Giving effect to the youth of the male is frequent in statutes of other states. The essence of statutory rape, after all, is taking advantage of the youth of the girl. It seems proper to recognize that the act when done by an adolescent male may be equally the result of immaturity rather than exploitation of the imm-


turity of the girl. The best, or at least the easiest, way to give effect to this factor is to require a substantial age differential between the parties. The code uses this device for assessing the seriousness of the offense; unless the actor is 20 years old or more, the offense is only a misdemeanor. Even this might be considered unfair, when applied against a boy just over 16 who engaged in mutual sexual acts with a girl perhaps only a few months younger. It might be very unfair in cases where the girl was unchaste and perhaps even a prostitute, and was herself more active solicitor than victim. The code, unlike the law of some states and the recommendation of the Model Penal Code (Sec. 207.4) takes no account of the previous unchastity of the girl.

A justifiable belief that the girl was 16 years of age or older is made a defense. This liberalizes the present rule in most states, including New Mexico, that such mistake does not excuse or even mitigate the offense. The existing rule has been severely criticized. Pursuit of females who reasonably appear to be over 16 betokens no abnormality and may be engaged in by men who are not essentially "criminals." Such men may be acting contrary to religious or social standards, but these standards are too widely disregarded to be effectively enforced by criminal sanctions.

G. Sodomy and Related Offenses: The proposed code would adopt the present-day view of most experts that deviate sexual behavior should be punishable as a crime only if committed by force or by adult corruption of minors, or so openly as to constitute a public nuisance. The New Mexico proposal (Sec. 13-7) would add also the situation where the accused is an inmate of a penal or delinquency institution. This last is presumably a recognition of the fact that homosexual practices flourish in such institutions—which, of course, is only what we should expect when we herd large numbers together, without access to the other sex. Whether we would improve matters by imposing criminal penalties, which could operate only to prolong the situation that led to the practice, seems dubious.

Homosexual practices, committed by consent, between adults, in private, are almost impossible for the criminal law effectively to police. Statutes purporting to prohibit such conduct are therefore largely unenforced, or are enforced in a capricious and discriminatory way. What is worse, they serve mainly to help

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32. For an illustrative case, see Reid v. State, 290 P.2d 775 (Okla. Crim. 1955). The prosecutrix was a "car hop" at a dairy bar. She was only a little over 14 years of age, but both she and her mother had given her age as 17 when she got the job and her girl associates testified that she could have passed for 21. On the job, she wore slacks that fit "like she had been poured in," and a blouse with the top button unbuttoned and the second missing. She declined another girl's offer of a pin, saying she might want someone "to see something." She was proud of her body, thought she could make Marilyn Monroe look sick, and was ambitious to be a strip-tease dancer. A favorite gambit when boys telephoned her was to say that she had just got out of bed, was "standing in the raw," or wearing only bra and panties, or detailing the procedure of dressing as she talked. This sort of conversation occurred both of the first two times defendant telephoned her. The first time defendant met her, at the dairy bar, he reached over and buttoned her blouse, but she unbuttoned it and cursed him. The cursing was apparently mere pleasantry, however, because she also followed him and his companions around and gave him
blackmailing operations. The possibility of criminal prosecution probably also deters some persons from seeking psychiatric or other help. Certainly putting homosexuals into penal institutions, where the practice is more prevalent than anywhere else, is no answer.

H. Attempts and Assaults: New Mexico has a large number of statutes covering crimes of attempt and assault. Most of these would be assimilated under three sections of the proposed code (Secs. 5-1, 5-2, and 5-3) classifying attempts for purposes of sentencing into common and aggravated, and two sections (7-1 and 7-2) defining assault and aggravated assault. No “assaults with intent to” are found in the code. These would all be “aggravated assault,” which is defined merely as (A) an attempt to commit an aggravated battery, or (B) an unlawful intentional act which causes in another justifiable belief that he is threatened with immediate infliction of great bodily harm. This would replace a long list of existing crimes: Assault with intent to commit burglary, robbery, rape, murder, mayhem, or “any felony,” to maim, disfigure or injure in any of a number of ways (cut or maim the tongue, put out or destroy an eye, cut or tear off an ear, etc.), assault with a deadly weapon, assault with intent to kill, to rob while armed, or while unarmed, assault upon one’s wife, attempt to commit murder or sodomy, poisoning with intent to kill or injure, and others.\(^3\)

A tremendous amount of scholarly learning has gone into the effort to formulate a rational and workable definition of attempt.\(^3\) In my own effort to state the law years ago, I concluded that just where along the path toward the completed offense we can say an attempt has occurred “is capable of no satisfactory statement. Various efforts to express the idea have been offered, but beautiful
abstractions though they are, the actual decisions vary with combinations of several factors which are involved."³⁸

In all the formulations that have been offered, two principal tests are discernible: (1) did the actor come dangerously close to accomplishing his criminal purpose; and (2) did the act unequivocally manifest his criminal purpose? The late Dean Gausewitz of the University of New Mexico School of Law suggested a modification:

If the purpose [of the criminal law] be wholly incapacitative and reformative, the test [for determining when an act has gone far enough to become an attempt] might be something as follows: Any person who shall do an act for the purpose of bringing about a consequence or conditions prohibited under a criminal penalty shall, if the act was done under circumstances which evidence beyond a reasonable doubt that such person was willing to, desirous of, and of a character capable of perpetrating that particular crime, be convicted of an attempt to commit it and sentenced as for the crime itself . . . . It is to be contrasted with Justice Holmes’ solution of the problem by the test of dangerousness and of the proximity to success, which has been usually approved, although it looks more to the act than to the personality of the actor. The importance attached to the actual invasion of a social interest can only be justified on a theory of retribution: the person has not committed the crime he attempted, therefore he is not a criminal and does not deserve full punishment, although the attempt may show him to be the most vicious of persons.³⁹

The proposed code clearly puts its emphasis on the criterion of manifesting criminal purpose. The act need not come dangerously close; it need only be a step toward the commission of the ultimate crime, but it must be one that unequivocally shows its purpose. This is somewhat similar to the wording adopted in the 1955 Wisconsin Code.⁴⁰

Assault by a prisoner is the only specific kind of assault that is made the subject of a separate section (Sec. 26-13). It is made a second degree felony. This severity is perhaps justified for some of the acts included in the definition of this crime, such as “placing an officer or employee of any penal institution or a visitor therein in apprehension of an immediate battery likely to cause death or create bodily harm,” or holding persons as hostage. But the section also covers causing or attempting to cause “threat, bodily harm to an officer or an employee” or a visitor. One can foresee prisoners being charged with this crime merely because they engaged in verbal arguments.

I. Theft: The code combines the most common property offenses into one crime denominated “theft.” Sec. 20-1 provides:

⁴⁰. Wis. Stat. § 939.32 (1958). Other states have also in recent years undertaken to define attempts. La. Crim. Code art. 27 (1942); Miss. Code Ann. § 2017 (1942).
Theft is the misappropriation or taking of anything of value which belongs to another, either
A. Without the consent of the other to the misappropriation or taking; or
B. By means of fraudulent conduct, practices or representations.

This seems to be broad enough to include the traditionally distinct crimes of larceny, larceny by trick, embezzlement, obtaining by false pretenses, fraudulent conversion, larceny by bailee, cheating, and perhaps extortion and blackmail. The reasons for the distinctions are largely historical, and they operate mainly to create pointless procedural obstacles to the conviction of thieves, swindlers and confidence men.

Whether the scope of the consolidated offense can be defined in a single comprehensive section such as the proposed section 20-1, however, is an open question. That it can is apparently the opinion not only of the New Mexico Criminal Law Study Committee, but also of the draftsmen of the Louisiana general theft statute, from which the New Mexico proposed section is taken. On the other hand, the draftsmen of the Model Penal Code considered it necessary to have a rather large number of separate sections (Secs. 206.1 to 206.13) to make specific provision for the differences between physical takings and transfer of legal ownership or legal rights by deception or intimidation, distinctions between taking of movables and of immovables, theft of lost or mislaid property, and of funds received by failing to make required disposition, theft by spouse or servant, theft by receiving, or by selling or pledging and other situations.

The only kinds of theft specially defined in the proposed New Mexico code are theft of livestock and theft of poultry (Secs. 20-2 and 20-3). Why these need specific mention is unclear, since they would certainly be covered by the general section, dealing with the misappropriation or taking of "anything of value." There would seem to be more need to spell out some other kinds of takings mentioned above. Theft of services, for example, might be held not to be included in the general provision, on the reasoning that services do not constitute any "thing."

Although the consolidation of crimes against property has general approval, it has been suggested that embezzlement creates some special social problems. Apparently only "a very small percentage of known embezzlers are prosecuted despite the fact that embezzlement is one of the most common and costliest of all crimes." More frequently than with any other comparable offense, prosecution terminates in the grant of probation or suspended sentence. This may suggest that the currently popular view that embezzlement should be combined with larceny into one offense and other related crimes needs reexamination. The

widespread practice of business men and surety companies to enter into "deals" not to prosecute also needs reexamination.

Theft, under the proposed section 20-1, would be committed only if there is an intent to deprive "permanently." Temporary takings are covered by Sec. 20-10, which says:

Unauthorized use of movables is the intentional taking or use of any movable which belongs to another either

A. Without the other's consent; or
B. By means of fraudulent conduct, practices or representations, but without any intention to deprive the other of the movable permanently.

This wording seems broader than intended. Under it, any college youth who wears his roommate's clothes without permission is a criminal. The wording should be limited, so as to cover only (1) taking of valuable articles such as motor vehicles, (2) taking for such a long period as materially to impair the owner's rights, or (3) abandoning the property in such a way as to manifest a lack of concern whether the owner will ever recover it. Compare the Model Penal Code, Sec. 206.6.

Here again, undue harshness will only lead to evasion. In states that have no "joy-ride" statutes, and where youths who take automobiles for temporary use must be prosecuted for larceny, judges and prosecutors get into the practice of allowing wholesale waiver of the felony, and accepting pleas of guilty to a petty larceny charge, such as stealing a tire.

J. Abortion: Section 9-3 broadens permissive abortion to cases in which two physicians "deem it necessary to preserve the life of the woman or to prevent probable injury to her health." The present law, Sec. 40-3-2, legalizes abortion only when necessary to preserve life "or to prevent serious or permanent bodily injury." Beside danger to health, most medical men would agree that abortion statutes should be liberalized by adding two other grounds: (1) hereditary danger from those rare conditions in which there exists the probability of producing seriously abnormal progeny; and (2) social grounds—impregnation as a result of rape or incest, illegitimate impregnation of a psychotic or intellectually defectiv woman, and impregnation of a girl less than 16 years of age.

An example of the hereditary danger situation is illustrated in a case pending in the United States Supreme Court at the time this is written. The woman in that case, said counsel's brief:

... has had three consecutive pregnancies, each of which has terminated in the delivery of an infant with multiple congenital abnormalities inconsistent with life. The first infant was delivered in January, 1954 with congenital heart disease and kidney abnormality. It died on the 9th day of life. The second child was born in April, 1955, and was a Mongoloid with associated renal and cardiac lesions. It expired
within six days. The third child was born in October, 1957, with evidence of cerebral and gastro-intestinal maldevelopment. It perished within ten weeks. It is the opinion of appellant Buxton (her doctor) that even if these children had survived it is highly unlikely that any of them would have had a normal life. The cause of these abnormalities is thought by their physician and other specialists to be genetic but they have been unable to make a successful prognosis and treatment.\(^4\)

The rape-incest situation is illustrated in a case related in a book written by the writer and a psychiatrist:

A large-eyed, sad-faced, spindly-legged girl of twelve and a half had been impregnated by her father. That poor youngster was frantically sent from clinic to clinic—we were hoping to find some excuse for interrupting the pregnancy. The late John Whitridge Williams, the leader of American obstetrics and the chief of the department at the Johns Hopkins Hospital, expressed his readiness to do the abortion on social grounds if a court would request it. But that turned out to be a hopeless gesture. The expression in those eyes, when that child was told that she could get no help, is still a haunting memory.\(^5\)

K. Conspiracy: New Mexico, fortunately, has never accepted the common law definition of conspiracy, which includes any combination to do either an unlawful act or a lawful act by unlawful means. What agreements fall within the purview of the offense under this definition is unclear. The procedural peculiarities of conspiracy prosecutions create enough obstacles to fair treatment of individual defendants, without adding ambiguity in the very definition of the offense.\(^6\) It is well that the code (Sec. 5-4) would retain the present restriction, under which a conspiracy to be criminal must be for “the purpose of committing a felony within or without the state.”

In other respects, however, the proposed definition of conspiracy is very loose (“knowingly combining with another” for the purpose of committing a felony). The felony which the parties combine to commit may be a third-degree felony; but the combining to commit it is declared a second-degree felony, carrying a


\(^{5}\) Guttmacher and Weihofen, Psychiatry and the Law 204 (1954). A famous case is Rex v. Bourne [1939] 1 K.B. 687. Dr. Bourne, a leading obstetric surgeon, defied the strict English law on the subject to abort a 14-year-old girl who had been shockingly raped by a number of soldiers. He did so publicly and invited the Attorney General to take action. Mr. Justice Macnaughten, in a charge to the jury that has been much admired, read into the abortion statute an exception found in the child destruction statute (that no one should be found guilty unless it was proved that the act was not done in good faith for the purpose of preserving the life of the mother), and then interpreted “preserving the life of the mother” to include preserving her longevity. The jury returned a verdict of “not guilty.”

\(^{6}\) Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624 (1941); Arens,
maximum penalty of 10 years in prison and $10,000 fine. This is not only irrational and harsh, but is inconsistent with the code's general provisions on attempted crime (Sec. 5-1). The inconsistency is another product of the committee's recent impatience; the general attempt provision was adopted early, while the conspiracy section is part of the hasty job of last summer.

L. Defamation: Sec. 15-1 combines libel and slander into one crime, "defamation." It then proceeds, however, to revive the old distinction to some extent by providing that "no person shall be convicted on the basis of an oral communication except on the testimony of two other persons. . . ." Radio and television create doubts about what "oral" includes and the proposed code gives us no definition. Strictly, communication by these facilities is "oral," but the potential harm is enormously greater than by ordinary oral statement.

Even more unclear is section 15-2, which defines when a communication is privileged. It not only lays down the general rule that matter is privileged if it "was true and was communicated with good motives and for justifiable ends," but then undertakes to spell out at least seven other specific circumstances. Some of these are not well phrased. Thus Sec. 15-2C makes privileged "a true statement of fact as to the qualifications of any person for any occupation, profession or trade." But a person's qualifications are not usually a matter of "fact"; they are a matter of opinion. A court applying the rule expressio unius est exclusio alterius might interpret this provision to leave unprotected an honest statement about qualifications, as in a letter of recommendation, even though made in good faith and without malice. Similarly, para. H of this section would make the following privileged if true: investigations of the official conduct of public officials; or that (the grammatical false parallelism is in the bill) a person is of a notorious bad or infamous character; or a charge (sic) that an official or candidate for office has been guilty of some malfeasance in office "rendering him unworthy of the office." Since these again all constitute value judgments, how is anyone to determine whether they are "true" or not? One sub-paragraph of the section is so ungrammatical as to be incomprehensible.47

M. Extra-Code Crimes: The code would of course not include all the state's criminal law. In sheer quantity, the greater number of offenses remain outside the code. These include the criminal sanctions of regulatory statutes, such as

47. Section 15-2(F): "The matter communicated concerned an administrative, legislative or judicial proceeding, whether the matter communicated be in fact true, unless the matter communicated was a charge of corruption against some person acting in an administrative, legislative or judicial capacity."
those licensing and otherwise regulating trades, businesses and professions, those
regulating commercial practices, blue-sky laws, fish and game laws, traffic regu-
lations and various others.

Postscript

This article was written while the proposal was before the legislature. That
body did not enact it. Instead, it continued the Criminal Law Study Committee
for another two years, with a new appropriation of $20,000. This is in effect
a mandate to the committee to consider the criticisms that were voiced in the
hearings before the Senate and House judiciary committees, and to devote more
time to improvement.

This paper has not attempted a methodical, section-by-section summary of
the current draft. It has focused attention on those provisions that seemed to
the writer most significant and most controversial. The net impression given
may therefore be more adverse than is fair or is intended. But these criticisms
seem substantial. Others, raised by representatives of the organized bar, also call
for consideration by the committee.

Submitting the code for legislative approval in 1961 served a useful purpose
if it has stirred official and public interest in the project. It is to be hoped that
during the next two years the committee will continue its labors, with the help
of a staff assistant experienced in code drafting and with the help of suggestions
and criticisms from the bar. It is also to be hoped that the committee will resume
the policy of working for a comprehensive and consistent code built on adequate
research techniques and supported by comments explaining the extent to which
each proposed section departs from existing law, the source of new provisions
if taken from the law of some other state or from the Model Penal Code, and
the objectives that the committee expects the change to accomplish. This is the
sort of product that the committee worked toward for three years, and is the
sort of product to which the state is entitled.