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A PROPOSED CRIMINAL CODE FOR OKLAHOMA

Ronald N. Ricketts*

After a five year study, the Criminal Jurisprudence Committee of the Oklahoma Senate has issued a proposed Criminal Code¹ which is to be considered by the Thirty-fifth Legislature in its second regular session. Regardless of whether this proposed Code is eventually adopted, consideration of it will inevitably result in a reexamination of the present Oklahoma Penal Code² which will be a collateral benefit of no small public significance since in a little over a decade from now most of its provisions will have been law for a century.³

As consideration of this proposed Code is undertaken by the legislature, it might be well to recall the following comments of the late Professor William R. Bandy concerning the present Code: "In summary, our present [criminal] laws are basically good, but there are many improvements that can be made. We cannot be satisfied with only 'basically good' laws, but we must work constantly for better laws."⁴

The singular purpose of this article is to offer a comparison of the provisions of the proposed and present Codes, using the proposed Code as a format.

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1. Criminal Jurisprudence Committee substitute for Senate Bill No. 46 [hereinafter referred to in the text as the proposed Code and cited in P.C.].

2. The present Penal Code of the state of Oklahoma is codified in title 21 of the Oklahoma Statutes [hereinafter referred to in the text as the present Code].

3. The present Code was borrowed from the 1887 compiled laws of the Dakotas.

4. Bandy, *Oklahoma Criminal Law and Procedure*, 10 OKLA. L. REV. 400, 405 (1957).

ARTICLE I—GENERAL PROVISIONS
CHAPTER ONE: APPLICABILITY

Restrictions on Applicability

The proposed Code begins,⁵ as does the present Code,⁶ by abolishing common law crimes in this state and providing that no act or omission shall be a crime unless made so by statute. Likewise, neither the present⁷ nor the proposed Code⁸ operates to affect or bar any civil remedy authorized by law.

The initial change effected by the proposed Code deals with the contempt power. Presently, contempt of court in Oklahoma is regulated by a series of statutes⁹ and a single constitutional provision.¹⁰ These statutes, though more restrictive than the definitions and procedure found at common law,¹¹ have been held to govern the contempt power in this state¹² despite the fact that contempt is recognized as an inherent power of the courts.¹³ By repealing the existing statutes and offering no substitute,¹⁴ the effect of the proposed Code would be to introduce to Oklahoma the broader definition and less restrictive regulation of contempt found at common law.¹⁵

Territorial Applicability

Section 151 establishes the jurisdiction of the present Code.¹⁶ It

5. P.C. § 1-102(A).

6. OKLA. STAT. tit. 21, § 2 (1971). The common law may, nevertheless, still be used to define statutory crimes. See OKLA. STAT. tit. 22, § 9 (1971); *Traxler v. State*, 96 Okla. Crim. 231, 251 P.2d 815 (1952).

7. OKLA. STAT. tit. 21, § 131 (1971).

8. P.C. § 1-102(D).

9. OKLA. STAT. tit. 21, §§ 565-68 (1971).

10. OKLA. CONST. art. 2, § 25.

11. *Hosmer v. State*, 24 Okla. Crim. 312, 322, 218 P. 164, 167 (1923).

12. *Best v. Evans*, 297 P.2d 379 (Okla. 1956); *Brown v. State*, 89 Okla. Crim. 443, 209 P.2d 715 (1949).

13. *State v. Owens*, 125 Okla. 66, 256 P. 704 (1927); *Champion v. State*, 456 P.2d 571 (Okla. Crim. App. 1969).

14. P.C. § 7-3203 repeals all sections of the present Code and sections 13 and 56 of title 57.

15. Most notable of the resulting changes in the contempt power would be the expansion of the indirect contempt power to acts considered indirect contempts at common law and the elimination of the present guarantee of a jury trial for an indirect contempt charge. The jury trial guarantee of article II, section 25 of the Oklahoma constitution with respect to a charge of indirect contempt arising from violation of a restraining order or injunction would, however, remain unchanged.

Likewise, the guarantee of a jury trial in any criminal contempt case where the sentence exceeded six months as required by *Bloom v. Illinois*, 391 U.S. 194 (1968) would remain unaffected.

16. It should be noted that the rules governing venue of criminal actions found at OKLA. STAT. tit. 22, §§ 121 *et seq.* would remain unchanged by the proposed Code.

enlarges the common law rule¹⁷ to vest jurisdiction in this state when any part of a crime occurs within its boundaries.¹⁸ The proposed Code achieves the same result,¹⁹ with the exception that jurisdiction would not vest where

causing a particular result is an element of an offense and the result is caused by conduct occurring outside the state that would not constitute an offense if the result had occurred there, unless the actor intentionally or knowingly caused the result within the state.²⁰

The proposed Code provides for a rebuttable presumption that the injury or impact causing death in a homicide case occurred where the body is found.²¹ This does not exist under the present law. Additionally, under the present Code both jurisdiction and venue in a homicide prosecution vests where the injury causing death occurred regardless where the victim died.²² The proposed Code, however, provides for jurisdiction either where the impact causing death occurred or where the victim died.²³ The balance of the proposed Code's provisions concerning jurisdiction are basically compatible with the present Code.

Definitions of Mental States

Intentionally,²⁴ knowingly,²⁵ wantonly²⁶ and recklessly²⁷ are the culpable mental states defined by the proposed Code.²⁸ The concurrence

17. Under the common law rule when a crime is defined in terms of acts or omissions exclusive jurisdiction rested where the act or omission occurred; and when a crime is defined in terms of a result, exclusive jurisdiction rested where the result occurred. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 118 (1972).

18. OKLA. STAT. tit. 21, § 151(1) (1971).

19. P.C. § 1-103(A)(1).

20. P.C. § 1-103(B). This section can be illustrated by the following hypothetical murder committed prior to 1973. Our hypothetical situation would find the defendant located in New Mexico just a few yards west of the boundary between New Mexico and Oklahoma. Upon observing his wife and a man engaged in an act of sexual intercourse on the Oklahoma side of the line he shoots and kills the man. Since New Mexico had, before its repeal in 1973, a statute (N.M. STAT. ANN. § 40A-2-4 (1953)) justifying a homicide occurring in New Mexico under such circumstances, this section of the proposed Code would vest jurisdiction of the homicide in Oklahoma since the defendant intentionally caused the result in Oklahoma. The result would be otherwise, however, if the defendant was ignorant or mistaken as to the state line and did not know the result (homicide) was caused in Oklahoma.

21. P.C. § 1-103(D).

22. OKLA. STAT. tit. 22, § 134 (1971).

23. P.C. § 1-103(C).

24. P.C. § 1-107(1).

25. P.C. § 1-107(2).

26. P.C. § 1-107(3).

27. P.C. § 1-107(4).

28. The present Code defines five culpable mental states: wilfully, OKLA. STAT. tit.

of a culpable mental state (*mens rea*) and a guilty act or omission (*actus rea*) is required as a predicate to criminal liability under the proposed Code²⁹ as well as the present case law.³⁰ However, both recognize the authority of the legislature to promulgate absolute liability crimes; i.e., crimes requiring no *mens rea*.³¹

The proposed Code adopts a doctrine sometimes referred to in the criminal law as "transferred intent."³² Under the proposed Code when a defendant is shown to have the culpable intent required for a particular criminal result and by his action either (1) a different person or property is injured or affected, or (2) a less serious injury or harm than intended occurs, then in either of such events the culpable intent may be transferred so as to concur with the actual result.³³ No similar provision of general application exists under the present Code though the present first- and second-degree murder statutes provide for transferred intent through the specific language found therein.³⁴

Ignorance or Mistake

The present Code excludes from criminal responsibility those persons who commit an act or omission "under an ignorance or mistake of fact which disproves any criminal intent."³⁵ The proposed Code provides for the same result,³⁶ and further provides for exclusion from responsibility when "ignorance or mistake [of fact] is of a kind that supports a defense of justification in this Penal Code."³⁷

Under the present Code ignorance of the law provides no excuse from criminal liability.³⁸ Likewise, as a general rule, the proposed

21, § 92 (1971); negligent, *id.* § 93; corruptly, *id.* § 94; malice, *id.* § 95; and knowingly, *id.* § 96. The Court of Criminal Appeals, in *Miller v. State*, 9 Okla. Crim. 55, 130 P. 813 (1913), ruled that wilfully, as defined, is synonymous with intentionally.

29. P.C. § 1-108.

30. *Treese v. State*, 16 Okla. Crim. 682, 180 P. 190 (1919).

31. P.C. § 1-110. *Magnolia Pipe Line v. State*, 95 Okla. Crim. 193, 243 P.2d 369 (1952).

32. See W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 243-46 (1972) for a discussion of this doctrine.

33. P.C. § 1-111(B)(1). Similar provision is made under P.C. § 1-111(C)(1) for the transfer of wantonness and recklessness when such are required mental states.

34. OKLA. STAT. tit. 21, §§ 701.1 -2 (Supp. 1975). Both sections provide that the intent to kill will suffice if the defendant's purpose was to cause the death of "the person killed, or . . . any other person."

35. OKLA. STAT. tit. 21, § 152(5) (1971).

36. P.C. § 1-112(1).

37. P.C. § 1-112(3).

38. OKLA. STAT. tit. 21, § 152(5) (1971).

Code does not recognize ignorance or mistake of law as an excuse.³⁹ However, the proposed Code offers a change from the present Code by providing an exception to the general rule when "such mistaken belief is actually founded upon an official statement of the law, afterward determined to be invalid or erroneous"⁴⁰ This change would cause an opposite result than that reached under the present law by such cases as *Needham v. State*⁴¹ where the defendant was prohibited from presenting proof showing that he had consulted the county attorney and had been advised that his proposed conduct would not violate the law.⁴²

Intoxication

The present Code provides that voluntary intoxication is no defense or excuse for the commission of crime.⁴³ The proposed Code provides for the same, with two exceptions: (1) when the intoxication, even though voluntary, "negatives the existence of an element of the offense" or (2) when the intoxication is involuntary "and deprives the defendant of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."⁴⁴ Existing Oklahoma case law has established the first exception.⁴⁵ However, the second exception would lower the present standard which requires involuntary intoxication to render a defendant incapable of discerning between right and wrong before rising to the dignity of a defense.⁴⁶

Duress

The proposed⁴⁷ and present⁴⁸ Codes both provide for the defense

39. P.C. § 1-112(C).

40. P.C. § 1-112(C). To qualify for this exception the official statement of law must be contained in either:

1. A statute or other enactment;
2. A judicial decision, opinion or judgment;
3. An administrative order or grant of permission;
4. An official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

P.C. § 1-112(C).

41. 55 Okla. Crim. 430, 32 P.2d 92 (1934).

42. The position taken by the proposed Code has been recognized as "the better view." See W. LAFAVE & A SCOTT, *HANDBOOK ON CRIMINAL LAW* 356 (1972).

43. OKLA. STAT. tit. 21, § 153 (1971).

44. P.C. § 1-113.

45. *Copperfield v. State*, 37 Okla. Crim. 11, 255 P. 590 (1927).

46. *Choate v. State*, 19 Okla. Crim. 169, 197 P. 1060 (1921).

47. P.C. § 1-114.

48. OKLA. STAT. tit. 21, § 156 (1971).

of duress. The proposed Code, however, excepts from this defense intentional homicides and situations where "the defendant intentionally or wantonly placed himself in a situation in which it was probable that he would be subjected to coercion."⁴⁹ The present Code does not provide for either exception.⁵⁰

As an additional change, the proposed Code eliminates the defense of coverture,⁵¹ and the inference of subjection arising therefrom,⁵² now found in the present Code.

CHAPTER TWO: ACCOUNTABILITY OF PARTIES

Complicity

Oklahoma, by statute, abrogates the common law distinction between accessories before the fact and principals, and also between principals in the first degree and second degree,⁵³ and classifies parties to crime as either principals or accessories.⁵⁴

The proposed Code eliminates altogether the common law classification of parties to crime, and deals with what at common law would amount to an accessory after the fact in its section concerning interference with judicial administration.⁵⁵ The proposed Code approaches the subject of one person's criminal liability for a completed crime committed by another by segregating it into those instances in which the crime was committed by an innocent or irresponsible agent,⁵⁶ or by a guilty agent.⁵⁷

To be held criminally responsible for a crime committed by another, present law requires a showing that the person charged either procured the crime to be done, or aided, assisted, abetted, advised or encouraged its commission.⁵⁸ The proposed Code imposes liability not

49. P.C. § 1-114(B).

50. In the case of *Methvin v. State*, 60 Okla. Crim. 1, 60 P.2d 1062 (1936) the defendant attempted unsuccessfully to avail himself of the defense of duress in a murder prosecution. The Court of Criminal Appeals did not directly reject duress as a defense available to one charged with murder but the court did leave some doubt about its application when it said: "[I]n view of the undisputed facts and circumstances in the case the same does not show any foundation for the defense by reason of fear, even if it could have availed." *Id.* at 15, 60 P.2d at 1068.

51. OKLA. STAT. tit. 21, § 155 (1971).

52. *Id.* § 157.

53. *Id.* § 432.

54. *Id.* § 171.

55. P.C. § 5-1612.

56. P.C. § 1-201.

57. P.C. § 1-202.

58. *Anderson v. State*, 66 Okla. Crim. 291, 91 P.2d 794 (1939).

only in each of these instances, but also when one "attempts to aid [another] in planning or committing the offense" ⁵⁹

Two enigmatic subsections of the proposed Code impose criminal responsibility upon a person who with the requisite criminal culpability fails to make a proper effort to prevent the commission of a crime when he has the legal duty to do so. ⁶⁰ Judicial interpretation of this language would be critical. Arguably, this language could be interpreted as imposing vicarious criminal liability upon any person who, having the opportunity to do so, fails to make a proper attempt to prevent the commission of a felony. ⁶¹ On the other hand, it could be interpreted as imposing liability only where there is a breach of a specific statutory duty. ⁶² The former interpretation would result in liability on a theory similar to the common law crime of misprision of felony. ⁶³ In the event of the latter interpretation the liability imposed would increase the sanctions imposed by present statutes from misdemeanor to felony liability when the crime the defendant failed to prevent is a felony. ⁶⁴

Specifically excluded by the proposed Code as a defense to joint criminal liability is the fact that the party who actually perpetrated the crime was given immunity, has been acquitted, has been convicted of a different offense, or has never been prosecuted. ⁶⁵ Also excluded as a

59. P.C. § 1-202(A)(2); see P.C. § 1-202(B)(2).

60. P.C. §§ 1-202(A)(3), 1-202(B)(3). These sections of the proposed Code are patterned after section 2.06 of the MODEL PENAL CODE (1962).

61. See *Hulls v. Williams*, 167 Okla. 346, 29 P.2d 582 (1934), where the supreme court noted that the common law placed a duty on all persons to prevent felony crimes being attempted, and remarked that the defendant in the case before them had a "duty to arrest plaintiff because he apprehended plaintiff in the commission of the particular offense." *Id.* at 347, 29 P.2d at 583.

62. OKLA. STAT. tit. 19, § 516 (1971) places a duty upon sheriffs, under-sheriffs and deputies to keep and preserve the peace in their respective counties, which would include preventing the violation of any law enacted to preserve peace and good order. See *Miles v. State*, 30 Okla. Crim. 302, 236 P. 57 (1925). Violation of this duty would subject the officer to misdemeanor punishment under OKLA. STAT. tit. 21, § 580 (1971).

A citizen, not a peace officer, has the duty upon request to assist a peace officer and is subjected to criminal punishment for his failure to do so under the provisions of OKLA. STAT. tit. 22, §§ 93, 103 (1971).

In discussing this identical provision of section 2.06 of the MODEL PENAL CODE (1962), Professor LaFave suggests that liability would additionally be imposed for a failure to prevent a crime where, because of a particular relationship between the defendant and the party actually committing the crime, the defendant had a legal duty to act. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 504 (1972).

63. See *Hulls v. Williams*, 167 Okla. 346, 347, 29 P.2d 582, 583 (1934), where the Oklahoma Supreme Court recognized the common law definition of misprision of felony.

64. Under sections 1-202(A)(3) and 1-202(B)(3) of the proposed Code the defendant is made guilty of the offense he failed to prevent, which if a felony would then give rise to felony punishment.

65. P.C. § 1-203(1).

defense is the fact that the party committing the offense belongs to a class of persons incapable of committing the offense in his individual capacity.⁶⁶ These exclusions are compatible with the present law both as to the former⁶⁷ and latter⁶⁸ situations.

Two exceptions to joint criminal liability are recognized by the proposed Code. The first exists when the crime "is so defined that [the defendant's] conduct is inevitably incident to its commission."⁶⁹ The second arises when the defendant manifests a voluntary renunciation prior to the commission of the crime.⁷⁰ Neither the present Code nor case law presently address either of these exceptions.

Corporate Liability

The proposed Code imposes criminal liability upon a corporation under any of three circumstances. They are: (1) when there is a breach of a specific corporate duty required by law, or (2) the criminal conduct is "engaged in, authorized, commanded or wantonly tolerated by the board of directors or by a high managerial agent . . ."⁷¹ or (3) when the crime is committed by an agent acting within the scope of his employment, and the crime is a misdemeanor or one in which corporate criminal liability was intended.⁷² Although the present Code includes corporation within the definition of a person,⁷³ and the present statutes proscribe the procedure for pursuing criminal actions against corporations,⁷⁴ beyond this neither the present Code nor case law establish rules governing corporate criminal liability.

CHAPTER THREE: JUSTIFICATION

Choice of Evils

It is, under the proposed Code, a defense to criminal liability that a crime was committed as a result of a defendant having been forced by

66. P.C. § 1-203(2).

67. *Johnson v. State*, 453 P.2d 390 (Okla. Crim. App. 1969).

68. *Cody v. State*, 361 P.2d 307 (Okla. Crim. App. 1961); *Capshaw v. State*, 69 Okla. Crim. 440, 104 P.2d 282 (1948). These cases deal with the reverse situation from that described by the proposed Code. However the reasoning would be equally applicable.

69. P.C. § 1-204(1).

70. P.C. § 1-204(2).

71. P.C. § 1-205(A)(2).

72. P.C. § 1-205(A).

73. OKLA. STAT. tit. 21, § 105 (1971).

74. OKLA. STAT. tit. 22, §§ 1301 *et seq.* (1971).

circumstances beyond his control to choose between the lesser of two evils.⁷⁵ No similar provision exists in the present Code, nor does existing Oklahoma case law presently approve or reject this defense.

Execution of Public Duty

A public officer, or private citizen assisting him, may under the present Code use force or violence upon another without incurring criminal liability when such action is necessary in the performance of a legal duty.⁷⁶ A homicide committed by a public officer and any others assisting him is justified by the present Code when done "[i]n obedience to any judgment of a competent court"⁷⁷

The proposed Code has a similar provision,⁷⁸ and goes further to provide that this justification will be available to a public officer or one assisting him when the legal process he is operating under is defective, jurisdictionally or otherwise.⁷⁹

Other Justifications

In addition to those just mentioned, six other areas of justification are set out in the proposed Code. They are: (1) self-protection,⁸⁰ (2) protection of another,⁸¹ (3) protection of property,⁸² (4) law enforcement,⁸³ (5) prevention of suicide or crime,⁸⁴ and (6) the use of physical force by one responsible for care, discipline or safety of others.⁸⁵ When a fact situation gives rise to one or more areas of justification, a person is authorized by the proposed Code to use nondeadly physical force without incurring criminal liability. Section 643 of the present Code justifies the use of force or violence of a nondeadly nature under most of the same circumstances.⁸⁶

75. P.C. § 1-303. The underlying theory of this defense is that a violation of the law will be excused where by such a violation a person has prevented a greater harm from occurring than the harm guarded against by the penal statute. See W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 381 (1972).

76. OKLA. STAT. tit. 21, § 643(1) (1971).

77. *Id.* § 732(1).

78. P.C. § 1-304(A).

79. P.C. § 1-304(B).

80. P.C. § 1-305.

81. P.C. § 1-307.

82. P.C. § 1-308.

83. P.C. § 1-309.

84. P.C. § 1-310.

85. P.C. § 1-311.

86. Section 1-311(D)(a) of the proposed Code is compatible with OKLA. STAT. tit. 76, § 5(3) (1971), and section 1-311(B)(1) of the proposed Code is compatible with OKLA. STAT. tit. 57, § 11 (1971).

Variances do exist, however, between the proposed Code and the present Code regarding the use of deadly force, which is permitted in the first five of these six areas of justification. Generally speaking, the present Code allows more latitude in the use of deadly force in felony law enforcement and the prevention of felony crime, while the proposed Code allows more latitude in the use of deadly force in self-defense and the defense of others.

Protection of Another

The present Code justifies the use of deadly force by one person in order to protect another from death or great personal injury, or to prevent the commission of a felony against such person, when the person so threatened falls within a specified relationship.⁸⁷ While the proposed Code eliminates this relationship requirement, it restricts the felonies against which deadly force can be used to kidnapping or forcible rape, though, it, like the present Code, permits the use of deadly force where imminent death or serious bodily injury is threatened against another.⁸⁸

Prevention of Crime

Before deadly force may be used to prevent a felony crime the Court of Criminal Appeals of Oklahoma presently requires that such crime be accompanied by personal violence⁸⁹ or an attempt to invade an occupied domicile.⁹⁰ The proposed Code does not permit the use of deadly force to prevent crime unless the defendant believes that the person whom he seeks to prevent from committing the crime is likely to endanger human life.⁹¹

Law Enforcement

The proposed Code authorizes the use of deadly force, when necessary, in effecting an arrest for a felony crime.⁹² However, the following limitations are placed on this right: (1) the felony must

87. OKLA. STAT. tit. 21, § 733(2) (1971).

88. P.C. § 1-307(B)(1).

89. *Mammano v. State*, 333 P.2d 602 (Okla. Crim. App. 1958).

90. *Armstrong v. State*, 11 Okla. Crim. 159, 143 P. 870 (1914).

91. P.C. § 1-310(B). This provision of the proposed Code is the same as section 3.07(5) of the MODEL PENAL CODE (1962) which has been criticized as being too restrictive. See R. PERKINS, CRIMINAL LAW 992 (2d ed. 1969).

92. P.C. § 1-309(B).

involve "the use or threatened use of physical force likely to cause death or serious physical injury . . ." and (2) there must be a belief by the person using deadly force "that the person to be arrested is likely to endanger human life unless apprehended without delay."⁹³ Section 733(3) of the present Code permits the use of deadly force when necessary "to apprehend any person for any felony committed . . ."⁹⁴

Protection of Property

The proposed Code limits the use of deadly force in protection of property to situations where (1) a burglary or arson is being attempted against his dwelling, or a dispossession is attempted from a dwelling without a claim of right.⁹⁵ Under the present Code any felony attempted upon the dwelling in which the defender is located will justify the use of deadly force.⁹⁶

Self-Defense

The treatment afforded self-defense is basically the same under both Codes. Each requires the threat of death or great personal injury in order to justify the use of deadly force.⁹⁷ Further, the following similarities exist between the proposed Code and present law: (1) neither requires retreat,⁹⁸ (2) neither allows an aggressor to avail himself of a self-defense plea,⁹⁹ (3) both, however, permit a self-defense plea where an aggressor abandons the encounter, makes his withdrawal known, and thereafter the adversary becomes the aggressor.¹⁰⁰

Two changes respecting self-defense are made by the proposed Code. First, the proposed Code does not permit physical resistance to an unlawful arrest,¹⁰¹ while present law does.¹⁰² Second, the proposed

93. P.C. §§ 1-309(B)(2)-(3). This provision is substantially the same as section 3.07(2)(b) of the MODEL PENAL CODE (1962) which has been criticized as being too restrictive. See R. PERKINS, CRIMINAL LAW 986 (2d ed. 1969).

94. OKLA. STAT. tit. 21, § 733(3) (1971).

95. P.C. § 1-308(B).

96. OKLA. STAT. tit. 21, § 733(1) (1971).

97. P.C. § 1-305(B); OKLA. STAT. tit. 21, § 733(2) (1971).

98. In *Wingfield v. State*, 89 Okla. Crim. 45, 205 P.2d 320 (1949), an instruction that the defendant was not required to retreat in order to avail himself of a self-defense plea under the present law was held proper. Section 1-305(B) of the proposed Code, describing the circumstances under which the use of deadly force is permissible, makes no requirement of retreat as a predicate to its use when those circumstances exist.

99. *Freeman v. State*, 97 Okla. Crim. 275, 262 P.2d 713 (1953); P.C. § 1-306(2).

100. *Evans v. State*, 89 Okla. Crim. 218, 206 P.2d 247 (1949), *modified on rehearing on other grounds*, 89 Okla. Crim. 218, 214 P.2d 970 (1950). P.C. § 1-306(3)(b).

101. P.C. § 1-306(1).

102. *Yates v. State*, 73 Okla. Crim. 51, 117 P.2d 811 (1941). However, in order for

Code permits deadly force to be used in self-defense by an aggressor when he initiates an encounter with nondeadly force and in return is met with deadly force.¹⁰³ Under present law a death caused under such circumstances would result in a manslaughter conviction.¹⁰⁴

CHAPTER FOUR: RESPONSIBILITY

Immaturity

Four ages are of consequence under the present Code with respect to a youngster's criminal responsibility. A child under age seven has no criminal capacity whatsoever;¹⁰⁵ one between seven and fourteen is rebuttably presumed to lack criminal capacity;¹⁰⁶ and every child under eighteen charged with the violation of any federal or state law or criminal ordinance (except traffic law or ordinance) must be proceeded against in a juvenile proceeding rather than a regular criminal action.¹⁰⁷ Provision is made, however, for the certification of a child as an adult so he may be proceeded against in a regular criminal action if the crime charged is a felony.¹⁰⁸

No minimum age for criminal capacity is established by the proposed Code, and under it all persons below seventeen must be proceeded against in a juvenile proceeding except where the crime charged is a felony and the defendant is certified as an adult by the juvenile court.¹⁰⁹

Mental Disease or Defect

In any criminal proceeding the present mental condition of a defendant is significant, as is the mental condition of the defendant at the time of the commission of the crime with which he is charged. However, each are significant for different reasons.

Under the existing criminal procedure a defendant cannot be "tried, adjudged to punishment, or punished for a public offense

a person to use deadly force to resist an unlawful arrest it appears the present law would require that the person about to be illegally arrested honestly and reasonably believes that he is in danger of being killed or seriously injured; in other words, the use of deadly force to prevent an illegal arrest would have to be justified under the right of self-defense. See Note, *Criminal Law: Force that May Be Used to Resist an Illegal Arrest*, 9 OKLA. L. REV. 60 (1956).

103. P.C. § 1-306(3)(a).

104. *Jenkins v. State*, 80 Okla. Crim. 328, 162 P.2d 336 (1945).

105. OKLA. STAT. tit. 21, § 152(1) (1971).

106. *Id.* § 152(2).

107. OKLA. STAT. tit. 10, § 1112(a) (Supp. 1975).

108. *Id.* § 1112(b).

109. P.C. § 1-401.

. . . ." while presently insane.¹¹⁰ And the test specified for determining a defendant's present sanity is whether he has a rational understanding of the proceedings against him and is capable of aiding counsel in his defense.¹¹¹

The defendant's mental condition at the time of the commission of the criminal offense is significant because the present statutes provide "[a]n act done by a person in a state of insanity cannot be punished as a public offense"¹¹² The present Code specifies the test to be applied in connection with an insanity defense is whether at the time of committing the act constituting the crime the defendant was "incapable of knowing its wrongfulness."¹¹³

The proposed Code effects no change from the present procedure established for dealing with the issue of present sanity. However, the proposed Code provides that the test to be applied concerning an insanity defense is whether the defendant at the time of the crime lacked, because of mental disease, a "substantial capacity to appreciate the difference between right and wrong."¹¹⁴ Thus, the proposed Code adopts, in part, the "substantial capacity" test established by the Model Penal Code.¹¹⁵ This test has been widely praised and adopted in a number of jurisdictions. It is predicted that this test of criminal insanity will generally be accepted in the future.¹¹⁶

The proposed Code, unlike the present Code or case law, requires at least twenty days written notice of an insanity defense; and it further provides that upon such notice a psychiatric examination be given the defendant.¹¹⁷ If a defendant is acquitted because of an insanity defense the district attorney may, under the present procedure, apply pursuant to the Oklahoma Mental Health Law for a civil insanity commitment.¹¹⁸ The proposed Code, however, provides only for a direct commitment in a state hospital for mental examination without the safeguards of a civil commitment proceeding.¹¹⁹

110. OKLA. STAT. tit. 22, § 1161 (Supp. 1975).

111. *Baker v. State*, 433 P.2d 525 (Okla. Crim. App. 1967).

112. OKLA. STAT. tit. 22, § 1161 (Supp. 1975).

113. OKLA. STAT. tit. 22, § 152(4) (1971). This test is known as the McNaghten test and is the exclusive test of insanity under the present law. *French v. State*, 416 P.2d 171 (Okla. Crim. App. 1966).

114. P.C. § 1-402.

115. MODEL PENAL CODE § 4.01 (1962).

116. R. PERKINS, CRIMINAL LAW 877 (2d ed. 1969).

117. P.C. § 1-405.

118. OKLA. STAT. tit. 22, § 1161 (Supp. 1975).

119. P.C. § 1-403. The position of the proposed Code is unfortunate in that it would repeal by implication that portion of section 1161 of the present Code requiring that the

ARTICLE II—INCHOATE OFFENSES
CHAPTER FIVE: PART (A) ANTICIPATORY CRIMES

Included as inchoate crimes in the proposed Code are criminal attempts,¹²⁰ solicitation,¹²¹ conspiracy,¹²² and facilitation.¹²³ Solicitation and facilitation do not exist as crimes under the present Code,¹²⁴ while attempts and conspiracy do.¹²⁵

Attempt

The crime of attempt is defined by the proposed Code as "any overt act toward the perpetration of a crime by a person who intends to commit such crime but fails or is prevented or interrupted in the perpetration thereof."¹²⁶ This definition is compatible with case law which requires the following elements: (1) intent, (2) some overt act toward the commission of the crime, and (3) failure to consummate.¹²⁷

Under the proposed Code the overt act is required to be "a substantial step in a course of conduct planned to culminate in [the] commission of the crime."¹²⁸ To constitute a substantial step, the overt act must leave "no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting."¹²⁹

The present law, on the other hand, requires that to qualify as an overt act the conduct must move directly toward the crime and bring the accused nearer to its commission than mere acts of preparation or of planning. It must be such act or acts as will

defendant be afforded the safeguards of a civil commitment proceeding. The problem of a direct commitment is examined in Williams, *Is a Defendant Entitled to a Civil Sanity Hearing Prior to Commitment . . . ?* 43 OKLA. B. ASS'N J.Q. SUPP. 292 (1972).

120. P.C. § 2-501.

121. P.C. § 2-505.

122. P.C. § 2-506.

123. P.C. § 2-510.

124. In *Cale v. State*, 14 Okla. Crim. 18, 166 P. 1115 (1917) the Court of Criminal Appeals noted that where a criminal information charges only the crime of solicitation, no public offense is stated. In *Jones v. State*, 481 P.2d 169 (Okla. Crim. App. 1971) the Court of Criminal Appeals stated that the defendant could not be "convicted as a seller even though his conduct may have *facilitated* the sale where the evidence shows no conspiracy or prearranged plan between defendant and the seller." *Id.* at 170 (court syllabus par. 4) (emphasis added).

125. Criminal attempt is covered in sections 41-44 of the present Code. OKLA. STAT. tit. 21, §§ 41-44 (1971). Criminal conspiracy is covered in sections 421-24 of the present Code. *Id.* §§ 421-24.

126. P.C. § 2-501.

127. *Kidd v. State*, 462 P.2d 281 (Okla. Crim. App. 1969).

128. P.C. § 2-501(B)(2).

129. P.C. § 2-501(D).

apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself.¹³⁰

Under the proposed Code then, the test of an overt act is an objective one which is based upon what the defendant has already done toward completing the intended crime, while the test under the present law is based on what remains to be done.¹³¹

The Oklahoma legislature, dissatisfied with what the Court of Criminal Appeals considered in *Booth v. State*¹³² to be the defense of "legal impossibility," enacted in 1965 section 44 of the present Code.¹³³ Under this section impossibility can be a defense to the crime of attempt only in the situation where the conduct of the defendant, if concluded as intended, would not be proscribed by the law as criminal.¹³⁴ No change is effected by the proposed Code respecting impossibility.¹³⁵

As does the present Code,¹³⁶ the proposed Code¹³⁷ provides that no conviction may be had for an attempt where the intended crime is in fact perpetrated. The proposed Code provides for the identical punishment of attempts as does the present Code.¹³⁸ Renunciation of criminal purpose is provided as an affirmative defense to a completed crime of attempt under the proposed Code.¹³⁹ This defense has not been adopted by either the present Code or case law.¹⁴⁰

130. *Dunbar v. State*, 75 Okla. Crim. 275, 286, 131 P.2d 116, 122 (1942).

131. The test of an overt act under the proposed Code is similar to the "equivocality approach" described in W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 435-36 (1972); and the test established by the present law is similar to the "probable desistance approach." *Id.* at 434-35.

132. 398 P.2d 863 (Okla. Crim. App. 1965).

133. OKLA. STAT. tit. 21, § 44 (1971). The position of section 44 toward the impossibility defense is recognized as the "better view." W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 443 (1972).

134. Assuming, for example, that possession of marijuana was not a crime in Oklahoma (though presently, it is in fact a misdemeanor) a person would not be guilty of criminal attempt under section 44 for possessing marijuana although he mistakenly believed such possession to be a crime. If, however, a defendant possessed a green leafy plant, mistakenly believing it to be marijuana when it was not, then under the present law (in fact making possession a misdemeanor) he would by operation of section 44 be guilty of attempted possession of marijuana.

135. P.C. § 2-501(B)(1).

136. OKLA. STAT. tit. 21, § 41 (1971).

137. P.C. § 2-503.

138. P.C. § 2-502 is identical to OKLA. STAT. tit. 21, § 42 (1971).

139. P.C. § 2-504.

140. Though no case appears where the defense of renunciation has been expressly rejected, the Court of Criminal Appeals has in *Huckaby v. State*, 94 Okla. Crim. 29, 32, 229 P.2d 235, 238 approved the rule recited in 22 C.J.S. *Criminal Law* § 41, at 132 (1961) to the effect that the status of a crime is fixed once it is completed and cannot thereafter be changed by a subsequent act of the criminal.

Conspiracy

The present Code provides that the purpose of a criminal conspiracy may be to commit any crime or to accomplish any one of several statutorily specified unlawful, though not necessarily criminal, results.¹⁴¹ The proposed Code, however, limits the scope of criminal conspiracy to a purpose of engaging in conduct itself constituting a crime, or an attempt, or solicitation to commit such crime.¹⁴² Both the proposed¹⁴³ and present¹⁴⁴ Codes require as a predicate to conspiracy liability the commission of an overt act by at least one of the conspirators. While present law requires the overt act to be a step toward the execution of the conspiracy,¹⁴⁵ no definition of an overt act is set out in the proposed Code.

Under the proposed Code an agreement to commit several crimes is but one conspiracy,¹⁴⁶ and it is also provided that a person may be a co-conspirator with one or more whose identities are unknown to him by conspiring through an intermediary.¹⁴⁷ Although neither the present Code nor case law address either of these situations, the principles have been generally accepted elsewhere.¹⁴⁸

As an exception to conspiracy liability, the proposed Code prohibits a conspiracy conviction "when an element of that crime is agreement with the person with whom he is alleged to have conspired or when that crime is so defined that his conduct is an inevitable incident to its commission."¹⁴⁹ This exception, known as the Wharton Rule, is recognized as preventing conspiracy convictions for such intended crimes as dueling, bigamy, adultery, incest, gambling, and bribery. It should be recognized, however, that the Wharton Rule is properly applied only when the intended crime is achieved and not when it is unachieved,¹⁵⁰ although the proposed Code appears to place no such limitation on this exception. Some dictum in an early Court of Criminal Appeals opinion would seem to indicate that this exception would apply in the case of a completed crime in which an agreement was an essential element.¹⁵¹

141. OKLA. STAT. tit. 21, § 421 (1971).

142. P.C. § 2-506.

143. P.C. § 2-507(A).

144. OKLA. STAT. tit. 21, § 423 (1971).

145. *State v. Bennett*, 81 Okla. Crim. 206, 162 P.2d 581 (1945).

146. P.C. § 2-507(B).

147. P.C. § 2-507(C).

148. W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 62 (1972).

149. P.C. § 2-507(D).

150. 2 F. WHARTON, *CRIMINAL LAW* § 1604 (12th ed. 1932).

151. *Burns v. State*, 72 Okla. Crim. 432, 117 P.2d 155 (1941). "The crime of

The criminal irresponsibility or legal incapacity of a co-conspirator is excluded as a defense by the proposed Code.¹⁵² The same rule exists under the present law.¹⁵³ Renunciation is established as a defense to a completed conspiracy crime under the proposed Code,¹⁵⁴ while neither the present Code nor case law either accept or reject it as a defense.

CHAPTER FIVE: PART (A) SECOND AND
SUBSEQUENT OFFENSES

Section 2-511 of the proposed Code providing for enhanced punishment for second and subsequent offenders is identical to section 51 of the present Code.¹⁵⁵ Not presently included in the proposed Code, however, is a provision similar to section 51A of the present Code which does not permit the use of former convictions in which ten years have elapsed since the completion of the sentence unless the defendant in the meantime has been convicted of a misdemeanor involving moral turpitude or a felony.¹⁵⁶

ARTICLE III—CRIMES AGAINST PERSONS
CHAPTER SIX: PART (A) HOMICIDE

Criminal homicide is classified under the present Code as murder or manslaughter.¹⁵⁷ A third classification, negligent homicide, was created in 1961 with the enactment of the Oklahoma Highway Safety Code.¹⁵⁸

Murder

Homicide is second-degree murder under the present Code when perpetrated with the intent to kill the victim or any other human; or, though not perpetrated with the intent to kill, a homicide will nonethe-

conspiracy does not merge in the felonies described as overt acts in the indictment, where the conspiracy is a crime and not an essential part of the felonies to accomplish which the conspiracy was formed." *Id.* (court syllabus par. 1).

152. P.C. § 2-509(B).

153. *Capshaw v. State*, 69 Okla. Crim. 440, 104 P.2d 282 (1940). "A person may be guilty of a conspiracy to commit bribery, even though he could not by reason of his status commit bribery." *Id.* at 440, 104 P.2d at 283 (court syllabus par. 2).

The proposed Code describes the reverse of the situation in *Capshaw*; that is, it is the co-conspirator not the defendant who is incapable of committing the intended crime under the proposed Code provision. However, the rationale of *Capshaw* is equally applicable.

154. P.C. § 2-508(A).

155. OKLA. STAT. tit. 21, § 51 (1971).

156. OKLA. STAT. tit. 21, § 51A (Supp. 1975).

157. OKLA. STAT. tit. 21, § 691 (1971).

158. OKLA. STAT. tit. 47, § 11-903 (1971).

less be second-degree murder when perpetrated by an imminently dangerous act evincing a depraved mind, or when perpetrated while engaged in the commission of a felony crime.¹⁵⁹

The proposed Code contains the identical provision defining second-degree murder, and establishes the same punishment presently provided for.¹⁶⁰ However, the proposed Code allows the trial court to elect between an indeterminate or determinate sentence¹⁶¹ while the present Code requires that an indeterminate sentence be set.¹⁶²

Unlike criminal codes of most states, the present Code did not before 1973 provide for two degrees of murder.¹⁶³ However, effective May 17, 1973, the Oklahoma legislature repealed the then existing capital punishment provisions for murder and enacted laws¹⁶⁴ which were intended to provide a nondiscriminatory scheme for the enforcement of capital punishment in cases of first-degree murder.¹⁶⁵

The essence of the present first-degree murder statute is to provide for mandatory capital punishment where a defendant commits a homicide, intending to kill the victim, or any other human being, and such killing occurred by one of the acts specified in the ten subsections of the statute. The present first-degree murder statute has been ruled to be constitutional in that it does not provide for cruel or unusual punishment, nor is it so arbitrary, discriminatory or vague as to deny equal protection or due process of the law.¹⁶⁶

With the exception of sections 701.5 and 701.6 the proposed Code retains the first-degree murder statute of the present Code in its identical form,¹⁶⁷ and likewise provides for mandatory capital punishment.¹⁶⁸

Manslaughter

The present Code ignores the common law divisions of voluntary

159. OKLA. STAT. tit. 21, § 701.2 (Supp. 1975).

160. P.C. § 3-603.

161. P.C. § 3-604.

162. OKLA. STAT. tit. 21, § 701.4 (Supp. 1975).

163. See R. PERKINS, CRIMINAL LAW 88 (2d ed. 1969), where it is recognized that "[m]ost of the states have provided two degrees of murder while leaving manslaughter without such division."

164. OKLA. STAT. tit. 21, §§ 701.1-.6 (Supp. 1975).

165. Williams v. State, 542 P.2d 554, 578 (Okla. Crim. App. 1975).

166. *Id.* at 585-86.

167. Sections 701.5 and 701.6 of the present Code (OKLA. STAT. tit. 21, §§ 701.5-.6 (Supp. 1975)) which permitted the Court of Criminal Appeals to modify a death sentence to life imprisonment were held unconstitutional in Williams v. State, 542 P.2d at 583-84.

168. P.C. § 3-602.

and involuntary manslaughter, and classifies manslaughter into first and second degree for the purpose of providing different punishment.¹⁶⁹

The present Code defines manslaughter in the first degree as (1) an unintentional killing committed while the defendant is engaged in the commission of a misdemeanor,¹⁷⁰ (2) an intentional killing committed in a heat of passion upon adequate provocation,¹⁷¹ (3) an intentional, but unnecessary killing, in resisting a crime, or after such attempt fails,¹⁷² (4) an unintentional killing by an intoxicated physician,¹⁷³ (5) an intentional killing of an unborn quick child by injury to its mother,¹⁷⁴ (6) an intentional killing of an unborn quick child by medicine, drugs or other substance, or by instrument or other means.¹⁷⁵

The following are mitigating circumstances recognized by Oklahoma case law—though not included in the statutory definition of first-degree manslaughter—in which a killing will be reduced from murder to manslaughter: (7) a homicide committed by a defendant who because of being so voluntarily intoxicated at the time of the killing could not form the requisite intent to kill,¹⁷⁶ (8) an intentional killing committed under the imperfect defense of self-defense.¹⁷⁷

Manslaughter in the second degree arises under the present Code in the following cases: (1) an unintentional killing of one person through the culpable negligence of another,¹⁷⁸ (2) when a human being is killed by a mischievous animal which the owner, knowing of its propensities, has intentionally allowed to go, or has not used ordinary care in keeping.¹⁷⁹ The proposed Code, like the common law, divides

169. OKLA. STAT. tit. 21, § 715 (1971) provides the punishment for first-degree manslaughter shall be imprisonment in the penitentiary for not less than four years. OKLA. STAT. tit. 21, § 722 (1971) provides the punishment for second-degree manslaughter shall be imprisonment in the penitentiary for not more than four years and not less than two years, or imprisonment in the county jail not exceeding one year, or a fine not exceeding one thousand dollars, or both fine and imprisonment.

170. OKLA. STAT. tit. 21, § 711(1) (1971).

171. *Id.* § 711(2).

172. *Id.* § 711(3).

173. *Id.* § 712.

174. *Id.* § 713.

175. *Id.* § 714.

176. *Chambers v. State*, 16 Okla. Crim. 238, 182 P. 714 (1919).

177. *Morgan v. State*, 536 P.2d 952 (Okla. Crim. App. 1975). The rationale of *Morgan* would be equally applicable to the "imperfect" right of . . . defense of others, or of crime-prevention, or of the defenses of coercion or necessity . . ." See W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 583 (1972). Likewise, a homicide will be manslaughter where the self-defense plea is "imperfect" because the defendant was the initial aggressor, *Wood v. State*, 3 Okla. Crim. 553, 107 P. 937 (1910).

178. OKLA. STAT. tit. 21, § 716 (1971).

179. *Id.* § 717.

manslaughter into two classes, voluntary and involuntary; however, unlike the common law the proposed Code provides different punishments for each class.¹⁸⁰

Adoption of the proposed Code would effect several changes of significance from the present law. An unintentional killing committed in the commission of a misdemeanor, presently first-degree manslaughter, would be classified as involuntary manslaughter causing a significant reduction in possible punishment. An unintended death caused by an intoxicated physician, presently first-degree manslaughter, would be involuntary manslaughter effecting the same punishment reduction.¹⁸¹

Culpable negligence, under the present Code, requires a showing that the defendant failed to exercise that degree of ordinary care expected of reasonable men,¹⁸² while the proposed Code requires a showing that the defendant acted in a wanton manner by conduct constituting a gross deviation from that expected of a reasonable man.¹⁸³

Ordinarily, to be considered a human being within the definition of homicide, a fetus must have been born alive before the killing.¹⁸⁴ Because of this the intentional killing of an unborn quick child, made first-degree manslaughter by the present Code, contrary to the general rule, would not be manslaughter under the proposed Code.

Negligent Homicide

The negligent homicide section of the proposed Code,¹⁸⁵ while similar in definition and punishment range to the present law,¹⁸⁶ ex-

180. P.C. § 3-605 defines voluntary manslaughter as "the unlawful killing of a human being, without malice, which is done intentionally upon a sudden quarrel or in the heat of passion." Punishment for voluntary manslaughter is not less than five years nor more than twenty years imprisonment in the penitentiary.

P.C. § 3-606 defines involuntary manslaughter as "the unlawful killing of a human being, without malice, which is done unintentionally in the commission of an unlawful act not amounting to [a] felony, or in the commission of a lawful act in an unlawful or wanton manner." Punishment for involuntary manslaughter is not less than one year nor more than five years imprisonment in the penitentiary.

For a discussion of the treatment of manslaughter at common law see W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 571 (1972).

181. A physician being intoxicated in either a hospital or his office would be in violation of section 5-2010 of the proposed Code, which is the misdemeanor crime of public intoxication; therefore, he would fall within the definition of involuntary manslaughter under section 3-606 of the proposed Code—the unintentional killing of a human being in the commission of an unlawful act not amounting to a felony.

182. Jackson v. State, 84 Okla. Crim. 138, 179 P.2d 924 (1947).

183. P.C. § 1-107(3) defines wanton.

184. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 530-31 (1972).

185. P.C. § 3-607.

186. OKLA. STAT. tit. 47, § 11-903 (1971).

pands its application beyond the motor vehicles presently covered to include motorboats and airplanes.

The rationale of present case law to the effect that the negligent homicide statute supersedes criminal negligence type manslaughter when the defendant committed the homicide while engaged in the negligent operation of a motor vehicle¹⁸⁷ would still be applicable under the proposed Code. This would not hold true, however, regarding the misdemeanor-manslaughter doctrine when the homicide resulted from the defendant's driving while intoxicated.¹⁸⁸

CHAPTER SIX: PART (B) ASSAULT AND BATTERY

Assault

There are two distinct types of criminal assault: the attempted-battery type, and the intent-to-frighten type.¹⁸⁹ The former is expressly established by section 641 of the present Code, and the latter has been recognized, though not expressly established, in *Dunbar v. State*.¹⁹⁰ Both types of criminal assault are made punishable by the proposed Code.¹⁹¹ Punishment for assault up to thirty days and/or a fine up to one hundred dollars under the proposed Code is compatible with that provided in the present Code.¹⁹²

Battery

The definition of battery under the proposed Code requires that the touching or application of force be "done in a rude, insolent or angry manner."¹⁹³ The present Code defines battery as "any wilful and unlawful use of force or violence . . ." ¹⁹⁴ However, present law and the proposed Code reach the same result since a mere touching has, under present law, been held insufficient to constitute a battery.¹⁹⁵ The

187. *Atchley v. State*, 473 P.2d 286 (Okla. Crim. App. 1970).

188. *Ritchie v. Raines*, 374 P.2d 772 (Okla. Crim. App. 1962).

189. W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 609 (1972).

190. 75 Okla. Crim. 275, 131 P.2d 116 (1942). "An assault is any wilful and unlawful attempt or offer with force or violence to do a corporal hurt to another' or by any threatening gesture, showing in itself or by words accompanying it, sufficient to cause a well-founded apprehension of immediate peril." *Id.* at 275, 131 P.2d at 117 (court syllabus par. 3).

191. P.C. § 3-608.

192. OKLA. STAT. tit. 21, § 644 (1971).

193. P.C. § 3-612.

194. OKLA. STAT. tit. 21, § 642 (1971).

195. *Armstrong v. State*, 51 Okla. Crim. 407, 2 P.2d 100 (1931).

proposed Code substantially raises both the maximum incarceration period and fine for battery.

Aggravated Assault

Section 3-610 of the proposed Code defines aggravated assault in three subsections. Subsection one is equivalent to the crime of assault and battery with a deadly weapon under the present Code.¹⁹⁶ Subsection two is equivalent to the crime of assault while masked or disguised under the present Code.¹⁹⁷ And subsection three is equivalent to the crime of assault with intent to commit a felony under the present Code.¹⁹⁸

The proposed Code substantially diminishes the maximum period of incarceration called for by each of the present crimes, but increases the permissible fines.¹⁹⁹

Aggravated Battery

The proposed Code provides that a battery is aggravated where: (1) great bodily harm is inflicted, or (2) disfigurement or dismemberment is caused, or (3) the battery is done with a deadly weapon, or any other manner whereby great bodily harm, disfigurement, dismemberment or death can be inflicted.²⁰⁰

Subsection one has as its counterpart section 646(1), the present aggravated battery statute.²⁰¹ Although both are identical in definition, the proposed Code provides felony punishment while the present Code provides only misdemeanor punishment.²⁰² Subsection two is equivalent to the crime of maiming in the present Code²⁰³ which is punishable up to seven years imprisonment and/or a one thousand dollar fine.²⁰⁴

196. OKLA. STAT. tit. 21, § 652 (1971).

197. *Id.* § 1303. This section of the present Code requires the assault be committed with a dangerous weapon while the proposed Code does not.

198. *Id.* § 681.

199. Aggravated assault under the proposed Code is punishable by imprisonment up to two years and/or a fine up to five thousand dollars. Assault and battery with a deadly weapon under the present Code is punishable by imprisonment up to twenty years. Assault while masked is punishable under the present Code by not less than five nor more than twenty years and a fine of not less than one hundred dollars nor more than five hundred dollars. Assault with intent to commit a felony is punishable under the present Code by imprisonment in the penitentiary up to five years, or up to one year in the county jail, and/or a fine up to five hundred dollars.

200. P.C. § 3-614.

201. OKLA. STAT. tit. 21, § 646(1) (1971).

202. *Id.* § 647.

203. *Id.* § 751.

204. *Id.* § 759.

Subsection three is equivalent to the present crime of assault and battery with a dangerous weapon which is punishable by up to five years in the penitentiary.²⁰⁵

Aggravated battery under the proposed Code is punishable by up to five years imprisonment and/or a ten thousand dollar fine.

Assault or Battery upon a Police Officer

Both the proposed and present Codes provide for enhanced punishment when an assault and/or battery is committed upon a police officer. The proposed Code provides for imprisonment in jail for up to one year,²⁰⁶ while the present Code fixes the maximum imprisonment at six months.²⁰⁷

Aggravated Assault or Battery upon a Police Officer

The maximum punishment for aggravated assault upon a police officer under the proposed Code is up to five years imprisonment,²⁰⁸ and up to ten years imprisonment for aggravated battery upon a police officer.²⁰⁹ The present Code has no equivalent to aggravated assault upon a police officer, and under the present aggravated battery upon a police officer statute the punishment provided for is maximum imprisonment of up to two two years and/or up to a one thousand dollar fine.²¹⁰

Shooting with Intent to Kill

Section 3-616 of the proposed Code establishes the crime of shooting with intent to kill and is identical in definition and punishment with its counterpart, section 652 of the present Code.²¹¹

CHAPTER SIX: PART (C) KIDNAPPING

Kidnapping

Kidnapping may be accomplished by force, intimidation or deception under the proposed as well as the present Code.²¹² Acquiescence of the victim is no defense under the proposed Code if the victim is

205. *Id.* § 645.

206. P.C. §§ 3-609, 3-613.

207. OKLA. STAT. tit. 21, § 649 (1971).

208. P.C. § 3-611.

209. P.C. § 3-615.

210. OKLA. STAT. tit. 21, § 650 (1971).

211. *Id.* § 652.

212. P.C. § 3-617(2); OKLA. STAT. tit. 21, § 741 (1971).

under sixteen years of age or mentally incompetent; the age of consent is fixed at twelve years under the present Code.²¹³

The proposed²¹⁴ as well as present Code²¹⁵ provides for a minimum imprisonment of ten years where kidnapping is committed for the purpose of extortion. However, the proposed Code goes further to provide the same punishment where the defendant's intent in kidnapping is to accomplish or advance the commission of a felony, inflict bodily injury or terrorize the victim, or another, interfere with the performance of a governmental or political function, or to use the victim as a shield or hostage.

A kidnapping, other than for the purpose of extortion, under the present Code is punishable by up to ten years imprisonment.

CHAPTER SIX: PART (D) SEXUAL OFFENSES

Rape

Rape is divided into three degrees under the proposed Code²¹⁶ and into two under the present Code.²¹⁷

The age of consent under the present Code is eighteen if the victim is previously chaste, and sixteen if she is not.²¹⁸ The proposed Code fixes the age of consent at sixteen without exception.²¹⁹ Statutory rape is in the first degree under the present Code when the defendant is over eighteen and the victim is under fourteen, and in the second degree when the victim is over fourteen. Statutory rape under the proposed Code is in the first degree when the victim is under twelve; in the second degree when the victim is twelve or over but under fourteen, and the defendant is over eighteen; and in the third degree when the victim is fourteen or over but under sixteen and the defendant is twenty-one or over.

213. P.C. § 3-617(2); OKLA. STAT. tit. 21, § 741(3) (1971).

214. P.C. § 3-617(C).

215. OKLA. STAT. tit. 21, § 745(A) (1971).

216. P.C. § 3-620 (rape in the first degree); P.C. § 3-621 (rape in the second degree); P.C. § 3-622 (rape in the third degree).

First-degree rape is punishable by imprisonment for not less than five years nor more than twenty years, except where the victim is under twelve years or receives serious physical injury, in which case it is punishable by imprisonment of not less than ten years to life. Second-degree rape is punishable by imprisonment for not more than five years. Third-degree rape is punishable by imprisonment for not more than two years.

217. OKLA. STAT. tit. 21, § 1114 (1971). *Id.* § 1115 fixes the punishment for first-degree rape at any number of years imprisonment not less than five. *Id.* § 1116 fixes the punishment for second-degree rape at imprisonment for not less than one nor more than fifteen years.

218. *Id.* §§ 1111, 1st & 2nd.

219. P.C. § 3-622.

In addition to lack of age, the victim is deemed incapable of consent under the present Code: (1) because of the victim's lunacy or unsoundness of mind.²²⁰ (Sexual intercourse made rape because of this incapacity is first-degree rape under the present Code, while its counterpart under the proposed Code, mental defectiveness, is third-degree rape.)²²¹ (2) because of the victim being intoxicated by a narcotic or anesthetic agent administered by or with the privity of the accused.²²² (Sexual intercourse made rape because of this incapacity is second-degree rape under the present Code, while its counterpart under the proposed Code, mental incapacitation, is made third-degree rape.²²³) (3) because of the victim's unconsciousness of the nature of the act.²²⁴ (Sexual intercourse made rape because of this incapacity is second-degree rape under the present Code, while its counterpart under the proposed Code, physical helplessness, is made first-degree rape.)²²⁵

Under the present Code consent of the victim is ineffective where obtained by the defendant through any artifice, pretense or concealment by which the victim submits to the sexual intercourse believing it to be with her husband.²²⁶ The proposed Code does not provide for this exception to consent.

A second change of significance is that under the proposed Code the defendant's ignorance of the victim's incapacity to consent because of her lack of age, mental defectiveness, mental incapacity or physical helplessness is recognized as a valid defense.²²⁷ Presently in Oklahoma such mistake or ignorance, even if reasonable, is not a valid defense although it may be considered in mitigation of punishment.²²⁸

Sodomy

Sodomy is described by the proposed Code as "deviate sexual intercourse,"²²⁹ and as the "crime against nature" by the present Code.²³⁰ The crime against nature has been interpreted by case law to

220. OKLA. STAT. tit. 21, § 1111, 3rd (1971).

221. P.C. § 3-622.

222. OKLA. STAT. tit. 21, § 1111, 6th (1971).

223. P.C. § 3-622.

224. OKLA. STAT. tit. 21, § 1111, 7th (1971).

225. P.C. § 3-620(2).

226. OKLA. STAT. tit. 21, § 1111, 8th (1971).

227. P.C. § 3-619.

228. *Law v. State*, 92 Okla. Crim. 444, 447, 224 P.2d 278, 279 (1950).

229. P.C. §§ 3-623 to -626.

230. OKLA. STAT. tit. 21, § 886 (1971).

include bestiality,²³¹ buggery,²³² and sexual penetration per os.²³³ Deviate sexual intercourse as defined by the proposed Code includes buggery and penetration per os, but does not include or otherwise make criminal an act of bestiality.²³⁴

Sodomy is divided into degrees by the proposed Code,²³⁵ but not the present Code. Punishment for first-degree sodomy is more severe under the proposed Code than that now provided for by the present Code,²³⁶ while punishment for the lesser degrees of sodomy under the proposed Code is less severe.²³⁷

The fact that both participants consented to an act of sodomy is no defense under present law since lack of consent has been held not to be an element of the crime.²³⁸ Neither does the fact that the participants committing a voluntary act of sodomy are husband and wife offer a defense under present law.²³⁹ The proposed Code reaches an opposite result, however, by excluding from its definition of deviate sexual intercourse those acts committed between husband and wife.²⁴⁰ Further, deviate sexual intercourse between two consenting adults, married or not, is not made criminal under the proposed Code, unless they are of the same sex, in which event such homosexual behavior is sodomy in the fourth degree, a misdemeanor.²⁴¹

231. *Roberts v. State*, 57 Okla. Crim. 244, 47 P.2d 607 (1935). Bestiality is carnal copulation by either a man or woman with an animal. R. PERKINS, CRIMINAL LAW 389 (2d ed. 1969).

232. Buggery is copulation per anum by a man with either another man or woman. R. PERKINS, CRIMINAL LAW 389 (2d ed. 1969). In *Berryman v. State*, 283 P.2d 558 (Okla. Crim. App. 1955), the Court of Criminal Appeals stated that the crime against nature prohibited copulation per anus.

233. *Ex parte De Ford*, 14 Okla. Crim. 133, 168 P. 58 (1917).

234. P.C. § 3-618(1).

235. Sodomy is divided into four degrees by the proposed Code. First-degree sodomy is punishable by not less than five nor more than twenty years imprisonment (P.C. § 3-623). Second-degree sodomy is punishable by up to five years imprisonment (P.C. § 3-624). Third-degree sodomy is punishable by up to two years imprisonment (P.C. § 3-625). Fourth-degree sodomy is a misdemeanor, and is punishable by up to one year in the county jail (P.C. § 3-626).

236. OKLA. STAT. tit. 21, § 886 (1971) punishes sodomy by imprisonment in the penitentiary not exceeding ten years.

237. Second-, third-, and fourth-degree sodomy each have maximum punishments of one-half or less the possible maximum sentence under the present Code.

238. *Hopper v. State*, 302 P.2d 162 (Okla. Crim. App. 1956).

239. *Cole v. State*, 83 Okla. Crim. 254, 259, 175 P.2d 376, 379 (1946).

240. P.C. § 3-618(1).

241. P.C. § 3-626. Homosexual conduct would fall within section 886 of the present Code and be punished as a felony (OKLA. STAT. tit. 21, § 886 (1971)). See *Warner v. State*, 489 P.2d 526 (Okla. Crim. App. 1971).

Sexual Abuse

An act of lewd molestation committed upon a child under the age of fourteen by an adult at least five years the child's senior is punishable under the present Code by imprisonment from one to twenty years.²⁴²

Lewd "sexual contact"²⁴³ under the proposed Code is first-degree sexual abuse when committed upon a child less than twelve years old;²⁴⁴ second-degree sexual abuse when committed upon a child less than fourteen years old;²⁴⁵ and third-degree sexual abuse if the child is under seventeen but is at least fourteen years old and the defendant is at least five years the victim's senior.²⁴⁶

Unlike section 1123 of the present Code,²⁴⁷ the proposed Code punishes an act of sexual contact between unmarried adults under the following circumstances: (1) when accomplished by force or compulsion overcoming the victim's earnest resistance,²⁴⁸ or (2) when the victim's consent is invalid because of (a) physical helplessness,²⁴⁹ or (b) mental incapacity or defectiveness.²⁵⁰

Sexual Misconduct

When an act of sexual intercourse or deviate sexual intercourse between unmarried adults does not qualify as rape or sodomy because the victim, while not consenting to the act, fails to "earnestly resist,"²⁵¹ the proposed Code proscribes the conduct as sexual misconduct²⁵² and establishes punishment for the offender of up to one year in the county jail. The equivalent circumstance would, under the present code, constitute a battery.

Indecent Exposure

Presently, the crime of indecent exposure is a felony punishable by up to ten years imprisonment and/or a five thousand dollar fine.²⁵³

242. OKLA. STAT. tit. 21, § 1123 (1971).

243. Sexual contact is defined in section 3-618(7) of the proposed Code.

244. P.C. § 3-627.

245. P.C. § 3-628.

246. P.C. § 3-629.

247. OKLA. STAT. tit. 21, § 1123 (1971).

248. P.C. § 3-627(1). A forcible sexual contact unconsented to would be punishable as a battery under the present Code.

249. P.C. § 3-627(2)(a).

250. P.C. § 3-628(1).

251. The definition of forcible compulsion under section 3-618(2) of the proposed Code requires the physical force to overcome the victim's "earnest resistance."

252. P.C. § 3-630.

253. OKLA. STAT. tit. 21, § 1021 (1971).

Under the proposed Code indecent exposure is a misdemeanor punishable by up to six months in jail, but it is made a felony punishable by up to two years imprisonment where the victim is less than twelve years old.²⁵⁴

ARTICLE IV—CRIMES AGAINST PROPERTY
CHAPTER SEVEN: BURGLARY

First-Degree Burglary

In addition to the elements of burglary existing at common law,²⁵⁵ the present Code requires that the dwelling burglarized be occupied by a human being at the time of entry,²⁵⁶ and unlike the common law which requires that the breaking and entry be accomplished with the specific intent to commit a felony, presently an intent to commit any crime will suffice.

The proposed Code section defining first-degree burglary²⁵⁷ is in some respects substantially dissimilar to the present Code. Most significant is that the element of breaking is eliminated by the proposed Code and replaced with the requirement that the entry of or flight from the dwelling be made under any one of three specified circumstances, or at night.²⁵⁸ Additionally, the proposed Code shortens the definition of nighttime by one hour;²⁵⁹ and like the common law, the proposed Code

254. P.C. § 3-631.

255. At common law, the crime of burglary consisted of a (1) breaking and (2) entering of (3) a dwelling house (4) of another (5) in the night time (6) with the intent to commit a felony therein. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 708 (1972).

256. OKLA. STAT. tit. 21, § 1431 (1971). The punishment for burglary in the first degree is "for any term not less than seven nor more than twenty years." *Id.* § 1436.

257. P.C. § 4-702. The punishment for burglary in the first degree under the proposed Code is "at least ten (10) but not more than twenty (20) years in the state penitentiary."

258. P.C. § 4-702(A) provides:

A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling with the intent to commit a crime and when:

1. In effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the offense:

- a. is armed with explosives or a deadly weapon, or
- b. causes physical injury to any person who is not a participant in the crime, or
- c. uses or threatens the use of a dangerous instrument against some person who is not a participant in the crime; or

2. The entering or remaining occurs at night.

259. P.C. § 4-701(3). Nighttime under the proposed Code is the period between thirty minutes after sunset and thirty minutes before sunrise, while under section 1440 of the present Code it is the period between sunset and sunrise. OKLA. STAT. tit. 21, § 1440 (1971).

makes no requirement that the dwelling be occupied at the time of the commission of the burglary.

Second-Degree Burglary

Both the proposed and present Codes provide for burglary in the second degree.²⁶⁰ Again, as in the case of first-degree burglary, the proposed Code eliminates the element of breaking and substitutes therefor the requirement that the entry or flight be made under one of the same three circumstances.²⁶¹ Other distinctions are that the present Code includes within the definition of second-degree burglary the breaking into a coin operated machine while the proposed Code does not. And under the present Code the building or structure burglarized must be one in which personal property is kept; no such requirement is made by the proposed Code.

The present Code requires that the breaking and entry be committed with the intent to steal property or to commit a felony. Under the proposed Code, however, an intent to commit any crime is sufficient. The proposed Code increases by three years both the minimum and maximum punishment provided by the present Code for second-degree burglary.²⁶²

Third-Degree Burglary

Third-degree burglary²⁶³ is distinguished from second degree under the proposed Code by the elimination of the three circumstances under which the entry or flight must be made; otherwise the elements are the same for both. Third-degree burglary is compatible with section 1438 of the present Code—"entering buildings or structures with certain intent"—with the exception that third-degree burglary is a felony while section 1438 is a misdemeanor.²⁶⁴

260. P.C. § 4-703; OKLA. STAT. tit. 21, § 1435 (1971).

261. The element of breaking is required for second-degree burglary under the present Code. *Yeager v. State*, 82 Okla. Crim. 326, 169 P.2d 579 (1946).

It should be noted that an entry or remaining at night will not suffice under the proposed Code's second-degree burglary section as is the case in first-degree burglary.

262. The punishment for burglary in the second degree as set out in section 1436 of the present Code is imprisonment "not exceeding seven years and not less than two years." OKLA. STAT. tit. 21, § 1436 (1971).

Burglary in the second degree under section 4-703(B) of the proposed Code is punished by "at least five (5) but not more than ten (10) years in the state penitentiary."

263. P.C. § 4-704.

264. OKLA. STAT. tit. 21, § 1438 (1971).

Possession of Burglar's Tools

Both Codes punish as a misdemeanor the possession of burglar's tools with the intent to use such tools for a criminal purpose.²⁶⁵ This criminal purpose under the proposed Code includes the forcible entry into premises or a theft by physical taking; the present Code, however, limits the required criminal purpose to the perpetration of a burglary. In contrast to the proposed Code, the possession of burglar's tools is punished as a felony by the present Code when perpetrated by one previously convicted of burglary.²⁶⁶

Criminal Trespass

Criminal trespass—the unlawful entry or remaining upon another's property—is classified as first degree by the proposed Code when committed in a dwelling;²⁶⁷ second degree when committed in a building or fenced or enclosed real property;²⁶⁸ and third degree when committed upon any other real property.²⁶⁹ The approach to criminal trespass under the present Code differs from that of the proposed Code in that an entry upon another's property is made criminal only when the owner or occupant has expressly forbidden such entry.²⁷⁰

CHAPTER EIGHT: CRIMINAL DAMAGES

Criminal Mischief

The intentional or wanton defacing, destruction, or damaging of any real or personal property, without a right or reasonable belief that a right to do so exists is criminal mischief under the proposed Code. Such conduct is first-degree criminal mischief (a felony) where a pecuniary loss is occasioned in excess of one thousand dollars;²⁷¹ second-degree

265. P.C. § 4-705; OKLA. STAT. tit. 21, § 1437 (1971).

266. OKLA. STAT. tit. 21, § 1442 (1971).

267. P.C. § 4-706. First-degree trespass, a misdemeanor, is punishable by up to twelve months in jail.

268. P.C. § 4-707. Second-degree trespass, a misdemeanor, is punishable by up to ninety days in jail.

269. P.C. § 4-708. Third-degree trespass is classified as a violation with no punishment specified.

270. OKLA. STAT. tit. 21, § 1835 (1971). One type trespass is excepted from this approach: it is provided that entry into a pecan grove without prior consent is a criminal trespass.

Criminal trespass is punishable by a fine not to exceed twenty-five dollars, except where waste or an attempt to commit waste, theft or damage is made, in which event the punishment is a fine of from fifty to five hundred dollars and/or from thirty days to six months in the county jail.

271. P.C. § 4-802. First-degree criminal mischief is "punishable by imprisonment in the state penitentiary for a term not exceeding five (5) years."

criminal mischief (a misdemeanor) where a pecuniary loss is occasioned in excess of five hundred dollars;²⁷² and third-degree criminal mischief (a misdemeanor) where a pecuniary loss of less than five hundred dollars is occasioned or, if no pecuniary loss is occasioned, where such criminal mischief endangers another's property.²⁷³ The present Code punishes malicious mischief as a general misdemeanor regardless of the pecuniary loss suffered by the victim.²⁷⁴

Criminal Use of Noxious Substances

The criminal use, as well as the possession of a noxious substance with the intent to cause its criminal use, are both misdemeanor crimes under the proposed Code.²⁷⁵ Presently, the criminal use of a noxious substance is a felony.²⁷⁶ However, mere possession of a noxious substance, regardless of intent, is not made criminal.

Criminal Littering

Both Codes contain misdemeanor sanctions against the littering of land or water.²⁷⁷ Unlike the present Code, however, the proposed Code extends the application of its littering statute to private (unless occurring with the landowner's consent) as well as public land. Aside from the prohibition against the attachment of objects to utility poles,²⁷⁸ no comparable section exists under the present Code to the misdemeanor

272. P.C. § 4-803. Second-degree criminal mischief is "punishable by imprisonment in the county jail for a term not to exceed one (1) year."

273. P.C. § 4-804. Third-degree criminal mischief is "punishable by imprisonment in the county jail for a term not to exceed ninety (90) days."

274. OKLA. STAT. tit. 21, § 1760 (1971). As a general misdemeanor, malicious mischief is punishable by imprisonment up to one year in the county jail and/or a fine up to five hundred dollars.

While section 1760 is the malicious mischief statute of general application, several other malicious mischief statutes of specific application (some felony crimes) are set out in chapter 69 of the present Code. OKLA. STAT. tit. 21, §§ 1751 *et seq.* (1971), *as amended*, (Supp. 1975).

275. P.C. §§ 4-805 to -806. Both the criminal use and possession of a noxious substance are punishable by imprisonment in the county jail for a term not exceeding ninety days.

276. OKLA. STAT. tit. 21, § 1767.1(5) (1971). As a general felony this crime is mischief is punishable by imprisonment up to one year in the county jail and/or a fine exceeding one thousand dollars.

277. P.C. § 4-807. Criminal littering under the proposed Code is punishable in the county jail not to exceed ninety days.

OKLA. STAT. tit. 21, § 1753.3 (1971) covers the littering of public property; *Id.* § 1194 covers public waters. *See also* OKLA. STAT. tit. 29, § 7-401 (Supp. 1975).

278. OKLA. STAT. tit. 21, § 1838 (1971).

crime of "unlawfully posting advertisements" as contained in the proposed Code.²⁷⁹

CHAPTER NINE: ARSON

Four degrees of arson are provided for under the present Code;²⁸⁰ the proposed Code provides for three.²⁸¹ Under the present Code the determination of the degree of arson is contingent upon the nature of the property burned, damaged or destroyed. If the property is a dwelling the crime is first-degree arson; if it is a building it is second-degree arson; if it is personal property it is third-degree arson; and attempted arson is punished as fourth-degree arson.

The proposed Code is similar to the present Code in that its provisions relating to arson are applicable to dwellings and certain other structures, but the only personal property to which the proposed Code would be applicable are vehicles, watercraft or aircraft. The distinction between first- and second-degree arson under the proposed Code rests upon whether the defendant knew or had reason to believe another person was present at the time and location of the arson.

While the present Code requires the intentional destruction or attempted destruction by burning or explosion for all degrees of arson, the proposed Code permits a charge of third-degree arson to be maintained where the damage is occasioned by the defendant's wantonness. And under the proposed Code, unlike the present Code, it is a defense to arson (second and third degree only) that the property burned or

279. P.C. § 4-808.

280. OKLA. STAT. tit. 21, § 1401 (1971) defines first-degree arson and provides that it shall be punished "by a fine not to exceed Twenty-five Thousand Dollars (\$25,000.00) or [by confinement] to the penitentiary for not more than twenty (20) years or both."

Id. § 1402 defines second-degree arson and provides that it shall be punished "by a fine not to exceed Twenty Thousand Dollars (\$20,000.00) or [by confinement] in the penitentiary for not more than fifteen (15) years or both."

Id. § 1403 defines third-degree arson and provides that it shall be punished "by a fine not to exceed Five Thousand Dollars (\$5,000.00) or [by confinement] in the penitentiary for not more than five (5) years or both."

Id. § 1404 defines fourth-degree arson and provides that it shall be punished "by a fine not to exceed Two Thousand Five Hundred Dollars (\$2,500.00) or [by confinement] in the penitentiary for not more than (3) years or both."

281. P.C. § 4-902 defines first-degree arson and provides for "imprisonment in the state penitentiary for a term not to exceed twenty (20) years nor less than ten (10) years."

P.C. § 4-903 defines second-degree arson and provides for "imprisonment in the state penitentiary for a term not to exceed ten (10) years nor less than five (5) years."

P.C. § 4-904 defines third-degree arson and provides for "imprisonment in the state penitentiary for a term not exceeding five (5) years."

destroyed by explosion was owned by the defendant, or, if jointly owned with others, that those having a possessory or proprietary interest in the property consented to the defendant's conduct.

CHAPTER TEN: THEFT AND RELATED OFFENSES

Theft

The proposed Code consolidates into the crime of theft the following distinct crimes now existing in the present Code: larceny,²⁸² false pretenses,²⁸³ embezzlement²⁸⁴ and extortion.²⁸⁵ This approach, as well as the substance of the proposed Code provisions concerning theft, are patterned after the Model Penal Code.²⁸⁶ The separate treatment afforded these crimes by the present Code has resulted in the creation of technical distinctions in two areas: (1) between larceny and false pretenses, and (2) between larceny and embezzlement. These distinctions serve no useful purpose and on two occasions law review commentators have recommended corrective legislation.²⁸⁷ Thus, the consolidation approach of the proposed Code achieves a desirable result.

Conduct which falls subject to the crime of theft is defined in five sections of the proposed Code.²⁸⁸ The observation made by Professor LaFave concerning these same classifications in the Model Penal Code are equally applicable to the proposed Code: "Thus 'theft by unlawful taking or disposition' covers what was formerly larceny and embezzlement; 'theft by deception,' what was formerly false pretenses and larceny by trick; 'theft by extortion,' what was formerly blackmail or extortion

282. OKLA. STAT. tit. 21, § 1701 (1971).

283. *Id.* § 1541.1.

284. *Id.* § 1451.

285. *Id.* § 1481.

286. MODEL PENAL CODE § 223.1(1) (1962).

287. When the taking is by fraud, the distinction between larceny and embezzlement is determined with reference to the time when the fraudulent intent to convert the property to the taker's own use occurs, and if criminal intent exists at the time of taking the property, it is larceny, but if the criminal intent occurs afterward, it is embezzlement. *Riley v. State*, 64 Okla. Crim. 183, 78 P.2d 712 (1938).

The distinction between larceny and false pretenses depends upon the intention of the owner to part with possession only, or both possession and title to his property. If his intention is the former, the crime is larceny, and if the latter, it is false pretenses. *Warren v. State*, 95 Okla. Crim. 160, 241 P.2d 410 (1952).

That corrective legislative action has been encouraged see Bandy, *Oklahoma Criminal Law and Procedure*, 10 OKLA. L. REV. 400 (1957); Note, *Criminal Law: Distinction Between Larceny, Embezzlement and Obtaining Property by False Pretenses in Oklahoma*, 7 OKLA. L. REV. 339, 342 (1954).

288. P.C. §§ 4-1003 (theft by unlawful taking or disposition), 4-1004 (theft by deception), 4-1005 (theft of property), 4-1007 (theft by failure to make required disposition), 4-1008 (theft by extortion).

. . . ."²⁸⁹ In addition to his comments it may be observed that "theft of property" covers the present Code's larceny of lost property;²⁹⁰ and "theft by failure to make required disposition" covers embezzlement.

Unlawful Taking or Disposition

An initial change effected by the proposed Code under the section dealing with unlawful taking is to raise from twenty to fifty dollars the dividing line now existing between misdemeanor and felony larceny.²⁹¹ In addition, the proposed Code eliminates without a similar replacement the crimes of "larceny in the nighttime from the person"²⁹² and "grand larceny in any house or vessel."²⁹³ For these two crimes the present Code extracts enhanced punishment above that provided for grand larceny.

The proposed Code subjects both movable and immovable property to the crime of unlawful taking, while the present Code subjects only personal property to the crime of larceny. However, in reality no change is brought about by the proposed Code, since contrary to the common law, the present Code treats a written instrument affecting an interest in real property as personal property, and thereby makes it the subject of larceny.²⁹⁴

Theft by Deception

Three noteworthy distinctions exist between the proposed Code's "theft by deception" and the present Code's crime of false pretenses. First, a deception under the proposed Code may be based upon a future intention or state of mind while present law requires that the misrepresentation be of a past or present fact.²⁹⁵ Second, the present Code divides between felony and misdemeanor punishment at twenty dol-

289. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 677-78 (1972).

290. OKLA. STAT. tit. 21, § 1702 (1971).

291. *Id.* § 1704. Grand larceny (where the value of the property taken exceeds twenty dollars) is punishable under section 1705 by imprisonment in the penitentiary not exceeding five years. Petit larceny (where the value of the property taken does not exceed twenty dollars) is punishable under section 1706 by a fine of not less than ten dollars nor more than one hundred dollars, or imprisonment in the county jail not to exceed thirty days or both.

292. *Id.* § 1708 provides for imprisonment in the penitentiary not exceeding ten years.

293. *Id.* § 1707 provides for imprisonment in the penitentiary not exceeding eight years.

294. *Id.* § 1709; see *State v. McCrary*, 15 Okla. Crim. 374, 177 P. 127 (1919), where a deed to real property was held to be the subject of larceny.

295. *Helsey v. State*, 18 Okla. Crim. 98, 193 P. 50 (1920).

lars;²⁹⁶ the proposed Code raises this division to fifty dollars and lowers the maximum imprisonment from the ten years presently provided to five years.²⁹⁷ Third, while both Codes make criminal the obtaining of property by bogus check²⁹⁸ and provide for a presumption of knowledge where the defendant fails to make good an insufficient check within a certain period after notice of its return, they differ in that such period is ten days under the proposed Code and five under the present Code.²⁹⁹

Theft of Property

The proposed Code requires a person coming into control of lost property, realizing it to be lost, to exercise reasonable efforts to restore it to the person entitled thereto. The failure to make this effort, combined with the intent to deprive the owner of the property, will subject the finder to punishment for theft of property.³⁰⁰ Under the present Code, however, a finder is punished for his failure to make a reasonable effort to return lost property only when circumstances exist giving him knowledge or a means of inquiry regarding the true owner.³⁰¹

The proposed Code requires a reasonable effort to restore property which has been delivered under a mistake as to the nature or amount of the property or the identity of the recipient. The failure to make this effort, combined with the intent to deprive the owner of the property, is made punishable as theft.³⁰² There exists no comparable provision under the present Code concerning misdelivered property.

Theft of Services

A theft of services occurs when a person either: (1) obtains services by deception, threat, false token, or other means to avoid payment, or (2) intentionally diverts the services of others to which he is not entitled to his own benefit or to the benefit of another not entitled thereto.³⁰³ While the present Code does not have a single statute of similar application, section 1503 punishes the defrauding of hotels, inns, or restaurants; section 1515 punishes the fraudulent procurement of telecommunication services; section 1714 punishes the fraudulent con-

296. OKLA. STAT. tit. 21, §§ 1541.1, 1541.2 (1971).

297. *Id.* § 1541.2.

298. P.C. § 4-1004(A)(5); OKLA. STAT. tit. 21, § 1541.3 (1971).

299. P.C. § 4-1004(D)(2); OKLA. STAT. tit. 21, § 1541.4 (Supp. 1975).

300. P.C. § 4-1005.

301. OKLA. STAT. tit. 21, § 1702 (1971).

302. P.C. § 4-1005.

303. P.C. § 4-1006.

sumption of gas, and section 1627 punishes the fraudulent obtaining or attempting to obtain labor or professional services by a false or bogus order directing the payment of money.³⁰⁴ And because the term "valuable thing" in the present Code crime of false pretenses has been defined to include services as well as property,³⁰⁵ that section of the present Code³⁰⁶ would also be compatible with the crime of theft of services. The present Code has no section which makes criminal the diversion of services by one in control thereof.³⁰⁷

Theft by Failure to Make Required Disposition

The proposed Code eliminates the various classifications of embezzlement presently existing³⁰⁸ and creates a presumption of conversion where an officer or employee of the government or a financial institution fails to account for property on demand or where an audit reveals a falsification or shortage of accounts.³⁰⁹ No presumption of this nature exists under the present Code.

An intent to restore embezzled property, though not a defense under the present Code, will authorize mitigation if the accused has voluntarily restored or offered the return of the property prior to a criminal information having been filed.³¹⁰ Such mitigation is not provided for under the proposed Code.

Theft by Extortion

The proposed Code provides two additional grounds for extortion not provided for in the present Code.³¹¹ They are: (1) threatening to

304. See OKLA. STAT. tit. 21, §§ 1503, 1515, 1627, 1714 (1971).

305. *Stokes v. State*, 366 P.2d 425 (Okla. Crim. App. 1961).

306. OKLA. STAT. tit. 21, § 1541.1 (1971).

307. The present Code crime of embezzlement is applicable only to property as defined by OKLA. STAT. tit. 21, § 104 (1971).

308. Section 1452 relates to embezzlement by officer, etc., of a corporation, etc.; section 1453 relates to embezzlement by a carrier or other person; section 1454 relates to embezzlement by a trustee; section 1455 relates to embezzlement by a bailee; and section 1456 relates to embezzlement by a clerk or servant. OKLA. STAT. tit. 21, §§ 1452-56 (1971).

309. P.C. § 4-1007(C).

310. OKLA. STAT. tit. 21, § 1461 (1971).

311. *Id.* § 1482 provides:

Fear such as will constitute extortion, may be induced by a threat, either:

1st. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or member of his family; or,

2nd. To accuse him, or any relative of his or member of his family, of any crime; or,

3rd. To expose or impute to him, or them, any deformity or disgrace; or,

4th. To expose any secret affecting him or them.

bring about or continue a strike, boycott or other collective unofficial action, or (2) threatening to testify or provide information or withhold testimony or information with respect to another's legal claim or defense.³¹² Extortion by a public officer, servant or employee is a misdemeanor under the present Code;³¹³ it is punished as a felony under the proposed Code.³¹⁴

The proposed Code differentiates between felony and misdemeanor extortion on the basis of the value of the property obtained. Property which is valued in excess of one hundred dollars is subject to felony extortion.³¹⁵ All extortions under the present Code (except by a public officer) are felonies without regard to property value.³¹⁶

Theft of Labor

The payment for performed labor with an insufficient or "no-account" check is separately treated by both Codes. As such it is made a felony under the proposed Code where the value of the labor is fifty dollars or more and is made a misdemeanor in all other cases.³¹⁷ The present Code, on the other hand, makes the crime a misdemeanor in all cases without regard to the value of the labor performed.³¹⁸

Unauthorized Use of Vehicles

Stealing a vehicle without the intent to permanently deprive is a misdemeanor under the proposed Code³¹⁹ and is presently a felony under title 47.³²⁰ Enactment of the proposed Code would not, however, affect the present statute since it is not within title 21.³²¹

Receiving Stolen Property

The present Code makes criminal the receiving (or concealing) of property where the defendant either knows or has reasonable cause to

312. P.C. §§ 4-1008(5)-(6).

313. OKLA. STAT. tit. 21, § 1484 (1971).

314. P.C. § 4-1008(4).

315. P.C. § 4-1008(C) provides for misdemeanor punishment by not less than ninety days nor more than twelve months in jail and for felony punishment by not less than one year nor more than five years in the state penitentiary.

316. OKLA. STAT. tit. 21, § 1483 (1971) provides for imprisonment in the penitentiary not exceeding five years.

317. P.C. § 4-1006(C).

318. OKLA. STAT. tit. 21, § 1627 (1971).

319. P.C. § 4-1010.

320. OKLA. STAT. tit. 47, § 4-102 (1971).

321. P.C. § 7-3201 specifies that enactment of the proposed Code is not intended to repeal any substantive crimes defined in other titles of the Oklahoma Statutes.

believe that such property was stolen.³²² The proposed Code requires a showing that the defendant knew of the stolen character of the property but would not provide for a conviction where it appeared that the defendant had reasonable cause to believe that the property was stolen.³²³

Under the proposed Code the possession of recently stolen property establishes as prima facie evidence the defendant's knowledge of its stolen character.³²⁴ While the present Code has no similar statutory provision, case law has reached the same result.³²⁵ Receiving stolen property is a misdemeanor under the proposed Code if the value of the property received is less than one hundred dollars and a felony if it is over that amount.³²⁶ Regardless of the value of the property received or concealed this crime is a felony under the present Code.³²⁷

Obscuring the Identity of a Machine

Removing or obscuring any identification number or distinguishing mark on a vehicle, machine or other electrical or mechanical device is a misdemeanor under the proposed Code if done with the intent to render the object unidentifiable.³²⁸ It is also a misdemeanor under the proposed Code to possess a vehicle or machine with such identification removed or obscured unless the fact of the possession has been reported to the police.³²⁹

With respect to the present Code, the removal or obliteration of identification from electrical or mechanical machinery is made criminal by section 1546;³³⁰ from farm machinery by section 1841;³³¹ and from a motor vehicle by section 4-107 of title 47.³³² Concerning possession,

322. OKLA. STAT. tit. 21, § 1713 (1971).

323. P.C. § 4-1011.

324. P.C. § 4-1011(B).

325. *Miller v. State*, 481 P.2d 175 (Okla. Crim. App. 1969).

326. P.C. § 4-1011(C).

327. This leads to the rather unusual result that a person stealing property valued at under twenty dollars is guilty of a misdemeanor while a receiver or concealer of the same property is guilty of a felony.

328. P.C. § 4-1012.

329. P.C. § 4-1012(C).

330. OKLA. STAT. tit. 21, § 1546 (1971). This section provides for general misdemeanor punishment.

331. *Id.* § 1841. Section 1843 provides that the punishment for violating section 1841 shall be a fine of not less than fifty dollars nor more than one thousand dollars, or imprisonment for not less than thirty days nor more than one year, or both. *Id.* § 1843.

332. OKLA. STAT. tit. 47, § 4-107 (1971). This section provides for punishment by imprisonment for not less than one year nor more than five years.

section 1547 relates to electrical or mechanical machinery,³³³ and section 4-107 of title 47 relates to motor vehicles.³³⁴ No provision of the present Code punishes the possession of farm machinery with removed or obscured identification.

CHAPTER ELEVEN: ROBBERY

The present Code provides for three categories of robbery: (1) robbery or attempted robbery with a dangerous weapon or firearm,³³⁵ (2) first-degree robbery,³³⁶ and (3) second-degree robbery.³³⁷ That portion of section 801 which punishes robbery with any firearm or other dangerous weapon is equivalent to first-degree robbery under the proposed Code;³³⁸ that portion of section 801 which punishes robbery with an imitation, blank or unloaded firearm is equivalent to the proposed Code's second-degree robbery;³³⁹ and attempted robbery, which under section 801 is subject to the same penalty as a successful robbery, would be covered only by the general attempt statute of the proposed Code.³⁴⁰

The threat of future injury, which presently may be punished as second-degree robbery³⁴¹ is not punishable as robbery under the proposed Code, but would properly be the subject only of the crime of extortion.³⁴² And unlike the present Code, the fact that multiple

333. OKLA. STAT. tit. 21, § 1547 (1971). This section provides for general misdemeanor punishment.

334. OKLA. STAT. tit. 47, § 4-107 (1971). Section 4-107 relating to possession provides for general misdemeanor punishment, and relating to possession with intent to conceal or misrepresent the identity of the vehicle or engine provides for general misdemeanor punishment.

335. OKLA. STAT. tit. 21, § 801 (Supp. 1975) provides for punishment by imprisonment for life at hard labor in the state penitentiary or for a period of time of not less than five years.

336. OKLA. STAT. tit. 21, § 797 (1971). First-degree robbery is punished under section 798 by imprisonment in the state penitentiary for a term of not less than ten years. *Id.* § 798.

337. *Id.* § 797. Second-degree robbery is punished under section 799 by imprisonment in the state penitentiary for a term not to exceed ten years. *Id.* § 799.

338. P.C. § 4-1102. Robbery in the first degree is punishable under the proposed Code by not less than ten years, and by a maximum sentence of life imprisonment in the state penitentiary.

339. P.C. § 4-1103. Robbery in the second degree is punishable by not less than two years nor more than ten years in the state penitentiary.

340. P.C. §§ 2-501 *et seq.* See notes 126-40 *supra* and accompanying text.

341. OKLA. STAT. tit. 21, § 794 (1971) provides that the fear which constitutes robbery includes the "fear of an unlawful injury, immediate or future, to the person or property of the person robbed or of any relative of his, or member of his family . . ."

342. The proposed Code follows the general rule that a threat of future harm will not suffice for robbery. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 699 (1972).

defendants perpetrate the robbery does not enhance punishment under the proposed Code.³⁴³

CHAPTER TWELVE: FORGERY AND RELATED OFFENSES

Forgery

The proposed Code makes the subject of forgery any written instrument "used for the purpose of reciting, embodying, conveying or recording information, or constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person"³⁴⁴ In contrast, the present Code specifically sets out those classes of instruments which may be the subject of criminal forgery,³⁴⁵ and it does not have a section of general application similar to that existing in the proposed Code.

Because of the differing approaches, the crime of forgery under the proposed Code is much broader in application. For example, documents such as diplomas and letters of recommendation are the subject of forgery under the proposed Code but not under the present Code.³⁴⁶ In addition, the proposed Code classifies as second degree the forgery of deeds, wills and codicils,³⁴⁷ each of which presently fall within the definition of first-degree forgery.³⁴⁸

Uttering and Possession of a Forged Instrument

The proposed Code segregates into three degrees the uttering or possession of a forged instrument.³⁴⁹ The determination of the degree

343. OKLA. STAT. tit. 21, § 800 (1971). Robbery by multiple parties is punishable by imprisonment in the penitentiary for not less than five years nor more than fifty years. (This section is pertinent to second-degree robbery only).

344. P.C. § 4-1201(1).

345. Section 1561 relates to wills, deeds and certain other instruments; section 1562 relates to public securities; section 1571 relates to public and corporate seals; section 1572 relates to records; section 1574 relates to certificates of acknowledgement; section 1585 relates to process of court or title to property; section 1587 relates to tickets of passage; and section 1588 relates to postage stamps. OKLA. STAT. tit. 21, §§ 1561-62, 1571-72, 1574, 1585, 1587-88 (1971).

346. These examples are recognized by Professor Perkins. See R. PERKINS, CRIMINAL LAW 343-44 (2d ed. 1969).

347. P.C. § 4-1203. Second-degree forgery under the proposed Code is punishable by at least one but not more than five years in the state penitentiary.

348. OKLA. STAT. tit. 21, § 1561 (1971). Forgery in the first degree is punishable by imprisonment for not less than seven years nor more than twenty.

349. P.C. § 4-1205. Criminal possession of a forged instrument in the first degree is punishable by at least five years but not more than ten years in the state penitentiary.

P.C. § 4-1206. Criminal possession of a forged instrument in the second degree is punishable by at least one but not more than five years in the state penitentiary.

P.C. § 4-1207. Criminal possession of a forged instrument in the third degree is punishable by at least ninety days but not more than one year in the county jail.

rests upon the nature of the instrument uttered or possessed.³⁵⁰ The crimes of uttering and possession of a forged instrument are not divided into degrees by the present Code. Both crimes are punished the same as second-degree forgery without regard to the nature of the instrument.³⁵¹

Three additional crimes are included by the proposed Code in chapter twelve as offenses related to forgery: (1) possession of forgery device,³⁵² (2) criminal simulation,³⁵³ and (3) using slugs.³⁵⁴ The making or possession of any device specifically designed or adapted for use in forging instruments is made a felony by the proposed Code.³⁵⁵ The pertinent section of the present Code, on the other hand, is applicable only to the making or possession of false bank note plates.³⁵⁶ No criminal sanction exists under the present Code equivalent to the proposed Code's crime of criminal simulation.³⁵⁷

The manufacture, distribution or possession of slugs with the intent that they be used in a coin operated machine is a felony under the proposed Code if the value of the slugs exceeds fifty dollars.³⁵⁸ The use of slugs is a misdemeanor.³⁵⁹ The same conduct relating to slugs is only a misdemeanor under the present Code regardless of the value represented by the slugs.³⁶⁰

CHAPTER THIRTEEN: BUSINESS FRAUDS

Deceptive Business Practices

Of the five deceptive business practices prohibited by the proposed

350. If the nature of the instrument is such that its forgery could be prosecuted as first-degree forgery then its possession or uttering is punishable as first-degree possession; if it could be prosecuted as second-degree forgery then its possession or uttering is punishable as second-degree possession; if it could be prosecuted as third-degree forgery then its possession or uttering is punishable as third-degree possession.

351. OKLA. STAT. tit. 21, §§ 1579, 1592 (1971).

352. P.C. § 4-1209.

353. P.C. § 4-1211.

354. P.C. §§ 4-1212 to -1213.

355. P.C. § 4-1209. As such it is punishable by at least one but not more than five years imprisonment.

356. OKLA. STAT. tit. 21, § 1575 (1971). Making or possessing false bank note plates is punishable as forgery in the second degree.

357. P.C. § 4-1211.

358. P.C. § 4-1212. The punishment provided is for at least one year but not more than five years imprisonment. If the value of the slugs is not fifty dollars P.C. § 4-1213(2) provides for punishment of not more than ninety days in the county jail.

359. P.C. § 4-1213. The punishment for the use of slugs is not more than ninety days in the county jail.

360. OKLA. STAT. tit. 21, §§ 1849, 1850 (1971). Both sections provide for punishment by a fine of not more than one hundred dollars, or imprisonment of not more than thirty days, or both.

Code within section 4-1302, only two—the use and possession of false weights and measures,³⁶¹ and misrepresentation as to the quantity of commodities or services³⁶²—are made criminal by the present Code. The balance of the prohibited practices are, however, punished by statutes outside the present Code.³⁶³

False Advertising

False advertising directed to the public with the intent to promote the sale of property or services is made criminal by both Codes.³⁶⁴ However, only the proposed Code punishes as a crime the practice of "bait advertising."³⁶⁵

Falsifying Business Records

The falsification of any business record with the intent to defraud is made a misdemeanor by the proposed Code.³⁶⁶ Presently, the same conduct is made criminal only in connection with books of records of corporations, associations, partnerships or joint stock associations.³⁶⁷

361. OKLA. STAT. tit. 21, §§ 1551, 1552 (1971). Both sections provide for punishment by a fine of not exceeding one hundred nor less than five dollars, or by imprisonment in the county jail not more than thirty days, or both. OKLA. STAT. tit. 2, § 5-46(a) (1971) prohibits the same conduct.

362. OKLA. STAT. tit. 21, § 1505 (1971). The punishment provided is a fine of twenty-five dollars for each offense. OKLA. STAT. tit. 2, §§ 5-45, 5-46(d) (1971) prohibit the same conduct.

363. P.C. § 4-1302 prohibits a buyer from taking or attempting to take more than the represented quantity when he furnishes the weight, measure or measuring device. OKLA. STAT. tit. 2, § 5-46(e) (1971) prohibits the same conduct.

P.C. § 4-1302(4) prohibits the selling, offering or exposing for sale of an adulterated commodity; and P.C. § 4-1032(5) prohibits the selling, offering or exposing for sale of a mislabeled commodity.

The following are equivalent sections under the present statutes: OKLA. STAT. tit. 2, § 3-62(5) (1971) relating to adulterated or misbranded pesticides; *id.* § 6-259 relating to adulterated or misbranded poultry; *id.* § 7-51 relating to adulterated milk; *id.* § 8-47 relating to adulterated or misbranded commercial feed; OKLA. STAT. tit. 47, § 470 (1971) relating to adulterated or misbranded anti-freeze; *id.* § 12-315 relating to adulterated or misbranded hydraulic brake fluid; OKLA. STAT. tit. 63, § 1-1102 (Supp. 1975) relating to adulterated or misbranded food; and OKLA. STAT. tit. 63, § 1-1402 (1971) relating to adulterated or misbranded drugs or cosmetics.

364. P.C. § 4-1303. False advertising is punishable by not less than ninety days nor more than twelve months in jail.

OKLA. STAT. tit. 21, § 1502 (1971). False advertising under the present Code is punishable by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment in the county jail not exceeding twenty days, or both.

365. P.C. § 4-1304. "Bait advertising" is punishable by not less than ninety days nor more than twelve months in jail. "Bait advertising" is prohibited by the Oklahoma Deceptive Trade Practices Act, OKLA. STAT. tit. 78, §§ 51 *et seq.* (1971) but no criminal sanctions are imposed.

366. P.C. § 4-1305. The punishment provided is for not less than ninety days nor more than twelve months in jail.

367. OKLA. STAT. tit. 21, §§ 1589, 1590 (1971). Both sections provide for second-

Defrauding Creditors

The fraudulent disposition, destruction, concealment, or removal of property which is the subject of a security interest is made a misdemeanor by the proposed Code;³⁶⁸ it is a felony under the present Code.³⁶⁹

In an effort to protect judgment creditors, the proposed Code makes criminal the fraudulent conveyance, concealment or disposition of property which is subject to execution.³⁷⁰ Similar statutes exist under the present Code. They are distinguishable, however, in that the present Code provisions are applicable to any debtor, not judgment debtors alone. Moreover, the present Code sections make both parties to a fraudulent conveyance subject to punishment while the proposed Code is limited to the transferring debtor.³⁷¹

Fraud in Insolvency

The proposed Code prohibits conduct which obstructs or defeats the purpose of receivership or other proceedings concerning the administration of property for the benefit of creditors.³⁷² The present Code provision dealing with this subject is more limited in that it is drafted to punish fraudulent conduct in "making or prosecuting any application for a discharge as an insolvent debtor, under the provisions of any law now in force"³⁷³

False Financial Statements

Both Codes punish the making of a false financial statement,

degree forgery punishment. Violation of OKLA. STAT. tit. 21, § 1634 (1971) is a general misdemeanor, while violation of *id.* § 1635 is a felony punishable "by imprisonment in the penitentiary not exceeding ten years and not less than three, or by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both"

368. P.C. § 4-1306. The punishment provided for is not less than ninety days nor more than twelve months in jail.

369. OKLA. STAT. tit. 21, § 1834 (1971). The punishment provided for is imprisonment in the penitentiary not exceeding three years or in the county jail not exceeding one year, or by a fine not exceeding five hundred dollars.

370. P.C. § 4-1307. The punishment provided for is not less than ninety days nor more than twelve months in jail.

371. OKLA. STAT. tit. 21, §§ 1671, 1672 (1971). Both sections provide for punishment as a general misdemeanor. *See also id.* § 573, a general misdemeanor.

372. P.C. § 4-1308. The punishment provided for is not less than ninety days nor more than twelve months in jail.

373. OKLA. STAT. tit. 21, § 1674 (1971). This section provides for general misdemeanor punishment.

whether it relates to the defendant or another.³⁷⁴ The uttering of a false financial statement is also punished by both Codes.³⁷⁵ However, the present Code requires that the procurement of property, money or credit be accomplished based upon the false statement; the proposed Code makes no such requirement.

Other Business Frauds

There exists no comparable counterpart in the present Code to the proposed Code's crimes of "receiving deposits in failing institutions"³⁷⁶ and "misapplication of entrusted property."³⁷⁷

CHAPTER FOURTEEN: PERJURY

Perjury, as defined by the proposed Code, is the making of a material false statement under oath and is in the first degree when made in any official proceeding,³⁷⁸ and in the second degree when made in a subscribed written statement with the intent to mislead a public officer in the performance of his official functions.³⁷⁹ Making a false statement under oath is proscribed by the proposed Code as a misdemeanor distinct from perjury.³⁸⁰ Perjury is defined by the present Code in section 491,³⁸¹ and while different degrees of perjury are not provided for, distinctions are made for the purpose of punishment.³⁸²

The proposed Code, like the common law, requires the perjured statement to be material; that is, capable of affecting the outcome of the

374. P.C. § 4-1309. The punishment provided for is not less than ninety days nor more than twelve months in jail.

OKLA. STAT. tit. 21, § 1501 (1971). This section provides for punishment by imprisonment for not more than six months or by a fine of not more than five hundred dollars, or both. *Id.* § 1636 relates to making a false report of a corporation's pecuniary condition, and provides for punishment as a general misdemeanor.

375. P.C. § 4-1309; OKLA. STAT. tit. 21, § 1501 (1971).

376. P.C. § 4-1310.

377. P.C. § 4-1311.

378. P.C. § 4-1402. First-degree perjury is punishable by not less than one year nor more than five years in the state penitentiary.

379. P.C. § 4-1403. Second-degree perjury is punishable by not less than ninety days nor more than twelve months in jail.

380. P.C. § 4-1404. False swearing is punishable by up to ninety days in jail.

381. OKLA. STAT. tit. 21, § 491 (1971).

382. *Id.* § 500 provides:

Perjury is punishable by imprisonment in the penitentiary as follows:

First. When committed on the trial of an indictment for felony, by imprisonment not less than two years nor more than twenty years.

Second. When committed on any other trial or proceeding in a court of justice, by imprisonment for not less than one nor more than ten years.

Third. In all other cases by imprisonment not more than five years.

proceeding in which it was given.³⁸³ The present Code specifies that a lack of materiality is not a defense to perjury although it may be considered as a factor in assessing punishment.³⁸⁴ Except for a prosecution based upon two inconsistent sworn statements, no perjury charge may be successfully maintained under the proposed Code through the contradiction of a single witness.³⁸⁵ Conversely, corroboration is not required under the present Code.³⁸⁶

It is excluded as a defense to perjury under the proposed Code that (1) the oath or affirmation was irregularly administered, or (2) the defendant was an incompetent witness, or (3) the court in which the perjury was committed lacked jurisdiction.³⁸⁷ The first two exclusions are compatible with the present Code.³⁸⁸ However, the third exclusion reverses the present law which recognizes lack of jurisdiction as a valid defense.³⁸⁹ Finally, the present Code, unlike the proposed Code, provides that a person who has been convicted of perjury shall thereafter be incompetent to be a witness in any legal action or proceeding.³⁹⁰

ARTICLE V—CRIMES AGAINST THE PUBLIC

CHAPTER FIFTEEN: INTERFERING WITH JUDICIAL ADMINISTRATION

Witnesses

Bribing or intimidating any witness with the intent to (1) influence his testimony, (2) induce him to avoid being subpoenaed, or (3) induce him to disobey a subpoena is a felony under the proposed Code.³⁹¹ Likewise, a witness who receives or agrees to receive a bribe with the understanding that any of these intended results will be accomplished is also guilty of a felony.³⁹² While bribing a witness to influence

383. P.C. § 4-1401(1).

384. OKLA. STAT. tit. 21, § 498 (1971). Prior to the 1965 amendment of section 498, Oklahoma case law, like the common law, required the false statement to be material. *Huffine v. State*, 13 Okla. Crim. 239, 163 P. 557 (1917).

385. P.C. § 4-1406.

386. OKLA. STAT. tit. 21, § 498(A) (1971).

387. P.C. § 4-1408.

388. OKLA. STAT. tit. 21, §§ 494, 495 (1971).

389. *Bennett v. District Court*, 81 Okla. Crim. 351, 162 P.2d 561 (1945).

390. OKLA. STAT. tit. 21, § 506 (1971).

391. P.C. § 5-1502 relates to bribing a witness. P.C. § 5-1504 relates to intimidating a witness. Both sections provide for punishment by imprisonment in the state penitentiary for up to five years.

392. P.C. § 5-1503. This section provides for punishment by imprisonment in the state penitentiary for up to five years.

his testimony is similarly a felony under the present Code,³⁹³ no sanctions are set out for the receipt of a bribe by a witness.

Section 455 of the present Code punishes the wilful prevention or dissuasion of a witness from obeying a subpoena,³⁹⁴ while section 546 punishes the prevention by deceit, threat or violence of any party from procuring the attendance of a witness.³⁹⁵ Not punished by the present Code, however, is the receipt of a bribe by a person in return for his disobedience or avoidance of the service of a subpoena to appear as a witness.³⁹⁶

The misdemeanor crime "tampering with a witness" as defined by the proposed Code prohibits the inducing or attempting to induce a witness to refrain from appearing or testifying at an official proceeding.³⁹⁷ It also prohibits practicing deceit upon a witness with the intent to affect his testimony. Concerning the former, section 546 of the present Code is applicable to a nonsubpoenaed witness and section 455 is applicable to a subpoenaed witness.³⁹⁸ Concerning the latter, section 452 punishes as a misdemeanor the practicing of deceit upon a witness.³⁹⁹

Physical Evidence

The fabrication, concealment, destruction, or alteration of physical evidence as well as the offering of fabricated or altered physical evidence is a felony under the proposed Code.⁴⁰⁰ The present Code covers the destruction, preparation or offering of false evidence,⁴⁰¹ but there is no provision punishing the concealment of physical evidence.

393. OKLA. STAT. tit. 21, § 456 (1971). Bribing a witness is punished as a general felony.

394. *Id.* § 455. Section 455 is a general felony.

395. *Id.* § 546. Section 546 is a general misdemeanor.

396. It should be noted though that wilful disobedience to legal process would constitute indirect contempt of court under section 565. *Id.* § 565.

397. P.C. § 5-1505. Tampering with a witness is punishable by a jail term not to exceed one year but not less than ninety days.

398. A violation of section 546 is punishable as a general misdemeanor by up to one year in jail and/or up to a five hundred dollar fine. A violation of section 455 is a general felony and is punishable by up to two years in the state penitentiary and or up to a one thousand dollar fine.

399. OKLA. STAT. tit. 21, § 452 (1971).

400. P.C. § 5-1506. Tampering with physical evidence is punishable by up to five years in the state penitentiary.

401. OKLA. STAT. tit. 21, §§ 451, 453-54 (1971). Section 451 relates to offering false evidence and provides for punishment by imprisonment not exceeding seven years.

Jurors

Criminal offenses relating to jurors under the proposed Code include jury tampering,⁴⁰² jury bribing,⁴⁰³ and jury intimidation.⁴⁰⁴ Additionally, the taking of a bribe by a juror is made criminal.⁴⁰⁵ Each of these is punished by the present Code.⁴⁰⁶ Furthermore, the attempted influencing of a juror by the publication of any statement, argument or observation is made criminal⁴⁰⁷ as is the wilful permitting by a juror of an unauthorized communication to be made to him by another.⁴⁰⁸

Simulating Legal Process

Delivering simulated legal process which requests the payment of money is a misdemeanor under the proposed Code.⁴⁰⁹ The same conduct is presently punished as a felony.⁴¹⁰

CHAPTER SIXTEEN: ESCAPE AND OTHER OFFENSES
RELATING TO CUSTODY

Escape

The proposed Code provides for three degrees of escape. First degree⁴¹¹ is distinguishable from the other two degrees in that it requires

402. P.C. § 5-1507. Jury tampering is a misdemeanor punishable by up to one year in jail but not less than ninety days.

403. P.C. § 5-1802(1). A juror would fall within the definition of a "public servant" set out in P.C. § 5-1801(1)(c). This section provides for punishment by imprisonment for a term not exceeding five years.

404. P.C. § 5-1902(A). A juror would fall within the definition of a "public servant" set out in P.C. § 5-1901(3)(c). P.C. § 5-1902(C) provides for punishment as a misdemeanor which under P.C. § 1-106(B) is punished by up to one year in jail and/or up to a five hundred dollar fine.

405. P.C. § 5-1802(2).

406. OKLA. STAT. tit. 21, §§ 383-84, 388 (1971). Section 383 relates to bribing jurors and provides for punishment by imprisonment not exceeding ten years or by a fine not exceeding five thousand dollars, or both. Section 384 relates to bribe receiving by jurors and provides for punishment by imprisonment not exceeding two years and/or a fine up to one thousand dollars. Section 388 relates to attempts to influence jurors by unauthorized communications or by threats or intimidation and provides for punishment by up to one year in jail and/or a fine not exceeding five hundred dollars.

407. *Id.* § 388(5).

408. *Id.* § 385(2). This section provides for punishment by up to one year in jail and/or a fine not exceeding five hundred dollars.

409. P.C. § 5-1509. This section provides for punishment by up to ninety days in jail.

410. OKLA. STAT. tit. 21, §§ 1585, 1592 (1971). Section 1585 prohibits the forgery of court process and section 1592 punishes as second-degree forgery the uttering of forged court process with the intent to defraud.

411. P.C. § 5-1602. First-degree escape is punishable by imprisonment for a term of not less than twenty years nor more than life.

the use or threatened use of force in effecting the escape. Escape from confinement in a detention facility is second-degree escape⁴¹² while escape from custody of a public officer is third-degree escape.⁴¹³

The present Code does not provide for different degrees of escape, rather, it places emphasis on the nature of the facility from which the escape occurred. Escape from a state penal institution is a felony,⁴¹⁴ escape from a county jail is a misdemeanor,⁴¹⁵ and escape from custody is punished as a misdemeanor if accomplished by force or fraud.⁴¹⁶

Promoting Contraband

Introducing contraband⁴¹⁷ into a detention facility is labeled "promoting contraband in the second degree"⁴¹⁸ by the proposed Code, and where "dangerous contraband"⁴¹⁹ is introduced the crime is "promoting contraband in the first degree."⁴²⁰ The present statutes in this area are more limited in scope. Punished is the unauthorized introduction of drugs, alcoholic beverages or money into penal institutions;⁴²¹ the unauthorized introduction of a letter or printing to any convict in the

412. P.C. § 5-1603. Through apparent oversight no punishment provision has been attached to section 5-1603.

413. P.C. § 5-1604. Third-degree escape is punished by a term in jail not to exceed ninety days. Escape from custody will be second-degree escape rather than third-degree escape when the escapee is charged with or convicted of a felony.

414. OKLA. STAT. tit. 21, § 443 (Supp. 1975). The section provides for punishment by a term of imprisonment for not less than two years nor more than seven years.

415. OKLA. STAT. tit. 57, § 56 (1971). A violation of this section is punishable by a jail term up to one year and/or a one thousand dollar fine. If a prisoner has been sentenced to a state penal institution and escapes from a county jail while being held there, awaiting transportation to that state penal institution, the escape would be punished by section 443 rather than section 56.

416. OKLA. STAT. tit. 21, § 435 (1971). This section provides for punishment by imprisonment in the penitentiary not exceeding two years, or in the county jail not exceeding one year to commence from the expiration of the original term of imprisonment. *See id.* § 442 where "prisoner" is defined to include every person held in custody under lawful arrest.

417. "Contraband" is defined by P.C. § 5-1601(1) as "any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, departmental regulation or posted institutional rule or order"

418. P.C. § 5-1606. This section provides for punishment by a term in jail for not less than ninety days nor more than one year.

419. "Dangerous contraband" is defined by P.C. § 5-1601(3) as "contraband which is capable of such use as may endanger the safety or security of a detention facility or persons therein."

420. P.C. § 5-1605. This section provides for punishment by imprisonment for a term not exceeding five years.

421. OKLA. STAT. tit. 57, § 21 (1971). This section provides for punishment by imprisonment for not less than one year nor more than five years, or a fine of not less than one hundred dollars nor more than one thousand dollars, or both.

penitentiary;⁴²² and the introduction of any item into any prison (including a county jail) to aid escape.⁴²³

Bail Jumping

The proposed Code and present statutes both provide for basically the same treatment of bail jumping.⁴²⁴ Two distinguishing factors, however, do exist. First, the proposed Code more than doubles the maximum punishment for felony bail jumping. Second, under the proposed Code bail jumping is a misdemeanor if the pending crime in which the bail or recognizance is given is a misdemeanor; presently bail jumping is a felony regardless of the nature of the pending charge.

Resisting Arrest

Resisting arrest is punished by both Codes,⁴²⁵ but only the present Code punishes the refusal on command to aid a law enforcement officer in making an arrest or recapturing an escaped prisoner.⁴²⁶

Failing to stop a motor vehicle in violation of a peace officer's order to stop is a misdemeanor under the proposed Code.⁴²⁷ A similar statute exists under the present Code.⁴²⁸ However, the proposed Code section is of broader application because the present Code is limited to the situation where pursuit occurs with red light and siren while the proposed Code is not.

422. OKLA. STAT. tit. 21, § 586 (1971). This section provides for punishment by up to one year in jail and/or a fine up to five hundred dollars.

423. *Id.* § 438. If the prisoner was confined upon a charge or conviction of a felony this section provides for punishment by imprisonment in the penitentiary not exceeding ten years. If the prisoner was otherwise confined then the punishment provided for is up to one year in jail and/or a fine up to five hundred dollars.

424. P.C. § 5-1607 relates to first-degree bail jumping and provides for punishment by imprisonment in the penitentiary not exceeding five years. P.C. § 5-1608 relates to second-degree bail jumping and provides for punishment by a term in jail not exceeding one year nor less than ninety days.

OKLA. STAT. tit. 59, § 1335 (1971) relates to bail jumping in the trial court only; it does not differentiate between the nature of the pending crime and provides for punishment by up to two years imprisonment and/or up to a five thousand dollar fine. *Id.* § 1110 relates to bail jumping both in the trial court and pending appeal; it is, however, applicable only to instances where the pending charge was a felony. The punishment provided for is by imprisonment not to exceed one year and/or a fine not to exceed one thousand dollars.

425. P.C. § 5-1609 provides for punishment up to one year in jail but not less than ninety days. OKLA. STAT. tit. 21, § 540 (1971) provides for punishment by up to one year in jail and/or a fine not exceeding five hundred dollars.

426. OKLA. STAT. tit. 21, § 537 (1971).

427. P.C. § 5-1610. This section provides for punishment by a term in jail not exceeding one year but not less than ninety days.

428. OKLA. STAT. tit. 21, § 540(A) (1971). This section provides for a jail term up to six months and/or a fine up to one thousand dollars.

Hindering Prosecution

That conduct which under the present Code makes a person guilty of being an accessory after the fact⁴²⁹ is punished under the proposed Code as "hindering prosecution or apprehension." If the prosecution hindered is for a felony then the crime of hindering in the first degree has been committed,⁴³⁰ and if the prosecution hindered is for a misdemeanor then the crime of hindering in the second degree has been committed.⁴³¹ The present accessory after the fact statute is applicable only where the prosecuted crime is a felony—there exists no accessory after the fact to the commission of a misdemeanor.⁴³²

CHAPTER SEVENTEEN: ABUSE OF PUBLIC OFFICE

Official Misconduct

The offense of official misconduct as set out by the proposed Code is perpetrated when an official knowingly

1. [c]ommits an act relating to his office which constitutes an unauthorized exercise of his official functions;
2. [r]efrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or
3. [v]iolates any statute or lawfully adopted rule or regulation relating to his office.⁴³³

If any of these prohibited acts are accomplished with the intent to obtain or confer a benefit, or to injure or deprive another of a benefit, then the offense is official misconduct in the first degree;⁴³⁴ if not, then the offense is official misconduct in the second degree.⁴³⁵

The present Code has misdemeanor sanctions against a public officer violating a provision of law relating to his official conduct,⁴³⁶ and

429. *Id.* § 173. A violation of this section is punished by imprisonment up to five years in the penitentiary or up to one year in jail and/or a fine up to five hundred dollars. *Id.* § 175.

430. P.C. § 5-1612. A violation of this section is punishable by up to five years in the penitentiary.

431. P.C. § 5-1613. A violation of this section is punishable up to one year in jail but not less than ninety days.

432. OKLA. STAT. tit. 21, § 174 (1971). However, section 439 does punish the concealing of an escaped prisoner who has been confined for a misdemeanor. *Id.* § 439.

433. P.C. § 5-1702.

434. *Id.* This section provides for punishment by up to one year in jail but not less than ninety days.

435. P.C. § 5-1703. This section provides for punishment by up to ninety days in jail.

436. OKLA. STAT. tit. 21, § 343 (1971). This section provides for punishment by up to one year in jail and or up to a five hundred dollar fine.

also against the wilful neglect or omission by such officer of a legal duty of his office.⁴³⁷ However, unlike the proposed Code, no distinction is made in these sections as to whether or not an intent to obtain a benefit exists. The present Code has no statute of general application similar to that concerning the unauthorized exercise of official function.

CHAPTER EIGHTEEN: BRIBERY

It can be fairly stated that the proposed and present Codes treat the crime of bribery of public officials in a basically compatible manner.⁴³⁸ The distinguishing features of importance that do exist are that the giving or taking of bribes in athletic contests are included as bribery under the present Code⁴³⁹ but not under the proposed Code. Additionally, the present Code provides that the first party to a criminal bribery who confesses and testifies against the other party or parties shall not thereafter be criminally liable for bribery.⁴⁴⁰ Such disclosure and cooperation would not offer a defense under the proposed Code.

CHAPTER NINETEEN: OBSTRUCTION OF PUBLIC ADMINISTRATION

Obstructing Governmental Operations

The distinction of importance between the two Codes on the subject of obstructing governmental functions is that the proposed Code requires as an element of the offense the use or threat of force or physical interference⁴⁴¹ while the present Code section of general application does not.⁴⁴²

437. *Id.* §§ 347, 348. These sections provide for punishment by up to one year in jail and or up to a five hundred dollar fine.

438. P.C. § 5-1802 provides for punishment by up to five years imprisonment. OKLA. STAT. tit. 21, §§ 381, 382 (1971). Bribing a public officer is punished by up to five years imprisonment, or by a fine not exceeding three thousand dollars and up to one year in jail. *Id.* § 381. Section 382 punishes bribe receiving by a public officer by up to ten years imprisonment, or by a fine not exceeding five thousand dollars and up to one year in jail.

439. OKLA. STAT. tit. 21, § 399 (1971). This section provides for punishment by up to five years imprisonment, or by a fine up to three thousand dollars and up to one year in jail.

440. *Id.* § 391.

441. P.C. § 5-1902(A). A violation of this section is punishable by up to one year in jail and or a fine of not more than five hundred dollars.

442. OKLA. STAT. tit. 21, § 540 (1971). A violation of this section is punishable by up to one year in jail and/or a fine of not more than five hundred dollars.

Compounding a Crime

Three primary differences distinguish the Codes with respect to the offense of compounding a crime. First, compounding a crime under the proposed Code means "refraining from initiating a prosecution for a crime."⁴⁴³ The present Code covers not only that,⁴⁴⁴ but in addition, it punishes the concealing of a crime as well as the discontinuance or delay of a pending prosecution.⁴⁴⁵ Second, the proposed Code punishes both parties to an agreement to compound a crime, while the present Code is applicable only to the party accepting a benefit with the understanding he will compound a crime. Third, under the present Code, compounding a felony crime is itself a felony, while compounding a misdemeanor crime is a misdemeanor. Compounding a crime under the proposed Code is a misdemeanor no matter what type crime is compounded.

CHAPTER TWENTY: RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

Riot

The present Code requires a minimum of three participants to constitute a riot;⁴⁴⁶ the proposed Code, on the other hand, requires a minimum of five.⁴⁴⁷ Riot in the first degree under the proposed Code is a felony,⁴⁴⁸ while second-degree riot is a misdemeanor.⁴⁴⁹ The difference in the degree turns upon whether personal injury or property damage occurs during the riot; if it does, the definition of first-degree riot is applicable. There are no degrees of riot provided for in the present Code, and riot is punishable as either a felony or a misdemeanor.⁴⁵⁰ Moreover, if murder, maiming, robbery, rape or arson is com-

443. P.C. § 5-1903. A violation of this section is punishable by up to one year in jail and/or a fine of not more than five hundred dollars.

444. OKLA. STAT. tit. 21, § 543 (1971). If the crime compounded is punishable by death or life imprisonment the provided punishment is up to five years imprisonment or up to one year in jail. If the crime compounded is any other felony the provided punishment is up to three years imprisonment or up to one year in jail. If the compounded crime is a misdemeanor the provided punishment is up to one year in jail and/or a fine up to two hundred and fifty dollars.

445. *Id.* § 544. A violation of this section is punished by up to one year in jail and/or a fine up to five hundred dollars.

446. *Id.* § 1311.

447. P.C. § 5-2001(5).

448. P.C. § 5-2002. First-degree riot is punishable by at least one but not more than five years in the state penitentiary.

449. P.C. § 5-2003. Second-degree riot is punishable by at least ninety days but not more than one year in jail.

450. OKLA. STAT. tit. 21, § 1312 (1971).

mitted in the course of a riot, the present Code provides that each participant in the riot shall be punished as a principal to that crime.⁴⁵¹

The proposed Code provides that a person who incites a riot is guilty of a misdemeanor;⁴⁵² in contrast, the present Code punishes incitement to riot as a felony.⁴⁵³ Likewise, the proposed Code punishes an unlawful assemblage of five or more persons as a misdemeanor.⁴⁵⁴ The present Code punishes an unlawful assemblage of three persons as a misdemeanor⁴⁵⁵ and of four or more as a felony.⁴⁵⁶

Loitering

The proposed Code prohibits loitering in a public place for the purpose of gambling, prostitution, or use of unlawful drugs. In addition, loitering around schools and in transportation facilities is made criminal.⁴⁵⁷ The vagrancy statute of the present Code was repealed by the legislature in 1974.⁴⁵⁸

CHAPTER TWENTY-ONE: FIREARMS

The Oklahoma Firearms Act of 1971⁴⁵⁹ is adopted without change by the proposed Code.⁴⁶⁰ Not covered by the proposed Code, however, is a prohibition against carrying firearms by one who has been previously convicted of a felony crime, or a prohibition against anyone carrying a dangerous weapon. The former is a felony crime under the present Code,⁴⁶¹ and the latter is a misdemeanor.⁴⁶²

451. *Id.* § 1312(1).

452. P.C. § 4-2004. This section provides for punishment by up to one year but not less than ninety days in jail.

453. OKLA. STAT. tit. 21, § 1320.4 (1971). This section provides for punishment by up to ten years imprisonment and/or a fine of up to ten thousand dollars.

454. P.C. § 4-2005. Unlawful assemblage is punishable by up to ninety days in jail.

455. OKLA. STAT. tit. 21, § 1314 (1971). Section 1315 provides for misdemeanor punishment (up to one year in jail and/or a five hundred dollar fine). *Id.* § 1315.

456. *Id.* § 1320.3. The punishment for violating this section is up to five years in prison and/or a fine of up to five thousand dollars. *Id.* § 1320.5.

457. P.C. § 5-2009. Loitering is a general misdemeanor.

458. Law of Feb. 28, 1903, ch. 12, art. 4, §§ 1-4 [1903] Okla. Sess. Laws 154-55 (repealed 1974).

459. OKLA. STAT. tit. 21, §§ 1289.1-17 (1971).

460. P.C. § 5-2101 to -2113.

461. OKLA. STAT. tit. 21, § 1283 (1971). Section 1284 provides for punishment by imprisonment for not less than one year nor more than ten years. *Id.* § 1284.

462. *Id.* § 1272. This section provides for misdemeanor punishment (up to one year in jail and/or a fine of up to five hundred dollars).

CHAPTER TWENTY-TWO: FAMILY OFFENSES

Bigamy

Presently, bigamy is treated in two separate statutory sections. One statute refers to bigamy before divorce,⁴⁶³ and the second refers to bigamy subsequent to divorce.⁴⁶⁴ With respect to bigamy before divorce, adoption of the proposed Code would eliminate the four statutory exceptions presently existing,⁴⁶⁵ and substitute as a defense that "the accused believed he was legally eligible to remarry."⁴⁶⁶ Because the present statute concerning bigamy subsequent to divorce is contained in title 12, adoption of the proposed Code would be of no effect.⁴⁶⁷

Adultery

Like bigamy, adultery may, under the present statutes, be committed either before divorce⁴⁶⁸ or by remarriage within a prohibited time subsequent to divorce.⁴⁶⁹ The proposed Code does not provide for any criminal sanctions for conduct which would, under the present Code, amount to adultery before divorce. However, adoption of the proposed Code would not affect the present prohibition against adultery subsequent to divorce.⁴⁷⁰

Incest

Presently, the crime of incest punishes the acts of intermarriage, adultery or fornication between persons coming within that degree of consanguinity described in section 2 of title 43.⁴⁷¹ Because the pro-

463. *Id.* § 881. Section 883 provides for punishment by imprisonment for up to five years. *Id.* § 883. Section 884 is pertinent to a person marrying a bigamist and provides for punishment by imprisonment for up to five years in the penitentiary, or up to one year in jail and/or a fine up to five hundred dollars. *Id.* § 884.

464. OKLA. STAT. tit. 12, § 1280 (1971). Section 1281 provides for punishment by imprisonment for not less than one nor more than three years. *Id.* § 1281.

465. OKLA. STAT. tit. 21, § 882 (1971). Basically the exceptions are: (1) the first spouse has been absent for five years, (2) the first spouse has continually remained outside the United States for a space of five years, (3) the former marriage has been pronounced void or annulled by a competent court, (4) the first spouse has been sentenced to imprisonment for life.

466. P.C. § 5-2201(B). Bigamy under the proposed Code is punishable by imprisonment for up to five years.

467. P.C. § 7-3201 provides that the proposed Code is not to affect or repeal substantive crimes defined in titles other than title 21 of the present statutes.

468. OKLA. STAT. tit. 21, § 871 (1971). Section 872 provides for punishment by up to five years imprisonment and/or up to a five hundred dollar fine. *Id.* § 872.

469. OKLA. STAT. tit. 12, § 1280 (1971). Section 1281 provides for punishment by imprisonment for not less than one nor more than three years. *Id.* § 1281.

470. See note 466 *supra*.

471. OKLA. STAT. tit. 21, § 885 (1971). Incest is punishable by imprisonment not exceeding ten years.

posed Code requires sexual intercourse as an element of incest,⁴⁷² the act of intermarriage alone would not be punished as incest under the proposed Code as is presently the case. As an additional distinction, the crime of incest under the proposed Code does not extend to sexual intercourse between cousins of the first degree, uncles and nieces, aunts and nephews—the crime of incest presently covers those relationships.

ARTICLE VI—MISCELLANEOUS OFFENSES
CHAPTER TWENTY-THREE: GAMBLING

The proposed Code adopts in an unchanged form the present Code sections dealing with commercial gambling.⁴⁷³ Not adopted by the proposed Code are the recently promulgated statutes providing for the licensing and regulation of bingo contests.⁴⁷⁴ Inasmuch as bingo games conducted by nonprofit organizations would be excluded from the commercial gambling statutes,⁴⁷⁵ the licensing and regulations of the present Code should also be carried over into the proposed Code.

CHAPTER TWENTY-FOUR: PROSTITUTION

Prostitution is made a misdemeanor crime by both Codes.⁴⁷⁶ The major distinction between the two is that under the present Code both the prostitute and her customer are subject to prosecution while under the proposed Code only the prostitute is subject to prosecution. Additionally, the present Code punishes as prostitution both sexual intercourse for hire and "indiscriminate sexual intercourse without hire;" under the proposed Code the sexual conduct must be for a fee.

A party who forces another by the use of force or intimidation to engage in prostitution is, under the proposed Code, guilty of promoting prostitution in the first degree;⁴⁷⁷ the equivalent crime under the present

472. P.C. § 5-2202. Incest is punishable under the proposed Code by imprisonment not to exceed five years.

473. P.C. §§ 6-2301 *et seq.* The provisions in the present Code are OKLA. STAT. tit. 21, §§ 981-88 (Supp. 1975).

474. OKLA. STAT. tit. 21, §§ 995.1-.18 (Supp. 1975).

475. P.C. § 6-2301(1)(b).

476. P.C. § 6-2402. Prostitution is punished by the proposed Code by a term in jail not to exceed ninety days.

OKLA. STAT. tit. 21, §§ 1029-31 (1971). Section 1029 makes prostitution unlawful; section 1030 defines prostitution; and section 1031 punishes prostitution by a term in jail for not less than thirty days nor more than one year.

477. P.C. § 6-2403. This section provides for punishment by imprisonment for not less than five years nor more than ten years.

Code is "pandering."⁴⁷⁸ A person conducting a prostitution business involving two or more prostitutes is subject to felony prosecution under the proposed Code.⁴⁷⁹ However, this conduct would be subject only to misdemeanor punishment under the present Code.⁴⁸⁰

CHAPTER TWENTY-FIVE: PORNOGRAPHY

The present Code has four distinct statutes relating to obscenity.⁴⁸¹ Three of these statutes make no attempt to describe the conduct which is considered obscene. However, in compliance with *Miller v. California*⁴⁸² the Court of Criminal Appeals of Oklahoma, in order to save their constitutionality, has judicially interpreted these statutes to prohibit the sexual conduct described in *Miller*.⁴⁸³ The fourth statute contains a description of the proscribed conduct and is therefore not subject to expansion by judicial interpretation.⁴⁸⁴ The proposed Code specifically defines "sexual conduct."⁴⁸⁵ Thus, judicial enactment of the *Miller* examples would neither be necessary nor appropriate.

The proposed Code, like the present Code, prohibits the acts of preparation, exhibition and distribution of obscene matter as well as its possession with the intent to distribute.⁴⁸⁶ The proposed Code does not

478. OKLA. STAT. tit. 21, § 1081 (1971). Pandering is punished by imprisonment for not less than two years nor more than twenty years and by a fine of not less than three hundred dollars and not to exceed one thousand dollars.

479. P.C. § 6-2404. This section provides for punishment by imprisonment not to exceed five years.

480. OKLA. STAT. tit. 21, §§ 1025-26, 1028 (1971) are misdemeanors and relate to engaging in the business of prostitution.

481. *Id.* §§ 1021, 1040.8, 1040.13, 1040.51. Section 1021 provides for punishment by a fine of not less than one hundred dollars nor more than five thousand dollars or by imprisonment for not less than thirty days nor more than ten years, or both. Section 1040.8 provides for punishment by a jail term of not more than one year or by a fine of not more than one thousand dollars, or both. Section 1040.13 provides for punishment by a jail term of not more than one year or by a fine of not more than one thousand dollars, or both. Section 1040.51 provides for punishment by a fine not to exceed twenty-five thousand dollars or by imprisonment for a term not to exceed fifteen years, or both.

482. 413 U.S. 15 (1973).

483. Concerning section 1021 *see* McCrary v. State, 533 P.2d 629 (Okla. Crim. App. 1974); concerning sections 1040.8 and 1040.13 *see* Cherokee News and Arcade, Inc. v. State, 533 P.2d 624 (Okla. Crim. App. 1974); concerning section 1040.51 *see* State v. Combs, 536 P.2d 1301 (Okla. Crim. App. 1975).

484. Section 1040.51 proscribes material depicting "sexual intercourse or unnatural copulation." The examples of conduct described by the United States Supreme Court in *Miller* which could be proscribed are more comprehensive than those set out in section 1040.51.

485. P.C. § 6-2501(4).

486. P.C. § 6-2502. This section provides for punishment by a term in jail of not

prohibit the purchase of obscene matter, however, as does the present Code.⁴⁸⁷

Under the present Code the attorney general or a district attorney may institute an action to have a judicial determination of the obscenity of any material.⁴⁸⁸ No such procedure is provided for under the proposed Code. This omission is not significant, however, since any party could use the present Declaratory Judgment Act to seek a determination of the obscenity of any matter.⁴⁸⁹ Furthermore, the proposed Code has no provision similar to section 1040.52 of the present Code relating to outdoor theaters.⁴⁹⁰ It should be noted in this regard that in light of the recent United States Supreme Court decision of *Erznoznik v. City of Jacksonville*⁴⁹¹ subsection (A)(2) of section 1040.52 is most likely unconstitutional. The conduct described in subsection (A)(1) could be subject to prosecution under section 6-2502 of the proposed Code.

CHAPTER TWENTY-SIX: EAVESDROPPING

The present Code punishes eavesdropping where accomplished by wiretapping⁴⁹² or by "loitering about any building, with intent to overhear discourse therein"⁴⁹³ There are presently no sanctions against eavesdropping by way of a mechanical or electronic device (commonly referred to as a "bug").

The proposed Code on the other hand does punish eavesdropping by way of an electronic or mechanical "bug;"⁴⁹⁴ it also punishes wire-

less than ninety days nor more than one year. Enhanced punishment of up to five years in the penitentiary is provided for repeat offenders who distribute obscene matter to minors or use minors to distribute obscene matter. P.C. §§ 6-2503, 6-2504.

487. Only one of the four present Code sections punishes the purchase of obscene matter. It is section 1040.51 which provides the most severe punishment.

488. OKLA. STAT. tit. 21, §§ 1040.14-25 (1971).

489. OKLA. STAT. tit. 12, §§ 1651-57 (1971), *as amended*, (Supp. 1975). See *Keuper v. Wilson*, 111 N.J. Super. 502, 268 A.2d 760 (Super. Ct. Ch. 1970) where the use of the Uniform Declaratory Judgments Law to determine the issue of obscenity was approved.

490. OKLA. STAT. tit. 21, § 1040.52 (Supp. 1975) relates to the showing of specified actual or simulated sexual activity and nudity at certain outdoor theaters. The punishment provided for is by a jail term of not more than one year or a fine of not more than one thousand dollars, or both.

491. 422 U.S. 205 (1975).

492. OKLA. STAT. tit. 21, § 1757 (1971). This section provides for punishment by a term in jail not to exceed one year or a fine of not less than fifty nor more than five hundred dollars, or both.

493. *Id.* § 1202. This section provides for punishment by a term in jail not to exceed one year or by a fine not to exceed five hundred dollars, or both.

494. P.C. § 6-2601 defines "eavesdrop" and P.C. § 6-2602 provides for punishment by up to five years imprisonment.

tapping,⁴⁹⁵ but, unlike the present Code, does not punish eavesdropping without the use of an electronic or mechanical "bug."

CONCLUSION

There are a few crimes of significance which, while punished by the present Code, are not covered by the proposed Code. These include abortion,⁴⁹⁶ adultery,⁴⁹⁷ child beating,⁴⁹⁸ the carrying of firearms by a convicted felon,⁴⁹⁹ and attempted suicide.⁵⁰⁰ Of these, it might be well to recommend legislative attention toward an adequate replacement for the child beating statute as well as that statute which prohibits the carrying of firearms by convicted felons.

The proposed Code is patterned almost entirely after the Kentucky Penal Code⁵⁰¹ which became effective in that state on January 1, 1975. The distinctions existing between the proposed Code and the Kentucky Penal Code arise primarily where the proposed Code has adopted existing provisions of the present Code: *e.g.*, murder, firearms, gambling, and the punishment provisions relating to attempted crimes and habitual criminal offenders.

495. "Wiretapping" comes within the definition of "eavesdrop" set out in P.C. § 6-2601. Wiretapping is subject to imprisonment for up to five years.

496. OKLA. STAT. tit. 21, § 861 (1971).

497. *Id.* § 871.

498. OKLA. STAT. tit. 21, § 843 (Supp. 1975).

499. OKLA. STAT. tit. 21, § 1283 (1971).

500. *Id.* § 812.

501. KY. REV. STAT. ANN. §§ 500.010-534.060 (1975).