LEGISLATIVE HISTORY GUIDE TO NORTH DAKOTA CRIMINAL CODE REVISION (NDCC TITLE 12.1)

12-33: See letter to Senator Tim Mathern; July 20, 1988, by Jim Ganje

12.1-01-04: Section 109 of the Federal Criminal Code; March 2-3, 1972, Judiciary "B" Committee minutes, pp. 13, 15, 16, and July 20-21, 1972, pp. 44-46

12.1-01-04(06): See entry for 12.1-01-04; September 30-October 1, 1974, Judiciary "A" Committee minutes, pp. 16-17, 20-21

12.1-01-05: 1973 Judiciary standing committee minutes for Senate Bill No. 2046; see also 1973 Judiciary "B" Committee report, p. 93; October 26-27, 1972, Judiciary "B" Committee minutes, pp. 13-14; July 24-25, 1974, Judiciary "A" Committee minutes, p. 7

12.1-02-02: Section 302 of the Federal Criminal Code; March 2-3, 1972, Judiciary "B" Committee minutes, pp. 17-20; North Dakota Criminal Code Hornbook, p. 132

12.1-02-05: Section 305 of the Federal Criminal Code; March 2-3, 1972, Judiciary "B" Committee minutes, p. 21

12.1-05-05: Section 605 of the Federal Criminal Code; March 2-3, 1972, Judiciary "B" Committee minutes

12.1-05-08: Section 608 of the Federal Criminal Code; March 2-3, 1972, Judiciary "B" Committee minutes, pp. 45-46; North Dakota Criminal Code Hornbook, pp. 149-150

12.1-05-12: Section 619 of the Federal Criminal Code; March 2-3, 1972, Judiciary "B" Committee minutes, pp. 41-43

12.1-06-04: Section 1004 of the Federal Criminal Code; April 6-7, 1972, Judiciary "B" Committee minutes, pp. 9-10

12.1-07-03 and 04: February 15, 1974, Judiciary "A" Committee minutes, p. 22 (card #5), and September 30-October 1, 1974, pp. 15-16 (card #13)

12.1-08-01: Section 1301 of the Federal Criminal Code; April 6-7, 1972, Judiciary "B" Committee minutes, pp. 11-12, 15; July 25-26, 1974, Judiciary "A" Committee minutes, p. 8

12.1-08-02: Section 1302 of the Federal Criminal Code; April 6-7, 1972, Judiciary "B" Committee minutes, pp. 11-12, 15; September 30-October 1, 1974, Judiciary "A" Committee minutes, pp. 17, 21

12.1-08-03: Section 1303 of the Federal Criminal Code; April 6-7, 1972, Judiciary "B" Committee minutes, pp. 12-15; September 30-October 1, 1974, Judiciary "A" Committee minutes, pp. 17-21

12.1-08-06: Section 1306 of the Federal Criminal Code; April 6-7, 1972, Judiciary "B" Committee minutes, pp. 12, 13, 15

12.1-10-05: Section 1345 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 13-14, 16

12.1-11-01: Section 1351 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 20-23

12.1-11-02: Section 1352 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 20-23; July 25-26, 1974, Judiciary "A" Committee minutes, p. 8

12.1-11-03: Section 1354 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 20-23

12.1-12-01: Section 1361 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 23-24, 27-29

12.1-13-03: See 1960 North Dakota Century Code parent for Section 12-10-06 as well as 1971 supplement to North Dakota Century Code; September 20-21, 1971, Judiciary "B" Committee minutes, p. 16; September 21-22, 1972, Judiciary "B" Committee minutes, pp. 37, 39

12.1-14-01: May 11-12, 1972, Judiciary "A" Committee minutes, p. 42

12.1-14-03: Section 1531 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes; April 25-26, 1974, Judiciary "A" Committee minutes, pp. 2-3

12.1-14-04 and 05: Sections 1512-1515 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 40-43

12.1-15-02: Section 1561 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 47-48

12.1-15-04: Section 1563 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 45-46

12.1-16-02: North Dakota Criminal Code Hornbook, p. 162; Section 1602 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 49-51

12.1-17-01: Section 1611 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 51-56; 1975 Judiciary "A" Committee report, p. 125; September 30-October 1, 1974, Judiciary "A" Committee minutes, pp. 18, 23

12.1-17-02(3): Section 1612 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 51-56 (card #6)

12.1-17-03: Section 1613 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 52-56

12.1-17-04: Section 1614 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 52-56

12.1-17-05: Section 1616 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 52-56

12.1-17-07 and 08: Sections 1618 and 1619 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 53-56; July 25-26, 1974, Judiciary "A" Committee minutes, pp. 9-10

12.1-18-02: Section 1632 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 57-59; North Dakota Criminal Code Hornbook, p. 165

12.1-18-03: Section 1633 of the Federal Criminal Code; May 11-12, 1972, Judiciary "B" Committee minutes, pp. 58-59; North Dakota Criminal Code Hornbook, pp. 165-166

12.1-20-02: Section 1649 of the Federal Criminal Code; June 20-21, 1972, Judiciary "B" Committee minutes, pp. 15-22; July 20-21, 1972, p. 10-11; scan remaining minutes also

12.1-20-05: Section 1645 of the Federal Criminal Code; North Dakota Criminal Code Hornbook, pp. 219-220; Judiciary "B" Committee minutes: June 20-21, 1972, pp. 15, 16, 19, 20; July 20-21, 1972, pp. 11, 30; August 24-25, 1972, pp. 3, 7, 13, 14, 21

12.1-20-08: See 1960 North Dakota Century Code parent for Section 12-22-08 "Fornication;" June 20-21, 1972, Judiciary "B" Committee minutes, pp. 11, 15-22; July 20-21, 1972, Judiciary "B" Committee minutes, pp. 6, 8 (Section 1644), 10-12; August 24-25, 1972, Judiciary "B" Committee minutes, pp. 1, 4 (Section 1649), 8 (Section 1646), 10 (Section 1648), 12-17; September 21-22, 1972, Judiciary "B" Committee minutes, pp. 31-35; October 26-27, 1972, Judiciary "B" Committee minutes, p. 16 and NDCC Section 12-20-11-Alt.1, Section 12-20-08-Alt.2 and 3 on attachments; standard legislative history for 1973 SB 2049; North Dakota Criminal Code Hornbook, pp. 221-222.

12.1-20-10 (originally Section 12-22-12 from 1960 NDCC): Judiciary "B" Committee minutes: June 20-21, 1972, pp. 21-22; July 20-21, 1972, pp. 10-12; August 24-25, 1972, pp. 8, 14-15; North Dakota Criminal Code Hornbook, p. 222; 1987 Legislative Council's Judiciary Committee report, p. 132

12.1-20-11: North Dakota Criminal Code Hornbook, p. 224; November 22-23, 1971, Judiciary "B" Committee minutes, p. 17

12.1-22-02: Section 1711 of the Federal Criminal Code; North Dakota Criminal Code Hornbook, pp. 178-184; June 20-21, 1972, Judiciary "B" Committee minutes, pp. 24-26

12.1-22-03: Section 1712 of the Federal Criminal Code; June 20-21, 1972, Judiciary "B" Committee minutes, pp. 24-26

12.1-22-06: Section 1719 of the Federal Criminal Code; June 20-21, 1972, Judiciary "B" Committee minutes, pp. 23, 26

12.1-23-02: Section 1732 of the Federal Criminal Code; North Dakota Criminal Code Hornbook, pp. 184-188; June 20-21, 1972, Judiciary "B" Committee minutes, pp. 27-28, pp. 36, 40

12.1-23-03: Section 1733 of the Federal Criminal Code; North Dakota Criminal Code Hornbook, pp. 188-189; June 20-21, 1972, Judiciary "B" Committee minutes, pp. 36-37, 40

12.1-23-06: Section 1736 of the Federal Criminal Code; North Dakota Criminal Code Hornbook, pp. 193-194; June 20-21, 1972, Judiciary "B" Committee minutes, pp. 38, 40; September 30-October 1, 1974, Judiciary "A" Committee minutes, pp. 17, 19, 24

12.1-26-01: November 22-23, 1971, Judiciary "B" Committee minutes, pp. 21-26, and July 20-21, 1972, pp. 38-42

12.1-28-02: Sections 1831 and 1832 of the Federal Criminal Code; July 20-21, 1972, Judiciary "B" Committee minutes, pp. 34-42

12.1-31-01: Section 1861 of the Federal Criminal Code; July 20-21, 1972, Judiciary "B" Committee minutes; North Dakota Criminal Code Hornbook, p. 207

12.1-31-03: October 26-27, 1972, Judiciary "B" Committee minutes, pp. 14-15 (it was 12-31-03)

12.1-32-01(7): In 1975 section was numbered (6), August 30-31, 1973, Judiciary "A" Committee minutes, p. 1-4

12.1-32-02(1)(c): Intermittent Imprisonment; start with NDCC Sections 12-06-30, 31, and 32. (1957 SB 62 - no history); see January 24-25, 1972, Judiciary "B" Committee minutes, pp. 1, 12, 14-15; August 24-25, 1972, Judiciary "B" minutes, beginning with pp. 26-27, 33, 41, discussion on p. 51

12.1-32-02(2): September 21-22, 1972, Judiciary "B" Committee minutes; see also Section 3204 of the Federal Criminal Code. Use ABA Standards - Comparative Analysis to North Dakota Law

12.1-32-06: Section 3102 of the Federal Criminal Code; August 24-25, 1972, Judiciary "B" Committee minutes, pp. 38, 52, 53, 62. Also use Hornbook B Probation

12.1-32-07: Section 3103 of the Federal Criminal Code; August 24-25, 1972, Judiciary "B" Committee minutes, pp. 38-40, 51-62, and September 21-22, 1972, pp. 5-7, 18-23. Also pp. 123-126 of North Dakota Criminal Code Hornbook

12.1-32-08: August 24-25, 1972, Judiciary "B" Committee minutes, pp. 54-56; September 21-22, 1972, Judiciary "B" Committee minutes, pp. 7-8, 18, 20-22, 24; July 25-26, 1974, Judiciary "A" Committee minutes, p. 11

12.1-32-09(e): August 24-25, 1972, Judiciary "B" Committee minutes, pp. 26, 28, 29, 51, 53, 57, 58; September 21-22, 1972, Judiciary "B" Committee, pp. 1, 9, 23; North Dakota Criminal Code Hornbook, pp. 127-129; see (e) of the Federal Criminal Code Section 3202

12.1-33-02: 1973 Judiciary "B" Legislative Council report, p. 92; August 24-25, 1972, Judiciary "B" Committee minutes, pp. 31, 59

14-07-15: March 28-29, 1974, Judiciary "A" Committee minutes, pp. 28-29

14-09-22: March 28-29, 1974, Judiciary "A" Committee minutes, p. 29

19-03.1-23: May 23-24, 1974, Judiciary "A" Committee minutes, pp. 30-34

19-03.1-30: May 23-24, 1974, Judiciary "A" Committee minutes, pp. 35-36

29-03-01: Was Section 12-06-03 (no specific Judiciary "B" Committee minutes found)

29-03-01.1: October 26-27, 1972, Judiciary "B" Committee minutes, p. 12 (it was 12-06-02)

35-27-08: March 28-29, 1974, Judiciary "A" Committee minutes, pp. 13-14

36-09-23: March 28-29, 1974, Judiciary "A" Committee minutes, pp. 37-38

51-09-02: October 25-26, 1973, Judiciary "A" Committee minutes, p. 17

JUNE 28, 1971

JUDICIARY "B"

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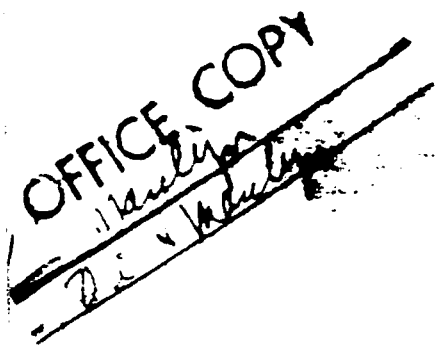

Tentative Agenda

COMMITTEE ON JUDICIARY "B"

Meeting of Monday, June 28, 1971
Committee Room G-2, State Capitol
Bismarck, North Dakota

10:00 a.m.	Call to Order Roll Call
10:15 a.m.	Introductory remarks
10:30 a.m.	Presentation by Mr. Vance Hill regarding progress under his consulting agreement with the Law Enforcement Council
11:10 a.m.	Consideration of Committee's responsibilities under House Concurrent Resolution No. 3050 - determination of method of procedure - presentation of staff memo on classification of offenses and penalties
12:00 noon	Luncheon recess

* *

1:15 p.m.	Reconvene - continue discussion of 11:10 a.m. item
3:30 p.m.	Adjournment

NORTH DAKOTA LEGISLATIVE COUNCIL

MINUTES

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Monday, June 28, 1971
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 10:00 a.m. on Monday, June 28, 1971, in Committee Room G-2 of the State Capitol in Bismarck, North Dakota.

Members present:	Senators Freed, Page Representatives Atkinson, Henry, Hilleboe, Murphy, Stone
Advisory members present:	Judge W. C. Lynch, Mr. Rodney Webb, Mr. Albert A. Wolf
Members absent:	Representative Kieffer
Advisory members absent:	Judge Ralph Erickstad, Judge Kirk Smith, Mr. Harry Pearce, Mr. Larry Kraft
Also present:	Mr. C. Emerson Murry, Mr. Vance Hill, Representative Bryce Streibel

The Chairman welcomed the members of the Committee and pointed out that, because of the nature of the study, the Legislative Council's Chairman had authorized the addition of advisory members to the Committee consisting of judges and practicing lawyers.

The Chairman then called on Mr. Vance Hill who discussed briefly the revision project which he is carrying out under a Law Enforcement Council grant. Mr. Hill noted that he intends to work in close cooperation with the Committee on Judiciary "B".

The Committee then discussed sentencing theory. Judge Lynch noted that in North Dakota the court is responsible for sentencing, and that before a sentence is pronounced, a presentence report is generally studied. After sentencing, the judge loses jurisdiction of the defendant and jurisdiction is vested in the Board of Parole. Mr. Albert Wolf pointed out that the proper concept of sentencing should be to sentence the man, not the crime.

The Committee then discussed its responsibilities under House Concurrent Resolution No. 3050, and the relationship of the Committee to Mr. Vance Hill. It was noted that Mr. Hill desires to work with the Committee, but also desires to retain a certain degree of independence regarding the submission of separate drafts in instances where his ideas vary from those of the Committee as a whole.

The Chairman called on a member of the Council staff to read House Concurrent Resolution No. 3050. Following the reading, the Chairman explained that the Committee's responsibility does not include matters related to criminal procedure.

The Chairman called on Mr. Vance Hill for an outline of the methodology he intends to use in working on criminal code revision. Mr. Hill explained that the goal of his revision project is to secure clear and concise laws and penalties for violations which combine the ideals and practices of the majority of North Dakotans in the 1970's. He noted that this goal could be reached by pursuing the following objectives:

1. By the consolidation of related code sections;

2. By the standardization, simplification, and reduction of existing language;

3. By the deletion of obsolete and unnecessary provisions;

4. By the elimination of loopholes, ambiguities, and conflicts;

5. By the creation of standardized, flexible, and equitable sentences; and

6. By the creation of model correctional statutes.

The Chairman then called on the staff of the Legislative Council to read a background memorandum, attached hereto as Appendix "A", regarding classification of sentences. Representative Murphy, noting that many crimes can be both felonies and misdemeanors, inquired why it is necessary to classify them at all. Mr. Murry stated that, in addition to the need for a rational method of assigning penalties to present and future criminal statutes, classification is necessary in order to allow certain other civil disability to provisions to take effect, if those civil disability provisions were to be retained. Mr. Wolf stated that classification is also necessary for purposes of extradition, since extradition is generally allowed for felonies, but not for misdemeanors.

The Committee then discussed the idea of mandatory minimum sentences. Mr. Hill stated that the mandatory minimum sentence theory was probably not a valid rehabilitative tool. Mr. Wolf agreed with Mr. Hill's opposition to the mandatory minimum sentence and noted that there are three postulates which must be taken into account in the sentencing procedure: First, the court should sentence the man, not the crime; second, it should be noted that the fear of incarceration is a greater deterrent than incarceration itself; and third, it should be noted that the deferred imposition of sentence procedure is a valuable correctional tool.

Representative Henry inquired as to the Committee's thoughts regarding the use of restitution as part of the penalty structure, especially in the cases of crimes such as vandalism. Mr. Webb stated that the theory of restitution should be made a part of the Committee's study.

The Committee discussed the deferred imposition of sentence procedure, and Judge Lynch explained the procedure. He noted that 87 percent of those persons who had received deferred impositions of sentencing during the last 10 years did not commit further offenses.

Judge Lynch stated the Committee has a tremendous job before it and that goals should be set regarding where law enforcement emphasis should be put on the types of crimes; i.e., should law enforcement emphasis be placed on traffic violations or on crimes of violence, etc.

The Committee recessed for lunch at 12:05 p.m. and reconvened at 1:15 p.m.

* *

The Chairman called on the staff for an explanation of the possible methods of attacking the code revision project. The Committee Counsel noted there are two basic ways of going at the revision: Either starting from the beginning and working through the present criminal code and other code sections creating crimes revising them as you go along, or else using a model criminal code which is already developed as a starting point. Mr. Webb noted that the North Dakota criminal law has more precedent behind it than any other body of state law in North Dakota. He stated that he favored housecleaning and consolidation of the present criminal statutes, including a long look at all sections of the Century Code creating and defining crimes.

Representative Hilleboe stated that the Committee should first classify penalties and then go through the printout of the code sections creating and defining crimes on a section-by-section basis. Representative Murphy felt that the resulting criminal code should be as short and concise as possible.

Mr. Murry noted that the Committee should probably start with Title 12, the present North Dakota Crimes Code, work through it, and accomplish three things: First, determine if a particular offense should remain as a statutory offense; second, if a particular offense is to remain as such, to determine its seriousness and where penalties should be set; and third, whether a consolidation of that offense with other related offenses can take place.

Mr. Hill noted that perhaps the Committee should give serious consideration to the handling of a majority of traffic offenses outside of the criminal code.

The Committee further discussed the classification of offenses and penalties, and Mr. Hill suggested that perhaps the Bismarck members of the Committee should be designated as a subcommittee to classify offenses and penalties.

IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY REPRESENTATIVE HENRY, AND UNANIMOUSLY CARRIED that a classification of offenses and penalties is to be prepared by the Committee staff, with the help of the Bismarck membership of the Committee, and that the classification is to be mailed to the membership of the Committee prior to the next meeting.

Mr. Rodney Webb noted that the Committee is going to have to take under consideration the problem of environmental pollution and criminal offenses involved therewith; the problems of whether or not insanity and alcoholism should be considered defenses to criminal prosecution; the problem of making restitution to victims of crime; and whether or not a fund should be created for making reparation to victims of crime.

Representative Murphy inquired as to whether the work of the Constitutional Convention would affect the work of this Committee. The Chairman replied that since it was relatively foreseeable that the Constitutional Convention would not propose definitions of crimes in any new constitutional revision, it was relatively unlikely that the work of the Convention would affect the Committee's work.

Mr. Murry discussed the fact that the Council staff had made application for a grant of federal funds from the Law Enforcement Assistance Administration through the North Dakota Combined Law Enforcement Council.

Representative Henry inquired as to whether it wouldn't be necess to draft numerous bills to carry out the revision. Mr. Murry stated it would probably not require numerous bills. He envisioned the Committee' efforts resulting in one major revision bill and several bills, dealing with controversial matters, which would amend the major revision bill. The procedure would be somewhat similar to that followed by the interim Committee on Education during the 1969-1971 biennium when that Committee carried out a revision of the elementary and secondary education statutes.

Representative Hilleboe noted that the decisions of the Supreme Court of the United States may, in many cases, invalidate many of the statutes dealing with public morals, and that the Committee would have to take note of these decisions in its considerations of that type of criminal statute.

Mr. Murry noted, in regard to the Committee's mode of procedure, that it would probably be best not to take any outside testimony until the Committee had reached the second draft of its proposed revision.

It was the consensus of the Committee that the staff of the Legislative Council cause 15 copies of Title 12 of the North Dakota Century Code to be printed out, using the statutory search and retrieval system, for use as working papers by the Committee.

The Chairman urged the members of the Committee to be well-inform regarding the present statutory crimes in North Dakota and other areas of criminal code revision procedure, so that the Committee would be ready

to be fully engaged in the process by the time of the next meeting. The Committee discussed the time for the next meeting, and it was noted it should probably be held in the early fall and that it would very likely be a two-day meeting.

The Chairman appointed Representative Myron Atkinson as the Chairman of the subcommittee appointed to prepare a classification of offenses and penalties.

Without objection, the meeting was declared adjourned at 3:40 p.m. on Monday, June 28, 1971.

C. Emerson Murry
Director

John A. Graham
Assistant Director

Appendix "A"

Prepared by the staff of the
Legislative Council for the
Committee on Judiciary "B"
June 1971

BACKGROUND MEMORANDUM ON CLASSIFICATION OF CRIMINAL OFFENSES

In North Dakota, classification of criminal offenses commences with the State Constitution. Section 23 of the Constitution provides that malicious interference or hindrance which prevents any citizen from obtaining employment or enjoying employment already obtained is a misdemeanor.

Section 48 of the Constitution provides that each House of the Legislature shall have the power to punish for contempt, but that no imprisonment by either House for contempt shall continue beyond 30 days.

Section 196 of the Constitution provides that the Governor and certain other state officials can be impeached for habitual drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office. Section 197 of the Constitution provides that all officers not liable to impeachment shall be subject to removal for misconduct, malfeasance, crime, or misdemeanor in office, or for habitual drunkenness or gross incompetence.

Section 6 of the Constitution, dealing with bail for criminal offenses, refers to "capital offenses" which need not be bailable where proof of commission "is evident or the presumption great".

Section 8 of the Constitution refers to the term "felony" and provides that no person shall be proceeded against for a felony except by indictment, until another procedure is provided by law.

Section 17 of the Constitution provides that "neither slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this state".

The statutory classification of crimes in North Dakota is contained in section 12-01-07 of the Century Code which reads as follows:

> "Crimes or public offenses are either felonies or misdemeanors. A felony is a crime which is or may be punishable with death or imprisonment in the penitentiary. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the penitentiary also is punishable by fine or imprisonment in a county jail, in the discretion of the court or jury, it is, except when otherwise especially declared by law to be a felony, a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary."

Section 12-01-12 of the Century Code provides that Title 12, crimes and punishments, does not affect any power conferred by law upon any public body, tribunal, or officer to impose or inflict punishment for a contempt.

In addition to the classification of crimes provided by section 12-01-07, sections 12-06-10 and 12-06-14 provide general punishments for felonies and misdemeanors. Section 12-06-10 provides that where an offense is declared to be a felony, but with no specific penalty attached, the offense is punishable by a fine of not more than $1,000, by imprisonment in the penitentiary for not less than one nor more than five years, or by both fine and imprisonment.

Section 12-06-14 provides that unless a specific penalty is prescribed, a misdemeanor is to be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than $500, or by both such fine and imprisonment.

The lack of a comprehensive statutory classification of crimes and penalties in North Dakota has resulted in the scattering throughout the Century Code of definitions of crimes and prescriptions of penalties inconsistent with the general definitions contained in Title 12. The gravity of the prescribed penalties are also inconsistent in comparison to the relative gravity of various offenses.

For instance, section 65-05-31 (Workmen's Compensation Title) provides that any person knowingly making a false affidavit in connection with a compensation claim is guilty of perjury, and is punishable by a fine of not more than $2,000, or by imprisonment in the penitentiary for not more than one year, or by both such fine and imprisonment. Thus, the statute prescribed incarceration according to the maximum prescribed for a misdemeanor, but provides for a fine exceeding the maximum provided as general punishment for a felony. The perjury prescribed by section 65-05-31 would probably be defined as a felony under section 12-01-07 because the offender is subject to imprisonment in the penitentiary. But it seems inconsistent that the imprisonment prescribed is less than that contained in the general statute, while the fine prescribed is double that contained in the general statute.

Section 57-33.1-12 deals with willful failure to comply with the Century Code chapter dealing with taxation of cooperative electrical generating plants. It provides that the offender is guilty of a misdemeanor punishable by a fine of not more than $5,000, or by imprisonment in a county jail for not more than one year, or by both such fine and imprisonment. Thus, we have any offense specifically declared to be a misdemeanor. An offender is subject to the maximum misdemeanor imprisonment under the general misdemeanor statutes (section 12-06-14). But he is also subject to a fine that is five times the maximum fine provided in the general statute dealing with punishment for felony (section 12-06-10).

A person who deposits dead animals, offal, or other refuse which is offensive to the senses or deleterious to health on or near any lake or stream in this State is guilty of a misdemeanor and is punishable by a fine of not less than $20 nor more than $100 (NDCC section 61-01-13). A person who receives payment of any costs, fees,

bond, fine, or penalty imposed by law or ordinance and fails to execute a written receipt in triplicate therefor, and delivers the original to the person paying the same, delivers a copy to the municipality or department, and retains one copy in his files, is guilty of a misdemeanor. Since no specific penalty is attached to the latter offense, the offender is subject, pursuant to section 12-06-14, to imprisonment in the county jail up to one year, to a fine of up to $500, or to both such fine and imprisonment.

Classification of public offenses into felonies and misdemeanors has other effects in addition to providing a basis for a logical determination of the seriousness of a particular criminal act. For instance, section 29-26-04 provides that if a defendant is convicted of a felony, he must be personally present when judgment is pronounced upon him, but need not be present when judgment is pronounced upon him following conviction for a misdemeanor.

A further example is laid out in the case of In Re Stricker, 62 ND 215, 242 NW 912 (1932). In that case the defendant Stricker was charged in a county court with increased jurisdiction with committing the crime of aggravated assault and battery which was punishable by a fine of not more than $1,000, or by imprisonment in the county jail or penitentiary for not more than one year, or by both such fine and imprisonment.

The defendant, Stricker, entered a plea of guilty and was sentenced to serve a term of 1 year in jail and pay a fine of $500.

The defendant petitioned for a writ of habeas corpus on the basis that the county court with increased jurisdiction did not have jurisdiction of the offense. The Supreme Court of North Dakota agreed, using the following rationale.

Section 111 of the Constitution gives county courts with increased jurisdiction concurrent jurisdiction with the district courts over all criminal actions below the grade of felony. The statutory definition of a felony (which corresponded, in 1932, to the present section 12-01-07 of the Century Code) provided that a felony is a crime which may be punishable with death or imprisonment in the penitentiary, and that where an alternative was provided for imprisonment in a county jail, the crime may be considered a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary.

The court reasoned that since the determination as to whether the particular crime charged was a misdemeanor could only be made after judgment, the county court with increased jurisdiction did not have original jurisdiction since the crime charged had the possibility of being punished by imprisonment in the penitentiary, and therefore was a felony.

CLASSIFICATION OF CRIMES AND PENALTIES IN OTHER SELECTED CRIMINAL CODES

The recently enacted Colorado Criminal Code (Senate Bill No. 262, 1971 Session of the Colorado Legislature) classified offenses into ten categories. Five classes of felonies, three classes of misdemeanors, and two classes of petty offenses.

The five classes of felonies: First class, a minimum sentence of life imprisonment and a maximum sentence of death; second class, a minimum sentence of ten years imprisonment in the State Penitentiary and a maximum sentence of 50 years imprisonment in the State Penitentiary; third class, a minimum sentence of five years imprisonment in the State Penitentiary and a maximum sentence of 40 years imprisonment in the State Penitentiary; fourth class, a minimum sentence of one year imprisonment, or a $2,000 fine, or both, and a maximum sentence of 10 years imprisonment, or a $30,000 fine, or both; and fifth class, a minimum sentence of one year imprisonment, or a $1,000 fine, and a maximum sentence of five years imprisonment, or a $15,000 fine, or both.

The classification of misdemeanors: First class, a minimum sentence of six months imprisonment, or a $500 fine, or both, and a maximum sentence of 24 months imprisonment, or a $5,000 fine, or both; second class, a minimum sentence of three months imprisonment, or a $250 fine, or both, and a maximum sentence of 12 months imprisonment, or a $1,000 fine, or both; and third class, a minimum sentence of a $50 fine, and a maximum sentence of six months imprisonment, or a $750 fine, or both.

The new Colorado law provides that no term of imprisonment for conviction of a misdemeanor shall be served in the State Penitentiary unless it is served concurrently with a term for conviction of a felony.

The Colorado petty offense classification statute (40-1-107) reads as follows: "A violation of a statute of this state is a 'petty offense' if specifically classified as a class one or class two petty offense. The penalty for commission of a class one petty offense is a fine of not more than $500 or imprisonment for not more than six months other than in the State Penitentiary, or both. The penalty for commission of a class two petty offense is a fine specified in the section defining the offense. The penalty assessment procedure of section 40-1-305 is available for the payment of fines in class two petty offense cases."

Some examples of classifications of specific crimes under the Colorado classification system: First degree murder is a class one felony; manslaughter is a class four felony, as is vehicular homicide; first degree assault is a class three felony; second degree kidnapping

(kidnapping without intent to hold for ransom) is a class four felony and false imprisonment is a class two misdemeanor. Issuance of a bad check is a class two misdemeanor if the check is less than $50, and a class five felony if the check was for $50 or more,or if the offender is convicted of issuing two or more bad checks within a 30-day period in the State of Colorado which total more than $50 in the aggregate. It is a class three misdemeanor for a sheepherder to abandon sheep without giving notice to the owner.

The 1963 Minnesota Criminal Code classifies crimes as follows (see Minnesota Statutes Annotated, section 609.02): A felony is a crime for which a sentence of imprisonment for more than one year may be imposed. A misdemeanor is a crime for which a sentence of not more than 90 days, or a fine of not more than $300, or both, may be imposed. A gross misdemeanor is any other crime which is not a felony or a misdemeanor.

Section 609.03, MSA, provides that if a crime is a felony, and the punishment is not otherwise provided by law, a person may be sentenced to imprisonment for not more than five years, or fined not more than $5,000, or both. If a crime is a gross misdemeanor, and the punishment is not otherwise provided by statute, the offender may be sentenced to imprisonment for not more than one year, or fined not more than $1,000, or both. If the crime is a misdemeanor, the person may be sentenced to not more than 90 days imprisonment, fined not more than $300, or both. That section also provides in subdivision 4: "If the crime is other than a misdemeanor and a fine is imposed but the amount is not specified, (the person may be sentenced) to payment of a fine of not more than $500, or to imprisonment for a specified term of not more than six months if the fine is not paid."

The Model Penal Code of the American Law Institute classifies criminal offenses as follows: Felonies are classified into three degrees, and a felony is of the first or second degree when it is so designated by the Code. If a crime is declared to be a felony, without a specification of degree, it is a felony of the third degree. The Code also provides that if any state statute, other than the Penal Code, defines a crime as a felony, it shall constitute "for the purpose of sentence" a felony of the third degree. The other two classifications of criminal offenses contained in the Model Penal Code are "misdemeanors" and "petty misdemeanors".

Classification of punishments for the various classes of criminal offenses under the Code are broken down into classifications of fines and of sentences of imprisonment.

The fine classification: Maximum fine of $10,000 for conviction of a first or second degree felony; a maximum fine of $5,000 for conviction of a third degree felony; a maximum fine of $1,000 for conviction of a misdemeanor; a maximum fine of $500 for conviction of a petty misdemeanor; any higher amount equal to double the pecuniary gain derived from the offense by the offender; or any higher amounts specifically authorized by statute.

Classification of sentences of imprisonment for felony under the Code: First degree felony, a minimum term fixed by the court at not less than one nor more than ten years, and a maximum term of life imprisonment; second degree felony, a minimum term fixed by the court at not less than one nor more than three years, and a maximum term of ten years; and third degree felony, a minimum term fixed by the court of not less than one nor more than two years, and a maximum term of five years.

In the case of a misdemeanor, the minimum term to be fixed by the court is not more than one year, and the maximum is not more than three years. For a petty misdemeanor, the minimum term to be fixed by the court is not more than six months, and the maximum term is not more than two years.

The Model Penal Code also sets out extended terms which may be assessed as punishment where the offender is an habitual criminal, or a "dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public", or a professional criminal.

The Code also provides that a court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless the defendant has derived a pecuniary gain from the crime, or the court is of the opinion that a fine is especially adapted to deterrence of the crime involved or to correction of the offender. The court is directed by the Code not to sentence a defendant to pay a fine unless: The defendant is or will be able to pay the fine, and the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

The following two quotations seem to be an apt summary of the need for a study of the desirability of adopting a classification of criminal offenses:

> "One of the major failures of the present Federal Criminal Code (and the same is true of most of the State Codes across the country) is the utter inconsistency and irrationality of its penalty structure. The major cause is undoubtedly the fact that criminal legislation, like most, is the product of Ad Hoc responses to particular situations extending over an enormous time period. Statutes are passed at one legislative session without a clear picture of the manner in which offenses of similar gravity have been dealt with in the past. There is little attempt to produce an integrated whole." (Working papers of the National Commission on Reform of Federal Criminal Laws, Volume 2, page 1246.)
>
> "The basic function of the legislature should be to provide a wide enough range of alternatives to permit a sentence which is appropriate for each individual case. As a corollary, the

legislature should not attempt to determine the specific sente which should be imposed on the offender irrespective of the circumstances. It is also destructive if the authorized sentences are not consistent with each other, and if they represent too sophisticated an attempt to refine distinctions in advance. It is preferable for there to be a small number of sentencing categories, each with its own set of alternatives, with each offense assigned to a particular category. . . ." (American Bar Association Project on Minimum Standards for Criminal Justice - Standards Relating to Sentencing Alternatives and Procedures, page 4 of the introduction.)

Forty-Second Legislative Assembly, State of North Dakota begun and held at the Capitol in the City of Bismarck, on Tuesday, the fifth day of January, one thousand nine hundred and seventy-one.

HOUSE CONCURRENT RESOLUTION NO. 3050
(Atkinson, Hilleboe)

A concurrent resolution directing the Legislative Council to carry out a revision of the substantive criminal laws of North Dakota.

WHEREAS, the criminal justice provisions and statutes of the State of North Dakota, and of the other States of the Union, are not adequately serving the needs of society in the areas of protection, the rehabilitation of convicted persons, or the prevention of criminal activity; and

WHEREAS, the North Dakota Judicial Council is in the process of revising the criminal procedures of this State, and, upon completion of the study, will offer for promulgation by the North Dakota Supreme Court a comprehensive set of rules of criminal procedure; and

WHEREAS, North Dakota's present substantive criminal statutes are the product of piecemeal legislation over a substantial period of time; and

WHEREAS, disparities and inequities in sentences and sentencing procedures are among the chief causes of the growing disenchantment with both the national and state criminal justice systems; and

WHEREAS, the system of criminal justice must be viewed as a comprehensive whole embracing every phase from crime prevention through correction and rehabilitation; and

WHEREAS, a revision of the substantive criminal laws of this State, with emphasis on classification of penalties, elimination of criminal provisions having little or no social utility, and consideration of substituting civil for criminal penalties when feasible, would, in conjunction with the pending revision of the rules of criminal procedure, be a large step toward development of a comprehensive criminal justice system for North Dakota;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NORTH DAKOTA, THE SENATE CONCURRING THEREIN:

That the Legislative Council is hereby directed to

review and revise the substantive criminal statutes of the State of North Dakota, or so much thereof as may reasonably be revised during the 1971-1972 legislative interim, with special emphasis on study and revision of the penalty structure established by present law, including the classification of penalties and the elimination of duplicate penalties. The Legislative Council shall also identify and prepare legislation to remove unused and archaic statutes, reconcile ambiguities and conflicting laws, eliminate surplus language, and take such other steps as may be necessary to prepare a substantively and formally complete codification, or so much thereof as may be accomplished during the 1971-1972 legislative interim; and

BE IT FURTHER RESOLVED, that the Legislative Council may, by itself or in conjunction with the Combined Law Enforcement Council, make application for and receive grants from an appropriate federal agency or agencies, and may expend any funds received for the purposes outlined in this resolution. The Legislative Council shall report its recommendations, accompanied by suitable legislation to accomplish the objectives of this study, to the Forty-third Legislative Assembly.

Tentative Agenda

COMMITTEE ON JUDICIARY "B"

September 20-21, 1971
Room G-2, State Capitol
Bismarck, North Dakota

Monday, September 20:

9:30 a.m.	Call to order Roll call Minutes of previous meeting
9:45 a.m.	Consideration of Subcommittee Penalty Classification Plan and adoption of a penalty classification plan
11:30 a.m.	Section-by-section analysis of Title 12 of the North Dakota Century Code, commencing with Chapter 12-01
12:00 noon	Luncheon recess
	* *
1:15 p.m.	Reconvene - continue section-by-section analysis
4:30 p.m.	Recess until Tuesday

Tuesday, September 21:

9:00 a.m.	Continue section-by-section analysis
12:00 noon	Luncheon recess
	* *
1:00 p.m.	Reconvene - continue section-by-section analysis
3:30 p.m.	Adjournment

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Monday and Tuesday, September 20-21, 1971
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:40 a.m. on Monday, September 20, 1971, in Committee Room G-2 of the State Capitol in Bismarck, North Dakota.

Members present:	Senators Freed, Page Representatives Atkinson, Hilleboe, Kieffer, Murphy, Stone
Advisory members present:	Honorable Harry Pearce, Honorable Kirk Smith, Mr. Larry Kraft, Mr. Rodney Webb, Mr. Albert Wolf
Members absent:	Senator Longmire
Advisory members absent:	Honorable W. C. Lynch, Honorable Ralph Erickstad
Also present:	Mr. C. Emerson Murry, Mr. Vance Hill, Mr. Charles Travis, and Representative Earl Rundle

The Chairman called on the Committee Counsel to read the minutes of the meeting of June 28, 1971. Following the reading of the minutes, IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY SENATOR PAGE, AND UNANIMOUSLY CARRIED that the minutes of the meeting of June 28, 1971, be approved as read.

IT WAS MOVED BY SENATOR PAGE, SECONDED BY REPRESENTATIVE STONE, AND UNANIMOUSLY CARRIED that the Committee give recognition to the services of Representative Howard Henry, recently deceased. Representative Henry had attended the first meeting of the Committee, and had shown himself an intelligent contributor to the deliberations of the Committee, as well as a dedicated and sincere legislator.

The Committee Counsel introduced Mr. Charles Travis, Criminal Rules Revisor for the special Judicial Council Committee on Rules of Criminal Procedure.

The Chairman called on Representative Myron Atkinson, Chairman of the temporary Subcommittee on Penalty Classification, to explain the plan proposed by the Subcommittee. A copy of the plan is attached hereto as Appendix "A".

Representative Atkinson noted the need for a classification of penalties as the starting point for a complete revision of the Code, and as a reference point for future legislative action creating or redefining crimes. He stated the procedure used in arriving at the proposed plan was to consider the classifications used in the most recently adopted State Criminal Codes, in the Model Penal Code, and the proposed Federal Criminal Code. The idea of eliminating the categorization of crimes into felonies and misdemeanors arose from the Subcommittee and was not drawn from the Criminal Code of any other jurisdiction.

Representative Atkinson stated it was the hope of the Subcommittee that the removal of the distinction between felonies and misdemeanors would aid in the rehabilitation of criminal offenders, and would make the criminal law more readily comprehensible to the layman. He noted that where the distinction was necessary for reasons other than sentencing, such as in the determination of the jurisdiction of a court, etc., a separate section of the Code could be inserted delineating the necessary distinctions.

The Committee discussed the classification plan further, and it was noted that the plan provides for a "mandatory parole component" which would come into play in every situation where an offender serves out his total sentence of incarceration. It was suggested that perhaps it would be more desirable to have a mandatory parole component regardless of whether the offender had served his total sentence of incarceration. The Chairman noted that the concept of a mandatory parole component would be discussed again at length by the Committee, but that the Committee should adopt a classification plan temporarily, in order that it might begin to consider the substantive criminal sections of Title 12.

IT WAS MOVED BY REPRESENTATIVE ATKINSON AND SECONDED BY REPRESENTATIVE STONE that the Committee temporarily adopt the classification plan submitted by the temporary Subcommittee on Classification (see Appendix "A").

Mr. Rodney Webb stated that the felony-misdemeanor distinction is of importance in many instances within the field of criminal law; for instance, in the area of arrests without warrants, rehabilitation of juveniles, etc.

Representative Murphy stated he felt that a law enforcement officer should not have to rely on his personal knowledge of the distinction between felonies and misdemeanors in order to arrest without a warrant. He stated that generally he favored more flexibility of action for judges, parole boards, and law enforcement officers.

Senator Page pointed out that it was now probably very difficult for law enforcement officers to make a distinction between what is a felony and what is a misdemeanor, and therefore they are continually running the risk of making an arrest which is beyond their statutory power.

Mr. Vance Hill indicated to the Committee that the proposed classification plan had been mailed to Messrs. Paul Kalin and Sol Rubin of the National Conference on Crime and Delinquency for their comments. Mr. Hill noted that Mr. Rubin would be available to discuss the Committee's work at some future meeting, and would do so at no charge if his transportation to and from Bismarck were paid.

Following this discussion, THE MOTION MADE BY REPRESENTATIVE ATKINSON TO TEMPORARILY ADOPT THE CLASSIFICATION PLAN PUT FORTH BY THE SUBCOMMITTEE ON CLASSIFICATION WAS UNANIMOUSLY CARRIED.

The Committee then discussed the method of procedure to be used in commencing its revisory work. The Committee Counsel noted that the Committee could go through Title 12 on a section-by-section basis making the determination whether each section should constitute a criminal offense, and if so, what penalty classification it should be placed in. Mr. Kraft commented that while he was in agreement with the procedure whereby the Committee determines whether a particular type of action should be a criminal offense, he thought it would be difficult for the Committee to place particular criminal offenses in the sentencing classification plan without determining the goal to be reached by the possible sentencing alternatives.

Representative Kieffer stated perhaps the Committee should first go through the sections of Title 12 to determine whether a particular action therein stated should remain a criminal offense, then go through the sections again, and at that time assign the remaining offenses within the penalty classification plan.

Representative Hilleboe noted that during its deliberations the Committee is going to come across the minor-adult distinction many times, and that it is going to have to determine at what age a person should be responsible for criminal acts solely as an adult; solely as a juvenile; or alternatively as an adult or a juvenile.

The Committee commenced a section-by-section consideration of the sections in Title 12 which define and prescribe penalties for criminal action.

The first section discussed was Section 12-01-14, dealing with the requirement for giving of receipts upon payment of a criminal fine. It was the consensus of the Committee that Section 12-01-14 be eliminated and that the action defined therein no longer be criminal.

Mr. Hill noted the possibility of consolidating numerous present offenses dealing with essentially the same topic into one general statute covering that topic. He gave as an example the 14 sections in Title 12 dealing with what is essentially the crime of bribery. He distributed a draft of a single section which would encompass the present 14 sections dealing with bribery. Note: Mr. Hill's sample draft on this subject is attached to these minutes as Appendix "B".

The Committee then discussed Section 12-03-01 which defines the crime of conspiracy and declares it a misdemeanor. The Legislative Council staff recommendation was that the section be entirely revised, and that conspiracy be classified as a Class D offense. Judge Harry Pearce noted that the penalty for conspiring to commit a particular crime should be arrived at by reference to the penalty for the substantive crime concerning which the defendants were conspiring.

After further discussion concerning the crime of conspiracy, the Committee recessed for lunch at 12:10 p.m. and reconvened at 1:30 p.m.

* *

Upon reconvening, the Chairman stated the Committee would proceed by considering those sections in Title 12 (Chapter 12-01 through 12-11) which the Legislative Council staff had recommended for elimination, or elimination and consolidation.

The Committee then discussed Section 12-03-02 which makes it a felony to conspire to treason against the State while the conspirators are without the State. The staff recommendation was that this section be eliminated, and that the general conspiracy statute be relied on to prosecute a person for the act formerly encompassed by this section. The Committee consensus was that the section be eliminated.

The Committee next discussed Section 12-07-07 which makes it a misdemeanor to carry, exhibit, or display a flag which is not a flag of the United States, North Dakota, or a friendly foreign nation. The staff recommendation was that this crime be eliminated, and the Committee consensus was in concurrence.

Section 12-07-08 prohibits the carrying or exhibiting of a red or black flag, or other banner having an inscription opposed or antagonistic to the existing government of the United States, or of the State of North Dakota. The staff recommendation was that the section be eliminated and that the action defined therein no longer be criminal. The Committee Counsel noted that so far as the section could be construed to allow state prosecution for "sedition" against the Federal Government, it would probably be unlawful, as invading an area preempted by act of Congress. See People v. Lynch, 11 Johns. (N.Y.) 553 (1814); and Pennsylvania v. Nelson, 350 US 497 (1955).

The Chairman noted that since Sections 12-07-07 and 12-07-08 were to be eliminated, Section 12-07-09, which provides the penalty for violation for either of the two preceding sections, would also have to be eliminated.

The Committee then discussed Section 12-08-16 which prohibits the giving or offering of bribes to "public officers". It was the staff recommendation that this section be eliminated, and the offense described therein be consolidated into a general statute prohibiting bribery of any public official. The Committee consensus was that Section 12-08-16 should be eliminated at this point, and the offense therein stated be consolidated with other statutes dealing with the crime of bribery.

The Committee discussed Section 12-08-18 which prohibits certain action by the Governor, including the receipt of bribes. It was noted that much of Section 12-08-18 was a restatement of Section 81 of the North Dakota Constitution. The consensus of the Committee was that, to the extent that the section is a restatement, it be deleted at this point and provision be made in the new Code for a penalty for violations of Section 81.

Section 12-08-20 makes it a misdemeanor for anyone to prevent an "executive officer" from performing his duty. It was the Committee consensus that this section be eliminated, and that its provisions be consolidated into a revised general statute dealing with obstruction of officials in the performance of their duty.

Section 12-08-21 makes it a misdemeanor to knowingly resist an "executive officer" in the performance of his duty. The staff recommendation was that this section be eliminated, and that its provisions be included within a general statute dealing with obstruction of official duty. The Committee consensus was to that effect.

The Committee next discussed Section 12-09-02 which makes it a misdemeanor to disturb the Legislative Assembly, or either House thereof, while in session. It was the consensus of the Committee that this section be eliminated, and that its provisions be consolidated with other general sections dealing with obstruction of public officials.

The Committee discussed Section 12-09-04 which makes it a misdemeanor to intimidate members of the Legislative Assembly. The staff recommendation was that this section be eliminated at this point, and that its provisions be included in the general statute dealing with intimidation of public officials. The Committee consensus was to that effect.

Section 12-09-08 prohibits the giving or offering of bribes to members of the Legislative Assembly. The consensus of the Committee was that this section should be eliminated at this point, and that

the offense defined therein should be included in a general statute dealing with the crime of bribery. It was noted that perhaps the crime of bribery should extend beyond the bribing of public officials and should include the bribing of officials of athletic events, etc.

Section 12-09-10 prohibits the solicitation of bribery by members of the Legislative Assembly. It was noted that this section restated much of the language of Section 40 of the North Dakota Constitution. The staff recommendation was that this section be eliminated and that punishment of commission of the acts prohibited by Section 40 of the Constitution be included within a consolidated section dealing generally with bribery.

The Committee considered Section 12-09-11 which provides that a vote in consideration of a vote is bribery. It was noted that this section also was essentially a restatement of Section 40 of the North Dakota Constitution. It was the consensus of the Committee that this section be handled the same as Section 12-09-10.

The Committee considered Section 12-09-14 which makes it a misdemeanor for a witness to refuse to attend a legislative hearing. It was the Committee consensus that this section be eliminated at this point, and that provision be made for a general statute dealing with contempt of the subpoena power of the Legislative Assembly and criminal liability arising therefrom.

Section 12-09-15 makes it a misdemeanor to refuse to testify after being summoned before the Legislature, either House thereof, or a committee thereof. It was again the consensus of the Committee that this section be eliminated at this point, and that perhaps criminal liability for refusal to appear or to testify be provided for in Chapter 54-03, which contains other statutes dealing with the Legislative Assembly.

The Committee discussed Section 12-09-17 which prohibits personal lobbying. It was the consensus of the Committee that this section be eliminated, as lobbying is regulated under Chapter 54-05.

Section 12-09-18 makes it a misdemeanor for lobbyists to go upon the floor of either House "reserved for the members thereof" except upon the invitation of the House. It was the consensus of the Committee that this offense could be adequately dealt with under legislative rules of procedure.

Section 12-09-19 provides the penalty for violation of either Section 12-09-17 or Section 12-09-18. Since those two sections are to be eliminated, the Chairman pointed out that Section 12-09-19 must also be eliminated.

The Committee considered Section 12-10-01 dealing with the embezzlement of state funds by public officers, knowingly keeping

false accounts, or the fraudulent alteration or obliteration of an account. The staff recommendation was that, to the extent the statute deals with embezzlement, its provisions be incorporated into a general "theft" statute. To the extent the statute deals with fraudulent or false accounting by public officials, it should be covered within the revision of sections dealing with misfeasance of duty by public officials in Chapter 12-08. The Committee consensus was that the section should be consolidated with other relevant sections, taking into account Sections 12-08-02 and 12-36-05.

Section 12-10-02 makes it a felony for a public officer or employee to misappropriate public funds. The staff recommendation was that this section be eliminated at this point, and that its provisions be incorporated in the revision of Chapter 12-08 dealing with the exercise of office by public officials. The Committee consensus was that the section should be consolidated with other similar offenses.

The Committee considered Section 12-10-04 which makes it a misdemeanor for a state or county officer to appropriate allowances made for deputies or clerkhire to his own use. The Committee consensus was that this section should be eliminated at this point and its provisions consolidated into a revision of Chapter 12-08, dealing generally with the duties of public office.

Section 12-10-05 makes it a felony for a sheriff, coroner, clerk of court, constable, or other ministerial officer, or the deputy of any of them, to appropriate funds to their own use. It was the consensus of the Committee that this section be eliminated and its provisions be consolidated within a general theft statute, which would include the former crime of embezzlement.

Section 12-10-07 prohibits the making of a contract or agreement to move personal property from one jurisdiction to another, the consideration of which is that the property will be assessed at a lower value than otherwise would be the case. It was the consensus of the Committee that this provision be eliminated.

The Committee considered Section 12-10-09 which makes it a misdemeanor for anyone to make a false statement regarding the basis of imposing any tax or assessment, or the basis for the reduction of any tax or assessment. It was the consensus of the Committee that this section be eliminated at this point and consolidated into a general section prohibiting false dealings with governmental agencies.

The Committee considered Section 12-10-10 which prohibits the willful injury or destruction of public buildings. The staff recommendation was that this section be eliminated, and that any inclusion of this particular crime be considered when looking at Section 12-18-04. The Committee consensus was to eliminate this section and consolidate its provisions elsewhere.

Section 12-10-11 prohibits the seizure of military stores or supplies belonging to the State. The staff recommendation was that this section be eliminated at this point, and that the crime defined be left for coverage under the statutes dealing with burglary or treason.

The Committee considered Section 12-11-05 which makes it a misdemeanor to wager upon the results of any election. The staff recommendation was that this section be eliminated, and that any prohibition upon wagering on elections be covered under the general statutes prohibiting gambling. The consensus of the Committee was that language prohibiting betting upon elections should remain specifically in the Code to ensure coverage of that type of illegal wagering. However, the Committee felt that such language could be incorporated into the general antigambling statute, or, in the alternative, could be incorporated into Title 16, the Elections Code.

Section 12-11-06 prohibits the bribing of electors and also prohibits electors from receiving bribes. The section further prohibits election officials from menacing or bribing electors. The Committee consensus was that this section should be eliminated at this point, and its provisions should be covered in general statutes dealing with bribery and illegal influencing of electors by means other than bribery.

The Committee discussed Section 12-11-09 which makes it a misdemeanor for anyone to bribe or offer to bribe an election official. It was the consensus of the Committee that this section be eliminated at this point, and that its provisions be consolidated into a general statute dealing with bribery.

Section 12-11-11 prohibits the willful obstruction of an elector who is on his way to the polls. It was the consensus of the Committee that this section be eliminated and its provisions consolidated with a revised general statute dealing with illegally influencing or obstructing electors.

Section 12-11-12 prohibits unauthorized voter registration by a person who is not qualified to register. The staff recommendation was that this section be eliminated, and that its provisions, insofar as they are applicable, be included in a general revision covering falsification of facts leading to the right to vote.

Section 12-11-13 makes it a felony to falsely "personate" a registered voter. It was the Committee consensus that this section be eliminated, and that its provisions be revised and consolidated in a general section dealing with voting under false pretenses.

The Committee considered Section 12-11-14 which makes it a misdemeanor for a person to make a false statement in order to secure registration or voting privileges. It was the consensus of the

Committee that this section be eliminated, and that its provisions be included in the consolidated revised section dealing with illegal voting.

Representative Hilleboe noted that the Committee should include within any revision of election offenses the action on the part of an unqualified person who signs a recall, initiative, or referral petition.

The Committee discussed Section 12-11-18 which prohibits knowingly casting a vote in the wrong polling place. The consensus of the Committee was that this section should be eliminated and its provisions included within a general section dealing with illegal voting.

Section 12-11-19 prohibits unlawful voting at a township meeting. It was the consensus of the Committee that this section be eliminated, and that the definition of an "election" within a general statute prohibiting unlawful voting include township elections within its scope.

The Committee considered Section 12-11-21 which prohibits the use of threats, force, or any other means to influence a voter. It was the consensus of the Committee that this section be eliminated and its provisions included in a general revision dealing with illegal influencing of a voter.

The Committee considered Section 12-11-22 which makes it a misdemeanor to disturb election proceedings. It was the consensus of the Committee that this section be eliminated, and that its provisions, so far as necessary, be incorporated into statutes dealing with unlawful obstruction of public procedures, or obstruction of public officials carrying out their duty.

The Committee considered Section 12-11-23 which prohibits the willful disturbing of a public meeting of electors. It was the consensus of the Committee that this section be eliminated, as its provisions are adequately covered under statutes dealing with riot, breach of the peace, etc.

Section 12-11-24 makes it a misdemeanor to unlawfully prevent a public meeting of electors. The Committee consensus was that this section be eliminated, and, to the extent necessary, its provisions included in a section similar to Section 12-19-02.

The Committee discussed Section 12-11-25 prohibiting willful disobedience of a lawful command of an inspector or judge of election, board of election, or election officer; or the disruption or interruption of those officers by disorderly conduct. The section also provides for summary arrest upon order of those officials. Committee consensus was that this section be revised and consolidated.

The Committee discussed Section 12-11-28 which makes it a misdemeanor to willfully destroy election supplies or remove election materials posted in the polling place. It was the consensus of the Committee that this section should be eliminated and its provisions consolidated with some other relevant section.

The Committee considered Section 12-11-29 which makes it a misdemeanor for a poll clerk to keep a false poll list. It was the staff recommendation that this section be eliminated and the specific offense covered under the general statute dealing with falsification of official documents by public officials. The consensus of the Committee was to this effect.

Section 12-11-30 prohibits election officials from willfully excluding a qualified vote, or from willfully receiving a vote from a person who has been challenged but who has not satisfied the challenge, or from willfully failing to challenge a person whom they suspect is not entitled to vote. The staff recommendation was that this section be eliminated. The Committee consensus was that the section be eliminated and its provisions consolidated with other statutes covering the same general types of offenses.

Section 12-11-32 provides penalties for a county auditor who willfully refuses or neglects to canvass election returns or to make proper abstracts thereof, or who fails to issue proper certificates of election. The staff recommendation and Committee consensus were that the section be eliminated as the offenses listed therein can be adequately covered under a general statute dealing with willful refusal or neglect to perform public duties. Further, the duties imposed upon a county auditor are set forth in Chapter 16-13, and a general penalty for failure to perform those duties is established by Section 16-13-06.

The Committee discussed Section 12-11-33 which prohibits anyone from willfully mutilating election returns, or otherwise preventing their delivery to the proper authorities. It was the Committee consensus that this section be eliminated and that its provisions be incorporated into sections dealing with misfeasance of duty by public officials and obstruction of public officials in the performance of their duties.

The Committee considered Section 12-11-34 which deals with the use of a proxy at a political convention. The use of proxies at political conventions is specifically covered by Section 12-17-13. The Committee felt that the action covered by Section 12-11-34 should not be a criminal offense, and therefore the section should be eliminated.

Mr. Charles Travis and Mr. Al Wolf pointed out that it is often necessary for the Legislature to define a crime specifically, in order to inform potential defendants of the elements of the crime.

It was noted that this was especially true when the crime was not one which the populace at large considered an action which in itself was morally wrong; i.e., where the offense is merely malum prohibitum as opposed to malum in se.

The Committee recessed at 5:10 p.m. until 9:00 a.m. on Tuesday, September 21, 1971.

* *

The Committee reconvened at 9:00 a.m. and considered a sample revisory draft bill covering Chapter 12-08, and discussed the format to be used in the revision. Mr. Hill stated that perhaps the way to proceed is to repeal Title 12 and enact a new Title 12. Discussion followed concerning the fact that it would be necessary for the Committee to document the disposition of all of the sections of the present Title 12. The Committee Counsel noted that, while the draft provisions placed before the Committee would deal with present Code section numbers for the most part, the final Committee product could certainly be drafted in terms of a complete repeal of Title 12 and substitution of a new Title 12.

The Committee continued discussing the need for providing a legislative history of the proposed revision of the Criminal Code, concerning which portion of it was derived from former statutes. It was noted, since the Committee could not hope to draft a perfect document, that it would be necessary to provide the courts and other persons involved in interpreting the Code with a reference point in terms of the legislative considerations involved in incorporating present statutes into new revised sections of the Code.

The Committee then discussed the extent the staff should go to in consolidating current sections of the Code which deal with similar offenses. Mr. Wolf stated that at one point he had thought all definitions of criminal offenses should be contained in Title 12. However, he now felt there were certain areas of law, such as election law and highway law, which should be complete in themselves and should contain their own definitions of offenses arising within that area of law.

Representative Murphy stated that the Code should be as short and concise as possible, and that whatever is feasible by way of consolidation should be done. Mr. Webb stated that care must be taken to draft precisely when dealing with those offenses which do not involve moral wrong, as moral wrong is understood by the general public.

Judge Kirk Smith noted that present requirements of particularity in criminal complaints allow for less specificity in the statute which defines the crime.

Mr. Kraft noted, as an example of consolidation of several offenses, the theft provisions of the Model Penal Code. He indicated that the new theft provision could be simplified and consolidated because the courts would have the former historical basis necessary for interpreting the new provision.

Representative Kieffer stated it seemed to him that any consolidation and recodification should make use of comprehensive definitions of often-used terminology, so as to limit the proliferation of statutes defining new crimes with particularity.

The Committee then discussed Section 12-03-01 defining the crime of conspiracy. It was noted that conspiracy was joint criminal action which could be prosecuted, but which was more remote from the particular substantive offense concerning which the conspiracy arose than was an attempt at committing that offense.

The Committee discussed the differences between the crime of conspiracy and an attempt to commit a crime. It was noted that a conspiracy required the involvement of two or more persons, whereas an attempt could be made by one person.

The staff recommendation was that the definition of conspiracy should be revised, and that conspiracy should be punished as a Class C offense. Mr. Wolf stated he felt that conspiracy should be punished to the same extent as is the substantive crime concerning which the offenders were conspiring.

Judge Smith noted that one argument in favor of having the same penalties for conspiracy as for the substantive crime conspired about is that prosecutors will then be more willing to attempt to prosecute conspirators, rather than wait until the substantive crime has been attempted or committed.

Mr. Kraft stated the other side of that coin is that criminals will have a tendency to complete their criminal action if they are going to receive the same sentence for conspiracy as they will receive for completing the crime. Representative Murphy noted that although the maximum sentence might be the same, it seemed to him that in most cases the judge would take into account the fact the prosecution was for conspiracy, rather than for a completed substantive crime.

Mr. Webb stated that action to change the penalties for conspiracy to make them equal to the penalties which may be imposed for the substantive crime would be one of the most important changes that the Committee could recommend. He indicated that it would be "a prosecutor's dream".

Judge Smith noted that the danger in having the substantive penalties apply to criminal conspiracy was that prosecutors would

commence criminal prosecutions for conspiracy even in those cases where the crime had actually been committed, because it is generally easier to prove conspiracy than it is to prove the commission of the substantive offense.

The Chairman asked for the sense of the Committee in regard to the handling of the crime of conspiracy. It was the sense of the Committee that the penalty for conspiracy to commit a crime should be placed in the same classification as the penalty for the substantive crime itself, and that statutory provisions for prosecution of solicitation, facilitation, conspiracy, and attempt should be revised and contained in the same general area of the new Criminal Code.

The Committee then considered Sections 12-04-01 and 12-04-02 which define and set the punishment for an attempt to commit a crime. The Chairman noted that, in light of the previous discussion concerning conspiracy, the punishment for attempts should be set within the same range as the punishment for the substantive offense concerning which the attempt was made, with discretion in the trial judge to consider the seriousness of the attempt. The consensus of the Committee was in agreement with the Chairman; however, Mr. Wolf noted that in revising the present statutes dealing with attempts, the staff should keep Section 12-04-03 in mind, which negates any protection for a person who in unsuccessfully attempting to commit one crime does in fact commit another crime.

The Committee then discussed Section 12-07-01 defining the crime of treason and setting the penalty at death, or not less than five years' imprisonment. It was the consensus of the Committee that this section should be revised simply to provide a penalty for commission of treason as defined in Section 19 of the Constitution. The question of retaining the death penalty for treason was left undecided.

The Committee next discussed Section 12-07-03 which defines the crime of misprision of treason, which generally is a concealment of the knowledge, either before or after the fact, of treason. It was the consensus of the Committee that this statute should be eliminated at this point, and that there should be a general revised statute covering the offense of willful concealing of knowledge regarding criminal actions.

After further discussion, IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY SENATOR PAGE, AND UNANIMOUSLY CARRIED that Section 12-07-03 be eliminated at this point, and that the criminal offense defined therein be included in general statutes dealing with conspiracy, attempt, and concealing knowledge of criminal actions.

The Committee then discussed Section 12-07-04 which prohibits desecration of the flag. Representative Atkinson suggested that the section be revised and that desecration of the flag be classified as

a Class D offense. He noted that there seem to be essentially two crimes involved in Section 12-07-04: First, what is known as "desecration" of a flag, and second, misuse of symbols purporting to be flags.

Judge Smith noted that the language contained in Section 12-07-05 as follows: "by which the person seeing the same, without deliberation, may believe the same to represent a flag" should be retained in any revision, as that language provided a useful standard in prosecutions for desecration of, or casting contempt upon, a flag.

Representative Atkinson stated that contempt to the flag is the essence of the offense. After further Committee discussion of Section 12-07-04, it was the consensus of the Committee that the staff revise it, taking into consideration the various Committee comments.

The Committee discussed the proper penalty classification to be attached to the offenses presently covered under revision of Chapter 12-08. Representative Atkinson and Mr. Hill stated that these offenses should be classified Class C offenses. The staff recommendation was that they generally be classified as Class D offenses.

Mr. Webb noted that he would like to see a classification based on the misdemeanor and felony system, with interim classifications including "major misdemeanors" and "minor felonies", rather than using the classification simply based on offenses. Judge Smith noted that the classification of crimes simply as offenses would make North Dakota unique in the federal system, since no other State classifies crimes in that manner.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY REPRESENTATIVE ATKINSON, AND UNANIMOUSLY CARRIED that the general misfeasance and obstruction statutes dealing with public officials as exemplified by those crimes listed in Chapter 12-08 should be classified as Class C offenses.

The Committee next discussed the provisions in Chapter 12-08 which presently provide for forfeiture of office for conviction of a crime defined therein. The question was broadened to discuss forfeiture of office generally. It was noted that perhaps an automatic forfeiture provision in a criminal statute might not be constitutional, because it would deny the officeholder a "due process" hearing.

Mr. Wolf raised the question concerning deferment of imposition of sentence, and the effect of deferment in terms of disqualifying an officeholder for office. There was disagreement amongst the members of the Committee concerning the specific effect of deferment of imposition of sentence, i.e., whether it constituted a "conviction", or a "judgment", for purposes of disqualification from public office.

The Committee recessed for lunch at 12:10 p.m.

* *

The Committee reconvened at 1:30 p.m., at which time it discussed Section 12-09-01 which makes it a felony to willfully prevent a meeting of the Legislative Assembly, or either House thereof. Judge Smith inquired as to whether it would be desirable to leave all offenses against the Legislature to prosecution by the Legislature under its contempt power.

It was the consensus of the Committee that this section (12-09-01) should be included within a general revised statute dealing with obstruction of public functions. Further, where such obstruction is committed or attempted by violent means, it should be classified as a Class B offense, and where it is attempted or committed by nonviolent means, it should be classified as a Class C offense.

The Committee discussed Section 12-09-03 which prohibits any person from willfully compelling the Legislature, or either House thereof, to adjourn. MR. WOLF MOVED to treat Section 12-09-03 in the same manner as Section 12-09-01 was treated. HIS MOTION DID NOT RECEIVE A SECOND, BUT THE COMMITTEE CONSENSUS WAS TO THE SAME EFFECT.

The Committee discussed Sections 12-09-06 and 12-09-07 which deal with the alteration or theft of a bill draft, or an enrolled or engrossed copy of a bill. It was the consensus of the Committee that, to the extent the two sections dealt with theft, they could be covered under a comprehensive theft statute; to the extent that they dealt with forgery, they could be covered under a comprehensive forgery statute; and to the extent that they dealt with obstruction of public functions, they could be included within a revision dealing with that topic.

Representative Hilleboe noted that while forgery in other areas could be corrected if discovered, the alteration of an enrolled or engrossed bill was probably irreversible, once the bill had passed out of the hands of the House of introduction of the Legislature.

The Committee next discussed Section 12-09-13 which prohibits state legislators from soliciting appointments by the Governor in return for their legislative vote in favor of or in opposition to a particular bill or proposition. IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY REPRESENTATIVE HILLEBOE, AND UNANIMOUSLY CARRIED that the offense defined in Section 12-09-13 be eliminated. It was noted that Section 81 of the Constitution prohibits the Governor from promising to appoint a particular person to office in consideration that any "member" shall give his vote or attempt to influence any matter pending before the Legislative Assembly. To the extent that the crime defined in Section 12-09-13 is covered by Section 81, it would, of course, remain a crime, and the Committee consensus was

that provision should be made for penalties to be attached to the commission of the acts prohibited by Section 81.

The Committee then discussed Chapter 12-09 in general, and it was the Committee consensus that the Chapter could be omitted, and the substantive offenses defined therein could be consolidated with general offenses which would encompass those specific offenses.

The Committee discussed Section 12-10-03 which makes it a misdemeanor for a public officer or employee to willfully disobey any provision of law regulating his official conduct. It was the consensus of the Committee that this section be eliminated at this point and that its provisions be consolidated with other general statutes dealing with misfeasance or malfeasance on the part of public officers.

The Committee next discussed Section 12-10-06 prohibiting a personal interest in a contract with the governmental agency by an officer of that agency. Judge Smith noted that the statute originally seemed to have been designed as an "anti-kickback" statute, but that by amendment the anti-kickback aspect of the statute no longer was clear. Representative Atkinson noted that the general theory behind a statute of this type seems to be that public officials should not be allowed to profit as a result of their official action.

Mr. Wolf stated the offense covered by Section 12-10-06 should be retained as an offense; however, the section should be revised. The Chairman asked the Committee staff to revise Section 12-10-06, and to reflect in their revision, to the extent possible, the Committee comments.

Section 12-10-08 makes it a misdemeanor for anyone to obstruct a public officer from collecting revenue. It was the consensus of the Committee that this section be eliminated at this point and that its provisions be included within the general statute dealing with obstruction of governmental functions.

The Committee discussed Section 12-11-04 which makes it a misdemeanor for one having been convicted of a felony to vote or offer to vote at any election without previously having his civil rights restored. Mr. Travis inquired whether a deferred imposition of sentence for a felony would cause the defendant whose sentence was deferred to lose his right to vote. Mr. Wolf stated that if there has been a deferred imposition of sentence, the defendant should not lose any of his civil rights, since he had not been convicted by the judgment of a court. Mr. Hill stated that if the crime charged provides penalties which put it in either a misdemeanor or a felony class, then a deferred imposition of sentence should not deprive the defendant of his civil rights; however, if the crime charged provides penalties which make it only a felony, then a deferred imposition does cause the person convicted to lose whatever civil rights will be lost in the event of conviction of a felony.

The Committee then discussed the length of time during which a convicted felon should lose his right to vote. Mr. Webb pointed out that, historically, felons have been denied the right to vote for the remainder of their lives following conviction. Judge Smith stated he felt that a person should lose his right to vote only during the period of his imprisonment. Senator Page agreed with Mr. Webb to the effect that a convicted felon should lose his right to vote forever, unless he is restored to his civil rights by the Board of Pardons. The Committee consensus, with objection by Senator Page and Mr. Webb, was that conviction of a felony should result in the loss of the right to vote during the period of imprisonment imposed.

The Committee then discussed the whole of Chapter 12-11 dealing with offenses against the elective franchise, and it was agreed that the staff should draft a revision of this chapter to be placed within Title 16, the Elections Code, and that Chapter 12-11 should be eliminated as a chapter in the Criminal Code.

Mr. Wolf noted that Minnesota had recently passed a Fair Campaign Practices Act, and that that Act could be used as the basis for the staff draft dealing with election offenses.

The Chairman inquired as to whether there were any other matters which should be brought before the Committee. Mr. Hill stated that the Committee had numerous policy decisions to make, for instance, he intended to propose that the defense of "insanity" be abolished, and that the question of the defender's mental status be taken into consideration at the time of disposition, rather than prior to trial.

The Chairman thanked the Committee members for their attendance, and without objection the Committee stood adjourned at 3:20 p.m. on Tuesday, September 21, 1971.

C. Emerson Murry
Director

John A. Graham
Assistant Director

APPENDIX "A"

Classification plan adopted by Subcommittee on Classification at its meeting of Friday, August 6, 1971, as modified on August 30, 1971:

Classification:	Maximum penalty:
Class A offense	25 years imprisonment; $5,000 fine; restitution
Class B offense	5 years imprisonment; $5,000 fine; restitution
Class C offense	1 year imprisonment; $2,500 fine; restitution
Class D offense	30 days imprisonment; $500 fine; restitution
Violation (noncriminal)	(no penalty -monetary- set by Subcommittee)

Note: This classification scheme does away with the distinction between felonies and misdemeanors. It is envisioned by the Subcommittee that the place of incarceration of an offender committing any class of offense can be either the penitentiary or a local jail. Where the distinction between felony and misdemeanor is necessary for other reasons, such as for the determination of payment of costs in extradition proceedings, a separate section will set forth which class of offense is to be considered a felony, and which a misdemeanor for special purposes.

FINES: The Subcommittee believes that a special section should be written into the criminal code setting forth guidelines for the imposition of fines. The Subcommittee considered, but took no action on the question of a special schedule of fines for corporate offenders.

RESTITUTION: The Subcommittee agreed that provision should be made for a sentencing judge to order the offender to make restitution to the victim. Restitution is to be made directly to the victim, or in the alternative is to be paid into court. An offender's earnings while incarcerated would be subject, in appropriate cases, to deduction for use in making restitution. The Subcommittee discussed the desirability of creating a fund from which restitution could be made to victims of criminal activities. There was some discussion concerning the possibility of depositing fines imposed into such a fund; however, the Subcommittee makes no recommendations in regard to creation of a restitution fund.

EXTENDED SENTENCES: The Subcommittee would make the following provisions for extended sentences, to be imposed upon a finding that the defendant is:

1. A dangerous, mentally abnormal person;

   a. The court shall not make such a finding unless the presentence report, including a psychiatric examination, concludes that the defendant's conduct has been characterized by persistent aggressive behavior, and that such condition makes him a serious danger to other persons.

2. A professional criminal;

   a. The court shall not make such a finding unless the defendant is over 21 years of age, and the presentence report shows he committed the present offense as part of a pattern of criminal conduct which constituted a substantial source of income to him.

3. Convicted of a crime which seriously endangered the life of another, and has previously been convicted of a similar offense; or

4. Especially dangerous because he used a firearm or destructive device in the commission of the offense or flight therefrom.

The extended sentence could be imposed as follows:

A. For a Class A offense, the defendant, upon a proper finding, would be sentenced to life imprisonment.

B. For a Class B, or Class C offense, upon a proper finding, the defendant could be sentenced up to a maximum of twice the stated number of years' imprisonment; i.e., 10 years for a Class B offense, and 2 years for a Class C offense.

C. There would be no specifically authorized extended sentence for a Class D offense; however, the court would have available in its range of sentencing alternatives the possibility of a commitment for treatment of alcoholism and drug addiction, which commitment might be for a period in excess of 30 days.

SENTENCING ALTERNATIVES: The court may impose a sentence including incarceration, probation, restitution, fine, deferred imposition of sentence, suspended sentence, referral for treatment, restoration of damaged property or other appropriate work detail, unconditional discharge, or any appropriate combination of these choices. All sentences imposed shall be accompanied by a statement by the court, of record, as to the reasons for imposing that particular sentence.

MANDATORY PAROLE COMPONENTS: Class A, B, and C offenses shall have mandatory parole components as follows:

1. Class A offense - 5 years
2. Class B offense - 3 years
3. Class C offense - 1 year

The mandatory parole component (m.p.c.) would not interfere with the parole jurisdiction of the Parole Board during the term of a defendant's incarceration. The mandatory parole component would only come into play where an offender had served the total term to which he had been sentenced. The m.p.c. would be used to ensure that an offender, whose conduct during incarceration prevented parole, would not be denied supervision following service of his total term of incarceration. Violation of parole while being supervised under m.p.c. would subject the offender to reincarceration for the remainder of the m.p.c. or one year, whichever period is greater. The Class D offense category would not have a mandatory parole component; however, the court would be specifically authorized to sentence a Class D offender to probation, or parole following incarceration, for a period not to exceed one year. The Subcommittee wishes to emphasize that the Parole Board would have full jurisdiction over the time and conditions of release on parole once a convicted person had commenced a sentence of incarceration.

GOOD TIME STATUTES: The Subcommittee is of the opinion that Chapter 12-54 of the Century Code should be repealed. This chapter relates to diminution of sentence, and, in effect, makes a sentence to 1 year in the penitentiary equal to 8 months and 17 days.

OTHER STATUTORY GUIDELINES: The Subcommittee believes that the new criminal code should contain statutory guidelines for use of incarceration, probation, parole, or fine as components of a given sentence.

CONFINEMENT FOR DIAGNOSTIC TESTING: The Subcommittee believes that any adopted sentencing scheme should provide for a period of presentence diagnostic testing at the request of the trial judge. The statutes should provide for presentence confinement for diagnostic testing for a period not exceeding 30 days.*

APPELLATE REVIEW OF SENTENCES: The Subcommittee believes that specific provision should be made for appellate review, but has not worked out any details. The Subcommittee feels that the Bar Association committee which is working on rules of appellate procedure may deal with the subject of appellate review of sentences.

MINIMUM SENTENCES: The Subcommittee recommends that minimum sentences not be authorized by the criminal code.

EXAMPLES OF CLASSIFICATION OF PARTICULAR OFFENSES: The following are some possible classifications of particular offenses under the Subcommittee's recommended classification plan:

Classification:	Type of offense:
Class A offense	Murder, robbery while armed with deadly weapon, arson or bombing of a structure or vehicle holding human beings, forcible rape, mayhem, kidnapping

* Modification of first draft.

Classification: (Cont.)	Type of offense:
Class B offense	Manslaughter, serious assault and theft offenses
Class C offense	Less serious assault and theft offenses
Class D offense	Disorderly conduct, trespass

APPENDIX "B"

EXAMPLE OF CONSOLIDATION OF SPECIFIC CRIMES

12-08 - Executive

12-08-16	Giving or offering bribes.
12-08-17	Asking or receiving bribes -- forfeit.
12-08-18	Governor receiving bribes -- forfeit.

12-09 - Legislative

12-09-08	Giving or offering bribes.
12-09-09	Asking or receiving bribes.
12-09-10	Solicitation of bribery by members.
12-09-11	Vote in consideration of vote is bribery.
12-09-12	Members soliciting action by governor for vote is bribery.
12-09-13	Senators soliciting appointments by governor in return for vote.
12-09-16	Conviction forfeits office.

12-12 - Judicial

12-12-01	Giving bribes to judicial officers, jurors, referees and others.
12-12-02	Accepting bribes by judicial officers, jurors, referees and others.
12-12-03	Accepting gifts.

12-16 - Rescues and Escapes

12-16-13	Bribe for permitting escape.

Suggested Replacement for above 14 Statutes:

1. A person is guilty of bribery if he knowingly offers, gives or agrees to give to another, or solicits, accepts or agrees to accept from another, a thing of value as consideration for:
(a) the recipient's official action as a public servant; or
(b) the recipient's violation of a known legal duty as a public servant.
2. Bribery is a Class B crime and one convicted of same shall forfeit any public office held and shall be barred from holding any public office in the future.

******

There are many statutes setting forth specific crimes which can be committed by public officers. I believe it is possible to replace them with a single statute substantially as follows:

1. Any person holding any public trust or employment who wilfully fails to perform the duties of his office or attempts to exercise powers not given him by law or asks for or accepts any emoluments for carrying out his official duties other than those provided by law is guilty of a Class B crime.

Tentative Agenda

COMMITTEE ON JUDICIARY "B"

Monday and Tuesday, November 22-23, 1971
Room G-2, State Capitol
Bismarck, North Dakota

Monday:

9:30 a.m.	Call to order Roll call Minutes of previous meeting
9:45 a.m.	Consideration of draft revision of NDCC Chapters 12-18 through 12-24
12:00 noon	Luncheon recess

* *

1:15 p.m.	Continue consideration of morning item
4:30 p.m.	Recess

Tuesday:

9:00 a.m.	Consider revision of NDCC Chapters 12-24 through 12-33
12:00 noon	Luncheon recess

* *

1:15 p.m.	Continue consideration of morning item
4:00 p.m.	Adjournment

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Monday and Tuesday, November 22-23, 1971
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:40 a.m. in Committee Room G-2 of the State Capitol in Bismarck, North Dakota, on Monday, November 22, 1971.

Members present:	Senators Freed, Page Representatives Atkinson, Hilleboe, Stone
Advisory members present:	Judge W. C. Lynch, Judge Harry Pearce, Mr. Rodney Webb, Mr. Al Wolf
Members absent:	Senator Longmire Representatives Kieffer, Murphy
Advisory members absent:	Judge Ralph Erickstad, Judge Kirk Smith, Mr. Larry Kraft
Also present:	Representative Bryce Streibel, Mr. Charles Travis, Mr. Vance Hill

IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY REPRESENTATIVE STONE, AND UNANIMOUSLY CARRIED that the reading of the minutes of the meeting of September 20-21, 1971, be dispensed with, and the minutes be approved as mailed.

Mr. Charles Travis advised the Committee that Judge Ralph Erickstad was necessarily absent, but that he had requested Mr. Travis to attend the meeting in his place. The Chairman welcomed Mr. Travis to the meeting.

The Committee commenced consideration of a first draft of a revision designed to encompass most of the crimes covered by Chapters 12-18 through 12-24 of the North Dakota Century Code. (A copy of this draft as revised by Committee action is appended to these minutes as Appendix "A".)

The Committee Counsel read Sections 1 and 2 of the first draft dealing generally with the crime of riot.

Those sections read as follows:

SECTION 1. RIOT - DESTRUCTIVE DEVICE - DEFINITIONS.) As used in this Title:

1. "Riot" means a public disturbance involving a group of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to persons or property, or substantially obstructs the performance of any governmental function, including the administration of any penal or correctional facility.

2. "Destructive device" means any physical object, liquid, or gas capable of being used, either by itself or in combination with any other physical object, liquid, or gas, to cause death, or sudden and violent injury or damage to persons or property. The term "destructive device" includes the generic terms "weapons" and "explosives".

SECTION 2. RIOTING - INCITING RIOT - ARMING RIOTERS - CLASSIFICATION OF OFFENSES.)

1. It shall be an offense for a person to:

a. Engage in a riot.

b. Incite or urge a group of five or more persons to engage in a current or impending riot, or to give commands, instructions, or signals to a person or persons in furtherance of a riot.

c. Knowingly supply a destructive device for use in a riot, or to teach another to prepare or use a destructive device, with intent that such destructive device be used in a riot.

2. A person who violates subdivision a of subsection 1 of this section is guilty of a class D offense, unless he was apprehended in possession of a destructive device, in which case he shall be guilty of a class B offense. A person who violates subdivision b of subsection 1 of this section shall be guilty of a class C offense. A person who violates subdivision c of subsection 1 of this section is guilty of a class B offense.

3. Any person who, while engaged in a riot, commits any other offense punishable under the laws of this state may be prosecuted for such offense in lieu of prosecution under this section.

The Committee discussed the number of persons which should be considered a riotous group. It was noted that present North Dakota law, see Section 12-19-03, defines a riotous group as six or more persons. It was also noted that other criminal codes set the minimum number at from two to eleven.

IT WAS MOVED BY SENATOR PAGE, SECONDED BY REPRESENTATIVE ATKINSON, AND UNANIMOUSLY CARRIED that the word "five" appearing on lines 3 and 19 be deleted, and the word "six" be substituted therefor, so that the minimum number of persons which could be considered a riotous group would be six.

The Committee discussed the fact that the penalty for engaging in a riot, without possessing a destructive device, was in the Class D range. Some question arose as to whether such a classification would, as a practical matter, allow extradition of a person who had engaged in a riot in North Dakota. The Committee discussed the desirability of increasing the penalty classification for violation of either Subdivision a or Subdivision b.

IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that the penalty classifications assigned to Subdivisions a and b of Subsection 1 of Section 2 be increased one grade, so that engaging in a riot shall be a Class C offense, and inciting or urging a group of six or more persons to riot shall be a Class B offense.

Mr. Wolf noted that, as a general rule, the so-called riot offenses should be triable in a district court, rather than any of the "lower" courts, and he felt that the raising of the offense penalty classifications would accomplish this.

The Committee discussed the fact that a person who engages in a riot would be subject to greater penalties if he were apprehended in possession of a destructive device. It was noted that the definition of "destructive device" probably included such things as bricks, baseball bats, clubs, etc. The Committee also discussed the use of the word "tumultuous" as contained in the definition of a riot. The Chairman directed the staff of the Legislative Council to do further research on the definition of the word tumultuous with respect to its use in defining the term "riot".

The Committee discussed Subsection 3 of Section 2 which would have the effect of causing a prosecuting attorney to have to elect to either prosecute for riot, or for such other offense as may be committed in the course of a riot.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY MR. WEBB, AND UNANIMOUSLY CARRIED that Subsection 3 of Section 2 be deleted.

The question of the proper handling of "lesser included offenses" was discussed by the Committee. Mr. Travis was asked whether the Joint Committee of the Judicial Council and the State Bar Association for the Adoption of Rules of Criminal Procedure was encompassing the subject of "lesser included offenses" in its proposed criminal rules. Mr. Travis replied that he did not think so, and, upon later checking, replied that "lesser included offenses" would not be covered under the present drafts of the proposed Rules of Criminal Procedure.

The Committee Counsel read Section 3 of the first draft as follows:

SECTION 3. UNLAWFUL ASSEMBLY - DISTURBING PUBLIC ASSEMBLY - OBSTRUCTION OF PUBLIC ACCESS - FAILURE TO DISPERSE UPON ORDER - CLASSIFICATION OF OFFENSES.) It shall be an offense:

1. For three or more persons to assemble without authority of law in a manner likely to disturb the public peace or excite public alarm, or for three or more persons to assemble to do a lawful act in a violent, boisterous, or tumultuous manner.

2. For any person to willfully disturb or disrupt a lawful public meeting through conduct which is violent or patently offensive, or through utterances or gestures which are patently offensive, or which tends to incite panic on the part of those in attendance at the meeting.

3. For any person to unlawfully obstruct in any manner any public street or highway, or access to any real property or structure or improvement thereon.

4. For any person to willfully remain present at the scene of a riot, or of an unlawful assembly in violation of subsection 1, after receiving a lawful command to disperse.

A person who violates subsections 1, 2, or 3 is guilty of a class C offense. A person who violates subsection 4 is guilty of a class D offense.

If persons assembled in violation of subsection 1 of section 1 of this bill, or subsection 1 of this section, do not disperse after receiving a lawful command to do so, the law enforcement officer shall take such action as is reasonably necessary to disperse the assemblage, including the calling of private persons to his aid.

It was noted that this section encompasses, in part, the action prohibited by Sections 24-12-01 and 24-12-02. Mr. Wolf indicated that he had experience with those two sections and felt that they should be retained, subject to possible revision to the extent that Subsection 3 of Section 3 of the draft being considered covered the same offense.

Representative Atkinson noted that Subsection 2 of the draft covered willful conduct which tends to incite panic on the part of those attending a lawful public meeting. He indicated that that language, standing alone, was not sufficient to cover the offenses presently covered by Section 12-19-31, which also covered the conveying of false information regarding an attempt to endanger any

private or public building or structure, meeting or gathering, or any public carrier. It was noted that Section 12 of Mr. Hill's draft was intended to cover the remainder of Section 12-19-31 by making it a crime to falsely inform another that a situation dangerous to human life is imminent, or that the commission of a crime of violence is imminent.

The Committee then considered Section 4 of the draft revision which reads as follows:

SECTION 4. UNLAWFUL POSSESSION OF DESTRUCTIVE DEVICE - UNLAWFUL FURNISHING OF DESTRUCTIVE DEVICE - CLASSIFICATION OF OFFENSES.)

1. It shall be a class D offense for any person to knowingly carry or have concealed on himself or under his immediate control any destructive device. If the offense prohibited by this subsection is committed aboard a commercial common carrier, it shall be a class C offense.

2. Subsection 1 does not apply:

a. To law enforcement officers or members of the military forces of this state, another state, or of the United States, who are authorized to carry destructive devices and who are acting within the scope of their duties; or

b. When the destructive device was carried, or was under the control of the actor, pursuant to a permit to carry or control it; or

c. When the destructive device, other than an explosive, was carried or under the control of the actor in his own place of residence; or

d. To the carrying of a shotgun or rifle for use in hunting, target practice, or sporting events involving the firing of a rifle or shotgun.

3. It is an affirmative defense to a charge under subsection 1:

a. That the actor was engaged in a lawful act which required the carrying of the destructive device; or

b. That the destructive device, other than an explosive, was carried under circumstances which would justify a prudent man in going armed in defense of his person, property, or family.

4. It shall be a class C offense for a person to knowingly supply a destructive device, or a component essential to the use thereof, to another person who intends to commit a crime with the aid of, or while armed with, such device, or with such device and the component supplied.

The Committee discussed the possibility that the use of the phrase "destructive device" as defined in Section 1 was too broad a term for use in the statute prohibiting possession. It was noted that, in theory, a child could be prosecuted for carrying a baseball bat. Judge Pearce stated he felt that the offenses listed in Section 4 should be classified at a higher level than is suggested in the draft, and the Committee consensus seemed to that effect. It was noted that this section was primarily designed to cover Sections 62-03-01 and 62-03-02, as well as the sections in Title 12 which deal with the use and manufacture of explosives.

The Committee discussed the fact that extreme care must be taken in dealing with the prohibition of the possession of firearms, and that perhaps it would be better to redraft the entire section.

IT WAS MOVED BY MR. WOLF AND SECONDED BY SENATOR PAGE that the staff of the Legislative Council redraft the whole of Section 4. The Chairman, in lieu of the motion, directed the Committee Counsel to redraft Section 4, and MR. WOLF'S MOTION WAS WITHDRAWN.

Mr. Wolf pointed out that in redrafting the statute, the present federal law regarding the carrying of weapons aboard "common carriers" should be kept in mind, as should a definition of "destructive device" or similar phraseology which would not include the carrying of items not normally thought of as weapons.

Section 5 of the first draft revision was read as follows:

SECTION 5. INTENTIONAL ENDANGERMENT - CLASSIFICATION OF OFFENSES.) It shall be an offense for a person to knowingly place an object or substance or permit an object or substance to remain upon his property, or to knowingly place an object or substance upon the property of another, which objects or substances are not otherwise authorized to be placed by a law of this state or of the United States, and create grave risk of injury or death to persons who may enter them, use them, or otherwise come in contact with them. Violation of this section is a class D offense.

It was noted that this section was designed to replace Section 12-18-07, dealing with the laying out of poison, and Section 12-18-11, dealing with the abandoning or discarding of refrigerators with their doors attached. The section was also designed to complement Section 12 of Mr. Hill's draft which prohibits "negligent endangerment" by providng for "intentional endangerment".

Judge Pearce noted that Section 5 would seem to encompass the creation or maintenance of any "attractive nuisance", and wondered whether it would be proper to provide criminal liability, in addition to tort liability, in all areas of attractive nuisance.

Mr. Wolf suggested that Section 5 of the first draft revision, and Section 12 of Mr. Hill's draft should be rewritten to encompass the intentional creation of a grave risk of harm.

The Committee discussed the use of the term "negligence" in the criminal laws, and the problem of how such "negligence" should be defined. Mr. Hill noted that the problem would arise again when the offense of "negligent homicide" was discussed.

IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that Section 5 of the first draft revision of Chapters 12-18 through 12-24 and Section 12 of Mr. Hill's draft be combined and redrafted to provide for an offense dealing with the intentional creation of a grave risk of danger, and for less serious gradations of that offense, including possibly a "negligent" creation of grave risks of danger to human life.

The Committee recessed for lunch at 12:05 p.m.

* *

The Committee reconvened at 1:15 p.m., at which time Section 6 of the first draft revision was read as follows:

SECTION 6. DUELING - DEFINITION - CLASSIFICATION OF OFFENSES.) 1. As used in this section, "duel" means any combat with destructive devices fought between two persons by agreement, whether such combat takes place in a public or private place.

2. Any person who engages in, or aids those engaging in, a duel shall be guilty of a class C offense. Any person who shall, by agreement, engage in a fight with another in a public or private place, except when engaged in a legitimate athletic event or exercise or as authorized by chapter 53-01, shall be guilty of a class D offense.

It was noted that this section was intended to replace Chapter 12-20 of the Century Code which presently prohibits dueling and related offenses.

The Committee discussed the necessity for a statute prohibiting "dueling", and it was noted by Mr. Travis that "dueling" just does not occur any more. Therefore, there seems to be no need for this type of statute. Mr. Hill suggested that perhaps the word "duel" should be dropped, and the section should be revised to encompass the crime of engaging in combat by agreement.

It was noted that should a killing or wounding occur during the course of a "duel", the perpetrator could be prosecuted under the homicide or assault statutes. Mr. Hill felt, however, that it was necessary, as a matter of public policy, to also allow prosecution where the "duel" occurs by agreement between the parties, thus making likelihood of prosecution by either of the parties remote.

The Committee heard a reading of Section 7 of the first draft revision as follows:

SECTION 7. OBSCENITY - DEFINITIONS - DISSEMINATION - CLASSIFICATION OF OFFENSES.) 1. A person is guilty of a class C offense if, knowing of its character, he disseminates obscene material, or if he produces, transports, or sends obscene material with intent that it be disseminated.

2. A person is guilty of a class C offense if he presents or directs an obscene performance, or participates in any portion of a performance which contributes to the obscenity of the performance as a whole.

3. As used in this section, the terms "obscene material" and "obscene performance" mean material or a performance which, considered as a whole:

a. Predominantly appeals to a prurient or morbid interest in nudity, sex, excretion, sadism, or masochism; and

b. Goes substantially beyond customary limits of candor in describing or representing such matters; and

c. Is utterly without redeeming social value.

That material or a performance predominantly appeals to a prurient or morbid interest shall be judged with reference to ordinary adults, unless it appears from the character of the material or the circumstances of its dissemination to be designed for minors or other specially susceptible audience, in which case, the material or performance shall be judged with reference to that type of audience.

4. As used in this section, the term "disseminate" means to sell, lease, advertise, broadcast, exhibit, or distribute.

5. As used in this section, the term "material" means any physical object used as a means of presenting or communicating information, knowledge, sensation, image, or emotion to or through a human being's receptive senses.

6. As used in this section, the term "performance" means any

play, motion picture, dance, or other exhibition presented before an audience.

7. Subsections 1 and 2 do not apply to a motion picture projectionist acting within the scope of his employment as an employee of any person, firm, or corporation exhibiting motion pictures pursuant to a license issued under the provisions of chapter 53-06, provided that such operator is not a manager and has no financial interest in his place of employment, other than wages.

In the general discussion following the reading of the section, it was noted that Section 7 is an attempt to insert standards for determining whether material or a performance is obscene which are in line with the standards set out in numerous opinions of the United States Supreme Court. Present North Dakota law, see Section 12-21-09, dealing with dissemination of obscene materials to adults does not set forth adequate constitutional standards.

Representative Hilleboe questioned the desirability of maintaining laws regulating the dissemination of certain types of material to adults. He stated that he was in favor of such laws if they were limited to the dissemination of material to minors, but thought that legislation attempting to enforce moral standards on adults was questionable.

Judge Pearce pointed out that, as he read the section, it would prohibit the screening of a motion picture, which might later be determined to be obscene, to a group of consenting adults in a private home. Judge Pearce questioned whether that type of conduct should give rise to criminal liability.

The Chairman noted that the question of making substantial changes in statutes regulating morals is an extremely difficult one, and that perhaps the Committee should not tackle the policy question in regard to regulation of the dissemination of pornographic materials to adults.

Representative Hilleboe pointed out that during the 1971 session, he had introduced House Concurrent Resolution No. 3039 which called specifically for study and revision of Chapters 12-30 (dealing with rape and carnal abuse) and 12-32 (dealing with seduction and abduction) and all other statutes which are no longer valid because they do not conform with current social mores. He stated he withdrew that resolution, before the Legislative Council Resolutions Committee, in deference to a resolution sponsored by Representative Atkinson and

himself which would call for a complete revision of all of Title 12, with an understanding that legislation regulating morals would be studied by the Committee.

Representative Atkinson stated that Representative Hilleboe's explanation of the rationale behind the study resolution was correct. However, he noted that, aside from the policy question of whether dissemination of obscenity to adults should be controlled, there was a need for a technical revision of North Dakota's obscenity statutes, as they did not presently establish any standards sufficient to meet the requirements set forth by the United States Supreme Court.

The Committee discussion led to a consensus that, regardless of the stand taken on dissemination to adults, the dissemination of pornography to minors should be controlled. It was suggested that perhaps dissemination to adults could be controlled by city ordinance rather than state law. Mr. Webb stated he did not believe that the people of the State of North Dakota were ready to allow legal dissemination of pornography to adults, except as restricted by various city ordinances.

Representative Atkinson stated that he agreed with Mr. Webb concerning the degree of acceptance of free dissemination by the general populace of the State. He stated that he also thought the offense should apply to dissemination to both adults and minors.

Mr. Wolf said he thought that commercial purveyance of pornography should be prohibited, otherwise the moral fiber of the citizenry will be jeopardized. However, he felt that the statute shouldn't go so far as to prohibit private acts between consenting adults.

The Chairman requested a motion on the policy question regarding the legality of dissemination of pornography to adults.

Representative Stone stated she agreed that the majority of North Dakotans want a statute outlawing dissemination of pornography to both adults and minors. She stated that she would like to see more prosecutions begun under statutes outlawing this type of action. Representative Atkinson noted that, should purveyance to adults be legalized, it would be almost impossible to enforce statutes outlawing purveyance to minors.

IT WAS MOVED BY MR. WOLF AND SECONDED BY MR. ATKINSON that the Committee recommend retention of statutes prohibiting dissemination of obscenity, with the text of those statutes to read essentially as does Section 7 of the first draft revision. THIS MOTION CARRIED WITH TWO DISSENTING VOTES.

The Committee discussed the need for the exemption for motion picture projectionists. IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY MR. WEBB, AND CARRIED (by a vote of five to four) that Subsection 7 of Section 7, relating to exemptions for motion picture projectionists, be deleted.

The Chairman called on the Committee Counsel, who read Sections 8 and 9 of the first draft revision, as follows:

SECTION 8. PROMOTING OBSCENITY TO MINORS - DEFINITIONS.) As used in section 9:

1. "Minor" means a person under eighteen years of age.

2. "Promote" means to produce,direct, manufacture, issue, sell, lend, mail, publish, distribute, exhibit, or advertise for pecuniary gain.

3. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when such description or representation:

   a. Predominantly appeals to the prurient, shameful, or morbid interest of minors; and

   b. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

   c. Is utterly without redeeming social importance for minors.

4. "Material" and "performance" shall be defined as in section 7, subsections 5 and 6, respectively.

SECTION 9. PROMOTING OBSCENITY TO MINORS - MINOR PERFORMING IN OBSCENE PERFORMANCE - CLASSIFICATION OF OFFENSES.) 1. It shall be a class C offense for a person to knowingly promote to a minor any material or performance which, taken as a whole, is harmful to minors; or to admit a minor for monetary consideration to premises where a performance harmful to minors is exhibited or takes place.

This subsection shall not apply to a motion picture projectionist acting within the acope of his employment as an employee of any person, firm, or corporation exhibiting motion pictures pursuant to a license issued under the provisions of chapter 53-06, provided that such operator is not a manager and has no financial interest in his place of employment, other than wages.

2. It shall be a class C offense to permit a minor to participate in a performance which, taken as a whole, is harmful to minors.

Mr. Travis pointed out that the Committee should keep in mind the fact that there are studies which indicate that exposure to pornography may act as an outlet for antisocial behavior.

The Committee then discussed the fact that Sections 8 and 9, dealing with the promotion of obscenity to minors, related primarily to such promotion when done for pecuniary gain. Mr. Travis noted that the provision in Line 24 of Section 9 dealing with the admission of a minor to an obscene performance for "monetary consideration" could probably be construed as outlawing other types of "consideration". MR. TRAVIS MOVED that the word "monetary" in Line 24 of Section 9 be deleted. HE THEN WITHDREW HIS MOTION.

IT WAS MOVED BY MR. WOLF AND SECONDED BY MR. TRAVIS that Line 6 (for pecuniary gain) of Section 8 be deleted and that the words "for monetary consideration" in Line 24 of Section 9 be deleted, and that a new subsection creating an offense dealing with the distribution of obscene materials for consideration be drafted, with the penalty set at one classification higher than for distribution without compensation.

Representative Hilleboe noted that if he understood Mr. Wolf's motion correctly, a person could go to jail for five years for selling a book deemed obscene. The Chairman stated that he felt Mr. Wolf's motion was only suggesting a sentencing range, rather than a particular sentence, and Mr. Wolf agreed.

MR. WOLF'S MOTION regarding creation of a separate penalty classification for the dissemination of obscenity for compensation CARRIED.

IT WAS MOVED BY MR. WOLF, SECONDED BY MR. WEBB, AND UNANIMOUSLY CARRIED that Lines 26 through 31 of Section 9, dealing with an exemption for motion picture projectionists, be deleted.

The Committee continued discussion of classification of "obscenity" offenses according to whether the material was disseminated for profit or not. IT WAS MOVED BY MR. WEBB, SECONDED BY MR. TRAVIS, AND CARRIED that nonprofit distribution under Sections 8 and 9 be a Class D offense, and that dissemination for profit under Section 7 be a Class D offense, with the staff of the Legislative Council to redraft the sections accordingly.

The Committee then discussed the need for provision of a defense to governmental and private institutions possessing obscene material in the course of scientific research. IT WAS MOVED BY MR. TRAVIS AND SECONDED BY MR. WOLF that the staff of the Legislative Council be directed to draft an additional subsection to the appropriate obscenity dissemination sections to read essentially as follows: "It is an affirmative defense to prosecution under (appropriate sections) that dissemination was restricted to institutions or persons having scientific, educational, governmental, or other similar justification for possessing obscene material." THIS MOTION LOST by a vote of three ayes and five nays. Mr. Wolf noted that he had seconded the motion in deference to what he felt would be the wishes of librarians around the State who might feel more secure in their handling of library material with such a proviso.

The Chairman called on the Committee Counsel to read Sections 10 and 11 as follows:

SECTION 10. PROSTITUTION - DEFINITIONS.) 1. "Prostitution" means the performance or offer of performance of any act of sexual intercourse, including deviate sexual intercourse, with any person not the actor's spouse, in exchange for money or other thing of value.

2. "House of prostitution" is any place where prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

3. "Inmate" is a person who regularly carries on prostitution in or through the agency of a house of prostitution.

4. "Prostitution business" is any business which derives funds from prostitution carried on by a person under the control, management, or supervision of another.

5. "Deviate sexual intercourse" includes sodomy, oral-genital contact, and sado-masochistic abuse.

SECTION 11. PROSTITUTION - MAINTAINING HOUSE OF PROSTITUTION - RELATED OFFENSES - CLASSIFICATION OF OFFENSES.) 1. It shall be a class C offense for any person to engage in prostitution, or to solicit another person with the intention of being hired to engage in prostitution.

2. It shall be a class C offense for anyone to maintain or have control of a house of prostitution, or to maintain or participate in a prostitution business.

3. It shall be a class D offense for a person to hire a prostitute to engage in sexual intercourse with him, or for a person to enter or remain in a house of prostitution for the purpose of engaging in sexual intercourse.

4. It shall be an offense for a person to: (a) procure an inmate for a house of prostitution; or (b) to procure a place in a house of prostitution for one who would be an inmate. Violation of this subsection shall be a class C offense, unless, under clause (a), the person so procured is under sixteen years of age, or the procurement is carried out by force, or threat of use of force, in which cases violation of this subsection shall be a class B offense.

5. It shall be a class B offense for any person, other than a prostitute, or a legal dependent of such prostitute, to live on or to be supported or maintained, in whole or in part, by money or other thing of value, earned by any person through prostitution.

6. It shall be a class B offense for any person to compel another to engage in prostitution, by any means which negates the exercise of the other person's free choice.

Representative Atkinson noted that, since the draft provided that it was a Class C offense to maintain or control a house of prostitution or maintain or participate in a prostitution business, it seemed that it should only be a Class C, instead of Class B, offense for a person to live off the earnings of a prostitute.

Mr. Wolf suggested that all of Section 11 could be simplified by making it an offense to engage in, procure, or solicit prostitution; or to maintain or operate a house of prostitution or prostitution business; or to compel anyone to engage in prostitution.

Representative Hilleboe suggested that legal penalties for the carrying on of prostitution were another example of attempts to legislate morals, and that prostitution itself is essentially a victimless crime. He suggested that prostitutes needed treatment rather than incarceration. Mr. Wolf pointed out that the proceeds from organized prostitution were a large portion of the total revenues of organized crime syndicates, and it certainly was necessary for North Dakota to continue to prohibit the operation of prostitution businesses.

Judge Pearce agreed with Representative Hilleboe in regard to the fact that engaging in prostitution is essentially a "victimless crime". The Chairman stated that he agreed with Judge Pearce; however, he believed that the public would demand criminal sanctions against prostitutes and prostitution.

IT WAS MOVED BY MR. WOLF AND SECONDED BY REPRESENTATIVE HILLEBOE that the Committee take a position that soliciting, procuring, obtaining for, or engaging in prostitution on the part of any person shall be a Class D offense for the first conviction, and a Class C offense for second and subsequent convictions. And that compelling prostitution, maintaining a house of prostitution, or procuring a minor as an inmate of a house of prostitution shall be a Class C offense for the first conviction, and a Class B offense for subsequent offenses. THIS MOTION CARRIED by a vote of five to three.

Representative Hilleboe questioned the use of the words "deviate sexual intercourse" in Line 3 and Line 13 of Section 10.

IT WAS MOVED BY PRESENTATIVE HILLEBOE, SECONDED BY MR. TRAVIS, AND UNANIMOUSLY CARRIED that the words "act of" be deleted from Line 2 of Section 10; the words "intercourse, including deviate sexual intercourse" be deleted from Line 3 of Section 10, and that the words "activity for hire" be substituted therefor; and that Lines 13 and 14 of Section 10 be deleted.

The Chairman called on the Committee Counsel to read Section 12 of the first draft revision, as follows:

SECTION 12. INCEST - CLASSIFICATION OF OFFENSE.) It shall be

a class B offense for a person to marry or have sexual intercourse with another person when the other person is known by the offender to be within the degree of consanguinity set forth in section 14-03-03.

It was noted that incestuous marriages were prohibited by Chapter 14-03, and that entering into such marriage was made a misdemeanor by Section 14-03-28. The Committee felt that the gist of the crime was the sexual intercourse between close relatives, whereas the marriage of close relatives could be treated in the law of marriage.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY MR. WEBB, AND UNANIMOUSLY CARRIED that the capital letter B in Line 2 be deleted and the capital letter C be substituted therefor, and that the words "marry or" in the same line be deleted.

The Chairman called on the Committee Counsel to read Section 13, as follows:

SECTION 13. BIGAMY - EXCEPTIONS - CLASSIFICATION OF OFFENSE.) It shall be a class C offense for a married person to marry or cohabit with another, unless at the time of the subsequent marriage or cohabitation:

1. The actor reasonably believes that the prior spouse is dead; or
2. The prior spouse has been continually absent for a period of seven years preceding the subsequent marriage or cohabitation, during which time the actor did not know the prior spouse to be alive; or
3. The prior spouse had been sentenced to imprisonment for life; or
4. The prior spouse had continually remained without the United States for a period of five successive years preceding the subsequent marriage or cohabitation.

The Committee discussed exception nos. 3 and 4, i.e., where the prior spouse had been sentenced to life imprisonment, or where the prior spouse had continually remained without the United States for a period of five successive years. It was noted that these exceptions also, in all probability, provided grounds for divorce.

It was then suggested that perhaps no exceptions to bigamy were necessary, as the gist of the offense was that the person married again knowing that his previous spouse was still alive and that they were still married.

IT WAS MOVED BY MR. WEBB, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that the suggested language of Section 13 be stricken, and that Section 13 be amended to read as follows:

> "It shall be a class C offense for a married person willfully and knowingly to contract a second marriage while the first marriage, to the knowledge of the offender, is still subsisting and undissolved."

The Committee discussed Section 14, dealing with polygamy, and it was suggested that Section 14 and Section 13 could be combined with the following language being inserted as a second subsection of Section 13:

> "2. It shall be a class C offense for an unmarried person to knowingly marry or cohabit with another in this state under circumstances which would render the other person guilty of an offense under subsection 1 of this section."

IT WAS MOVED BY SENATOR PAGE, SECONDED BY REPRESENTATIVE STONE, AND UNANIMOUSLY CARRIED that the above-quoted language dealing with "polygamy" be consolidated with the previously amended language of Section 13 as a second subsection thereto.

MR. TRAVIS MOVED that further consideration of bigamy and polygamy be tabled until Tuesday morning, due to the lateness of the hour. THE CHAIRMAN ACCEPTED MR. TRAVIS' MOTION and agreed that the meeting should stand recessed, and the meeting stood recessed at 4:55 p.m., and reconvened at 9:00 a.m. on Tuesday, November 23, 1971.

* *

The Chairman read a proposed draft of combined Sections 13 and 14 as follows:

SECTION 13.) 1. It shall be a class C offense for a married person to willfully and knowingly contract a second marriage in this state while the first marriage, to the knowledge of the offender, is

still subsisting and undissolved; or for a married person to contract a second marriage outside this state and hold himself out as married to the second spouse in this state.

2. It shall be a class C offense for an unmarried person to knowingly marry another in this state under circumstances which would render the other person guilty of an offense under subsection 1.

Representative Atkinson noted that the proposed draft of combined Sections 13 and 14 omitted the former language of Subsection 3 of Section 14 providing an exception to parties to a polygamous marriage lawful where entered into who are temporarily visiting in North Dakota, or traveling through North Dakota.

The following language was added to the draft:

"This section does not apply to parties to a marriage, lawful in the country of which they are nationals or residents, while they are in transit through or temporarily visiting this state."

It was also suggested that the draft be changed so that the word "second" where it appears preceding the word "marriage" be deleted and the word "subsequent" be substituted therefor. Also that the words "the first" which precede the word "marriage" be deleted and the words "a prior" be substituted therefor.

IT WAS MOVED BY MR. TRAVIS, SECONDED BY REPRESENTATIVE ATKINSON, AND UNANIMOUSLY CARRIED that Section 13 be adopted to read as follows:

"SECTION 13.) 1. It shall be a class C offense for a married person to willfully and knowingly contract a subsequent marriage in this state while a prior marriage, to the knowledge of the offender, is still subsisting and undissolved; or for a married person to contract a subsequent marriage outside this state and hold himself out as married to the subsequent spouse in this state.

2. It shall be a class C offense for an unmarried person to knowingly marry another in this state under circumstances which would render the other person guilty of an offense under subsection 1.

3. This section does not apply to parties to a marriage, lawful in the country of which they are nationals or residents, while they are in transit through or temporarily visiting this state."

The Chairman called on the staff to read Section 15 of the first draft revision, as follows:

SECTION 15. EQUAL ENJOYMENT OF PUBLIC FACILITIES - DEFINITION - CLASSIFICATION OF OFFENSE.) 1. As used in this section, "public facility" means any theater, place of amusement, hotel, barber shop, saloon, restaurant, retail or wholesale outlet, public conveyance, or other place of refreshment, entertainment, or accommodation which is commonly open to the public.

2. It shall be a class D offense for any person to exclude another person from full and equal enjoyment of any public facility on account of the sex, race, color, religion, or national origin of the person excluded.

It was noted that this was essentially a restatement of Section 12-22-30, with the addition of "sex" as one of the grounds on which discrimination was not to be based, and with the addition of "retail or wholesale outlets" to the list defining "public facility".

The Committee discussed the necessity for defining the term "public facility", and it was suggested that it could possibly be simply stated as a "facility open to the public".

IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that Subsection 1 of the first draft revision of Section 15 be deleted; that the word "public" in the second line of Subsection 2 be deleted, and that the words "open to the public" be added after the word "facility".

The Chairman called on the Committee Counsel to read Sections 16 and 17 of the first draft revision dealing with gambling and related offenses, as follows:

SECTION 16. GAMBLING - DEFINITIONS.) As used in section 17:

1. "Gambling" means risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including

an election or sporting event, over which the person taking the risk has no control. Gambling does not include: (a) lawful contests of skill, speed, strength, or endurance in which awards are made only to entrants or to the owners of entries; or (b) lawful business transactions, or other acts or transactions now or hereafter expressly authorized by law.

2. "Lottery" means any plan for the distribution of a thing of value, whether tangible or intangible, or a person or persons selected by chance from among participants, some or all of whom have given a consideration for the chance of being selected.

3. "Bucket shop" means any location wherein the pretended buying or selling of securities or commodities for future delivery is carried on without any intention of future delivery, whether such pretended contract is to be performed within or without this state.

4. "Gambling apparatus" means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons, or gambling by a person involving the playing of a machine. Gambling apparatus does not include an amusement game or device as defined in section 53-04-01.

5. "Gambling house" means any location or structure, stationary or movable, wherein gambling is permitted or promoted, or

where a lottery is conducted or managed. In the application of this definition, any place where gambling apparatus is found is presumed to be a gambling house, provided that this presumption shall not apply where cards, dice, or other games are found in a private residence.

SECTION 17. GAMBLING - RELATED OFFENSES - CLASSIFICATION OF OFFENSES.)

1. It shall be a class D offense to engage in gambling.
2. It shall be a class C offense to knowingly maintain, or to knowingly aid or permit the maintenance of, a gambling house or bucket shop.
3. It shall be a class C offense to:
   a. Conduct a lottery; or
   b. Sell, purchase, receive, or transfer a chance to participate in a lottery; or
   c. Disseminate information about a lottery with intent to encourage participation in it.
4. Subsection 3 shall apply to a lottery drawn or to be drawn outside of this state, whether or not such lottery is lawful in such other state or country.

The Committee discussed the desirability of the continued outlawing of gambling between private individuals. It was noted that the present antigambling statutes are honored mainly in their nonenforcement, as applied to private individuals and private clubs.

Representative Atkinson stated that, while it was true that prohibitions against private gambling were not generally enforced, the majority of North Dakotans had seemed to indicate that they did not want legalized gambling, with the most recent indication being the resounding defeat of the parimutuel betting measure.

Mr. Wolf suggested that the Committee should set forth alternative positions which would put the question of enforcing or legalizing private gambling squarely up to the Legislature. He stated that the alternatives should be framed so that one would allow private gambling, and one would affirmatively prohibit all gambling in every place in the strongest possible language.

The Chairman agreed with Representative Atkinson concerning the desire of North Dakota citizens for an antigambling law, but noted that it would be proper to submit a minority report of the Committee in regard to abolition of the prohibition against private gambling.

IT WAS MOVED BY MR. WOLF AND SECONDED BY MR. WEBB that the Committee adopt Sections 16 and 17 as drafted as one position; and provide an alternative allowing an exception for private gambling, and private gambling in nonprofit organizations; and draft a third alternative strengthening the antigambling provisions to ensure coverage of all gambling, including private gambling in nonprofit clubs and elsewhere.

The Chairman noted that South Dakota had passed laws authorizing lotteries, and the playing of bingo when devoted to the raising of funds for the benefit of religious, charitable, fraternal, or other organizations not organized for profit. He read Section 22-25-23 of the South Dakota Compiled Laws as follows:

> "For the purposes of this section and sections 22-25-25 and 22-25-26 "bingo" is that game in which each player is supplied a card or board containing five adjoining horizontal and vertical rows with five spaces in each row, each containing a number or figure therein, except for the central row with four spaces, each containing a number or figure therein and the word "free" marked in the center space thereof. Upon announcement by the person or persons conducting the game of any number or figure appearing on the player's card or board, the space containing said figures or number is covered by the player. When the player shall have covered all five spaces in any horizontal or vertical row, or shall have covered four spaces and the free space in a five-space diagonal row, or shall have covered the required combination of spaces in some other pre-announced pattern or arrangement, such combination of spaces covered shall constitute "bingo". The player or players to first announce "bingo" are awarded money, merchandise, or some other consideration by the person or persons conducting the game."

The Chairman also read South Dakota Compiled Laws Section 22-25-25 as follows:

> "The game "bingo" as defined in section 22-25-23 or lottery as defined in section 22-25-24 shall not be construed as gambling or as a lottery within the meaning of section 22-25-1 or 22-25-8, respectively, provided that:

(1) Such game or lottery is conducted by a religious, charitable, fraternal or other association, not organized for pecuniary profit, and duly existing under the laws of the State of South Dakota;

(2) The proceeds therefrom do not inure to the benefit of any individuals;

(3) No compensation of any kind in excess of $15 in value is paid to any person for services rendered during any bingo session in connection with the conduct of the game or in consideration of any lottery; provided, however, the provisions of this paragraph (3) shall not apply to games or lotteries conducted in connection with any of the following events: a county fair conducted pursuant to section 7-27-3, the state fair conducted pursuant to chapter 1-21, or a civic celebration recognized by resolution or other similar official action of the governing body of a county, city, town, or village;

(4) Such association before conducting such game or lottery gives 30 days' written notice of the time and place thereof to the governing body of the county, city, town, or village in which it intends to conduct such game or lottery, and such governing body does not pass a resolution objecting thereto."

Mr. Travis noted that Mr. Wolf's motion required the adoption of Sections 16 and 17 as a first alternative. He stated that he had questions regarding the language "has no control" in Line 7 of Section 16, since he could conceive of a person being guilty of gambling where that person did have some control over the event. Mr. Wolf noted that his motion was intended only to include the essence of Sections 16 and 17, and that he intended to allow internal revision of those sections.

Mr. Wolf stated that, as an indication of the seriousness of the alternative totally prohibiting gambling, a section should be put in allowing prosecution of prosecutors who fail to enforce the gambling laws, or persons who fail to report violations of gambling laws. Mr. Webb stated that such a section should not be affirmative law, but rather should be a statement of legislative intent. Mr. Wolf stated that his suggestion was made somewhat facetiously; however, he did feel that it might be well to have a statute providing for an annual meeting between the Attorney General and all State's Attorneys, at which time the Attorney General, upon receiving information from the State's Attorneys, would order prosecution of gambling offenders.

Mr. Webb stated that the Committee should take a policy position on the extent of criminal liability for gambling and the extent of enforcement of gambling laws. Judge Pearce agreed that the Committee should take such a position.

MR. WOLF'S MOTION regarding alternative gambling drafts, stated above, CARRIED UNANIMOUSLY.

Mr. Webb suggested that the staff of the Legislative Council do research on the extent to which other States may provide exceptions to a general gambling prohibition, and should also find out what the status of Article I of the amendments to the North Dakota Constitution is in respect to the Constitutional Convention's consideration of that article.

IT WAS MOVED BY MR. WEBB, SECONDED BY MR. WOLF, AND UNANIMOUSLY CARRIED that the staff be directed to research the laws of other jurisdictions which allow limited gambling, and to report the results of this research to the Committee.

The Chairman called on the Committee Counsel to read Sections 18, 19, and 20, dealing with prohibitions against business or labor on Sunday, as follows:

SECTION 18. BUSINESS OR LABOR ON SUNDAY - EXEMPTIONS - CLASSIFICATION OF OFFENSES.) Except as otherwise provided in sections 19 and 20, it shall be a class D offense for any person on Sunday to:

1. Engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public, or to authorize or direct his employees or agents to take such action; or
2. Keep open, run, or permit the running or use of any place for public dancing between the hours of one o'clock a.m. and eight o'clock a.m. the following Monday morning.
3. Subsection 1 shall not apply to any person who in good faith observes a day other than Sunday as the Sabbath, if he refrains from engaging in or conducting business or labor for profit and closes his place of business to the public on that day.

4. The attorney general, a state's attorney, a mayor, a city manager, or a municipal attorney may petition a district court, for the district where a violation is occurring, to enjoin a violation of this section.

SECTION 19. PERSONAL PROPERTY SALES ALLOWABLE ON SUNDAY.) The sale of any of the following items of personal property shall be allowed during any and all hours on Sundays:

1. Drugs, medical and surgical supplies, or any object purchased on the written prescription of a licensed medical or dental practitioner for the treatment of a patient.
2. Food prepared for consumption on or off the premises where sold.
3. Newspapers, magazines, and books.
4. Gasoline, fuel additives, lubricants, and antifreeze.
5. Tires.
6. Repair or replacement parts and equipment necessary to, and safety devices intended for, safe and efficient operation of land vehicles, boats, and aircraft.
7. Emergency plumbing, heating, cooling, and electrical repair and replacement parts and equipment.
8. Cooking, heating, and lighting fuel.
9. Infant supplies.
10. Camera and school supplies, stationery, and cosmetics.
11. Beer and alcoholic beverages but only until one o'clock a.m.

SECTION 20. BUSINESSES ALLOWED TO OPERATE ON SUNDAY.) The operation of any of the following businesses shall be allowed on Sundays:

1. Restaurants, cafeterias, or other prepared food service organizations.
2. Hotels, motels, and other lodging facilities.
3. Hospitals and nursing homes.
4. Dispensaries of drugs and medicines.
5. Ambulance and burial services.
6. Generation and distribution of electric power.
7. Distribution of gas, oil, and other fuels.
8. Telephone, telegraph, and messenger services.
9. Heating, refrigeration, and cooling services.
10. Railroad, bus, trolley, subway, taxi, and limousine services.
11. Water, air, and land transportation services and attendant facilities.
12. Cold storage warehousing.
13. Ice manufacturing and distribution.
14. Minimal maintenance of equipment and machinery.
15. Plant and industrial protection services.
16. Industries where continuous processing or manufacturing is required by the very nature of the process involved.
17. Newspaper publication and distribution.
18. Radio and television broadcasting.
19. Motion picture, theatrical, and musical performances.
20. Automobile service stations.
21. Athletic and sporting events.
22. Parks, beaches, and recreational facilities.
23. Scenic, historic, and tourist attractions.

24. Amusement centers, fairs, zoos, and museums.

25. Libraries.

26. Educational lectures, forums, and exhibits.

27. Service organizations (USO, YMCA, etc.).

28. Grocery stores operated by the owner-manager who regularly employs not more than three employees for the operation of said store.

29. Premises licensed to dispense beer and alcoholic beverages within the limits prescribed in section 5-02-05.

It was noted that these three sections are a revision, without change in substance, of Chapter 12-21.1, and also include Section 12-21-19 dealing with public dancing on Sunday. It was the consensus of the Committee that, with the recent upholding of city ordinances based on Chapter 12-21.1 by the Supreme Court (See City of Bismarck v. Materi, 177 N.W. 2d 530), it would be best not to change the substance of the "Sunday closing laws".

The Committee then discussed that portion of Section 18 dealing with the operation of a place of public dancing on Sunday (the replacement for Section 12-21-19). It was noted that the statement of hours during which dancing was prohibited, although taken from present law, was confusing. Further, since the gist of the section was the banning of activity on Sunday, it was questionable whether there was a need to continue the ban on dancing until 8:00 o'clock a.m. on the following Monday.

IT WAS MOVED BY MR. WEBB AND SECONDED BY SENATOR PAGE that the words "between" in Subsection 2 of Section 18 be deleted, and the word "after" be substituted therefor; and that the words "and 8:00 o'clock a.m. the following Monday morning" also be deleted from that subsection.

REPRESENTATIVE HILLEBOE MADE A SUBSTITUTE MOTION, SECONDED BY MR. TRAVIS, to delete Subsection 2 of Section 18 entirely. THE SUBSTITUTE MOTION CARRIED by a vote of five to three, thus negating the necessity to consider the main motion.

The Committee then discussed Subsection 4 of Section 18, which provided that certain state, county, and city officials could seek an injunction against violations of the "Sunday closing laws". Representative Hilleboe and Mr. Webb thought that perhaps it was dangerous to specifically provide for an injunction in this statute, since that might be construed as negating any general power to enjoin other crimes.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE AND SECONDED BY MR. WEBB that Subsection 4 of Section 18 be deleted entirely, and that the power to enjoin a "Sunday closing law" violation be included in a general section, to be drafted, allowing the proper officials to enjoin criminal acts as an alternative, or in addition to prosecution.

Mr. Webb stated the general injunction statute should be specific in providing that the injunctive procedure should not be a substitute for prosecution.

Mr. Travis stated he was opposed to Representative Hilleboe's motion. He said he felt the power to enjoin was proper in the context of "Sunday closing laws", but that a general power to enjoin criminal activity may not be proper.

REPRESENTATIVE HILLEBOE WITHDREW HIS MOTION concerning deletion of Subsection 4 of Section 18. IT WAS MOVED BY MR. TRAVIS, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that the Committee accept the first draft revision of Sections 18, 19, and 20 as amended; and that the staff of the Legislative Council carry out a review of the possibilities and problems involved in having either a general section dealing with enjoining criminal activity, or the desirability of retaining Subsection 4 of Section 18.

The Chairman called on the Committee Counsel to read Section 21 of the first draft revision, as follows:

SECTION 21. PUBLIC PROFANITY AND ABUSIVE LANGUAGE - DEFINITIONS - CLASSIFICATION OF OFFENSES.) 1. As used in this section, "profanity" means language which is patently offensive and goes substantially beyond customary limits of verbal candor within the community. Profanity includes language which is obscene or blasphemous, and language which is obviously coarse and abusive.

2. It shall be a class D offense for anyone to use profanity in a public place where other persons may hear it and be offended, alarmed, or annoyed.

Representative Hilleboe stated that this section was another example of an attempt to legislate "morals". He felt that sections such as this are unnecessary, and are relatively unenforceable. Mr. Wolf and Mr. Webb stated they believed that a statute prohibiting profanity could be of value, and that such a statute, in a revised version, should be retained.

Representative Hilleboe stated that at least the reference to blasphemy contained in Subsection 1 should be deleted since the word "blasphemous" was based solely on religious interpretation.

The Committee discussed the need to limit Section 21 to the use of profanity "in a public place". IT WAS MOVED BY MR. TRAVIS, SECONDED BY MR. WOLF, AND CARRIED by a vote of six to one, that the words "in a public place" be deleted from Subsection 2 of Section 21.

IT WAS MOVED BY MR. WOLF AND SECONDED BY REPRESENTATIVE HILLEBOE that the words "or obscene" be inserted after the word "offensive" in Subsection 1; and that the last sentence of that subsection be deleted.

MR. WEBB MADE A SUBSTITUTE MOTION, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED to delete the words "or blasphemous," from the last sentence of Subsection 1 of Section 21.

Judge Lynch asked the Chairman if it would be possible for the staff to have the full text of each existing section available for study at the time the revised section replacing those sections is considered. The Chairman replied this could be done, if xeroxed copies of the present section were used. Judge Lynch also asked whether the material which the Committee was to consider at a coming meeting could be sent out in advance. The Chairman replied this would be done to the greatest extent practicable.

The Committee recessed for a luncheon break at 12:05 p.m. and reconvened at 1:15 p.m., at which time Section 1 of Mr. Vance Hill's draft was considered. (NOTE: Appendix "B" attached hereto consists of those sections drafted by Mr. Hill as they appeared after consideration and action by the Committee.)

* *

Mr. Hill read his proposed Section 1, dealing with the lawful use of force, as follows:

Section 1.

A. The threat or use of force upon another person is lawful when necessarily committed (1) in the arrest of a criminal; or (2) in preventing or stopping the commission of a crime, attempted suicide, or unlawful interference with another's person or property; or (3) by a parent, parent's agent, guardian, or teacher in correcting or restraining a child; or (4) by authorized personnel against the inmates, patients, or students of an institution, when the force or threat is reasonable.

B. The use of deadly force is lawful if necessarily committed when (1) the actor reasonably believed that such force was necessary to protect himself or others against a serious crime

of violence and the actor did not provoke the encounter and could not reasonably avoid using such force; or (2) the actor is a police or correctional officer, or a person acting under such direction, and is attempting to effect the arrest of a person who is fleeing and has committed a serious crime of violence and the actor believes the force employed creates no substantial risk of injury to innocent persons and that there is a substantial risk that the person to be arrested will commit a serious crime of violence if his apprehension is delayed; or (3) the actor reasonably believed that such force was necessary to prevent the commission of a serious crime in his home by an intruder; or (4) the actor was at his place of employment and he was attempting to prevent the commission of robbery, burglary, arson, or a serious crime of violence, or the flight of such criminal, and the use of other force would expose innocent persons to substantial danger.

Mr. Hill noted that the proposed section represented a change from present law in regard to the extent of the authority granted to law enforcement officers to use "deadly force" in apprehending offenders fleeing an attempted arrest. Mr. Hill stated that he made this change because he felt, in light of the current trend away from capital punishment, that police officers should not be allowed to use deadly force on "felons" unless the officers believe there is a "substantial risk" that the fleeing offender will commit another "serious crime of violence" if his apprehension is delayed. He also stated that his draft proposal would prevent the high speed vehicular chases of criminals which he felt are often carried on at great risk to innocent persons.

The Committee discussed this proposition at great length, and it was finally MOVED BY REPRESENTATIVE ATKINSON AND SECONDED BY SENATOR PAGE that Subsection b of Section 1 of Mr. Hill's draft be revised to make it reflect the present law in North Dakota regarding the use of deadly force by an arresting law enforcement officer.

Mr. Wolf stated he was in favor of language similar to that proposed by Mr. Hill, and that he would oppose Representative Atkinson's motion. Mr. Webb stated he would have no problem with Mr. Hill's language if all law enforcement officers in North Dakota received the amount of training that is presently received by officers of the Federal Bureau of Investigation. However, he felt that since all of North Dakota's law enforcement officers did not receive that type of training, Mr. Hill's proposed language would simply cause an undue hampering of our officers.

Judge Pearce stated that he supported Mr. Wolf's opposition to the motion, and further indicated that he believes the situation in which a police officer would have to make the decision under Mr. Hill's proposed language would be extremely rare.

Representative Atkinson stated that adoption of Mr. Hill's language as proposed would tend to indicate a lack of trust in our law enforcement officers. THE VOTE ON REPRESENTATIVE ATKINSON'S MOTION was then taken, and RESULTED IN A TIE. The Chairman then directed Mr. Hill to redraft several alternatives to Section 1, which Mr. Hill agreed to do.

The Chairman called on Mr. Hill to read his draft Sections 2, 3, 4, 5, and 6, dealing with homicide, which were read, as follows:

Section 2.

Criminal homicide means to intentionally, recklessly, or negligently cause the death of another human being. Criminal homicide, is either (1) murder, (2) manslaughter, (3) negligent homicide, or (4) aiding suicide.

Section 3.

Criminal homicide constitutes murder, a class A offense, when (1) it is committed intentionally; or (2) it is committed under circumstances manifesting extreme indifference to the value of human life; or (3) it is committed while committing, attempting to commit, or fleeing from robbery, burglary, arson, kidnapping, rape, or escape from confinement.

Section 4.

Criminal homicide constitutes manslaughter, a class B offense, when (1) it is committed recklessly; or (2) it is committed under the influence of extreme emotional disturbance for which there is reasonable excuse.

Section 5.

Criminal homicide constitutes aiding suicide, a class B offense, when a person willfully encourages or assists another person in taking his own life. A person who willfully encourages or assists another to attempt suicide is guilty of a class C offense.

Section 6.

Criminal homicide constitutes negligent homicide, a class B offense, when it is committed negligently.

Mr. Hill discussed the problems which have arisen because the misdemeanor-manslaughter rule has been used in prosecuting motor vehicle homicides, rather than the negligent homicide sections, which were specifically enacted to cover vehicular homicide. He stated that his proposed Section 6 is intended to obviate the use of the misdemeanor-manslaughter rule in the standard vehicular homicide case.

Mr. Webb stated that, generally speaking, he was impressed with Mr. Hill's proposed draft, but he wondered whether negligent homicide should be in the same penalty class as manslaughter. Mr. Webb also questioned the use of the words "extreme emotional disturbance" in Mr. Hill's proposed Section 4.

Mr. Hill read a statement from the proposed Federal Criminal Code relating to the phrase "extreme emotional disturbance". The federal explanation is as follows:

> "As to 'voluntary manslaughter', the scope of admissible 'provocation' is broadened to include anything that inexcusably leads to 'extreme emotional disturbance'. For example, taunts or seduction of female relatives might suffice. But extreme emotional disturbance will not reduce murder to manslaughter if the actor has culpably brought about his own mental disturbance, such as by involving himself in a crime, or if the excuse is not reasonable, such as where political events provoke an assassination."

The Committee discussed the meaning of the word "negligently" as used in Mr. Hill's proposed Section 6 dealing with negligent homicide. The question was raised as to whether "negligently" did not in fact refer to "gross negligence" as that term is known in North Dakota tort law.

Mr. Hill stated that the proposed Federal Code and the Model Penal Code define negligence as used in criminal statute.

The Model Penal Code definition (see Section 2.02) is as follows:

> "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of its conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

The proposed Federal Code (see Section 302) states:

> "A person engages in conduct: . . . (d) 'negligently' if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; . . . ."

IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that the staff of the Legislative Council be directed to prepare a new negligent homicide statute requiring some degree of negligence greater than simple negligence as that term is understood in tort law.

The Committee discussed Mr. Hill's proposed Section 5 dealing with aiding suicide. Mr. Hill noted that Section 12-33-02 which had previously made it a crime to attempt to commit suicide had been repealed in 1967, so he had not dealt with that subject in his revision.

The Committee discussed the use of the phrase "reasonable excuse" in Mr. Hill's proposed Section 4. Mr. Hill noted that Section 1602 of the proposed Federal Criminal Code was drawn on in drafting his Section 4. He stated that Section 1602 contains additional language discussing the phrase "reasonable excuse", as follows:

> "The reasonableness of the excuse shall be determined from the viewpoint of a person in his situation under the circumstances as he believes them to be. An emotional disturbance is excusable, within the meaning of this paragraph, if it is occasioned by any provocation, event or situation for which the offender was not culpably responsible."

Judge Lynch stated that the definitional language is very helpful to trial judges when they reach the stage of giving instructions to the jury. Mr. Hill stated that he will add the definitional language to his Section 4.

Mr. Wolf noted that the annotated cases to existing North Dakota criminal law are important, and reference to those annotations should always be available to Committee members.

Judge Lynch inquired whether the word "intentional", as used in the murder statute (Mr. Hill's proposed Section 3), includes the old "with malice aforethought" element of a definition of murder. Mr. Hill replied that the "with malice aforethought" language was intended to be included in the word "intentional", but perhaps that word should be defined.

Mr. Hill read his proposed Section 7, as follows:

Section 7.

> Every person who (1) intentionally assists or advises any pregnant woman to miscarry; or (2) is pregnant and solicits assistance or advice to procure a miscarriage; or (3) intentionally causes the death of a pregnant woman's quick child is guilty of a class B offense, unless such action was necessary to save the life of the mother."

Mr. Travis stated that it was his opinion that the North Dakota statutes should not prohibit medical abortion, but rather should concentrate on abortions performed by persons who are not licensed medical doctors. MR. WOLF MOVED that Section 7 be accepted as proposed by Mr. Hill. THE MOTION DID NOT RECEIVE A SECOND.

The Committee discussed the question of whether a lawyer would be in violation of Mr. Hill's proposed Section 7 if he advised a female client that she could get an abortion in New York, and further, whether the female client who solicited such advice would also be in violation of Section 7. Mr. Hill noted that the language of his section is probably broader than the current language of Chapter 12-25.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED, Mr. Webb and Mr. Travis voting in the negative, that Mr. Hill's proposed Section 7 be accepted with modification to make the section more closely reflect present North Dakota law on this subject.

Mr. Travis stated that he would like to receive a consensus from the Committee concerning the desirability of legalized abortion. Representative Hilleboe stated that, because the Legislature has recently indicated that the present abortion laws are adequate, it would probably be well for the Committee to abide by that decision. Judge Lynch agreed with Representative Hilleboe.

The Chairman called on Mr. Hill to read his proposed Sections 10 and 11, as follows:

Section 10.

> A person is guilty of the crime of assault if he intentionally and unlawfully threatens or offers to do physical harm to another person. Assault is a class C offense unless such assault threatens or offers serious bodily harm or death and then it shall be a class B offense.

Section 11.

> A person is guilty of the crime of battery if he intentionally and unlawfully uses force or violence against another person. Battery is a class C offense unless such battery attempts or causes serious bodily harm and then it shall be a class B offense.

Mr. Hill stated that he was leery of the double penalty classifications which he has given to both assault and battery. Judge Lynch suggested that all assault can be classified as a class C offense.

Mr. Wolf asked whether there shouldn't be a suggestion of "apparent ability to act" included in the definition of assault. The Committee then discussed the concepts of assault and of battery, and whether a battery includes an assault. It seemed to be the consensus of the Committee that a battery does include an assault; however, either an assault or a battery should be charged, rather than charging assault and battery.

IT WAS MOVED BY MR. TRAVIS, SECONDED BY JUDGE PEARCE, AND CARRIED that the crime of "assault" in Section 10 be a Class C offense only, and that the crime of "battery" as defined in Section 11 could be graded as both a Class C and a Class B offense depending on whether "serious bodily harm" was attempted or caused by the person committing the battery.

IT WAS MOVED BY MR. WEBB, SECONDED BY MR. TRAVIS, AND CARRIED that in proposed Section 10 the word "or" be deleted after the words "unlawfully threatens"; and that after the word "offers" the words ", or attempts" be inserted.

Mr. Hill made reference to his proposed Section 13, dealing with the unlawful administration of a "drug", and inquired as to whether the Committee believed that the word "drug" included "poisons". It was the feeling of the Committee that more research be done on this question.

The Chairman declared that, without objection, the meeting would be adjourned, subject to the call of the Chair. The meeting was adjourned at 3:25 p.m. on Tuesday, November 23, 1971.

John A. Graham
Assistant Director

REVISION OF CHAPTERS 12-18 THROUGH 12-24, NDCC

SECTION 1. RIOT - DESTRUCTIVE DEVICE - DEFINITIONS.) As used in this Title:

1. "Riot" means a public disturbance involving a group of six or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to persons or property, or substantially obstructs the performance of any governmental function, including the administration of any penal or correctional facility.
2. "Destructive device" means any physical object, liquid, or gas capable of being used, either by itself or in combination with any other physical object, liquid, or gas, to cause death, or sudden and violent injury or damage to persons or property. The term "destructive device" includes the generic terms "weapons" and "explosives".

SECTION 2. RIOTING - INCITING RIOT - ARMING RIOTERS - CLASSIFICATION OF OFFENSES.)

1. It shall be an offense for a person to:
   a. Engage in a riot.
   b. Incite or urge a group of six or more persons to engage in a current or impending riot, or to give commands, instructions, or signals to a person or persons in furtherance of a riot.
   c. Knowingly supply a destructive device for use in a riot, or to teach another to prepare or use a destructive device, with intent that such destructive device be used in a riot.

2. A person who violates subsection 1 of this section is guilty of a class C offense, unless he was apprehended in possession of a destructive device, in which case he shall be guilty of a class B offense. A person who violates subsection 2 of this section shall be guilty of a class B offense. A person who violates subsection 3 of this section is guilty of a class B offense.

SECTION 3. UNLAWFUL ASSEMBLY - DISTURBING PUBLIC ASSEMBLY - OBSTRUCTION OF PUBLIC ACCESS - FAILURE TO DISPERSE UPON ORDER - CLASSIFICATION OF OFFENSES.) It shall be an offense:

1. For three or more persons to assemble without authority of law in a manner likely to disturb the public peace or excite public alarm, or for three or more persons to assemble to do a lawful act in a violent, boisterous, or tumultuous manner.
2. For any person to willfully disturb or disrupt a lawful public meeting through conduct which is violent or patently offensive, or through utterances or gestures which are patently offensive, or which tends to incite panic on the part of those in attendance at the meeting.
3. For any person to unlawfully obstruct in any manner any public street or highway, or access to any real property or structure or improvement thereon.
4. For any person to willfully remain present at the scene of a riot, or of an unlawful assembly in violation of subsection 1, after receiving a lawful command to disperse.

A person who violates subsections 1, 2, or 3 is guilty of a class C offense. A person who violates subsection 4 is guilty of a class D offense.

If persons assembled in violation of subsection 1 of section 1 of this bill, or subsection 1 of this section, do not disperse after receiving a lawful command to do so, the law enforcement officer shall take such action as is reasonably necessary to disperse the assemblage, including the calling of private persons to his aid.

SECTION 4. (Staff to redraft.)

SECTION 5. (Staff to redraft.)

SECTION 6. DUELING - DEFINITION - CLASSIFICATION OF OFFENSES.) 1. As used in this section, "duel" means any combat with destructive devices fought between two persons by agreement, whether such combat takes place in a public or private place.

2. Any person who engages in, or aids those engaging in, a duel shall be guilty of a class C offense. Any person who shall, by agreement, engage in a fight with another in a public or private place, except when engaged in a legitimate athletic event or exercise or as authorized by chapter 53-01, shall be guilty of a class D offense.

SECTION 7. OBSCENITY - DEFINITIONS - DISSEMINATION - CLASSIFICATION OF OFFENSES.) 1. A person is guilty of a class D offense if, knowing of its character, he disseminates obscene material, or if he produces, transports, or sends obscene material with intent that it be disseminated.

2. A person is guilty of a class D offense if he presents or

directs an obscene performance, or participates in any portion of a performance which contributed to the obscenity of the performance as a whole.

3. As used in this section, the terms "obscene material" and "obscene performance" mean material or a performance which, considered as a whole:

a. Predominantly appeals to a prurient or morbid interest in nudity, sex, excretion, sadism, or masochism; and

b. Goes substantially beyond customary limits of candor in describing or representing such matters; and

c. Is utterly without redeeming social value.

That material or a performance predominantly appeals to a prurient or morbid interest shall be judged with reference to ordinary adults, unless it appears from the character of the material or the circumstances of its dissemination to be designed for minors or other specially susceptible audience, in which case, the material or performance shall be judged with reference to that type of audience.

4. As used in this section, the term "disseminate" means to sell, lease, advertise, broadcast, exhibit, or distribute.

5. As used in this section, the term "material" means any physical object used as a means of presenting or communicating information, knowledge, sensation, image, or emotion to or through a human being's receiptive senses.

6. As used in this section, the term "performance" means any play, motion picture, dance, or other exhibition presented before an audience.

SECTION 8. PROMOTING OBSCENITY TO MINORS - DEFINITIONS.) As used in section 9:

1. "Minor" means a person under eighteen years of age.

2. "Promote" means to produce, direct, manufacture, issue, sell, lend, mail, publish, distribute, exhibit, or advertise.

3. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when such description or representation:

a. Predominantly appeals to the prurient, shameful, or morbid interest of minors; and

b. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

c. Is utterly without redeeming social importance for minors.

4. "Material" and "performance" shall be defined as in section 7, subsections 5 and 6, respectively.

SECTION 9. PROMOTING OBSCENITY TO MINORS - MINOR PERFORMING IN OBSCENE PERFORMANCE - CLASSIFICATION OF OFFENSES.) 1. It shall be a class D offense for a person to knowingly promote to a minor any material or performance which, taken as a whole, is harmful to minors; or to admit a minor to premises where a performance harmful to minors is exhibited or takes place.

2. It shall be a class C offense to permit a minor to participate in a performance which, taken as a whole, is harmful to minors.

3. (New subsection to be added.)

SECTION 10. PROSTITUTION - DEFINITIONS.) 1. "Prostitution" means the performance or offer of performance of any sexual activity for hire with any person not the actor's spouse, in exchange for money or other thing of value.

2. "House of prostitution" is any place where prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

3. "Inmate" is a person who regularly carries on prostitution in or through the agency of a house of prostitution.

4. "Prostitution business" is any business which derives funds from prostitution carried on by a person under the control, management, or supervision of another.

SECTION 11. PROSTITUTION - MAINTAINING HOUSE OF PROSTITUTION - RELATED OFFENSES - CLASSIFICATION OF OFFENSES.) 1. It shall be a class D offense for any person to engage in prostitution, or to solicit another person with the intention of being hired to engage in prostitution. (Increased penalty - class C - for second and subsequent convictions.)

2. It shall be a class C offense for anyone to maintain or have control of a house of prostitution, or to maintain or participate in a prostitution business.

3. It shall be a class D offense for a person to hire a prostitute to engage in sexual intercourse with him, or for a person to enter or remain in a house of prostitution for the purpose of engaging in sexual intercourse.

4. It shall be an offense for a person to: (a) procure an inmate for a house of prostitution; or (b) to procure a place in a house of prostitution for one who would be an inmate. Violation of this subsection shall be a class C offense. (Penalty increased to class B for second and subsequent offenses.)

5. It shall be a class B offense for any person, other than a prostitute, or a legal dependent of such prostitute, to live on or to be supported or maintained, in whole or in part, by money or other thing of value, earned by any person through prostitution.

6. It shall be a class C offense for any person to compel another to engage in prostitution, by any means which negates the exercise of the other person's free choice. (Penalty increased to class B for second and subsequent offenses.)

SECTION 12. INCEST - CLASSIFICATI N OF OFFENSE.) It shall be a class C offense for a person to have sexual intercourse with another person when the other person is known by the offender to be within the degree of consanguinity set forth in section 14-03-03.

SECTION 13.) 1. It shall be a class C offense for a married person to willfully and knowingly contract a subsequent marriage in this state while a prior marriage, to the knowledge of the offender, is still subsisting and undissolved; or for a married person to contract a subsequent marriage outside this state and hold himself out as married to the subsequent spouse in this state.

2. It shall be a class C offense for an unmarried person to knowingly marry another in this state under circumstances which would render the other person guilty of an offense under subsection 1.

3. This section does not apply to parties to a marriage, lawful in the country of which they are nationals or residents, while they are in transit through or temporarily visiting this state.

SECTION 14. (Combined with section 13.)

SECTION 15. EQUAL ENJOYMENT OF PUBLIC FACILITIES - CLASSIFICATION OF OFFENSE.) It shall be a class D offense for any person to exclude another person from full and equal enjoyment of any facility open to the public on account of the sex, race, color, religion, or national origin of the person excluded.

SECTION 16. GAMBLING - DEFINITIONS.) As used in section 17:

1. "Gambling" means risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including an election or sporting event, over which the person taking the risk has no control. Gambling does not include: (a) lawful contests of skill, speed, strength, or endurance in which awards are made only to entrants or to the owners of entries; or (b) lawful business transactions, or other acts or transactions now or hereafter expressly authorized by law.
2. "Lottery" means any plan for the distribution of a thing of value, whether tangible or intangible, or a person or persons selected by chance from among participants, some or all of whom have given a consideration for the chance of being selected.

3. "Bucket shop" means any location wherein the pretended buying or selling of securities or commodities for future delivery is carried on without any intention of future delivery, whether such pretended contract is to be performed within or without this state.

4. "Gambling apparatus" means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons, or gambling by a person involving the playing of a machine. Gambling apparatus does not include an amusement game or device as defined in section 53-04-01.

5. "Gambling house" means any location or structure, stationary or movable, wherein gambling is permitted or promoted, or where a lottery is conducted or managed. In the application of this definition, any place where gambling apparatus is found is presumed to be a gambling house, provided that this presumption shall not apply where cards, dice, or other games are found in a private residence.

SECTION 17. GAMBLING - RELATED OFFENSES - CLASSIFICATION OF OFFENSES.)

1. It shall be a class D offense to engage in gambling.

2. It shall be a class C offense to knowingly maintain, or to knowingly aid or permit the maintenance of, a gambling house or bucket shop.

3. It shall be a class C offense to:

a. Conduct a lottery; or

b. Sell, purchase, receive, or transfer a chance to participate in a lottery; or

c. Disseminate information about a lottery with intent to encourage participation in it.

4. Subsection 3 shall apply to a lottery drawn or to be drawn outside of this state, whether or not such lottery is lawful in such other state or country.

SECTION 18. BUSINESS OR LABOR ON SUNDAY - EXEMPTIONS - CLASSIFICATION OF OFFENSES.) Except as otherwise provided in sections 19 and 20, it shall be a class D offense for any person on Sunday to:

1. Engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public, or to authorize or direct his employees or agents to take such action; or

2. Subsection 1 shall not apply to any person who in good faith observes a day other than Sunday as the Sabbath, if he refrains from engaging in or conducting business or labor for profit and closes his place of business to the public on that day.

3. The attorney general, a state's attorney, a mayor, a city manager, or a municipal attorney may petition a district court, for the district where a violation is occurring, to enjoin a violation of this section.

SECTION 19. PERSONAL PROPERTY SALES ALLOWABLE ON SUNDAY.) The

sale of any of the following items of personal property shall be allowed during any and all hours on Sundays:

1. Drugs, medical and surgical supplies, or any object purchased on the written prescription of a licensed medical or dental practitioner for the treatment of a patient.
2. Food prepared for consumption on or off the premises where sold.
3. Newspapers, magazines, and books.
4. Gasoline, fuel additives, lubricants, and antifreeze.
5. Tires.
6. Repair or replacement parts and equipment necessary to, and safety devices intended for, safe and efficient operation of land vehicles, boats, and aircraft.
7. Emergency plumbing, heating, cooling, and electrical repair and replacement parts and equipment.
8. Cooking, heating, and lighting fuel.
9. Infant supplies.
10. Camera and school supplies, stationery, and cosmetics.
11. Beer and alcoholic beverages but only until one o'clock a.m.

SECTION 20. BUSINESSES ALLOWED TO OPERATE ON SUNDAY.) The operation of any of the following businesses shall be allowed on Sundays:

1. Restaurants, cafeterias, or other prepared food service organizations.
2. Hotels, motels, and other lodging facilities.
3. Hospitals and nursing homes.

4. Dispensaries of drugs and medicines.
5. Ambulance and burial services.
6. Generation and distribution of electric power.
7. Distribution of gas, oil, and other fuels.
8. Telephone, telegraph, and messenger services.
9. Heating, refrigeration, and cooling services.
10. Railroad, bus, trolley, subway, taxi, and limousine services.
11. Water, air, and land transportation services and attendant facilities.
12. Cold storage warehousing.
13. Ice manufacturing and distribution.
14. Minimal maintenance of equipment and machinery.
15. Plant and industrial protection services.
16. Industries where continuous processing or manufacturing is required by the very nature of the process involved.
17. Newspaper publication and distribution.
18. Radio and television broadcasting.
19. Motion picture, theatrical, and musical performances.
20. Automobile service stations.
21. Athletic and sporting events.
22. Parks, beaches, and recreational facilities.
23. Scenic, historic, and tourist attractions.
24. Amusement centers, fairs, zoos, and museums.
25. Libraries.
26. Educational lectures, forums, and exhibits.
27. Service organizations (USO, YMCA, etc.).

28. Grocery stores operated by the owner-manager who regularly employs not more than three employees for the operation of said store.

29. Premises licensed to dispense beer and alcoholic beverages within the limits prescribed in section 5-02-05.

SECTION 21. PUBLIC PROFANITY AND ABUSIVE LANGUAGE - DEFINITIONS - CLASSIFICATION OF OFFENSES.) 1. As used in this section, "profanity" means language which is patently offensive and goes substantially beyond customary limits of verbal candor within the community. Profanity includes language which is obscene and language which is obviously coarse and abusive.

2. It shall be a class D offense for anyone to use profanity where other persons may hear it and be offended, alarmed, or annoyed.

Section 1.

(To be redrafted.)

Section 2.

Criminal homicide means to intentionally, recklessly, or negligently cause the death of another human being. Criminal homicide is either (1) murder, (2) manslaughter, (3) negligent homicide, or (4) aiding suicide.

Section 3.

Criminal homicide constitutes murder, a class A offense, when (1) it is committed intentionally; or (2) it is committed under circumstances manifesting extreme indifference to the value of human life; or (3) it is committed while committing, attempting to commit, or fleeing from robbery, burglary, arson, kidnapping, rape, or escape from confinement.

Section 4.

Criminal homicide constitutes manslaughter, a class B offense, when (1) it is committed recklessly; or (2) it is committed under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in his situation under the circumstances as he believes them to be. An emotional disturbance is excusable, within the meaning of this paragraph, if it is occasioned by any provocation, event or situation for which the offender was not culpably responsible.

Section 5.

Criminal homicide constitutes aiding suicide, a class B offense, when a person willfully encourages or assists another person in taking his own life. A person who willfully encourages or assists another to attempt suicide is guilty of a class C offense.

Section 6.

(To be redrafted, deals with negligent homicide.)

Section 7.

(To be modified.)
Every person who (1) intentionally assists or advises any pregnant woman to miscarry; or (2) is pregnant and solicits assistance or advice to procure a miscarriage; or (3) intentionally causes the death of a pregnant woman's quick child is guilty of a class B offense, unless such action was necessary to save the life of the mother.

Section 10.

A person is guilty of a crime of assault if he intentionally and unlawfully threatens, offers, or attempts to do physical harm to another person. Assault is a class C offense.

Section 11.

A person is guilty of the crime of battery if he intentionally and unlawfully uses force or violence against another person. Battery is a class C offense unless such battery attempts or causes serious bodily harm and then it shall be a class B offense.

C. EMERSON MURRY
DIRECTOR

STATE CAPITOL
BISMARCK 58501

TELEPHONE
(701) 224-2916

North Dakota Legislative Council

December 22, 1971

TO: ALL MEMBERS OF THE COMMITTEE ON JUDICIARY "B"

The Chairman, Senator Howard Freed, has called the next meeting of the Committee on Judiciary "B" for Monday and Tuesday, January 24 and 25, 1972, to commence at 9:30 a.m. in Committee Room G-2 of the State Capitol in Bismarck, North Dakota.

The agenda will probably consist of revision of the first six chapters of Title 12, and it is hoped that advance copies of the draft revision will be mailed to all members prior to the meeting dates so that you will have time for advance consideration.

If any member is unable to attend on these dates, it would be appreciated if he would notify this office as soon as possible.

Sincerely,

C. Emerson Murry
Director

CEM:ms

Copies to: Senators Freed, Page
Representatives Atkinson, Hilleboe, Kieffer, Murphy, Stone
Judges Erickstad, Lynch, Smith
Messrs. Wolf, Webb, Pearce, Kraft

C. EMERSON MURRY
DIRECTOR

JOHN A. GRAHAM
ASSISTANT DIRECTOR

CHESTER E. NELSON, JR.
BUDGET ANALYST AND AUDITOR

JOHN D. OLSRUD
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ROGER BAUER
FISCAL ANALYST

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COUNSEL

North Dakota Legislative Council

STATE CAPITOL — BISMARCK 58501 TELEPHONE (701) 224-2916

January 19, 1972

TO: ALL MEMBERS OF THE COMMITTEE ON JUDICIARY "B"

Enclosed please find a copy of the first nine sections of the draft revision to be considered on the agenda of the meeting to be held on Monday and Tuesday, January 24-25, 1972.

Unfortunately, the total draft revision to be considered at that meeting is not available for mailing at this time, however, we wished to get this information to you for your prior consideration. Comments to these sections, and collations of present sections of law replaced by these sections will be presented at the meeting.

Thank you for your kind attention.

Sincerely,

John A. Graham
Assistant Director

JAG:da

Copies to: Senators Freed, Page
Representatives Atkinson, Hilleboe, Kieffer, Murphy, Stone
Judges Erickstad, Lynch, Smith
Messrs. Wolf, Webb, Pearce, Kraft, Hill, Travis

Travis

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Monday and Tuesday, January 24-25, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Vice Chairman, Representative Myron Atkinson, called the meeting of the Committee on Judiciary "B" to order at 9:45 a.m. on Monday, January 24, 1972, in Committee Room G-2 of the State Capitol in Bismarck, North Dakota.

Members present:	Representatives Atkinson, Hilleboe, Murphy, Stone Senator Page
Advisory members present:	Judge Ralph Erickstad, Judge Harry Pearce, Professor Larry Kraft, Mr. Rodney Webb, Mr. Al Wolf
Members absent:	Representative Kieffer Senator Freed
Advisory members absent:	Judge W. C. Lynch, Judge Kirk Smith
Also present:	Representative Bryce Streibel, Chairman, Legislative Council; Mr. Charles Travis, Criminal Rules Revisor; Mr. James Wilson, Associated Press

IT WAS MOVED BY SENATOR PAGE, SECONDED BY REPRESENTATIVE HILLEBOE, AND UNANIMOUSLY CARRIED that the minutes of the meeting of November 22-23, 1971, be approved as mailed.

The Vice Chairman called on the Committee Counsel to discuss the draft revision to be considered by the Committee during this meeting. (The sections affected by Committee action during this meeting are appended to these minutes as Appendix "A".) The Committee Counsel noted that the draft revision encompassed the bulk of Chapters 12-01 through 12-06 of the Century Code, except that the major topic of attempts to commit crime had not been revised. In addition, the Committee was presented with a document containing staff comments to the proposed revised sections intended to replace Chapters 12-01 through 12-06, and a collation of present sections of the Century Code affected by each section of the draft revision.

The Vice Chairman called on the Committee Counsel to read SECTION 1A of the proposed revision, as follows:

SECTION 1A.) 1. This title, except as provided in subsection 2 of this section, shall not apply to offenses committed prior to its effective date. Prosecutions for such offenses shall be governed by prior law, which is continued in effect for that purpose. For the purposes of this section, an offense was committed prior to the effective date of this title if any of the elements of the offense occurred prior thereto.

2. In cases pending on or after the effective date of this title, and involving offenses committed prior thereto:

a. The provisions of this title according a defense or mitigation shall apply, with the consent of the defendant; and

b. The court, with the consent of the defendant, may impose sentence under the provisions of this title which are applicable to the offense and the offender.

The Committee Counsel noted that SECTION 1A was intended to replace Sections 12-01-01 and 12-01-02, and that it was primarily a statement of the effect of the adoption of a revision of the criminal code.

SECTION 1A sets forth the standard for determining when an offense shall be considered to have occurred prior to the effective date of adoption of the revision of the criminal code. The section also provides that provisions of the revision which are favorable to an offender may be applied to his case, regardless of the fact that the offense occurred prior to the effective date of the revision, if the offender consents to such application.

The Vice Chairman called on the Committee Counsel to read SECTION 2A, as follows:

SECTION 2A.) 1. No conduct or omission to act constitutes an offense unless it is declared to be an offense under this title, the

Constitution of this state, or another statute of this state.

2. The provisions of this chapter are applicable to offenses defined by other statutes, unless otherwise provided in this title.

3. This section does not affect the power of a court or legislature to punish for contempt, or to employ any enforcement sanction authorized by law, nor does this section affect any power conferred by law upon military authority to impose punishment upon offenders.

The Committee Counsel noted that the section is derived in essence from Section 1.05 of the Model Penal Code. This section is intended to abolish common law crimes by providing that no action or omission to act is a crime unless declared to be so by the Constitution or statutes of North Dakota. The provisions of this section and of a "General Provisions" chapter to be contained in the revised criminal code would be applicable to offenses defined by statutes outside of Title 12, unless Title 12 itself specifically provided otherwise.

The section contains a disclaimer of any intention to govern the procedures regarding exercise of the contempt power by a court or the Legislature, or to govern the exercise of penal power by military authorities. The portion of the section dealing with the exercise of the contempt power and military penal authority is designed to replace Section 12-01-12.

Mr. Charles Travis inquired as to the status of municipal ordinances in relation to SECTION 2A. He noted Subsection 1 provides that no act or omission constitutes an offense unless it is declared to be an offense by the Constitution or a statute. What about "offenses" established solely by municipal ordinance? The Vice Chairman directed the Legislative Council staff to research the question of the effect of SECTION 2A, Subsections 1 and 2, as they relate to "offenses" defined by municipal ordinance.

Judge Erickstad inquired as to the effect of this statute on the problem outlined in the decision of State v. Odegaard, 165 NW2d 677. That case dealt with a statute prohibiting the operation of a motorcycle without a helmet, which had been inserted in a chapter of the Century Code containing a general penalty section at the end of the chapter. The statute itself contained no specific penalty.

Judge Erickstad noted the problem with which the court had to wrestle was whether the general penalty, previously existing, applied to a section of the Code which was inserted by the Code Revisor at a later date. He stated that SECTION 2A, read in conjunction with

SECTION 4A, did not solve this problem, as SECTION 4A made reference to the fact that the definition of an "offense" was an act or omission prohibited or demanded by statute "and to which is annexed" a punishment. His question was whether the punishment must be "annexed" in the specific section defining the offense, or whether it could be "annexed" as a general penalty section within the chapter of the Century Code containing the specific section.

The Vice Chairman called on the Committee Counsel to read SECTION 3A, as follows:

SECTION 3A.) In this title, unless the context requires a different meaning:

1. "Act" or "action" means a bodily movement, whether voluntary or involuntary.
2. "Omission" means a failure to act.
3. "Negligent", "negligence", and "negligently" designate the standard prescribed in section _____.
4. "Actor" includes, where relevant, a person guilty of an omission.
5. "Acted" includes, where relevant, "omitted to act".
6. "Public servant" means any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses.
7. "Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of government.
8. "Government" means (a) the government of the United States, any state, or any political unit within a state; (b) any agency, subdivision, or department of the foregoing, including the executive, legislative, and judicial branches;

(c) any corporation or other entity established by law to carry on any governmental function; and (d) any commission, corporation, or agency established by statute, compact, or contract between or among governments for the execution of intergovernmental programs.

9. "Person" includes, where relevant, a corporation, partnership, unincorporated association, or other legal entity. When used to designate a party whose property may be the subject of an offense, the word "person" includes a government which may lawfully own property in this state.

10. "Property" includes both real and personal property.

11. "Peace officer" includes sheriffs, policemen, coroners, constables, marshals, and other officers whose duty it is to enforce the public peace.

12. "Writing" includes printing, typewriting, and copying.

13. "Signature" includes any name, mark, or sign written or affixed with intent to authenticate any instrument or writing.

14. Words used in the singular include the plural, and the plural the singular. Words in the masculine gender include the feminine and neuter genders. Words used in the present tense include the future tense, but exclude the past tense.

15. "Motor vehicle" includes any self-propelled device, not running on tracks or cables, by which persons or property may be transported on land, water, or in the air.

Mr. Wolf noted that the language of Subsection 9 of SECTION 3A which defines the word "person" to include a government where property

may be the subject of the offense could be construed to cause the government to be criminally liable. The Vice Chairman directed the staff to research this problem and make a proper determination.

Mr. Kraft questioned the necessity for Subsection 3 of SECTION 3A, in light of the fact that all the degrees of culpability would be defined in a separate section or sections of the proposed revised criminal code. It was the consensus of the Committee that Subsection 3 of SECTION 3A be stricken.

In regard to Subsection 11, defining "peace officer", Judge Erickstad inquired as to whether or not the definition should also include highway patrolmen. Mr. Wolf added that possibly the definition should also include truck regulatory officials. The Committee discussed at length the question of who should be considered a "peace officer" for the purposes of a revised criminal code, and whether the term "peace officer" is the proper one to be used in defining persons charged with law enforcement.

Mr. Webb stated that he thought the Committee should provide a broad general definition of "peace officer". Mr. Wolf agreed that perhaps a broad general definition would be appropriate in this section, with provision, where necessary, for more specific definitions elsewhere in the proposed code.

Senator Page inquired as to whether the inclusion of highway patrolmen in a general definition of "peace officers" would not indirectly result in the creation of a state police force. The Committee discussed his comment, and Judge Erickstad noted that the powers of a particular law enforcement official would still be based on the statutes stating the extent of his power to arrest. Judge Erickstad stated that the various arrest statutes in the Century Code should be studied to determine the extent of the powers of the various law enforcement officials.

Professor Kraft suggested that Subsection 11 be redrafted and that essentially the definition contained in Subsection (w) of Section 109 of the proposed Federal Criminal Code be substituted for the present definition in Subsection 11. That definition reads as follows:

> "'Law enforcement officer' means a public servant authorized by law or by a government agency or branch to conduct or engage in investigations or prosecutions for violations of law;"

Mr. Wolf stated he was in favor of that definition, but would suggest that the definition include reference to the responsibility of a "law enforcement officer" to enforce the law.

Representative Stone inquired as to why we didn't use the words "law enforcement officer" rather than the words "peace officer".

Mr. Webb stated that the reason was because so many references throughout the Code are to "peace officer". Mr. Wolf suggested that the definition, for the Committee's purposes, be stated in terms of defining a "law enforcement officer or peace officer".

Judge Erickstad stated that if a definition of this sort were adopted, a person would still have to look at the statutory authority governing each particular type of officer to determine the extent of that officer's authority.

The Committee consensus was to redraft Subsection 11 of SECTION 3A using essentially the language of Subsection (w) of Section 109 of the proposed Federal Criminal Code.

Representative Hilleboe questioned the definition in Subsection 6 of SECTION 3A defining a "public servant" as including any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function. He questioned whether it would be practically possible to determine whether a "consultant" was not performing up to par for the purposes of prosecution.

There was discussion of Representative Hilleboe's point, and IT WAS MOVED BY REPRESENTATIVE HILLEBOE AND SECONDED BY MR. WEBB that in Line 13, the words "as an advisor, consultant, process server, or otherwise" be stricken, and that in Line 14, the word "performing" be deleted and the words "in the performance of" be placed in lieu thereof.

MR. WOLF MADE A SUBSTITUTE MOTION to strike the word "or" in Line 12, and insert in lieu thereof a comma; and to insert after the word "appointed" in Line 12, the words "or contracted with". MR. WOLF WITHDREW HIS MOTION, and requested that the minutes reflect that "advisors" and "consultants" are intended to be "public servants" under the definition, as amended by the motion made by Representative Hilleboe. At that point, REPRESENTATIVE HILLEBOE'S MOTION AMENDING SUBSECTION 6 OF SECTION 3A CARRIED UNANIMOUSLY.

The Vice Chairman called on the Committee Counsel to read SECTION 4A, as follows:

SECTION 4A.) As used in this title, an offense is an act committed or omitted in violation of a statute forbidding or commanding it, and to which is annexed, upon conviction, one or a combination of the following punishments:

1. Imprisonment;

2. Fine;

3. Restitution;

4. Removal from office;

5. Disqualification to vote or hold office; or

6. Other penal discipline.

The word "offense" is synonymous with the words "crime", "crimes", or "public offense".

The Committee Counsel noted that SECTION 4A was designed to replace Section 12-01-06, and is essentially a revision of that section, rather than a restatement of a section from another criminal code. The Counsel noted that the reference to "title" in Line 1 of SECTION 4A is probably inappropriate, and reference should rather be made to "Code". The Vice Chairman stated that without objection, the word "title" in Line 1 of SECTION 4A would be changed to "Code".

Mr. Webb inquired as to whether we shouldn't give more consideration to the meaning of the word "annexed" in Line 3 of SECTION 4A, especially in light of the previous change of the word "title" to "Code". Judge Erickstad suggested that perhaps we should change "Code" to "title" in order to obviate any possible problems with the word "annexed".

Representative Streibel joined the meeting at this point, and briefly discussed his trip to New York to study the New York Legislature in action. He noted that while there were relatively few attorneys in the North Dakota Legislature, only five of the 57 New York Senators were not attorneys.

The Vice Chairman called on the Committee Counsel to read SECTIONS 5A and 6A, as follows:

SECTION 5A.) An offense defined in this title, or other statute of this state, constitutes a violation if it is so designated in this title, or in any other statute defining the offense, or if no sentence other than a fine, restitution, forfeiture, or a combination of these is authorized upon conviction. Conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

SECTION 6A.) Offenses are divided into five classes, which are

to be distinguished from one another by the following maximum penalties which are authorized upon conviction:

1. Class A offenses, for which a maximum penalty of twenty-five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
2. Class B offenses, for which a maximum penalty of five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
3. Class C offenses, for which a maximum penalty of one year's imprisonment, a fine of two thousand five hundred dollars, or both, may be imposed.
4. Class D offenses, for which a maximum of thirty days' imprisonment, a fine of five hundred dollars, or both, may be imposed.
5. Violations, for which only a penalty consisting of a fine, restitution, forfeiture, or a combination of the foregoing may be imposed.

This section shall not be construed to forbid sentencing under section 8A relating to extended sentences.

The Counsel noted that SECTION 5A is designed to define the term "violation" when used as a portion of the classification plan tentatively adopted at the September 20-21, 1971, meeting. SECTION 6A is a draft of the tentatively adopted classification structure, which eliminates the use of the words "felony" and "misdemeanor" and substitutes the use of the word "offenses" therefor.

Judge Pearce noted that SECTIONS 5A and 6A give rise to questions concerning their applicability or relationship with municipal ordinance violations. He stated he felt that municipal ordinance violations should specifically be made noncriminal. In addition, municipal courts should be given concurrent jurisdiction over Class D offenses. Thus, the criminal jurisdiction of municipal courts would be uniform throughout the State.

Judge Pearce stated that the definition of "offense" should be clarified in light of the conflicts that always arise when municipal ordinance questions are considered. He commented that he thought this was an appropriate topic on which the Committee on Judiciary "B" could make recommendations. He indicated that he would be prepared to draft a proposal for the Committee's consideration.

Judge Erickstad suggested that the Vice Chairman appoint Judge Pearce as a subcommittee of one to prepare a proposal which would bring the relevant statutes in the municipalities portion of the Code in line with the Committee classification scheme and with Judge Pearce's thoughts regarding the proper status of municipal ordinances.

The Vice Chairman appointed Judge Pearce to a subcommittee of one to draft a proposal along the lines of his discussion. He was to receive aid from Mr. Travis, Mr. Hill, and the Committee Counsel. Mr. Wolf stated that the question of the constitutionality of the present structure of offense classification, and any proposed structure of offense classification, should be carefully looked at by the Committee.

The Vice Chairman asked the Committee to discuss a timetable for completion of the Committee's work during this biennium. The Committee Counsel noted that the Committee, in all likelihood, would be able to finish no more than a revision of Title 12 of the Century Code, and that an outside date for completion of this work would be October 15, 1972. This date would allow time for preparation of the Committee report prior to the biennial Camp Grafton meeting of the full Legislative Council.

The Vice Chairman noted that the Committee would have to provide time on agendas of future meetings for invitations to representatives of interested groups to present their views on the proposed revision. Therefore, a complete draft of the proposed revision must be available in time to allow such invitations.

Mr. Wolf noted the Committee should finish a rough draft of the complete revision before the election campaign begins in earnest, due to the fact that several legislative members of the Committee will probably have less time to attend meetings during the campaign. He also stated the draft must be considered by groups with a particular interest during the interim, otherwise it will meet with stiff opposition during the session.

The Vice Chairman noted it would probably be well for the Committee to consider itself as operating on a seven-month timetable from February 1 on. He inquired of the Committee Counsel whether the Committee could have considered a complete draft of the revision of Title 12 within a seven-month timetable. The Committee Counsel replied that he believed the Committee could finish its consideration; however, it would require four meetings within the next seven months, all of which would be two-day meetings,and perhaps one or two of which might be three-day meetings.

The Vice Chairman noted that the Committee should make contact with the different interested groups and inform them of the Committee's plans. He asked members for suggestions as to the groups which should be invited to make presentations regarding the proposed revision of Title 12. The Committee membership chose the following groups:

1. The State's Attorneys Association.
2. The County Sheriffs' Association.
3. The North Dakota Peace Officers' Association.
4. The North Dakota League of Cities.
5. The Judicial Council.
6. The North Dakota Police Chiefs' Association.
7. The North Dakota Combined Law Enforcement Council.
8. The North Dakota State Bar Association.

The Council Chairman, Representative Streibel, directed the Committee Counsel to contact the above-named organizations, and to indicate that the Committee wishes to have a strong line of communication with these organizations. The Committee Counsel was also to indicate in his communication that representatives of these groups are to be invited to future meetings of the Committee to express their views regarding its proposals.

Mr. Wolf noted that the above-listed state organizations should, to the extent possible, have a chance to put the proposed revision of Title 12 on the agenda of their annual meetings. Thus, it would be well to have a complete draft by June 1972.

The Chairman inquired whether it would be possible for the Committee to have monthly meetings for the remainder of the biennium. The Committee Counsel stated perhaps monthly meetings may be necessary later in the spring, but they may not be feasible due to the fact that the staff work necessary in preparation for a meeting might not be completed within a month.

The Committee recessed for lunch and reconvened at 1:15 p.m., continuing its discussion of SECTIONS 5A and 6A. In regard to SECTION 6A, Mr. Webb stated that he was opposed to classification of offenses on the basis of alphabetical or numerical designations. He suggested that the classifications should be on the following basis:

1. Major felony.
2. Felony.

3. Gross misdemeanor.

4. Misdemeanor.

Mr. Wolf stated that essentially he agreed with Mr. Webb, but indicated we should retain the proposed classification scheme subject to future reconsideration by the Committee.

Representative Murphy inquired as to whether we shouldn't provide a death penalty as the maximum punishment for commission and conviction of a Class A offense. The Committee Counsel noted the Constitutional Convention has, at the present time, proposed that the Constitution specifically prohibit the death penalty as a punishment for crime.

In regard to SECTION 5A, Mr. Webb inquired as to whether there was a real need for a classification of offenses known as "violations". He stated that, at this time, he could see no need for such a classification. Judge Erickstad stated there might be instances in which such a classification would be beneficial.

Mr. Wolf stated that a "violation" classification might be valuable in areas where the civil remedies available to persons harmed are really not a practical method of preventing the particular type of wrong committed. For instance, situations involving the misappropriation of water rights.

Following further discussion, IT WAS MOVED BY MR. WEBB AND SECONDED BY MR. WOLF that Subsection 5 of SECTION 6A (Lines 23, 24, and 25) be deleted. Mr. Wolf noted that his second was for the purpose of discussion. MR. WEBB'S MOTION TO DELETE SUBSECTION 5 OF SECTION 6A FAILED TO CARRY.

Mr. Wolf explained his negative vote as not indicating complete satisfaction with the proposed offense classification plan. Rather, he would like to again adopt it temporarily, subject to further consideration by the Committee.

Mr. Webb stated that his objection to the use of an offense classification known as "violation" was based on the fact that incarceration, or its possibility, is the heart of criminal law, and that where incarceration is not deemed to be a proper punishment for an "offense", that "offense" should not be considered criminal.

The Vice Chairman called on the Committee Counsel to read SECTION 7A, as follows:

SECTION 7A.) 1. Every person convicted of an offense, other than a violation, shall be sentenced to one or a combination of the following alternatives:

a. Unconditional discharge, except as the penalty following conviction of a class A offense.

b. Deferred imposition of sentence.

c. Probation.

d. A term of imprisonment, including intermittent imprisonment.

e. A fine.

f. Restitution for damages resulting from the commission of the offense.

g. Restoration of damaged property, or other appropriate work detail.

h. Commitment to an appropriate licensed public or private institution for treatment of alcoholism, drug addiction, or mental disease or defect.

i. Disqualification, pursuant to section _____.

Sentences imposed under this subsection shall not exceed in duration the maximum sentences provided by section 6A, section 8A, or as provided specifically in a statute defining an offense.

2. Every person convicted of a violation may be sentenced to one or a combination of the following alternatives:

a. Unconditional discharge.

b. Probation.

c. Deferred imposition of sentence.

d. A fine.

e. Restitution for damages resulting from commission of the offense.

3. A court may, at any time prior to the time custody of a

convicted offender is transferred to a penal institution or institution for treatment, suspend all or a portion of any sentence imposed pursuant to this section.

4. A court may, prior to imposition of sentence, order the convicted offender committed to an appropriate licensed public or private institution for diagnostic testing for such period of time as may be necessary, but not to exceed thirty days. The court may also order such diagnostic testing without ordering commitment to an institution. Validity of a sentence shall not be challenged on the ground that diagnostic testing was not performed pursuant to this subsection. If an offender is sentenced to imprisonment following a commitment for diagnostic testing, the number of days he was confined to an institution shall be credited against his term of imprisonment.

5. If a court, taking into regard the nature and circumstances of the offense and the history and character of the offender, concludes it would be unduly harsh to enter a judgment of conviction for that class of offense, it may enter a judgment of conviction for the next lower class of offense and impose sentence accordingly.

6. All sentences imposed shall be accompanied by a written statement by the court setting forth the reasons for imposing the particular sentence. The statement shall become part of the record of the case.

IT WAS MOVED BY MR. WOLF AND SECONDED BY REPRESENTATIVE STONE that Subdivision b of Subsection 1 of SECTION 7A be deleted, and that in Line 1 of SECTION 7A the word "offense" be deleted and the words "found guilty" be inserted in lieu thereof. THIS MOTION WAS WITHDRAWN BY MR. WOLF WITH THE CONSENT OF HIS SECOND.

MR. WOLF then stated and WITHDREW A MOTION directing the staff to redraft SECTION 7A so as to continue the possibility of deferred imposition of sentences.

Judge Erickstad noted that Subdivision a of Subsection 1 of SECTION 7A providing for "unconditional discharge" is probably not language which could be considered a "sentence" in the traditional sense.

The Committee then discussed the provision of a "sentence" for conviction of a "violation". Senator Page inquired whether the fine which could be assessed as punishment for a "violation" shouldn't have a specific dollar maximum stated in Subsection 5 of SECTION 6A. The Committee consensus was that a maximum dollar amount should be stated in Subsection 5 of SECTION 6A. It was also the consensus of the Committee that the language "one hundred dollars or as otherwise provided by law" should be inserted in the appropriate place in Subsection 5 of SECTION 6A.

The Committee then discussed Subsection 4 of SECTION 7A providing for presentence diagnostic testing, including commitment to an institution for such testing, for a period not to exceed 30 days. The Committee discussed the 30-day limitation. Mr. Wolf stated he felt that a 30-day limit on such a presentence commitment was a long enough period.

The Committee discussed Subsection 5 of SECTION 7A which would allow the trial judge to reduce the classification of an offense after a finding of guilt against the offender. The question arose as to why such a subsection was necessary.

Mr. Murphy stated he felt that the judge should have complete sentencing discretion, and should be able to reclassify an offense to any lower class offense.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY MR. WOLF, AND CARRIED that Subsection 5 of SECTION 7A be deleted, and that the subsections remaining be renumbered as necessary.

The Committee discussed Subsection 6 of SECTION 7A which requires the trial judge to accompany each sentence imposed with a written statement of the reasons for imposing that sentence. Mr. Travis said there was a possibility that this provision would unduly hamper a trial judge in his sentencing decisions. He stated that some sentences are "gut reactions" on the part of the trial judge and cannot be justified in writing. Mr. Kraft stated that the provisions of Subsection 6 of SECTION 7A would be valuable should the concept of appellate review of sentences be recommended by the Committee.

The Vice Chairman called on the Committee Counsel to read SECTION 8A, as follows:

SECTION 8A.) 1. A court may sentence a convicted offender to an extended sentence in accordance with the provisions of this section upon a finding that:

a. The convicted offender is a dangerous, mentally abnormal person. The court shall not make such a finding unless the presentence report, including a psychiatric examination, concludes that the offender's conduct has been characterized by persistent aggressive behavior, and that such behavior makes him a serious danger to other persons.

b. The convicted offender is a professional criminal. The court shall not make such a finding unless the offender is more than twenty-one years of age and the presentence report shows:

(1) That he committed the present offense as part of a pattern of criminal conduct which constituted a substantial source of income to him; or

(2) That the offender has substantial income or resources not derived from a source other than criminal activity.

c. The convicted offender is a persistent offender. The court shall not make such a finding unless the offender is over twenty-one years of age and has previously been convicted of two offenses classified as class B or above, or of one offense classified as class B or above plus two offenses classified as class C or below, committed at different times when the offender was over eighteen years of age.

d. The offender was convicted of an offense which seriously endangered the life of another person, and the offender had previously been convicted of a similar offense.

e. The offender is especially dangerous because he used a

destructive device in the commission of the offense or during the flight therefrom.

2. The extended sentence may be imposed in the following manner:

a. If the offense for which the offender is convicted is a class A offense, the court may impose a sentence up to a maximum of life imprisonment.

b. If the offense for which the offender is convicted is a class B offense, the court may impose a sentence up to a maximum of imprisonment for ten years.

c. If the offense for which the offender is convicted is a class C offense, the court may impose a sentence up to a maximum of imprisonment for two years.

3. The court shall make the finding required by subsection 1 in writing, and the finding of the court shall be incorporated in the record of the case.

Representative Hilleboe questioned the advisability of Paragraph b of Subsection 1, especially with relation to the use of the words "substantial source of income" and "substantial income". He noted that the use of the word "substantial" could result in eliminating the "rich" professional criminal from the operation of this extended sentence provision. Representative Hilleboe also questioned the use of the age "twenty-one" in Paragraph b of Subsection 1 of SECTION 8A. He felt that, wherever possible, 18-year-olds should be considered adults.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE AND SECONDED BY REPRESENTATIVE MURPHY that the word "twenty-one" in Lines 12 and 21 of SECTION 8A should be deleted, and the word "eighteen" should be inserted in lieu thereof.

MR. WEBB MADE A SUBSTITUTE MOTION to use the word "adult" in place of the words "twenty-one" and "eighteen", WHICH MOTION WAS THEN WITHDRAWN. REPRESENTATIVE HILLEBOE, with the consent of his second, RESTATED HIS MOTION so that the words "an adult" would be substituted for the words "more than twenty-one years of age" in Line 12; and for the words "over twenty-one years of age" in Line 21;

and for the words "over eighteen years of age" in Line 25, all such amendments to SECTION 8A. THE MOTION, AS RESTATED BY THE MOVANT, CARRIED.

The Committee further discussed Subparagraphs (1) and (2) of Subdivision b of Subsection 1 of SECTION 8A. Representative Hilleboe stated it was his thought that those two subparagraphs were in essence the same, and that their content could be successfully stated as a single proposition.

Therefore IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY MR. WEBB, AND CARRIED that Subparagraphs (1) and (2) of Subdivision b of Subsection 1 of SECTION 8A be deleted; and the colon in Line 13 be deleted and that the words "that the offender has substantial income or resources derived from criminal activity." be inserted in lieu thereof.

The Committee discussed Subdivisions d and e of Subsection 1 of SECTION 8A. It was noted that although both of these provisions covered an offender whose conduct may have been violent, there was a difference between them in that the finding by the court in the case of Subdivision d would simply be that the offender had previously been convicted of an offense which endangered the life of another person, and was now convicted of that same type of an offense. On the other hand, under Subdivision e the court could impose an extended sentence simply upon finding that the offender was "especially dangerous" because of the use of a "destructive device" in the commission of an offense. For instance, this provision would allow the imposition of an extended sentence upon someone who had planted a bomb, regardless of the fact that he had never before been convicted.

The Committee discussed Subsection 3 of SECTION 8A which provides that the court is to make its finding prior to imposition of an extended sentence in writing. Mr. Webb inquired as to how the trial judge proceeds in making the "finding" required by Subsection 3. He wished to know if, for instance, such a finding must be based on the taking of additional evidence regarding the commission of previous offenses, or regarding source of income, etc. Mr. Wolf stated he felt that those were procedural questions which could probably be better handled by a committee similar to the Judicial Council's Committee on Adoption of Rules of Criminal Procedure.

The Vice Chairman called on the Committee Counsel to read SECTION 9A, as follows:

SECTION 9A.) If an offender is sentenced to a term of imprisonment for a class A, class B, or class C offense, he shall be subject to the following mandatory parole components:

1. For a sentence to a term of years in a range from fifteen years to life imprisonment, the parole component shall be five years.
2. For a sentence to a term of years in a range from three years to fifteen years less one day, the parole component shall be three years.
3. For a sentence to a term in a range from one year to one day less than three years, the parole component shall be one year.

The mandatory parole components set forth in this section shall not be served unless the convicted offender shall serve the whole of the term of imprisonment to which he was sentenced. Nothing in this section shall prohibit the parole of the offender in accordance with other provisions of law.

The Committee Counsel noted that SECTION 9A embodies the concept of a mandatory parole component. When the mandatory parole component concept was last discussed by the Committee it was unclear whether the Committee desired that the component should only be effective if the offender had served the total term of imprisonment to which he was sentenced, or whether the component should come into play regardless of the fact that the offender did not serve his total sentence of imprisonment.

The Committee Counsel noted that the final sentence of SECTION 9A was intended to ensure that parole board jurisdiction over persons serving sentences of imprisonment will remain as it presently is during that person's term of imprisonment.

Mr. Webb stated he felt that the mandatory parole component should be based on the length of the sentence imposed and that the statutory language should be worded similarly to the language of Subsection 2 of Section 3201 of the proposed Federal Criminal Code.

At 4:50 p.m., the Vice Chairman declared the meeting recessed until 9:00 a.m. on Tuesday, January 25, 1972, at which time the Committee reconvened.

* *

Judge Pearce stated that, after further reflection, he felt his assignment from this Committee to revise the statutes dealing with municipal courts was too broad an assignment to add to the Committee's already large workload. Further, Judge Pearce felt the work that he had in mind would probably be more appropriately considered by the Judicial Council's Criminal Rules Committee. He suggested, however, that the Committee continue to keep in mind the question of the propriety of an offense classification known as "violation". He said he had difficulty with the concept of such an offense classification, because he felt it was not certain that criminal procedure should apply to prosecution of a "violation".

The Vice Chairman agreed with Judge Pearce to the effect that the task of revising the statutes dealing with municipal courts was probably too great for this Committee, but requested that Judge Pearce keep this topic in mind throughout the remainder of this Committee's deliberations, in order that the Committee may become aware of relevant points of discussion when its deliberations touch upon the interests of municipal judges.

The Vice Chairman called on the Committee Counsel to read SECTIONS 10A and 11A, as follows:

SECTION 10A.) Where an offense is defined by a statute outside of this title without specification of its classification pursuant to section 6A, the offense shall be punishable as provided in the statute defining it, or:

1. If the offense is declared to be a felony, without further specification of punishment, it shall be punishable as if it were a class B offense.
2. If the offense is declared to be a misdemeanor, without further specification of punishment, it shall be punishable as if it were a class C offense.

The sentencing alternatives available under section 7A shall be available to a court sentencing an offender for commission of an offense defined by a statute outside this title. The mandatory parole component provided by section 9A shall apply to sentences imposed for offenses defined by statutes outside this title.

SECTION 11A.) For the purpose of making determinations, other than sentence imposition, wherein the terms "felony" or "misdemeanor" are relevant, the term "felony" shall be deemed to mean class A and class B offenses; and the term "misdemeanor" shall be deemed to mean class C and class D offenses.

The Committee Counsel noted that SECTION 10A is intended to provide a scale of punishment for those offenses which are defined outside of Title 12 and which are simply declared to be "felonies" or "misdemeanors". SECTION 11A is to provide for the situation wherein references are made, for purposes other than sentencing, to the terms "felony" or "misdemeanor". Where determinations of that sort are necessary, the term "felony" is to be deemed equivalent to a Class A or Class B offense, and the term "misdemeanor" is to be deemed equivalent to a Class C or Class D offense.

The Vice Chairman called on the Committee Counsel to read SECTION 12A, as follows:

SECTION 12A.) No person shall be punishable for an omission to perform an act if the act has been performed by another person, acting on behalf of the first person, who is legally competent to perform it.

The Committee Counsel noted SECTION 12A is a revision of Section 12-01-08 which provides that a person shall not be criminally liable for an omission, if the act omitted was performed by another person who is legally competent to do so, and who was acting on behalf of the defendant.

The Vice Chairman called on the Committee Counsel to read SECTION 13A, as follows:

SECTION 13A.) Where the sending of a letter is an element of an offense defined in this Code, that element is deemed to be completed at the time the letter is deposited in any post office or official postal receptacle, or is delivered to any other person with intent that it be forwarded to the addressee. The person sending the letter may be prosecuted in the jurisdiction in which the letter is deposited or delivered, or in the jurisdiction where the letter is received by the addressee, or his agent.

The Committee Counsel noted that SECTION 13A is a revision of Section 12-01-09 of the Century Code providing the time when the sending of a letter is deemed completed, where the sending of a letter is an element of the offense charged.

The Vice Chairman called on the Committee Counsel to read SECTION 14A, as follows:

SECTION 14A.) The omission to specify in this title that civil liability may arise as the result of an act or omission made punishable by this title does not affect any right to recover damages or have any other civil remedy as provided by law.

The Committee Counsel noted that SECTION 14A was a revision of Section 12-01-10 of the Century Code providing that civil remedies are not affected simply because they are not specifically restated in the criminal code. The Committee Counsel noted that he was not aware of what effect the provision of restitution as a sentencing alternative would have on civil liability for damages. He concluded that, without research into the topic, any restitution paid would be offset against a judgment for civil damages based on the same set of facts.

The Vice Chairman called on the Committee Counsel to read SECTION 15A, as follows:

SECTION 15A.) All fines imposed as punishment for an offense defined by state law, and all costs assessed against an offender upon conviction of an offense defined by state law, shall, when collected, be paid to the treasurer of the proper county to be added to the state school fund. All proceeds resulting from forfeiture of bail to the state shall be paid to the treasurer of the county wherein the prosecution was instituted to be credited to the general fund of that county. If the attorney general instituted the action, the proceeds of any bail forfeiture shall be paid over to the proper state official and credited to the state school fund.

The Committee Counsel stated that SECTION 15A is a revision of NDCC Section 12-01-13 with one major change. In addition to fines, "cost" assessed in a criminal case will also be added to the "state school fund".

It was noted that Section 154 of the Constitution presently requires that "all fines for violation of state laws" are to be added to the state school fund. The Committee discussed this section at length and its consensus was that the Committee should not make determinations regarding the deposit of moneys received as the result of criminal prosecutions.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE STONE, AND UNANIMOUSLY CARRIED that SECTION 15A be deleted, and that the provisions of Section 12-01-13 be covered elsewhere in the Century Code, other than in Title 12. Further, the topic of the handling of costs and fines assessed as the result of criminal prosecutions should be recommended to the Committee on Judiciary "A" for further study.

The Vice Chairman called on the Committee Counsel to read SECTION 16A, as follows:

SECTION 16A.) Persons under the age of seven years shall be deemed incapable of commission of an offense defined by the Constitution or statutes of this state. The prosecution of any person as an adult shall be barred if the offense was committed when the person was more than seven years of age, but less than sixteen years of age.

The Committee Counsel noted that SECTION 16A is intended to replace Subsections 1 and 2 of Section 12-02-01, which subsections declare that children under the age of seven years are incapable of committing a crime; and that children between the ages of seven and 14 years are likewise incapable, unless it is clearly proven that they knew the wrongfulness of the act at the time of commission.

SECTION 16A changes the emphasis of the present Code by providing an absolute bar against criminal prosecution of children under age seven, but simply providing that children between ages seven and 16 would only be barred from criminal prosecution as an adult. This change follows the concept of the Uniform Juvenile Court Act, which also prohibits the transfer of an offense for prosecution in the adult criminal courts if the offender was under 16 years of age when the offense was committed.

The Committee Counsel noted that proposed SECTION 16A was drawn essentially from Section 501 of the proposed Federal Criminal Code. The comment to Section 501 indicates that the use of the word "barred" does not require the prosecution to introduce evidence regarding the offender's age unless the offender raises the issue of his age. (See "Final Report of the National Commission on Reform of Federal Criminal Laws", Page 38.)

Judge Pearce inquired as to whether the exact age "seven" was not left in limbo by the draft of SECTION 16A. Committee consensus was that the words "more than" in Line 5 of SECTION 16A should be deleted in line with Judge Pearce's comments.

Representative Hilleboe suggested that the words "six years of age" be used in lieu of the words "under the age of seven years" in Line 1 of SECTION 16A, since anyone under seven is by definition "six". The Vice Chairman directed the staff of the Legislative Council to redraft SECTION 16A to take into account the Committee's comments.

The Vice Chairman called on the Committee Counsel to read SECTION 17A, as follows:

SECTION 17A.) 1. A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The Committee Counsel stated that SECTION 17A, providing for the "insanity" defense, was designed to replace Subsections 3 and 4 of Section 12-02-01 and Sections 12-05-02 and 12-05-03 of the Century Code. He noted that the language of SECTION 17A was taken from Section 4.01 of the Model Penal Code and Section 503 of the proposed Federal Criminal Code.

The Vice Chairman called on Professor Kraft to explain the "M'Naghten" and "irresistible impulse" insanity defenses. Professor Kraft said that the M'Naghten test of insanity is that the defendant was unable to know the nature and quality of the act which he was doing. In other words, an inability to distinguish right from wrong, due to mental disorder. The "irresistible impulse" test is satisfied by finding that the defendant, due to mental disorder, was irresistibly driven to commit the offense charged. While the defendant who claims an irresistible impulse insanity defense may appreciate the nature and quality of the act which he performed, and the fact that it was wrong, he does not possess sufficient power to prevent himself from committing it.

The Committee Counsel noted that the tests set forth in SECTION 17A are a combination of the M'Naghten and irresistible impulse tests as propounded by the American Law Institute. The language contained

in Lines 3 and 4 which reads "he lacks substantial capacity either to appreciate the wrongfulness of his conduct" is essentially a statement of the M'Naghten test; and the language in Lines 4 and 5 of SECTION 17A which reads "or to conform his conduct to the requirements of law" is essentially the irresistible impulse test.

The Committee Counsel noted that the addition of the "irresistible impulse" test in SECTION 17A was probably a reversal of Section 12-05-02 of the Century Code which provides that a "morbid propensity" to commit an offense is not a defense if the offender is capable of knowing right from wrong.

Professor Kraft noted that the test propounded by SECTION 17A is probably as good a test as can be put together in the time allotted to the Committee. He said that the important question the Committee would have to decide is whether there should be a defense of "insanity" at all. The Committee Counsel noted it was Mr. Hill's position that insanity should not be a defense to a crime, but should rather be a factor to be considered in the imposition of sentence after conviction.

Senator Page inquired as to the status of "lapse of memory" as a defense to a criminal prosecution. Professor Kraft noted that a "lapse of memory" would probably come under the heading of "temporary insanity", and that if it met the criteria established by the statutory insanity test, it would be a defense to a crime.

The Vice Chairman called on the Committee Counsel to read SECTION 18A, as follows:

SECTION 18A.) 1. In this section:

a. "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of alcohol, drugs, or other substances into the body.

b. "Self-induced intoxication" means intoxication caused by a substance which the actor knowingly introduced into his body, the tendency of which he knows or ought to know is to cause intoxication, unless he introduced the substance pursuant to medical advice, or under such circumstances as would otherwise afford a defense to a charge of crime.

c. "Pathological intoxication" means intoxication grossly

excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

2. Except as provided in subsection 3, intoxication is not a defense to a criminal charge, nor does it, in itself, constitute mental disease within the meaning of section 17A. Evidence of intoxication is admissible whenever it is relevant to negate or establish an element of the offense charged.

3. Intoxication which is not self-induced or is pathological is an affirmative defense, if by reason of such intoxication the actor, at the time of his conduct, lacked substantial capacity either to appreciate its criminality, or to conform his conduct to the requirements of law.

4. When recklessness establishes an element of the offense, the fact that the actor, due to self-induced intoxication, is unaware of the risk, which he would have been aware of if unintoxicated, is immaterial.

The Committee Counsel noted that SECTION 18A provides for the "intoxication"defense, and is designed to replace Section 12-05-01 of the Century Code. The latter section provides that voluntary intoxication is not a defense to a criminal prosecution, but that evidence of such intoxication may be received to aid in the determination of whether the defendant had the requisite criminal intent, where such intent is an element of the offense.

The Committee discussed the definition of "pathological intoxication" contained in Subdivision c of Subsection 1. Judge Pearce stated that the definition is based on medical terminology, and is used to refer to an outburst of irrational or destructive behavior after consumption of relatively small quantities of alcohol.

Professor Kraft stated that at this point the Committee should consider a change in its course of procedure. The Committee should base its revision efforts on some existing code as the starting point. His personal choice would be the proposed Federal Criminal Code because it is the latest of the codifications of criminal law, and because it represents the combined thinking of some of the most knowledgeable people in the field of criminal law.

He stated he was suggesting this change because he felt that a proposed North Dakota Criminal Code based on an existing criminal code would be more likely to pass legislative scrutiny; and because the Committee, if it continues with its present method of procedure, could overlook an important area and get into trouble, resulting in legislative rejection of the entire proposed criminal code.

Judge Erickstad noted that his Committee, which is drafting Rules of Criminal Procedure, is following this procedure, i.e., it is using the Federal Rules of Criminal Procedure as the base for the proposed State Rules and then making any necessary changes, additions, or deletions. He stated that if the Committee decides to use the proposed Federal Criminal Code as the basis for its work, all members of the Committee should have copies of that proposed Code available. The Committee Counsel noted that he intended to order copies of the Code and accompanying working papers for Committee members.

Mr. Wolf stated there are essentially three reasons why he agrees with Professor Kraft's position regarding the use of the proposed Federal Criminal Code as the starting point of the Committee's work:

1. Gaining legislative acceptance of the final Committee product will be easier if the Federal Code is used as a starting point;

2. When the Federal Code is adopted, federal case law will be available as an aid in construction of the new state law; and

3. He believes the Committee's work will move faster if it is based on the proposed Federal Criminal Code as a starting point, and time is of the essence to the Committee.

The Committee Counsel noted that the use of an existing criminal code as the basis of the Committee's deliberation was previously considered, as it was suggested as one of a list of possible methods of proceeding at the first meeting of the Committee.

Mr. Webb stated he favored Professor Kraft's position, and did not think that the Committee had wasted its time to date, as the discussions which have occurred during the several Committee meetings would have been necessary at any rate.

Mr. Travis stated that, should the Committee adopt an existing code as its starting point, the Committee should be furnished with an outline of the entire code so it could determine where any particular provision which it is considering fits into the entire code.

The Vice Chairman declared the Committee would stand recessed for 10 minutes during which time he and the Committee Counsel would have

a discussion with Mr. Vance Hill, who was on the floor of the Constitutional Convention, and would also have a telephone conversation with Senator Freed, who was not able to attend the meeting due to extremely bad highway conditions between Dickinson and Bismarck.

Upon reconvening, the Vice Chairman stated he had discussed Professor Kraft's proposal with Senator Freed and with Mr. Hill, and noted that both of them were in agreement regarding the use of the proposed Federal Criminal Code as the basis for further Committee discussion. The Committee discussed Professor Kraft's proposal at length, and arrived at a consensus that the proposed Federal Criminal Code should be used as the basis for further Committee deliberation. Those parts of the Federal Criminal Code which are only relevant to the Federal Government would, of course, be disregarded by the Committee in its deliberations.

The Vice Chairman requested that the staff of the Legislative Council mail copies of the proposed Federal Criminal Code and the accompanying working papers, when they become available, to all members of the Committee. In addition, a statement of the correlation between the Committee's work to date and the proposed Federal Criminal Code is also to be prepared and mailed in advance of the next meeting, if possible.

The Committee Counsel inquired as to whether the numbering system of the proposed Federal Criminal Code should be used for the purpose of the Committee's work. The Committee consensus was that the federal numbering system should be used, and that the Committee should make a determination at a later date as to whether the federal numbering system should be reflected in the Century Code if the Committee's product were passed by the Legislature.

The Vice Chairman called for Committee discussion regarding a date for the next meeting of the Committee. Some Committee members thought the Committee should consider the possibility of meeting on a schedule which would include Saturday as one of the meeting days. The Committee Counsel noted that Saturday is not a standard working day for the Legislative Council staff during the greater part of the interim between sessions, and if the Committee should meet on Saturday, the usual staff support services, with the exception of the Committee Counsel himself, would not be available to Committee members. After further discussion, it was decided to aim for February 24-25, 1972, as a tentative date for the next meeting of the Committee.

The Committee discussed the possibility of meeting in some place other than the State Capitol. It was noted that it might be well to meet in Grand Forks. Such a meeting could be held at the Law School, and law students and other interested persons could be invited to attend during a portion of the Committee meeting. The Committee Counsel noted that, if the subject matter to be considered by the Committee is suitable, the Legislative Council Chairman is not opposed

to the holding of Committee meetings at locations throughout the State.

The Vice Chairman thanked the members for their attendance and, without objection, declared that the meeting was adjourned, subject to the call of the Chair.

John A. Graham
Assistant Director

SECTION 1A.) 1. This title, except as provided in subsection 2 of this section, shall not apply to offenses committed prior to its effective date. Prosecutions for such offenses shall be governed by prior law, which is continued in effect for that purpose. For the purposes of this section, an offense was committed prior to the effective date of this title if any of the elements of the offense occurred prior thereto.

2. In cases pending on or after the effective date of this title, and involving offenses committed prior thereto:

a. The provisions of this title according a defense or mitigation shall apply, with the consent of the defendant; and

b. The court, with the consent of the defendant, may impose sentence under the provisions of this title which are applicable to the offense and the offender.

SECTION 2A.) 1. No conduct or omission to act constitutes an offense unless it is declared to be an offense under this title, the Constitution of this state, or another statute of this state.

2. The provisions of this chapter are applicable to offenses defined by other statutes, unless otherwise provided in this title.

3. This section does not affect the power of a court or legislature to punish for contempt, or to employ any enforcement sanction authorized by law, nor does this section affect any power conferred by law upon military authority to impose punishment upon offenders.

SECTION 3A.) In this title, unless the context requires a different meaning:

1. "Act" or "action" means a bodily movement, whether voluntary or involuntary.
2. "Omission" means a failure to act.
3. "Actor" includes, where relevant, a person guilty of an omission.
4. "Acted" includes, where relevant, "omitted to act".
5. "Public servant" means any officer or employee of government, whether elected or appointed, and any person participating in the performance of a governmental function, but the term does not include witnesses.
6. "Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of government.
7. "Government" means (a) the government of the United States, any state, or any political unit within a state; (b) any agency, subdivision, or department of the foregoing, including the executive, legislative, and judicial branches; (c) any corporation or other entity established by law to carry on any governmental function; and (d) any commission, corporation, or agency established by statute, compact, or contract between or among governments for the execution of intergovernmental programs.
8. "Person" includes, where relevant, a corporation, partnership, unincorporated association, or other legal entity. When used to designate a party whose property may be the subject of an offense, the word "person" includes a government which may lawfully own property in this state.

9. "Property" includes both real and personal property.

10. "Peace officer" (to be redrafted)

11. "Writing" includes printing, typewriting, and copying.

12. "Signature" includes any name, mark, or sign written or affixed with intent to authenticate any instrument or writing.

13. Words used in the singular include the plural, and the plural the singular. Words in the masculine gender include the feminine and neuter genders. Words used in the present tense include the future tense, but exclude the past tense.

14. "Motor vehicle" includes any self-propelled device, not running on tracks or cables, by which persons or property may be transported on land, water, or in the air.

SECTION 4A.) As used in this Code, an offense is an act committed or omitted in violation of a statute forbidding or commanding it, and to which is annexed, upon conviction, one or a combination of the following punishments:

1. Imprisonment;

2. Fine;

3. Restitution;

4. Removal from office;

5. Disqualification to vote or hold office; or

6. Other penal discipline.

The word "offense" is synonymous with the words "crime", "crimes", or "public offense".

SECTION 5A.) An offense defined in this title, or other statute of this state, constitutes a violation if it is so designated in this

title, or in any other statute defining the offense, or if no sentence other than a fine, restitution, forfeiture, or a combination of these is authorized upon conviction. Conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

SECTION 6A.) Offenses are divided into five classes, which are to be distinguished from one another by the following maximum penalties which are authorized upon conviction:

1. Class A offenses, for which a maximum penalty of twenty-five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
2. Class B offenses, for which a maximum penalty of five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
3. Class C offenses, for which a maximum penalty of one year's imprisonment, a fine of two thousand five hundred dollars, or both, may be imposed.
4. Class D offenses, for which a maximum of thirty days' imprisonment, a fine of five hundred dollars, or both, may be imposed.
5. Violations, for which only a penalty consisting of a fine, restitution, forfeiture, or a combination of the foregoing may be imposed. A fine imposed upon conviction of a violation shall not exceed one hundred dollars, except as otherwise provided by law.

This section shall not be construed to forbid sentencing under section 8A relating to extended sentences.

SECTION 7A.) 1. Every person convicted of an offense, other than a violation, shall be sentenced to one or a combination of the following alternatives:

a. Unconditional discharge, except as the penalty following conviction of a class A offense.

b. Deferred imposition of sentence.

c. Probation.

d. A term of imprisonment, including intermittent imprisonment.

e. A fine.

f. Restitution for damages resulting from the commission of the offense.

g. Restoration of damaged property, or other appropriate work detail.

h. Commitment to an appropriate licensed public or private institution for treatment of alcoholism, drug addiction, or mental disease or defect.

i. Disqualification, pursuant to section _____.

Sentences imposed under this subsection shall not exceed in duration the maximum sentences provided by section 6A, section 8A, or as provided specifically in a statute defining an offense.

2. Every person convicted of a violation may be sentenced to one or a combination of the following alternatives:

a. Unconditional discharge.

b. Probation.

c. Deferred imposition of sentence.

d. A fine.

e. Restitution for damages resulting from commission of the offense.

3. A court may, at any time prior to the time custody of a convicted offender is transferred to a penal institution or institution for treatment, suspend all or a portion of any sentence imposed pursuant to this section.

4. A court may, prior to imposition of sentence, order the convicted offender committed to an appropriate licensed public or private institution for diagnostic testing for such period of time as may be necessary, but not to exceed thirty days. The court may also order such diagnostic testing without ordering commitment to an institution. Validity of a sentence shall not be challenged on the ground that diagnostic testing was not performed pursuant to this subsection. If an offender is sentenced to imprisonment following a commitment for diagnostic testing, the number of days he was confined to an institution shall be credited against his term of imprisonment.

5. All sentences imposed shall be accompanied by a written statement by the court setting forth the reasons for imposing the particular sentence. The statement shall become part of the record of the case.

SECTION 8A.) 1. A court may sentence a convicted offender to an extended sentence in accordance with the provisions of this section upon a finding that:

a. The convicted offender is a dangerous, mentally abnormal person. The court shall not make such a finding unless the presentence report, including a psychiatric examination,

concludes that the offender's conduct has been characterized by persistent aggressive behavior, and that such behavior makes him a serious danger to other persons.

b. The convicted offender is a professional criminal. The court shall not make such a finding unless the offender is an adult and the presentence report shows that the offender has substantial income or resources derived from criminal activity.

c. The convicted offender is a persistent offender. The court shall not make such a finding unless the offender is an adult and has previously been convicted of two offenses classified as class B or above, or of one offense classified as class B or above plus two offenses classified as class C or below, committed at different times when the offender was an adult.

d. The offender was convicted of an offense which seriously endangered the life of another person, and the offender had previously been convicted of a similar offense.

e. The offender is especially dangerous because he used a destructive device in the commission of the offense or during the flight therefrom.

2. The extended sentence may be imposed in the following manner:

a. If the offense for which the offender is convicted is a class A offense, the court may impose a sentence up to a maximum of life imprisonment.

b. If the offense for which the offender is convicted is a class B offense, the court may impose a sentence up to a maximum of imprisonment for ten years.

c. If the offense for which the offender is convicted is a class C offense, the court may impose a sentence up to a maximum of imprisonment for two years.

3. The court shall make the finding required by subsection 1 in writing, and the finding of the court shall be incorporated in the record of the case.

SECTION 9A.) If an offender is sentenced to a term of imprisonment for a class A,class B, or class C offense, he shall be subject to the following mandatory parole components:

1. For a sentence to a term of years in a range from fifteen years to life imprisonment, the parole component shall be five years.

2. For a sentence to a term of years in a range from three years to fifteen years less one day, the parole component shall be three years.

3. For a sentence to a term in a range from one year to one day less than three years, the parole component shall be one year.

The mandatory parole components set forth in this section shall not be served unless the convicted offender shall serve the whole of the term of imprisonment to which he was sentenced. Nothing in this section shall prohibit the parole of the offender in accordance with other provisions of law.

SECTION 10A.) Where an offense is defined by a statute outside of this title without specification of its classification pursuant to section 6A, the offense shall be punishable as provided in the statute defining it, or:

1. If the offense is declared to be a felony, without further specification of punishment, it shall be punishable as if it were a class B offense.
2. If the offense is declared to be a misdemeanor, without further specification of punishment, it shall be punishable as if it were a class C offense.

The sentencing alternatives available under section 7A shall be available to a court sentencing an offender for commission of an offense defined by a statute outside this title. The mandatory parole component provided by section 9A shall apply to sentences imposed for offenses defined by statutes outside this title.

SECTION 11A.) For the purpose of making determinations, other than sentence imposition, wherein the terms "felony" or "misdemeanor" are relevant,the term "felony" shall be deemed to mean class A and class B offenses; and the term "misdemeanor" shall be deemed to mean class C and class D offenses.

SECTION 12A.) No person shall be punishable for an omission to perform an act if the act has been performed by another person, acting on behalf of the first person, who is legally competent to perform it.

SECTION 13A.) Where the sending of a letter is an element of an offense defined in this Code, that element is deemed to be completed at the time the letter is deposited in any post office or official postal receptacle, or is delivered to any other person with intent that it be forwarded to the addressee. The person sending the letter may be prosecuted in the jurisdiction in which the letter is deposited or delivered, or in the jurisdiction where the letter is received by the addressee, or his agent.

SECTION 14A.) The omission to specify in this title that civil liability may arise as the result of an act or omission made punishable by this title does not affect any right to recover damages or have any other civil remedy as provided by law.

SECTION 15A.) (Deleted by Committee)

SECTION 16A.) (To be Redrafted)

SECTION 17A.) 1. A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

2. When a defendant is acquitted on the ground of mental disease or defect, excluding responsibility, the court may, if it deems the defendant dangerous to the public safety, order him committed to the state hospital, or to such other place as may be appropriate for custody, care, and treatment.

SECTION 18A.) 1. In this section:

a. "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of alcohol, drugs, or other substances into the body.

b. "Self-induced intoxication" means intoxication caused by a substance which the actor knowingly introduced into his body, the tendency of which he knows or ought to know is to cause intoxication, unless he introduced the substance pursuant to medical advice, or under such circumstances as would otherwise afford a defense to a charge of crime.

c. "Pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

2. Except as provided in subsection 3, intoxication is not a defense to a criminal charge, nor does it, in itself, constitute mental disease within the meaning of section 17A. Evidence of intoxication is admissible whenever it is relevant to negate or establish an element of the offense charged.

3. Intoxication which is not self-induced or is pathological is an affirmative defense, if by reason of such intoxication the actor, at the time of his conduct, lacked substantial capacity either to appreciate its criminality, or to conform his conduct to the requirements of law.

4. When recklessness establishes an element of the offense, the fact that the actor, due to self-induced intoxication, is unaware of the risk, which he would have been aware of if unintoxicated, is immaterial.

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Thursday and Friday, March 2-3, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:50 a.m. on Thursday, March 2, 1972, in Committee Room G-2 of the State Capitol in Bismarck, North Dakota.

Members present:	Senators Freed, Page Representatives Hilleboe, Kieffer, Murphy
Advisory members present:	Judges Erickstad, Pearce, Smith Messrs. Lockney, Webb, Wolf
Members absent:	Representatives Atkinson, Stone
Advisory member absent:	Judge W. C. Lynch
Also present:	Mr. Vance Hill, Mr. Charles Travis

IT WAS MOVED BY JUDGE SMITH, SECONDED BY SENATOR PAGE, AND UNANIMOUSLY CARRIED that consideration of the minutes of the meeting of January 24-25, 1972, be delayed until Friday, March 3, 1972.

The Chairman called on the Committee Counsel for comments regarding scheduling of meetings of the Committee in order that it might complete a first draft of a proposed criminal code by June 1972. The Committee Counsel noted that the FCC contained 287 sections, of which he had determined that 189 were relevant to the Committee's project. He stated that if any Committee member disagreed with his choice of relevant sections, the member's ideas should be made known, and that section or sections could be included for consideration in the future.

Judge Smith stated he had his doubts as to whether the Committee could finish its product in two years without sacrificing adequate consideration of all facets of the problems raised.

Mr. Hill replied that Judge Smith's doubts were the reason why the Committee decided to use the proposed Federal Criminal Code

(hereinafter FCC) as its base document. Mr. Hill stated that if the Committee essentially adheres to the language of the FCC and, in addition, advances the effective date of any proposed bill to either July 1, 1974, or July 1, 1975, then the Committee ought to at least finish its task of revising Title 12. Judge Smith agreed with Mr. Hill's suggestion for an advanced effective date for any bill proposed by the Committee.

The Committee continued to discuss scheduling, and it was noted that the State Bar Convention would be held during the week of June 19, 1972. The Committee consensus seemed to be that it would be desirable to have a first draft prepared for presentation to the State Bar Convention. Mr. Webb noted that the State's Attorneys Association was also meeting during that week.

IT WAS MOVED BY SENATOR PAGE, SECONDED BY JUDGE ERICKSTAD, AND CARRIED that the Committee accept the following tentative schedule of meetings through June 1972:

1. An April 6-7, 1972, meeting;

2. An April 27-28, 1972, meeting;

3. A May 25-26, 1972, meeting;

4. A June 15-16, 1972, meeting.

The Chairman noted that the Committee members should be alerted to the fact that perhaps one or more of these meetings might have to continue on through Saturday morning in order that the Committee finish the material presented at a given meeting. The Chairman noted further that Committee members were going to have to read the material furnished them in advance of the meeting, in order that consideration of the sections presented at a meeting could be expedited.

The Chairman then called on the Committee Counsel to present the draft of Sections 101 through 1309 prepared for this meeting. (Note: The text of the sections considered by the Committee, as revised by the Committee, are attached hereto as Appendix "A".)

The Committee Counsel read Section 101, as follows:

SECTION 101. TITLE; RETROACTIVITY; APPLICATION; CONTEMPT POWER.)

1. Title 12 of the Century Code may be cited as the North Dakota Criminal Code.

((((2) Effective Date and Application. This Code shall become effective one year after the date of enactment. Unless otherwise

provided this Code shall apply to prosecutions under any Act of Congress except the Uniform Code of Military Justice, District of Columbia Code and Canal Zone Code.)))

2. This title, except as provided in subsection 3 of this section, shall not apply to offenses committed prior to its effective date. Prosecutions for such offenses shall be governed by prior law, which is continued in effect for that purpose. For the purposes of this section, an offense was committed prior to the effective date of this title if any of the elements of the offense occurred prior thereto.

3. In cases pending on or after the effective date of this title, and involving offenses committed prior thereto:

a. The provisions of this title according a defense or mitigation shall apply, with the consent of the defendant; and,

b. The court, with the consent of the defendant, may impose sentence under the provisions of this title which are applicable to the offense and the offender.

4. No conduct or omission to act constitutes an offense unless it is declared to be an offense under this title, the Constitution of this state, or another statute of this state.

5. The provisions of this chapter are applicable to offenses defined by other statutes, unless otherwise provided in this title.

6. This section does not affect the power of a court or legislature to punish for contempt, or to employ any enforcement sanction authorized by law, nor does this section affect any power conferred by law upon military authority to impose punishment upon offenders.

It was noted that Section 101 would replace Sections 12-01-01, 12-01-02, and 12-01-12 of the Century Code. It was further noted that Subsections 2 through 6 of Section 101 had previously been considered by the Committee as Sections 1A and 2A of the January 1972 draft. See minutes of the meeting of January 24-25, 1972.

Judge Erickstad inquired about the use of the word "section" in Subsection 6 (Line 29). He wondered whether the word should not be chapter or title. In addition, he inquired regarding the use of the word "chapter" in Subsection 5 (Line 27). The Committee Counsel noted that the use of the word "section" in Subsection 6 was to assure that Subsection 4 was not construed to include the contempt power, nor situations in which military justice was applicable. In addition, the use of the word "chapter" in Subsection 5 was designed to relate to the FCC numbering, which was broken down according to chapter. For instance, Sections 101 through 109 constitute Chapter 100; Sections 301 through 305 constitute Chapter 300, and so on.

Mr. Hill questioned the need for Subsections 4, 5, and 6 of Section 101. He indicated he thought those subsections stated legal truisms. Mr. Webb stated he would like to see Section 101 contain a postponed effective date. IT WAS MOVED BY JUDGE ERICKSTAD, SECONDED BY JUDGE PEARCE, AND CARRIED that the Committee recommend to the Legislative Council that any draft presented by the Committee have an effective date of July 1, 1975.

The Chairman noted that the result of this motion would be to allow another Legislature to consider the criminal code before it went into effect, thus, hopefully, allowing the second Legislature to correct any errors which may have been noted during the interim between passage of the bill and July 1, 1975.

Mr. Hill requested that the Committee not move to accept Section 101 until he was able to do further research on the need for Subsections 4, 5, and 6. The Chairman requested the Committee Counsel to read Section 102, as follows:

SECTION 102. GENERAL PURPOSES.) The general purposes of this (((Code))) title are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which (((federal))) governmental protection is appropriate. To this end, the provisions of this (((Code))) title are intended, and shall be construed, to achieve the following objectives:

1. To ensure the public safety through: a. vindication of public norms by the imposition of merited punishment; b. the deterrent influence of the penalties hereinafter provided; c. the rehabilitation of those convicted of violations of this (((Code))) title; and d. such confinement as may be necessary to prevent likely recurrence of serious criminal behavior;
2. By definition and grading of offenses, to define the limits and systematize the exercise of discretion in punishment and to give fair warning of what is prohibited and of the consequences of violation;
3. To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders;
4. To safeguard conduct that is without guilt from condemnation as criminal and to condemn conduct that is with guilt as criminal;
5. To present arbitrary or oppressive treatment of persons accused or convicted of offenses;
6. To define the scope of (((federal))) state interest in law enforcement against specific offenses and to systematize the exercise of (((federal))) state criminal jurisdiction.

Following the reading of Section 102, the Committee again gave consideration to Section 101. IT WAS MOVED BY REPRESENTATIVE MURPHY AND SECONDED BY JUDGE PEARCE that Subsection 4 of Section 101 be deleted. Judge Erickstad noted that part of the problem with the definition of "offense" arises in a situation as typified by the

Odegaard case, wherein the penalty section was separate and apart from the section defining the "offense".

Mr. Webb stated it was his feeling that Subsection 4 of Section 101 simply was a provision to ensure that there would be no "common law crimes" in North Dakota. In other words, no conduct could be declared criminal except by the Constitution or by a duly enacted statute. Following this discussion, REPRESENTATIVE MURPHY, WITH THE CONSENT OF HIS SECOND, WITHDREW HIS MOTION to delete Subsection 4.

The Committee then again considered Section 102. Judge Smith noted that, although the draft of Section 102 did state some principles of construction, it did not have any specific language saying that the criminal code should be "liberally" construed.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY JUDGE SMITH that the Committee adopt the text of Section 102 as presented. Professor Lockney stated that he liked the idea of a statement of purposes such as is presented by Section 102. He thought the language of Subdivision a of Subsection 1 dealing with the "vindication of public norms" would be valuable to judges in making their sentencing decisions.

Judge Smith questioned the use of the word "guilt" in Subsection 4; however, he felt that as the general statement it was probably acceptable. THE MOTION OF JUDGE PEARCE TO ADOPT SECTION 102 THEN CARRIED.

The Chairman then called on the Committee Counsel to read Section 103, as follows:

SECTION 103. PROOF AND PRESUMPTIONS.) 1. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. An accused is (((assumed to be))) presumed innocent until (((convicted))) proven guilty. The fact that he has been arrested, confined (((or indicted for))), or (((otherwise))) charged with (((,))) the offense gives rise to no inference of guilt at his trial. "Element of an offense" means: a. the forbidden conduct; b. the attendant circumstances specified in the definition and grading of the offense; c. the required culpability; d. any required result; and e. the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable

doubt on the issue. (((The existence of federal jurisdiction is not an element of the offense; but it shall be proved by the prosecution beyond a reasonable doubt.)))

2. Subsection 1 does not require negating a defense: a. by allegation in the (((indictment, information, or other charge))) charging document; or b. by proof, unless the issue is in the case as a result of evidence sufficient to raise a reasonable doubt on the issue. Unless it is otherwise provided or the context plainly requires otherwise, (((when))) if a statute outside this (((Code))) title defining an offense, or a related statute, or a rule or regulation thereunder, contains a provision constituting an exception from criminal liability for conduct which would otherwise be included within the prohibition of the offense, that the defendant came within such exception is a defense.

3. Subsection 1 does not apply to any defense which (((a statute))) is explicitly (((designates as))) designated an "affirmative defense". (((Defenses so designated))) An affirmative defense must be proved by the defendant by a preponderance of evidence.

4. When a statute establishes a presumption, it has the following consequences:

a. (((when))) If there is sufficient evidence of the facts which gave rise to the presumption, the presumed fact is deemed sufficiently proved to warrant submission of the issue to a jury unless the court is satisfied that the evidence as a whole clearly negates the presumed fact;

b. In submitting the issue of the existence of the presumed fact

to a jury, the court shall charge that, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the facts giving rise to the presumption as strong evidence of the fact presumed.

5. When a statute declares that given facts constitute a prima facie case,proof of such facts warrants submission of a case to the jury with the usual instructions on burden of proof and without additional instructions attributing any special probative force to the facts proved.

The Committee discussed the relationship between "defenses" and "affirmative defenses". It was noted that an affirmative defense had to be proved by the defendant by a "preponderance of evidence". Some members of the Committee questioned the desirability of using a standard of burden of proof drawn from the civil law. Mr. Wolf stated that it was probably better to use the standard known as "preponderance of the evidence", rather than to attempt to define a new standard. Although the "preponderance of evidence" standard is from the civil law, at least it is relatively well understood by the Bar and judiciary.

IT WAS MOVED BY MR. WEBB, SECONDED BY MR. WOLF, AND CARRIED that the Committee accept the text of Section 103 as presented.

The Chairman called on the Committee Counsel to read Section 109 as follows:

SECTION 109. GENERAL DEFINITIONS.) (((Unless it is otherwise provided or))) <u>As used in this title, unless</u> a different meaning plainly is required:

((((a) "aircraft" includes spacecraft;)))

1. "Bodily injury" means any impairment of physical condition, including physical pain;

((((c) "this Code" means the Federal Criminal Code;)))

2. "Court" means any of the following courts: the supreme cour

a district court, a county court with increased jurisdiction, a county justice, and a county court;

((((e) "crime" means a misdemeanor or a felony and does not include an infraction; but "criminal" and "criminally", when used as an adjective or adverb, refer to any offense;)))

3. "Dangerous weapon" means any switch blade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles or sand club; any slungshot; and any projector of (((or))) a bomb or any object containing or capable of producing and emitting any noxious liquid, gas or substance;

4. "Destructive device" means any explosive, incendiary or poison gas bomb, grenade, mine, rocket, missile, or similar device;

((((h) "element of an offense" has the meaning prescribed in section 103(1);)))

5. "Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, and any chemical compounds, mechanical mixture, or other ingredients in such proportions, quantities or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, or material or any part thereof may cause an explosion;

((((j) "felony" means an offense for which a term of imprisonment of more than one year is authorized by a federal statute, or would be if federal jurisdiction existed;)))

6. "Firearm" means any weapon which will expel, or is readily capable of expelling, a projectile by the action of an explosive and includes any such weapon, loaded or unloaded, commonly referred to as a pistol, revolver, rifle, gun, machine gun, shotgun, bazooka, or cannon;

7. "Force" means physical action;

8. "Government" means (a) the government of the United States, of this state or any political subdivision of this state; (b) any agency, subdivision, or department of the foregoing, including the executive, legislative, and judicial branches; (c) any corporation or other entity established by law to carry on any governmental function; and (d) any commission, corporation, or agency established by statute, compact, or contract between or among governments for the execution of intergovernmental programs;

8a. "Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of government;

9. "Person" includes, where relevant, a corporation, partnership, unincorporated association, or other legal entity. When used to designate a party whose property may be the subject of action constituting an offense, the word "person" includes a government which may lawfully own property in this state;

((((n) "government agency" includes any department, independent establishment, commission, administration, authority, board or bureau of government or any corporation in which a

government has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense;)))

10. "Harm" means loss, disadvantage, or injury (((, or anything so regarded by))) to the person affected, (((including))) and includes loss, disadvantage or injury to any other person in whose welfare he is interested;

11. "Human being" means a person who has been born and is alive;

12. "Included offense" means an offense: a. which is established by proof of the same or less than all the facts required to establish commission of the offense charged; b. which consists of criminal facilitation of or an attempt or solicitation to commit the offense charged; or c. which differs from the offense charged only in (((the respect))) that it constitutes a less serious harm or risk of harm to the same person, property, or public interest, or because a lesser (((kind))) degree of culpability suffices to establish its commission;

13. "Includes" should be read as if the phrase "but is not limited to" were also set forth;

((((s) "infraction" means an offense for which a sentence of imprisonment is not authorized;

(t) "intentionally" and variants thereof designate the standard prescribed in section 302(1);)))

14. "Judge" (((includes justice of the Supreme Court))) means the presiding officer of a court, and the judges of the supreme court;

(((((v) "knowingly" and variants thereof designate the standard prescribed in section 302 (1);)))

15. "Law enforcement officer" or "peace officer" means a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law;

16. "Local" means of or pertaining to any political (((unit within any))) subdivision of the state;

((((y) "magistrate" includes commissioner;

(z) "misdemeanor" means an offense for which a term of imprisonment of one year or less is authorized by a federal statute, or would be if federal jurisdiction existed;

(aa) "negligently" and variants thereof designate the standard prescribed in section 302(1);

(ab) "offense" means conduct for which a term of imprisonment or a fine is authorized by a federal statute, or would be if federal jurisdiction existed;)))

17. "Official action" means a decision, opinion, recommendation, vote, or other exercise of discretion;

18. "Official proceeding" means a proceeding heard or which may be heard before any government agency or branch or public servant authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with any such proceeding;

19. "Person" means a human being and a corporation or organizatio

as defined in section 409;

20. "Public servant" (((means an officer or employee of a government or a person authorized to act for or on behalf of a government or serving a government as an adviser or consultant. The term includes Members of Congress, members of the state legislatures, Resident Commissioners, judges and jurors))) means any officer or employee of government, including law enforcement officers, whether elected or appointed, and any person participating in the performance of a governmental function, but the term does not include witnesses;

21. "Reasonably believes" designates a belief which is not recklessly held by the actor;

((((ah) "recklessly" and variants thereof designate the standard prescribed in section 302(1);

(ai) "section" means a section of this Code; "subsection" or "paragraph" refers to a subsection or paragraph of the section or subsection, as the case may be, in which the term is used;)))

22. "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ;

((((ak) "state" includes Puerto Rico, the Canal Zone, the District of Columbia, American Samoa, Guam, the Virgin Islands, Johnston Island, Midway Island, Wake Island, and Kingman's Reef and any other territory or possession of the United States;)))

23. "Thing of value" means a gain or advantage, or anything regarded, or which might reasonably be regarded, by the beneficiary as a gain or advantage, including a gain or advantage to any other person. "Thing of pecuniary value" means a thing of value in the form of money, tangible or intangible property, commercial interests or anything else the primary significance of which is economic gain;

((((am) "United States", in a territorial sense, includes all states and all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone;

(an) "United States", when not used in a territorial sense, means government, as defined in paragraph (m), of the United States.)))

24. "Act" or "action" means a bodily movement, whether voluntary or involuntary;

25. "Omission" means a failure to act;

26. "Actor" includes, where relevant, a person guilty of an omission;

27. "Acted", "acts", and "actions" include, where relevant, "omitted to act" and "omissions to act";

28. "Property" includes both real and personal property;

29. "Writing" includes printing, typewriting, and copying;

30. "Signature" includes any name, mark, or sign written or affixed with intent to authenticate any instrument or writing;

31. "Motor vehicle" includes any self-propelled device, not

running on tracks or cables, by which persons or property may be transported on land, water, or in the air.

Words used in the singular include the plural, and the plural the singular. Words in the masculine gender include the feminine and neuter genders. Words used in the present tense include the future tense, but exclude the past tense.

Following the reading of Section 109, the Committee Counsel noted that he had made changes in Subsection 3 defining a "dangerous weapon", because he was unsure of the meaning of the subsection as printed in the proposed FCC. (See FCC, Section 109, Subsection f.)

Mr. Hill questioned the coverage of the phrase "political subdivisions" in Subsection 16 of Section 109. He noted that at least one Attorney General's opinion had held that a "city" was not included within the definition of "political subdivision". The Committee Counsel noted that he intended the phrase to include "cities".

At this point, the Committee recessed for lunch until 1:15 p.m., then reconvened and continued consideration of Section 109.

* *

Representative Murphy inquired as to whether the definition of "human being" contained in Subsection 11 of Section 109 included a fetus. Judge Smith noted that this definition of "human being" would not apply to abortion offenses. He stated that the definition was worded that way in the Federal Criminal Code because Federal Criminal Law does not cover offenses related to illegal abortions. He noted, however, the fact that this definition of "human being" would not apply to abortion offenses should be indicated in a comment to Section 109.

The Chairman noted that for the purpose of offenses relating to illegal abortion, a definition of "quick child" could probably be formulated and inserted in the chapter dealing with illegal abortion offenses.

Judge Pearce inquired as to whether an assault upon a pregnant woman, resulting in the death of her fetus, would constitute murder under the FCC. The Committee Counsel noted that under the FCC definition of both "human being" and "murder" (see Section 1601), the death of a fetus under the circumstances outlined by Judge Pearce would not be murder.

IT WAS MOVED BY JUDGE SMITH, SECONDED BY MR. WEBB, AND UNANIMOUSLY CARRIED that Subsection 11 of Section 109, relating to the definition of a "human being", be deleted.

The Committee discussed Subsection 12 defining an "included offense", and it was noted that this was probably a broader definition of less "included offense" than could be gleaned from present North Dakota case law on included offenses.

The Committee discussed Subsection 14 defining a "judge". It was noted that the federal definition of "judge" was probably designed solely to ensure inclusion of justices of the United States Supreme Court. If the proposed new Constitution were adopted, then North Dakota Supreme Court "judges" would be referred to as "justices".

IT WAS MOVED BY MR. WEBB, SECONDED BY JUDGE ERICKSTAD, AND UNANIMOUSLY CARRIED that the language "means the presiding officer of a court, and the judge of the supreme court" be deleted from Subsection 14, and that Subsection 14 read as it does in the proposed FCC. In addition, a caveat is to be contained in the comments to Section 109 indicating that this subsection would only be relevant if the proposed new Constitution were adopted on April 28, 1972.

The Committee discussed Subsection 15 of Section 109 defining a "law enforcement officer or peace officer". The Committee Counsel noted that the Committee had previously considered a definition of "peace officer", and had decided to adopt essentially the federal definition of "law enforcement officer" but to indicate in the definition that "law enforcement officer" was synonymous with "peace officer". In addition, the federal definition had been extended to ensure that the responsibility of a "law enforcement officer" to enforce the law was recognized.

The Committee discussed the definition of "motor vehicle" contained in Subsection 31 of Section 109. Representative Hilleboe inquired as to whether the words "running on tracks" would exclude a caterpillar from the definition of motor vehicle. Several members of the Committee questioned the need for a definition of "motor vehicle" in a general definition section.

IT WAS MOVED BY MR. WEBB, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that Subsection 31 of Section 109 defining a "motor vehicle" be deleted.

It was the consensus of the Committee that further consideration of individual definitions contained in Section 109 be deferred until the Committee has had an opportunity to consider sections which used the words defined in context.

The Chairman called on the Committee Counsel to read Section 301, as follows:

SECTION 301. BASIS OF LIABILITY FOR OFFENSES.) 1. A person commits an offense only if he engages in conduct, including an act,

an omission, or possession, in violation of a statute which provides that the conduct is an offense.

2. A person who omits to perform an act does not commit an offense unless he has a legal duty to perform the act, nor shall such an omission be an offense if the act is performed on his behalf by a person legally authorized to perform it.

(((3. Publication Required. A person does not commit an offense if he engages in conduct in violation only of a statute or regulation thereunder that has not been published.)))

Judge Erickstad noted that Subsection 1 of Section 301 was essentially the same as Subsection 4 of Section 101, previously considered. He suggested that Mr. Hill, in his consideration of the need for Subsections 4, 5, and 6 of Section 101, keep the provisions of Subsection 1 of Section 301 in mind. The Committee Counsel noted that Section 301, as modified by the addition of the language in Subsection 2, would replace a portion of Section 12-01-06 and would also replace Section 12-01-08.

The Committee Counsel noted that Subsection 3 of Section 301 of the proposed FCC had been omitted from this draft, as it seemed that in order to enact Subsection 3, North Dakota should have a statutory mandate that regulations be published and made readily available to the public, and an additional mandate that statutes defining criminal offenses do not take effect until they are published and made publicly available.

IT WAS MOVED BY JUDGE ERICKSTAD, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that the text of Section 301 be adopted as presented.

The Chairman called on the Committee Counsel to read the text of Section 302, as follows:

SECTION 302. REQUIREMENTS OF CULPABILITY.) 1. A person engages in conduct:

a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so;

b. "Knowingly" if, when he engages in the conduct, he knows or

has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so;

c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 502, awareness of the risk is not required where its absence is due to voluntary intoxication;

d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; and

e. "Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.

2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully. Except as otherwise expressly provided or unless the context otherwise requires, if a statute provides that conduct is (((an infraction))) <u>a violation</u> without including a requirement of culpability, no culpability is required.

3. a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition

of the offense, except that where the required culpability is "intentionally", the culpability required as to an attendant circumstance is "knowingly".

b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required kind of culpability is required with respect to the result.

c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for (((federal jurisdiction or for))) grading.

d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in part A of this (((Code))) title or chapter 10; otherwise the least kind of culpability required for the offense is required with respect to such facts.

e. A factor as to which it is expressly stated that it must "in fact" exist is a factor for which culpability is not required.

4. (((If conduct is an offense if a person engages in it negligently, the conduct is an offense also if a person engages in it intentionally, knowingly, or recklessly. If conduct is an offense if a person engages in it recklessly, the conduct is an offense also if a person engages in it intentionally or knowingly. If conduct is an offense if a person engages in it knowingly, the conduct is an offense also if a person engages in it intentionally.))) Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this (((Code))) title.

The Committee Counsel noted that Section 302 would specifically replace the definition of degrees of culpability contained in Subsections 1 through 5 of Section 12-01-04. In response to a question from Representative Murphy, the Committee Counsel stated that the word "culpability", though difficult to define, could be considered as the mental state of a person which leads to criminal liability or fault.

The Committee discussed the difficulty in applying the standards or degrees of culpability provided by Section 302 to offenses defined outside of Title 12. IT WAS MOVED BY JUDGE ERICKSTAD, SECONDED BY REPRESENTATIVE MURPHY, AND UNANIMOUSLY CARRIED that the word "A" in Line 1 of Section 302 be deleted, and that the words "For the purposes of this title, a" be inserted in lieu thereof.

The Chairman called on the Committee Counsel to read Section 303, as follows:

SECTION 303. MISTAKE OF FACT IN AFFIRMATIVE DEFENSES.) (((Except as))) Unless otherwise expressly provided, a mistaken belief that the facts which constitute an affirmative defense exist is not a defense.

The Committee Counsel noted that North Dakota had no statutory material which was essentially equivalent to Section 303. However, since the total concept of the proposed FCC involves delineations between "defenses" and "affirmative defenses", the Committee Counsel believed that Section 303 should be retained.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that the Committee accept the text of Section 303 as presented.

The Chairman called on the Committee Counsel to read Section 304, as follows:

SECTION 304. IGNORANCE OR MISTAKE NEGATING CULPABILITY.) A person does not commit an offense if, when he engages in conduct, he is ignorant or mistaken about a matter of fact or law and the ignorance or mistake negates the kind of culpability required for commission of the offense.

The Committee Counsel noted that this section would replace Subsection 5 of Section 12-02-01, and would probably cause a substantive change in North Dakota law, because it provides that ignorance or mistake about a matter "of law" would result in otherwise criminal conduct not being considered an offense. The Committee Counsel also noted that Section 609 of the FCC provides that a "mistake of law" is an affirmative defense, and sets forth the situations in which that defense ("mistake of law") can arise.

The Committee discussed the fact that other Codes, including the Illinois Criminal Code and the Model Penal Code (see Section 2.04), make ignorance or mistake as to a matter of law a defense, rather than stating that a person does not commit the offense if he is ignorant or mistaken.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY JUDGE ERICKSTAD, AND CARRIED that Section 609 be redrafted to refer to Section 4-8 of the Illinois Criminal Code, and to Section 2.04 of the Model Penal Code.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY MR. WEBB, AND CARRIED that the staff redraft Section 304, using essentially the language contained in Section 4-8 of the Illinois Criminal Code, but making mistake of fact or law an affirmative defense.

The Chairman called on the Committee Counsel to read Section 305, as follows:

SECTION 305. CAUSAL RELATIONSHIP BETWEEN CONDUCT AND RESULT.) Causation may be found where the result would not have occurred but for the conduct of the accused operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient.

The Committee Counsel noted that Section 305 does not have an equivalent counterpart in Title 12. He also noted that the drafters of the proposed FCC admit that no totally sufficient statement of principles regarding causation can be drafted; however, they believe that a section similar to Section 305 should be included for guidance purposes. The equivalent section of the Model Penal Code is Section 2.03.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE KIEFFER, AND UNANIMOUSLY CARRIED that the Committee accept Section 305 as presented.

The Chairman read Section 401, as follows:

SECTION 401. ACCOMPLICES.) 1. A person may be convicted of an offense based upon the conduct of another person when:

a. Acting with the kind of culpability required for the offense, he causes the other to engage in such conduct; or

b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it or,having a legal duty to prevent its commission, he fails to make proper effort to do so; or

c. He is a co-conspirator and his association with the offense meets the requirements of either of the other paragraphs of this subsection.

A person is not liable under this subsection for the conduct of another person when he is either expressly or by implication made not accountable for such conduct by the statute defining the offense or related provisions, because he is a victim of the offense or otherwise.

2. Unless otherwise provided, in a prosecution in which the liability of the defendant is based upon the conduct of another person, it is no defense that:

a. The defendant does not belong to the class of persons who, because of their official status or other capacity or characteristic, are by definition of the offense the only persons capable of directly committing it; or

b. The person for whose conduct the defendant is being held liable has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice.

The Committee Counsel noted that Section 401 provides for the criminal liability of "accomplices", and would replace Sections 12-02-03, 12-02-04, and 12-02-06.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that Section 401 as presented be adopted by the Committee.

The Chairman called on the Committee Counsel to read Section 402, as follows:

SECTION 402. CORPORATE CRIMINAL LIABILITY.) 1. A corporation may be convicted of:

a. Any offense committed by an agent of the corporation within the scope of his employment on the basis of conduct authorized, requested, or commanded, by any of the following or a combination of them:

(1) The board of directors;

(2) An executive officer or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees;

(3) Any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy;

(4) Any other person for whose act or omission the statute defining the offense provides corporate responsibility for offenses;

b. Any offense consisting of an omission to discharge a specific duty of affirmative conduct imposed on corporations by law;

c. Any (((misdemeanor))) <u>class C or class D offense</u> committed by an agent of the corporation within the scope of his employment; or

d. Any offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation within the scope of his employment.

2. It is no defense that an individual upon whose conduct liability of the corporation for an offense is based has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice.

The Committee Counsel noted that Section 402 deals with corporate criminal liability. He stated that aside from Section 12-06-11, which deals with the punishment of a corporation convicted of a felony, no specific provisions in Title 12 dealt with the criminal liability of corporations. The Committee Counsel noted that Section 402 would not replace Section 12-06-11, as that section would be replaced by Sections 3001, 3007, and 3301 through 3304 of the FCC which deal with the penalties to be attached upon a finding of corporate criminal liability.

The Committee discussed the meaning of Subparagraph 3 of Subdivision a of Subsection 1 which provides that a person who is not an officer of the corporation, but who controls the corporation or is responsibly involved in forming its policy, can direct an employee of the corporation to act in such a way that the corporation would become criminally liable as a result of the employee's action.

IT WAS MOVED BY SENATOR PAGE, SECONDED BY MR. WOLF, AND UNANIMOUSLY CARRIED that the Committee accept Section 402 as presented.

The Chairman called on the Committee Counsel to read Section 403, as follows:

SECTION 403. INDIVIDUAL ACCOUNTABILITY FOR CONDUCT ON BEHALF OF ORGANIZATIONS.) 1. A person is legally accountable for any conduct he performs or causes to be performed in the name of an organization or in its behalf to the same extent as if the conduct were performed in his own name or behalf.

2. Except as otherwise expressly provided, whenever a duty to act is imposed upon an organization by a statute or regulation thereunder,

any agent of the organization having primary responsibility for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed directly upon himself.

3. When an individual is convicted of an offense as an accomplice of an organization, he is subject to the sentence authorized when a natural person is convicted of that offense.

(((4. A person responsible for supervising relevant activities of an organization is guilty of an offense if he manifests his assent to the commission of an offense for which the organization may be convicted by his willful default in supervision within the range of that responsibility which contributes to the occurrence of that offense. Conviction under this subsection shall be of an offense of the same class as the offense for which the organization may be convicted, except that if the latter offense is a felony, conviction under this subsection shall be for a Class A misdemeanor.)))

The Committee Counsel noted that the Model Penal Code provision which is similar to Section 403 is Section 2.07, Subsection 6. He stated that that subsection of Section 2.07 provides that an omission on the part of an incorporate employee or agent which would make that person responsible must be "reckless"; however, Subsection 2 of Section 403 does not provide a standard of culpability.

Mr. Wolf questioned the use of the words "legally accountable" in Line 2 of Section 403 because those words might also include civil liability. He felt that a criminal code should not be dealing with questions of civil liability.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY SENATOR PAGE that Section 403 be adopted as presented.

IT WAS MOVED BY MR. WOLF AND SECONDED BY JUDGE SMITH that Judge Pearce's motion (see above) be amended to add the word "unlawful" before the word "conduct"in Line 2 of Section 403. THIS MOTION LOST by a vote of 4 "ayes"to 6 "nays".

The question was then on the original motion made by Judge Pearce to adopt Section 403 WHICH MOTION CARRIED.

The Chairman called on the Committee Counsel to read Section 409, as follows:

SECTION 409. DEFINITIONS AND GENERAL PROVISIONS.) 1. In this chapter:

a. "Organization" means any legal entity, whether or not organized as a corporation or unincorporated association, but does not include an entity organized as or by a governmental agency for the execution of a governmental program;

b. "Agent" means any partner, director, officer, servant, employee, or other person authorized to act in behalf of an organization.

2. Nothing in this chapter shall limit or extend the criminal liability of an unincorporated association.

The Committee Counsel noted that Section 409 provides definitions which are relevant to Sections 401 through 403. He stated that the federal comment to Section 409 indicated that "liability of unincorporated associations is left to specific statutory provisions and judicial development". (See proposed FCC, Page 37.)

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE KIEFFER, AND UNANIMOUSLY CARRIED that the Committee adopt Section 409 as presented.

The Chairman called on the Committee Counsel to read the text of Section 501, as follows:

SECTION 501. JUVENILES.) (((A prosecution of any person as an adult shall be barred if the offense was committed:

(a) when he was less than fifteen years old in any case, or when he was less than sixteen years old in the case of offenses other than murder, aggravated assault, rape and aggravated involuntary sodomy; or

(b) when he was less than eighteen years old unless trial as an adult is ordered by the district court to promote justice.))) Persons under the age of seven years shall be deemed incapable of commission of an offense defined by the Constitution or statutes of this state. The prosecution of any person as an adult shall be barred if the offense was committed when the person was seven years of age, but less than sixteen years of age.

The Committee discussed the need for the language "seven years of age, but" contained in the last sentence of Section 501. It was noted that the intent of Section 501 would be carried out if the language simply barred prosecution as an adult of anyone less than 16 years of age. The provision of the first sentence of Section 501 that persons under seven years of age shall be deemed incapable of committing an offense would still prevent criminal liability from attaching to a person under seven years of age, even in a juvenile court.

The Committee Counsel noted that Section 501 would replace Subsections 1 and 2 of Section 12-02-01.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that the words "seven years of age, but" in the last sentence of Section 501 be deleted.

IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE PEARCE, AND UNANIMOUSLY CARRIED that the Committee accept Section 501 as amended. The Committee recessed at 4:40 p.m. and reconvened at 9:00 a.m. on Friday, March 3, 1972.

* *

The Chairman called on the Committee Counsel to read Section 502, as follows:

SECTION 502. INTOXICATION.) 1. Except as provided in subsection 3, intoxication is not a defense to a criminal charge. Intoxication does not,in itself, constitute mental disease within the meaning of section 503. Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged.

2. A person is reckless with respect to an element of an offense

even though his disregard thereof is not conscious, if his not being conscious thereof is due to self-induced intoxication.

3. Intoxication which is not self-induced, or if self-induced, is grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible, is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacked substantial capacity either to appreciate its criminality or to conform his conduct to the requirements of law.

4. In this section:

a. "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of alcohol, drugs, or other substances into the body;

b. "Self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would otherwise afford a defense to a charge of crime.

The Committee Counsel noted that this section would replace Section 12-05-01, which provides that an act is not any less criminal because it was committed while the actor was in a state of "voluntary intoxication". However, Section 12-05-01 also provides that evidence of intoxication may be introduced to aid the jury in determining whether the defendant acted with the necessary "purpose, motive, or intent", where the purpose, motive, or intent is an element of the crime.

The Committee discussed at length the provision in Section 502 for the defense of "pathological intoxication". Judge Smith argued that both of the defenses established by Subsection 3 of Section 502 should be stricken, as they would introduce too much of an element of subjectiveness into criminal trials. He stated that this was particularly true in regard to the pathological intoxication defense, as a

person who had decided on a course of criminal conduct could have one or two drinks prior to carrying out the criminal action, then could defend on the basis that he was "pathologically intoxicated".

The Chairman noted that it would probably be desirable to strike out the "pathological intoxication" language in Subsection 3, and, in addition, to formulate a definition for "non-self-induced intoxication".

Professor Lockney noted that the federal comment to Section 502 contained the following alternative:

> "Intoxication is a defense to the criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense evidence of intoxication of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense charged, except as provided in Subsection (2)."

Professor Lockney noted that under this alternative, Subsections 3 and 4 of Section 502 would be omitted. Mr. Hill stated that, while he would like to see Subsection 3 omitted, he would like Subsection 4 retained in order that the new criminal code contain a definition of "intoxication" which is more extensive than intoxication solely through the use of alcoholic beverages.

Mr. Webb stated that the Committee should use the alternative intoxication proposal as contained on Page 39 of the proposed FCC. He said he felt that this alternative was closer to present North Dakota law, and consequently would be more likely to receive legislative approval.

IT WAS MOVED BY JUDGE SMITH, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that Subsections 1, 3, and 4 of Section 502 be deleted, and that the alternative language contained on Page 39 of the Final Report of the National Commission on Reform of Federal Criminal Laws be substituted for Subsection 1.

The Chairman called on the Committee Counsel to read Section 503, as follows:

SECTION 503. MENTAL DISEASE OR DEFECT.) 1. A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal

or otherwise antisocial conduct. Lack of criminal responsibility under this section is a defense.

2. When a defendant is acquitted on the ground of mental disease or defect, excluding responsibility, the court may, if it deems the defendant dangerous to the public safety, order him committed to the state hospital, or to such other place as may be appropriate for custody, care, and treatment.

The Committee Counsel noted that the Committee had previously discussed the topic of an "insanity" defense (see Section 17A noted in the minutes of January 24-25, 1972). Section 503 would replace Subsections 3 and 4 of Section 12-02-01, and Sections 12-05-02 and 12-05-03.

Mr. Hill stated that the alternative federal formulation set forth on Page 40 of the "Final Report" is preferable to the text of Section 503 as presented.

Mr. Hill read the alternative formulation, as follows:

> "Mental disease or mental defect is a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense."

Mr. Hill stated that, ideally, "insanity" should not be a defense at all, but rather should be taken into consideration in imposition of sentence. He stated that it is difficult for the layman to understand why a defendant is acquitted by reason of insanity, where the facts indicate that it is perfectly clear the defendant committed the offense charged.

Judge Pearce stated he agrees with Mr. Hill, and pointed out that it is often better for the defendant to have the protections of a criminal proceeding prior to his commitment for mental disease, as the civil commitment procedure could be more open to abuse than commitment following a criminal proceeding. Judge Pearce also noted that the "insanity" defense has been called a "rich man's defense", because the successful raising of the defense often depends upon whether one can afford to hire prestigious psychiatrists.

Professor Lockney stated that he agreed with Mr. Hill and Judge Pearce regarding the problems that arise by making insanity an absolute defense to criminal prosecution, but questioned whether the alternative proposed by the drafters of the FCC would do much to solve that problem.

Judge Pearce stated that the alternative would also result in the prosecution and defense trying to line up the most opposing psychiatrists; however, he felt that it would be too great a leap to eliminate the "insanity" defense altogether.

Judge Smith noted that the civil commitments statutes, as they presently stand in North Dakota, do not represent bad legislation. He indicated that examples of abuse of civil commitment are probably more related to bad administration of the laws than to the laws themselves.

Professor Lockney stated that Section 503 probably represented an instance in which it will be well to have alternatives placed before the Committee. He suggested that the Committee Counsel draft two alternates to the present draft; one, which would be essentially the federal alternative printed on Page 40 of the proposed FCC, and the second, an alternative providing for no "insanity" defense. He noted that prior to Committee consideration of the alternatives, the Committee should have the relevant portions of the working papers dealing with Section 503 available to them.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the staff draft two alternatives to present Section 503; one, setting forth the federal alternative presented on Page 40 of the proposed FCC, and the other providing that "insanity" is not a defense to a criminal charge. In addition, the staff is to provide Committee members with the working paper comments on Section 503.

The Chairman called on the Committee Counsel to read Sections 601 and 602, as follows:

SECTION 601. JUSTIFICATION.) 1. Except as otherwise expressly provided, justification or excuse under this chapter is a defense.

2. If a person is justified or excused in using force against another, but he recklessly or negligently injures or creates a risk of injury to other persons, the justifications afforded by this chapter are unavailable in a prosecution for such recklessness or negligence, as the case may be.

3. That conduct may be justified or excused within the meaning of this chapter does not abolish or impair any remedy for such conduct which is available in any civil action.

(((4. The defenses of justification and excuse may be asserted in a

state or local prosecution of a federal public servant, or a person acting at his direction, based on acts performed in the course of the public servant's official duties.)))

SECTION 602. EXECUTION OF PUBLIC DUTY.) 1. Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law.

2. A person who has been directed by a public servant to assist that public servant is justified in using force to carry out the public servant's direction, unless the action (((being taken))) directed by the public servant is plainly unlawful.

3. A person is justified in using force upon another in order to effect his arrest or prevent his escape when a public servant authorized to make the arrest or prevent the escape is not available, if the other person has committed, in the presence of the actor, any crime which the actor is justified in using force to prevent or if the other person has committed (((a felony))) an offense involving force or violence.

The Committee Counsel noted that Section 601, and Sections 602 through 607 deal with the justified use of force, and that they would replace Sections 12-26-03, 12-27-03, 12-27-04, 12-27-05, and 12-27-06.

Representative Kieffer inquired as to whether a peace officer could call a private citizen to his assistance under present North Dakota law. The Committee Counsel noted that present North Dakota law does provide that a peace officer may call a private citizen to his assistance, and, at least in the case of a riot, makes it a criminal offense for the citizen to refuse to aid the peace officer.

The Committee discussed Section 601, and it was decided that action on Section 601 would be delayed until the remaining sections of Chapter 6, FCC, had been studied, so that the particular types of justifications or excuses provided by the drafters would be known in considering Section 601.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY SENATOR PAGE, AND UNANIMOUSLY CARRIED that the Committee adopt Section 602 as presented.

The Chairman called on the Committee Counsel to read Section 603, as follows:

SECTION 603. SELF-DEFENSE.) A person is justified in using force upon another person in order to defend himself against danger of imminent unlawful bodily injury, sexual assault, or detention by such other person, except that:

1. A person is not justified in using force for the purpose of resisting arrest, execution of process, or other performance of duty by a public servant under color of law, but excessive force may be resisted; and
2. A person is not justified in using force if: a. he intentionally provokes unlawful action by another person in order to cause bodily injury or death to such other person; or b. he has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances. A person's use of defensive force after he withdraws from an encounter and indicates to the other person that he has done so is justified if the latter nevertheless continues or menaces unlawful action.

The Committee Counsel noted that Section 603 would specifically replace Subsections 1 and 2 and Section 12-27-05. In addition, he noted that the language of Subsection 1 of Section 603 would prevent a person from using force to resist even an unlawful arrest.

Mr. Wolf questioned the use of the language "but excessive force may be resisted" in Subsection 1 of Section 603. He felt that this would allow persons being subjected to arrest to use a subjective standard in determining whether they should resist the peace officer making the arrest.

Judge Erickstad noted that Subsection 3 of Section 12-26-03 qualified the use of force by the following language: "If the force or violence used is not more than sufficient to prevent such offense".

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY PROFESSOR LOCKNEY that the Committee adopt the text of Section 603 as presented.

IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE SMITH, AND CARRIED THAT JUDGE PEARCE'S MOTION ABOVE BE AMENDED to insert the words "only with force sufficient to prevent such excessive force" after the word "resisted" in the last line of Subsection 1 of Section 603. (See additional motion on this subject, infra, P. 44.)

JUDGE PEARCE, WITH THE CONSENT OF HIS SECOND, THEN WITHDREW HIS MOTION regarding adoption of Section 603, and commented that the language added by Mr. Wolf's amendment should also be included in Subsection 2, where Subsection 2 relates to resisting "clearly excessive" force.

The Chairman called on the Committee Counsel to read Section 604, as follows:

SECTION 604. DEFENSE OF OTHERS.) A person is justified in using force upon another person in order to defend anyone else if:

1. The person defended would be justified in defending himself; and

2. The person coming to the defense has not, by provocation or otherwise, forfeited the right of self-defense.

The Committee Counsel noted that Section 604, providing for justified self-defense, allows both the defense of strangers and the defense of one's own family on the same basis. Section 604 would specifically replace Subsection 2 of Section 12-27-05, and Subsection 3 of Section 12-26-03.

IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE PEARCE, AND CARRIED that Section 604 be adopted as presented.

The Chairman called on the Committee Counsel to read Section 605, as follows:

SECTION 605. USE OF FORCE BY PERSONS WITH PARENTAL, CUSTODIAL, OR SIMILAR RESPONSIBILITIES.) The use of force upon another person is justified under any of the following circumstances:

1. A parent, guardian, or other person responsible for the care and supervision of a minor under eighteen years old, or

teacher or other person responsible for the care and supervision of such a minor for a special purpose, or a person acting at the direction of any of the foregoing persons, may use reasonable force upon the minor for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct, and the maintenance of proper discipline. The force may be used for this purpose (((may be such as is reasonable))), whether or not it is "necessary" as required by section 607(1) (((, but must not be designed to cause or known to))). The force used must not create a substantial risk of (((causing))) death, serious bodily injury, disfigurement, or gross degradation;

2. A guardian or other person responsible for the care and supervision of an incompetent person, or a person acting at the direction of the guardian or responsible person, may use reasonable force upon the incompetent person for the purpose of safeguarding or promoting his welfare, including the prevention of his misconduct or, when he is in a hospital or other institution for care and custody, for the purpose of maintaining reasonable discipline in the institution. The force may be used for these purposes (((may be such as is reasonable))), whether or not it is "necessary" as required by section 607(1) (((, but must not be designed to cause or known to))). The force used must not create a substantial risk of (((causing))) death, serious bodily injury, disfigurement, or gross degradation;

3. A person responsible for the maintenance of order in a vehicle, train, vessel, aircraft, or other carrier, or in a place where others are assembled, or a person acting at the responsible person's direction, may use force to maintain order;

4. A duly licensed physician, or a person acting at his direction, may use force in order to administer a recognized form of treatment to promote the physical or mental health of a patient if the treatment is administered in an emergency, or with the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision, or by order of a court of competent jurisdiction;

5. A person may use force upon another person, about to commit suicide or suffer serious bodily injury, in order to prevent the death or serious bodily injury of such other person.

The Committee Counsel noted that Section 605 would replace the essence of Subsections 4, 5, and 6 of Section 12-26-03. Representative Hilleboe indicated that the words "under eighteen years old" contained in the second line of Subsection 1 of Section 605 should be stricken, as they are superfluous. Judge Erickstad indicated that he agreed with Representative Hilleboe to the extent that either the word "minor" should be used, or the word "person" should be used in place of "minor".

Representative Hilleboe inquired as to the meaning of the words "a special purpose" in Line 7. It was noted that "special purpose" probably refers to teaching, or other situations in which a person has temporary care and supervision of a minor.

Judge Smith questioned the use of the words "gross degradation" in Line 17. He wondered whether this might not allow a teacher, or other person responsible for a minor for a special purpose, to use

force which would simply degrade the minor, as opposed to "grossly" degrading him. He wondered whether minors should be subject to any degradation.

The Committee discussed Subsection 4 of Section 605 at length, and particularly the question of whether the section was intended to allow a doctor to operate on a competent adult, if the operation were ordered by a court of competent jurisdiction.

At this point the Committee recessed for lunch and reconvened at 1:15 p.m., at which time it took up consideration of the minutes of the last meeting.

* *

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY REPRESENTATIVE HILLEBOE, AND UNANIMOUSLY CARRIED that the reading of the minutes of the meeting of January 24-25, 1972, be waived, and the minutes be approved as distributed.

The Committee then continued discussion of Subsection 4 of Section 605. Professor Lockney suggested that semicolons be placed after the word "emergency" in Line 4 of Subsection 4, and after the first word "patient" in Line 5 of Subsection 4, in order to ensure that the doctor would not be protected in operating except on a minor or incompetent, if he operated by court order.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED that semicolons be placed in Subsection 4 of Section 605 as per Professor Lockney's suggestion. (See additional motion on this subject, infra, P. 44.)

The Chairman then called on the Committee Counsel to read Section 606, as follows:

SECTION 606. USE OF FORCE IN DEFENSE OF PREMISES AND PROPERTY.) Force is justified if it is used to prevent or terminate an unlawful entry or other trespass in or upon premises, or to prevent an unlawful carrying away or damaging of property, if the person using such force first requests the person against whom such force is to be used to desist from his interference with the premises or property, except that:

1. A request is not necessary if it would be useless (((to make the request,))) or (((it would be))) dangerous to make the request; or substantial damage would be done to the property

sought to be protected before the request could effectively be made; and

2. The use of force is not justified to prevent or terminate a trespass if it will expose the trespasser to substantial danger of serious bodily injury.

The Committee Counsel noted that Section 606 would replace that portion of Subsection 3 of Section 12-26-03 which allows the use of force to prevent a trespass or other unlawful interference with real or personal property which was in the lawful possession of the person using the force.

Judge Pearce questioned the language of Subsection 2 of Section 606 on the basis that the word "trespass" was subject to misconstruction. He felt that "trespass" could be construed to include burglary or other entry on premises for the purpose of committing a felony. The Chairman requested that further consideration of Section 606 be held in abeyance until Sections 607 and 619 had been read. The Committee Counsel read Sections 607 and 619, as follows:

SECTION 607. LIMITS ON THE USE OF FORCE: EXCESSIVE FORCE; DEADLY FORCE.) 1. A person is not justified in using more force than is necessary and appropriate under the circumstances.

2. Deadly force is justified in the following instances:

a. When it is expressly authorized by (((a federal statute))) law or occurs in the lawful conduct of war;

b. When used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of (((a felony))) an offense involving violence. (((except that the))) The use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the person menaced. A person seeking to protec

someone else must, before using deadly force, try to cause that person to retreat, or otherwise comply with the requirements of this provision, if safety can be obtained thereby (((; but))). But, 1. a public servant (((or an officer of a ship or aircraft))) justified in using force in the performance of his duties or a person justified in using force in his assistance need not desist from his efforts because of resistance or threatened resistance by or on behalf of the person against whom his action is directed, and 2. no person is required to retreat from his dwelling, or place of work, unless he was the original aggressor or is assailed by a person who he knows also dwells or works there;

c. When used by a person in possession or control of a dwelling or place of work, or a person who is licensed or privileged to be there, if such force is necessary 1. to prevent commission of arson, burglary, robbery, or (((a felony))) an offense involving violence upon or in the dwelling or place of work, or 2. to prevent a person in flight immediately after committing a robbery or burglary from taking the fruits thereof from the dwelling or place of work, and the use of force other than deadly force for such purposes would expose anyone to substantial danger of serious bodily injury;

d. When used by a public servant authorized to effect arrests or prevent escapes, if such force is necessary to effect an arrest or to prevent the escape from custody of a person who has committed or attempted to commit (((a felony))) an offense

involving violence, or is attempting to escape by the use of a deadly weapon, or has otherwise indicated that he is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay;

e. When used by a guard or other public servant, if such force is necessary to prevent the escape of a prisoner from a detention facility, unless he knows that the prisoner is not such a person as described in paragraph d above. A detention facility is any place used for the confinement, pursuant to a court order, of a person 1. charged with or convicted of an offense, or 2. charged with being or adjudicated a juvenile delinquent, or 3. held for extradition, or 4. otherwise confined pursuant to court order;

f. When used by a public servant, if such force is necessary ((((i) to prevent overt and forceful acts of treason, insurrection or sabotage, or (ii)))) to prevent murder, manslaughter, aggravated assault, arson, robbery, burglary, or kidnapping in the course of a riot, if the deadly force is employed following reasonable notice of intent to employ deadly force, and does not carry with it (((an))) unreasonable danger to (((life of))) nonparticipants in the riot, and is employed pursuant to a decision or order of a public servant having supervisory authority over (((ten))) <u>three</u> or more other public servants concerned in the suppression of the riot;

(((g. When used by an officer of a ship or aircraft if such force is necessary to prevent overt and forceful acts of mutiny,

after the participants in such acts against whom such force is to be used have been ordered to cease and given reasonable notice of intent to employ deadly force;)))

g. When used by a duly licensed physician, or a person acting at his direction, if such force is necessary (((in order))) to administer a recognized form of treatment to promote the physical or mental health of a patient and if the treatment is administered 1. in an emergency, or 2. with the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision, or 3. by order of a court of competent jurisdiction;

h. When used by a person who is directed or authorized (((to use deadly force))) by a public servant, (((or an officer of a ship or aircraft))) and who does not know that, if such is the case, the public servant (((or such officer))) is himself not authorized to use deadly force under the circumstances.

SECTION 619. DEFINITIONS.) In this chapter:

1. "Force" means physical action, threat, or menace against another, and includes confinement;

2. "Deadly force" means force which a person uses with the intent of causing, or which he knows creates a substantial risk of causing, death or serious bodily injury. (((Intentionally firing a firearm or hurling a destructive device in the direction of another person or at a moving vehicle in which another person is believed to be constitutes deadly force.)))

A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force;

3. "Premises" means all or any part of a building or real property, or any structure, vehicle, or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein;

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

Representative Hilleboe questioned the last sentence of Subsection 2 of Section 619 and asked whether this would allow people to walk about the streets with a loaded firearm. The Committee discussed this question, and the further question regarding at what point the display of a loaded firearm could be considered "deadly force", or any kind of "force" at all.

The Committee reverted to discussion of Section 607, and particularly the use of the words "an offense" in place of the words "a felony" in Subsections 2 (b), (c), and (d). Mr. Webb noted that this would allow the use of deadly force against someone attempting to perpetrate simple assault, as that crime is defined in our present statutes.

IT WAS MOVED BY JUDGE ERICKSTAD AND SECONDED BY MR. WEBB that the staff, in the present draft, and future drafts, use the words "felony" and "misdemeanor" where they are used in the draft of the proposed FCC by the National Commission, when such words are used in a context indicating that they are not used to classify a particular substantive offense.

The Committee discussed Subdivision b of Subsection 2 of Section 607, and it was noted that this would restrict the use of deadly force by a law enforcement officer attempting to effect an arrest or prevent an escape to those situations where the person to be arrested or who is escaping had committed or attempted to commit a felony involving violence. Mr. Webb questioned whether the law enforcement officer's authority to use deadly force should be limited to felonies "involving violence".

THE MOTION OF JUDGE ERICKSTAD regarding the use of the words "felony" and "misdemeanor" as stated above CARRIED.

The Committee then launched into discussion of the use of alternative provisions, and whether alternatives should be presented in the main draft or presented as additional bills amending the complete revisory bill as recommended by the Committee. The Committee Counsel noted that, where he was aware of controversial policy decisions, the drafts could be presented with alternative language in them. It was the consensus of the Committee that the drafts should contain alternative presentations by the staff, where the staff was aware of a possible controversial policy question.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY JUDGE ERICKSTAD that Section 607, as amended, be adopted by the Committee, including adoption of restrictions on the use of deadly force by law enforcement officers and others to instances where the person upon whom the force is to be used has committed or attempted to commit a felony "involving violence".

The Committee discussed Subdivision g of Subsection 2 of Section 607 and noted that, as drafted, it would protect a duly licensed physician who had performed an operation upon a competent adult, where such operation was ordered by a court. JUDGE PEARCE, WITH THE CONSENT OF JUDGE ERICKSTAD, AMENDED HIS MOTION regarding Section 607 to delete the numeral "3." where it appeared in Line 8 of Subdivision g, and to insert the following "3." before the word "if" in Line 6 of Subdivision g.

Mr. Webb suggested that Subdivision f of Subsection 2 of Section 607 be deleted, as it might not present an adequate restriction on the use of unreasonable force in the course of a riot. JUDGE PEARCE, WITH THE CONSENT OF JUDGE ERICKSTAD, AGREED TO AMEND HIS MOTION so as to include a deletion of Subdivision f of Subsection 2 of Section 607. JUDGE PEARCE'S MOTION, AS FURTHER AMENDED, THEN CARRIED.

Mr. Webb explained his vote by noting that he voted "aye", but wants an alternative drafted to Subdivision d of Subsection 2 of Section 607 so as to provide that "public servants can effect arrests or prevent escapes for felonies, whether or not such felonies involve violence".

Judge Smith noted he was afraid that Subsection 4 of Section 605 and Subdivision g of Subsection 2 of Section 607, relating to the justified use of force by physicians, create an inference that the professional actions of physicians are criminal, unless a specific statute justifies or authorizes them.

The Committee further discussed the question of whether a physician should be justified in operating on a competent adult, if such operation is ordered by a court. Judge Erickstad suggested that

the staff do research on the question of the extent to which present North Dakota statutes authorize courts to order medical operations on competent adults. The Chairman directed the staff to carry out this research, and in addition to do some research on the extent to which federal statutes allow medical treatment of competent adults by court order.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED that the Committee reconsider the action whereby it renumbered the provisions of Subdivision g of Subsection 2 of Section 607, and that Subdivision g of Subsection 2 of Section 607 and Subsection 4 of Section 605 be amended to indicate that a physician is protected in operating upon a competent adult, when such operation is ordered by a court.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY SENATOR PAGE, AND CARRIED that the words "under eighteen years old" in Line 5 of Section 605 (Subsection 1) be deleted.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY REPRESENTATIVE KIEFFER, AND CARRIED that Section 605, as amended, be adopted by the Committee.

The Committee then discussed Section 603 further, and the necessity for Mr. Wolf's amendment to that section. IT WAS MOVED BY REPRESENTATIVE KIEFFER, SECONDED BY MR. WEBB, AND CARRIED BY A VOTE OF 5 "ayes" to 4 "nays" that the Committee reconsider the action by which it had amended Subsection 1 of Section 603. This motion was made in light of the provisions of Section 607, Subsection 1.

Judge Smith then noted that perhaps all the provisions of Chapter 600 of the proposed FCC were more comprehensive than was necessary in North Dakota. IT WAS MOVED BY JUDGE SMITH AND SECONDED BY MR. WEBB that Chapter 600 of the proposed FCC be deleted, and that the present North Dakota statutes dealing with justified or excusable use of force be substituted for Chapter 600.

The Committee discussed this motion at length, and it was noted that Chapter 600 was an integral part of the scheme of the proposed FCC. JUDGE SMITH, WITH THE CONSENT OF HIS SECOND, WITHDREW HIS MOTION in favor of an indication on the record that he did not think the Committee should blindly accept any of the provisions of the proposed FCC simply because they had been drafted by a National Commission.

The Committee then further considered Section 603, and IT WAS MOVED BY JUDGE PEARCE, SECONDED BY JUDGE ERICKSTAD, AND CARRIED BY A VOTE OF 7 to 3, to adopt Section 603 as presented in the draft prepared by the staff.

The Committee further considered Section 601, and IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY SENATOR PAGE, AND CARRIED that the Committee adopt Section 601 as presented in the staff draft.

In regard to Section 606, IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY JUDGE PEARCE, AND CARRIED that Subsection 2 of Section 606 be deleted, and that the necessary additional grammatical changes be made to the remainder of the section.

Judge Pearce noted that his second of the motion, and his affirmative vote indicated he believed that Subsection 2 was unnecessary, since the general limitation on the use of force contained in Subsection 1 of Section 607 already covered the language of Subsection 2 of Section 606.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY JUDGE PEARCE, AND CARRIED that Section 606, as amended, be adopted by the Committee.

The Chairman called on the Committee Counsel to read Section 608, as follows:

SECTION 608. EXCUSE.) 1. A person's conduct is excused if he believes that the factual situation is such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this chapter, even though his belief is mistaken (((, except that,))). However, if his belief is negligently or recklessly held, it is not an excuse in a prosecution for an offense for which negligence or recklessness, as the case may be, suffices to establish culpability. Excuse under this subsection is a defense or affirmative defense according to which type of defense would be established had the facts been as the person believed them to be.

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

The Committee Counsel noted that this section would replace the essence of Section 12-27-03, although its provisions are not exactly apposite to the provisions of Section 12-27-03.

The Committee discussed Subsection 2 of Section 608, dealing with marginally hasty or excessive action taken in an emergency.

It was noted that the federal comments to Section 608 do not adequately define "marginally hasty or excessive".

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY JUDGE ERICKSTAD, AND CARRIED that the words "factual situation is" in Line 2 of Section 608 be deleted and that the words "facts are" be inserted in lieu thereof; and in addition that Subsection 2 of Section 608 be deleted, and that the appropriate grammatical changes be made in the remainder of the section.

Judge Erickstad explained that he seconded the motion and voted "aye" because he believes that the essence of Subsection 2 is covered in Subsection 1, since the question of whether a person acted negligently or recklessly would be based in part on a determination as to whether that person was faced with an "emergency".

The Committee did not consider Section 609, since there was a previous motion to the effect that Section 609 be redrafted, taking into account the provisions of Section 4-8 of the Illinois Criminal Code. (See motion on Page 21, supra.)

The Chairman called on the Committee Counsel to read Section 610, as follows:

SECTION 610. DURESS.) 1. It is an affirmative defense to a criminal charge that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another. In a prosecution for (((an))) a class C or class D offense (((which does not constitute a felony))), it is an affirmative defense that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force. Compulsion within the meaning of this section exists only if the force, threat, or circumstances would render a person of reasonable firmness incapable of resisting the pressure.

2. The defense defined in this section is not available to a person who, by voluntarily entering into a criminal enterprise, or otherwise, willfully placed himself in a situation where it was foreseeable he would be subjected to duress. The defense is also

unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

The Committee Counsel noted that Section 610 deals with the defense of "duress", and would replace Section 12-05-04 of the Century Code. The Committee discussed the definition of "compulsion" contained in the last sentence of Subsection 1. Judge Pearce noted that the handling of the duress defense in the Illinois Criminal Code was probably better than the draft of Section 610.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that Section 610 be redrafted, taking into consideration the provisions of Section 7-11 of the Illinois Criminal Code.

The Committee considered Section 619 further, and IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED that the Committee adopt Section 619 as presented in the staff draft.

The Committee Counsel noted that the draft presented at this meeting contained sections which would be considered at the next meeting of the Committee, and asked all Committee members to retain that draft for study prior to the next meeting of the Committee, and for use at that meeting.

The Chairman noted that, according to the schedule adopted at the beginning of this meeting, the next meeting of the Committee would be on April 6-7, 1972, and declared that, without objection, the Committee would stand adjourned until that date. The Committee adjourned at 4:55 p.m. on Friday, March 3, 1972.

John A. Graham
Assistant Director

SECTION 101. TITLE; RETROACTIVITY; APPLICATION; CONTEMPT POWER.)

1. Title 12 of the Century Code may be cited as the North Dakota Criminal Code.

2. This title, except as provided in subsection 3 of this section, shall not apply to offenses committed prior to its effective date. Prosecutions for such offenses shall be governed by prior law, which is continued in effect for that purpose. For the purposes of this section, an offense was committed prior to the effective date of this title if any of the elements of the offense occurred prior thereto.

3. In cases pending on or after the effective date of this title, and involving offenses committed prior thereto:

a. The provisions of this title according a defense or mitigation shall apply, with the consent of the defendant; and,

b. The court, with the consent of the defendant, may impose sentence under the provisions of this title which are applicable to the offense and the offender.

4. No conduct or omission to act constitutes an offense unless it is declared to be an offense under this title, the Constitution of this state, or another statute of this state.

5. The provisions of this chapter are applicable to offenses defined by other statutes, unless otherwise provided in this title.

6. This section does not affect the power of a court or legislature to punish for contempt, or to employ any enforcement sanction authorized by law, nor does this section affect any power conferred by law upon military authority to impose punishment upon offenders.

(Note: Subsections 4, 5, and 6 are to receive further consideration.)

SECTION 102. GENERAL PURPOSES.) The general purposes of this title are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which governmental protection is appropriate. To this end, the provisions of this title are intended, and shall be construed, to achieve the following objectives:

1. To ensure the public safety through: a. vindication of public norms by the imposition of merited punishment; b. the deterrent influence of the penalties hereinafter provided; c. the rehabilitation of those convicted of violations of this title; and d. such confinement as may be necessary to prevent likely recurrence of serious criminal behavior;
2. By definition and grading of offenses, to define the limits and systematize the exercise of discretion in punishment and to give fair warning of what is prohibited and of the consequences of violation;
3. To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders;
4. To safeguard conduct that is without guilt from condemnation as criminal and to condemn conduct that is with guilt as criminal;
5. To prevent arbitrary or oppressive treatment of persons accused or convicted of offenses;

6. To define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction.

SECTION 103. PROOF AND PRESUMPTIONS.) 1. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. An accused is presumed innocent until proven guilty. The fact that he has been arrested, confined, or charged with the offense gives rise to no inference of guilt at his trial. "Element of an offense" means: a. the forbidden conduct; b. the attendant circumstances specified in the definition and grading of the offense; c. the required culpability; d. any required result; and e. the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

2. Subsection 1 does not require negating a defense: a. by allegation in the charging document; or b. by proof, unless the issue is in the case as a result of evidence sufficient to raise a reasonable doubt on the issue. Unless it is otherwise provided or the context plainly requires otherwise, if a statute outside this title defining an offense, or a related statute, or a rule or regulation thereunder, contains a provision constituting an exception from criminal liability for conduct which would otherwise be included within the prohibition of the offense, that the defendant came within such exception is a defense.

3. Subsection 1 does not apply to any defense which is explicitly designated an "affirmative defense". An affirmative defense must be proved by the defendant by a preponderance of evidence.

4. When a statute establishes a presumption, it has the following consequences:

a. If there is sufficient evidence of the facts which gave rise to the presumption, the presumed fact is deemed sufficiently proved to warrant submission of the issue to a jury unless the court is satisfied that the evidence as a whole clearly negates the presumed fact;

b. In submitting the issue of the existence of the presumed fact to a jury, the court shall charge that, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the facts giving rise to the presumption as strong evidence of the fact presumed.

5. When a statute declares that given facts constitute a prima facie case, proof of such facts warrants submission of a case to the jury with the usual instructions on burden of proof and without additional instructions attributing any special probative force to the facts proved.

SECTION 109. GENERAL DEFINITIONS.) As used in this title, unless a different meaning plainly is required:

1. "Bodily injury" means any impairment of physical condition, including physical pain;

2. "Court" means any of the following courts: the supreme court, a district court, a county court with increased jurisdiction, a county justice, and a county court;

3. "Dangerous weapon" means any switch blade or gravity knife, machete, scimitar,stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles or sand club; any slungshot; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas or substance;

4. "Destructive device" means any explosive, incendiary or poison gas bomb, grenade, mine, rocket, missile, or similar device;

5. "Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, and any chemical compounds, mechanical mixture, or other ingredients in such proportions, quantities or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, or material or any part thereof may cause an explosion;

6. "Firearm" means any weapon which will expel, or is readily capable of expelling, a projectile by the action of an explosive and includes any such weapon, loaded or unloaded, commonly referred to as a pistol, revolver, rifle, gun, machine gun, shotgun, bazooka, or cannon;

7. "Force" means physical action;

8. "Government" means (a) the government of the United States, of this state or any political subdivision of this state;

(b) any agency, subdivision, or department of the foregoing, including the executive, legislative, and judicial branches; (c) any corporation or other entity established by law to carry on any governmental function; and (d) any commission, corporation, or agency established by statute, compact, or contract between or among governments for the execution of intergovernmental programs;

8a. "Governmental function" includes any activity which a public servant is legally authorized to undertake on behalf of government;

9. "Person" includes, where relevant, a corporation, partnership, unincorporated association, or other legal entity. When used to designate a party whose property may be the subject of action constituting an offense, the word "person" includes a government which may lawfully own property in this state;

10. "Harm" means loss, disadvantage, or injury to the person affected, and includes loss, disadvantage or injury to any other person in whose welfare he is interested;

11. "Included offense" means an offense: a. which is established by proof of the same or less than all the facts required to establish commission of the offense charged; b. which consists of criminal facilitation of or an attempt or solicitation to commit the offense charged; or c. which differs from the offense charged only in that it constitutes a less serious harm or risk of harm to the same person, property, or public interest, or because a lesser degree of culpability suffices to establish its commission;

12. "Includes" should be read as if the phrase "but is not limited to" were also set forth;

13. "Judge" includes justice of the Supreme Court;

14. "Law enforcement officer" or "peace officer" means a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law;

15. "Local" means of or pertaining to any political subdivision of the state;

16. "Official action" means a decision, opinion, recommendation, vote, or other exercise of discretion;

17. "Official proceeding" means a proceeding heard or which may be heard before any government agency or branch or public servant authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with any such proceeding;

18. "Public servant" means any officer or employee of government, including law enforcement officers, whether elected or appointed, and any person participating in the performance of a governmental function, but the term does not include witnesses;

19. "Reasonably believes" designates a belief which is not recklessly held by the actor;

20. "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent

disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ;

21. "Thing of value" means a gain or advantage, or anything regarded, or which might reasonably be regarded, by the beneficiary as a gain or advantage, including a gain or advantage to any other person. "Thing of pecuniary value" means a thing of value in the form of money, tangible or intangible property, commercial interests or anything else the primary significance of which is economic gain;

22. "Act" or "action" means a bodily movement, whether voluntary or involuntary;

23. "Omission" means a failure to act;

24. "Actor" includes, where relevant, a person guilty of an omission;

25. "Acted", "acts", and "actions" include, where relevant, "omitted to act" and "omissions to act";

26. "Property" includes both real and personal property;

27. "Writing" includes printing, typewriting, and copying;

28. "Signature" includes any name, mark, or sign written or affixed with intent to authenticate any instrument or writing.

Words used in the singular include the plural, and the plural the singular. Words in the masculine gender include the feminine and neuter genders. Words used in the present tense include the future tense, but exclude the past tense.

SECTION 301. BASIS OF LIABILITY FOR OFFENSES.) 1. A person

commits an offense only if he engages in conduct, including an act, an omission, or possession, in violation of a statute which provides that the conduct is an offense.

2. A person who omits to perform an act does not commit an offense unless he has a legal duty to perform the act, nor shall such an omission be an offense if the act is performed on his behalf by a person legally authorized to perform it.

SECTION 302. REQUIREMENTS OF CULPABILITY.) 1. For the purposes of this title, a person engages in conduct:

a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so;

b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so;

c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 502, awareness of the risk is not required where its absence is due to self-induced intoxication;

d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; and

e. "Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.

2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may by guilty without culpability, the culpability that is required is willfully. Except as otherwise expressly provided or unless the context otherwise requires, if a statute provides that conduct is a violation without including a requirement of culpability, no culpability is required.

3. a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is "intentionally", the culpability required as to an attendant circumstance is "knowingly".

b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result.

c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.

d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in part A of this title or chapter 10; otherwise the least kind of culpability required for the offense is required with respect to such facts.

e. A factor as to which it is expressly stated that it must "in fact" exist is a factor for which culpability is not required.

4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.

SECTION 303. MISTAKE OF FACT IN AFFIRMATIVE DEFENSES.) Unless otherwise expressly provided, a mistaken belief that the facts which constitute an affirmative defense exist is not a defense.

SECTION 304. IGNORANCE OR MISTAKE NEGATING CULPABILITY.) (To be redrafted)

SECTION 305. CAUSAL RELATIONSHIP BETWEEN CONDUCT AND RESULT.) Causation may be found where the result would not have occurred but for the conduct of the accused operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient.

SECTION 401. ACCOMPLICES.) 1. A person may be convicted of an offense based upon the conduct of another person when:

a. Acting with the kind of culpability required for the offense, he causes the other to engage in such conduct; or

b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it or, having a legal duty to prevent its commission, he fails to make proper effort to do so; or

c. He is a co-conspirator and his association with the offense meets the requirements of either of the other paragraphs of this subsection.

A person is not liable under this subsection for the conduct of another person when he is either expressly or by implication made not accountable for such conduct by the statute defining the offense or related provisions, because he is a victim of the offense or otherwise.

2. Unless otherwise provided, in a prosecution in which the liability of the defendant is based upon the conduct of another person, it is no defense that:

a. The defendant does not belong to the class of persons who, because of their official status or other capacity or characteristic, are by definition of the offense the only persons capable of directly committing it; or

b. The person for whose conduct the defendant is being held liable has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice.

SECTION 402. CORPORATE CRIMINAL LIABILITY.) 1. A corporation may be convicted of:

a. Any offense committed by an agent of the corporation within the scope of his employment on the basis of conduct authorized, requested, or commanded, by any of the following or a combination of them:

(1) The board of directors;

(2) An executive officer or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees;

(3) Any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy;

(4) Any other person for whose act or omission the statute defining the offense provides corporate responsibility for offenses;

b. Any offense consisting of an omission to discharge a specific duty of affirmative conduct imposed on corporations by law;

c. Any class C or class D offense committed by an agent of the corporation within the scope of his employment; or

d. Any offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation within the scope of his employment.

2. It is no defense that an individual upon whose conduct liability of the corporation for an offense is based has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice.

SECTION 403. INDIVIDUAL ACCOUNTABILITY FOR CONDUCT ON BEHALF OF ORGANIZATIONS.) 1. A person is legally accountable for any conduct he performs or causes to be performed in the name of an organization or in its behalf to the same extent as if the conduct were performed in his own name or behalf.

2. Except as otherwise expressly provided, whenever a duty to act is imposed upon an organization by a statute or regulation thereunder, any agent of the organization having primary responsibility for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed directly upon himself.

3. When an individual is convicted of an offense as an accomplice of an organization, he is subject to the sentence authorized when a natural person is convicted of that offense.

SECTION 409. DEFINITIONS AND GENERAL PROVISIONS.) 1. In this chapter:

a. "Organization" means any legal entity, whether or not organized as a corporation or unincorporated association, but does not include an entity organized as or by a governmental agency for the execution of a governmental program;

b. "Agent" means any partner, director, officer, servant, employee, or other person authorized to act in behalf of an organization.

2. Nothing in this chapter shall limit or extend the criminal liability of an unincorporated association.

SECTION 501. JUVENILES.) Persons under the age of seven years shall be deemed incapable of commission of an offense defined by the Constitution or statutes of this state. The prosecution of any person as an adult shall be barred if the offense was committed when the person was less than sixteen years of age.

SECTION 502. INTOXICATION.) 1. Intoxication is a defense to

the criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense evidence of intoxication of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense charged, except as provided in subsection (2).

2. A person is reckless with respect to an element of an offense even though his disregard thereof is not conscious, if his not being conscious thereof is due to self-induced intoxication.

SECTION 503. MENTAL DISEASE OR DEFECT.) 1. A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Lack of criminal responsibility under this section is a defense.

2. When a defendant is acquitted on the ground of mental disease or defect, excluding responsibility, the court may, if it deems the defendant dangerous to the public safety, order him committed to the state hospital, or to such other place as may be appropriate for custody, care, and treatment.

(Note: Two additional alternatives are to be drafted.)

SECTION 601. JUSTIFICATION.) 1. Except as otherwise expressly provided, justification or excuse under this chapter is a defense.

2. If a person is justified or excused in using force against another, but he recklessly or negligently injures or creates a risk of

injury to other persons, the justifications afforded by this chapter are unavailable in a prosecution for such recklessness or negligence, as the case may be.

3. That conduct may be justified or excused within the meaning of this chapter does not abolish or impair any remedy for such conduct which is available in any civil action.

SECTION 602. EXECUTION OF PUBLIC DUTY.) 1. Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law.

2. A person who has been directed by a public servant to assist that public servant is justified in using force to carry out the public servant's direction, unless the action directed by the public servant is plainly unlawful.

3. A person is justified in using force upon another in order to effect his arrest or prevent his escape when a public servant authorized to make the arrest or prevent the escape is not available, if the other person has committed, in the presence of the actor, any crime which the actor is justified in using force to prevent or if the other person has committed a felony involving force or violence.

SECTION 603. SELF-DEFENSE.) A person is justified in using force upon another person in order to defend himself against danger of imminent unlawful bodily injury, sexual assault, or detention by such other person, except that:

1. A person is not justified in using force for the purpose of resisting arrest, execution of process, or other performance of duty by a public servant under color of law, but excessive force may be resisted; and

2. A person is not justified in using force if: a. he intentionally provokes unlawful action by another person in order to cause bodily injury or death to such other person; or b. he has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances. A person's use of defensive force after he withdraws from an encounter and indicates to the other person that he has done so is justified if the latter nevertheless continues or menaces unlawful action.

SECTION 604. DEFENSE OF OTHERS.) A person is justified in using force upon another person in order to defend anyone else if:

1. The person defended would be justified in defending himself; and

2. The person coming to the defense has not, by provocation or otherwise, forfeited the right of self-defense.

SECTION 605. USE OF FORCE BY PERSONS WITH PARENTAL, CUSTODIAL, OR SIMILAR RESPONSIBILITIES.) The use of force upon another person is justified under any of the following circumstances:

1. A parent, guardian, or other person responsible for the care and supervision of a minor, or teacher or other person responsible for the care and supervision of such a minor for a special purpose, or a person acting at the direction of any of the foregoing persons, may use reasonable force upon the minor for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct

and the maintenance of proper discipline. The force may be used for this purpose, whether or not it is "necessary" as required by section 607(1). The force used must not create a substantial risk of death, serious bodily injury, disfigurement, or gross degradation;

2. A guardian or other person responsible for the care and supervision of an incompetent person, or a person acting at the direction of the guardian or responsible person, may use reasonable force upon the incompetent person for the purpose of safeguarding or promoting his welfare, including the prevention of his misconduct or, when he is in a hospital or other institution for care and custody, for the purpose of maintaining reasonable discipline in the institution. The force may be used for these purposes, whether or not it is "necessary" as required by section 607(1). The force used must not create a substantial risk of death, serious bodily injury, disfigurement, or gross degradation;

3. A person responsible for the maintenance of order in a vehicle, train, vessel, aircraft, or other carrier, or in a place where others are assembled, or a person acting at the responsible person's direction, may use force to maintain order;

4. A duly licensed physician, or a person acting at his direction, may use force in order to administer a recognized form of treatment to promote the physical or mental health of a patient if the treatment is administered 1. in an emergency,

or 2. with the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision, or 3. by order of a court of competent jurisdiction;

5. A person may use force upon another person, about to commit suicide or suffer serious bodily injury, in order to prevent the death or serious bodily injury of such other person.

SECTION 606. USE OF FORCE IN DEFENSE OF PREMISES AND PROPERTY.) Force is justified if it is used to prevent or terminate an unlawful entry or other trespass in or upon premises, or to prevent an unlawful carrying away or damaging of property, if the person using such force first requests the person against whom such force is to be used to desist from his interference with the premises or property, except that a request is not necessary if it would be useless or dangerous to make the request; or substantial damage would be done to the property sought to be protected before the request could effectively be made.

SECTION 607. LIMITS ON THE USE OF FORCE: EXCESSIVE FORCE; DEADLY FORCE.) 1. A person is not justified in using more force than is necessary and appropriate under the circumstances.

2. Deadly force is justified in the following instances:

a. When it is expressly authorized by law or occurs in the lawful conduct of war;

b. When used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or

anyone else against death, serious bodily injury, or the commission of a felony involving violence. The use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the person menaced. A person seeking to protect someone else must, before using deadly force, try to cause that person to retreat, or otherwise comply with the requirements of this provision, if safety can be obtained thereby. But, 1. a public servant justified in using force in the performance of his duties or a person justified in using force in his assistance need not desist from his efforts because of resistance or threatened resistance by or on behalf of the person against whom his action is directed, and 2. no person is required to retreat from his dwelling, or place of work, unless he was the original aggressor or is assailed by a person who he knows also dwells or works there;

c. When used by a person in possession or control of a dwelling or place of work, or a person who is licensed or privileged to be there, if such force is necessary 1. to prevent commission of arson, burglary, robbery, or a felony involving violence upon or in the dwelling or place of work, or 2. to prevent a person in flight immediately after committing a robbery or burglary from taking the fruits thereof from the dwelling or place of work, and the use of force other than deadly force for such purposes would expose anyone to substantial danger of serious bodily injury;

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

e. When used by a guard or other public servant, if such force is necessary to prevent the escape of a prisoner from a detention facility, unless he knows that the prisoner is not such a person as described in paragraph d above. A detention facility is any place used for the confinement, pursuant to a court order, of a person 1. charged with or convicted of an offense, or 2. charged with being or adjudicated a juvenile delinquent, or 3. held for extradition, or 4. otherwise confined pursuant to court order;

f. When used by a duly licensed physician, or a person acting at his direction, if such force is necessary to administer a recognized form of treatment to promote the physical or mental health of a patient and if the treatment is administered 1. in an emergency, or 2. with the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision, or 3. by order of a court of competent jurisdiction;

g. When used by a person who is directed or authorized by a public servant, and who does not know that, if such is the case, the public servant is himself not authorized to use deadly force under the circumstances.

SECTION 608. EXCUSE.) A person's conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this chapter, even though his belief is mistaken. However, if his belief is negligently or recklessly held, it is not an excuse in a prosecution for an offense for which negligence or recklessness, as the case may be, suffices to establish culpability. Excuse under this subsection is a defense or affirmative defense according to which type of defense would be established had the facts been as the person believed them to be.

SECTION 609. MISTAKE OF LAW.) (To be redrafted)

SECTION 610. DURESS.) (To be redrafted)

SECTION 619. DEFINITIONS.) In this chapter:

1. "Force" means physical action, threat, or menace against another, and includes confinement;
2. "Deadly force" means force which a person uses with the intent of causing, or which he knows creates a substantial risk of causing, death or serious bodily injury. A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force;

3. "Premises" means all or any part of a building or real property, or any structure, vehicle, or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein;

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

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Thursday and Friday, April 6-7, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:30 a.m. on Thursday, April 6, 1972, in Committee Room G-2 of the State Capitol in Bismarck, North Dakota.

The roll call revealed the lack of a quorum, but the Chairman decided to proceed with consideration of Committee business, with all motions made being subject to ratification by the Committee when a quorum is present.

Legislative members present:	Senator Freed Representatives Atkinson, Hilleboe, Murphy
Citizen members present:	Judge Ralph Erickstad; Judge Harry Pearce; Professor Thomas Lockney; Mr. Albert Wolf
Legislative members absent:	Senator Page Representatives Kieffer, Stone
Citizen members absent:	Judge W. C. Lynch; Judge Kirk Smith; Mr. Rodney Webb
Also present:	Mr. Vance Hill; Mr. Charles Travis; Mr. Robert Wefald

(Note: The foregoing listing of members present reflects a particular member's presence during some portion of the meeting. At no one time during the meeting was a quorum present.)

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that, subject to ratification, the reading of the minutes of March 2-3, 1972, be dispensed with and the minutes approved as mailed.

(Note: The text of all sections adopted by the Committee, subject to ratification, are attached to these minutes as Appendix "A".)

The Committee Counsel introduced Mr. Robert Wefald, who is acting in the capacity of additional part-time staff for the Committee.

The Committee discussed a proposed redraft of Section 304 as follows:

SECTION 304. IGNORANCE OR MISTAKE.) 1. A person's ignorance or mistake as to a matter of either fact or law, except as provided in section 302(5), is an affirmative defense if it negatives the existence of the mental state which is required with respect to an element of the offense.

2. Although ignorance or mistake would otherwise be a defense to the offense charged, the person may be convicted of another offense of which he would be guilty had the situation been as he supposed.

The Committee Counsel noted that Section 304 had been redrafted pursuant to a motion made at the last meeting of the Committee, and that the redraft was based primarily on Section 4-8 of the Illinois Criminal Code. He also noted that the motion had been made by Judge Pearce, who, the Committee Counsel believed, felt that ignorance or mistake as to a matter of fact or law should provide an "affirmative defense", which should be specifically stated. The first draft of Section 304 simply provided that a person did not "commit" an offense, if he was ignorant or mistaken as to a matter of either fact or law, and the ignorance or mistake negated the required standard of culpability.

Professor Lockney inquired as to whether it would be constitutionally feasible to make ignorance or mistake of fact an "affirmative defense", thus placing the burden of proving that defense on the defendant.

After further discussion, IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that, subject to ratification, further consideration of Section 304 be laid over until Judge Pearce was present.

The Chairman called on the Committee Counsel to read the second redraft of Section 609 as follows:

SECTION 609. MISTAKE AS TO FACT THAT CONDUCT IS AN OFFENSE.) A person's reasonable belief that his conduct does not constitute an offense is an affirmative defense if:

1. The offense is defined by an administrative order or regulation which is unknown to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or
2. He acts in reliance upon a statute which is later determined to be invalid; or
3. He acts in reliance upon a judicial decision, opinion, or judgment, later determined to be erroneous or invalid; or
4. He acts in reliance upon an official interpretation of the statute, order, or regulation defining the offense, made by a public officer or agency legally authorized to interpret, administer, or enforce such statute.

The Committee Counsel noted that Section 609 had also been redrafted in accordance with a motion made at the last meeting of the Committee. The redraft had been with reference to Section 4-8 of the Illinois Criminal Code, and to Section 2.04 of the Model Penal Code.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that further consideration of the redraft of Section 609 be delayed, and that the staff prepare an alternative draft of Section 609, taking cognizance of the comments accompanying Section 609 in the "Final Report" on the FCC.

The Chairman then called on the Committee Counsel to read Section 610 as follows:

SECTION 610. DURESS OR COMPULSION.) 1. It is an affirmative defense to a criminal charge that the person engaged in the conduct under the compulsion of threat or menace of the imminent infliction of death or great bodily harm upon himself or upon a member of his immediate family, if he reasonably believes death or great bodily harm will be so inflicted if he does not perform such conduct.

2. A married woman is not entitled, by reason of the presence of her husband, to any presumption of compulsion.

3. The defense defined in this section is not available to a person who, by voluntarily entering into a criminal enterprise, or otherwise, willfully placed himself in a situation where it was foreseeable that he would be subject to compulsion. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED, subject to ratification, that further consideration of Section 610 be laid over until such time as Judge Pearce should be present.

The Chairman called on the Committee Counsel to read the first redraft of Section 702 as follows:

SECTION 702. ENTRAPMENT.) 1. It is an affirmative defense that the defendant was entrapped into committing the offense.

2. Entrapment occurs when a law enforcement (((agent))) officer induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(((3. LAW ENFORCEMENT AGENT DEFINED. In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.)))

The Committee Counsel noted that Section 702 provided for an affirmative defense of entrapment, which defense is not provided for in the Century Code. The Committee discussed the language "normally law-abiding persons" contained in Subsection 2 of Section 702. Representative Murphy inquired as to whether the underlying theories of criminal law would allow a court to treat a "normally law-abiding person" any differently than a known criminal when the

question arose of whether or not that person had been entrapped.

REPRESENTATIVE MURPHY MOVED that the language "normally law-abiding persons" contained in Line 5 of Section 702 be deleted, and that the words "a person" be substituted therefor. PROFESSOR LOCKNEY SECONDED THE MOTION for purposes of discussion.

Professor Lockney noted that Volume I, Working Papers, contained a statement of the major problems faced in formulating an entrapment statute. He indicated that one of the problems was in determining the theory on which the entrapment defense should be based, and read from Page 303 of Volume I as follows:

> "Should entrapment be predicated on the theory: (i) that the law should not count countenance governmental wrongdoing which offends the sensibilities of society or impugns the integrity of the judicial process; or
>
> (ii) that the law should not permit the conviction of otherwise innocent persons who have been induced to commit an offense."

REPRESENTATIVE MURPHY, WITH THE CONSENT OF HIS SECOND, THEN WITHDREW THE MOTION. The Committee then discussed the fact that Section 702, as redrafted, limited the possible instances of entrapment to action by actual law enforcement officers. The Committee Counsel noted that a policy question had been presented as to whether entrapment should also be extended to persons cooperating with law enforcement officers or law enforcement agencies.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that Section 702 be redrafted so that it reads exactly as it is presented in the Final Report of the National Commission on Reform of Federal Criminal Laws.

The Committee Counsel read Section 1001 as follows:

SECTION 1001. CRIMINAL ATTEMPT.) 1. A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he (((intentionally))) engages in conduct which, in act, constitutes a substantial step toward commission of the crime. A "substantial step" is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense, if the crime could have been committed had the attendant circumstances been as the actor believed them to be.

2. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt, if the conduct would establish his complicity under section 401 were the crime committed by the other person, even if the other is not guilty of committing or attempting the crime, for example, because he has a defense of justification or entrapment.

3. Criminal attempt is an offense of the same class as the offense attempted, except that an attempt to commit a class A offense shall be a class B offense (((, and (b) whenever it is established by a preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the crime, an attempt to commit a Class B felony shall be a Class C felony and an attempt to commit a Class C felony shall be a Class A misdemanor))).

The Committee Counsel noted that Section 1001 would replace Sections 12-04-01, 12-04-02, and 12-04-03 of the Century Code dealing with definitions and punishments for criminal attempts. He noted that the word "intentionally" in Line 3 of the section had been deleted because it seemed to imply another standard of culpability in addition to the one required in the definition of the offense.

Professor Lockney indicated that the word "intentionally" refers more to the conduct which constitutes a substantial step toward commission, rather than the kind of culpability "otherwise required for commission of a crime". IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that the triple parentheses around the word "intentionally" in Line 3 of Section 1001 be deleted.

The Committee then discussed Subsection 2 and it was noted that the staff had added a comma after the word "attempt" in the second line of the subsection. IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that the "," on the second line of Subsection 2 of Section 1001 be deleted.

The Committee discussed Subsection 3 of Section 1001, and the Committee Counsel noted that he had deleted the language relating to increasing sentencing if an attempt comes "dangerously close" to commission of the offense.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that Section 1001, as drafted by the National Commission, be adopted.

The Committee recessed for lunch at 12:07 p.m. and reconvened at 1:10 p.m., at which time the Chairman called on the Committee Counsel to read Section 1002 as follows:

SECTION 1002. CRIMINAL FACILITATION.) 1. A person is guilty of criminal facilitation if he knowingly provides substantial assistance to a person intending to commit a (((felony))) class A or class B offense, and that person, in fact, commits the (((crime))) offense contemplated, or a like or related (((felony))) offense, employing the assistance so provided. The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial. This section does not apply to a person who is either expressly or by implication made not accountable by the statute defining the (((felony))) offense facilitated or related statutes.

2. Except as otherwise provided, it is no defense to a prosecution under this section that the person whose conduct the defendant facilitated has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

3. Facilitation of a class A (((felony))) offense is a class C (((felony))) offense. Facilitation of a class B (((or Class C felony))) offense is a class (((A misdemeanor))) D offense.

The Committee Counsel noted that Section 1002 deals with the offense of criminal facilitation. Section 1002 would affect Sections 12-02-06 and 29-11-42 of the Century Code. Criminal facilitation is defined as the knowing provision of "substantial assistance" to one who intends to commit a felony, if the person in fact commits the felony contemplated or a similar felony, and uses the assistance provided by the person charged with criminal facilitation.

The Committee discussed at great length the provision in Subsection 1 that "ready lawful availability" of the goods or services provided by the defendant is to be considered in determining whether or not his assistance was substantial.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY REPRESENTATIVE MURPHY that the penultimate sentence of Subsection 1 of Section 1002 should be noted in the minutes and the report of the Committee as an area of contention. THIS MOTION WAS THEN WITHDRAWN.

IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that Section 1002 be approved as drafted, with a notation that the second sentence of Subsection 1 of Section 1002 be noted as raising many questions in the minds of Committee members.

The Committee again discussed the classification system tentatively adopted at a previous meeting of the Committee. It was noted that perhaps the classification system is going to have to be modified in order to encompass the range of crimes covered by the FCC. The Chairman agreed that the classification plan, which was tentatively adopted, would have to be thoroughly reviewed at the end of the Committee's work, but thought that it should be left as is for the time being.

The Committee Counsel read Section 1003 as follows:

SECTION 1003. CRIMINAL SOLICITATION.) 1. A person is guilty of criminal solicitation if he commands, induces, entreats, or otherwise attempts to persuade another person to commit a (((particular felony))) <u>class A or class B offense</u>, whether as principal or accomplice, with intent to promote or facilitate the commission (((of that felony))), under circumstances strongly corroborative of that intent, and <u>if</u> the person solicited commits an overt act in response to the solicitation.

2. It is a defense to a prosecution under this section that, if the criminal object were achieved, the defendant would be a victim of the offense, or the offense is so defined that his conduct would be inevitably incident to its commission, or he otherwise would not be guilty under the statute defining the offense or as an accomplice under section 401.

3. It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility, (((or))) culpability, or other incapacity or defense.

4. Criminal solicitation is an offense of the class next below that of the (((crime))) offense solicited.

The Committee Counsel noted that Section 1003, defining criminal solicitation, would affect Section 12-02-04, which treats a person as a principal if he advises and encourages the commission of either a felony or a misdemeanor. The Counsel noted that the language of Subsection 1 of Section 1003 would be more restrictive than the current North Dakota law, since it would limit criminal solicitation to the solicitation of commission of a felony.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that Section 1003 be adopted as presented.

The Chairman called on the Committee Counsel to read Section 1004 as follows:

SECTION 1004. CRIMINAL CONSPIRACY.) 1. A person (((is guilty of))) commits conspiracy if he agrees with one or more persons to engage in or cause (((the performance of))) conduct which, in fact, constitutes (((a crime or crimes))) an offense or offenses, and, except in the case of a class A offense, any one or more of such persons does an overt act to effect an objective of the conspiracy. The agreement need not be explicit, but may be implicit in the fact of collaboration or existence of other circumstances.

2. If a person knows or could expect that one with whom he agrees has agreed or will agree with another to effect the same objective, he shall be deemed to have agreed with the other, whether or not he knows the other's identity.

3. A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated, or abandoned. "Objectives" includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it. A conspiracy shall be deemed abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations.

4. It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

5. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined as provided in section 401.

6. Conspiracy shall be (((subject to the penalties provided for attempt in section 1001(3)))) an offense classified the same as the offense concerning which the offender conspired.

The Committee Counsel noted that Section 1004, defining criminal conspiracy, would replace Century Code Sections 12-03-01, 12-03-02, 12-03-03, 12-03-04, and 12-03-05. He further noted that the Committ had previously agreed that Section 12-03-02 should be deleted (see Page 4, minutes of the meeting of September 20-21, 1971). The Committee discussed the exception to the requirement that a conspiracy cannot be proved without proof of an "overt act", which exception is in case of a charge of conspiracy to commit a "class A offense". The Committee Counsel noted that the exception was presently provided for, in essence, in North Dakota law. The Committee also discussed whether the penalty for criminal conspiracy should be the same as the penalty provided for the substantive offense concerning which the conspirators conspired.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that the words ", except in the case of a class A offense," be stricken from Lines 4 and 5 of Subsection 1 of Section 1004, and that Subsection 6 read as originally drafted by the National Commission.

Mr Hill noted that at the rate the Committee was proceeding, it would be almost impossible to complete the Committee's work in time to present a comprehensive bill to the Legislature. The Committee discussed methods of expediting consideration of the necessary sections of the FCC. Mr. Hill suggested that the Committee consider sections in logical groupings (subchapters), with the staff giving a general overview of the whole grouping, followed by questions, amendments, or deletions. Then, the whole grouping of sections could be adopted together.

After further discussion, the Chairman directed the staff to prepare a presentation, by way of example, for use during this meeting, with the presentation to consist of a staff overview of logical groupings of sections of the FCC. After the staff overview has been presented, the Chairman stated that he would call on the Committee for its comments on a section-by-section basis, and if the Committee felt that any section needed to be amended, amendments would be made at that time. Thereafter, the Chairman would call for a motion to approve all of the considered sections as a group, whether or not they had been amended by the Committee.

The Committee Counsel noted that if this system is to be tried, it would probably be best to revert to the offense classification system used by the drafters of the FCC. He felt that, without reflection on the validity of the tentatively adopted classification plan, it would be best to avoid controversies over that plan if at all possible. This could be achieved by simply adhering to the federal classification plan for the time being, and then reconsidering an overall classification plan when the Committee reaches those sections of the proposed FCC which deal with the federal classification plan. It was the consensus of the Committee members that, for the purposes of the new method of Committee consideration, the staff adhere to the federal classification plan in all future redrafts.

At this point, the Committee recessed until 9:00 a.m. on Friday, April 7, 1972. When the Committee reconvened at 9:00 a.m., Judges Erickstad and Pearce were present.

The Chairman called on the Committee Counsel for a comprehensive overview presentation of Sections 1301 through 1309. The text of the sections was not read.

The Committee Counsel noted that he would give an overview which would be designed to achieve the following minimum objectives:

1. To give notice that a particular provision of the proposed FCC creates a new criminal offense not presently existing in North Dakota;

2. To give notice that a given "comprehensive" section (or sections) of the proposed FCC does not encompass a particular offense defined by North Dakota law, where the present North Dakota statute is within the general subject matter area of the "comprehensive" federal section;

3. To give notice that a redraft of a proposed FCC section will change the penalty for the present North Dakota equivalent from a misdemeanor to a felony, or vice versa;

4. To give notice that the staff has made either a grammatical or substantive change in the proposed federal language, except where the change is simply to delete language which can only have relevance at the federal level, e.g., the numerous jurisdictional provisions set out in the proposed FCC;

5. To give notice of "policy questions" raised by alternative proposals stated in the comments to the proposed FCC; and

6. To give notice of "policy questions" raised by political, social, cultural, or like questions which are "unique" to North Dakota.

The Committee Counsel then presented an overview of Section 1301 through 1309, indicating that those sections dealt primarily with physical obstruction of governmental functions.

Section 1301 is a definition of a general offense of physical obstruction of a governmental function, or of the administration of law, and the offense is classified as a Class A misdemeanor. The section would replace numerous sections of the Century Code, some of which are classified as felonies and some as misdemeanors. However, these which are classified as felonies would be better prosecuted under such headings as robbery, theft, assault, etc. Otherwise, Section 1301 does not represent any major change from present North Dakota law.

Other offenses defined in Sections 1302 through 1309 include "preventing arrest or discharge of other duties" (Section 1302); "hindering law enforcement" (Section 1303); "aiding consummation of crime" (Section 1304); "failure to appear after release; bail jumping" (Section 1305); "escape" (Section 1306); "public servants permitting escape" (Section 1307); "inciting or leading riot in detention facilities" (Section 1308); and "introducing or possessing contraband useful for escape" (Section 1309). (Note: The text of Sections 1301 through 1309, as adopted by the Committee, subject to ratification, are included in Appendix "A".)

The "policy questions" raised by these sections are as follows:

First, Section 1302 provides a defense to the charge of preventing arrest, if the public servant was acting "unlawfully". This defense is not specifically provided for in the Century Code, although North Dakota case law seems to recognize the defense. See State v. Moe, 151 N.W.2d 310. The policy question then is whether North Dakota should have such a defense;

Second, Section 1305, dealing with bail jumping, classifies the offense according to whether the offender was released afte being charged with a felony, after being convicted of any crime,

or after being charged with a misdemeanor. In the first two cases, the offense is classified as a Class C felony; and in the latter case, it is classified as a Class A misdemeanor. Section 29-08-27, which Section 1305 would replace, simply makes jumping bail a misdemeanor;

Third, Section 1306, dealing with escape, grades the offense as a Class A misdemeanor, unless the offender used a weapon to implement his escape, in which case it is classified as a Class B felony. If the escapee uses force, or was escaping after being charged with a felony, the crime of escape is classified as a Class C felony. In contrast, Section 12-16-06 would punish an escape as a felony if the escapee had been charged or convicted of a felony, and as a misdemeanor if the escapee had been charged or convicted of a misdemeanor. Other than for these differences in offense classification, the FCC escape provisions do not constitute a substantial change from present North Dakota law;

Fourth, Section 1307 makes it a Class A misdemeanor for a public servant to "recklessly" permit an escape; and a Class B misdemeanor to "negligently" permit an escape. Present North Dakota law, see Section 12-16-14, would probably classify either type of action as a misdemeanor;

Fifth, Section 1308 provides for the offense of inciting or leading a riot in a prison. North Dakota presently has no statutory equivalent for this section; thus, if the section is adopted, a new crime would be created. The policy question presented is should North Dakota have a specific crime allowing prosecution of the leaders of prison riots, or should the general riot statutes (particularly those dealing with inciting to riot) be relied on to prosecute this type of offense; and

Sixth, Section 1309 makes it an offense for a potential escapee from a detention facility to "unlawfully" provide himself with an object useful to his escape. North Dakota has no present statutory law which would be the equivalent of that portion of Section 1309. The policy question presented is whether North Dakota should have such a provision. The provision is in the proposed FCC primarily because present federal law provides for it.

In regard to Section 1302, Professor Lockney questioned whether it is desirable to allow a person charged with resisting arrest to defend on the basis that the public servant making the arrest was "acting unlawfully". The Committee discussed this question at length; however, no specific motion was made.

Representative Hilleboe noted that Section 1303, prohibiting "hindering law enforcement" would also apply to the so-called "traffic offenses", and wondered whether this was desirable.

Judge Pearce questioned the desirability of the affirmative defense provided by Subsection 3 of Section 1305 defining "bail jumping". He thought that the language excusing a nonappearance was particularly confusing.

Judge Pearce stated he felt it was not necessary that an offender be specifically provided with a statutory affirmative defense, since the situations in which he could raise the affirmative defense would also be situations which, if proven, would negate the type of culpability required under Subsection 1. Judge Pearce also noted that although Subsection 1 did not contain a statement of required culpability, Subsection 2 of Section 302 required that the state of culpability was "willfully" where culpability was not stated.

In line with his comments, Judge Pearce felt that Subsection 3 should be deleted, and that further, a specific standard of culpability, i.e., "willfully", should be inserted in Subsection 1.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY REPRESENTATIVE HILLEBOE that Subsection 3 of Section 1305 be deleted, and that the staff redraft Subsection 1 of Section 1305 to specifically include "willfully" as a standard of culpability therein.

Professor Lockney spoke against the motion, stating he felt that where there was contention concerning the rationale for the federal version of a particular offense, the Committee should be prone to leave it as drafted by the National Commission. In addition, he felt that there was a general attack being made on the theory of affirmative defenses, which could be extremely troublesome, since the entire FCC is based on distinguishing between "defenses" and "affirmative defenses".

Judge Pearce replied that he had no intention of making a general attack on the statutory provision of affirmative defenses, but simply felt that the "affirmative defense" provided by Subsection 3 of Section 1305 was stated in very confusing language, and, at any rate, was unnecessary. At that point JUDGE PEARCE'S MOTION, STATED ABOVE, PASSED, subject to ratification, by a vote of 3 to 2.

The Committee discussed Section 1308, providing increased penalties for those persons who incite or lead a riot in a "detention facility". Representative Hilleboe inquired as to whether the section should be limited to detention facilities. He asked whether the rationale for the section wouldn't be equally as great in favor of increased or special penalties for inciting or leading a riot in a state college dormitory, for instance.

Representative Atkinson inquired as to why the text of the federal language was changed so that it requires six or more persons to constitute a riot, rather than five or more persons. The Committee Counsel replied that that change was made in light of an earlier decision by the Committee regarding the general riot statute, to the effect that it should require six persons to constitute a riot. Representative Atkinson stated that the number chosen to be the minimum limit for a riotous group was essentially arbitrary in nature, and, that being the case, he could see no reason for deviating from the number chosen by the National Commission.

Therefore, IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY JUDGE PEARCE, AND CARRIED, subject to ratification, that for the

purposes of consideration of the draft of the FCC, a riotous group would consist a minimum of five persons.

After further discussion, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that Sections 1301 through 1309, as amended, be adopted.

The Chairman then called on Mr. Robert Wefald, Assistant Committee Counsel, for his overview comments on Sections 1321 through 1327. Mr. Wefald stated that those seven sections dealt primarily with obstruction of justice through such actions as interference with jurors, witnesses, or informants, or through tampering with physical evidence. He noted that the sections taken together were more comprehensive than corresponding sections of the Century Code.

Mr. Wefald indicated that Sections 1321 through 1327 contained two provisions which may not be needed or desired in a redraft of Title 12. He stated that the two sections he was referring to were Section 1325, which prohibits demonstrations intended to influence judicial proceedings, and Section 1327, which makes it a crime for a person not to disclose that he is working on retainer when he is attempting to influence a public servant regarding a criminal matter.

Speaking specifically about Section 1321, Mr. Wefald noted that its provisions prohibiting tampering with witnesses or informants, or the solicitation of bribes by witnesses or informants, are broader than the corresponding sections in Title 12. He also noted that the acts prohibited by Section 1321 are punished as class C felonies, whereas all of the sections which Section 1321 would replace are classified as misdemeanors. Thus, the Committee was presented with a policy question as to whether the federal penalty should remain.

In regard to Section 1322, making it an offense to tamper with an informant involved in a criminal investigation, Mr. Wefald noted that North Dakota has no similar offense now. Therefore, the sole policy question before the Committee is whether North Dakota should have such an offense.

Section 1323 corresponds to existing law regarding the destruction of evidence usable at a criminal trial; however, the proposed FCC section makes that crime a felony, whereas it is a misdemeanor under present North Dakota law.

Section 1324, dealing with the harassment of and communication with jurors, is essentially a restatement of North Dakota law, with a change being made in the text of the proposed FCC Section 1324 to expand the definition of "juror" to include referees, arbitrators, umpires, or assessors who are authorized to hear and determine controversies. This change to a more comprehensive definition is made so that the section will more closely correspond to North Dakota law.

Mr. Wefald stated that there is no corresponding North Dakota section equivalent to Section 1325, which prohibits demonstrations designed to influence judicial proceedings. The most nearly related North Dakota sections are Section 12-19-02, which prohibits disturbances of lawful meetings, and Section 12-19-25, which prohibits the

unlawful occupation of lots or streets in a municipality. The policy question presented to the Committee is whether action which constitutes a demonstration designed to influence judicial proceedings should be made criminal.

In regard to Section 1326, Mr. Wefald noted that North Dakota has no eavesdropping provision which closely parallels that section. However, he took note of Section 12-42-05. Mr. Wefald noted that a sentence had been added to Subsection 2 of Section 1326 by the staff to read as follows:

> "Nor does this section apply to a person studying the jury process, whose actions are under the control and supervision of the court."

This sentence had been added so as to allow academic studies of the jury process, where such studies were carried out with the authorization and under the supervision of the trial court. Mr. Wefald indicated that the policy question before the Committee is whether such a provision should be contained in Section 1326.

Mr. Wefald stated that Section 1327, as presented by the staff, would create criminal law in North Dakota, as there are no corresponding provisions in the Century Code. He noted that the staff had added language which would make it an offense for a person to fail to note that he was acting on retainer when appearing on behalf of a person seeking parole or probation, as well as when appearing at the time of initiation of a prosecution, at the time of sentencing, or at the time of modification of a previously imposed sentence. The principal policy question posed by Section 1327 is whether or not it is desirable for North Dakota to have such a crime.

Following the presentation by Mr. Wefald, the Committee discussed the fact that Subsection 1 of Section 1324, dealing with the harassment of and communication with jurors, only prohibited harassment of the juror's spouse or other relative who resided in the same house with the juror. The Committee questioned whether harassment of anyone with intent to influence the juror should not be prohibited.

IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED, subject to ratification, that the staff redraft Section 1324, Subsection 1, to repeal the limitation on persons who cannot be harassed in an attempt to influence a juror, and extend the criminal penalties to include harassment of any person, where such harassment takes place in an attempt to influence a juror's decision.

Thereafter, Professor Lockney discussed Section 1325, and indicated it was his personal opinion that North Dakota should have no such law. For instance, he stated that if he were rich enough to take out a newspaper advertisment indicating that the judge, the jury, or the prosecutor (or any combination thereof) were miscreant in prosecuting the action, his action would be privileged. Professor Lockney stated he did not feel that a person who could not afford to take the newspaper advertisement should be subject to criminal liability for placing the same message on a sign and demonstrating near a courtroom.

Mr. Travis stated he disagreed with Professor Lockney, and felt that a section similar to Section 1325 is necessary because of the potential for violence that such a demonstration creates. Judge Pearce indicated that he was in agreement with Professor Lockney.

Representative Hilleboe questioned the use of the word "communicates" in Subsection 1 of Section 1324. He wondered whether the use of a sign outside a courtroom would not be such a communication with a juror who saw it as to bring the person carrying the sign within the provisions of Subsection 1 of Section 1324. The Committee discussed this provision and thought that perhaps alternatives to the word "communicates" should be drafted.

The Committee then further considered Section 1325, and IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED, subject to ratification, that Section 1325 be deleted.

Professor Lockney moved that the staff be directed to draft alternative formulations to substitute for the word "communicates" in Subsection 1 of Section 1324. The Chairman directed the Committee Counsel to carry out the gist of Professor Lockney's motion.

The Committee then discussed the language added to Subsection 2 of Section 1326, which would provide a defense to a charge of eavesdropping on a jury, if the alleged offender were engaged in an academic study of the jury process under the direction and control of the trial court. The Committee discussed at great length whether such academic studies of the jury process should be allowed; however, it was determined that it would probably be preferable not to discuss the desirability of allowing such studies, but simply to discuss whether it is necessary to provide a defense to someone who is making such a study, if he is charged with eavesdropping on jury deliberations.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY JUDGE PEARCE that the words ", whose actions are" be deleted from the language added to Subsection 2, and that the words "in the manner provided by law, and" be substituted in its place, to make clear that the Committee was not providing for such studies, but was only providing a defense to a charge of eavesdropping, should the Legislature see fit to provide for such studies in the future.

Representative Hilleboe inquired as to whether the phrase "in the manner provided by law" would allow such studies to be made after approval by a court, acting under its implied judicial power to allow such a study. He stated that if this were the case, the word "statute" should be substituted for the word "law". Professor Lockney stated that, with the consent of his second, he would substitute the word "statute" for the word "law" in his motion, and his second, Judge Pearce, agreed. Thereafter, PROFESSOR LOCKNEY'S MOTION CARRIED, subject to ratification.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED, subject to ratification, that Sections 1321 through 1327, as amended, be adopted by the Committee. THERE WAS ONE DISSENTING VOTE TO THIS MOTION.

The Committee recessed for lunch and reconvened at 1:15 p.m., at which time it considered Section 1005, which reads as follows:

SECTION 1005. GENERAL PROVISIONS.) 1. The definition of an offense (((defined))) in sections 1001 and 1004 shall not apply to another offense also defined in sections 1001 to 1004.

2. Whenever "attempt" or "conspiracy" is made an offense outside this chapter, it shall mean attempt or conspiracy, as the case may be, as defined in this chapter.

3. a. In a prosecution under section 1001, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning this criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

b. In a prosecution under section 1003 or 1004, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited or of the crime or crimes contemplated by the conspiracy, as the case may be.

c. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (1) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation, or which makes more difficult the consummation of the crime, or (2) a decision to postpone

the criminal conduct until another time or to substitute another victim, or another but similar objective.

The Committee Counsel noted that Section 1005 contains general provisions applicable to Sections 1001 through 1004, and, in addition, provides for the defense of "renunciation" where a person has been charged with criminal solicitation or criminal conspiracy.

Professor Lockney noted that the section did not provide for a defense of abandonment; thus, perhaps a defendant could still be in a situation wherein he would be liable for a crime which was committed while he was in jail, if he were charged as a co-conspirator. He noted that the definition of an abandoned conspiracy in Subsection 3 of Section 1004 would not solve this problem, if it is a problem.

After further discussion, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that Section 1005 be adopted as presented.

The Chairman called on the Committee Counsel to read Section 1006 as follows:

SECTION 1006. REGULATORY OFFENSES.) 1. This section shall govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides. The limits on a sentence to pay a fine provided in part C of this (((Code))) title shall not apply if the other statute fixes a different limit. "Penal regulation" means any requirement of a statute, regulation, rule or other which is enforceable by criminal sanctions, forfeiture, or civil penalty.

2. a. A person who violates a penal regulation is guilty of (((an infraction))) a violation. Culpability as to conduct or the existence of the penal regulation need not be proved under this paragraph, except to the extent required by the penal regulation.

b. A person who willfully violates a penal regulation is guilty of a class (((B misdemeanor))) D offense. Willfulness as to both the conduct and the existence of the penal regulation is required.

c. A person is guilty of a class (((A misdemeanor))) C offense if he flouts regulatory authority by willful and persistent disobedience of any body of related penal regulations.

3. A person is guilty of a class (((A misdemeanor))) C offense if he willfully violates a penal regulation and thereby, in fact, creates a substantial likelihood of harm to life, health, or property, or of any other harm against which the penal regulation was directed.

The Committee Counsel noted that Section 1006 was essentially designated to provide a general plan of sanctions for violation of regulatory statutes or statutory regulations, where those statutes or regulations specifically referred to Section 1006. Mr. Hill stated he was not sure that it was desirable to enact such a statute until such time as the "regulatory" criminal statutes themselves have been revised. However, he thought that since Section 1006 would only be applicable to those statutes that specifically referred to it, perhaps it was all right.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WOLF, AND CARRIED, subject to ratification, that Section 1006 be adopted as presented.

The Chairman called on the Committee Counsel to read Section 1101 as follows:

SECTION 1101. TREASON.) Treason, a class A offense, shall consist of levying war against the state, or adhering to, or aiding and comforting enemies of the state.

The Committee Counsel noted that the reason for including Section 1101 in this redraft was that both the present Constitution and the proposed new Constitution define the crime of "treason". Mr. Wolf stated that rather than defining treason in the Code, a penalty should simply be provided.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that the text of Section 1101 should read as follows:

"Treason as defined in the Constitution of the state of North Dakota is a class A felony".

The Chairman called on Mr. Hill to discuss Subsections 4, 5, and 6 of Section 101. Mr. Hill stated he felt that Subsection 4 of Section 101 was not necessary in light of Subsection 1 of Section 301.

The Chairman asked the Committee Counsel if he agreed with that statement. The Committee Counsel replied that he did, if the word "statute" in Line 3 of Subsection 1 of Section 301 encompassed every definition of a crime in the State of North Dakota, including those crimes defined in the Constitution. If the word "statute" is not so comprehensive, then Subsection 1 of Section 301 should be amended to include crime defined by the Constitution. If that were the case, Subsection 4 of Section 101 would no longer be necessary.

Mr. Hill pointed out that Subsection 5 of Section 101 was just confusing in that the use of the words chapter and title may be inappropriate. The Committee Counsel agreed they may be inappropriate, but suggested that perhaps the decision on whether or not they were inappropriate should wait until the Committee had had an opportunity to discuss the entire relevant text of the proposed FCC.

In regard to Subsection 6, Mr. Hill stated he did not feel that the subsection was necessary, as it stated the obvious. The Committee Counsel noted that the subsection was included to replace a specific section in Title 12 (Section 12-01-12), which provides that the provisions of Title 12 do not affect the powers conferred upon military authority to punish offenders.

The Chairman directed the Committee Counsel and Mr. Hill to work out all differences regarding Subsections 4, 5, and 6 of Section 101.

The Chairman called on Mr. Hill to read his redraft of Section 503, prepared pursuant to a motion made at the last meeting of the Committee. Mr. Hill's redraft reads as follows:

> "SECTION 1. Mental disease or mental defect or a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense.
>
> "SECTION 2. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.
>
> "SECTION 3. A. When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the Court. If the finding will be contested, the Court shall hold a hearing on the issue. The Court may order the defendant to be committed to the State Hospital or other suitable facility for a period not exceeding thirty days for psychiatric examination.

"B. If the Court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in Subsection C of this Section, and the Court shall commit him to the custody of the Superintendent of the State Hospital for so long as such unfitness shall endure, but shall not exceed the maximum period for which the defendant could be sentenced and in no event shall exceed three years. When the Court determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If prosecution of the defendant has not resumed prior to the expiration of the maximum period for which the defendant could be committed to the Superintendent of the State Hospital, the charges against him shall be dismissed and the defendant shall be subject to laws governing civil commitment of persons suffering from mental disease or defect.

"C. The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant."

Professor Lockney stated he realized that Mr. Hill had, as an ultimate goal, the abolishment of the defense of insanity, and the use of proof of insanity only as a factor to be considered in mitigation of punishment. However, Professor Lockney wondered whether Section 1 of Mr. Hill's proposal was not just as confusing as the previously proposed Section 503.

Mr. Hill noted that his Section 2, dealing with incapacity to stand trial, was taken from Section 4.04 of the Model Penal Code, and from Page 257 of Volume I of the Working Papers.

IT WAS MOVED BY PROFESSOR LOCKNEY that the staff redraft Mr. Hill's proposed Section 503 by substituting Subsection 1 of the previously considered version of Section 503 from Mr. Hill's "Section 1". After further discussion, PROFESSOR LOCKNEY WITHDREW HIS MOTION on the grounds that the topic of the defense of mental disease or mental defect should be considered when the Committee has a quorum present.

The Committee discussed the nature of the protection for a defendant who is not competent to stand trial. Mr. Wolf stated that rather than limit to 30 days the amount of time for psychiatric examination of a defendant whose fitness to proceed has been drawn into question, the statute should provide for successive periods of commitment, limited to 30 days each, and ordered by the judge having jurisdiction of the case.

The Committee discussed the next meeting date, and noted that it may not be possible to have a full first draft prepared by the middle of June. Mr. Wolf suggested that the Committee Counsel write again to all interested organizations, asking them to present at their annual conventions, so much of the Committee's work as may be ready, and thereafter to appoint small study committees to look at the Committee's work and report to their executive boards prior to the next session.

It was decided, after discussion, that the next meeting of the Committee should be set for Thursday and Friday, May 11-12, 1972, with the possibility of the Committee continuing to meet on Saturday, May 13, 1972.

Without objection, the Chairman declared the meeting adjourned at 3:20 p.m. on Friday, April 7, 1972.

John A. Graham
Assistant Director

SECTION 702. ENTRAPMENT.) 1. It is an affirmative defense that the defendant was entrapped into committing the offense.

2. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

3. Law Enforcement Agent Defined. In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.

SECTION 1001. CRIMINAL ATTEMPT.) 1. A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime. A "substantial step" is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense, if the crime could have been committed had the attendant circumstances been as the actor believed them to be.

2. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under section 401 were the crime committed by the other person, even if the other is not guilty of committing or attempting the crime, for example, because he has a defense of justification or entrapment.

3. Criminal attempt is an offense of the same class as the offense attempted, except that (a) an attempt to commit a class A felony shall be a class B felony, and (b) whenever it is established by a preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the crime, an attempt to commit a class B felony shall be a class C felony and an attempt to commit a class C felony shall be a class A misdemeanor.

SECTION 1002. CRIMINAL FACILITATION.) 1. A person is guilty of criminal facilitation if he knowingly provides substantial assistance to a person intending to commit a felony and that person, in fact, commits the crime contemplated, or a like or related felony, employing the assistance so provided. The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial. This section does not apply to a person who is either expressly or by implication made not accountable by the statute defining the felony facilitated or related statutes.

2. Except as otherwise provided, it is no defense to a prosecution under this section that the person whose conduct the defendant facilitated has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

3. Facilitation of a class A (((felony))) offense is a class C (((felony))) offense. Facilitation of a class B (((or Class C felony))) offense is a class (((A misdemeanor))) D offense.

SECTION 1003. CRIMINAL SOLICITATION.) 1. A person is guilty of criminal solicitation if he commands, induces, entreats, or

otherwise attempts to persuade another person to commit a (((particular felony))) class A or class B offense, whether as principal or accomplice, with intent to promote or facilitate the commission (((of that felony))), under circumstances strongly corroborative of that intent, and if the person solicited commits an overt act in response to the solicitation.

2. It is a defense to a prosecution under this section that, if the criminal object were achieved, the defendant would be a victim of the offense, or the offense is so defined that his conduct would be inevitably incident to its commission, or he otherwise would not be guilty under the statute defining the offense or as an accomplice under section 401.

3. It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility, (((or))) culpability, or other incapacity or defense.

4. Criminal solicitation is an offense of the class next below that of the (((crime))) offense solicited.

SECTION 1004. CRIMINAL CONSPIRACY.) 1. A person (((is guilty of))) commits conspiracy if he agrees with one or more persons to engage in or cause (((the performance of))) conduct which, in fact, constitutes (((a crime or crimes))) an offense or offenses, and any one or more of such persons does an overt act to effect an objective of the conspiracy. The agreement need not be explicit, but may be implicit in the fact of collaboration or existence of other circumstances.

2. If a person knows or could expect that one with whom he agrees has agreed or will agree with another to effect the same

objective, he shall be deemed to have agreed with the other, whether or not he knows the other's identity.

3. A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated, or abandoned. "Objectives" includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it. A conspiracy shall be deemed abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations.

4. It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

5. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined as provided in section 401.

6. Conspiracy shall be subject to the penalties provided for attempt in section 1001(3).

SECTION 1005. GENERAL PROVISIONS.) 1. The definition of an offense (((defined))) in sections 1001 to 1004 shall not apply to another offense <u>also</u> defined in sections 1001 to 1004.

2. Whenever "attempt" or "conspiracy" is made an offense outside this chapter, it shall mean attempt or conspiracy, as the case may be, as defined in this chapter.

3. a. In a prosecution under section 1001, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted

by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

b. In a prosecution under section 1003 or 1004, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited or of the crime or crimes contemplated by the conspiracy, as the case may be.

c. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (1) a belief that a circumstance exists which increases the probability of detection of apprehension of the defendant or another participant in the criminal operation, or which makes more difficult the consummation of the crime, or (2) a decision to postpone the criminal conduct until another time or to substitute another victim, or another but similar objective.

SECTION 1006. REGULATORY OFFENSES.) 1. This section shall govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides. The limits on a sentence to pay a fine provided in part C of this (((Code))) <u>title</u> shall not apply if the other statute fixes a different limit. "Penal regulation" means any requirement of a statute, regulation, rule, or order which is enforceable by criminal sanctions, forfeiture, or civil penalty.

2. a. A person who violates a penal regulation is guilty of an infraction. Culpability as to conduct or the existence of the penal regulation need not be proved under this paragraph, except to the extent required by the penal regulation.

b. A person who willfully violates a penal regulation is guilty of a class B misdemeanor. Willfulness as to both the conduct and the existence of the penal regulation is required.

c. A person is guilty of a class A misdemeanor if he flouts regulatory authority by willful and persistent disobedience of any body of related penal regulations.

3. A person is guilty of a class A misdemeanor if he willfully violates a penal regulation and thereby, in fact, creates a substantial likelihood of harm to life, health, or property, or of any other harm against which the penal regulation was directed.

SECTION 1301. PHYSICAL OBSTRUCTION OF GOVERNMENT FUNCTION.) 1. A person is guilty of a class A misdemeanor if, by physical interference or obstacle, he intentionally obstructs, impairs, or perverts the administration of law or other government function.

2. This section does not apply to the conduct of a person obstructing arrest of himself; but such conduct is subject to section 1302. This section does apply to the conduct of a person obstructing arrest of another. Inapplicability under this subsection is a defense.

3. It is a defense to a prosecution under this section that the administration of law or other government function was not lawful; but it is no defense that the defendant mistakenly believed that the administration of law or other government function was not lawful.

For the purposes of this section, the conduct of a public servant acting in good faith and under color of law in the execution of a warrant or other process for arrest or search and seizure shall be deemed lawful.

SECTION 1302. PREVENTING ARREST OR DISCHARGE OF OTHER DUTIES.) 1. A person is guilty of a class A misdemeanor if, with intent to prevent a public servant from effecting an arrest of himself or another, or from discharging any other official duty, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of the duty.

2. It is a defense to a prosecution under this section that the public servant was not acting lawfully; but it is no defense that the defendant mistakenly believed that the public servant was not acting lawfully. A public servant executing a warrant or other process in good faith and under color of law shall be deemed to be acting lawfully.

SECTION 1303. HINDERING LAW ENFORCEMENT.) 1. A person is guilty of hindering law enforcement if he intentionally interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of another for an offense by:

a. Harboring or concealing the other;

b. Providing the other with a weapon, money, transportation, disguise, or other means of avoiding discovery or apprehension;

c. Concealing, altering, mutilating, or destroying a document or thing, regardless of its admissibility in evidence; or

d. Warning the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law.

2. Hindering law enforcement is a class C felony if the actor:

a. Knows of the conduct of the other and such conduct constitutes a class A or class B felony; or

b. Knows that the other has been charged with or convicted of a crime and such crime is a class A or class B felony.

Otherwise hindering law enforcement is a class A misdemeanor.

SECTION 1304. AIDING CONSUMMATION OF CRIME.) 1. A person is guilty of aiding consummation of crime if he intentionally aids another to secrete, disguise, or convert the proceeds of a crime or otherwise profit from a crime.

2. Aiding consummation of a crime:

a. Is a class C felony if the actor knows of the conduct of the other and such conduct constitutes a class A or class B felony; and

b. Is a class A misdemeanor if the actor knows of the conduct of the other and such conduct constitutes a class C felony or class A misdemeanor.

Otherwise aiding consummation of a crime is a Class B misdemeanor.

SECTION 1305. FAILURE TO APPEAR AFTER RELEASE; BAIL JUMPING.) 1. A person is guilty of an offense if, after having been released (((pursuant to the Bail Reform Act of 1966,))) upon condition or undertaking that he will subsequently appear before a court or judicial officer as required, he willfully fails to appear as required.

2. The offense is a class C felony if the actor was released in connection with a charge of felony or while awaiting sentence or

pending appeal (((or certiorari))) after conviction of any crime. Otherwise it is a class A misdemeanor.

SECTION 1306. ESCAPE.) 1. A person is guilty of escape if, without lawful authority, he removes or attempts to remove himself from official detention or fails to return to official detention following temporary leave granted for a specified purpose or limited period.

2. Escape is a class B felony if the actor uses a firearm, destructive device, or other dangerous weapon in effecting or attempting to effect his removal from official detention. Escape is a class C felony if (a) the actor uses any other force or threat of force against another in effecting or attempting to effect his removal from official detention, or (b) the person escaping was in official detention by virtue of his arrest for, or on charge of, a class A or class B offense, or pursuant to his conviction of any offense. Otherwise escape is a class A misdemeanor.

3. In this section:

a. "Official detention" means arrest, custody following surrender in lieu of arrest, detention in any facility for custody of persons under charge or conviction of an offense or alleged or found to be delinquent, detention under a law authorizing civil commitment in lieu of criminal proceedings or authorizing such detention while criminal proceedings are held in abeyance, detention for extradition (((or deportation))), or custody for purposes incident to the foregoing, including transportation, medical diagnosis or treatment, court appearances, work and recreation; but "official detention"

does not include supervision on probation or parole or constraint incidental to release (((under 18 U.S.C., Chapter 207 (Release) and section 5035 (Juvenile))));

b. "Conviction of an offense" does not include an adjudication of juvenile delinquency.

4. Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, shall not be a defense to a prosecution under this section if the escape is from prison or other facility used for official detention or from detention pursuant to commitment by an official proceeding. In the case of other detentions, irregularity or lack of jurisdiction shall be an affirmative defense if (a) the escape involved no substantial risk of harm to the person or property of anyone other than the detainee, or (b) the detaining authority did not act in good faith under color of law.

SECTION 1307. PUBLIC SERVANTS PERMITTING ESCAPE.) A public servant concerned in official detention pursuant to process issued by a court, judge, or magistrate is guilty of a class A misdemeanor if he recklessly permits an escape and is guilty of a class B misdemeanor if he negligently permits an escape. "Official detention" has the meaning prescribed in section 1306(3).

SECTION 1308. INCITING OR LEADING RIOT IN DETENTION FACILITIES.) 1. A person is guilty of a class C felony if, with intent to cause, continue, or enlarge a riot, he solicits a group of five or more persons to engage in a riot in a facility used for official detention or engages in conduct intended to serve as the beginning of or signal for such riot, or participates in planning such riot, or, in the course of such riot, issues commands or instructions in furtherance thereof.

2. In this section:

a. "Riot" means a disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs the operation of the facility or other government function;

b. "Official detention" has the meaning prescribed in section 1306(3).

SECTION 1309. INTRODUCING OR POSSESSING CONTRABAND USEFUL FOR ESCAPE.) 1. A person is guilty of a class C felony if he unlawfully provides an inmate of an official detention facility with any tool, weapon, or other object which may be useful for escape. Such person is guilty of a class B felony if the object is a firearm, destructive device, or other dangerous weapon.

2. An inmate of an official detention facility is guilty of a class C felony if he unlawfully procures, makes, or otherwise provides himself with, or has in his possession, any tool, weapon, or other object which may be useful for escape. Such person is guilty of a class B felony if the object is a firearm, destructive device, or other dangerous weapon.

3. In this section:

a. "Unlawfully" means surreptitiously or contrary to a statute or regulation, rule, or order issued pursuant thereto;

b. "Official detention" has the meaning prescribed in section 1306(3).

SECTION 1321. TAMPERING WITH WITNESSES AND INFORMANTS IN PROCEEDINGS.)

1. TAMPERING. A person is guilty of a class C felony if he uses force, threat, deception, or bribery;

a. With intent to influence another's testimony in an official proceeding; or

b. With intent to induce or otherwise cause another:

(1) To withhold any testimony, information, document, or thing from an official proceeding, whether or not the other person would be legally privileged to do so;

(2) To violate section 1323 (Tampering With Physical Evidence);

(3) To elude legal process summoning him to testify in an official proceeding; or

(4) To absent himself from an official proceeding to which he has been summoned.

2. SOLICITING BRIBE. A person is guilty of a class C felony if he solicits, accepts, or agrees to accept from another a thing of pecuniary value as consideration for:

a. Influencing the actor's testimony in an official proceeding; or

b. The actor's engaging in the conduct described in paragraphs (1) through (4) of subsection 1b.

3. DEFENSES.

a. It is a defense to a prosecution under this section for use of threat with intent to influence another's testimony that the threat was not of unlawful harm and was used solely to influence the other to testify truthfully.

b. In a prosecution under this section based on bribery,

it shall be an affirmative defense that any consideration for a person's refraining from instigating or pressing the prosecution of an offense was to be limited to restitution or indemnification for harm caused by the offense.

c. It is no defense to a prosecution under this section that an official proceeding was not pending or about to be instituted.

4. WITNESS FEES AND EXPENSES. This section shall not be construed to prohibit the payment or receipt of witness fees provided by statute, or the payment, by the party upon whose behalf a witness is called, and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time (((lost))) spent in attendance at an official proceeding, or in the case of expert witnesses, a reasonable fee for preparing and presenting an expert opinion.

SECTION 1322. TAMPERING WITH INFORMANTS IN CRIMINAL INVESTIGATIONS.) A person is guilty of a class C felony if, believing another may have information relating to an offense, he deceives such other person or employs force, threat, or bribery with intent to hinder, delay, or prevent communication of such information to a law enforcement officer. The affirmative defense in subsection 3b of section 1321 applies to this section.

SECTION 1323. TAMPERING WITH PHYSICAL EVIDENCE.)

1. OFFENSE. A person is guilty of an offense if, believing an official proceeding is pending or about to be instituted, or believing process, demand, or order has been issued or is about to be issued, he alters, destroys, mutilates, conceals, or removes a record,

document, or thing with intent to impair its verity or availability in such official proceeding or for the purposes of such process, demand, or order.

2. GRADING. The offense is a class C felony if the actor substantially obstructs, impairs, or perverts prosecution for a felony. Otherwise it is a class A misdemeanor.

3. DEFINITION. In this section, "process, demand, or order" means process, demand, or order authorized by law for the seizure, production, copying, discovery, or examination of a record, document, or thing.

SECTION 1324. HARASSMENT OF AND COMMUNICATION WITH JURORS.)

1. OFFENSE. A person is guilty of a class A misdemeanor if, with intent to influence the official action of another as juror, he communicates with him, other than as part of the proceedings in a case, or harasses or alarms him. Conduct directed against the juror's spouse or other relative residing in the same household with the juror shall be deemed conduct directed against the juror.

2. DEFINITION. In this section, "juror" means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror, and any referee, arbitrator, umpire, or assessor authorized by law to hear and determine any controversy.

(Section 1324 to be redrafted.)

SECTION 1326. EAVESDROPPING ON JURY DELIBERATIONS.)

1. OFFENSE. A person is guilty of a class (((A misdemeanor))) D offense if he intentionally:

a. Records the proceedings of a jury while such jury is deliberating or voting; or

b. Listens to or observes the proceedings of any jury of

which he is not a member while such jury is deliberating or voting.

2. DEFENSE. This section shall not apply to the taking of notes by a juror in connection with and solely for the purpose of assisting him in the performance of his official duties. Nor does this section apply to a person studying the jury process in the manner provided by statute, and under the control and supervision of the court. Inapplicability under this subsection is a defense.

3. DEFINITIONS. In this section, "jury" means grand jury or petit jury, and "juror" means grand juror or petit juror.

SECTION 1327. NONDISCLOSURE OF RETAINER IN CRIMINAL MATTER.)

1. OFFENSE. A person employed for compensation to influence the official action of a public servant with respect to the initiation, conduct, or dismissal of a prosecution; (((for an offense or))) the imposition or modification of a sentence; or the granting of parole or probation is guilty of a class A misdemeanor if he privately addresses to such public servant any representation, entreaty, argument, or other communication intended to influence official action without disclosing the fact of such employment, knowing that the public servant is unaware of it.

2. APPLICABILITY TO ATTORNEY AT LAW. This section does not apply to an attorney at law or to a person authorized by statute or regulation to act in a representative capacity with respect to the official action when he is acting in such capacity and makes known to the public servant or has indicated in any manner authorized by law that he is acting in such capacity. Inapplicability under this subsection is a defense.

C. EMERSON MURRY
DIRECTOR

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STATE CAPITOL
BISMARCK 58501

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TELEPHONE
(701) 224-2916

North Dakota Legislative Council

March 8, 1972

TO: ALL MEMBERS OF THE COMMITTEE ON JUDICIARY "B"

Pursuant to the meeting schedule tentatively adopted at the last meeting of the Committee, the Chairman, Senator Howard Freed, is calling the next meeting of the Committee for Thursday and Friday, April 6-7, 1972, to commence at 9:30 a.m. in Committee Room G-2 of the State Capitol in Bismarck, North Dakota.

The agenda for this meeting will consist of Committee consideration of Sections 304, 609, 702, 1001 through 1006, 1101, 1301 through 1309, 1321 through 1327, 1341 through 1346, 1351, 1352, 1354 through 1356, 1361 through 1367, and 1369. In addition, the Committee will consider the alternative drafts of Section 503, ordered at the last meeting. To aid in this latter consideration, a xerox copy of Pages 229 through 259 of Volume I of the "Working Papers" is enclosed with this notice.

Staff drafts of the FCC sections listed above have been or will be furnished prior to the next meeting, and each member is urged by the Chairman to study the draft sections, as well as the federal comments pertinent to those sections, prior to the meeting, so that consideration by the Committee as a whole can be expedited. Members are also urged to bring their copies of the proposed Federal Criminal Code with them, as extra copies are not available.

If any member should be unable to attend on these dates, it would be appreciated if he would notify this office as soon as possible.

Sincerely,

C. Emerson Murry

C. Emerson Murry
Director

CEM:ms
Copies to: Senators Freed, Page
Representatives Atkinson, Hilleboe, Kieffer, Murphy, Stone
Judges Erickstad, Lynch, Smith
Messrs. Wolf, Webb, Pearce, Lockney, Hill, Travis

Enc.

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Thursday and Friday, April 6-7, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:30 a.m. on Thursday, April 6, 1972, in Committee Room G-2 of the State Capitol in Bismarck, North Dakota.

The roll call revealed the lack of a quorum, but the Chairman decided to proceed with consideration of Committee business, with all motions made being subject to ratification by the Committee when a quorum is present.

Legislative members present:	Senator Freed Representatives Atkinson, Hilleboe, Murphy
Citizen members present:	Judge Ralph Erickstad; Judge Harry Pearce; Professor Thomas Lockney; Mr. Albert Wolf
Legislative members absent:	Senator Page Representatives Kieffer, Stone
Citizen members absent:	Judge W. C. Lynch; Judge Kirk Smith; Mr. Rodney Webb
Also present:	Mr. Vance Hill; Mr. Charles Travis; Mr. Robert Wefald

(Note: The foregoing listing of members present reflects a particular member's presence during some portion of the meeting. At no one time during the meeting was a quorum present.)

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that, subject to ratification, the reading of the minutes of March 2-3, 1972, be dispensed with and the minutes approved as mailed.

(Note: The text of all sections adopted by the Committee, subject to ratification, are attached to these minutes as Appendix "A".)

The Committee Counsel introduced Mr. Robert Wefald, who is acting in the capacity of additional part-time staff for the Committee.

The Committee discussed a proposed redraft of Section 304 as follows:

SECTION 304. IGNORANCE OR MISTAKE.) 1. A person's ignorance or mistake as to a matter of either fact or law, except as provided in section 302(5), is an affirmative defense if it negatives the existence of the mental state which is required with respect to an element of the offense.

2. Although ignorance or mistake would otherwise be a defense to the offense charged, the person may be convicted of another offense of which he would be guilty had the situation been as he supposed.

The Committee Counsel noted that Section 304 had been redrafted pursuant to a motion made at the last meeting of the Committee, and that the redraft was based primarily on Section 4-8 of the Illinois Criminal Code. He also noted that the motion had been made by Judge Pearce, who, the Committee Counsel believed, felt that ignorance or mistake as to a matter of fact or law should provide an "affirmative defense", which should be specifically stated. The first draft of Section 304 simply provided that a person did not "commit" an offense, if he was ignorant or mistaken as to a matter of either fact or law, and the ignorance or mistake negated the required standard of culpability.

Professor Lockney inquired as to whether it would be constitutionally feasible to make ignorance or mistake of fact an "affirmative defense", thus placing the burden of proving that defense on the defendant.

After further discussion, IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that, subject to ratification, further consideration of Section 304 be laid over until Judge Pearce was present.

The Chairman called on the Committee Counsel to read the second redraft of Section 609 as follows:

SECTION 609. MISTAKE AS TO FACT THAT CONDUCT IS AN OFFENSE.) A person's reasonable belief that his conduct does not constitute an offense is an affirmative defense if:

1. The offense is defined by an administrative order or regulation which is unknown to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or
2. He acts in reliance upon a statute which is later determined to be invalid; or
3. He acts in reliance upon a judicial decision, opinion, or judgment, later determined to be erroneous or invalid; or
4. He acts in reliance upon an official interpretation of the statute, order, or regulation defining the offense, made by a public officer or agency legally authorized to interpret, administer, or enforce such statute.

The Committee Counsel noted that Section 609 had also been redrafted in accordance with a motion made at the last meeting of the Committee. The redraft had been with reference to Section 4-8 of the Illinois Criminal Code, and to Section 2.04 of the Model Penal Code.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that further consideration of the redraft of Section 609 be delayed, and that the staff prepare an alternative draft of Section 609, taking cognizance of the comments accompanying Section 609 in the "Final Report" on the FCC.

The Chairman then called on the Committee Counsel to read Section 610 as follows:

SECTION 610. DURESS OR COMPULSION.) 1. It is an affirmative defense to a criminal charge that the person engaged in the conduct under the compulsion of threat or menace of the imminent infliction of death or great bodily harm upon himself or upon a member of his immediate family, if he reasonably believes death or great bodily harm will be so inflicted if he does not perform such conduct.

2. A married woman is not entitled, by reason of the presence of her husband, to any presumption of compulsion.

3. The defense defined in this section is not available to a person who, by voluntarily entering into a criminal enterprise, or otherwise, willfully placed himself in a situation where it was foreseeable that he would be subject to compulsion. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED, subject to ratification, that further consideration of Section 610 be laid over until such time as Judge Pearce should be present.

The Chairman called on the Committee Counsel to read the first redraft of Section 702 as follows:

SECTION 702. ENTRAPMENT.) 1. It is an affirmative defense that the defendant was entrapped into committing the offense.

2. Entrapment occurs when a law enforcement (((agent))) officer induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(((3. LAW ENFORCEMENT AGENT DEFINED. In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.)))

The Committee Counsel noted that Section 702 provided for an affirmative defense of entrapment, which defense is not provided for in the Century Code. The Committee discussed the language "normally law-abiding persons" contained in Subsection 2 of Section 702. Representative Murphy inquired as to whether the underlying theories of criminal law would allow a court to treat a "normally law-abiding person" any differently than a known criminal when the

question arose of whether or not that person had been entrapped.

REPRESENTATIVE MURPHY MOVED that the language "normally law-abiding persons" contained in Line 5 of Section 702 be deleted, and that the words "a person" be substituted therefor. PROFESSOR LOCKNEY SECONDED THE MOTION for purposes of discussion.

Professor Lockney noted that Volume I, Working Papers, contained a statement of the major problems faced in formulating an entrapment statute. He indicated that one of the problems was in determining the theory on which the entrapment defense should be based, and read from Page 303 of Volume I as follows:

> "Should entrapment be predicated on the theory: (i) that the law should not count countenance governmental wrongdoing which offends the sensibilities of society or impugns the integrity of the judicial process; or
>
> (ii) that the law should not permit the conviction of otherwise innocent persons who have been induced to commit an offense."

REPRESENTATIVE MURPHY, WITH THE CONSENT OF HIS SECOND, THEN WITHDREW THE MOTION. The Committee then discussed the fact that Section 702, as redrafted, limited the possible instances of entrapment to action by actual law enforcement officers. The Committee Counsel noted that a policy question had been presented as to whether entrapment should also be extended to persons cooperating with law enforcement officers or law enforcement agencies.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that Section 702 be redrafted so that it reads exactly as it is presented in the Final Report of the National Commission on Reform of Federal Criminal Laws.

The Committee Counsel read Section 1001 as follows:

SECTION 1001. CRIMINAL ATTEMPT.) 1. A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he (((intentionally))) engages in conduct which, in act, constitutes a substantial step toward commission of the crime. A "substantial step" is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense, if the crime could have been committed had the attendant circumstances been as the actor believed them to be.

2. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt, if the conduct would establish his complicity under section 401 were the crime committed by the other person, even if the other is not guilty of committing or attempting the crime, for example, because he has a defense of justification or entrapment.

3. Criminal attempt is an offense of the same class as the offense attempted, except that an attempt to commit a class A offense shall be a class B offense (((, and (b) whenever it is established by a preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the crime, an attempt to commit a Class B felony shall be a Class C felony and an attempt to commit a Class C felony shall be a Class A misdemanor))).

The Committee Counsel noted that Section 1001 would replace Sections 12-04-01, 12-04-02, and 12-04-03 of the Century Code dealing with definitions and punishments for criminal attempts. He noted that the word "intentionally" in Line 3 of the section had been deleted because it seemed to imply another standard of culpability in addition to the one required in the definition of the offense.

Professor Lockney indicated that the word "intentionally" refers more to the conduct which constitutes a substantial step toward commission, rather than the kind of culpability "otherwise required for commission of a crime". IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that the triple parentheses around the word "intentionally" in Line 3 of Section 1001 be deleted.

The Committee then discussed Subsection 2 and it was noted that the staff had added a comma after the word "attempt" in the second line of the subsection. IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that the "," on the second line of Subsection 2 of Section 1001 be deleted.

The Committee discussed Subsection 3 of Section 1001, and the Committee Counsel noted that he had deleted the language relating to increasing sentencing if an attempt comes "dangerously close" to commission of the offense.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that Section 1001, as drafted by the National Commission, be adopted.

The Committee recessed for lunch at 12:07 p.m. and reconvened at 1:10 p.m., at which time the Chairman called on the Committee Counsel to read Section 1002 as follows:

SECTION 1002. CRIMINAL FACILITATION.) 1. A person is guilty of criminal facilitation if he knowingly provides substantial assistance to a person intending to commit a (((felony))) class A or class B offense, and that person, in fact, commits the (((crime))) offense contemplated, or a like or related (((felony))) offense, employing the assistance so provided. The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial. This section does not apply to a person who is either expressly or by implication made not accountable by the statute defining the (((felony))) offense facilitated or related statutes.

2. Except as otherwise provided, it is no defense to a prosecution under this section that the person whose conduct the defendant facilitated has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

3. Facilitation of a class A (((felony))) offense is a class C (((felony))) offense. Facilitation of a class B (((or Class C felony))) offense is a class (((A misdemeanor))) D offense.

The Committee Counsel noted that Section 1002 deals with the offense of criminal facilitation. Section 1002 would affect Sections 12-02-06 and 29-11-42 of the Century Code. Criminal facilitation is defined as the knowing provision of "substantial assistance" to one who intends to commit a felony, if the person in fact commits the felony contemplated or a similar felony, and uses the assistance provided by the person charged with criminal facilitation.

The Committee discussed at great length the provision in Subsection 1 that "ready lawful availability" of the goods or services provided by the defendant is to be considered in determining whether or not his assistance was substantial.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY REPRESENTATIVE MURPHY that the penultimate sentence of Subsection 1 of Section 1002 should be noted in the minutes and the report of the Committee as an area of contention. THIS MOTION WAS THEN WITHDRAWN.

IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that Section 1002 be approved as drafted, with a notation that the second sentence of Subsection 1 of Section 1002 be noted as raising many questions in the minds of Committee members.

The Committee again discussed the classification system tentatively adopted at a previous meeting of the Committee. It was noted that perhaps the classification system is going to have to be modified in order to encompass the range of crimes covered by the FCC. The Chairman agreed that the classification plan, which was tentatively adopted, would have to be thoroughly reviewed at the end of the Committee's work, but thought that it should be left as is for the time being.

The Committee Counsel read Section 1003 as follows:

SECTION 1003. CRIMINAL SOLICITATION.) 1. A person is guilty of criminal solicitation if he commands, induces, entreats, or otherwise attempts to persuade another person to commit a (((particular felony))) <u>class A or class B offense</u>, whether as principal or accomplice, with intent to promote or facilitate the commission (((of that felony))), under circumstances strongly corroborative of that intent, and <u>if</u> the person solicited commits an overt act in response to the solicitation.

2. It is a defense to a prosecution under this section that, if the criminal object were achieved, the defendant would be a victim of the offense, or the offense is so defined that his conduct would be inevitably incident to its commission, or he otherwise would not be guilty under the statute defining the offense or as an accomplice under section 401.

3. It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility, (((or))) culpability, or other incapacity or defense.

4. Criminal solicitation is an offense of the class next below that of the (((crime))) offense solicited.

The Committee Counsel noted that Section 1003, defining criminal solicitation, would affect Section 12-02-04, which treats a person as a principal if he advises and encourages the commission of either a felony or a misdemeanor. The Counsel noted that the language of Subsection 1 of Section 1003 would be more restrictive than the current North Dakota law, since it would limit criminal solicitation to the solicitation of commission of a felony.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that Section 1003 be adopted as presented.

The Chairman called on the Committee Counsel to read Section 1004 as follows:

SECTION 1004. CRIMINAL CONSPIRACY.) 1. A person (((is guilty of))) commits conspiracy if he agrees with one or more persons to engage in or cause (((the performance of))) conduct which, in fact, constitutes (((a crime or crimes))) an offense or offenses, and, except in the case of a class A offense, any one or more of such persons does an overt act to effect an objective of the conspiracy. The agreement need not be explicit, but may be implicit in the fact of collaboration or existence of other circumstances.

2. If a person knows or could expect that one with whom he agrees has agreed or will agree with another to effect the same objective, he shall be deemed to have agreed with the other, whether or not he knows the other's identity.

3. A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated, or abandoned. "Objectives" includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it. A conspiracy shall be deemed abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations.

4. It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

5. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined as provided in section 401.

6. Conspiracy shall be (((subject to the penalties provided for attempt in section 1001(3)))) an offense classified the same as the offense concerning which the offender conspired.

The Committee Counsel noted that Section 1004, defining criminal conspiracy, would replace Century Code Sections 12-03-01, 12-03-02, 12-03-03, 12-03-04, and 12-03-05. He further noted that the Committ had previously agreed that Section 12-03-02 should be deleted (see Page 4, minutes of the meeting of September 20-21, 1971). The Committee discussed the exception to the requirement that a conspiracy cannot be proved without proof of an "overt act", which exception is in case of a charge of conspiracy to commit a "class A offense". The Committee Counsel noted that the exception was presently provided for, in essence, in North Dakota law. The Committee also discussed whether the penalty for criminal conspiracy should be the same as the penalty provided for the substantive offense concerning which the conspirators conspired.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that the words ", except in the case of a class A offense," be stricken from Lines 4 and 5 of Subsection 1 of Section 1004, and that Subsection 6 read as originally drafted by the National Commission.

Mr Hill noted that at the rate the Committee was proceeding, it would be almost impossible to complete the Committee's work in time to present a comprehensive bill to the Legislature. The Committee discussed methods of expediting consideration of the necessary sections of the FCC. Mr. Hill suggested that the Committee consider sections in logical groupings (subchapters), with the staff giving a general overview of the whole grouping, followed by questions, amendments, or deletions. Then, the whole grouping of sections could be adopted together.

After further discussion, the Chairman directed the staff to prepare a presentation, by way of example, for use during this meeting, with the presentation to consist of a staff overview of logical groupings of sections of the FCC. After the staff overview has been presented, the Chairman stated that he would call on the Committee for its comments on a section-by-section basis, and if the Committee felt that any section needed to be amended, amendments would be made at that time. Thereafter, the Chairman would call for a motion to approve all of the considered sections as a group, whether or not they had been amended by the Committee.

The Committee Counsel noted that if this system is to be tried, it would probably be best to revert to the offense classification system used by the drafters of the FCC. He felt that, without reflection on the validity of the tentatively adopted classification plan, it would be best to avoid controversies over that plan if at all possible. This could be achieved by simply adhering to the federal classification plan for the time being, and then reconsidering an overall classification plan when the Committee reaches those sections of the proposed FCC which deal with the federal classification plan. It was the consensus of the Committee members that, for the purposes of the new method of Committee consideration, the staff adhere to the federal classification plan in all future redrafts.

At this point, the Committee recessed until 9:00 a.m. on Friday, April 7, 1972. When the Committee reconvened at 9:00 a.m., Judges Erickstad and Pearce were present.

The Chairman called on the Committee Counsel for a comprehensive overview presentation of Sections 1301 through 1309. The text of the sections was not read.

The Committee Counsel noted that he would give an overview which would be designed to achieve the following minimum objectives:

1. To give notice that a particular provision of the proposed FCC creates a new criminal offense not presently existing in North Dakota;

2. To give notice that a given "comprehensive" section (or sections) of the proposed FCC does not encompass a particular offense defined by North Dakota law, where the present North Dakota statute is within the general subject matter area of the "comprehensive" federal section;

3. To give notice that a redraft of a proposed FCC section will change the penalty for the present North Dakota equivalent from a misdemeanor to a felony, or vice versa;

4. To give notice that the staff has made either a grammatical or substantive change in the proposed federal language, except where the change is simply to delete language which can only have relevance at the federal level, e.g., the numerous jurisdictional provisions set out in the proposed FCC;

5. To give notice of "policy questions" raised by alternative proposals stated in the comments to the proposed FCC; and

6. To give notice of "policy questions" raised by political, social, cultural, or like questions which are "unique" to North Dakota.

The Committee Counsel then presented an overview of Section 1301 through 1309, indicating that those sections dealt primarily with physical obstruction of governmental functions.

Section 1301 is a definition of a general offense of physical obstruction of a governmental function, or of the administration of law, and the offense is classified as a Class A misdemeanor. The section would replace numerous sections of the Century Code, some of which are classified as felonies and some as misdemeanors. However, these which are classified as felonies would be better prosecuted under such headings as robbery, theft, assault, etc. Otherwise, Section 1301 does not represent any major change from present North Dakota law.

Other offenses defined in Sections 1302 through 1309 include "preventing arrest or discharge of other duties" (Section 1302); "hindering law enforcement" (Section 1303); "aiding consummation of crime" (Section 1304); "failure to appear after release; bail jumping" (Section 1305); "escape" (Section 1306); "public servants permitting escape" (Section 1307); "inciting or leading riot in detention facilities" (Section 1308); and "introducing or possessing contraband useful for escape" (Section 1309). (Note: The text of Sections 1301 through 1309, as adopted by the Committee, subject to ratification, are included in Appendix "A".)

The "policy questions" raised by these sections are as follows:

First, Section 1302 provides a defense to the charge of preventing arrest, if the public servant was acting "unlawfully". This defense is not specifically provided for in the Century Code, although North Dakota case law seems to recognize the defense. See State v. Moe, 151 N.W.2d 310. The policy question then is whether North Dakota should have such a defense;

Second, Section 1305, dealing with bail jumping, classifies the offense according to whether the offender was released afte being charged with a felony, after being convicted of any crime,

or after being charged with a misdemeanor. In the first two cases, the offense is classified as a Class C felony; and in the latter case, it is classified as a Class A misdemeanor. Section 29-08-27, which Section 1305 would replace, simply makes jumping bail a misdemeanor;

Third, Section 1306, dealing with escape, grades the offense as a Class A misdemeanor, unless the offender used a weapon to implement his escape, in which case it is classified as a Class B felony. If the escapee uses force, or was escaping after being charged with a felony, the crime of escape is classified as a Class C felony. In contrast, Section 12-16-06 would punish an escape as a felony if the escapee had been charged or convicted of a felony, and as a misdemeanor if the escapee had been charged or convicted of a misdemeanor. Other than for these differences in offense classification, the FCC escape provisions do not constitute a substantial change from present North Dakota law;

Fourth, Section 1307 makes it a Class A misdemeanor for a public servant to "recklessly" permit an escape; and a Class B misdemeanor to "negligently" permit an escape. Present North Dakota law, see Section 12-16-14, would probably classify either type of action as a misdemeanor;

Fifth, Section 1308 provides for the offense of inciting or leading a riot in a prison. North Dakota presently has no statutory equivalent for this section; thus, if the section is adopted, a new crime would be created. The policy question presented is should North Dakota have a specific crime allowing prosecution of the leaders of prison riots, or should the general riot statutes (particularly those dealing with inciting to riot) be relied on to prosecute this type of offense; and

Sixth, Section 1309 makes it an offense for a potential escapee from a detention facility to "unlawfully" provide himself with an object useful to his escape. North Dakota has no present statutory law which would be the equivalent of that portion of Section 1309. The policy question presented is whether North Dakota should have such a provision. The provision is in the proposed FCC primarily because present federal law provides for it.

In regard to Section 1302, Professor Lockney questioned whether it is desirable to allow a person charged with resisting arrest to defend on the basis that the public servant making the arrest was "acting unlawfully". The Committee discussed this question at length; however, no specific motion was made.

Representative Hilleboe noted that Section 1303, prohibiting "hindering law enforcement" would also apply to the so-called "traffic offenses", and wondered whether this was desirable.

Judge Pearce questioned the desirability of the affirmative defense provided by Subsection 3 of Section 1305 defining "bail jumping". He thought that the language excusing a nonappearance was particularly confusing.

Judge Pearce stated he felt it was not necessary that an offender be specifically provided with a statutory affirmative defense, since the situations in which he could raise the affirmative defense would also be situations which, if proven, would negate the type of culpability required under Subsection 1. Judge Pearce also noted that although Subsection 1 did not contain a statement of required culpability, Subsection 2 of Section 302 required that the state of culpability was "willfully" where culpability was not stated.

In line with his comments, Judge Pearce felt that Subsection 3 should be deleted, and that further, a specific standard of culpability, i.e., "willfully", should be inserted in Subsection 1.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY REPRESENTATIVE HILLEBOE that Subsection 3 of Section 1305 be deleted, and that the staff redraft Subsection 1 of Section 1305 to specifically include "willfully" as a standard of culpability therein.

Professor Lockney spoke against the motion, stating he felt that where there was contention concerning the rationale for the federal version of a particular offense, the Committee should be prone to leave it as drafted by the National Commission. In addition, he felt that there was a general attack being made on the theory of affirmative defenses, which could be extremely troublesome, since the entire FCC is based on distinguishing between "defenses" and "affirmative defenses".

Judge Pearce replied that he had no intention of making a general attack on the statutory provision of affirmative defenses, but simply felt that the "affirmative defense" provided by Subsection 3 of Section 1305 was stated in very confusing language, and, at any rate, was unnecessary. At that point JUDGE PEARCE'S MOTION, STATED ABOVE, PASSED, subject to ratification, by a vote of 3 to 2.

The Committee discussed Section 1308, providing increased penalties for those persons who incite or lead a riot in a "detention facility". Representative Hilleboe inquired as to whether the section should be limited to detention facilities. He asked whether the rationale for the section wouldn't be equally as great in favor of increased or special penalties for inciting or leading a riot in a state college dormitory, for instance.

Representative Atkinson inquired as to why the text of the federal language was changed so that it requires six or more persons to constitute a riot, rather than five or more persons. The Committee Counsel replied that that change was made in light of an earlier decision by the Committee regarding the general riot statute, to the effect that it should require six persons to constitute a riot. Representative Atkinson stated that the number chosen to be the minimum limit for a riotous group was essentially arbitrary in nature, and, that being the case, he could see no reason for deviating from the number chosen by the National Commission.

Therefore, IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY JUDGE PEARCE, AND CARRIED, subject to ratification, that for the

purposes of consideration of the draft of the FCC, a riotous group would consist a minimum of five persons.

After further discussion, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED, subject to ratification, that Sections 1301 through 1309, as amended, be adopted.

The Chairman then called on Mr. Robert Wefald, Assistant Committee Counsel, for his overview comments on Sections 1321 through 1327. Mr. Wefald stated that those seven sections dealt primarily with obstruction of justice through such actions as interference with jurors, witnesses, or informants, or through tampering with physical evidence. He noted that the sections taken together were more comprehensive than corresponding sections of the Century Code.

Mr. Wefald indicated that Sections 1321 through 1327 contained two provisions which may not be needed or desired in a redraft of Title 12. He stated that the two sections he was referring to were Section 1325, which prohibits demonstrations intended to influence judicial proceedings, and Section 1327, which makes it a crime for a person not to disclose that he is working on retainer when he is attempting to influence a public servant regarding a criminal matter.

Speaking specifically about Section 1321, Mr. Wefald noted that its provisions prohibiting tampering with witnesses or informants, or the solicitation of bribes by witnesses or informants, are broader than the corresponding sections in Title 12. He also noted that the acts prohibited by Section 1321 are punished as class C felonies, whereas all of the sections which Section 1321 would replace are classified as misdemeanors. Thus, the Committee was presented with a policy question as to whether the federal penalty should remain.

In regard to Section 1322, making it an offense to tamper with an informant involved in a criminal investigation, Mr. Wefald noted that North Dakota has no similar offense now. Therefore, the sole policy question before the Committee is whether North Dakota should have such an offense.

Section 1323 corresponds to existing law regarding the destruction of evidence usable at a criminal trial; however, the proposed FCC section makes that crime a felony, whereas it is a misdemeanor under present North Dakota law.

Section 1324, dealing with the harassment of and communication with jurors, is essentially a restatement of North Dakota law, with a change being made in the text of the proposed FCC Section 1324 to expand the definition of "juror" to include referees, arbitrators, umpires, or assessors who are authorized to hear and determine controversies. This change to a more comprehensive definition is made so that the section will more closely correspond to North Dakota law.

Mr. Wefald stated that there is no corresponding North Dakota section equivalent to Section 1325, which prohibits demonstrations designed to influence judicial proceedings. The most nearly related North Dakota sections are Section 12-19-02, which prohibits disturbances of lawful meetings, and Section 12-19-25, which prohibits the

unlawful occupation of lots or streets in a municipality. The policy question presented to the Committee is whether action which constitutes a demonstration designed to influence judicial proceedings should be made criminal.

In regard to Section 1326, Mr. Wefald noted that North Dakota has no eavesdropping provision which closely parallels that section. However, he took note of Section 12-42-05. Mr. Wefald noted that a sentence had been added to Subsection 2 of Section 1326 by the staff to read as follows:

> "Nor does this section apply to a person studying the jury process, whose actions are under the control and supervision of the court."

This sentence had been added so as to allow academic studies of the jury process, where such studies were carried out with the authorization and under the supervision of the trial court. Mr. Wefald indicated that the policy question before the Committee is whether such a provision should be contained in Section 1326.

Mr. Wefald stated that Section 1327, as presented by the staff, would create criminal law in North Dakota, as there are no corresponding provisions in the Century Code. He noted that the staff had added language which would make it an offense for a person to fail to note that he was acting on retainer when appearing on behalf of a person seeking parole or probation, as well as when appearing at the time of initiation of a prosecution, at the time of sentencing, or at the time of modification of a previously imposed sentence. The principal policy question posed by Section 1327 is whether or not it is desirable for North Dakota to have such a crime.

Following the presentation by Mr. Wefald, the Committee discussed the fact that Subsection 1 of Section 1324, dealing with the harassment of and communication with jurors, only prohibited harassment of the juror's spouse or other relative who resided in the same house with the juror. The Committee questioned whether harassment of anyone with intent to influence the juror should not be prohibited.

IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED, subject to ratification, that the staff redraft Section 1324, Subsection 1, to repeal the limitation on persons who cannot be harassed in an attempt to influence a juror, and extend the criminal penalties to include harassment of any person, where such harassment takes place in an attempt to influence a juror's decision.

Thereafter, Professor Lockney discussed Section 1325, and indicated it was his personal opinion that North Dakota should have no such law. For instance, he stated that if he were rich enough to take out a newspaper advertisment indicating that the judge, the jury, or the prosecutor (or any combination thereof) were miscreant in prosecuting the action, his action would be privileged. Professor Lockney stated he did not feel that a person who could not afford to take the newspaper advertisement should be subject to criminal liability for placing the same message on a sign and demonstrating near a courtroom.

Mr. Travis stated he disagreed with Professor Lockney, and felt that a section similar to Section 1325 is necessary because of the potential for violence that such a demonstration creates. Judge Pearce indicated that he was in agreement with Professor Lockney.

Representative Hilleboe questioned the use of the word "communicates" in Subsection 1 of Section 1324. He wondered whether the use of a sign outside a courtroom would not be such a communication with a juror who saw it as to bring the person carrying the sign within the provisions of Subsection 1 of Section 1324. The Committee discussed this provision and thought that perhaps alternatives to the word "communicates" should be drafted.

The Committee then further considered Section 1325, and IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED, subject to ratification, that Section 1325 be deleted.

Professor Lockney moved that the staff be directed to draft alternative formulations to substitute for the word "communicates" in Subsection 1 of Section 1324. The Chairman directed the Committee Counsel to carry out the gist of Professor Lockney's motion.

The Committee then discussed the language added to Subsection 2 of Section 1326, which would provide a defense to a charge of eavesdropping on a jury, if the alleged offender were engaged in an academic study of the jury process under the direction and control of the trial court. The Committee discussed at great length whether such academic studies of the jury process should be allowed; however, it was determined that it would probably be preferable not to discuss the desirability of allowing such studies, but simply to discuss whether it is necessary to provide a defense to someone who is making such a study, if he is charged with eavesdropping on jury deliberations.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY JUDGE PEARCE that the words ", whose actions are" be deleted from the language added to Subsection 2, and that the words "in the manner provided by law, and" be substituted in its place, to make clear that the Committee was not providing for such studies, but was only providing a defense to a charge of eavesdropping, should the Legislature see fit to provide for such studies in the future.

Representative Hilleboe inquired as to whether the phrase "in the manner provided by law" would allow such studies to be made after approval by a court, acting under its implied judicial power to allow such a study. He stated that if this were the case, the word "statute" should be substituted for the word "law". Professor Lockney stated that, with the consent of his second, he would substitute the word "statute" for the word "law" in his motion, and his second, Judge Pearce, agreed. Thereafter, PROFESSOR LOCKNEY'S MOTION CARRIED, subject to ratification.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED, subject to ratification, that Sections 1321 through 1327, as amended, be adopted by the Committee. THERE WAS ONE DISSENTING VOTE TO THIS MOTION.

The Committee recessed for lunch and reconvened at 1:15 p.m., at which time it considered Section 1005, which reads as follows:

SECTION 1005. GENERAL PROVISIONS.) 1. The definition of an offense (((defined))) in sections 1001 and 1004 shall not apply to another offense also defined in sections 1001 to 1004.

2. Whenever "attempt" or "conspiracy" is made an offense outside this chapter, it shall mean attempt or conspiracy, as the case may be, as defined in this chapter.

3. a. In a prosecution under section 1001, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning this criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

b. In a prosecution under section 1003 or 1004, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited or of the crime or crimes contemplated by the conspiracy, as the case may be.

c. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (1) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation, or which makes more difficult the consummation of the crime, or (2) a decision to postpone

the criminal conduct until another time or to substitute another victim, or another but similar objective.

The Committee Counsel noted that Section 1005 contains general provisions applicable to Sections 1001 through 1004, and, in addition, provides for the defense of "renunciation" where a person has been charged with criminal solicitation or criminal conspiracy.

Professor Lockney noted that the section did not provide for a defense of abandonment; thus, perhaps a defendant could still be in a situation wherein he would be liable for a crime which was committed while he was in jail, if he were charged as a co-conspirator. He noted that the definition of an abandoned conspiracy in Subsection 3 of Section 1004 would not solve this problem, if it is a problem.

After further discussion, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that Section 1005 be adopted as presented.

The Chairman called on the Committee Counsel to read Section 1006 as follows:

SECTION 1006. REGULATORY OFFENSES.) 1. This section shall govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides. The limits on a sentence to pay a fine provided in part C of this (((Code))) title shall not apply if the other statute fixes a different limit. "Penal regulation" means any requirement of a statute, regulation, rule or other which is enforceable by criminal sanctions, forfeiture, or civil penalty.

2. a. A person who violates a penal regulation is guilty of (((an infraction))) a violation. Culpability as to conduct or the existence of the penal regulation need not be proved under this paragraph, except to the extent required by the penal regulation.

b. A person who willfully violates a penal regulation is guilty of a class (((B misdemeanor))) D offense. Willfulness as to both the conduct and the existence of the penal regulation is required.

c. A person is guilty of a class (((A misdemeanor))) C offense if he flouts regulatory authority by willful and persistent disobedience of any body of related penal regulations.

3. A person is guilty of a class (((A misdemeanor))) C offense if he willfully violates a penal regulation and thereby, in fact, creates a substantial likelihood of harm to life, health, or property, or of any other harm against which the penal regulation was directed.

The Committee Counsel noted that Section 1006 was essentially designated to provide a general plan of sanctions for violation of regulatory statutes or statutory regulations, where those statutes or regulations specifically referred to Section 1006. Mr. Hill stated he was not sure that it was desirable to enact such a statute until such time as the "regulatory" criminal statutes themselves have been revised. However, he thought that since Section 1006 would only be applicable to those statutes that specifically referred to it, perhaps it was all right.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WOLF, AND CARRIED, subject to ratification, that Section 1006 be adopted as presented.

The Chairman called on the Committee Counsel to read Section 1101 as follows:

SECTION 1101. TREASON.) Treason, a class A offense, shall consist of levying war against the state, or adhering to, or aiding and comforting enemies of the state.

The Committee Counsel noted that the reason for including Section 1101 in this redraft was that both the present Constitution and the proposed new Constitution define the crime of "treason". Mr. Wolf stated that rather than defining treason in the Code, a penalty should simply be provided.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, subject to ratification, that the text of Section 1101 should read as follows:

"Treason as defined in the Constitution of the state of North Dakota is a class A felony".

The Chairman called on Mr. Hill to discuss Subsections 4, 5, and 6 of Section 101. Mr. Hill stated he felt that Subsection 4 of Section 101 was not necessary in light of Subsection 1 of Section 301.

The Chairman asked the Committee Counsel if he agreed with that statement. The Committee Counsel replied that he did, if the word "statute" in Line 3 of Subsection 1 of Section 301 encompassed every definition of a crime in the State of North Dakota, including those crimes defined in the Constitution. If the word "statute" is not so comprehensive, then Subsection 1 of Section 301 should be amended to include crime defined by the Constitution. If that were the case, Subsection 4 of Section 101 would no longer be necessary.

Mr. Hill pointed out that Subsection 5 of Section 101 was just confusing in that the use of the words chapter and title may be inappropriate. The Committee Counsel agreed they may be inappropriate, but suggested that perhaps the decision on whether or not they were inappropriate should wait until the Committee had had an opportunity to discuss the entire relevant text of the proposed FCC.

In regard to Subsection 6, Mr. Hill stated he did not feel that the subsection was necessary, as it stated the obvious. The Committee Counsel noted that the subsection was included to replace a specific section in Title 12 (Section 12-01-12), which provides that the provisions of Title 12 do not affect the powers conferred upon military authority to punish offenders.

The Chairman directed the Committee Counsel and Mr. Hill to work out all differences regarding Subsections 4, 5, and 6 of Section 101.

The Chairman called on Mr. Hill to read his redraft of Section 503, prepared pursuant to a motion made at the last meeting of the Committee. Mr. Hill's redraft reads as follows:

> "SECTION 1. Mental disease or mental defect or a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense.
>
> "SECTION 2. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.
>
> "SECTION 3. A. When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the Court. If the finding will be contested, the Court shall hold a hearing on the issue. The Court may order the defendant to be committed to the State Hospital or other suitable facility for a period not exceeding thirty days for psychiatric examination.

"B. If the Court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in Subsection C of this Section, and the Court shall commit him to the custody of the Superintendent of the State Hospital for so long as such unfitness shall endure, but shall not exceed the maximum period for which the defendant could be sentenced and in no event shall exceed three years. When the Court determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If prosecution of the defendant has not resumed prior to the expiration of the maximum period for which the defendant could be committed to the Superintendent of the State Hospital, the charges against him shall be dismissed and the defendant shall be subject to laws governing civil commitment of persons suffering from mental disease or defect.

"C. The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant."

Professor Lockney stated he realized that Mr. Hill had, as an ultimate goal, the abolishment of the defense of insanity, and the use of proof of insanity only as a factor to be considered in mitigation of punishment. However, Professor Lockney wondered whether Section 1 of Mr. Hill's proposal was not just as confusing as the previously proposed Section 503.

Mr. Hill noted that his Section 2, dealing with incapacity to stand trial, was taken from Section 4.04 of the Model Penal Code, and from Page 257 of Volume I of the Working Papers.

IT WAS MOVED BY PROFESSOR LOCKNEY that the staff redraft Mr. Hill's proposed Section 503 by substituting Subsection 1 of the previously considered version of Section 503 from Mr. Hill's "Section 1". After further discussion, PROFESSOR LOCKNEY WITHDREW HIS MOTION on the grounds that the topic of the defense of mental disease or mental defect should be considered when the Committee has a quorum present.

The Committee discussed the nature of the protection for a defendant who is not competent to stand trial. Mr. Wolf stated that rather than limit to 30 days the amount of time for psychiatric examination of a defendant whose fitness to proceed has been drawn into question, the statute should provide for successive periods of commitment, limited to 30 days each, and ordered by the judge having jurisdiction of the case.

The Committee discussed the next meeting date, and noted that it may not be possible to have a full first draft prepared by the middle of June. Mr. Wolf suggested that the Committee Counsel write again to all interested organizations, asking them to present at their annual conventions, so much of the Committee's work as may be ready, and thereafter to appoint small study committees to look at the Committee's work and report to their executive boards prior to the next session.

It was decided, after discussion, that the next meeting of the Committee should be set for Thursday and Friday, May 11-12, 1972, with the possibility of the Committee continuing to meet on Saturday, May 13, 1972.

Without objection, the Chairman declared the meeting adjourned at 3:20 p.m. on Friday, April 7, 1972.

John A. Graham
Assistant Director

SECTION 702. ENTRAPMENT.) 1. It is an affirmative defense that the defendant was entrapped into committing the offense.

2. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

3. Law Enforcement Agent Defined. In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.

SECTION 1001. CRIMINAL ATTEMPT.) 1. A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime. A "substantial step" is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense, if the crime could have been committed had the attendant circumstances been as the actor believed them to be.

2. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under section 401 were the crime committed by the other person, even if the other is not guilty of committing or attempting the crime, for example, because he has a defense of justification or entrapment.

3. Criminal attempt is an offense of the same class as the offense attempted, except that (a) an attempt to commit a class A felony shall be a class B felony, and (b) whenever it is established by a preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the crime, an attempt to commit a class B felony shall be a class C felony and an attempt to commit a class C felony shall be a class A misdemeanor.

SECTION 1002. CRIMINAL FACILITATION.) 1. A person is guilty of criminal facilitation if he knowingly provides substantial assistance to a person intending to commit a felony and that person, in fact, commits the crime contemplated, or a like or related felony, employing the assistance so provided. The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial. This section does not apply to a person who is either expressly or by implication made not accountable by the statute defining the felony facilitated or related statutes.

2. Except as otherwise provided, it is no defense to a prosecution under this section that the person whose conduct the defendant facilitated has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

3. Facilitation of a class A (((felony))) offense is a class C (((felony))) offense. Facilitation of a class B (((or Class C felony))) offense is a class (((A misdemeanor))) D offense.

SECTION 1003. CRIMINAL SOLICITATION.) 1. A person is guilty of criminal solicitation if he commands, induces, entreats, or

otherwise attempts to persuade another person to commit a (((particular felony))) class A or class B offense, whether as principal or accomplice, with intent to promote or facilitate the commission (((of that felony))), under circumstances strongly corroborative of that intent, and if the person solicited commits an overt act in response to the solicitation.

2. It is a defense to a prosecution under this section that, if the criminal object were achieved, the defendant would be a victim of the offense, or the offense is so defined that his conduct would be inevitably incident to its commission, or he otherwise would not be guilty under the statute defining the offense or as an accomplice under section 401.

3. It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility, (((or))) culpability, or other incapacity or defense.

4. Criminal solicitation is an offense of the class next below that of the (((crime))) offense solicited.

SECTION 1004. CRIMINAL CONSPIRACY.) 1. A person (((is guilty of))) commits conspiracy if he agrees with one or more persons to engage in or cause (((the performance of))) conduct which, in fact, constitutes (((a crime or crimes))) an offense or offenses, and any one or more of such persons does an overt act to effect an objective of the conspiracy. The agreement need not be explicit, but may be implicit in the fact of collaboration or existence of other circumstances.

2. If a person knows or could expect that one with whom he agrees has agreed or will agree with another to effect the same

objective, he shall be deemed to have agreed with the other, whether or not he knows the other's identity.

3. A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated, or abandoned. "Objectives" includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it. A conspiracy shall be deemed abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations.

4. It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

5. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined as provided in section 401.

6. Conspiracy shall be subject to the penalties provided for attempt in section 1001(3).

SECTION 1005. GENERAL PROVISIONS.) 1. The definition of an offense (((defined))) in sections 1001 to 1004 shall not apply to another offense <u>also</u> defined in sections 1001 to 1004.

2. Whenever "attempt" or "conspiracy" is made an offense outside this chapter, it shall mean attempt or conspiracy, as the case may be, as defined in this chapter.

3. a. In a prosecution under section 1001, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted

by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

b. In a prosecution under section 1003 or 1004, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited or of the crime or crimes contemplated by the conspiracy, as the case may be.

c. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (1) a belief that a circumstance exists which increases the probability of detection of apprehension of the defendant or another participant in the criminal operation, or which makes more difficult the consummation of the crime, or (2) a decision to postpone the criminal conduct until another time or to substitute another victim, or another but similar objective.

SECTION 1006. REGULATORY OFFENSES.) 1. This section shall govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides. The limits on a sentence to pay a fine provided in part C of this (((Code))) <u>title</u> shall not apply if the other statute fixes a different limit. "Penal regulation" means any requirement of a statute, regulation, rule, or order which is enforceable by criminal sanctions, forfeiture, or civil penalty.

2. a. A person who violates a penal regulation is guilty of an infraction. Culpability as to conduct or the existence of the penal regulation need not be proved under this paragraph, except to the extent required by the penal regulation.

b. A person who willfully violates a penal regulation is guilty of a class B misdemeanor. Willfulness as to both the conduct and the existence of the penal regulation is required.

c. A person is guilty of a class A misdemeanor if he flouts regulatory authority by willful and persistent disobedience of any body of related penal regulations.

3. A person is guilty of a class A misdemeanor if he willfully violates a penal regulation and thereby, in fact, creates a substantial likelihood of harm to life, health, or property, or of any other harm against which the penal regulation was directed.

SECTION 1301. PHYSICAL OBSTRUCTION OF GOVERNMENT FUNCTION.) 1. A person is guilty of a class A misdemeanor if, by physical interference or obstacle, he intentionally obstructs, impairs, or perverts the administration of law or other government function.

2. This section does not apply to the conduct of a person obstructing arrest of himself; but such conduct is subject to section 1302. This section does apply to the conduct of a person obstructing arrest of another. Inapplicability under this subsection is a defense.

3. It is a defense to a prosecution under this section that the administration of law or other government function was not lawful; but it is no defense that the defendant mistakenly believed that the administration of law or other government function was not lawful.

For the purposes of this section, the conduct of a public servant acting in good faith and under color of law in the execution of a warrant or other process for arrest or search and seizure shall be deemed lawful.

SECTION 1302. PREVENTING ARREST OR DISCHARGE OF OTHER DUTIES.) 1. A person is guilty of a class A misdemeanor if, with intent to prevent a public servant from effecting an arrest of himself or another, or from discharging any other official duty, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of the duty.

2. It is a defense to a prosecution under this section that the public servant was not acting lawfully; but it is no defense that the defendant mistakenly believed that the public servant was not acting lawfully. A public servant executing a warrant or other process in good faith and under color of law shall be deemed to be acting lawfully.

SECTION 1303. HINDERING LAW ENFORCEMENT.) 1. A person is guilty of hindering law enforcement if he intentionally interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of another for an offense by:

a. Harboring or concealing the other;

b. Providing the other with a weapon, money, transportation, disguise, or other means of avoiding discovery or apprehension;

c. Concealing, altering, mutilating, or destroying a document or thing, regardless of its admissibility in evidence; or

d. Warning the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law.

2. Hindering law enforcement is a class C felony if the actor:

a. Knows of the conduct of the other and such conduct constitutes a class A or class B felony; or

b. Knows that the other has been charged with or convicted of a crime and such crime is a class A or class B felony.

Otherwise hindering law enforcement is a class A misdemeanor.

SECTION 1304. AIDING CONSUMMATION OF CRIME.) 1. A person is guilty of aiding consummation of crime if he intentionally aids another to secrete, disguise, or convert the proceeds of a crime or otherwise profit from a crime.

2. Aiding consummation of a crime:

a. Is a class C felony if the actor knows of the conduct of the other and such conduct constitutes a class A or class B felony; and

b. Is a class A misdemeanor if the actor knows of the conduct of the other and such conduct constitutes a class C felony or class A misdemeanor.

Otherwise aiding consummation of a crime is a Class B misdemeanor.

SECTION 1305. FAILURE TO APPEAR AFTER RELEASE; BAIL JUMPING.) 1. A person is guilty of an offense if, after having been released (((pursuant to the Bail Reform Act of 1966,))) upon condition or undertaking that he will subsequently appear before a court or judicial officer as required, he willfully fails to appear as required.

2. The offense is a class C felony if the actor was released in connection with a charge of felony or while awaiting sentence or

pending appeal (((or certiorari))) after conviction of any crime. Otherwise it is a class A misdemeanor.

SECTION 1306. ESCAPE.) 1. A person is guilty of escape if, without lawful authority, he removes or attempts to remove himself from official detention or fails to return to official detention following temporary leave granted for a specified purpose or limited period.

2. Escape is a class B felony if the actor uses a firearm, destructive device, or other dangerous weapon in effecting or attempting to effect his removal from official detention. Escape is a class C felony if (a) the actor uses any other force or threat of force against another in effecting or attempting to effect his removal from official detention, or (b) the person escaping was in official detention by virtue of his arrest for, or on charge of, a class A or class B offense, or pursuant to his conviction of any offense. Otherwise escape is a class A misdemeanor.

3. In this section:

a. "Official detention" means arrest, custody following surrender in lieu of arrest, detention in any facility for custody of persons under charge or conviction of an offense or alleged or found to be delinquent, detention under a law authorizing civil commitment in lieu of criminal proceedings or authorizing such detention while criminal proceedings are held in abeyance, detention for extradition (((or deportation))), or custody for purposes incident to the foregoing, including transportation, medical diagnosis or treatment, court appearances, work and recreation; but "official detention"

does not include supervision on probation or parole or constraint incidental to release (((under 18 U.S.C., Chapter 207 (Release) and section 5035 (Juvenile))));

b. "Conviction of an offense" does not include an adjudication of juvenile delinquency.

4. Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, shall not be a defense to a prosecution under this section if the escape is from prison or other facility used for official detention or from detention pursuant to commitment by an official proceeding. In the case of other detentions, irregularity or lack of jurisdiction shall be an affirmative defense if (a) the escape involved no substantial risk of harm to the person or property of anyone other than the detainee, or (b) the detaining authority did not act in good faith under color of law.

SECTION 1307. PUBLIC SERVANTS PERMITTING ESCAPE.) A public servant concerned in official detention pursuant to process issued by a court, judge, or magistrate is guilty of a class A misdemeanor if he recklessly permits an escape and is guilty of a class B misdemeanor if he negligently permits an escape. "Official detention" has the meaning prescribed in section 1306(3).

SECTION 1308. INCITING OR LEADING RIOT IN DETENTION FACILITIES.) 1. A person is guilty of a class C felony if, with intent to cause, continue, or enlarge a riot, he solicits a group of five or more persons to engage in a riot in a facility used for official detention or engages in conduct intended to serve as the beginning of or signal for such riot, or participates in planning such riot, or, in the course of such riot, issues commands or instructions in furtherance thereof.

2. In this section:

a. "Riot" means a disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs the operation of the facility or other government function;

b. "Official detention" has the meaning prescribed in section 1306(3).

SECTION 1309. INTRODUCING OR POSSESSING CONTRABAND USEFUL FOR ESCAPE.) 1. A person is guilty of a class C felony if he unlawfully provides an inmate of an official detention facility with any tool, weapon, or other object which may be useful for escape. Such person is guilty of a class B felony if the object is a firearm, destructive device, or other dangerous weapon.

2. An inmate of an official detention facility is guilty of a class C felony if he unlawfully procures, makes, or otherwise provides himself with, or has in his possession, any tool, weapon, or other object which may be useful for escape. Such person is guilty of a class B felony if the object is a firearm, destructive device, or other dangerous weapon.

3. In this section:

a. "Unlawfully" means surreptitiously or contrary to a statute or regulation, rule, or order issued pursuant thereto;

b. "Official detention" has the meaning prescribed in section 1306(3).

SECTION 1321. TAMPERING WITH WITNESSES AND INFORMANTS IN PROCEEDINGS.)

1. TAMPERING. A person is guilty of a class C felony if he uses force, threat, deception, or bribery;

a. With intent to influence another's testimony in an official proceeding; or

b. With intent to induce or otherwise cause another:

(1) To withhold any testimony, information, document, or thing from an official proceeding, whether or not the other person would be legally privileged to do so;

(2) To violate section 1323 (Tampering With Physical Evidence);

(3) To elude legal process summoning him to testify in an official proceeding; or

(4) To absent himself from an official proceeding to which he has been summoned.

2. SOLICITING BRIBE. A person is guilty of a class C felony if he solicits, accepts, or agrees to accept from another a thing of pecuniary value as consideration for:

a. Influencing the actor's testimony in an official proceeding; or

b. The actor's engaging in the conduct described in paragraphs (1) through (4) of subsection 1b.

3. DEFENSES.

a. It is a defense to a prosecution under this section for use of threat with intent to influence another's testimony that the threat was not of unlawful harm and was used solely to influence the other to testify truthfully.

b. In a prosecution under this section based on bribery,

it shall be an affirmative defense that any consideration for a person's refraining from instigating or pressing the prosecution of an offense was to be limited to restitution or indemnification for harm caused by the offense.

c. It is no defense to a prosecution under this section that an official proceeding was not pending or about to be instituted.

4. WITNESS FEES AND EXPENSES. This section shall not be construed to prohibit the payment or receipt of witness fees provided by statute, or the payment, by the party upon whose behalf a witness is called, and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time (((lost))) spent in attendance at an official proceeding, or in the case of expert witnesses, a reasonable fee for preparing and presenting an expert opinion.

SECTION 1322. TAMPERING WITH INFORMANTS IN CRIMINAL INVESTIGATIONS.) A person is guilty of a class C felony if, believing another may have information relating to an offense, he deceives such other person or employs force, threat, or bribery with intent to hinder, delay, or prevent communication of such information to a law enforcement officer. The affirmative defense in subsection 3b of section 1321 applies to this section.

SECTION 1323. TAMPERING WITH PHYSICAL EVIDENCE.)

1. OFFENSE. A person is guilty of an offense if, believing an official proceeding is pending or about to be instituted, or believing process, demand, or order has been issued or is about to be issued, he alters, destroys, mutilates, conceals, or removes a record,

document, or thing with intent to impair its verity or availability in such official proceeding or for the purposes of such process, demand, or order.

2. GRADING. The offense is a class C felony if the actor substantially obstructs, impairs, or perverts prosecution for a felony. Otherwise it is a class A misdemeanor.

3. DEFINITION. In this section, "process, demand, or order" means process, demand, or order authorized by law for the seizure, production, copying, discovery, or examination of a record, document, or thing.

SECTION 1324. HARASSMENT OF AND COMMUNICATION WITH JURORS.)

1. OFFENSE. A person is guilty of a class A misdemeanor if, with intent to influence the official action of another as juror, he communicates with him, other than as part of the proceedings in a case, or harasses or alarms him. Conduct directed against the juror's spouse or other relative residing in the same household with the juror shall be deemed conduct directed against the juror.

2. DEFINITION. In this section, "juror" means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror, and any referee, arbitrator, umpire, or assessor authorized by law to hear and determine any controversy.

(Section 1324 to be redrafted.)

SECTION 1326. EAVESDROPPING ON JURY DELIBERATIONS.)

1. OFFENSE. A person is guilty of a class (((A misdemeanor))) D offense if he intentionally:

a. Records the proceedings of a jury while such jury is deliberating or voting; or

b. Listens to or observes the proceedings of any jury of

which he is not a member while such jury is deliberating or voting.

2. DEFENSE. This section shall not apply to the taking of notes by a juror in connection with and solely for the purpose of assisting him in the performance of his official duties. Nor does this section apply to a person studying the jury process in the manner provided by statute, and under the control and supervision of the court. Inapplicability under this subsection is a defense.

3. DEFINITIONS. In this section, "jury" means grand jury or petit jury, and "juror" means grand juror or petit juror.

SECTION 1327. NONDISCLOSURE OF RETAINER IN CRIMINAL MATTER.)

1. OFFENSE. A person employed for compensation to influence the official action of a public servant with respect to the initiation, conduct, or dismissal of a prosecution; (((for an offense or))) the imposition or modification of a sentence; or the granting of parole or probation is guilty of a class A misdemeanor if he privately addresses to such public servant any representation, entreaty, argument, or other communication intended to influence official action without disclosing the fact of such employment, knowing that the public servant is unaware of it.

2. APPLICABILITY TO ATTORNEY AT LAW. This section does not apply to an attorney at law or to a person authorized by statute or regulation to act in a representative capacity with respect to the official action when he is acting in such capacity and makes known to the public servant or has indicated in any manner authorized by law that he is acting in such capacity. Inapplicability under this subsection is a defense.

C. EMERSON MURRY
DIRECTOR

JOHN A. GRAHAM
ASSISTANT DIRECTOR

CHESTER E. NELSON JR.
BUDGET ANALYST AND AUDITOR

JOHN D. OLSRUD
CODE REVISOR

ROGER BAUER
FISCAL ANALYST

JACK McDONALD
COUNSEL

North Dakota Legislative Council

STATE CAPITOL — BISMARCK 58501 TELEPHONE (701) 224-2916

May 4, 1972

TO: ALL MEMBERS OF THE COMMITTEE ON JUDICIARY "B"

Enclosed please find your copy of the minutes of the meeting of April 6-7, 1972, and the staff redraft of Sections 1341 through 1369. Please read the minutes with care, as ratification of the actions taken at the last meeting will be the first order of business on Thursday, May 11, 1972.

At the next meeting, the staff hopes to cover the following sections, grouped in this manner:

1. Sections 1341 through 1346;
2. Sections 1354 through 1356;
3. Sections 1361 through 1367, and 1369;
4. Sections 1501, 1502, 1511 through 1515, 1531, and 1551;
5. Sections 1561 through 1564;
6. Sections 1601 through 1603, and 1609;
7. Sections 1611 through 1614, and 1616 through 1619; and
8. Sections 1631 through 1633, 1635, and 1639.

It will not be possible for the staff to mail redrafted versions of all of these sections prior to the meeting. However, each member is urged to read the sections in the text of the proposed FCC (Final Report of the National Commission on Reform of Federal Laws), as the changes made in the staff redrafts will usually be minimal. Members who were not at the last meeting should note that the federal penalty classification plan has been temporarily adopted by the Committee.

Again, each member is urged to make a special effort to attend, in order to ensure the presence of a quorum.

Sincerely,

John A. Graham
Assistant Director

JAG/vk
Encs.
Copies to: Senators Freed, Page
Representatives Atkinson, Hilleboe, Kieffer, Murphy, Stone
Judges Erickstad, Lynch, Smith
Messrs. Wolf, Webb, Pearce, Lockney, Hill, Travis

C. EMERSON MURRY
DIRECTOR

*

STATE CAPITOL
BISMARCK 58501

*

TELEPHONE
(701) 224-2916

North Dakota Legislative Council

April 14, 1972

REMINDER NOTICE

COPY

TO: ALL MEMBERS OF THE COMMITTEE ON JUDICIARY "B"

The Chairman, Senator Howard Freed, has called the next meeting of the Committee on Judiciary "B" for Thursday and Friday, May 11-12, 1972, to commence at 9:30 a.m. in Committee Room G-2 of the State Capitol in Bismarck, North Dakota. The Chairman has also indicated that, if the necessity arises, the Committee may continue to meet on Saturday, May 13, 1972. Therefore, the Chairman desires that all Committee members come prepared to continue meeting on Saturday.

At its last meeting, the Committee lacked a quorum. Thus, all action taken at that meeting will need to be ratified when a quorum is present. Therefore, the Chairman urges all members to scrutinize the minutes of the last meeting carefully, so that immediate consideration can be given to a ratification motion or motions.

Committee members should also note, when the minutes arrive, that a new procedure was adopted at the last meeting, wherein redrafted sections of the proposed Federal Criminal Code are presented in logical groupings, rather than section by section. This procedure allowed a much more rapid coverage of subject matter at the last meeting, and the Chairman desires that it be used at future meetings of the Committee.

Material to be considered at the next meeting of the Committee will be mailed to all members at a later date. If any member should be unable to attend on these dates, it would be appreciated if you would notify this office as soon as possible. Again, in order that the Committee will be ensured of having a quorum, each member is urged to make every effort to attend.

Sincerely,

C. Emerson Murry
Director

CEM/ks
Copies to: Senators Freed, Page
Representatives Atkinson, Hilleboe, Kieffer, Murphy, Stone
Judges Erickstad, Lynch, Smith
Messrs. Wolf, Webb, Pearce, Lockney, Hill, Travis

PROPOSED STATUTES ON MENTAL DISEASE OR DEFECTS

Section 1. Mental disease or mental defect is a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense.

Section 2. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

Section 3. A. When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the Court. If the finding will be contested, the Court shall hold a hearing on the issue. The Court may order the defendant to be committed to the state hospital or other suitable facility for a period not exceeding thirty days for psychiatric examination.

B. If the Court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in Subsection C of this Section, and the Court shall commit him to the custody of the Superintendent of the State Hospital for so long as such unfitness shall endure, but shall not exceed the maximum period for which the defendant could be sentenced and in no event shall exceed three years. When the Court determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If prosecution of the defendant has not resumed prior to the expiration of the maximum period for which the defendant could be committed to the Superintendent of the State Hospital, the charges against him shall be dismissed and the defendant shall be subject to laws governing civil commitment of persons suffering from mental disease or defect.

C. The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

Vance K. Hill
April 6, 1972

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Thursday and Friday, May 11-12, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:40 a.m. in Committee Room G-2, on Thursday, May 11, 1972.

Legislative members present:	Senators Freed and Page Representatives Hilleboe, Kieffer, Murphy, and Stone
Citizen members present:	Judge Erickstad, Judge Lynch, Professor Lockney, Mr. Webb, and Mr. Wolf
Legislative members absent:	Representative Atkinson
Citizen members absent:	Judge Smith, Judge Pearce
Also present:	Mr. Vance Hill, Mr. Charles Travis, Mr. Robert Wefald

The Chairman noted that at the last meeting of the Committee, a quorum was not present. Therefore, the Committee would have to take action at this meeting to ratify the actions taken during the last meeting. The Committee Counsel noted that the minutes contained a clerical error which should be deemed corrected. The error is on Page 22 of the minutes, the fifth paragraph, which commences with the words "IT WAS MOVED". In Line 3 of that paragraph, the word "for" should be substituted for the word "from".

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WOLF, AND UNANIMOUSLY CARRIED that the minutes of the last meeting be corrected by adding additional language on Page 16 following the final paragraph to state as follows: "In addition, there are alternative sections in the proposed F.C.C. under which unlawful demonstrations near courthouses, or other conduct which might interfere with the administration of justice, could be prosecuted. Since these alternatives exist, Section 1325 is both unnecessary, and subject to possible constitutional attacks either as applied, or, less likely, on its face."

The Chairman asked for the Committee's thoughts on how to proceed with the minutes. He asked whether the minutes should be approved separately from the other action taken, or whether the total action taken should be ratified in one motion.

Mr. Wolf stated that if the Committee had considered the subject of criminal contempt at the last meeting, he wished to have the minutes record that he was in favor of a provision ensuring that criminal contempts could not be accumulated throughout a long trial, with sentencing for those accumulated contempts coming at the end of the trial. He stated that he took this position in order to avoid the type of situation that arose immediately following the trial of the "Chicago seven". The Chairman noted that the subject of criminal contempt was on the agenda for this meeting.

IT WAS THEN MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the minutes of the meeting of April 6-7, 1972, be approved as mailed, and that the actions taken by the Committee at that meeting be ratified and approved as taken.

The Chairman called on the Committee Counsel to read the third redraft of Section 304 as follows:

SECTION 304. IGNORANCE OR MISTAKE.) 1. A person's ignorance or mistake as to a matter of either fact or law, except as provided in section 302(5), is an affirmative defense if it negatives the existence of the mental state which is required with respect to an element of the offense.

2. Although ignorance or mistake would otherwise be a defense to the offense charged, the person may be convicted of another offense of which he would be guilty had the situation been as he supposed.

The Committee Counsel noted that the redraft was based on a motion by Judge Pearce made at the meeting of March 2-3, 1972. He noted that Judge Pearce's primary reason for that motion seemed to be to ensure that Section 304 be stated in terms of creating "an affirmative defense", and to ensure that reference was made to the provisions of the F.C.C. which specifically provide that ignorance of the law is no excuse (see Section 302, Subsection 5). Mr. Wolf stated he agreed that Section 304 should be stated in terms of being a "defense", rather than simply providing that a person who is mistaken about a matter of fact or law did not "commit" the crime.

The Committee discussed Subsection 2 of the redraft in terms of a hypothetical situation wherein a man shoots a deer although he intended to shoot a man.

The Committee Counsel read Subsection 2 of Section 2.04 of the Model Penal Code as follows:

> "(2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed."

Mr. Wolf stated that the only situations wherein "ignorance of the law" should be a defense is where the defined offense is, in reality, simply "malum prohibitum". Senator Page noted an instance of the type of thing to which Mr. Wolf referred which arose under the federal wage and hours law, wherein violations occurred because of the method in which an employer was keeping records regarding overtime pay. He noted that the employer had no knowledge that records were required to be kept in a particular way, and had, in fact, been told by responsible persons that they need not be kept that way. Mr. Wolf agreed that this was the type of offense in which a reasonable, good faith mistake of law should be a defense.

Mr. Hill noted that Section 304 as contained in the proposed F.C.C. states what is essentially a truism: that a criminal offense is not committed if the offender is required to have a particular culpable frame of mind and he does not have that frame of mind. Professor Lockney agreed with Mr. Hill and noted that Section 304 could probably be omitted from the draft because the heart of the matter, insofar as ignorance or mistake of either law or fact is concerned, is contained in Sections 608 and 609. However, since the drafters of the F.C.C. had seen fit to leave Section 304 in place, Professor Lockney could see no harm in it.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY REPRESENTATIVE STONE that the Committee adopt Section 304 as shown on Page 31 of the proposed draft of the F.C.C. THIS MOTION WAS THEN WITHDRAWN by Professor Lockney, with the consent of his second.

The Chairman noted, for those members of the Committee who were not present at the last meeting, that the philosophy approved at the last meeting was to accept the language of the proposed F.C.C. when the Committee was in doubt as to its particular effect. This philosophy was in contrast to one which would result in the federal language being rejected when there was doubt as to its propriety. In other words, the federal drafters were to be given the benefit of the doubt.

Mr. Wolf again indicated that the "defense" of mistake of law should apply in cases where the offense charged was "malum prohibitum". For instance, Mr. Wolf noted that a person who "sells" four promissory notes in a 12-month period is guilty of several criminal offenses under North Dakota's "securities law". Mr. Wolf indicated that probably very few laymen were aware that the issuance of four promissory notes in a 12-month period was a criminal offense, and that where their ignorance

or mistake regarding this provision of the securities law was reasonable, such ignorance or mistake should provide a defense.

Representative Murphy inquired as to whether the result of simply omitting Sections 304, 608, and 609, would not be to vest authority to make these determinations in the trial judges. The Chairman stated that this would probably be what would occur; however, the trial judges should have, and would probably desire to have, guidelines for their own action in regard to "defenses" of this nature.

Mr. Hill asked Mr. Wolf how he would consider a statute which prohibited littering, since Mr. Hill felt that a statute of that nature was "malum prohibitum". He wondered if a mistake of law concerning a littering statute should be a defense. Mr. Wolf stated he felt that littering was not simply a malum prohibitum offense, but was an act which was wrong in itself (malum in se).

The Committee discussed Alternative 2 of Section 609 which would limit the defense of mistake of law to cases in which the offense charged is one in which knowledge of the law is an element of the offense, and, in addition, would require the person raising the defense to have acted in good faith reliance upon some official statement of the law; or would have required that the administrative order or regulation under which he was charged was not reasonably available to him.

IT WAS MOVED BY MR. WOLF that the first subsection of the third redraft of Section 304 be amended by adding the words "to the offense charged" after the words "affirmative defense" in Line 3 of Section 304, and that, with that additional language, Section 304 be adopted. THIS MOTION DIED FOR LACK OF A SECOND.

Representative Stone inquired as to whether adoption of Section 304 would result in justice being done, or would simply create loopholes which could be used by guilty parties to evade punishment. Mr. Webb stated that the only rationale on which the Committee could base its decision to adopt sections similar to Sections 304, 608, and 609 would be that those sections would serve to free alleged offenders who were innocent of the offenses charged.

The Chairman noted that it was his view, in light of the controversy over Section 304, that the Committee should choose to adopt Section 304 as contained in the proposed F.C.C. Mr. Wolf noted that he was in favor of Section 304, Subsection 1, contained in the redraft because it specifically provided that ignorance or mistake of law or fact was "an affirmative defense", and also because it made reference to Subsection 5 of Section 302 which specifically restates the principle that "ignorance of the law is no excuse".

IT WAS MOVED BY REPRESENTATIVE MURPHY AND SECONDED BY PROFESSOR LOCKNEY that the Committee adopt Section 304 as drafted by the National Commission, and as shown on Page 31 of the proposed final draft of the Federal Criminal Code.

Mr. Wolf noted that Section 304 would place the burden on prosecutors regarding whether or not the alleged offender had made a good faith mistake of law or fact. He said he felt that North Dakota lacks the prosecutorial time and equipment necessary to handle questions arising under an equivalent of Section 304. Mr. Hill noted that Section 304 as shown in the proposed F.C.C. is essentially the same as present North Dakota law as contained in Subsection 5 of Section 12-02-01.

REPRESENTATIVE MURPHY'S MOTION STATED ABOVE, THEN CARRIED, with Mr. Wolf voting in the negative.

The Committee then discussed Section 609, and IT WAS MOVED BY REPRESENTATIVE MURPHY that the Committee adopt Alternative No. 1 of the third redraft of Section 609. THIS MOTION DIED FOR LACK OF A SECOND.

IT WAS THEN MOVED BY MR. WEBB AND SECONDED BY MR. WOLF, that the Committee adopt the third redraft of Section 609, Alternative 2. THIS MOTION WAS DEFEATED.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY SENATOR PAGE, AND CARRIED that the Committee adopt Section 609 as contained in the proposed F.C.C. on Page 52. (Note: the text of all sections on which the Committee took action are appended to these minutes as Appendix "A".)

The Committee discussed Section 610, which had been redrafted to take into account the provisions of Section 7-11 of the Illinois Criminal Code. IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WEBB, AND CARRIED that the Committee adopt the text of Section 610 as contained in the proposed F.C.C., and shown on Page 53 of the Final Report.

Mr. Webb noted that he had recently attended a prosecutors' meeting in Milwaukee, Wisconsin, and had conversation with an Idaho prosecutor. The conversation revealed that Idaho had recently adopted a criminal code based primarily on the Model Penal Code. The Idaho Criminal Code had a delayed effective date, but when it was in force, so many complaints were heard concerning it that the Legislature repealed it. Professor Lockney stated that it would be interesting to find out the specific objections which the people of Idaho had to the criminal code. The Committee Counsel noted that he would write to the Idaho Legislative Council and inquire concerning the fate of their new criminal code.

The Chairman then called on Mr. Hill to present his proposed series of sections on mental disease or defect, and its effect on criminal liability and capacity to stand trial. Mr. Hill's draft read as follows:

Section 1. Mental disease or mental defect is a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the

defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense.

Section 2. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

Section 3. A. When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the Court. If the finding will be contested, the Court shall hold a hearing on the issue. The Court may order the defendant to be committed to the state hospital or other suitable facility for a period not exceeding thirty days for psychiatric examination.

B. If the Court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in Subsection C of this Section, and the Court shall commit him to the custody of the Superintendent of the State Hospital for so long as such unfitness shall endure, but shall not exceed the maximum period for which the defendant could be sentenced and in no event shall exceed three years. When the Court determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If prosecution of the defendant has not resumed prior to the expiration of the maximum period for which the defendant could be committed to the Superintendent of the State Hospital, the charges against him shall be dismissed and the defendant shall be subject to laws governing civil commitment of persons suffering from mental disease or defect.

C. The fact that the defendant is unfit to proceed does not preclude any legal

objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

Mr. Hill noted that his Section 1 was identical to the alternative set forth in the second paragraph to the comments to Section 503 as contained on Page 40 of the Final Report of the National Commission. Mr. Hill also noted that he had talked to Professor Louis B. Schwartz, who had been the Director of the Commission's staff, about Section 503. Professor Schwartz had stated that he thought Section 503 as contained in the draft of the F.C.C. would make an excellent model for a state statute providing standards for the "insanity" defense.

Mr. Hill noted that his Section 3, providing the method of proceeding when the fitness of a defendant to stand trial is drawn in question, was based primarily on Chapter 29-20 of the Century Code.

Professor Lockney noted that the whole question of restating the defense of "insanity" could be the subject of a full study by a legislative interim committee. Although he was in sympathy with Mr. Hill's desire to modernize the insanity defense, he felt that Section 503 as adopted by the National Commission provided a coherent restatement which would probably be more acceptable in North Dakota. PROFESSOR LOCKNEY THEN MOVED THAT MR. HILL'S PROPOSAL BE ADOPTED, with the text of Section 503 of the F.C.C., as shown on Page 40 of the Final Report, substituted for Section 1 of Mr. Hill's draft. THIS MOTION DIED FOR LACK OF A SECOND. The Committee then recessed for lunch at 12:05 p.m., and reconvened at 1:15 p.m.

The Committee continued consideration of Mr. Hill's statutes dealing with mental disease or mental defect as they affect criminal liability. Mr. Hill noted that, as far as he could recall, only Judge Pearce and he were in favor of the alternative version of Section 503 as put forward by some members of the National Commission.

Judge Lynch noted that he had some comments on Mr. Hill's draft; however, he first stated that he had requested the Chief Justice to replace him as a Committee member since his plans for the future were indefinite.

Judge Lynch then noted that Subsection B of Section 3 of Mr. Hill's draft should also provide that a defendant can be committed to some "other suitable facility". He stated that he favored such language because the State Hospital is not a "suitable facility" due to the fact that it does not have adequate security arrangements available. He noted that in many instances arising in his Court, he simply sends defendants to three local psychiatrists for testing regarding fitness to stand trial. Thus, it would be well if the draft also provided that the judge could have the defendant examined by psychiatrists within the city where the defendants are to be tried.

Mr. Hill noted that if Section 1 of his draft were changed to adopt the language of Section 503 of the proposed F.C.C., then he would want to redraft Section 3 of his proposed statutes, to make sure that all the language in Section 3 was appropriate. At that time, he could, of course, take Judge Lynch's comments into account.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY REPRESENTATIVE STONE that the Committee adopt Section 503 as shown in boldface on Page 40 of the Final Report as a substitute for Section 1 of Mr. Hill's proposed statutes on mental disease or mental defect.

Professor Lockney inquired of Judge Lynch whether, as a trial judge, he thought that proposed Section 503 was a workable section for North Dakota. Judge Lynch replied that the McNaghten Rule works well in North Dakota. He noted that the "irresistible impulse" language in Section 503 is probably too broad.

The Committee then discussed at length the difference between the defense based on mental incapacity at the time of the commission of the alleged crime, and lack of mental capacity at the time of trial, which results in the inability of the State to try the defendant until he again has the capacity to understand the proceedings against him and to assist in his defense. It was noted that this Committee should make a recommendation to the Committee on Rules of Criminal Procedure asking it to take some action in regard to drafting rules covering mental incapacity to stand trial. The Committee Counsel noted that the Rules Committee would probably not have a rule on this topic.

PROFESSOR LOCKNEY'S MOTION, ABOVE-STATED, THEN PASSED.

Mr. Hill stated he felt that it should be the responsibility of this Committee to draft sections covering the topic of a defendant's mental capacity to stand trial. Mr. Webb stated that he agreed with Mr. Hill. The Chairman directed that the provisions of Mr. Hill's draft on mental disease and mental defect, contained in Sections 2 and 3, be held in abeyance for further Committee consideration in the future.

The Chairman noted that the Committee has now reached the point on its agenda where it could begin considerations of sections by subchapter groupings. He stated that this was the procedure which was used during the last half of the meeting of April 6-7, 1972, and that it had worked well during that meeting.

The Chairman indicated that the procedure would be as follows:

1. The staff would present an "overview" of a logical grouping of F.C.C. sections;

2. The Chairman would call for comments and/or amendments on a section-by-section basis; and

3. All of the sections would be adopted by one motion, either as presented, or as amended.

Mr. Webb stated that before the Committee got into new material, he would like the minutes to reflect that the discussion on Section 503 regarding defenses based on mental disease or mental defect had been rather limited, and that the whole topic should be more fully discussed, especially by those groups representing the various segments of the bench and bar.

Professor Lockney noted that the whole question of a "defense" which dealt with the defendant's mental capactiy could be an area in which the Committee could present alternative drafts. Mr. Wolf noted, for the record, that the language of Mr. Hill's Section 1 of his proposed "mental disease and mental defect" statutes comported with the language, previously adopted by the Committee, of Section 304, as that language related to negating culpability.

The Chairman then called on the Committee Counsel for an overview of Sections 1341 through 1346, the texts of which read as follows:

SECTION 1341. CRIMINAL CONTEMPT.)

1. POWER OF COURT. A court of this state has power to punish for contempt of its authority only for the following offenses:

a. Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

b. Misbehavior of any of its officers in their official transactions;

c. Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

2. STATUS AS OFFENSE; GRADING. Except as otherwise provided, a criminal contempt proceeding under this section shall be deemed a prosecution for an offense for the purposes of part A (general provisions) and part C (sentencing) of this (((Code))) title. Criminal contempt shall be treated as a class B misdemeanor, except that the defendant may be sentenced to a term of imprisonment of no more than six months, and, if the criminal contempt is disobedience of or resistance to a court's lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, the defendant may be sentenced to pay a fine in any amount deemed just by the court.

3. SUCCESSIVE PROSECUTIONS. (((Notwithstanding the provisions of sections 704, 705, 706, 707, and 708 (relating to multiple prosecutions). a))) A criminal contempt proceeding under this section is not a bar to subsequent prosecution for a specific offense if the court certifies in the judgment of conviction of criminal contempt, or the order terminating the proceeding without acquittal or dismissal, that a summary criminal contempt proceeding was necessary to prevent repetition of misbehavior disruptive of an ongoing proceeding and that subsequent prosecution as a specific offense is warranted. In a subsequent prosecution, the defendant shall receive credit for all time spent in custody and any fine paid by him pursuant to the criminal contempt proceeding.

4. CIVIL CONTEMPT PRESERVED. This section shall not be construed to deprive a court of its power, by civil contempt proceedings, to compel compliance with its lawful writ, process, order, rule, decree, or command, or to compensate a complainant for losses sustained by reason of disobedience or resistance thereto, in accordance with the prevailing usages of law and equity, including the power of detention.

SECTION 1342. FAILURE TO APPEAR AS WITNESS, TO PRODUCE INFORMATION, OR TO BE SWORN.)

1. FAILURE TO APPEAR OR TO PRODUCE. A person who has been lawfully ordered to appear at a specified time and place to testify or to produce information in an official proceeding is guilty of a class A misdemeanor if, without lawful privilege, he fails to appear or to produce the information at that time and place.

2. REFUSAL TO BE SWORN. A person attending an official proceeding is guilty of a class A misdemeanor if, without lawful privilege, he fails to comply with a lawful order:

a. To occupy or remain at the designated place from which he is to testify as a witness in such proceeding; or

b. To be sworn or to make equivalent affirmation as a witness in such proceeding.

3. DEFENSES. It is a defense to a prosecution under this section that the defendant:

a. Was prevented from appearing at the specified time and place or unable to produce the information because of circumstances to the creation of which he did not contribute in reckless disregard of the requirement to appear or to produce; or

b. Complied with the order before his failure to do so substantially affected the proceeding.

4. DEFINITIONS. In this section, and in section 1343:

a. "Official proceeding" means:

(1) An official proceeding before a judge or court of this state, a magistrate, or a grand jury;

(2) An official proceeding before the legislative assembly, or one of its session or interim committees;

(3) An official proceeding in which, pursuant to lawful authority, a court orders attendance or the production of information;

(4) An official proceeding before an authorized agency;

(5) An official proceeding which otherwise is made expressly subject to this section;

b. "Authorized agency" means an agency authorized by statute to issue subpoenas or similar process supported by the sanctions of this section;

c. "Information" means a book, paper, document, record, or other tangible object.

SECTION 1343. REFUSAL TO TESTIFY.)

1. OFFENSE. A person is guilty of a class A misdemeanor if, without lawful privilege, he refuses:

a. To answer a question pertinent to the subject under inquiry in an official proceeding before the legislative assembly, or one of its session or interim committees, and continues in such a refusal after the presiding officer directs him to answer, and advises him that his continuing refusal may make him subject to criminal prosecution; or

b. To answer a question in any other official proceeding and continues in such refusal after a court or judge directs or orders him to answer and advises him that his continuing refusal may make him subject to criminal prosecution.

2. DEFENSE. It is a defense to a prosecution under this section that the defendant complied with the direction or order before his refusal to do so substantially affected the proceeding.

SECTION 1344. HINDERING PROCEEDINGS BY DISORDERLY CONDUCT.)

1. INTENTIONAL HINDERING. A person is guilty of a class A misdemeanor if he intentionally hinders an official proceeding by noise or violent or tumultuous behavior or disturbance.

2. RECKLESS HINDERING. A person is guilty of an offense if he recklessly hinders an official proceeding by noise or violent or tumultuous behavior or disturbance. The offense is a class B misdemeanor if it continues after explicit official request to desist. Otherwise it is an infraction.

SECTION 1345. DISOBEDIENCE OF JUDICIAL ORDER.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he disobeys or resists a lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, of a court of this state.

2. FINES. Notwithstanding the limitations of section 3301, the defendant may be sentenced to pay a fine in any amount deemed just by the court.

SECTION 1346. SOLICITING OBSTRUCTION OF PROCEEDINGS.) A person is guilty of a class A misdemeanor if he solicits another to commit an offense defined in sections 1342, 1343, 1344, or 1345.

The Committee Counsel noted that Sections 1341 through 1346 contained further prohibitions against the obstruction or hindrance of the judicial process. However, these sections center on activities by the alleged offender which are commonly thought of as criminal contempts, and, in fact, Section 1341 is a general statement of the criminal contempt power of a court. The remaining sections (1342, 1343, 1344, 1345, and 1346) define specific offenses which have a tendency to prejudice the smooth operation of the judicial system. In addition, those sections define offenses as crimes which are commonly thought of as constituting criminal contempts.

Section 1341 provides that criminal contempt shall be treated as a Class B misdemeanor, except that the potential maximum term of imprisonment is extended from 30 days to 6 months. Section 12-17-24, NDCC, presently defines certain actions as criminal contempts and makes them misdemeanors. In addition, Section 27-10-01 lists a similar series of acts which will be considered criminal contempts. That section (27-10-01) represents the legislative statement of the power of a court to punish summarily for criminal contempt.

To the extent that the punishment possible under Section 12-17-24 is a maximum of one year's imprisonment, Section 1341 represents a reduction in potential imprisonment penalty. However, this is probably a desirable reduction, since the six-month limitation would serve to reduce the possibility that the contemnor would be constitutionally entitled to a jury trial.

Section 1341 also provides that a criminal contempt proceeding under this section is not a bar to a later prosecution for a specific offense, if the offended court so certifies. However, the defendant is to receive credit for all time spent in custody, or for fines paid as a result of being found in criminal contempt.

Section 1342 provides that a failure to appear as a witness, or to produce subpoenaed documents, or to refuse to be sworn as a witness at an official proceeding, is a Class A misdemeanor. The primary policy question raised by Section 1342 is whether the specific offenses defined therein should be excepted from a court's general power to punish for criminal contempt. The thrust of the National Commission's action is to take certain specific offenses out of a general statement of the contempt power of courts, and to make them specific offenses, prosecutable in the normal manner. Of course, it may be that courts will be able to continue to treat the offenses defined in Section 1342 through 1345 as criminal contempts under an inherent contempt power. The case of State v. Markuson, 5 N.D. 147 (1895) indicates that North Dakota courts have such an inherent contempt power.

The Committee Counsel noted that the language ", and in section 1343" had been added to Subsection 4 of Section 1342 so that the definitions in Subsection 4 would apply to both Sections 1342 and 1343.

Section 1343 provides that it is a Class A misdemeanor to refuse to testify in an "official proceeding" after being directed to do so by the presiding officer, in the case of a legislative proceeding, or by a court or judge. The Committee Counsel noted that, in the case of administrative proceedings, a person could not be held in contempt for refusal to testify until the administrator had requested and received a court order that the person testify.

Section 1344 makes it a Class A misdemeanor to intentionally hinder an official proceeding; and makes it a Class B misdemeanor to recklessly hinder an official proceeding, unless the reckless hindrance ceases after an "explicit official request", in which case the "reckless hindrance" will be classified as an infraction. To the extent that reckless hindrance is either a Class B misdemeanor or an infraction, it would result in a lessening of the potential maximum penalties presently provided in Section 12-17-24.

Section 1345 provides that it is a Class A misdemeanor to disobey or resist an injunction or other lawful final order, other than an order for the payment of money, of a court of this State. This section is essentially a restatement of Subparagraph c of Subsection 1 of Section 1341. As such, the section may not be absolutely necessary in a redrafted criminal code. However, the section could be retained to allow prosecution of offenders where a court did not see fit to hold them in contempt. Subsection 2 of Section 1345 allows the court to assess a fine in "any amount deemed just", regardless of the limitations on fines established under Section 3301 (which sets the maximum limits for a fine, upon a finding of guilt of a Class A misdemeanor, at $1,000).

Section 1346 provides that it is a Class A misdemeanor to solicit another to commit any of the specific offenses defined in Sections 1342 through 1345. The reason that Section 1346 is necessary is to allow for prosecution for solicitation of a misdemeanor. The general solicitation section, Section 1003, limits prosecutions for criminal solicitation to instances where the alleged offender has solicited the commission of a felony. Thus, a specific provision is necessary if persons who solicit the commission of a misdemeanor are to be prosecuted.

Professor Lockney noted that the staff had omitted Section 1349, which, among other things, provides for prior court authorization before prosecution of one of the offenses defined in Sections 1342 through 1345, where the offense occurred in a judicial proceeding. Professor Lockney wondered whether such a provision might not be desirable for North Dakota. The Committee Counsel noted that, as a general rule, sections which provide for Attorney General or court certification before prosecution have been left out of the staff redraft of the proposed F.C.C. The Committee Counsel stated the reason for this is that the staff felt that these types of questions were beyond the immediate scope of the Committee's responsibility. However, it would be possible to include the equivalent of Subsection 1 of Section 1349 if the Committee so desired.

Professor Lockney's question was discussed at length; however, there was no motion made to have equivalent language placed on the Committee's agenda.

Mr. Wolf stated he felt that any new provisions dealing with criminal contempt should provide that the power of a court to punish for contempts committed in its presence should be unlimited, except for the constitutional prohibition on cruel or unusual punishments. In addition, he reiterated his earlier comment to the effect that a person being held in contempt during the course of a trial should be immediately notified of that fact, and of the punishment assessed, rather than allowing contempts to accumulate throughout the course of a trial, with consecutive sentences being imposed at the end of trial.

Representative Murphy questioned whether the provision that a court could punish summarily contempts committed "in its present" was not an unreasonable limitation on the court's contempt power. At least, the language requiring that the contempt occur in the presence of the court might give rise to confusion on the part of judges as to what is or is not a contempt occurring "in the court's presence".

Representative Hilleboe inquired as to why the language regarding Class B misdemeanors was used in Section 1341, since the potential maximum period of imprisonment exceeded that normally accompanying a Class B misdemeanor. He felt that if a specific penalty is to be provided for summary proceedings for criminal contempt, it should be stated separately, rather than keyed to the existing penalty classification plan. The Committee Counsel noted that the language of Section 1341 provides that criminal contempts punished under that section shall be "treated as" Class B misdemeanors.

The Committee continued to discuss the topic of criminal contempt, and Professor Lockney inquired as to whether the staff couldn't prepare a synopsis of the Working Papers' comments regarding the six sections, which could be used as the basis for further Committee discussion at some future meeting. Committee Counsel replied that the staff could do so, but that it would be desirable, if at all possible, to take action on these sections at this meeting.

IT WAS MOVED BY MR. WOLF AND SECONDED BY PROFESSOR LOCKNEY that Section 1341 be amended so as to provide that the power of a court to punish contempts committed in its presence be plenary except as restricted by the

Federal or State Constitutions, and to provide that a contemnor is to be given individual notice when he has been held in contempt, including notice regarding the penalty assessed, and when Section 1341 has been so amended, Sections 1341 through 1346 be adopted by the Committee.

Judge Lynch noted that one of the reasons that Judge Hoffman, the trial judge in the "Chicago seven" trial, had delayed assessment of penalties for the numerous criminal contempts until the end of the trial was to keep the jury from being prejudiced by the fact that the defense attorney was being continuously held in contempt. Judge Lynch also stated he felt that Section 1341 should be amended so that it contained language recognizing the inherent criminal contempt power of state courts.

The Committee Counsel stated that the rationale for legislative action outlining the extent of a court's criminal contempt power was that the contempt power of the court should be limited so that its extent would be defined by legislative action. If the legislature recognizes an "inherent" contempt power, then perhaps there would be no point in an attempt to regulate it by legislation except as a precatory guideline.

MR. WOLF, WITH THE CONSENT OF HIS SECOND, THEN WITHDREW HIS MOTION stated above.

Representative Stone stated that she would be in favor of deleting the word "only" after the word "authority" in Subsection 1 of Section 1341, in order that that subsection not provide a limitation on the court's contempt power.

The Committee discussed further the use of the terminology "class B misdemeanor" in Subsection 2 of Section 1341. It was noted that one of the reasons for using this terminology was to allow the full range of sentencing alternatives provided by the proposed F.C.C. to be applied to summary contempt proceedings. Mr. Webb noted that the "treated as" language preceding the words "class B misdemeanor" makes it clear that a summary contempt "conviction" is only to be treated as a misdemeanor for the purposes of sentencing, and taking advantage of all the sentencing alternatives provided.

IT WAS MOVED BY MR. WEBB, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that Sections 1341 through 1346 be adopted by the Committee as presented.

The Chairman called on the Committee Counsel for an overview of Sections 1351. 1352, 1354, 1355, and 1356,which read as follows:

SECTION 1351. PERJURY.)

1. OFFENSE. A person is guilty of perjury, a class C felony, if, in an official proceeding, he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a false statement previously made, when the statement is material and he does not believe it to be true.

((((2) CORROBORATION. No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by the testimony of one person.)))

2. PROOF. Commission of perjury need not be proved by any particular number of witnesses or by documentary or other types of evidence.

3. INCONSISTENT STATEMENTS. Where in the course of one or more official proceedings, the defendant made a statement under oath or equivalent affirmation inconsistent with another statement made by him under oath or equivalent affirmation to the degree that one of them is necessarily false, both having been made within the period of the statute of limitations, the prosecution may set forth the statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant to be true. Proof that the defendant made such statements shall constitute a prima facie case that one or the other of the statements was false; but in the absence of sufficient proof of which statement was false, the defendant may be convicted under this section only if each of such statements was material to the official proceeding in which it was made.

SECTION 1352. FALSE STATEMENTS.)

1. FALSE SWEARING IN OFFICIAL PROCEEDINGS. A person is guilty of a class A misdemeanor if, in an official proceeding, he makes a false statement, whether or not material, under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, if he does not believe the statement to be true.

2. OTHER FALSITY IN GOVERNMENTAL MATTERS. A person is guilty of a class A misdemeanor if, in a governmental matter, he:

a. Makes a false written statement, when the statement is material and he does not believe it to be true;

b. Intentionally creates a false impression in a written application for a pecuniary or other benefit, by omitting information necessary to prevent a material statement therein from being misleading;

c. Submits or invites reliance on any material writing which he knows to be forged, altered, or otherwise lacking in authenticity;

d. Submits or invites reliance on any sample, specimen, map, boundary-mark or other objection which he knows to be false in a material respect; or

e. Uses a trick, scheme, or device which he knows to be misleading in a material respect.

3. STATEMENT IN CRIMINAL INVESTIGATION. This section does not apply to information given during the course of an investigation into possible commission of an offense unless the information is given in an official proceeding or the declarant is otherwise under a legal duty to give the information. Inapplicability under this subsection is a defense.

4. DEFINITION. A matter is a "governmental matter" if it is within the jurisdiction of a government office or agency, or of an office, agency, or other establishment in the legislative or the judicial branch of government.

SECTION 1354. FALSE REPORTS TO LAW ENFORCEMENT OFFICERS OR SECURITY OFFICIALS.) A person is guilty of a class A misdemeanor if he:

1. Gives false information to a law enforcement officer with intent to falsely implicate another; or

2. Falsely reports to a law enforcement officer or other security official the occurrence of a crime of violence or other incident calling for an emergency response when he knows that the incident did not occur.

"Security official" means (((fireman or other))) a public servant responsible for averting or dealing with emergencies involving public safety.

SECTION 1355. GENERAL PROVISIONS FOR CHAPTER 13.)

1. MATERIALITY. Falsification is material under sections 1351, 1352, and 1354, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the official proceeding or the disposition of the matter in which the statement is made. Whether a falsification is material in a given factual situation is a question of law. It is no defense that the declarant mistakenly believed the falsification to be immaterial.

2. IRREGULARITIES NO DEFENSE. It is no defense to a prosecution under sections 1351 or 1352 that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at a time when the actor represents it as being so verified shall be deemed to have been duly sworn or affirmed.

3. DEFENSE OF RETRACTION. It is a defense to a prosecution under sections 1351, 1352, or 1354 that the actor retracted the falsification in the course of the official proceeding or matter in which it was made, if in fact he did so before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding or the matter.

4. DEFINITION OF "STATEMENT". In section 1351 and 1352, "statement" means any representation, but includes a representation of opinion, belief, or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

SECTION 1356. TAMPERING WITH PUBLIC RECORDS.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he:

   a. Knowingly makes a false entry in or false alteration of a government record; or

   b. Knowingly, without lawful authority, destroys, conceals, removes, or otherwise impairs the verity or availability of a government record.

2. DEFINITION. In this section "government record" means:

   a. Any record, document, or thing belonging to, or received or kept by the government for information or record;

   b. Any other record, document, or thing required to be kept by law, pursuant, in fact, to a statute which expressly invokes the sanctions of this section.

The Committee Counsel noted that Sections 1351 through 1356 cover the offenses of perjury, false swearing, false reports to law enforcement officers, and tampering with public records. Section 1355 contains general provisions applicable to the offenses defined in Sections 1351, 1352, and 1354. For instance, that section defines when a falsification is to be considered material, i.e., if the falsification could have affected the outcome of the "official proceeding". A falsification may be considered material regardless of the admissibility of the falsification under standard rules of evidence.

Section 1355 further provides that it is not a defense that the person mistakenly believed his false statement to be immaterial, nor is it a defense, under Sections 1351 or 1352, that the person making the false statement was given the oath in an irregular manner.

Finally, Section 1355, the general provisions section, provides for a defense of "retraction", which consists of retracting the false statement during the course of the official proceeding and before it substantially affects that proceeding, and before it becomes clear that the falsification would be exposed at any rate. The defenses and provisos in Section 1355 are essentially restatements of present North Dakota law, except that a defense of retraction is not specifically provided for by statute.

Section 1351 defines perjury and grades it as a Class C felony. Perjury is defined as the making of a material false statement under oath in an official proceeding, or swearing to the truth of a previously made material false statement.

The section also provides that a person may be prosecuted for inconsistent statements made under oath, where the inconsistency is of such a degree that one or the other of the statements must be false. A defendant prosecuted under the inconsistent statements provision can be convicted, even though the prosecution cannot prove which of the statements was false, if each of the statements was material to the "official proceeding" in which it was made. North Dakota has no statutory equivalent for this inconsistent statement provision, therefore the provision raises a policy question regarding its desirability.

Another policy question raised by Section 1351 is whether conviction of perjury should require that proof of the falsity of a statement be corroborated; i.e., that the proof does not rest solely on the testimony of one person. The alternative is to allow perjury to be proved in any possible manner.

The penalty classification under Section 1351 (a class C felony) differs somewhat from the penalties prescribed by Section 12-14-13 because:

1. The maximum period of imprisonment is less than the maximum provided for in two out of the three present North Dakota penalties; and

2. All types of perjury are subject to the same maximum penalty under Section 1351, whereas present North Dakota law differentiates between perjury committed in the trial of a felony, during any other trial or proceeding "in a court of justice", and in all other cases. The penalty decreases in North Dakota according to a legislative judgment of the seriousness of the proceeding in which the perjury was committed.

Section 1352 provides a penalty for the making of false statements, and for written falsifications. Insofar as Section 1352 relates to statements, it is in essence a "lesser included offense" to the Section 1351 perjury offense. Under Subsection 1 of Section 1352, the false statement must be made in an "official proceeding", but it is prosecutable whether or not material.

Under Subsection 2 of Section 1352, the falsification must be made with respect to "a governmental matter" and the false written statement must be material in relation to that governmental matter.

Subsection 3 of Section 1352 prevents prosecution for "false swearing" on the basis of statements made during the course of an investigation into the commission of a criminal offense, unless the declarant made the statement in the course of an "official proceeding", or unless the declarant was otherwise under a legal duty to give correct information. The Committee Counsel noted that the giving of false statements to law enforcement officers was separately treated under Section 1354, which would be considered during this meeting.

The Committee Counsel noted that classifying offenses relating to false written statements in governmental matters as Class A misdemeanors represented a reduction

in potential penalty from current North Dakota law. For instance, Section 12-15-01 provides that the preparation of false evidence is a felony, punishable by a maximum of five years' imprisonment. Thus, the Committee is presented with a policy question regarding the penalty grading of Section 1352.

Section 1354 deals with the giving of false information to law enforcement officers with intent to criminally implicate another. This section also prohibits the reporting, to law enforcement officers, of incidents calling for an "emergency response", when the alleged offender knows that the incident did not occur.

Section 1354 would replace Section 12-31-09, which makes it a misdemeanor to gratuitously report false information to a peace officer. An issue posed by Section 1354 is whether it should be either extended to cover all giving of false information to law enforcement officials, regardless of the intent of the declarant; or, in the alternative, whether the section should be restricted solely to false reports concerning incidents which call for an emergency response.

The Committee Counsel noted that the final section in the group, Section 1356, prohibits persons from making false entries in, alterations of, or from destroying or concealing, "government records". The prohibited action has to be taken "knowingly", and the offense defined in Section 1356 is graded as a Class A misdemeanor. A "government record" is defined as any record, document, or thing belonging to or received or kept by the government, and any other record or document required to be kept pursuant to a statute which in itself invokes the sanctions of Section 1356.

Section 1356 would replace Sections 12-13-01, 12-13-02, and 12-13-03, all of which define actions which, if taken, are classified as felonies. Thus, the Committee has a policy decision as to whether it desires to raise the penalty classification for Section 1356.

Mr. Webb stated that he did not believe "corroboration" is necessary for a conviction of perjury. The Committee Counsel noted that corroboration does not seem to be required under present North Dakota case law. Mr. Hill stated that he agreed with Mr. Webb that corroboration was not necessary. However, Mr. Hill questioned the need for any statement regarding quantum of proof necessary in a perjury case, once it had been decided that corroboration was unnecessary.

Representative Hilleboe questioned the use of the language "whether or not material" in Subsection 1 of Section 1352, and, in addition, questioned the difference in the penalties provided for in Section 1351 and Section 1352 offenses. Mr. Webb noted that Section 1352, Subsection 1 is essentially a "lesser included offense" to Section 1351 perjury. In addition, the "whether or not material" language greatly reduced the prosecutor's burden in prosecuting an offender for a violation of Subsection 1 of Section 1352.

IT WAS MOVED BY SENATOR PAGE AND SECONDED BY MR. WEBB that the Committee adopt Sections 1351, 1352, 1354, 1355, and 1356 as presented. Mr. Webb noted that perhaps he had some reservations regarding the penalty classification for Section 1352 in that he thought it may be too light, however, his reservations could be considered when the penalty classification plan was again reviewed by the Committee. SENATOR PAGE'S MOTION THEN CARRIED.

The Chairman called on Mr. Robert Wefald for an overview of Sections 1361 through 1369, which read as follows:

SECTION 1361. BRIBERY.)

1. OFFENSE. A person is guilty of bribery, a class C felony, if he knowingly offers, gives, or agrees to give to another, or solicits, accepts, or agrees to accept from another, a thing of value as consideration for:

a. The recipient's official action as a public servant; or

b. The recipient's violation of a known legal duty as a public servant.

2. DEFENSE PRECLUDED. It is no defense to a prosecution under this section that a recipient was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

3. PRIMA FACIE CASE. A prima facie case is established under this section upon proof that the actor knew that a thing of pecuniary value was offered, given, or agreed to be given by, or solicited, accepted, or agreed to be accepted from, a person having an interest in an imminent or pending (a) examination, investigation, arrest, or judicial or administrative proceeding, or (b) bid, contract, claim, or application, and that interest could be affected by the recipient's performance or nonperformance of his official action or violation of his known legal duty as a public servant.

SECTION 1362. UNLAWFUL REWARDING OF PUBLIC SERVANTS.)

1. RECEIVING UNLAWFUL REWARD. A public servant is guilty of a class A misdemeanor if he solicits, accepts, or agrees to accept a thing of pecuniary value for:

a. Having engaged in official action as a public servant; or

b. Having violated a legal duty as a public servant.

2. GIVING UNLAWFUL REWARD. A person is guilty of a class A misdemeanor if he knowingly offers, gives, or agrees to give a thing of pecuniary value, receipt of which is prohibited by this section.

SECTION 1363. UNLAWFUL COMPENSATION FOR ASSISTANCE IN GOVERNMENT MATTERS.)

1. RECEIVING UNLAWFUL COMPENSATION. A public servant is guilty of a class A misdemeanor if he solicits, accepts, or agrees to accept a thing of pecuniary value as compensation for advice or other assistance in promoting a bill, or preparing or promoting a (((bill,))) contract, claim, or other matter which is or is likely to be subject to his official action.

2. GIVING UNLAWFUL COMPENSATION. A person is guilty of a class A misdemeanor if he knowingly offers, gives, or agrees to give a thing of pecuniary value to a public servant, receipt of which is prohibited by this section.

SECTION 1364. TRADING IN PUBLIC OFFICE AND POLITICAL ENDORSEMENT.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he solicits, accepts, or agrees to accept, or offers, gives, or agrees to give, a thing of pecuniary value as consideration for approval or disapproval by a public servant or party official of a person for:

a. Appointment, employment, advancement, or retention as a public servant; or

b. Designation or nomination as a candidate for elective office.

2. DEFINITIONS. In this section:

a. "Approval" includes recommendation, failure to disapprove, or any other manifestation of favor or acquiescence;

b. "Disapproval" includes failure to approve, or any other manifestation of disfavor or nonacquiescence;

c. "Party official" means a person who holds a position or office in a political party, whether by election, appointment, or otherwise.

3. FORFEITURE OF OFFICE. A public servant who is convicted of a violation of this section shall forfeit his office.

4. APPOINTMENT VOID - OFFICIAL ACTS VALID. Any grant or deputation made contrary to the provisions of this section is void but official acts done before a conviction for any offense prohibited in this section shall not be deemed invalid in consequence of the invalidity of such grant or deputation.

SECTION 1365. TRADING IN SPECIAL INFLUENCE.) A person is guilty of a class A misdemeanor if he knowingly offers, gives, or agrees to give, or solicits, accepts, or agrees to accept a thing of pecuniary value for exerting, or procuring another to exert, special influence upon a public servant with respect to his legal duty or official action as a public servant. "Special influence" means power to influence through kinship or by reason of position as a public servant or party official, as defined in section 1364.

SECTION 1366. THREATENING PUBLIC SERVANTS.)

1. THREATS RELATING TO OFFICIAL PROCEEDINGS OR TO SECURE BREACH OF DUTY. A person is guilty of a class C felony if he threatens harm to another with intent to influence his official action as a public servant in a pending or prospective judicial or administrative proceeding held before him, or with intent to influence him to violate his duty as a public servant.

2. OTHER THREATS. A person is guilty of a class C felony if, with intent to influence another's official action as a public servant, he threatens:

a. To commit any crime or to do anything unlawful;

b. To accuse anyone of a crime; or

c. To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or deceased, to hatred, contempt, or ridicule, or to impair another's credit or business repute.

3. DEFENSE PRECLUDED. It is no defense to a prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

SECTION 1367. RETALIATION.) A person is guilty of a class A misdemeanor if he harms another by an unlawful act in retaliation for or on account of the service of another as a public servant, witness, or informant. "Informant" means a person who has communicated information to the government in connection with any government function.

SECTION 1369. DEFINITIONS FOR SECTIONS 1361 TO 1368.) In sections 1361 through 1368, "thing of value" and "thing of pecuniary value" does not include (a) salary, fees, and other compensation paid by the government in (((behalf of))) consideration for which the official action or legal duty is performed, or (b) concurrence in official action in the course of legitimate compromise among public servants, except as provided in [section 12-09-11, or its equivalent].

Mr. Wefald stated that Sections 1361 through 1369 principally relate to bribery which affects the actions (or nonfeasance) of public servants. He noted that other sections of the F.C.C. are designed to deal with bribery of non-public servants such

as witnesses (Section 1321), informants (Section 1322), bank officials (Section 1756), and sports participants (Section 1757). He also noted that Section 1361, specifically defining the offense of bribery, could replace at least 24 present sections of Title 12.

Mr. Wefald noted that Section 1361 aims at the same sorts of actions which are presently condemned under the several sections of Title 12 dealing with bribery of public officials. However, the punishment provided under Section 1361 is generally greater than the punishments provided under the several sections of Title 12. That being the case, the Committee may want to review the penalty classification under Section 1361.

Since the definition of "public servant" includes legislators, Section 1361 would, of course, apply to the legislators. The drafters of the proposed F.C.C. took this into account and specifically provided that the definition of "thing of value" contained in Section 1369 would exclude the action of one legislator in supporting another in return for that other's support. In other words, "logrolling" is specifically excepted from the purview of Section 1361. However, Section 40 of the Constitution and Section 12-09-11 of the Century Code specifically prohibit logrolling, and provide that a vote in consideration of a vote is bribery. Thus, Section 1361, if adopted, would be exactly contrary to Section 40 and Section 12-09-11. Therefore, the staff has added a bracketed clause to the end of Section 1369 to provide that "logrolling" is not excepted from the definition of thing of value.

Section 1362 is unique in that it deals with the unlawful rewarding of public servants for past official action. The section is designed to cover the situation where a public official acts wrongfully and is later rewarded for his action, or where his action is taken in anticipation of the later reward. The advisability of adopting a section similar to Section 1362 is questionable, since its enforceability will probably be low, particularly if the "reward" is in the form of a campaign contribution.

Mr. Wefald also noted that the staff comments accompanying Section 1362 point out that the phrase "a thing of pecuniary value" probably does not include the food or beverages which a lobbyist might buy for a legislator who happens to have voted "the right way". He stated that President Truman's admonition "if you can't eat it or drink it, don't take it", is probably relevant. Section 1363 prohibits the receipt or giving of unlawful compensation for assistance in governmental matters. The staff has added the language "promoting a bill or" before the word "preparing" in Line 5 of this Section, and has inserted triple parentheses around the word "bill," in Line 6 of this Section. This change was made to Section 1363 to free any legislator from criminal liability for the preparation (drafting) of a bill. It was felt that the evil to be aimed at was the promotion of that bill through a legislator's official position rather than the preparation of the bill.

Section 1364 prohibits receipt of compensation for approval or disapproval by a public servant or a political party official, of another person for appointment to office or nomination as a candidate for elective office. The staff has added Subsections 3 and 4

to Section 1364 simply to reflect present North Dakota law. Those subsections contain essentially the language of Sections 12-08-13 and 12-08-14. Possibly, these sections should be considered in conjunction with the consideration of Chapter 35 of the proposed F.C.C., dealing with the collateral consequences of conviction, rather than at this point.

Section 1365 prohibits trading in special influence, and would create essentially a new criminal offense in North Dakota. The Working Papers to the proposed F.C.C. make it clear that Section 1365 is not designed to prevent controlled lobbying.

Section 1366 prohibits the threatening of public servants, and is similar to Section 1617 prohibiting criminal coercion. The primary difference, aside from the emphasis on threats directed toward public servants, is on the potential penalties, with a Section 1366 offense being classified as a Class C felony, whereas a Section 1617 offense is classified as a Class A misdemeanor.

Section 1367 prohibits retaliatory acts against a person because of his service as a public servant, witness, or informant. The federal drafters' comments on Section 1367 indicate that the section is principally a device for establishing federal jurisdiction over more serious state crimes; i.e., murder of a government informer. Accordingly, Section 1367 may not be necessary in a state criminal code. There presently is no counterpart of Section 1367 in Title 12.

Section 1369 defines certain terms used in the subchapter on bribery. As previously noted, however, a provision has been added in brackets to Section 1369 so as to ensure that "logrolling" will be maintained as a prohibited course of conduct, in order to take into account the provisions of Section 40 of the State Constitution.

The Committee discussed the staff addition to Section 1363, which would have allowed legislators to receive compensation for the preparation of bills. It was the consensus of the Committee that this was not a desirable exception, since the compensation received for the preparation of a bill could, in essence, reflect a payment for the legislator's favorable promotion of the bill. IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY SENATOR PAGE, AND CARRIED, with Representative Murphy voting in the negative, that Section 1363 as presented in the staff redraft be amended to delete the added language, and to delete the triple parentheses around the word "bill".

The Committee then discussed Section 1362 which prohibits the unlawful rewarding of a public servant for past official action. The fact that such a provision would be extremely difficult to enforce was noted, and its desirability was questioned. The Committee also discussed Section 1367 dealing with retaliation against public servants, witnesses, and informers, and it was the consensus of the Committee that such a section was not needed in a state criminal code, since the basic offense committed against a public servant, witness, or informer could be prosecuted as such. That is, if the witness was assaulted because of his performance of service as a witness, the perpetrator of the assault could be prosecuted for assault.

IT WAS MOVED BY MR. WEBB, SECONDED BY REPRESENTATIVE HILLEBOE, AND UNANIMOUSLY CARRIED that Sections 1362 and 1367 be stricken from the draft as presented.

The Committee then discussed the addition of Subsections 3 and 4 to Section 1364. Those sections are an attempt to reflect current North Dakota law and provide that a public servant who is convicted of trading in public office shall forfeit his own office; and that actions taken by a public servant who has been appointed in violation of Section 1364 are not to be deemed invalid because the appointment was subsequently found invalid.

IT WAS MOVED BY MR. WEBB, SECONDED BY REPRESENTATIVE MURPHY, AND UNANIMOUSLY CARRIED that Subsections 3 and 4 of Section 1364 be deleted.

Representative Hilleboe then questioned the desirability of referring to partisan political officials in Section 1364. He stated that since all of the other sections in this subchapter dealt specifically with public servants, he felt it inappropriate that Section 1364 should also deal with partisan political officials. IT WAS MOVED BY REPRESENTATIVE HILLEBOE AND SECONDED BY MR. WEBB that Section 1364 be amended to strike out all of the language relating to "party officials". Mr. Webb stated that he seconded the motion for the purposes of discussion but felt that the proper thing to do would be to substitute the words "any person" for the words "public servant or party official" in Line 4 of Page 24 of Section 1364. Senator Page indicated that he agreed with Mr. Webb. Professor Lockney indicated that he was opposed to the motion, as he felt that this was a logical place to deal with unlawful political appointments, if they were to be dealt with at all. REPRESENTATIVE HILLEBOE'S MOTION, ABOVE-STATED, WAS THEN DEFEATED.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that Sections 1361 through 1369, as amended, be adopted by the Committee. Following approval of this motion, the Committee recessed at 6:00 p.m., to reconvene at 9:00 a.m. on Friday, May 12, 1972. Upon reconvening, the Chairman called on the Committee Counsel for an overview of Sections 1371, 1372, and 1381, which read as follows:

SECTION 1371. DISCLOSURE OF CONFIDENTIAL INFORMATION PROVIDED TO GOVERNMENT.) A person is guilty of a class A misdemeanor if, in knowing violation of a duty imposed on him as a public servant, he discloses any confidential information which he has acquired as a public servant. "Confidential information" means information made available to the government under a governmental assurance of confidence.

SECTION 1372. SPECULATING OR WAGERING ON OFFICIAL ACTION OR INFORMATION.)

1. SPECULATING DURING AND AFTER EMPLOYMENT. A person is guilty of a class A misdemeanor if during employment as a public servant, or within one year thereafter, in contemplation of official action by himself as a public servant or by a government agency with which he is or has been associated as a public servant, or in reliance on information to which he has or had access only in his capacity as a public servant, he:

a. Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action;

b. Speculates or wagers on the basis of such information or official action; or

c. Aids another to do any of the foregoing.

2. TAKING OFFICIAL ACTION AFTER SPECULATION. A person is guilty of a class A misdemeanor if as a public servant he takes official action which is likely to benefit him as a result of an acquisition of a pecuniary interest in any property, transaction, or enterprise, or of a speculation or wager, which he made, or caused or aided another to make, in contemplation of such official action.

SECTION 1381. IMPERSONATING OFFICIALS.)

1. OFFENSE. A person is guilty of an offense if he falsely pretends to be:

a. A public servant and acts as if to exercise the authority of such public servant; or

b. A public servant or a former public servant and thereby obtains a thing of value.

2. DEFENSE PRECLUDED. It is no defense to prosecution under this section that the pretended capacity did not exist or the pretended authority could not legally or otherwise have been exercised or conferred.

10 3. GRADING. An offense under subsection 1b is a class A misdemeanor.

11 An offense under subsection 1a is a class B misdemeanor.

The Committee Counsel noted that these sections deal with offenses wherein public servants take advantage of their positions, or where a person impersonates a public servant. All of the offenses defined in these sections are either Class A or Class B misdemeanors.

Section 1371 makes it a Class A misdemeanor for a public servant to disclose confidential information of which he has gained knowledge through his position as a public servant if the disclosure is made in "knowing violation" of his official duties. Confidential information is defined as information received by the government under a governmental assurance of confidence. Title 12 does not contain a provision equivalent to Section 1371; therefore, the Committee is presented with a policy question as to whether disclosure of confidential information should be a generalized offense in the criminal code. There are several specific statutes in the Century Code which prohibit the disclosure of information regarding particular topics, such as disclosing the contents of income tax returns, or the contents of welfare recipients' files.

Section 1372 prohibits a public servant from acquiring an interest in property or carrying out a speculation when the acquisition or speculation is based on information to which he had access only because he was a public servant. A public servant is also forbidden to aid any other person to acquire such an interest in property or to engage in such a speculation.

Subsection 2 of Section 1372 provides that a public servant is guilty of a Class A misdemeanor if he takes official action which will inure to his benefit because he has previously acquired property or entered into a speculation when the acquisition or speculation was carried out in contemplation of his own official action during his term of office, or the official action of a board or agency of which he was a member within one year after leaving office.

The Committee Counsel noted that the comments to Section 1372 indicate that it would replace Section 12-10-06; however, this is an error and the two sections, 12-10-06 and 1372, deal with essentially different things. Thus, the Committee will again have to consider Section 12-10-06 in another context.

Section 1381 prohibits a person from impersonating a public servant and either attempting to exercise the authority of the public servant whom he is impersonating, or attempting to obtain a thing of value due to the impersonation.

The second subsection of Section 1381 provides that it is no defense to a prosecution for impersonation that the capacity which the impersonator pretended to have did not, in fact, exist. Nor is it a defense that the pretended authority assumed by the impersonator could not legally or otherwise have been exercised by him or conferred upon him.

The offense of impersonating and taking action as a public servant is classified as a Class A misdemeanor, while the offense of impersonating a public servant and thereby obtaining a thing of value is classified as a Class B misdemeanor.

Section 12-38-03, which would be replaced by Section 1381, also makes it a misdemeanor to impersonate public officers when the offender does an act which injures, defrauds, vexes, or annoys another person. Thus, Section 1381 would broaden the offense of false impersonation by removing any requirement that another person be injured by the false impersonation.

The Committee discussed Section 1371 dealing with unlawful disclosure by a public servant of confidential governmental information. Professor Lockney noted that such a general statute is probably necessary to cover all of the various situations which could arise wherein information received by the government should be treated as confidential.

Mr. Webb stated that he disagreed, and that the Committee shouldn't be responsible for approving a general statute which suggests that the government can operate in secrecy. He said that he felt one of the reasons for the public's loss of confidence in all levels of government was due to the lack of openness of governmental proceedings. He thought that every effort should be made to make governmental operations more open and subject to public scrutiny. However, he said he realized that there were certain types of governmental information which should remain confidential, such as the facts stated on an income tax return, etc. He felt, however, that it was best to deal with those types of information by separate specific statutes. Representative Hilleboe stated that he agreed with Mr. Webb in regard to the proposition that needed confidentiality of governmental records be provided by specific statutes denominating the individual types of records which should be kept confidential.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY REPRESENTATIVE HILLEBOE that the word "statutory" be inserted before the word "duty" in Line 3 of Section 1371; and that the words "as provided by statute" be added after the word "confidence" in Line 5 of Section 1371. THIS MOTION CARRIED with two dissenting votes.

The Committee discussed the prohibition of speculation or wagering contained in Section 1372, and questions were raised concerning the desirability of including that type of language in a section similar to Section 1372. IT WAS MOVED BY MR. WOLF AND SECONDED BY REPRESENTATIVE HILLEBOE that Section 1372 be amended to delete from it all language relating to speculation or wagering.

Professor Lockney noted that he could conceive of a situation in which a legislator would bet with another person concerning the vote on a particular piece of legislation, and to help ensure the safety of his wager would vote on that piece of legislation in the appropriate manner. After further debate, MR. WOLF'S MOTION LOST, with Mr. Wolf also voting in the negative. Mr. Wolf stated that he voted against his own motion because he was convinced by the arguments of the opponents to the motion.

Representative Hilleboe stated that this section represented new criminal law as far as North Dakota is concerned, and, that being the case, could well be an example of Committee action beyond the scope of the resolution authorizing the Committee's existence. Representative Hilleboe said he felt that to the extent that the Committee creates new criminal liability, those creations should not be contained in the main revisory bill, but should be submitted as separate bills. He stated that as one of the sponsors of the study resolution, he did not intend that new criminal liability be imposed in the main revisory bill, but rather intended that the revisory bill would update current criminal liability provisions and remove outmoded or outdated definitions of criminal offenses.

The Committee Counsel noted that House Concurrent Resolution No. 3050, the Committee's enabling resolution, contains the following language: "The Legislative Council shall . . . take such other steps as may be necessary to prepare a substantively and formally complete codification". It was the Committee Counsel's opinion that the quoted language would authorize the Committee, if it deemed it necessary, to create new areas of criminal liability.

Mr. Wolf stated it was his feeling that the Committee should submit a single draft, with notations as to those sections which create new criminal liability, and that the matter should then be left up to the full Legislative Council as to whether those sections should remain in the bill presented to the Legislature. The Chairman agreed that the Committee should submit essentially one draft, with any subsidiary bills being in the nature of alternative propositions to a section of the general bill draft. However, the Chairman did not feel it necessary to submit sections which may create new criminal liability as separate bills.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED, with two dissenting votes, that the Committee adopt Sections 1371, 1372, and 1381, as amended.

The Chairman called on the Committee Counsel for an overview of Sections 1501 through 1551, which read as follows:

SECTION 1501. CONSPIRACY AGAINST RIGHTS OF CITIZENS.) A person is guilty of a class A misdemeanor:

1. If he conspires with another to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of, or because of his having so exercised, any right or privilege secured to him by the Constitution or laws of this state or of the United States; or

2. If, with intent to prevent or hinder another's free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of this state or of the United States, he goes on such other's premises with another or others or goes in disguise on the highway with another or others.

SECTION 1502. DEPRIVATION OF RIGHTS UNDER COLOR OF LAW.) A person is guilty of a class A misdemeanor if, under color of any law, statute, ordinance, regulation, or custom, he intentionally subjects any person within this state:

1. To the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of this state or of the United States; or
2. To different punishments, pains, or penalties on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens generally.

SECTION 1511. INTERFERENCE WITH ELECTIONS, STATE ASSISTED PROGRAMS, AND EMPLOYMENT.) A person is guilty of a class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force [or by economic coercion], intentionally injures, intimidates, or interferes with another because he is or has been, or in order to intimidate him or any other person from:

1. Voting for any candidate or issue or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in any local, primary, special, or general election;
2. Participating in or enjoying the benefits of any program, service, facility, or activity provided or administered by this state, or receiving state financial assistance, including (a) serving as a grand or petit juror in any court of this state or attending court in connection with such possible

service; or (b) qualifying for or operating in a contractual relationship with the government of this state, or its political subdivisions; or (c) qualifying for or enjoying the benefits of a governmental loan or loan guarantee; or

3. Applying for or enjoying employment, or any perquisite thereof, by any government agency.

SECTION 1512. DISCRIMINATION IN PUBLIC EDUCATION, EMPLOYMENT, PUBLIC ACCOMMODATIONS, HOUSING, INTERSTATE TRAVEL.) A person is guilty of a class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force or by economic coercion , intentionally injures, intimidates, or interferes with another because of his race, color, religion, or national origin and because he is or has been, or in order to intimidate him or any other person from:

1. Enrolling in or attending any public school or public college;

((((b) participating in or enjoying any benefit, service, privilege, program, facility provided or administered by any state or subdivision thereof;

(c) serving, or attending upon any court of any state in connection with possible service, as a grand or petit juror;)))

2. Enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium or any other place of exhibition or entertainment which serves the public, or

of any other establishment which serves the public and (a) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (b) which holds itself out as serving patrons of such establishment. Nothing in this subsection shall limit the lawful action in support of such guest policy as he chooses to adopt of a proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence;

3. Applying for or enjoying employment, or any perquisite thereof, by any private employer (((or any agency of any state or subdivision thereof))), or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

4. Selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

5. Traveling <u>within this state</u>, or using any facility which is an integral part of <u>such</u> travel, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air.

SECTION 1513. INTERFERENCE WITH PERSONS AFFORDING CIVIL RIGHTS TO OTHERS.) A person is guilty of a class A misdemeanor if, whether or not acting under

color of law, he, by force or threat of force [or by economic coercion] , intentionally injures, intimidates, or interferes with another because he is or has been, or in order to intimidate him or any other person from, affording, in official or private capacity, another person or class of persons opportunity or protection to participate without discrimination on account of race, color, religion, or national origin in any benefit or activity described in section 1512.

SECTION 1514. INTERFERENCE WITH PERSONS AIDING OTHERS TO AVAIL THEMSELVES OF CIVIL RIGHTS.) A person is guilty of a class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force[or by economic coercion], intentionally injures, intimidates, or interferes with another because he is or has been, or in order to intimidate him or any other person from, lawfully aiding or encouraging other persons to participate in any benefit or activity described in Section 1511 or to participate without discrimination on account of race, color, religion, or national origin in any benefit or activity described in section 1512.

SECTION 1515. DISCRIMINATORY INTERFERENCE WITH SPEECH OR ASSEMBLY RELATED TO CIVIL RIGHTS ACTIVITIES.) A person is guilty of a class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force [or by economic coercion], intentionally injures, intimidates, or interferes with another because he is or has been, or in order to intimidate him or any other person from participating lawfully in speech or peaceful assembly opposing any denial of opportunity to participate in any benefit or activity described in section 1511 or to participate without discrimination on account of race, color, religion, or national origin in any benefit or activity described in section 1512.

SECTION 1521. UNLAWFUL ACTS UNDER COLOR OF LAW.) A public servant acting under color of law or a person acting under color of law is guilty of a class A misdemeanor if he intentionally:

1. Subjects another to unlawful violence or detention; or

2. Exceeds his authority in making an arrest or a search and seizure.

SECTION 1531. SAFEGUARDING ELECTIONS.) A person is guilty of a class A misdemeanor if, in connection with any local, primary, general, or special election, he:

((((a) makes or induces any false voting registration;)))

1. Offers, gives, or agrees to give a thing of pecuniary value to another as consideration for the recipient's voting or withholding his vote or voting for or against any candidate or issue or for such conduct by another;

2. Solicits, accepts, or agrees to accept a thing of pecuniary value as consideration for conduct prohibited under subsection 1; or

3. Otherwise obstructs or interferes with the lawful conduct of such election (((or registration therefor))).

SECTION 1551. STRIKEBREAKING.) A person is guilty of a class A misdemeanor if he intentionally, by force or threat of force, obstructs or interferes with:

1. Peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor; or

2. The exercise by employees of any of the rights of self-organization or collective bargaining.

The Committee Counsel stated Sections 1501 through 1551 generally cover offenses which tend to deprive persons of their constitutional or statutory rights. However, the individual sections in this grouping are of a wide range and cover offenses which are only related in a general sense. All of the offenses defined in these sections are classified as Class A misdemeanors.

Section 1501 provides that if a person conspires with another to oppress or intimidate any citizen from exercising, or because he has exercised, a right or privilege secured to him by the Constitution or laws of North Dakota, or of the United States, he is guilty of a Class A misdemeanor. In addition, a person is guilty of a Class A misdemeanor if he goes on another's premises or goes on the highway in disguise, accompanied by other persons, with the intention of preventing a person's free exercise of rights or privileges granted by the Constitution or laws of North Dakota or of the United States.

The Committee Counsel noted that Section 1501 is a conspiracy section, and an offender prosecuted under this section must have been acting in concert with another person. Section 1502, on the other hand, provides for the prosecution of a single person, who, acting alone, intentionally subjects another to deprivation of his constitutional or legal rights or privileges; or to different pains or penalties, following arrest or conviction, where that subjection is based on the color, race, or citizenship status of the victim.

Under Section 1502, the alleged offender must have been acting "under color of any law, statute, ordinance, regulation, or custom". Taken together, Sections 1501 and 1502 create a broadly stated prohibition against conspiracies or acts by single persons which attempt to deprive any other person within this State of his constitutional or legal rights and privileges.

The Committee Counsel noted that Section 243.1 of the Model Penal Code was the section which corresponded to Section 1502. Section 243.1 prohibits a person who is acting "in an official capacity" from denying or impeding another in the exercise of any legal right or privilege if the offender knows that his conduct is illegal. The policy question before the Committee is whether North Dakota should have provisions equivalent to Sections 1501 and 1502.

Section 1511 provides that a person commits a Class A misdemeanor if he intentionally, by force or threat thereof, or by economic coercion, intimidates or interferes with another person, because that person is about to or has: voted, campaigned as a candidate, acted as an election official in any type of election, participated in any program or activity administered by the State, operated in a contractual relationship with the government, applied for or received a governmental loan, or applied for employment or been employed by a governmental agency. A person commits the offenses defined in Section 1511 whether or not he acts "under color of law".

The Committee Counsel noted that in Line 3 of Section 1511 the words "or by economic coercion" have been inserted in brackets. These words were also bracketed by the federal drafters, and the retention of these words represents a policy choice for the Committee. The federal drafters point out that insertion of the economic coercion method of intimidation could give rise to many nuisance suits against landlords or employers.

The Committee Counsel noted that the phrase "under color of law" when applied to a misuse of power, or a prohibited action, means that the actor possessed his apparent authority by virtue of law, and his action took place because the victim believed that the actor was clothed with the authority of state law. Action "under color of law" also includes the misuse of the process of state courts.

The policy question raised by Section 1511 is whether such action should be prohibited by state law. Section 1511 has to be read in conjunction with Section 1512, which also prohibits intimidation or interference with the exercise of certain named "rights", where the intimidation or interference is based on the race, color, religion, or national origin of the "victim".

Section 1512 prohibits interference with or intimidation because the victim is: attempting to enroll in a public school, attempting to enjoy any facility which "serves the public", applying for or working at private employment, selling or purchasing a residential dwelling place, or traveling within this state (and using the facilities appurtenant to that travel).

The Committee Counsel noted that the word "sex" is not listed among those words used to define the basis for nondiscrimination. When the Committee had previously discussed a draft section dealing with nondiscrimination in the use of public facilities, the draft had included the word "sex" as a basis for nondiscrimination, and the word had remained in the draft without much discussion. The Committee Counsel felt that in order to generate discussion concerning the desirability of listing "sex" as a basis for nondiscrimination, it had been left out of the draft of Sections 1512, 1513, 1514, and 1515.

Subsection 2 of Section 1512 would specifically replace Section 12-22-30, which is the present North Dakota statute prohibiting discrimination in the use of public accommodations. Subsection 2 is arguably more restrictive than the present Section 12-22-30, since the latter section could be read as preventing discrimination in "private clubs".

The Committee Counsel noted that Section 1512 provides an exclusion from its coverage for establishments which provide transient lodging, but which do not contain more than five rooms and are used by the proprietor as his own residence. This exclusion gives rise to a policy question, which is whether such an exclusion is desirable in North Dakota.

The Committee Counsel noted that Subsections (b) and (c) have been deleted from the federal draft of Section 1512. The reason for the deletion is that those particular types of activities are also protected under Section 1511. Since a person who intimidates or interferes with the exercise of a protected activity can be prosecuted under Section 1511, regardless of his intent to discriminate, there seems to be no need to repeat those protected activities in Section 1512.

Sections 1513 through 1515 are corollary sections to Sections 1511 and 1512. There are no corresponding sections of Title 12 which they would replace. Section 1513 makes it a Class A misdemeanor for a person to intentionally intimidate or

interfere with another who is or will be affording still another person an opportunity to participate in an activity described in Section 1511; or to participate without discrimination in an activity described in Section 1512.

Section 1514 prevents interference by force or threat of force (or by economic coercion) with a person who is lawfully "aiding or encouraging" third persons to take advantage of the rights protected by Sections 1511 and 1512.

Section 1515 prohibits a person from interfering with another person who is "lawfully" participating in a peaceful assembly, or who is making a speech opposing "any denial of opportunity" to participate in or receive the benefits of any of the activities protected by Sections 1511 and 1512. The Committee Counsel noted that the use of the word "lawfully" in Line 6 of Section 1515 gives rise to a collateral policy question. The question is whether prosecutors should have the additional burden of proving that a "victim" was acting lawfully.

Section 1521 prohibits "official oppression" by making it a Class A misdemeanor for a "public servant" to intentionally subject another to unlawful violence or detention, or to exceed his authority in making an arrest, or in executing a search and seizure. This section would replace portions of Section 12-17-06, and Sections 12-17-07, and 12-17-09. It would also provide penal sanctions for the policy statements contained in Sections 12-47-26 and 29-06-10. Those legislative policy statements are: that all inmates of state penal facilities are to be treated uniformly with kindness (12-27-26); and that a person arrested is not to be subjected to unnecessary or unreasonable force, nor to greater restraint than is necessary for his detention (29-06-10).

Section 1531 makes it a Class A misdemeanor for a person to bribe a voter; or for a voter to solicit a bribe as consideration for voting a particular way, or for not voting. In addition, the section prohibits the obstruction of or interference with "the lawful conduct of . . . (an) election."

The federal comment on the latter provision indicates that it is to be considered a broad prohibition on various corrupt acts relating to elections, such as ballot box stuffing, tampering with voting machines, suppressing absentee ballots, or corruption of election officials. If the provision is read that broadly, then the entirety of Section 1531 would replace approximately 12 sections in Chapter 12-11 of the Century Code.

The Committee Counsel noted that the language relating to "voter registration" had been enclosed in triple parentheses in the staff redraft of Section 1531. In view of Section 40-21-10, which allows a city to require voter registration for municipal elections at the city's option, perhaps the triple parentheses should be deleted.

Section 1551 makes it a Class A misdemeanor for a person to intentionally, by force or threat of force, obstruct or interfere with peaceful picketing, or the exercise of an employee's right of organization or collective bargaining. This section would provide criminal sanctions for "rights" granted in Sections 34-08-05 (peaceful

picketing) and 34-12-02 (right of organization and collective bargaining). The policy question before the Committee is whether such a section is needed, or whether sanctions for violations of those "rights" should be left to administrative remedies, or civil actions.

Mr. Wolf stated that establishing criminal liability based on federal constitutional "rights" is a somewhat chancy proposition, since it is not always entirely clear what federal constitutional "rights" are. In addition, he noted that such criminal acts as assaults on other persons "to deprive them of their civil rights" can be prosecuted under statutes prohibiting assaults. To the extent that persons are deprived of their civil rights, or discriminated against because of their race, color, religion, or national origin, provision of a civil remedy might be the best answer.

Professor Lockney stated he thought that the Committee could do a much neater job of drafting state legislation to cover protection of civil rights than is represented by the helter-skelter recodification of existing federal law in the proposed F.C.C. For instance, he thought that Section 243.1 of the Model Penal Code could be used as a model statute covering offenses by public servants acting under color of law. Section 243.1 of the Model Penal Code reads as follows:

"Section 243.1. OFFICIAL OPPRESSION.

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he:

(a) Subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or

(b) Denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity."

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WOLF that the Committee draft be amended to substitute Section 243.1 of the Model Penal Code as Section 1501; to delete Section 1502; to redraft Section 1511 to deal only with criminal conduct affecting elections; to redraft Section 1512 so that it encompasses only language equivalent to Section 12-22-30, NDCC; and to delete Sections 1513, 1514, 1515,1521, and 1531.

Mr. Wolf suggested that the motion be amended so that the substance of Sections 1513, 1514, and 1515 be reflected in the redraft of Section 1512. This suggestion was

accepted by Professor Lockney as a part of his motion. Thereafter, PROFESSOR LOCKNEY'S MOTION, STATED ABOVE, CARRIED.

The Committee discussed the provisions of Section 1551 relating to prohibitions against certain rightful labor activities. Representative Hilleboe suggested that this was an area which was adequately covered by present North Dakota statutes and need not be included in the new criminal code. IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that Section 1551 be deleted.

The Chairman called on Mr. Weiald for a staff overview of Sections 1561 through 1564, which read as follows:

SECTION 1561. INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS - EAVESDROPPING.)

1. OFFENSE. A person is guilty of a class C felony if he:

a. Intentionally intercepts any wire or oral communication by use of any electronic, mechanical, or other device; or

b. Intentionally discloses to any other person or intentionally uses the contents of any wire or oral communication, knowing that the information was obtained through the interception of a wire or oral communication; or

c. A person is guilty of a class A misdemeanor if he secretly loiters about any building with intent to overhear discourse or conversation therein and to repeat or publish the same with intent to vex, annoy, or injure others.

2. DEFENSES. It is a defense to a prosecution under this section that:

a. The actor was authorized by law to intercept, disclose, or use, as the case may be, the wire or oral communication (((under [18 U.S.C. Sections 2516-19, 2511(2)(a) & (b)]))):

b. The actor was (i) a person acting under color of law to intercept a wire or oral communication and (ii) he was a party to the communication or one of the parties to the communication had given prior consent to such interception;

c. (i) The actor was a party to the communication or one of the parties to the communication had given prior consent to such interception and (ii) such communication was not intercepted for the purpose of committing a crime or other unlawful harm (((; or

(d) the provisions of [18 U.S.C. Section 2511 (3)] apply))).

SECTION 1562. TRAFFIC IN INTERCEPTING DEVICES.)

1. MANUFACTURE, DISTRIBUTION, OR POSSESSION. A person is guilty of a class C felony if, within this state, he manufactures, assembles, possesses, transports, or sells an electronic, mechanical, or other device, knowing that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

2. ADVERTISING. A person is guilty of a class A misdemeanor if he places, in a newspaper, magazine, handbill, or other publication published in this state, an advertisement of an electronic, mechanical, or other device, knowing that the design of such device renders it primarily useful for surreptitious interception of wire or oral communications, or knowing that such advertisement promotes the use of such device for surreptitious interception of wire or oral communications.

3. DEFENSES. It is a defense to a prosecution under this section that the actor was:

a. An officer, agent, or employee of, or a person under contract with, a communications common carrier, acting within the normal course of the business of the communications common carrier; or

b. A public servant acting in the course of his official duties or a person acting within the scope of a government contract made by a person acting in the course of his official duties.

SECTION 1563. DEFINITIONS FOR SECTIONS 1561 TO 1563.) In sections 1561 to 1563:

1. "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

2. "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

((((c) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of an electronic, mechanical, or other device;)))

3. "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of an electronic, mechanical, or other device, or by secretly overhearing the communication;

4. "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

a. Any telephone or telegraph instrument, equipment, or facility, or any component thereof, (A) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by subscriber or user in the ordinary course of its

business; or (B) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

b. A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

5. "Contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

6. "Communications common carrier" shall have the meaning prescribed for the term "common carrier" by section 8-07-01.

SECTION 1564. INTERCEPTION OF CORRESPONDENCE.)

1. OFFENSE. A person is guilty of a class A misdemeanor if, knowing that a letter, postal card, or other written private correspondence has not yet been delivered to the person to whom it is directed, and knowing that he does not have the consent of the sender or receiver of the correspondence, he:

a. Damages or destroys the correspondence, with intent to prevent its delivery;

b. Opens or reads sealed correspondence, with intent to discover its contents; or

c. Knowing that sealed correspondence has been opened or read in violation of subparagraph b, intentionally divulges its contents, in whole or in part, or a summary of any portion thereof.

Mr. Wefald noted that these sections deal primarily with interception of private communications, and the advertising, sale, and manufacture of interception devices. Present North Dakota law on this subject is not nearly as comprehensive as is the coverage of Sections 1561 through 1564.

Section 1561 prohibits the interception and disclosure of any wire or oral communication by use of any device. A violation of the section is classified as a Class C felony. Present North Dakota law which most closely corresponds to Section 1561 is Section 12-42-05, which punishes as a misdemeanor eavesdropping by secretly loitering, or using any device with intent to overhear conversation and to repeat or publish the contents of that conversation.

In addition, Section 8-10-07 punishes, as a felony, the reading or copying of any telephone or telegraph communication under the control of any other person or company. This section relates primarily to common carriers of messages.

Section 1564 punishes, as a Class A misdemeanor, the interception of written correspondence. This section would replace Section 12-41-02 which prohibits the opening and reading of correspondence not addressed to the actor. The Committee should also note Section 47-07-09, which provides that letters or private communications in writing belong to the person to whom they are addressed and delivered. This latter section should be retained.

Section 1563 contains several definitions relating to the subchapter, and it ought to be adopted, if the subchapter is adopted.

Section 1562 punishes as a Class C felony the manufacture and transportation of any device used primarily for intercepting communications. In addition, a person advertising such devices in North Dakota is guilty of a Class A misdemeanor. There is no corresponding provision in present North Dakota law. The staff believes that it may be useful to adopt this provision in order to help law enforcement authorities frustrate any attempt to violate the provisions of Section 1561.

Mr. Wefald noted that the only substantial staff addition to the subchapter appears in Section 1561, where Subparagraph c of Subsection 1 has been added to get at the traditional crime of "eavesdropping". The language of that subparagraph is essentially similar to the language of Section 12-42-05, prior to the last amendment to that section. The amendment to that section broadened it to include electronic eavesdropping, which is now covered by Subparagraph a of Subsection 1 of Section 1561.

Representative Murphy inquired as to the use of the words "secretly loiters" in Subparagraph c of Subsection 1 of Section 1561. Mr. Wefald explained that those words were used so as to ensure that a person prosecuted under that section was in fact hiding with intent to overhear conversation in such a manner that the conversants themselves did not know of his presence.

Professor Lockney questioned the limitation in Section 1562 to advertisements placed in newspapers published in this State. He noted that if it is a question of jurisdiction, the jurisdictional base would be that the advertiser resided in this State; therefore, the section should apply to newspapers published anywhere, but distributed in this State.

Mr. Webb stated that he had serious objections to Subsection 1 of Section 1562, since that subsection prohibited the manufacture of devices, which could not be proved, in themselves, to be "evil" or inherently unlawful. Mr. Wefald noted that the rationale behind the subsection was to prevent the lawful distribution of such devices, in order that law enforcement officials would not have such a difficult time preventing their use. Mr. Hill noted that it only prohibited manufacture of the devices where their use was "primarily" for the purpose of surreptitious interception of communications.

The Committee recessed for lunch at 12 noon and reconvened at 12:45 p.m., at which time it continued discussion of Sections 1561 through 1564.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE KIEFFER, AND CARRIED, with Mr. Webb and Senator Page voting in the negative, that the Committee adopt Sections 1561 through 1564 as presented. Mr. Webb indicated that he voted in the negative simply because of his opposition to Subsection 1 of Section 1562, not because he was opposed to the remainder of the sections.

The Chairman called on Mr. Wefald for an overview of Sections 1601 through 1603, which read as follows:

SECTION 1601. MURDER.) A person is guilty of murder, a class A felony, if he:

1. Intentionally or knowingly causes the death of another human being;
2. Causes the death of another human being under circumstances manifesting extreme indifference to the value of human life; or
3. Acting either alone or with one or more other persons, commits or attempts to commit treason, (((offenses defined in sections 1102 or 1103, espionage, sabotage,))) robbery, burglary, kidnapping, felonious restraint, arson, rape, aggravated involuntary sodomy, or escape and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subsection in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

a. Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the commission thereof; and

b. Was not armed with a firearm, destructive device, dangerous weapon, or other weapon which under the circumstances indicated a readiness to inflict serious bodily injury; and

c. Reasonably believed that no other participant was armed with such a weapon; and

d. Reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

Subsections 1 and 2 shall be inapplicable in the circumstances covered by subsection 2 of section 1602.

SECTION 1602. MANSLAUGHTER.) A person is guilty of manslaughter, a class B felony, if he:

1. Recklessly causes the death of another human being; or

2. Causes the death of another human being under circumstances which would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in his situation under the circumstances as he believes them to be. An emotional disturbance is excusable, within the meaning of this subsection, if it is occasioned by any provocation, event, or situation for which the offender was not culpably responsible.

SECTION 1603. NEGLIGENT HOMICIDE.) A person is guilty of a class C felony if he negligently causes the death of another human being.

Mr. Wefald stated that these three sections, together with certain defenses outlined in Chapters 5 and 6 of the proposed F.C.C., will replace all of Chapter 12-27 of the Century Code. Of the three sections, Section 1603 is the most similar to our present law. Section 1603 deals with negligent homicide.

The present sections of the Century Code dealing with negligent homicide provide that a person's driver's license shall be revoked upon a conviction of negligent homicide. This provision, relating to driver's licenses, would be more properly considered under Sections 3501 through 3505 which deal with the collateral consequences of conviction.

Section 1601 defines the offense of murder, and Section 1602 defines manslaughter. These two sections work a rather substantial change in present North Dakota law on homicide. The most significant change is that the distinction between first and second-degree murder is eliminated, as is the distinction between first and second-degree manslaughter. Under the draft of Sections 1601 and 1602 there would only be two offenses--murder and manslaughter. However, these two sections would be more flexible in that a person convicted of murder or manslaughter could receive a penalty anywhere within the range prescribed.

In addition, the Committee should note that the proposed F.C.C. penalty classification system would provide a maximum term of imprisonment of 30 years for murder, with the possibility of an extended sentence should those provisions be adopted. The present North Dakota maximum possible sentence for murder (except murder while under incarceration for murder) is life imprisonment. Thus, the F.C.C. penalty classification would result in a reduction of potential maximum penalties.

Subsection 3 of Section 1601 establishes a "felony-murder rule" which would specifically replace Section 12-27-08, Subsection 3, and Section 12-27-12. The F.C.C. provision is broader, in terms of the number of specific felonies which it includes in its listing of the types of felonies which give rise to the felony-murder rule.

Representative Murphy inquired about whether a person who was fleeing from a relatively petty offense, such as larceny, and accidentally killed another person, would be guilty of murder. Mr. Wefald pointed out that that would not be murder within the felony-murder rule of Section 1601.

Mr. Webb stated he felt that these three sections were a great improvement over current law. For instance, the present North Dakota negligent homicide statute is not a "negligent" homicide statute at all, but rather is a "reckless" homicide statute. As the culpability standard "negligently" is defined in the proposed F.C.C., Section 1603 becomes in effect a gross negligent homicide statute. Mr. Webb stated that he also liked the idea of abolishing the distinction between first and second-degree murder and manslaughter.

Mr. Wefald explained the defense provided by Subsection 3 of Section 1601 wherein a defendant is given an affirmative defense to a felony-murder charge if he: 1. Did not

commit the murder, or aid in its commission; 2. Was not armed; 3. Reasonably believed that his co-participants were not armed; and 4. Reasonably believed that this co-participants did not intend to engage in conduct likely to result in death or serious bodily injury. If the defendant can prove by a preponderance of the evidence that these four states of affairs existed, then he has raised a defense to a charge of "felony-murder".

Mr. Webb noted that if these three sections replace Chapter 12-27, that the "year and a day" rule (see Section 12-27-27) would be abolished. The Chairman stated he felt that it was a step forward to eliminating the distinction between the first and second-degree murder and manslaughter.

IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY SENATOR PAGE, AND CARRIED that the Committee adopt Sections 1601 through 1603 as presented.

The Chairman called on Mr. Wefald for an overview of Sections 1611 through 1619, which read as follows:

SECTION 1611. SIMPLE ASSAULT.)

1. OFFENSE. A person is guilty of an offense if he:

a. Willfully causes bodily injury to another human being; or

b. Negligently causes bodily injury to another human being by means of a firearm, destructive device, or other weapon, the use of which against a human being is likely to cause death or serious bodily injury.

2. GRADING. Simple assault is a class A misdemeanor, unless committed in an unarmed fight or scuffle entered into mutually, in which case it is a class B misdemeanor.

SECTION 1612. AGGRAVATED ASSAULT.) A person is guilty of a class C felony if he:

1. Willfully causes serious bodily injury to another human being;

2. Knowingly causes bodily injury to another human being with a dangerous weapon or other weapon, the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury;

3. Causes bodily injury to another human being while attempting to inflict serious bodily injury on any human being; or

4. Fires a firearm or hurls a destructive device against another human being.

SECTION 1613. RECKLESS ENDANGERMENT.) A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another. The offense is a class C felony if the circumstances manifest his extreme indifference to the value of human life. Otherwise it is a class A misdemeanor. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized.

SECTION 1614. TERRORIZING.) A person is guilty of a class C felony if he:

1. Threatens to commit any crime of violence or act dangerous to human life, or

2. Falsely informs another that a situation dangerous to human life or commission of a crime of violence is imminent knowing that the information is false,

with intent to keep another human being in sustained fear for his or another's safety or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious disruption or public inconvenience, or in reckless disregard of the risk of causing such terror, disruption, or inconvenience.

SECTION 1617. CRIMINAL COERCION.)

1. OFFENSE. A person is guilty of a class A misdemeanor if, with intent to compel another to engage in or refrain from conduct, he threatens to:

a. Commit any crime;

b. Accuse anyone of a crime;

c. Expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or deceased, to hatred, contempt, or ridicule, or to impair another's credit or business repute; or

d. Take or withhold official action as a public servant, or cause a public servant to take or withhold official action.

2. DEFENSE. It is an affirmative defense to a prosecution under this section that the actor believed, whether or not mistakenly: (a) that the primary purpose of the threat was to cause the other to conduct himself in his own best interest or (b) that a purpose of the threat was to cause the other to desist from misbehavior, engage in behavior from which he could not lawfully abstain, make good a wrong done by him, or refrain from taking any action or responsibility for which he was disqualified.

SECTION 1618. HARASSMENT.)

1. OFFENSE. A person is guilty of an offense if, with intent to frighten or harass another, he:

a. Communicates in writing or by telephone a threat to commit any violent felony;

b. Makes a telephone call anonymously or in offensively coarse language; or

c. Makes repeated telephone calls, whether or not a conversation ensues, with no purpose of legitimate communication.

2. GRADING. The offense is a class A misdemeanor if it is under subparagraph a of subsection 1. Otherwise it is a class B misdemeanor.

SECTION 1619. CONSENT AS A DEFENSE.)

1. WHEN A DEFENSE. When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is a defense if:

a. Neither the injury inflicted nor the injury threatened is such as to jeopardize life or seriously impair health;

b. The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport; or

c. The conduct and the injury are reasonably foreseeable hazards of an occupation or profession or of medical or scientific experimentation conducted by recognized methods, and the persons subjected to such conduct or injury, having been made aware of the risks involved, consent to the performance of the conduct or the infliction of the injury.

2. INEFFECTIVE CONSENT. Assent does not constitute consent, within the meaning of this section, if:

a. It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor;

b. It is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

c. It is induced by force, duress, or deception.

Mr. Wefald stated that this subchapter dealing with assault and other life endangering behavior or threats is substantially different from our present law, at least as it relates to assault and battery. Perhaps the most noticeable change would be that adoption of the subchapter would abolish the traditional concept of an assault, which is an offer to commit bodily harm. Instead, the word "assault" is used in the proposed F.C.C. to define what is now termed a "battery" in Title 12. Traditional assault would have to be punished under the proposed F.C.C. by a charge under Section 1001, dealing with attempts, or by a charge under Section 1616 dealing with menacing.

Sections 1611 and 1612 cover the offense of assault, with Section 1611 defining simple assault; and Section 1612 defining aggravated assault. Section 1611 deals with situations wherein the offender willfully causes "bodily injury" or negligently causes bodily injury by means of a firearm or other weapon. Simple assault is graded as a Class A misdemeanor, unless it is committed in a mutual unarmed combat, in which case it is a Class B misdemeanor.

Section 1612 punishes a person who causes serious bodily injury, or who knowingly causes bodily injury with a dangerous weapon, or who causes bodily injury to one human being while attempting to inflict serious bodily injury upon any human being, or who fires or hurls a firearm or other weapon against another human being.

It should be noted from the definitions of assault and aggravated assault that Section 1611 and Section 1612 represent a substantial difference from the present definitions of "battery". Under Sections 1611 and 1612, "bodily injury" or "serious bodily injury" must result before the offender is guilty of an assault. Under the present definition of "battery", it is sufficient that the offender simply "makes contact" with the person he is charged with battering. In other words, the victim does not have to receive any bodily injury before the offender is guilty of a battery under present North Dakota law. Under present law, a person who makes a homosexual advance, or a person who pushes another against a wall and ruins his suit, without causing the victim bodily injury, would nevertheless be guilty of a battery. These types of conduct would probably not be covered under the proposed F.C.C.

Sections 1613, 1614, 1616, and 1618 deal with particular types of actions which threaten human safety, and would probably be considered valuable parts of a new criminal code.

The Committee discussed the fact that the proposed definitions of assault would omit criminal liability for a traditional battery, which only included unauthorized touching. It seemed to be the consensus of the Committee that such minor offenses should be left to redress by civil action.

Mr. Webb pointed out that the proposed draft of Sections 1611 and 1612 did not provide a separate penalty for assaults on peace officers, as does present North Dakota law. Mr. Webb stated he felt that such a provision should be contained in the proposed criminal code.

Representative Kieffer asked whether a provision that assault on a peace officer on duty is a higher class of offense doesn't cause problems for off-duty peace officers. That is, if a person intended to assault a peace officer, he could simply wait until that peace officer was off duty.

The Committee Counsel noted that if special grading is to be provided for the offense of assault on a peace officer, it could be accomplished by simply providing for a double grading in Subsection 2 of Section 1611, rather than by drafting an entirely new section dealing with assaults on peace officers.

IT WAS MOVED BY MR. WEBB, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED, with Representative Kieffer voting "no", that Subsection 2 of Section 1611 be amended to provide a special grading for assault on a peace officer when he is on duty, and the perpetrator of the assault knows that the person assaulted is a peace officer. That type of an assault is to be graded as a Class C felony.

Professor Lockney stated that he was bothered by the defenses provided in Subsection 2 of Section 1617 dealing with criminal coercion. He especially questioned the defense based on the fact that the threat was designed to cause another to make good a wrong done by him.

Representative Hilleboe noted that Section 1617 was very similar to Section 1366. The Committee Counsel noted that Section 1366 covered threats aimed at public officials, and classified the offense as a Class C felony, whereas Section 1617 aimed at threats intended to compel anyone to take or refrain from taking certain conduct.

Representative Hilleboe also questioned the use of the words "crime of violence" in Line 2 of Section 1614; and "violent felony" in Line 5 of Section 1618. He stated that if such terminology is to be used, it should be defined somewhere in the criminal code. Mr. Hill stated he felt that those terms were pretty well understood. The Committee Counsel noted that Section 109, dealing with general definitions, had not been finalized by the Committee, and could well contain definitions to encompass Representative Hilleboe's objections. Professor Lockney stated that the Committee minutes should reflect the fact that the Committee had difficulty in comprehending the precise definition of the phrases "crime of violence" and "violent felony".

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WEBB, AND CARRIED that the Committee adopt Sections 1611 through 1619 as amended.

The Chairman called on the Committee Counsel for an overview of Sections 1631 through 1639, which read as follows:

SECTION 1631. KIDNAPPING.)

1. OFFENSE. A person is guilty of kidnapping if he abducts another or, having abducted another, continues to restrain him, with intent to do the following:

a. Hold him for ransom or reward;

b. Use him as a shield or hostage;

c. Hold him in a condition of involuntary servitude;

d. Terrorize him or a third person;

e. Commit a felony or attempt to commit a felony; or

f. Interfere with the performance of any government or political function.

2. GRADING. Kidnapping is a class A felony unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a class B felony.

SECTION 1632. FELONIOUS RESTRAINT.) A person is guilty of a class C felony, if he:

1. Knowingly abducts another;

2. Knowingly restrains another under terrorizing circumstances or under circumstances exposing him to risk of serious bodily injury; or

3. Restrains another with intent to hold him in a condition of involuntary servitude.

SECTION 1633. UNLAWFUL IMPRISONMENT.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he knowingly subjects another to unlawful restraint.

2. DEFENSE. It is a defense to a prosecution under this section that the actor is a parent or person in equivalent relation to the person restrained and that the person restrained is (((a child))) less than eighteen years old.

SECTION 1635. USURPING CONTROL OF AIRCRAFT.) A person is guilty of a class A felony if, by force or threat of force, he usurps control of an aircraft in flight <u>within this state</u>.

SECTION 1639. DEFINITIONS FOR SECTIONS 1631 TO 1639). In sections 1631 to 1639:

1. "Restrain" means to restrict the movement of a person unlawfully and without consent, so as to interfere substantially with his liberty by removing him from his place of residence or business, by moving him a substantial distance from one place to another, or by confining him for a substantial period.

Restraint is "without consent" if it is accomplished by (a) force, intimidation or deception; or (b) any means, including acquiescence of the victim, if he is a child less than fourteen years old or an incompetent person, and if the parent, guardian, or person or institution responsible for the general supervision of his welfare has not acquiesced in the movement or confinement;

2. "Abduct" means to restrain a person with intent to prevent his liberation by (a) secreting or holding him in a place where he is not likely to be found; or (b) endangering or threatening to endanger the safety of any human being.

The Committee Counsel noted that Sections 1631, 1632, and 1633 cover the offenses of kidnapping, felonious restraint, and false imprisonment. Section 1635 defines the offense of "skyjacking", and Section 1639 provides definitions applicable to the preceding four sections.

Section 1631 would replace Section 12-42-01, which is the present North Dakota prohibition against kidnapping. Section 1631 is probably more restrictive than current North Dakota law, but, on the other hand, the potential maximum penalty is higher in cases where the victim is not voluntarily released alive prior to trial.

Section 1632 defines, as a Class C felony, an offense of a lesser degree than kidnapping which is denominated "felonious restraint". Felonious restraint consists of the knowing abduction of another; the knowing restraint of another under circumstances which expose the other to risk of serious bodily injury, or under terrorizing circumstances; or the restraint of another with the intent to hold him in a condition of involuntary servitude. North Dakota has no statute which would prohibit this kind of action specifically; thus, in effect, Section 1632 would be creating a new criminal offense.

Section 1633 defines the crime of false imprisonment and classifies it as a Class A misdemeanor. False imprisonment is the "knowing" subjection of another to unlawful restraint. The section provides a defense if the alleged offender is a parent, or person in an equivalent relationship to the restrained person, and the restrained person is under 18 years old. Section 1633 would replace that portion of Section 12-17-06 which deals with unlawful arrest or unlawful detention of a person. The penalties provided are essentially similar, since the maximum term of imprisonment under Section 1631 or Section 12-17-06 is one year.

Section 1635 defines the Class A felony of usurping control of an aircraft flying within this State by force or threat of force. North Dakota presently has no provision prohibiting "skyjacking". Thus, the section raises a policy question as to whether North Dakota needs such a provision.

The Committee discussed the need for Section 1632 dealing with felonious restraint, and it was essentially determined that felonious restraint, in many instances, was simply a lesser-included offense to kidnapping.

The Committee discussed the need for Section 1635 dealing with "skyjacking", and noted the possibility that, except for intrastate flights of civil aircraft, this field was preempted by federal law. IT WAS MOVED BY SENATOR PAGE, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that Section 1635 be deleted from the draft.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that Sections 1631 through 1639, as amended, be adopted by the Committee.

The Committee Counsel noted that if the Committee members desired to read ahead for the next meeting, they could read Sections 1641 through 1861 of the Final Report of the National Commission.

The Committee discussed a time for the next meeting, and it was decided to tentatively set the next meeting date for June 20-21, 1972, with the meeting site to be Grand Forks, North Dakota. It was noted that this meeting would immediately precede the State Bar Convention, also to be held in Grand Forks.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the Committee adjourn, subject to the call of the Chair. The Committee adjourned at 3:40 p.m. on Friday, May 12, 1972.

John A. Graham
Assistant Director

SECTION 304. IGNORANCE OR MISTAKE NEGATING CULPABILITY.) A person does not commit an offense if when he engages in conduct he is ignorant or mistaken about a matter of fact or law and the ignorance or mistake negates the kind of culpability required for commission of the offense.

SECTION 503. MENTAL DISEASE OR DEFECT.) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. Lack of criminal responsibility under this section is a defense.

SECTION 609. MISTAKE OF LAW.) Except as otherwise expressly provided, a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:

1. A statute or other enactment;

2. A judicial decision, opinion, order, or judgment;

3. An administrative order or grant of permission; or

4. An official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the crime.

SECTION 610. DURESS.)

1. AFFIRMATIVE DEFENSE. In a prosecution for any offense it is an affirmative defense that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another.

In a prosecution for an offense which does not constitute a felony, it is an affirmative defense that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force. Compulsion within the meaning of this section exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.

2. DEFENSE PRECLUDED. The defense defined in this section is not available to a person who, by voluntarily entering into a criminal enterprise, or otherwise, willfully placed himself in a situation in which it was foreseeable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

SECTION 1341. CRIMINAL CONTEMPT.)

1. POWER OF COURT. A court of this state has power to punish for contempt of its authority only for the following offenses:

a. Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

b. Misbehavior of any of its officers in their official transactions;

c. Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

2. STATUS AS OFFENSE; GRADING. Except as otherwise provided, a criminal contempt proceeding under this section shall be deemed a prosecution for an offense for the purposes of part A (general provisions) and part C (sentencing) of this title. Criminal contempt shall be treated as a class B misdemeanor, except that the defendant may be sentenced to a term of imprisonment of no more than six months,

and, if the criminal contempt is disobedience of or resistance to a court's lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, the defendant may be sentenced to pay a fine in any amount deemed just by the court.

3. SUCCESSIVE PROSECUTIONS. A criminal contempt proceeding under this section is not a bar to subsequent prosecution for a specific offense if the court certifies in the judgment of conviction of criminal contempt, or the order terminating the proceeding without acquittal or dismissal, that a summary criminal contempt proceeding was necessary to prevent repetition of misbehavior disruptive of an ongoing proceeding and that subsequent prosecution as a specific offense is warranted. In a subsequent prosecution, the defendant shall receive credit for all time spent in custody and any fine paid by him pursuant to the criminal contempt proceeding.

4. CIVIL CONTEMPT PRESERVED. This section shall not be construed to deprive a court of its power, by civil contempt proceedings, to compel compliance with its lawful writ, process, order, rule, decree, or command, or to compensate a complainant for losses sustained by reason of disobedience or resistance thereto, in accordance with the prevailing usages of law and equity, including the power of detention.

SECTION 1342. FAILURE TO APPEAR AS WITNESS, TO PRODUCE INFORMATION, OR TO BE SWORN.)

1. FAILURE TO APPEAR OR TO PRODUCE. A person who has been lawfully ordered to appear at a specified time and place to testify or to produce information in an official proceeding is guilty of a class A misdemeanor if, without lawful privilege, he fails to appear or to produce the information at that time and place.

2. REFUSAL TO BE SWORN. A person attending an official proceeding is guilty of a class A misdemeanor if, without lawful privilege, he fails to comply with a lawful order:

a. To occupy or remain at the designated place from which he is to testify as a witness in such proceeding; or

b. To be sworn or to make equivalent affirmation as a witness in such proceeding.

3. DEFENSES. It is a defense to a prosecution under this section that the defendant:

a. Was prevented from appearing at the specified time and place or unable to produce the information because of circumstances to the creation of which he did not contribute in reckless disregard of the requirement to appear or to produce; or

b. Complied with the order before his failure to do so substantially affected the proceeding.

4. DEFINITIONS. In this section, and in section 1343:

a. "Official proceeding" means:

(1) An official proceeding before a judge or court of this state, a magistrate, or a grand jury;

(2) An official proceeding before the legislative assembly, or one of its session or interim committees;

(3) An official proceeding in which, pursuant to lawful authority, a court orders attendance or the production of information;

(4) An official proceeding before an authorized agency;

(5) An official proceeding which otherwise is made expressly subject to this section;

b. "Authorized agency" means an agency authorized by statute to issue subpoenas or similar process supported by the sanctions of this section;

c. "Information" means a book, paper, document, record, or other tangible object.

SECTION 1343. REFUSAL TO TESTIFY.)

1. OFFENSE. A person is guilty of a class A misdemeanor if, without lawful privilege, he refuses:

a. To answer a question pertinent to the subject under inquiry in an official proceeding before the legislative assembly, or one of its session or interim committees, and continues in such a refusal after the presiding officer directs him to answer, and advises him that his continuing refusal may make him subject to criminal prosecution; or

b. To answer a question in any other official proceeding and continues in such refusal after a court or judge directs or orders him to answer and advises him that his continuing refusal may make him subject to criminal prosecution.

2. DEFENSE. It is a defense to a prosecution under this section that the defendant complied with the direction or order before his refusal to do so substantially affected the proceeding.

SECTION 1344. HINDERING PROCEEDINGS BY DISORDERLY CONDUCT.)

1. INTENTIONAL HINDERING. A person is guilty of a class A misdemeanor if he intentionally hinders an official proceeding by noise or violent or tumultuous behavior or disturbance.

2. RECKLESS HINDERING. A person is guilty of an offense if he recklessly hinders an official proceeding by noise or violent or tumultuous behavior or disturbance. The offense is a class B misdemeanor if it continues after explicit official request to desist. Otherwise it is an infraction.

SECTION 1345. DISOBEDIENCE OF JUDICIAL ORDER.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he disobeys or resists a lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, of a court of this state.

2. FINES. Notwithstanding the limitations of section 3301, the defendant may be sentenced to pay a fine in any amount deemed just by the court.

SECTION 1346. SOLICITING OBSTRUCTION OF PROCEEDINGS.) A person is guilty of a class A misdemeanor if he solicits another to commit an offense defined in sections 1342, 1343, 1344, or 1345.

SECTION 1351. PERJURY.)

1. OFFENSE. A person is guilty of perjury, a class C felony, if, in an official proceeding, he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a false statement previously made, when the statement is material and he does not believe it to be true.

2. PROOF. Commission of perjury need not be proved by any particular number of witnesses or by documentary or other types of evidence.

3. INCONSISTENT STATEMENTS. Where in the course of one or more official proceedings, the defendant made a statement under oath or equivalent affirmation inconsistent with another statement made by him under oath or equivalent affirmation to the degree that one of them is necessarily false, both having been made within the

period of the statute of limitations, the prosecution may set forth the statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant to be true. Proof that the defendant made such statements shall constitute a prima facie case that one or the other of the statements was false; but in the absence of sufficient proof of which statement was false, the defendant may be convicted under this section only if each of such statements was material to the official proceeding in which it was made.

SECTION 1352. FALSE STATEMENTS.)

1. FALSE SWEARING IN OFFICIAL PROCEEDINGS. A person is guilty of a class A misdemeanor if, in an official proceeding, he makes a false statement, whether or not material, under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, if he does not believe the statement to be true.

2. OTHER FALSITY IN GOVERNMENTAL MATTERS. A person is guilty of a class A misdemeanor if, in a governmental matter, he:

a. Makes a false written statement, when the statement is material and he does not believe it to be true;

b. Intentionally creates a false impression in a written application for a pecuniary or other benefit, by omitting information necessary to prevent a material statement therein from being misleading;

c. Submits or invites reliance on any material writing which he knows to be forged, altered, or otherwise lacking in authenticity;

d. Submits or invites reliance on any sample, specimen, map, boundary-mark or other objection which he knows to be false in a material respect; or

e. Uses a trick, scheme, or device which he knows to be misleading in a material respect.

3. STATEMENT IN CRIMINAL INVESTIGATION. This section does not apply to information given during the course of an investigation into possible commission of an offense unless the information is given in an official proceeding or the declarant is otherwise under a legal duty to give the information. Inapplicability under this subsection is a defense.

4. DEFINITION. A matter is a "governmental matter" if it is within the jurisdiction of a government office or agency, or of an office, agency, or other establishment in the legislative or the judicial branch of government.

SECTION 1354. FALSE REPORTS TO LAW ENFORCEMENT OFFICERS OR SECURITY OFFICIALS.) A person is guilty of a class A misdemeanor if he:

1. Gives false information to a law enforcement officer with intent to falsely implicate another; or

2. Falsely reports to a law enforcement officer or other security official the occurrence of a crime of violence or other incident calling for an emergency response when he knows that the incident did not occur. "Security official" means (((fireman or other))) a public servant responsible for averting or dealing with emergencies involving public safety.

SECTION 1355. GENERAL PROVISIONS FOR CHAPTER 13.)

1. MATERIALITY. Falsification is material under sections 1351, 1352, and 1354, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the official proceeding or the disposition of the matter in which the statement is made. Whether a falsification is material in a given factual situation is a question of law. It is no defense that the declarant mistakenly believed the falsification to be immaterial.

2. IRREGULARITIES NO DEFENSE. It is no defense to a prosecution under sections 1351 or 1352 that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at a time when the actor represents it as being so verified shall be deemed to have been duly sworn or affirmed.

3. DEFENSE OF RETRACTION. It is a defense to a prosecution under sections 1351, 1352, or 1354 that the actor retracted the falsification in the course of the official proceeding or matter in which it was made, if in fact he did so before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding or the matter.

4. DEFINITION OF "STATEMENT". In section 1351 and 1352, "statement" means any representation, but includes a representation of opinion, belief, or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

SECTION 1356. TAMPERING WITH PUBLIC RECORDS.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he:

a. Knowingly makes a false entry in or false alteration of a government record; or

b. Knowingly, without lawful authority, destroys, conceals, removes, or otherwise impairs the verity or availability of a government record.

2. DEFINITION. In this section "government record" means:

a. Any record, document, or thing belonging to, or received or kept by the government for information or record;

b. Any other record, document, or thing required to be kept by law, pursuant, in fact, to a statute which expressly invokes the sanctions of this section.

SECTION 1361. BRIBERY.)

1. OFFENSE. A person is guilty of bribery, a class C felony, if he knowingly offers, gives, or agrees to give to another, or solicits, accepts, or agrees to accept from another, a thing of value as consideration for:

a. The recipient's official action as a public servant; or

b. The recipient's violation of a known legal duty as a public servant.

2. DEFENSE PRECLUDED. It is no defense to a prosecution under this section that a recipient was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

3. PRIMA FACIE CASE. A prima facie case is established under this section upon proof that the actor knew that a thing of pecuniary value was offered, given, or agreed to be given by, or solicited, accepted, or agreed to be accepted from, a person having an interest in an imminent or pending (a) examination, investigation, arrest, or judicial or administrative proceeding, or (b) bid, contract, claim, or application, and that interest could be affected by the recipient's performance or nonperformance of his official action or violation of his known legal duty as a public servant.

SECTION 1363. UNLAWFUL COMPENSATION FOR ASSISTANCE IN GOVERNMENT MATTERS.)

1. RECEIVING UNLAWFUL COMPENSATION. A public servant is guilty of a class A misdemeanor if he solicits, accepts, or agrees to accept a thing of pecuniary value as compensation for advice or other assistance in preparing or promoting a bill, contract, claim, or other matter which is or is likely to be subject to his official action.

2. GIVING UNLAWFUL COMPENSATION. A person is guilty of a class A misdemeanor if he knowingly offers, gives, or agrees to give a thing of pecuniary value to a public servant, receipt of which is prohibited by this section.

SECTION 1364. TRADING IN PUBLIC OFFICE AND POLITICAL ENDORSEMENT.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he solicits, accepts, or agrees to accept, or offers, gives, or agrees to give, a thing of pecuniary value as consideration for approval or disapproval by a public servant or party official of a person for:

a. Appointment, employment, advancement, or retention as a public servant; or

b. Designation or nomination as a candidate for elective office.

2. DEFINITIONS. In this section:

a. "Approval" includes recommendation, failure to disapprove, or any other manifestation of favor or acquiescence;

b. "Disapproval" includes failure to approve, or any other manifestation of disfavor or nonacquiescence;

c. "Party official" means a person who holds a position or office in a political party, whether by election, appointment, or otherwise.

SECTION 1365. TRADING IN SPECIAL INFLUENCE.) A person is guilty of a class A misdemeanor if he knowingly offers, gives, or agrees to give, or solicits, accepts, or agrees to accept a thing of pecuniary value for exerting, or procuring another to exert, special influence upon a public servant with respect to his legal duty or official action as a public servant. "Special influence" means power to influence through kinship or by reason of position as a public servant or party official, as defined in section 1364.

SECTION 1366. THREATENING PUBLIC SERVANTS.)

1. THREATS RELATING TO OFFICIAL PROCEEDINGS OR TO SECURE BREACH OF DUTY. A person is guilty of a class C felony if he threatens harm to another with intent to influence his official action as a public servant in a pending or prospective judicial or administrative proceeding held before him, or with intent to influence him to violate his duty as a public servant.

2. OTHER THREATS. A person is guilty of a class C felony if, with intent to influence another's official action as a public servant, he threatens:

a. To commit any crime or to do anything unlawful;

b. To accuse anyone of a crime; or

c. To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or deceased, to hatred, contempt, or ridicule, or to impair another's credit or business repute.

3. DEFENSE PRECLUDED. It is no defense to a prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

SECTION 1369. DEFINITIONS FOR SECTIONS 1361 TO 1368.) In sections 1361 through 1368, "thing of value" and "thing of pecuniary value" does not include (a) salary, fees, and other compensation paid by the government in consideration for which the official action or legal duty is performed, or (b) concurrence in official action in the course of legitimate compromise among public servants, except as provided in [section 12-09-11, or its equivalent].

SECTION 1371. DISCLOSURE OF CONFIDENTIAL INFORMATION PROVIDED TO GOVERNMENT.) A person is guilty of a class A misdemeanor if, in knowing violation of a statutory duty imposed on him as a public servant, he discloses any confidential information which he has acquired as a public servant. "Confidential information" means information made available to the government under a governmental assurance of confidence as provided by statute.

SECTION 1372. SPECULATING OR WAGERING ON OFFICIAL ACTION OR INFORMATION.)

1. SPECULATING DURING AND AFTER EMPLOYMENT. A person is guilty of a class A misdemeanor if during employment as a public servant, or within one year thereafter, in contemplation of official action by himself as a public servant or by a government agency with which he is or has been associated as a public servant, or in reliance on information to which he has or had access only in his capacity as a public servant, he:

a. Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action;

b. Speculates or wagers on the basis of such information or official action; or

c. Aids another to do any of the foregoing.

2. TAKING OFFICIAL ACTION AFTER SPECULATION. A person is guilty of a class A misdemeanor if as a public servant he takes official action which is likely to benefit him as a result of an acquisition of a pecuniary interest in any property, transaction, or enterprise, or of a speculation or wager, which he made, or caused or aided another to make, in contemplation of such official action.

SECTION 1381. IMPERSONATING OFFICIALS.)

1. OFFENSE. A person is guilty of an offense if he falsely pretends to be:

a. A public servant and acts as if to exercise the authority of such public servant; or

b. A public servant or a former public servant and thereby obtains a thing of value.

2. DEFENSE PRECLUDED. It is no defense to prosecution under this section that the pretended capacity did not exist or the pretended authority could not legally or otherwise have been exercised or conferred.

3. GRADING. An offense under subsection 1b is a class A misdemeanor. An offense under subsection 1a is a class B misdemeanor.

SECTION 1501. OFFICIAL OPPRESSION.) A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he:

1. Subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or

2. Denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity.

SECTION 1511. (To be redrafted, see pages 34 and 35 of minutes.)

SECTION 1512. (To be redrafted, see pages 35 and 36 of minutes.)

SECTION 1561. INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS - EAVESDROPPING.)

1. OFFENSE. A person is guilty of a class C felony if he:

a. Intentionally intercepts any wire or oral communication by use of any electronic, mechanical, or other device: or

b. Intentionally discloses to any other person or intentionally uses the contents of any wire or oral communication, knowing that the information was obtained through the interception of a wire or oral communication; or

2. A person is guilty of a class A misdemeanor if he secretly loiters about any building with intent to overhear discourse or conversation therein and to repeat or publish the same with intent to vex, annoy, or injure others.

3. DEFENSES. It is a defense to a prosecution under subsection 1 that:

a. The actor was authorized by law to intercept, disclose, or use. as the case may be, the wire or oral communication (((under [18 U.S.C. Sections 2516-19, 2511(2)(a) & (b)]));

b. The actor was (i) a person acting under color of law to intercept a wire or oral communication and (ii) he was a party to the communication or one of the parties to the communication had given prior consent to such interception;

c. (i) The actor was a party to the communication or one of the parties to the communication had given prior consent to such interception and (ii) such communication was not intercepted for the purpose of committing a crime or other unlawful harm .

SECTION 1562. TRAFFIC IN INTERCEPTING DEVICES.)

1. MANUFACTURE, DISTRIBUTION, OR POSSESSION. A person is guilty of a class C felony if, within this state, he manufactures, assembles, possesses,

transports, or sells an electronic, mechanical, or other device, knowing that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

2. ADVERTISING. A person is guilty of a class A misdemeanor if he places, in a newspaper, magazine, handbill, or other publication published in this state, an advertisement of an electronic, mechanical, or other device, knowing that the design of such device renders it primarily useful for surreptitious interception of wire or oral communications, or knowing that such advertisement promotes the use of such device for surreptitious interception of wire or oral communications.

3. DEFENSES. It is a defense to a prosecution under this section that the actor was:

a. An officer, agent, or employee of, or a person under contract with, a communications common carrier, acting within the normal course of the business of the communications common carrier; or

b. A public servant acting in the course of his official duties or a person acting within the scope of a government contract made by a person acting in the course of his official duties.

SECTION 1563. DEFINITIONS FOR SECTIONS 1561 TO 1563.) In sections 1561 to 1563:

1. "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

2. "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

3. "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of an electronic, mechanical, or other device, or by secretly overhearing the communication;

4. "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

a. Any telephone or telegraph instrument, equipment, or facility, or any component thereof, (A) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by subscriber or user in the ordinary course of its business; or (B) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

b. A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

5. "Contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

6. "Communications common carrier" shall have the meaning prescribed for the term "common carrier" by section 8-07-01.

SECTION 1564. INTERCEPTION OF CORRESPONDENCE.)

1. OFFENSE. A person is guilty of a class A misdemeanor if, knowing that a letter, postal card, or other written private correspondence has not yet been delivered

to the person to whom it is directed, and knowing that he does not have the consent of the sender or receiver of the correspondence, he:

a. Damages or destroys the correspondence, with intent to prevent its delivery;

b. Opens or reads sealed correspondence, with intent to discover its contents; or

c. Knowing that sealed correspondence has been opened or read in violation of subparagraph b, intentionally divulges its contents, in whole or in part, or a summary of any portion thereof.

SECTION 1601. MURDER.) A person is guilty of murder, a class A felony, if he:

1. Intentionally or knowingly causes the death of another human being;

2. Causes the death of another human being under circumstances manifesting extreme indifference to the value of human life; or

3. Acting either alone or with one or more other persons, commits or attempts to commit treason, robbery, burglary, kidnapping, felonious restraint, arson, rape, aggravated involuntary sodomy, or escape and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subsection in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

a. Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the commission thereof; and

b. Was not armed with a firearm, destructive device, dangerous weapon, or other weapon which under the circumstances indicated a readiness to inflict serious bodily injury; and

c. Reasonably believed that no other participant was armed with such a weapon; and

d. Reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

Subsections 1 and 2 shall be inapplicable in the circumstances covered by subsection 2 of section 1602.

SECTION 1602. MANSLAUGHTER.) A person is guilty of manslaughter, a class B felony, if he:

1. Recklessly causes the death of another human being; or

2. Causes the death of another human being under circumstances which would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in his situation under the circumstances as he believes them to be. An emotional disturbance is excusable, within the meaning of this subsection, if it is occasioned by any provocation, event, or situation for which the offender was not culpably responsible.

SECTION 1603. NEGLIGENT HOMICIDE.) A person is guilty of a class C felony if he negligently causes the death of another human being.

SECTION 1611. SIMPLE ASSAULT.)

1. OFFENSE. A person is guilty of an offense if he:

a. Willfully causes bodily injury to another human being; or

b. Negligently causes bodily injury to another human being by means of a firearm, destructive device, or other weapon, the use of which against a human being is likely to cause death or serious bodily injury.

2. GRADING. (To be redrafted, see page 51 of the minutes.)

SECTION 1612. AGGRAVATED ASSAULT.) A person is guilty of a class C felony if he:

1. Willfully causes serious bodily injury to another human being;

2. Knowingly causes bodily injury to another human being with a dangerous weapon or other weapon, the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury;

3. Causes bodily injury to another human being while attempting to inflict serious bodily injury on any human being; or

4. Fires a firearm or hurls a destructive device against another human being.

SECTION 1613. RECKLESS ENDANGERMENT.) A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another. The offense is a class C felony if the circumstances manifest his extreme indifference to the value of human life. Otherwise it is a class A misdemeanor. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized.

SECTION 1614. TERRORIZING.) A person is guilty of a class C felony if he:

1. Threatens to commit any crime of violence or act dangerous to human life, or

2. Falsely informs another that a situation dangerous to human life or commission of a crime of violence is imminent knowing that the information is false.

with intent to keep another human being in sustained fear for his or another's safety or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious disruption or public inconvenience, or in reckless disregard of the risk of causing such terror, disruption, or inconvenience.

SECTION 1616. MENACING.) A person is guilty of a class A misdemeanor if he knowingly places or attempts to place another human being in fear by menacing him with imminent serious bodily injury.

SECTION 1617. CRIMINAL COERCION.)

1. OFFENSE. A person is guilty of a class A misdemeanor if, with intent to compel another to engage in or refrain from conduct, he threatens to:

a. Commit any crime;

b. Accuse anyone of a crime;

c. Expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or deceased, to hatred, contempt, or ridicule, or to impair another's credit or business repute; or

d. Take or withhold official action as a public servant, or cause a public servant to take or withhold official action.

2. DEFENSE. It is an affirmative defense to a prosecution under this section that the actor believed, whether or not mistakenly: (a) that the primary purpose of the threat was to cause the other to conduct himself in his own best interest or (b) that a purpose of the threat was to cause the other to desist from misbehavior, engage in behavior from which he could not lawfully abstain, make good a wrong done by him, or refrain from taking any action or responsibility for which he was disqualified.

SECTION 1618. HARASSMENT.)

1. OFFENSE. A person is guilty of an offense if, with intent to frighten or harass another, he:

a. Communicates in writing or by telephone a threat to commit any violent felony;

b. Makes a telephone call anonymously or in offensively coarse language; or

c. Makes repeated telephone calls, whether or not a conversation ensues, with no purpose of legitimate communication.

2. GRADING. The offense is a class A misdemeanor if it is under subparagraph a of subsection 1. Otherwise it is a class B misdemeanor.

SECTION 1619. CONSENT AS A DEFENSE.)

1. WHEN A DEFENSE. When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is a defense if:

a. Neither the injury inflicted nor the injury threatened is such as to jeopardize life or seriously impair health;

b. The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport; or

c. The conduct and the injury are reasonably foreseeable hazards of an occupation or profession or of medical or scientific experimentation conducted by recognized methods, and the persons subjected to such conduct or injury, having been made aware of the risks involved, consent to the performance of the conduct or the infliction of the injury.

2. INEFFECTIVE CONSENT. Assent does not constitute consent, within the meaning of this section, if:

a. It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor;

b. It is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

c. It is induced by force, duress, or deception.

SECTION 1631. KIDNAPPING.)

1. OFFENSES. A person is guilty of kidnapping if he abducts another or, having abducted another, continues to restrain him, with intent to do the following:

a. Hold him for ransom or reward;

b. Use him as a shield or hostage;

c. Hold him in a condition of involuntary servitude;

d. Terrorize him or a third person;

e. Commit a felony or attempt to commit a felony; or

f. Interfere with the performance of any government or political function.

2. GRADING. Kidnapping is a class A felony unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a class B felony.

SECTION 1632. FELONIOUS RESTRAINT.) A person is guilty of a class C felony, if he:

1. Knowingly abducts another;

2. Knowingly restrains another under terrorizing circumstances or under circumstances exposing him to risk of serious bodily injury: or

3. Restrains another with intent to hold him in a condition of involuntary servitude.

SECTION 1633. UNLAWFUL IMPRISONMENT.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he knowingly subjects another to unlawful restraint.

2. DEFENSE. It is a defense to a prosecution under this section that the actor is a parent or person in equivalent relation to the person restrained and that the person restrained is (((a child))) less than eighteen years old.

SECTION 1639. DEFINITIONS FOR SECTIONS 1631 TO 1639). In sections 1631 to 1639:

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

2. "Abduct" means to restrain a person with intent to prevent his liberation by (a) secreting or holding him in a place where he is not likely to be found; or (b) endangering or threatening to endanger the safety of any human being.

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes

of the

COMMITTEE ON JUDICIARY "B"

Meeting of Tuesday and Wednesday, June 20-21, 1972
Nakota Room, University Center
Grand Forks, North Dakota

The Vice Chairman, Representative Myron Atkinson, called the meeting of the Committee on Judiciary "B" to order at 10:15 a.m. in the Nakota Room, University Center, Grand Forks, North Dakota, on Tuesday, June 20, 1972.

Legislative members present:	Senators Freed, Page Representatives Atkinson, Hilleboe, Murphy, Stone
Citizen members present:	Judges Lynch, Smith, Pearce Professor Lockney, Mr. Webb
Legislative members absent:	Representative Kieffer
Citizen members absent:	Judge Erickstad, Mr. Al Wolf
Also present:	Mr. Charles Travis, Mr. Leonard Bucklin, Mr. Vance Hill

(Note: The above listing of persons present does not necessarily reflect their attendance during the whole of the Committee meeting, although there was a quorum of Committee members present at all times. The Chairman, Senator Freed, was unable to attend until the second day of the meeting.)

The Vice Chairman asked if there were any additions or corrections to the minutes of the meeting of May 11-12, 1972. Professor Lockney stated that on Page 55 in the second line of the fifth full paragraph, the word "traditional" should more appropriately be "technical". Hearing no objection, the Chairman directed that change to be recorded. In addition, Professor Lockney noted that on Page 47 of the minutes of that meeting, the last full paragraph, a notation should be made to the effect that he had stated, at that meeting, that criminal jurisdiction over nonresident advertisers could also be acquired. This could be accomplished under legal theories analogous to civil "long-arm" jurisdiction.

IT WAS THEN MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE MURPHY, AND UNANIMOUSLY CARRIED that the minutes of May 11-12, 1972, as corrected, be approved.

The Vice Chairman noted he intended that the Committee discuss, during this meeting, the subject of planning for the remainder of the interim, including the question of the desirability of submitting a completed draft to the Forty-third Legislative Assembly. The Vice Chairman stated he had discussed this matter by telephone with the Chairman just prior to the meeting, and the Chairman concurred.

Mr. Hill noted that at the next meeting of the Committee, it was likely the subject of sentencing would be discussed. He stated he had previously discussed the Committee's prior sentencing plan with Mr. Paul Kalin, who is with the National Council on Crime and Delinquency. Mr. Hill said he felt it would be valuable for the Committee to hear Mr. Kalin's views on sentencing, since he was a recognized authority in that field. Mr. Hill stated that Mr. Kalin had previously indicated he would be pleased to come and make a short presentation to the Committee. However, in order to give Mr. Kalin some advance notice, the Committee should make some decisions about its next meeting date at this meeting.

Representative Stone stated she, speaking as a Committee member, would like to hear the views of an expert in order to help her make some decision concerning the appropriate sentencing plan. The Chairman directed Mr. Hill to call Mr. Kalin during this meeting and report to the Committee when Mr. Kalin might have dates available to make a presentation, and the Committee would attempt to establish a meeting date accordingly.

The Chairman noted that Representative Hilleboe would be delayed in reaching Grand Forks and had called to request the provisions dealing with rape and other sexual offenses be considered later on the Committee's agenda. Therefore, the Chairman, without objection, directed the Committee consider the second item on its agenda which was a staff redraft of Sections 1701 through 1709 dealing with arson and related offenses. The Chairman called on the Committee Counsel for an overview of these sections which reads as follows:

SECTION 1701. ARSON.) A person is guilty of arson, a class B felony, if he starts or maintains a fire or causes an explosion with intent to destroy an entire or any substantial part of a building or inhabited structure of another or a vital public facility.

SECTION 1702. ENDANGERING BY FIRE OR EXPLOSION.)

1. OFFENSE. A person is guilty of an offense if he intentionally starts or maintains a fire or causes an explosion and thereby recklessly:

a. Places another person in danger of death or bodily injury;

b. Places an entire or any substantial part of a building or inhabited structure of another or a vital public facility in danger of destruction; or

c. Causes damage to property of another constituting pecuniary loss in excess of five thousand dollars.

2. GRADING. The offense is a class B felony if the actor places another person in danger of death under circumstances manifesting an extreme indifference to the value of human life. Otherwise it is a class C felony.

SECTION 1703. FAILURE TO CONTROL OR REPORT A DANGEROUS FIRE.) A person who knows that a fire which was started or maintained, albeit lawfully, by him or with his assent, is endangering life or a substantial amount of property of another is guilty of a class A misdemeanor if he willfully fails either to take reasonable measures to put out or control the fire when he can do so without substantial risk to himself, or to give a prompt fire alarm.

SECTION 1704. RELEASE OF DESTRUCTIVE FORCES.)

1. CAUSING CATASTROPHE. A person is guilty of a class B felony if he intentionally causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison, radioactive material, bacteria, virus, or other dangerous and difficult-to-confine force or substance, and is guilty of a class C felony if he does so willfully.

2. RISKING CATASTROPHE. A person is guilty of a class A misdemeanor if he willfully creates a risk of catastrophe by fire, explosives, or other means listed in subsection 1, although no fire, explosion, or other destruction results.

3. FAILING TO PREVENT CATASTROPHE. A person who knowingly does an act which causes or which he knows is likely to cause an explosion, fire, flood, avalanche, collapse of building, or release of poison, radioactive material, bacteria, virus, or other dangerous and difficult-to-confine force or substance, or assents to the doing of such act, is guilty of a class A misdemeanor if he willfully fails to take reasonable measures to prevent catastrophe.

4. CATASTROPHE DEFINED. Catastrophe means serious bodily injury to ten or more people or substantial damage to ten or more separate habitations or structures, or property loss in excess of five hundred thousand dollars.

SECTION 1705. CRIMINAL MISCHIEF.)

1. OFFENSE. A person is guilty of an offense if he:

a. Willfully tampers with tangible property of another so as to endanger person or property;

b. Willfully damages tangible property of another; or

c. Negligently damages tangible property of another by fire, explosives, or other dangerous means listed in section 1704(1).

2. GRADING. The offense is:

a. A class C felony if the actor intentionally causes pecuniary loss in excess of five thousand dollars or damages tangible property of another by means of an explosive or a destructive device; and

b. A class A misdemeanor if the actor recklessly causes pecuniary loss in excess of five thousand dollars or if the actor intentionally causes pecuniary loss in excess of five hundred dollars.

Otherwise the offense is a class B misdemeanor.

SECTION 1706. TAMPERING WITH OR DAMAGING A PUBLIC SERVICE.)

1. OFFENSE. A person is guilty of an offense if he causes a substantial interruption or impairment of a public communication, transportation, supply of water, gas, power, or other public service by: (a) tampering with or damaging the tangible property of another; (b) incapacitating an operator of such service; or (c) negligently damaging the tangible property of another by fire, explosive, or other dangerous means listed in section 1704(1).

2. GRADING. The offense is a class C felony if the actor engages in the conduct intentionally, and a class A misdemeanor if the actor engages in the conduct knowingly or recklessly. Otherwise it is a class B misdemeanor.

SECTION 1708. CONSENT A DEFENSE TO SECTIONS 1701 TO 1706.) Whenever in sections 1701 to 1706 it is an element of the offense that the property is of another, it is a defense to a prosecution under those sections that the other has consented to the actor's conduct with respect to the property.

SECTION 1709. DEFINITIONS FOR SECTIONS 1701 TO 1709.) In sections 1701 to 1709:

1. "Inhabited structure" means a structure or vehicle:

a. Where any person lives or carries on business or other calling;

b. Where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or

c. Which is used for overnight accommodation of persons.

Any structure or vehicle is deemed to be "inhabited" regardless of whether a person is actually present. If a building or structure is divided into separately inhabited units, any unit which is property of another constitutes an inhabited structure of another;

2. Property is that "of another" if anyone other than the actor has a possessory or proprietary interest therein;

3. "Vital public facility" includes a facility maintained for use as a bridge (whether over land or water), dam, tunnel, wharf, communications installation, or power station.

The Committee Counsel noted Sections 1701 through 1709 deal with the crimes of arson, endangering by fire or explosion, causing or risking a "catastrophe", failing to control or report a dangerous fire, criminal mischief, and tampering with or damaging a "public service".

The gist of the "arson" offenses defined in Sections 1701 and 1702 is the prohibition against the starting or maintaining of fires or the causing of explosions which destroy the buildings or inhabited structures "of another".

The offense of arson, as contained in the proposed Federal Criminal Code, would be broadened in comparison to present North Dakota law by the inclusion of destruction by "explosion", since present North Dakota law is limited to "burning".

On the other hand, Committee Counsel noted the FCC arson provisions do not extend to the burning of one's own property, whereas that action is presently considered arson in North Dakota. The federal drafters' rationale for not including the burning of one's own property as arson is that it is usually done, if done at all with criminal intent, in order to perpetrate a fraud on someone else with an interest in the property. Since perpetration of fraud to acquire the money or property of another is covered under the theft provisions, the federal drafters felt it need not be covered under arson, since the gist of the arson offense relates to the danger to other human beings, which supposedly is not present when you are burning your own property. If your motive in burning your own property is to kill other human beings inside the structure, the appropriate charge under the proposed Code provisions would be murder or attempted murder, as the case may be.

The Committee Counsel noted that Section 1701 provides a maximum penalty for arson of 15 years' imprisonment, which is a five-year reduction from the maximum penalty available under Section 12-34-01 which prohibits the burning of a "dwelling house" or adjoining "out-house".

For the willful burning of any other buildings, except a dwelling, Section 12-34-02 provides a maximum 10-year penalty. Thus, the Section 1701 maximum penalty is a splitting of the difference between the maximums available under present North Dakota law.

The Section 1701 offense requires that the alleged offender have an intent to destroy the building or structure, or a substantial part thereof. The Section 1702 offense, which more closely parallels North Dakota law, simply requires the offender to intentionally start or maintain the fire or cause the explosion, and be "reckless" as to whether that action endangers persons, property, or "vital public facilities". Section 1702 penalties are set at a maximum of 15 years' imprisonment if the offender places another person in danger of death, and at seven years' imprisonment in all other cases.

The Committee Counsel asked the Committee to note Sections 12-34-03 and 12-34-04, which presently prohibit arson of personal property or insured personal property. These provisions would be replaced by Subparagraph c of Subsection 1 of Section 1702 which prohibits intentionally starting a fire or causing an explosion and thereby "recklessly" causing damage to "property" (presumably including personal property) of another in excess of $5,000 in value. The $5,000 limitation poses a policy question for the Committee, because the present offense of arson of personal property occurs when that property exceeds $25 in value, and there is no dollar limit when the personal property was insured.

In light of the fact that fire insurance policies most often contain a deductible provision, and that insurable personal property which could be burned rarely has a value of less than $25, perhaps no special provisions are needed dealing with arson of insured property. However, the Committee Counsel noted the Committee may wish to reduce the $5,000 limitation contained in Subparagraph c of Subsection 1 of Section 1702.

Section 1703 makes it an offense to fail to control a fire if one could do so without substantial risk to himself, or, in the alternative, to fail to give a prompt fire alarm.

A corresponding section does not exist in Title 12, although Section 18-08-03 (read in conjunction with Section 18-08-01) makes it a misdemeanor for a person to permit a "lawfully set" fire to spread. Thus, it can be seen that Section 1703 does not create "new law".

Regarding Section 1704, the Committee Counsel noted it does create "new law" for North Dakota. That section provides that a person commits a Class B felony if he intentionally causes a "catastrophe". The person is guilty of a Class A misdemeanor if he willfully creates risk of a "catastrophe", or willfully fails to prevent a "catastrophe".

A "catastrophe" is defined as meaning an event which causes serious bodily injury to 10 or more persons, or damage to 10 or more separate buildings or structures, or property loss in excess of $500,000. The section creates several policy questions for the Committee. First, does North Dakota need such a provision? And second, are the limits used to define the term "catastrophe" realistic for a state with a relatively low population?

The Committee Counsel noted that Section 1705 defines "criminal mischief" and attempts to proscribe property damage caused by other than the highly destructive methods prohibited under Sections 1701 and 1702. The offenses outlined in Section 1705 are keyed to resultant damage to property, or actual tampering with property. Section 1705 should be read in conjunction with Section 1712, to be considered later, which prohibits "criminal trespass".

The penalty grading of Section 1705 is graduated from a Class B misdemeanor to a Class C felony, depending on results. The offense is a Class C felony if the offender "intentionally" causes more than $5,000 worth of damage, or if he damages another's "tangible property" through use of an explosive or a "destructive device". ("Destructive device" is defined in Section 109(g).) The offense is a Class A misdemeanor if the offender "recklessly" causes loss in excess of $5,000 or intentionally causes loss in excess of $500. In all other cases, the offense is a Class B misdemeanor. These grading provisions roughly correspond to the present provisions of Title 12 which would be replaced.

For instance, a person who "maliciously" destroys a book, map, picture, engraving, statue, coin, or other work of literature or art on public display is subject to three years' maximum imprisonment. The willful injury, defacing, or destruction of any real or personal property belonging to another is a misdemeanor under present Section 12-41-10. However, the Committee Counsel noted Section 12-41-10 itself presented a policy question for the Committee in that, in addition to the criminal penalties, it also provided for treble damages in a civil suit based on the willful destruction of real or personal property of another. Section 1705, of course, does not provide specifically for civil liability, although civil liability would not be precluded. Treble damages, however, would be precluded unless specifically mentioned.

Section 1706 deals with the person who causes substantial interruption or impairment of a public service. That section would replace Section 12-41-05, which makes it a felony to break or obstruct a water or gas pipe, and sections in Title 8 and Title 49 which deal with the destruction of railroad property or telegraph or telephone lines. The Committee Counsel said it seemed logical to encompass all those provisions in a general section prohibiting damage to or tampering with the property of or operators of public service facilities, which is a broader definition encompassing all of the present similar North Dakota statutes, and additional types of public service facilities.

Section 1706 offenses are graded as Class C felonies if the offender acts intentionally; and Class A misdemeanors if he acts either knowingly or recklessly. In other cases it is graded as a Class B misdemeanor.

Section 1708 would present a policy question for the Committee in that it provides that consent of the property owner is a defense to a charge under Sections 1701 through 1706, when it is an element of the offense charged that the property damaged belonged to another. Such a consent defense is not provided for statutorily in Title 12, although it is implied from present definitions of arson which require willfulness or malice. A person could not be acting willfully or maliciously if he had consent of the property owner. Therefore, the result of Section 1708 would be to put the burden on the defendant to bring the issue of consent forward, whereas under present law the prosecution probably has the burden of negating consent from the start.

Section 1709 provides definitions applicable to the foregoing sections, but does not include a definition of the term "property" so as to answer the question of whether or not that term includes both real and personal property. It can probably be assumed from the context in which the term is used in the substantive sections that it does include both real and personal property. Committee Counsel noted that the term "inhabited structure" as defined included vehicles and places of entertainment, such as stadia, auditoriums, etc.

Representative Murphy inquired as to the difference between the offenses described in Sections 1701 and 1702. The Committee Counsel noted the difference was primarily in the intent of the alleged offender. In Section 1701, the alleged offender had to "intend" that the building or structure, or a substantial part thereof be destroyed as a result of his actions. In Section 1702 the alleged offender only had to intentionally start the fire or cause the explosion, and be reckless as to what consequences might ensue therefrom, if the consequences were danger of death or bodily injury, danger of destruction of the building or "vital public facility", or danger of damage to property in excess of $5,000.

Senator Page inquired as to the meaning of the term "vital public facility". Committee Counsel noted that a vital public facility was, in the eyes of the federal drafters, one which could not be interrupted or impaired without substantial inconvenience or danger to a relatively large number of persons. Thus, poisoning of a city's water supply would be deemed to be the damaging of a vital public facility.

Judge Lynch inquired as to whether the words "substantial" and "vital" as used in Section 1701 were necessary. In addition, he questioned the desirability of not providing that the burning of one's own property is arson. He asked how a person who hired another to burn his property would be treated with respect to criminal liability.

The Committee Counsel said that if a property owner hired another to burn his property, the property owner would be subject to criminal liability under the criminal solicitation or facilitation provisions of Sections 1002 and 1003, previously considered and approved by the Committee.

In regard to the fact that the burning of one's own property is not considered arson by this draft, Committee Counsel noted that type of fraud would be covered by other provisions. Professor Lockney stated the provisions covering that type of action, generally consisting of an attempt to commit fraud on an insurance company, would be covered under the theft provisions contained in Sections 1731 through 1734. Judge Lynch stated that if the burning of one's own property, with a criminal intention, were covered under other provisions, then it was probably appropriate that it not be called arson.

The Committee discussed at length the burning of one's own property. Judge Smith noted burning of one's own property without criminal intent could cause public alarm in the neighborhood, and maybe should be the subject of criminal prohibition. However, no motion was made in this regard.

The Committee discussed the term "vital public facility", and especially the definition of that term contained in Section 1709. Judge Pearce stated he felt the term did not need to be defined, and that even the open-ended definition contained in Subsection 3 of Section 1709 could cause construction problems.

Judge Lynch noted his problem with the phrase was the inclusion of the word "vital", which he felt would cause construction problems. Judge Smith stated he agreed with Judge Lynch, especially where the term would need construction beyond the particular types of public facilities listed in Subsection 3 of Section 1709. He stated he could see many legalistic arguments forthcoming regarding whether or not an unmentioned facility was "vital".

Professor Lockney said he believed the intent of the federal drafters in adding the phrase "vital public facility" was to extend the definition of "building or inhabited structure" so that courts would no longer have problems in determining whether arson of some place which was not clearly a "building" was in fact a criminal offense. He noted that if Judge Pearce is concerned about the court extending the definition beyond that contained in Section 1709, the definition could be amended so that it reads "'vital public facility' includes, but is not limited to", and so on. Judge Pearce noted he did not feel the definition is needed at all, but if it is to be retained, Professor Lockney's suggestion would be an improvement.

Professor Lockney stated he disagreed with the striking of the definition, and thought it would be helpful to courts in that it would provide specific assurance if one of the named "vital public facilities" were involved, and examples of an unnamed "vital public facility" were involved.

The Committee discussed Section 1703, which makes it an offense to fail to control or fail to report a fire. The Committee Counsel noted that the federal drafters had wrestled with the question of whether to extend criminal liability under this section to anyone who happens upon an existing fire, rather than limiting liability to one who has started the fire originally. The Committee discussed such an expansion of the scope of liability under this section for North Dakota, but no motion was made in that regard.

Section 1704, defining the offenses of causing, risking, or failing to prevent a "catastrophe" was discussed. Representative Stone inquired as to whether "causing a catastrophe" should not carry a higher penalty than arson or endangering by fire under Sections 1701 and 1702.

Judge Pearce believed that the listing of the means by which a catastrophe might be caused in Subsection 1 of Section 1704 was unnecessary, and could cause problems in judicial construction. Since the definition of "catastrophe" is hinged to the amount of damage caused, Judge Pearce did not feel it was relevant how the catastrophe was caused, and could only lead to legal problems should a clever criminal devise an unlisted way of creating a catastrophe.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY REPRESENTATIVE MURPHY that the words "by explosion, fire, flood, avalanche, collapse of building," be deleted from Line 3 of Section 1704; that Line 4 be deleted; and that the words "to-confine force or substance" be deleted from Line 5 of Section 1704. In addition, the motion included the staff preparation of related amendments to the rest of the draft, where reference was made to the listing of possible causes of catastrophes.

Professor Lockney thought the causative definitions contained in Subsection 1 of Section 1704 are a valuable aid to judicial construction. Judge Smith stated perhaps Professor Lockney's objections could be overcome if the words "by any means" were added after the word "catastrophe" in Line 3. JUDGE PEARCE, WITH THE CONSENT OF HIS SECOND, CONCURRED IN THAT AMENDMENT TO HIS MOTION. JUDGE PEARCE'S MOTION THEN CARRIED.

The Committee then discussed the desirability of raising the penalty provided for a Subsection 1 offense under Section 1704, i.e. causing a "catastrophe". Professor Lockney stated he agreed with Representative Stone that the penalty should be increased, since causing any "catastrophe" seemed to be a graver offense than simple arson under Sections 1701 and 1702. Judge Pearce stated he, too, felt the penalty should be raised, but probably corresponding raises should be made in the other penalty provisions of Sections 1704.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE LYNCH, AND CARRIED that the penalty provisions contained in Section 1704 be raised so that the Subsection 1 offense would be a Class B felony, and the Subsections 2 and 3 offenses would be Class C felonies.

The Committee discussed the definition of "catastrophe" contained in Subsection 4 of Section 1704. The Committee Counsel reiterated the fact that limits set in that section perhaps were unrealistic for a small state like North Dakota. Judge Lynch stated he agreed, and that you certainly did not need to seriously injury 10 people before it would be considered a "catastrophe" in North Dakota. Judge Pearce stated he felt that any limitation set would be arbitrary, and of course the limitation could be set at one, in which case this section would duplicate the offense definitions contained in other sections, such as aggravated assault.

Representative Murphy inquired as to whether this section was needed at all. The Committee discussed this question at length, and it was noted that if nine buildings or structures were destroyed, of course, the prosecutor could charge the offender with nine counts of endangering by fire or explosion under Section 1702, if the offender used fire or explosion as his means of destruction. However, it was the Committee consensus that Section 1704 probably represented a valuable addition to North Dakota criminal law.

PROFESSOR LOCKNEY MOVED that Subsection 4 of Section 1704 be amended by deleting the word "ten" in Line 16 of Section 1074 and substituting the word "five" in lieu thereof. THIS MOTION FAILED FOR LACK OF A SECOND.

The Committee discussed Section 1705 defining the offense of "criminal mischief". Judge Pearce stated he had problems with the provisions of Subparagraph c of Section 1 of Section 1705 which made it an offense to "negligently damage" the tangible property of another by fire, explosives, or other dangerous means. His problems had to do with the use of the standard of culpability "negligently". Judge Smith stated he had problems in any case with a definition of criminal culpability which used the term "negligently". He said use of that term would cause confusion among lawyers and judges, since that term also has relevance in civil cases. The Committee Counsel noted the word "negligently" as used in the proposed Federal Criminal Code would more closely equate with "gross negligence" as a civil standard, and would not equate with "simple negligence" as that term is used in civil cases.

IT WAS MOVED BY JUDGE LYNCH AND SECONDED BY JUDGE PEARCE to delete Subparagraph c of Subsection 1 of Section 1705 (Lines 6 and 7 of Page 4).

Mr. Travis, speaking in favor of the motion, stated that with relation to the use of "explosives", he felt they could not be used negligently. He felt they were either used properly, or "recklessly", and thus, with relation to the causing of damage by use of explosives, he felt there was no need for a standard of culpability as low as "negligently". JUDGE LYNCH'S MOTION, STATED ABOVE, THEN CARRIED.

Representative Murphy inquired as to the use of the words "by means of an explosive or destructive device" in Subparagraph a of Subsection 2 of Section 1705. Committee Counsel noted those words related only to the grading of the offense, so the offense would be graded higher if a person "intentionally" damaged tangible property by those means.

The Committee discussed Section 1706 dealing with damaging of or tampering with a public service. Mr. Travis noted, for consistency's sake, the "negligently" damaging language of Subdivision (c) of Subsection 1 of Section 1706 should be deleted. Judge Lynch stated that, without objection, his previous motion could include that language, since he would have included it had he been aware of it. Hearing no objection, the Chairman directed the Committee Counsel to make that amendment.

The Committee discussed the "consent defense" provided in Section 1708. After much discussion, it was decided that Section 1708 should be included in the draft.

The Committee discussed Section 1709, and Representative Murphy inquired as to whether warehouses and related buildings were covered by the definition of "inhabited structure". The Chairman stated that warehouses were covered by use of the term "building" in the substantive definition sections (1701 et seq.).

Judge Lynch again referred to the use of the word "substantial" in Section 1701. He stated he felt that word would provide the basis for much defense objection to prosecution on the basis that the defendant did not in fact intend to destroy a "substantial part" of a building, but only "intended" to destroy an insubstantial part. Judge Lynch asked what difference it makes if someone intentionally sets fire to a building intending to destroy any part of it.

IT WAS MOVED BY JUDGE LYNCH AND SECONDED BY SENATOR PAGE that the word "substantial" in Line 3 of Section 1701 be deleted.

Professor Lockney inquired as to whether the words "an entire or any" on Line 2 and the words "part of" on Line 3 ought not also to be deleted, so that the intention would only be to destroy a building, inhabited structure, or vital public facility. Mr. Travis stated he disagreed with the motion and felt the use of the word "substantial" was valid, and would prevent prosecutions for serious felonies where the damage intended amounted to not much more than criminal mischief.

Judge Lynch asked how a trial judge would be able to instruct a jury regarding the word "substantial". He stated he wished his motion to include deletion of the word "substantial" in Line 5 of Section 1702, and without objection, the Chairman so directed. JUDGE LYNCH'S MOTION THEN CARRIED.

Representative Murphy asked whether Professor Lockney's suggestion should not be followed concerning deletion of the remaining language referring to a part of a building. After discussion, the Committee decided that that language should remain.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY JUDGE LYNCH, AND CARRIED that the Committee adopt Sections 1701 through 1709, as amended of record.

(Note: The text of all sections adopted by the Committee are appended to these minutes as Appendix "A".)

The Committee recessed for lunch at 1:00 p.m. and reconvened at 1:45 p.m., at which time Mr. Hill reported that he had had a telephone conversation with Mr. Paul Kalin. He said Mr. Kalin was available for consultation with the Committee on July 13-14, or during the first four days of the following week (July 17-20), 1972.

The Chairman called on the Committee Counsel for an overview of Sections 1641 through 1649 dealing with Rape and related offenses, which reads as follows:

SECTION 1641. RAPE.)

1. OFFENSE. A male who has sexual intercourse with a female not his wife is guilty of rape if:

a. He compels her to submit by force, or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. He has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge intoxicants or other means with intent to prevent resistance; or

c. The victim is less than ten years old.

2. GRADING. Rape is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subsection 1c, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise rape is a class B felony.

SECTION 1642. GROSS SEXUAL IMPOSITION.) A male who has sexual intercourse with a female not his wife is guilty of a class C felony if:

1. He knows that she suffers from a mental disease or defect which renders her incapable of understanding the nature of her conduct;

2. He knows that she is unaware that a sexual act is being committed upon her, or knows that she submits because she mistakenly supposes that he is her husband; or

3. He compels her to submit by any threat that would render a female of reasonable firmness incapable of resisting.

SECTION 1643. AGGRAVATED INVOLUNTARY SODOMY.)

1. OFFENSE. A person who engages in deviate sexual intercourse with another, or who causes another to engage in deviate sexual intercourse, is guilty of an offense if:

a. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. He has substantially impaired the victim's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance; or

c. The victim is less than ten years old.

2. GRADING. The offense is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subsection 1c, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise the offense is a class B felony.

SECTION 1644. INVOLUNTARY SODOMY.) A person who engages in deviate sexual intercourse with another, or who causes another to engage in deviate sexual intercourse, is guilty of a class C felony if:

1. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;

2. He knows that the other person is unaware that a sexual act is being committed upon him or her; or

3. He compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

SECTION 1645. CORRUPTION OF MINORS.)

1. OFFENSE. A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of an offense if the other person is less than sixteen

years old and the actor is at least five years older than the other person.

2. GRADING. The offense is a class C felony, except when the actor is less than twenty-one years old, in which case it is a class A misdemeanor.

SECTION 1646. SEXUAL ABUSE OF WARDS.) A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of a class A misdemeanor if:

1. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person; or

2. The other person is less than twenty-one years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare.

SECTION 1647. SEXUAL ASSAULT.) A person who knowingly has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of a class B misdemeanor if:

1. He knows that the contact is offensive to the other person;

2. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;

3. The other person is less than ten years old;

4. He has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;

5. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over him or her;

6. The other person is less than twenty-one years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare; or

7. The other person is less than sixteen years old and the actor is not less than twenty-one years old.

SECTION 1648. GENERAL PROVISIONS FOR SECTIONS 1641 TO 1647.)

1. MISTAKE AS TO AGE. In sections 1641 to 1647: (a) when the criminality of conduct depends on a child's being below the age of ten, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than ten; (b) when criminality depends on the child's being below a critical age older than ten, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

2. SPOUSE RELATIONSHIPS. In sections 1641 to 1647, when the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a female, this shall not preclude conviction of a spouse or female as accomplice in an offense which he or she causes another person, not within the exclusion, to perform.

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under sections 1641 to 1647 unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specifically interest in the victim, other than the alleged offender, learned of the offense.

((((4) State Law. Sections 1645 to 1647 shall not apply to conduct which is not criminal under the law of a state within which the conduct occurs. Inapplicability under this sub-section is a defense.)))

[4. TESTIMONY OF COMPLAINANTS. No person shall be convicted of any felony under sections 1641 to 1645 upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In a prosecution before a jury for an offense under sections 1641 to 1647, the jury shall be instructed to evaluate the testimony of a victim or complaining witness

with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.]

SECTION 1649. DEFINITIONS FOR SECTIONS 1641 TO 1649.) In sections 1641 to 1649:

1. "Sexual intercourse" occurs upon penetration, however slight; emission is not required;
2. "Deviate sexual intercourse" means sexual contact between human beings who are not husband and wife consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, or any form of sexual intercourse with an animal;
3. "Sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

The Committee Counsel noted this subgrouping of sections covers the crimes of rape, involuntary sodomy, sexual assault, and sexual abuse of a ward. The subgrouping will replace all of Chapter 12-30 of the Century Code and several sections in Chapter 12-22. The Committee Counsel noted the proposed Federal Criminal Code provisions contain no offense definitions comparable to present sections of the Century Code defining fornication, adultery, or unlawful cohabitation.

The first four sections of the subgrouping are related and use similar language. Section 1641 deals with rape, while Section 1642 deals with "gross sexual imposition". In both these sections, the principal offense is sexual intercourse with a female who is not the wife of the actor. The difference between the two sections is in the level of force used, or the extent of the coercion, or the offensiveness of the crime. Sexual intercourse by force or threat, or by reducing the victim's power to control her conduct by drugs or intoxicants is prohibited by Section 1641. In addition, any sexual intercourse with a child who is less than 10 years of age is a Section 1641 offense. The age limit set by Section 1641 provides a policy question for the Committee. If the female is unaware that the sexual act is being committed upon her, or if she submits because she mistakenly believes the actor is her husband, or if she submits because of a threat which could not be resisted by a "female of reasonable firmness", the offense is punishable under Section 1642.

When the victim was not the voluntary companion of the actor and had not previously permitted him sexual liberties, Section 1641 rape is classified as a Class A felony. In all other cases it is classified as a Class B felony. Section 1642 offenses are all classified as Class C felonies.

Sections 1643 and 1644 punish the person who engages in "deviant sexual intercourse", which is defined in Section 1649. The difference between Sections 1643 and 1644 is exactly the same as the difference between Sections 1641 and 1642. The FCC provisions recognize that deviant sexual intercourse committed upon an unwilling person, or in a situation where an unwilling person is forced to commit it, is just as serious as rape.

Section 1645 is the "statutory rape" provision of the FCC, and differs substantially from present North Dakota "statutory rape". Section 1645 is keyed to the relative difference between

the offender's age and the victim's age, whereas the present North Dakota statutory rape provisions are keyed solely to the age of the female victim.

Committee Counsel noted that under Section 1645, if the victim is less than 16 years old and the actor is at least five years older, he is guilty of a Class C felony. However, if the actor is less than 21 years old himself, the offense is a Class A misdemeanor. This latter provision poses a policy question for the Committee which is: Should the age "21" be reduced to "18" in order to make it correspond with recently passed provisions lowering the age of majority to 18 (for most purposes).

Section 1645 is principally aimed at mature adults (beyond the age of sexual experimentation) who are indulging in deliberate corruption of an immature person. If the actor is not five years older than the victim, and the victim is older than 10 years old, there is no criminal offense. In other words, adolescents who engage in sexual experimentation will not be guilty under Section 1645 in most cases.

Section 1646 proscribes sexual acts committed by an actor who has been placed in a position of authority over the "victim". Sexual assault is prohibited by Section 1647. Sexual assault is defined as "sexual contact" in an offensive manner, but not amounting to intercourse or deviant sexual intercourse.

Section 1648 contains some general provisions relating to the preceding sections. Subsection 1 of that section provides when a mistake as to age will be a defense. A mistake as to age will not be a defense in the case where the offense definition consists only of the acts committed on a person of a critical age, e.g., less than 10 years old.

Subsection 2 of Section 1648 details those circumstances under which the defense will be allowed that the victim was the actor's spouse. Basically, those persons living together as man and wife, whether or not married, will be entitled to claim the spouse relationship as a defense, when that defense is applicable. On the other hand, persons lawfully married will not be able to claim that defense if they are living apart under a decree of separation.

Subsection 3 of Section 1648 is a "statute of limitations", which provides that no prosecution can be maintained unless the alleged offense is brought to the notice of public authorities within three months after its occurrence, or within three months after the parents or guardian become aware of the offense.

Committee Counsel noted that Section 1648 contained a bracketed Subsection 4, wherein federal drafters offered an alternative providing that testimony of an alleged victim must be corroborated by other evidence in order that there can be a conviction.

Section 1649 contains definitions of terms used in the preceding sections. The Committee Counsel noted that Subsection 2 of Section 1649 specifically provides that persons who enjoy the status of husband and wife cannot be guilty of "deviant sexual intercourse", thus the defined actions engaged in by a husband and wife would no longer be criminal, which is a change from present North Dakota law defining "sodomy".

Mr. Hill stated that, regardless of his personal views, he felt deletion of the crimes of fornication, adultery, and unlawful cohabitation could risk the chance of passage of the proposed new Criminal Code. He felt the Committee should give a lot of thought to this matter. The Chairman noted that regardless of what the Committee does in drafting new provisions on sexual offenses, the topic would be much debated, including covering the same ground which the Committee might discuss, during the legislative session.

Professor Lockney suggested the Committee could recognize the current trend toward nonprohibition of consensual sexual acts among adults, but could remain neutral as to whether North Dakota should proscribe that type of conduct.

Representative Murphy felt North Dakota should definitely have an unlawful cohabitation provision because a couple could hold themselves out as man and wife for purposes of committing fraud. Representative Hilleboe stated he agreed, but the gist of the wrong was not the sexual acts being performed, but rather the fraud being perpetrated.

The Committee discussed at length the fact that the offenses of fornication, adultery, and unlawful cohabitation would not be covered by the proposed federal provisions. The Chairman again noted that all the debate which the Committee could engage in would not resolve the problem, and would be repeated during the legislative session. However, he felt it would be valuable to get each member's viewpoint on inclusion or exclusion of those named offenses.

Representative Stone asked what those offenses are. The Committee Counsel noted that fornication consists of simple sexual intercourse between a man and a woman. Adultery consists of intercourse between a person who is married and another person who is not his spouse. Unlawful cohabitation consists of the open and notorious cohabitation "as husband or wife".

Representative Stone asked whether, with the general breakdown of morals which is occurring in our society, this Committee could afford to delete sections prohibiting those acts. Representative Murphy said he thought sexual acts between consenting adults should not be prohibited by law, but acts which cause public concern, such as desertion of a "family" should be covered. He noted that in his district a man and woman had been living together for several years and had several children; then the man simply left the "family". That type of action should be prevented, since the woman and her children will become wards of the State in all likelihood.

Judge Pearce stated that unenforced laws have a tendency to breed disrespect for the law in general. Certainly the provisions against fornication and adultery were unenforced, and should they be enforced, a great percentage of the population would be subject to prosecution.

Professor Lockney stated that he agreed with Judge Pearce's premise, but would like to add that laws such as those against fornication and adultery also provided the opportunity for discriminatory enforcement, where the motive was not to prosecute the sexual act involved, but to get at someone that a prosecutor, or someone with influence over the prosecutor, did not like.

Mr. Webb stated he did not think the Committee should simply adopt the provisions of Sections 1641 through 1649 as they stood, but rather should revise current North Dakota law which sorely needed revision.

Representative Hilleboe stated it was his opinion that the provisions of Sections 1641 through 1649 were acceptable if an additional provision outlawing "unlawful cohabitation" were added to them. In regard to the crime of adultery, he stated that, should it be retained, a single female who has intercourse with a married man should also be guilty of the offense. He noted that this is not the case under present North Dakota law.

Judge Pearce suggested the Committee take a vote on the policy question of whether the Committee's draft should contain provisions outlawing offenses similar to the present offenses of fornication and adultery. Professor Lockney concurred in Judge

Pearce's suggestion, but the Chairman suggested the moment was probably premature, and perhaps the Committee should consider the provisions of Sections 1641 through 1649 in more depth prior to making that policy decision.

The Committee commenced discussion of Section 1641. Representative Hilleboe noted either sex should be able to be guilty of "rape". He said he had given this some thought, and would be able to cut down on the number of sections contained in this draft by revamping the definitions contained in Section 1649. He stated that if Subsections 1 and 2 of Section 1649 were deleted and a definition of "sexual act" substituted therefor, then Sections 1641 and 1643 could be combined, as could Sections 1642 and 1644.

Representative Hilleboe stated his definition of "sexual act" would encompass all of the types of "intercourse" presently covered under the definitions in Subsections 1 and 2 of Section 1649. He stated he also felt that a husband should not be precluded from a charge of rape by his wife, nor should the female be precluded from a charge of "rape" if Sections 1641 and 1643 were combined.

After much Committee discussion, IT WAS MOVED BY REPRESENTATIVE HILLEBOE AND SECONDED BY MR. WEBB that Subsections 1 and 2 of Section 1649 be deleted and the following definition be substituted therefor as Subsection 1: "Sexual act" means sexual contact between two persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, or the mouth and the vulva.

The Committee discussed Representative Hilleboe's motion at length, and Mr. Webb suggested the words "however slight" be added after the words "sexual contact" in Representative Hilleboe's motion. After further discussion, including some discussion concerning the need for addition of the concept of "penetration", REPRESENTATIVE HILLEBOE'S MOTION, STATED ABOVE, CARRIED.

Representative Hilleboe stated that, that motion having passed, he was now prepared to move that Sections 1641 and 1643 be combined, using his new definition of "sexual act". The Committee discussed that combination, noting it would be best to use essentially the language of Section 1643, inserting Representative Hilleboe's definition where appropriate. The Committee also discussed the need to add the word "penetration" at an appropriate place in the definition of "sexual act".

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY MR. WEBB, AND CARRIED that Sections 1641 and 1643 be consolidated into one section, using essentially the language of Section 1643, and substituting Representative Hilleboe's definition of "sexual act" for the phrase "deviant sexual intercourse" as used in Section 1643. This motion included the preparation by the staff of a new title for that section, the wording of which is to be left to the staff's discretion.

Judge Lynch noted the new offense definition now contained in the consolidated section included actions between husband and wife as the basis for criminal liability. He said this should not be the case, and that if a woman is forced to a sexual act by her husband, she should be left with an assault or similar charge, since the sexual connotation of the offense, as it would exist under Representative Hilleboe's consolidated section, could give rise to much abusive damage to reputation.

IT WAS MOVED BY JUDGE LYNCH AND SECONDED BY REPRESENTATIVE STONE to add the words ", who are not married to each other," after the word "persons" in Representative Hilleboe's definition of "sexual act".

Professor Lockney suggested that consideration be given to use of the word "spouse", rather than "married to each other" in order to accord with Subsection 2 of Section 1648. JUDGE LYNCH'S MOTION THEN CARRIED, and the Chairman directed the staff to redraft Subsection 1 of Section 1649 (defining "sexual act") accordingly, taking into account Professor Lockney's suggestion.

Judge Pearce commented on Subparagraph b of Subsection 1 of Section 1643, which conditions commission of the offense on the fact that the offender has deliberately impaired the victim's power to resist by administering intoxicants without the victim's knowledge. Judge Pearce asked whether or not a person who came upon a previously intoxicated person should not be guilty of as serious an offense as if he had administered the intoxicants. The Committee discussed Judge Pearce's comments at length.

Thereafter, IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY REPRESENTATIVE STONE that Subsection 1(b) of Section 1643 be redrafted to include within its context situations wherein the victim's inability to consent is caused by other than the offender's own act. And, more specifically, to include language similar to the first clause of Subsection 2 of Section 1642. THIS MOTION CARRIED, with Mr. Webb and Professor Lockney voting in the negative.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY MR. WEBB, AND CARRIED that Section 1642 be deleted and the new definition of "sexual act" be inserted in Section 1644 in the appropriate places, and that Section 1644 be renumbered as Section 1642.

The Committee discussed Section 1645. Mr. Webb noted Section 1645 is not equivalent to present North Dakota provisions on statutory rape, since present North Dakota provisions are keyed to the age of the female, whereas Section 1645 is keyed to the relative age difference between the offender and the victim. Mr. Webb noted the true "statutory rape" provisions of the proposed FCC were contained in Section 1641, which makes sexual intercourse with a female less than 10 years old "rape" regardless of her consent.

The Committee discussed the FCC proposal for lowering the age of "statutory rape" to 10 years old. Mr. Webb felt very positively there has to be absolute liability for "statutory rape" when the victim is at a tender age, which has to be above 10 years old. IT WAS MOVED BY MR. WEBB AND SECONDED BY REPRESENTATIVE STONE that the word "ten" in Line 9 of Section 1643 be deleted and the word "fifteen" be substituted in lieu thereof.

Mr. Webb noted this meant that the victim would in fact be 14 years old or less in the situation where the offender could be charged with statutory rape. In addition, Mr. Webb noted that if the offender himself were under 18 years of age, he would be handled as a juvenile in most instances. Thereafter, MR. WEBB'S MOTION LOST.

IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY SENATOR PAGE, AND CARRIED, with Judge Pearce voting in the negative, that the word "thirteen" be inserted in lieu of the word "ten" in Line 9 of Section 1643. Mr. Webb noted he voted "aye" on the motion because a higher age would not be acceptable to the Committee.

The Committee again discussed Section 1645, and Senator Page inquired why Subsection 2 made reference to the age of 21 years in terms of making the offense more serious when the offender was over 21 years old. He asked if that age should not be set at 18 years in light of the new definition of an "adult".

Mr. Webb noted Section 1645 would not punish as criminal any sexual experimentation between teenagers when the girl is over 13 years old and the boy is less than five years

older. He said it was his feeling that the Committee could not be put in a position where it was condoning sexual play between teenagers. Therefore, the age differential provisions of Section 1645 should be deleted.

Representative Hilleboe suggested perhaps Section 1645 could be amended to provide that any person who is over 18 years of age and commits a "sexual act" with a person who is 18 years of age or less, commits an offense. Mr. Webb suggested the Committee also formulate a definition of "public fornication" and make it an offense to publicly fornicate with any person.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE AND SECONDED BY MR. WEBB that Section 1645, as presented, be deleted and that the following language be inserted in lieu thereof: "Any person committing a sexual act with another is guilty of a Class A misdemeanor if the victim is a minor and the actor is an adult."

Professor Lockney, in opposition to the motion, stated it was essentially another "statutory rape" provision and did not at all recognize the intent of the original Section 1645 regarding "corruption" of minors. The original intent of Section 1645 was to ensure that older men (or older women) did not take advantage of the sexual naivete of much younger girls (or boys).

REPRESENTATIVE HILLEBOE'S MOTION THEN CARRIED with Professor Lockney and Judge Pearce voting in the negative.

The Committee discussed Section 1646 dealing with sexual abuse of persons who are in the custody of the offender, or for whom the offender has general supervisory responsibility. Without objection from the Committee, the Chairman directed the staff to substitute the new definition of "sexual act" where relevant in Section 1646. Representative Hilleboe said he felt the offense defined in Section 1646 was a serious offense and should be graded higher than a Class A misdemeanor. The Committee discussed Representative Hilleboe's comments and it was noted that Section 1646 covers consensual acts, and is aimed primarily at the breach of duty on the part of the custodian, parent, or guardian, rather than at the "depravity" of the sexual act.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY SENATOR PAGE that Section 1646 be amended to raise the penalty classification from a Class A misdemeanor to a Class C felony.

It was again noted that the offense defined in Section 1646 could be committed although the sexual act itself was the result of consent by both parties, or in fact was the result of seduction on the part of the person in custody. It was further noted, by Professor Lockney, that the custodian could be amply deterred by a misdemeanor penalty if he were to be deterred at all. In addition, the Committee noted Section 1646 dealt with incestuous relationships which were considered by the federal drafters as primarily a psychological problem, not fit to be treated as a felony. Thereafter, JUDGE PEARCE, WITH THE CONSENT OF HIS SECOND, WITHDREW HIS MOTION.

Representative Hilleboe suggested that the words "or inducement" be added after the word "threat" on Line 8 in Subsection 3 of Section 1644 to cover situations wherein the actor's conduct did not amount to a "threat". The Chairman directed the staff to take Representative Hilleboe's remarks into consideration in redrafting these sections.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the word "twenty-one" in Line 7 of Section 1646 be deleted and the word "eighteen" be inserted in lieu thereof.

The Committee discussed Section 1647 dealing with sexual assault. IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY SENATOR PAGE, AND CARRIED, with Judge Pearce dissenting, that the word "ten" in Line 7 of Section 1647 be deleted and the word "thirteen" be inserted in lieu thereof.

The Committee discussed Subsections 6 and 7 and noted that they have to be changed in light of previous amendments to Sections 1645 and 1646. IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY SENATOR PAGE, AND CARRIED that the word "twenty-one" in Line 17 in Section 1647 be deleted and the word "eighteen" be inserted in lieu thereof; and that Subsection 7 be amended to take into account the previous amendments to Section 1645.

The Committee discussed Subsection 4 of Section 1647 in light of the previous amendment to Subparagraph b of Subsection 1 of Section 1643. Committee Counsel noted that in this instance, Subsection 4 was probably appropriate.

The Committee discussed Section 1648, and particularly Subsection 1 dealing with defenses based on mistake as to age. The Chairman directed the staff to amend that subsection to accord with the critical age established by Section 1643. Judge Pearce requested the minutes record his continuing objection to the raising of the "critical age".

Representative Hilleboe suggested that the words "or conduct by a female" in Line 11 of Section 1648 be deleted since, in light of previous amendments, they were no longer relevant. In addition, the words "or female" in Line 12 of Section 1648 should be deleted. The Chairman directed the staff to take Representative Hilleboe's comments into account when redrafting these sections.

The Committee discussed Subsection 3 of Section 1648, which provides a "statute of limitations" on offenses defined by Sections 1641 through 1647. IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY SENATOR PAGE, AND CARRIED that the word "sixteen" in Line 16 of Section 1648 be deleted and the word "eighteen" be inserted in lieu thereof.

The Committee discussed Section 1649 defining the phrases "sexual act" and "sexual contact". Mr. Hill noted the definition of "sexual contact" meant a touching for the "purpose of arousing or gratifying sexual desire", and wonders about such touching for the purpose of embarrassing the person touched. The Committee discussed Mr. Hill's comment, but no motion was made.

The Committee discussed the new definition of "sexual act" and whether that definition should include some reference to "penetration". Mr. Webb said he felt, in light of common law construction, the concept of "penetration" should be included in those offenses defined as involving penis-vagina and penis-anus contacts. He stated he was not certain as to whether the other "types" of sodomy listed in the definition would require the concept of "penetration". The Chairman directed the staff to do further research on the need for including the concept of "penetration" in relation to the other types of "sodomy" defined, and to redraft the definition of "sexual act" accordingly.

Representative Hilleboe noted the change in the definitions contained in Section 1649 resulted in a deletion of the concept of "bestiality", and inquired whether this was desirable. The Committee discussed this comment, and it was noted that "bestiality" was essentially a "victimless" crime. No motion was made regarding Representative Hilleboe's comments.

Mr. Webb stated he felt it necessary, in addition to the provisions covered today, to cover actions involving public fornication, and, in addition, to provide criminal liability

for consensual sexual activity between minors. The Chairman directed the staff to include, in its redraft of these sections, further provisions dealing with the present crimes of fornication, adultery, and unlawful cohabitation.

The Committee recessed at 5:50 p.m. on Tuesday, June 20, 1972, and reconvened at 9:10 a.m. on Wednesday, June 21, 1972, with Senator Howard Freed presiding.

The Chairman called on the Committee Counsel for an overview of Sections 1711 through 1719 dealing with burglary and related offenses, and reading as follows:

SECTION 1711. BURGLARY.)

1. OFFENSE. A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.

2. GRADING. Burglary is a class B felony if:

a. The offense is committed at night, and is knowingly perpetrated in the dwelling of another; or

b. In effecting entry or while in the premises or in immediate flight therefrom, the actor inflicts or attempts to inflict bodily injury or physical restraint on another, or menaces another with imminent serious bodily injury, or is armed with a firearm, destructive device or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

Otherwise burglary is a class C felony.

SECTION 1712. CRIMINAL TRESPASS.)

1. DWELLING; HIGHLY SECURED PREMISES. A person is guilty of a class A misdemeanor if, knowing that he is not licensed or privileged to do so, he enters or remains in a dwelling or in highly secured premises.

2. BUILDING; STRUCTURE; ENCLOSED PREMISES. A person is guilty of a class B misdemeanor if, knowing that he is not licensed or privileged to do so, he:

a. Enters or remains in any building, occupied structure, or storage structure, or separately secured or occupied portion thereof; or

b. Enters or remains in any place so enclosed as manifestly to exclude intruders.

3. ANY PREMISES. A person is guilty of an infraction if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by actual communication to the actor by the person in charge of the premises or other authorized person or by posting in a manner reasonably likely to come to the attention of intruders.

4. DEFENSES. It is a defense to a prosecution under this section that:

a. The premises were abandoned; or

b. The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises.

SECTION 1713. BREAKING INTO OR CONCEALMENT WITHIN A VEHICLE.)

1. OFFENSE. A person is guilty of an offense if, knowing that he is not licensed or privileged to do so, he breaks into a vehicle, vessel or aircraft, or, with intent to commit a crime, conceals himself therein.

2. GRADING. The offense is a class C felony if the actor is armed with a firearm, destructive device, or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury. Otherwise it is a class A misdemeanor.

SECTION 1714. STOWING AWAY.) A person is guilty of a class A misdemeanor if, knowing that he is not licensed or privileged to do so, he surreptitiously remains aboard a vessel or aircraft with intent to obtain transportation.

SECTION 1719. DEFINITIONS FOR SECTIONS 1711 to 1719.)

In Sections 1711 to 1719:

1. "Occupied structure" means a structure or vehicle:

a. Where any person lives or carries on business or other calling; or

b. Which is used for overnight accommodation of persons.

Any such structure or vehicle is deemed to be "occupied" regardless of whether a person is actually present;

2. "Storage structure" means any structure, truck, railway car, (((vessel))) or aircraft which is used primarily for the storage or transportation of property;

3. "Highly secured premises" means any place, maintained, in fact, by the United States, the state of North Dakota, or any real or corporate person, which is continuously guarded and where display of visible identification is required of persons while they are on the premises;

4. "Dwelling" has the meaning prescribed in section 619;

5. "Night" means the period between thirty minutes past sunset and thirty minutes before sunrise.

Committee Counsel stated Section 1711 covers burglary and housebreaking and would replace the present North Dakota provisions on burglary. Burglary under Section 1711 is a Class B felony if the offense is committed at night in a dwelling, or if the offender inflicts or attempts to inflict physical restraint or injury on another, or if the offender is armed with a firearm or other destructive device in circumstances which indicate that he intended to use that weapon to inflict serious bodily injury. In all other cases, burglary is classified as a Class C felony.

Section 1711 does not require that the offender "break into" the premises. All that is required is that he surreptitiously remain in a building or occupied structure after it has been closed to the public, regardless of the fact that he may have lawfully entered in the first place.

Another element of the crime of burglary as defined in Section 1711 is that the offender intended to "commit a crime" in the building or occupied structure which he has entered, or in which he has "surreptitiously" remained.

Section 1712 punishes persons who enter upon property without license or privilege under circumstances not amounting to burglary under Section 1711 because the intent to commit a crime therein is not an element of the offense. Under Subsection 1 of Section 1712 the offender is guilty of a Class A misdemeanor if he enters or remains in a dwelling or "highly secured premise" without license. The offender is guilty of a Class B misdemeanor, under Subsection 2, if he enters any other building or occupied structure or other place which is closed with an obvious intent to exclude intruders if he is not licensed or privileged to so enter (or remain).

Committee Counsel stated Subsection 3 of Section 1712 provides that a person is guilty of an "infraction" if he trespasses upon the property of another (regardless of how it is described) where notice has been given to him not to so trespass.

Section 1713 is aimed at persons who break into vehicles or aircraft and conceal themselves therein with intent to commit a crime. The offense defined in Section 1713 is punished as a Class A misdemeanor unless the offender was armed with a firearm or destructive device in circumstances which indicate that he was ready to inflict serious bodily injury, in which case it is a Class C felony.

Section 1714 defines the offense of stowing away on vessels or aircraft which is classified as a Class A misdemeanor. The offense defined in this section seems to be principally one of federal concern and may not be necessary in a redraft of Title 12.

Section 1719 provides definitions for the foregoing sections. Subsection 3 of that section has been amended by the staff to include facilities maintained by the State of North Dakota or others within the definition of "a highly secured premise" where those facilities otherwise meet the requirements of the definition.

The Committee discussed the definition of a "highly secured premise" contained in Section 1719, and especially the reference to "real or corporate person". Mr. Hill noted that since the words "real or corporate person" seem to be intended to cover all entities which have capacity to own property, no language of ownership was necessary in the definition as long as the building met the other definitional requirements.

The Committee discussed Section 1712 covering "criminal trespass", and especially Subsection 4 providing a defense when the premises trespassed upon were "abandoned". Mr. Webb noted one of the problems in his jurisdiction is the use of unoccupied farm homes by unauthorized persons. The Committee discussed Section 12-35-04, defining the crime of "unlawful entry", which includes an element of an intent to commit a felony, larceny, or malicious mischief in the structure or vehicle entered.

A lengthy discussion was had concerning whether a defense should be allowed based on the fact that the premises entered were "abandoned"; and further, as to the meaning of the word "abandoned". Judge Pearce noted the word "abandoned" had a fairly well-defined legal meaning and indicated that the owner intended to rid himself of all indicia of ownership.

IT WAS MOVED BY MR. WEBB AND SECONDED BY REPRESENTATIVE MURPHY that Subsection 4 of Section 1712 be deleted. At the request of the Chairman, THIS MOTION WAS TEMPORARILY TABLED while Professor Lockney took time to go to the Law School library to determine whether there was a common law definition of "abandonment" which would be appropriate or which would answer the Committee's questions concerning the defense provided by Subsection 4.

The Committee then discussed Subsection 3 of Section 1712 and the fact that it defined an offense classified as an "infraction". Mr. Webb said he did not believe the Committee should be creating "noncriminal" offenses, and that the classification known as "infraction" should not be contained in any recommended Committee sentencing classification plan. In addition, he felt the offenses defined in Subsection 3 of Section 1712 were serious enough to warrant treatment as Class B misdemeanors.

Therefore, IT WAS MOVED BY MR. WEBB, SECONDED BY SENATOR PAGE, AND CARRIED that the penalty classification for the offenses defined in Subsection 3 of Section 1712 be raised from "infraction" to "Class B misdemeanor", and that if this change necessitated any further redrafting, that redrafting is to be done by the staff.

With regard to the "abandonment" defense, Judge Pearce noted Section 221.1 of the Model Penal Code provides the fact that the building or structure was "abandoned" is an "affirmative defense" to a prosecution for burglary. Judge Pearce then quoted from LaFave and Scott, Criminal law, Section 96, Pages 716-717, as follows:

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

Judge Pearce indicated the Volume quoted had cited California cases which seemed to imply that it was burglary to steal from an unoccupied phone booth, car, or cave.

The Chairman suggested that perhaps provisions could be drawn which would cover "abandoned" farmhouses in a special manner. Representative Murphy noted there are all kinds of other buildings located on rural property which are also "abandoned". Judge Pearce noted the Model Penal Code provision for an affirmative defense of "abandonment" applied to its burglary provisions (see MPC, Section 221.1), rather than to its criminal trespass provisions. He said the abandonment defense was probably more important in Section 1711 than in Section 1712.

Mr. Travis felt the question to be answered in regard to the abandonment defense is: What harm is trying to be prevented in Section 1712? If the harm to be prevented is invasion of existing property rights, he can't see that the harm is occurring if the property is actually legally abandoned.

The Chairman then called for the question on MR. WEBB'S MOTION to delete Subsection 4 of Section 1712, WHICH MOTION CARRIED, with Professor Lockney and Judge Pearce voting "nay".

The Committee further discussed Sections 1711 through 1719, and Mr. Webb noted the definition of burglary in Section 1711 does away with the "breaking and entering" concept. Mr. Webb also noted the provisions of Section 1713 dealing with breaking into a vehicle were presently covered under Section 12-35-02, Subsection 9. Representative Hilleboe inquired as to why the offense of breaking into a vehicle did not carry as great a penalty as the offense of breaking into an unoccupied structure.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE AND SECONDED BY MR. WEBB that the penalty grading in Subsection 2 of Section 1713 be increased by one grade to a Class B felony and a Class C felony, instead of a Class C felony and a Class A misdemeanor. The Chairman noted that in most instances the fact that penalty classifications are somewhat high will be offset by the proper exercise of judicial sentencing discretion. Thereafter REPRESENTATIVE HILLEBOE'S MOTION CARRIED.

IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY SENATOR PAGE, AND CARRIED that the Committee adopt the text of Sections 1711 through 1719, FCC, as amended.

The Chairman called on the Committee Counsel for an overview of Sections 1721 through 1741 dealing with robbery and "theft", and reading as follows:

SECTION 1721. ROBBERY.)

1. OFFENSE. A person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another, or threatens or menaces another with imminent bodily injury.

2. GRADING. Robbery is a class A felony if the actor fires a firearm or explodes or hurls a destructive device or directs the force of any other dangerous weapon against

another. Robbery is a class B felony if the robber possesses or pretends to possess a firearm, destructive device, or other dangerous weapon, or menaces another with serious bodily injury, or inflicts bodily injury upon another, or is aided by an accomplice actually present. Otherwise robbery is a class C felony.

3. DEFINITIONS. In this section:

a. An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, whether or not the theft is successfully completed, or in immediate flight from the commission of, or an unsuccessful effort to commit, the theft;

b. "Dangerous weapon" means a weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

SECTION 1731. CONSOLIDATION OF THEFT OFFENSES.)

1. CONSTRUCTION. Conduct denominated theft in sections 1732 to 1734 constitutes a single offense designed to include the separate offenses heretofore known as larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like.

2. CHARGING THEFT. An indictment or information charging theft under sections 1732 to 1734 which fairly apprises the defendant of the nature of the charges against him shall not be deemed insufficient because it fails to specify a particular category of theft. The defendant may be found guilty of theft under such an indictment or information if his conduct falls under any of sections 1732 to 1734, so long as the conduct proved is sufficiently related to the conduct charged that the accused is not unfairly surprised by the case he must meet.

SECTION 1732. THEFT OF PROPERTY.) A person is guilty of theft if he:

1. Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;

2. Knowingly obtains the property of another by deception or by threat with intent

to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat; or

3. Knowingly receives, retains, or disposes of property of another which has been stolen, with intent to deprive the owner thereof.

SECTION 1733. THEFT OF SERVICES.) A person is guilty of theft if:

1. He intentionally obtains services, known by him to be available only for compensation, by deception, threat, false token, or other means to avoid payment for the services; or

2. Having control over the disposition of services of another to which he is not entitled, he knowingly diverts those services to his own benefit or to the benefit of another not entitled thereto.

Where compensation for services is ordinarily paid immediately upon their rendition, as in the case of hotels, restaurants, and comparable establishments, absconding without payment or making provision to pay is prima facie evidence that the services were obtained by deception.

SECTION 1734. THEFT OF PROPERTY LOST, MISLAID OR DELIVERED BY MISTAKE.) A person is guilty of theft if he:

1. Retains or disposes of property of another when he knows it has been lost or mislaid, or

2. Retains or disposes of property of another when he knows it has been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property,

and with intent to deprive the owner of it, he fails to take readily available and reasonable measures to restore the property to a person entitled to have it.

SECTION 1735. GRADING OF THEFT OFFENSES UNDER SECTIONS 1732 to 1734.)

1. CLASS B FELONY. Theft under sections 1732 to 1734 is a class B felony if the property or services stolen exceed one hundred thousand dollars in value or are acquired or retained by a threat to commit a class A or class B felony or to inflict serious bodily injury on the person threatened or on any other person.

2. CLASS C FELONY. Theft under sections 1732 to 1734 is a class C felony if:

a. The property or services stolen exceed five hundred dollars in value;

b. The property or services stolen are acquired or retained by threat and are acquired or retained by a public servant by a threat to take or withhold official action, or exceed fifty dollars in value;

c. The property or services stolen exceed fifty dollars in value and are acquired or retained by a public servant in the course of his official duties;

d. The property stolen is a firearm, ammunition, explosive or destructive device or an automobile, aircraft, or other motor-propelled vehicle;

e. The property consists of any government file, record, document, or other government paper stolen from any government office or from any public servant;

f. The defendant is in the business of buying or selling stolen property and he receives, retains, or disposes of the property in the course of that business;

g. The property stolen consists of any implement, paper, or other thing uniquely associated with the preparation of any money, stamp, bond, or other document, instrument, or obligation of this state; or

h. The property stolen consists of a key or other implement uniquely suited to provide access to property the theft of which would be a felony and it was stolen to gain such access (((; or

i. the property is stolen from the United States mail and is first class mail or air mail))).

3. CLASS A MISDEMEANOR. All other theft under sections 1732 to 1734 is a class A misdemeanor, unless the requirements of subsection 4 or 5 are met.

4. CLASS B MISDEMEANOR. Theft under sections 1732 to 1734 of property or services of a value not exceeding fifty dollars shall be a class B misdemeanor if:

a. The theft was not committed by threat;

b. The theft was not committed by deception by one who stood in a confidential or fiduciary relationship to the victim of the theft; and

c. The defendant was not a public servant or an officer or employee of a financial institution who committed the theft in the course of his official duties.

The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.

[5. INFRACTION. Theft under section 1733 of services of a value not exceeding ten dollars shall be an infraction if the defendant was not a public servant who committed the theft in the course of his official duties. The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.]

6. ATTEMPT. Notwithstanding the provisions of section 1001(3), an attempt to commit a theft under sections 1732 to 1734 is punishable equally with the completed offense when the actor has completed all of the conduct which he believes necessary on his part to complete the theft except receipt of the property.

7. VALUATION. For purposes of grading, the amount involved in a theft under sections 1732 to 1734 shall be the highest value by any reasonable standard, regardless of the actor's knowledge of such value, of the property or services which were stolen by the actor, or which the actor believed that he was stealing, or which the actor could reasonably have anticipated to have been the property or services involved. Thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be charged as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense.

SECTION 1736. UNAUTHORIZED USE OF A VEHICLE.)

1. OFFENSE. A person is guilty of an offense if, knowing that he does not have the consent of the owner, he takes, operates, or exercises control over an automobile, aircraft, motorcycle, motorboat, or other motor-propelled vehicle of another.

2. DEFENSE. It is a defense to a prosecution under this section that the actor reasonably believed that the owner would have consented had he known of the conduct on which the prosecution was based.

3. GRADING. The offense is a class C felony if the vehicle is an aircraft or if the value of the use of the vehicle and the cost of restoration exceed five hundred dollars. Otherwise the offense is a class A misdemeanor.

SECTION 1737. MISAPPLICATION OF ENTRUSTED PROPERTY.) A person is guilty of a class A misdemeanor if he disposes of, uses, or transfers any interest in, property which has been entrusted to him as a fiduciary, or in his capacity as a public servant or an officer, director, agent, employee of, or a person controlling a financial institution, in a manner that he knows is not authorized and that he knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.

SECTION 1738. DEFRAUDING SECURED CREDITORS.)

1. OFFENSE. A person is guilty of an offense if he destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent to prevent collection of the debt represented by the security interest.

2. GRADING. The offense is a class A misdemeanor if the property has a value exceeding five hundred dollars and a class B misdemeanor if the property has a value exceeding fifty dollars. Otherwise it is an infraction. Value is to be determined as provided in section 1735(7).

SECTION 1739. DEFENSES AND PROOF AS TO THEFT AND RELATED OFFENSES.)

1. DEFENSES. It is a defense to a prosecution under sections 1732 to 1738 that:

a. The actor honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him; or

b. The victim is the actor's spouse, but only when the property involved constitutes household or personal effects or other property normally

accessible to both spouses and the parties involved are living together. The term "spouse", as used in this section, includes persons living together as man and wife.

2. PROOF. a. It shall be a prima facie case of theft under sections 1732 to 1734 if it is shown that a public servant or an officer, director, agent, or employee of, or a person connected in any capacity with a financial institution has failed to pay or account upon lawful demand for money or property entrusted to him as part of his official duties or if an audit reveals a shortage or falsification of his accounts. b. It shall be prima facie evidence that the actor knows that property has been stolen if it is shown that, being a dealer, he acquired it for a consideration which he knew to be far below its reasonable value. "Dealer" means a person, whether licensed or not, who has repeatedly engaged in transactions in the type of property involved.

SECTION 1741. DEFINITIONS FOR THEFT AND RELATED OFFENSES.) In sections 1731 to 1741:

1. "Deception" means: (i) creating or reinforcing a false impression, including false impressions as to fact, law, status, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not substantially perform the promise unless it is part of a continuing scheme to defraud; or (ii) preventing another from acquiring information which would affect his judgment of a transaction; or (iii) failing to correct a false impression which the actor previously created or reinforced, or which he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or (iv) failing to correct an impression which the actor previously created or reinforced and which the actor knows to have become false due to subsequent events; or (v) failing to disclose a lien, adverse claim, or other impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained or in order to continue to deprive another of his property, whether such impediment is or is not valid, or is or is not a matter of official record; or (vi) using a credit card, charge plate, or any other instrument

which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer (A) where such instrument has been stolen, forged, revoked, or cancelled, or where for any other reason its use by the actor is unauthorized, and (B) where the actor does not have the intention and ability to meet all obligations to the issuer arising out of his use of the instrument; or (vii) any other scheme to defraud. The term "deception" does not, however, include falsifications as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares in communications addressed to the public or to a class or group;

2. "Deprive" means: (i) to withhold property or to cause it to be withheld either permanently or under such circumstances that a major portion of its economic value, or its use and benefit, has, in fact, been appropriated; or (ii) to withhold property or to cause it to be withheld with the intent to restore it only upon the payment of a reward or other compensation; or (iii) to dispose of property or use it or transfer any interest in it under circumstances that make its restoration, in fact, unlikely.

3. "Fiduciary" means a trustee, guardian, executor, administrator, receiver, or any other person acting in a fiduciary capacity, or any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary;

4. "Financial institution" means a bank, insurance company, credit union, safety deposit company, savings and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment;

5. "Obtain" means: (i) in relation to property, to bring about a transfer or purported transfer of an interest in the property, whether to the actor or another; or (ii) in relation to services, to secure performance thereof;

6. "Property" means any money, tangible or intangible personal property, property (whether real or personal) the location of which can be changed (including things growing on, affixed to, or found in land and documents although the rights represented thereby have no physical location), contract right, chose-in-action,

interest in or claim to wealth, credit, or any other article or thing of value of any kind. "Property" also means real property the location of which cannot be moved if the offense involves transfer or attempted transfer of an interest in the property;

7. "Property of another" means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. "Owner" means any person or a government with an interest in property such that it is "property of another" as far as the actor is concerned;

8. "Receiving" means acquiring possession, control, or title, or lending on the security of the property;

9. "Services" means labor, professional service, transportation, telephone, mail or other public service, gas, electricity and other public utility services, accommodations in hotels, restaurants or elsewhere, admission to exhibitions, and use of vehicles or other property;

10. "Stolen" means property which has been the subject of theft or robbery or a vehicle which is received from a person who is then in violation of section 1736;

11. "Threat" means an expressed purpose, however communicated, to (i) cause bodily injury in the future to the person threatened or to any other person; or (ii) cause damage to property; or (iii) subject the person threatened or any other person to physical confinement or restraint; or (iv) engage in other conduct constituting a crime; or (v) accuse anyone of a crime; or (vi) expose a secret or publicize an asserted fact, whether true or false, tending to subject a person living or deceased, to hatred, contempt, or ridicule or to impair another's credit or business repute; or (vii) reveal any information

sought to be concealed by the person threatened; or (viii) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (ix) take or withhold official action as a public servant, or cause a public servant to take or withhold official action; or (x) bring about or continue a strike, boycott, or other similar collective action to obtain property or deprive another of his property which is not demanded or received for the benefit of the group which the actor purports to represent; or (xi) cause anyone to be dismissed from his employment, unless the property is demanded or obtained for lawful union purposes; or (xii) do any other act which would not in itself substantially benefit the actor or a group he represents but which is calculated to harm another person in a substantial manner with respect to his health, safety, business, employment, calling, career, financial condition, reputation, or personal relationship. Upon a charge of theft, the receipt of property in consideration for taking or withholding official action shall be deemed to be theft by threat regardless of whether the owner voluntarily parted with his property or himself initiated the scheme.

Committee Counsel said these sections describe two basic offenses--robbery and "theft". Section 1721 is the only section which deals with robbery, and it would replace the present robbery provisions contained in Chapter 12-31, NDCC.

The definition of robbery is fairly simple, but does not work any radical changes from the definition of robbery in Section 12-31-01. Robbery is defined as the infliction of or attempt to inflict bodily injury on another, or the threatening or menacing another with "imminent bodily injury" during the course of commission of a "theft".

Section 1721 defines the phrase "course of committing a theft" as including flight from the commission of, or an unsuccessful effort to commit the theft. That provision seems to be opposite from present North Dakota law. Section 12-31-02 provides the force used must be employed to obtain possession of the property stolen, or to overcome resistance to the theft. That section goes on to state: "If employed merely as a means of escape, it does not constitute robbery."

Thus, a policy question is presented for the Committee. Considering the thrust of the FCC robbery definition, which is the infliction or threatening of bodily injury, the Section 1721 definition of "course of committing a theft" seems reasonable.

Committee Counsel stated that robbery was graded in the FCC provisions as a Class A felony in cases where the robber directs the force of a dangerous weapon against another. It is graded as a Class B felony if the robber has an accomplice present or possesses or pretends to possess a firearm or dangerous weapon, or menaces another with serious bodily injury. Robbery is a Class C felony in all other cases.

This gradation is similar to the present gradation in Title 12, which breaks robbery into two degrees, punishing first-degree robbery by a maximum of life imprisonment, and second-degree robbery by a maximum of ten years. Present law also provides that if two

or more persons commit the robbery, they shall be punishable by a maximum of life imprisonment, which corresponds to the provision for grading robbery as a Class B felony, which would set a maximum punishment of 15 years' imprisonment. Section 1721 seems to provide a clear and more concise definition of robbery than do the provisions of Chapter 12-31, which would be replaced by Section 1721.

Sections 1731 through 1741 will, if adopted, work one of the most radical changes in current North Dakota law which the Committee will consider. Those sections are an attempt to consolidate all of the so-called "theft offenses", and would include the separate offenses now known as larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses, extortion, blackmail, fraudulent conversion, and receipt of stolen property.

The Committee Counsel noted the creation of a consolidated "theft offense" is the trend in modern criminal recodifications. For instance, Kentucky's new Penal Code and Ohio's proposed Criminal Code, as well as Article 223 of the Model Penal Code, all provide for consolidated theft offenses.

Section 1731 provides that the theft offenses are to be construed as consolidating the numerous separate offenses previously known in the criminal law, i.e., this section provides a statement of "legislative intent". It then goes on to provide that an indictment, information, or complaint which "fairly apprises the defendant of the nature of the charges against him" is not to be deemed insufficient because it does not specify a particular category of theft.

Section 1732 defines the offense of "theft of property", as opposed to "theft of services" which is covered in Section 1733. The Section 1732 definition covers, in general language, almost every conceivable situation in which the offender would take or exercise unauthorized control over the property of another, including the making of an unauthorized transfer of an interest in the real property of another. As an additional example of the scope of its coverage, Section 1732 covers the obtaining of property by "threat or deception", and thus would replace the classic definition of extortion.

Section 1732 also prohibits the knowing receipt of or disposing of property of another which has been stolen, accompanied by an intention to deprive the owner of that property. This portion of Section 1732 would replace Section 12-38-02 dealing with the receipt of property in false character with intent to convert the property to the recipient's own use; and would also replace Section 12-40-19, which prohibits buying or receiving stolen "personal property".

The Committee should note that since the FCC's theft provisions would replace the current definition of "larceny", a broadening of the scope of larceny would occur, since the present North Dakota definition of larceny limits it to the "theft" of personal property. Since Section 1732 extends to interest in real property, and Section 1733 covers services, the scope of the "larceny" offense would be broadened.

Section 1733 prohibits the "theft of services" which are defined, by Section 1741, to mean labor, professional service, transportation, telephone, mail, or other public service, gas, electricity, and other public utility services, accommodations in hotels, restaurants, or elsewhere, admission to exhibitions, and use of vehicles or other property. Section 1733 would replace Sections 12-40-17, prohibiting larceny of a passenger ticket; 12-38-11, prohibiting the evasion of a hotel bill; and 12-38-13, prohibiting the obtaining of tourist camp accommodations by fraud.

Section 1733 also provides that absconding without making payment or provision to pay for services which are usually paid for immediately upon rendition, is prima facie evidence

that the services were obtained by deception. This provision in Section 1733 represents a restriction of similar North Dakota provisions on prima facie proof of fraudulent intent. Section 12-38-12 makes it a prima facie case if the alleged offender refused or neglected to pay on demand; gave negotiable paper which "bounced"; surreptitiously removed his baggage; or absconded without offering to pay. Thus, the Committee is faced with a policy question as to whether the prima facie evidence provision of Section 1733 should be broadened to include all of the situations listed in Section 12-38-12, or, in the alternative, whether there should be any provision for establishing elements of the offense on a prima facie basis.

Section 1734 provides that a person is guilty of theft if he retains or disposes of another's property which he knows to have been lost or mislaid; or if he retains or disposes of the property of another when it has been delivered to him by mistake, or where the nature or amount of the property delivered was the result of a mistake. The offender must act with intent to deprive the true owner of the property, and one of the criteria for conviction is that the offender failed to take readily available and reasonable measures to restore the property to its true owner. Section 1734 would specifically replace Sections 12-40-08 and 12-40-09, which deal with the concealing of lost goods, or the appropriating of lost property.

Section 1735 provides grading for the "theft" offenses defined in Sections 1732 through 1734. Grading can range from a Class B felony to a Class B misdemeanor, i.e., from a maximum imprisonment of 15 years down to a maximum of 30 days.

The present North Dakota maximum for grand larceny is imprisonment for ten years, and for larceny of an automobile or motorcycle, imprisonment for seven years. The present maximum for extortion is imprisonment for five years. Thus, the range of grading of the theft offenses under the FCC proposals is slightly higher than the range under current North Dakota law. However, the Class B felony grading does not apply unless the property or services stolen exceeded $100,000 in value, or unless the property or services were stolen through use of a threat to commit a Class A or Class B felony, or to inflict "serious bodily injury" on the person threatened or on any other person. With the emphasis placed on either the tremendous value of the property stolen or the risk of commission of a serious offense or infliction of serious bodily injury, the possibility of grading certain theft offenses as Class B felonies seems reasonable.

If the property or services stolen exceed $500 in value, or are stolen through use of a threat and exceed $50 in value, or are stolen through use of a threat made by a public servant "to take or withhold official action", the offense is graded as a Class C felony, punishable by a maximum of seven years' imprisonment.

Committee Counsel noted this provision for Class C felony gradation represents a $400 higher limit than the present North Dakota division between "petit larceny" and "grand larceny". The present North Dakota division point between petit larceny and grand larceny is $100 (as the value of the property stolen).

Section 1735 also sets forth other instances in which the Class C felony gradation would apply, which are when the property or services exceed $50 in value and are "stolen" by a public servant during the course of his official duties; the stolen property is a weapon or a motor-propelled vehicle; the stolen property is a government file which was stolen from a government office or a public servant; the defendant is in the "business of buying or selling stolen property" and receives the property in the course of that business; the property consists of a thing uniquely associated with the preparation of documents, instruments, or obligations of this State; or the stolen property is a key or other device useful in providing access to still other property, and the thief stole it to gain such access.

All other theft is a Class A misdemeanor or Class B misdemeanor, depending on whether the theft was committed by threat, or deception on the part of a person in a fiduciary relationship to the victim, or where the offender was a public servant or officer or employee of a financial institution; and the property or services stolen did not exceed $50 in value.

Finally, theft will be classified as an "infraction" if the value of "services" stolen does not exceed $10, and the services were not stolen by a public servant acting in his official capacity. This latter provision is in brackets, and if the Committee does not take affirmative action to adopt it, former Committee procedure would require that it be deleted.

Subsection 6 of Section 1735 provides that attempts to commit thefts shall be punished equally with a completed offense "when the actor has completed all of the conduct which he believes necessary on his part to complete the theft, except receipt of the property". This provision differs slightly from the general grading of criminal attempt contained in Section 1001, FCC, which reduces attempt by one grade from the offense attempted, unless the conduct constituting the attempt came "dangerously close to commission of the crime".

Subsection 7 of Section 1735 provides that if several thefts result from "one scheme or course of conduct" they may be charged as one offense, and all of the amounts of property proved to have been stolen may be aggregated and a total "value" arrived at to determine the gradation of the offense. This provision represents new statutory law for North Dakota, and raises a policy question for the Committee.

The Committee Counsel stated that Section 1736 makes it a Class A misdemeanor to take an automobile, motorcycle, motorboat, or other motor-propelled vehicle without the consent of the owner. The offense is upgraded to a Class C felony if the vehicle is an aircraft, or if the value of the use of the vehicle and cost of restoration exceed $500. This section would replace Sections 12-40-06 and 12-40-07, which prohibit the stealing of automobile or motorcycles; or the driving of a motor vehicle without the owner's permission. Committee Counsel noted Section 1736 does not require an intent to deprive the owner of his vehicle, while Section 12-40-06 does so require. To that extent, Section 1736 would provide an easier burden of proof on the prosecution; however, the maximum potential penalty is reduced correspondingly from seven years' imprisonment to one year imprisonment, unless the value of the use of the vehicle and the cost of restoration exceeds $500, in which case the maximum punishment under Section 1736 would be the same as current North Dakota law.

Section 1736 provides a "defense" if the offender reasonably believed the owner would have consented had he known of the offender's culpable conduct. The corresponding provision of the Model Penal Code makes the owner's consent (ratification?) an "affirmative defense". This defense is not specifically provided for by North Dakota statute, although it may be implied as a result of the definition of the offense in Section 12-40-07.

Section 1737 makes it a Class A misdemeanor for a person to use or transfer property which has been entrusted to him in his capacity as a fiduciary, as a public servant, or as an officer or employee of a financial institution, when the offender knows that he was not authorized to so act, and knows that the action involves a detrimental risk to the owner, or to the person for whose benefit the property was entrusted. This section would replace Section 12-36-10, which provides that it is embezzlement for a fiduciary to fraudulently appropriate property entrusted to him.

Section 1738 makes it either a Class A misdemeanor, Class B misdemeanor, or infraction to defraud secured creditors, with the dividing line being that the property exceeded $500 in value (a Class A misdemeanor), $50 (a Class B misdemeanor), or less than $50 (an infraction).

The Committee Counsel noted that Section 1738 was believed necessary by FCC drafters because the definition of "property" contained in Section 1741 did not include a security interest. Thus, the "theft" provisions would not include the intentional defeating of a security interest without a section similar to Section 1738. Title 12 does not contain a similar offense definition; however, Sections 13-01-11 and 13-01-12 provide that it is a misdemeanor to fraudulently convey property to hinder or delay creditors or to remove or dispose of property to defraud creditors. Because it is broader, Section 1738 would probably be an appropriate provision to be contained in a new Title 12.

Section 1739 creates two "defenses" to a prosecution for theft. The defenses are:
1. That the offender honestly believed that he had a claim to the property or services; or
2. That the victim was the offender's spouse, that they were living together, and that the property involved was household or other property normally accessible to both spouses.
Both of these defenses would be new statutory law in North Dakota, although both are probably implied from the present definitions of larceny, since a person who had a good faith belief that he had a claim to the property involved would hardly be taking it with intent to deprive another of his incidents of ownership thereof. The word "spouse" as used in the second listed defense includes a man and woman who are living together although not legally married.

Section 1739 also establishes a prima facie case of theft under Sections 1732 through 1734 if a public servant or officer or employee of a financial institution has failed to pay or account upon demand for money or property entrusted to him, or if an audit reveals a shortage or falsification in his accounts. In addition, Section 1739 provides that if a person is a "dealer" and acquires property for a consideration which he knows to be far below its reasonable value, that fact shall be prima facie evidence that the actor ("dealer") knew that the property was stolen. A "dealer" is defined as a person, whether or not licensed, who has dealt repeatedly in the type of property involved.

Section 1741, mentioned before, provides definitions for the foregoing sections, including a definition of the word "fiduciary" and a definition of the word "property", which includes real property where the offense defined involves a transfer or attempted transfer of an interest in that real property.

Representative Murphy inquired whether a factual situation involving a person who did not "threaten" his victim, but rather politely asked for property on the person of the victim was robbery under Section 1721, when the victim was aware that he was in danger if he did not turn over the property. The Committee discussed this question, and it was noted this would be robbery, since the "threat" would either be considered as implied, or else would be covered by the word "menaces" contained in Line 3 of Section 1721.

Judge Lynch stated it was his opinion that the provisions (of Sections 1731 through 1741) for a consolidated theft offense were a definite step forward in criminal code revision. Mr. Webb agreed that the consolidated theft provisions were an improvement over current North Dakota law.

Professor Lockney read from "Criminal Law" by LaFave and Scott as follows:

> "The fine distinctions between larceny, embezzlement and false pretenses are often difficult to make in a particular case. The principal beneficiary of the difficulty is the defendant who undoubtedly has misappropriated another's property in one of the three ways covered by the three crimes. The modern remedy is to consolidate these three separate crimes (perhaps including also the separate crimes of receiving stolen property, and blackmail or extortion) into one consolidated crime called 'theft.' Under this plan, one charged with 'theft' can be convicted whether the proof shows what was formerly larceny or embezzlement or false pretenses (or receiving, or blackmail or extortion)." (Id, Page 673.)

Mr. Webb said the Committee should note the concept of putting the victim in "fear" is no longer stressed in Section 1721 defining robbery. In addition, he noted the various "prima facie" presumptions created by the federal draft may cause problems, especially in the constitutional sense. Mr. Webb also noted that Title 35, NDCC, contained sections related to Section 1738 dealing with the defrauding of secured creditors, especially in relation to evading the provisions of various types of liens.

The Committee discussed the $100,000 minimum limitation on classifying theft as a Class B felony. It was noted that this was probably a high limitation as far as North Dakota was concerned.

IT WAS MOVED BY MR. WEBB, SECONDED BY JUDGE PEARCE, AND CARRIED that the words "one hundred" be deleted from Line 3 of Section 1735 (Subsection 1), and that the word "ten" be inserted in lieu thereof.

Judge Lynch inquired as to the meaning of the word "restoration" in Subsection 3 of Section 1736. He wondered whether it encompasses the expenses necessary to retrieve a stolen vehicle or aircraft from where the offender may have left it.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY JUDGE LYNCH, AND CARRIED that the words "retrieval and" be inserted before the word "restoration" in Line 9 of Section 1736; and that the word "exceed" in that same line be deleted, and the word "exceeds" be inserted in lieu thereof.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the Committee adopt the staff redraft of Sections 1721 through 1741, as amended.

The Committee recessed for lunch at 12:05 p.m. and reconvened at 1:00 p.m., at which time the Chairman called on the Committee Counsel for an overview of Sections 1751 through 1755, which cover the offenses of forgery or counterfeiting and related offenses, and reads as follows:

SECTION 1751. FORGERY OR COUNTERFEITING.)

1. OFFENSE. A person is guilty of forgery or counterfeiting if, with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such deception or harm by another person, he:

a. Knowingly and falsely makes, completes, or alters any writing; or

b. Knowingly utters or possesses a forged or counterfeited writing.

2. GRADING. Forgery or counterfeiting is:

a. A class B felony if:

(i) The actor forges or counterfeits an obligation or other security of this state; or

(ii) The offense is committed pursuant to a scheme to defraud another of money or property of a value in excess of one hundred thousand dollars;

b. A class C felony if:

(i) The actor is a public servant or an officer or employee of a financial institution and the offense is committed under color of office or is made possible by his office;

(ii) The actor forges or counterfeits foreign money or other legal tender, or utters or possesses any forged or counterfeited obligation or security of this state or foreign money or legal tender;

(iii) The actor forges or counterfeits any writing from plates, dies, molds, photographs, or other similar instruments designed for multiple reproduction;

(iv) The actor forges or counterfeits a writing which purports to have been made by the government; or

((((v) the actor utters a forged or counterfeited United States passport or certificate of United States naturalization or citizenship;)))

(v) The offense is committed pursuant to a scheme to defraud another of money or property of a value in excess of five hundred dollars;

c. A class A misdemeanor in all other cases.

SECTION 1752. FACILITATION OF COUNTERFEITING.)

1. COUNTERFEITING IMPLEMENTS. A person is guilty of an offense if, except as authorized by statute or by regulation, he knowingly makes, executes, sells, buys, imports, possesses, or otherwise has within his control any plate, stone, paper, tool, die, mold, or other implement or thing uniquely associated with or fitted for the preparation of any forged or counterfeited security or tax stamp or any writing which purports to be made by this state or any foreign government.

2. COUNTERFEITING IMPRESSIONS. A person is guilty of an offense if, except as authorized by statute or by regulation, he:

a. Knowingly photographs or otherwise makes a copy of:

(i) Money or other obligation or security of this state or a foreign government, or any part thereof; or

(ii) Any plate, stone, tool, die, mold, or other implement or thing uniquely associated with or fitted for the preparation of any writing described in subsection 1; or

b. Knowingly sells, buys, imports, possesses, or otherwise has within his control any photograph or copy the making of which is prohibited by subsection 2a.

3. AUTHORIZATION AS DEFENSE. In a prosecution under this section, authorization by statute or by regulation is a defense.

4. GRADING. An offense defined in this section is a class B felony if the implement or the impression relates to the forging or counterfeiting of an obligation or security of this state. Otherwise it is a class C felony.

SECTION 1753. DECEPTIVE WRITINGS.)

1. OFFENSE. A person is guilty of an offense if, with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such a deception or harm by another person, he knowingly issues a writing without authority to issue it or knowingly utters or possesses a deceptive writing.

2. GRADING. The offense is a class B felony if it is committed pursuant to a scheme to defraud another of money or property of a value in excess of one hundred thousand dollars. The offense is a class C felony if (a) the actor is a public servant or an officer or employee of a financial institution and the offense is committed under color of office or is made possible by his office; or (b) the offense is committed pursuant to a scheme to defraud another of money or property of a value in excess of five hundred dollars. Otherwise it is a class A misdemeanor.

SECTION 1754. DEFINITIONS FOR SECTIONS 1751 TO 1754.) In sections 1751 to 1754:

1. The definitions prescribed in section 1741 apply;

2. "Writing" means (a) any paper, document, or other instrument containing written or printed matter or its equivalent, including money, a money order, bond, public record, affidavit, certificate, contract, security, or obligation, and (b) any coin or any gold or silver bar coined or stamped at a mint or assay office or any signa-

ture, certification, credit card, token, stamp, seal, badge, decoration, medal, trademark, or other symbol or evidence of value, right, privilege, or identification which is capable of being used to the advantage or disadvantage of the government or any person;

3. "Without authority" includes conduct that, on the specific occasion called into question, is beyond any general authority given by statute, regulation, or agreement;

4. "Falsely makes" means to make a writing which purports to be made by the government or another person, or a copy thereof, but which is not because the apparent maker is fictitious or because the writing was made without authority;

5. "Falsely completes" means to make an addition to or an insertion in a writing, without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker;

6. "Falsely alters" means to make a change in a writing, without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker;

7. To "forge" or to "counterfeit" a writing means to falsely make, complete, or alter the writing, and a "forged" or "counterfeited" writing is a writing which has been falsely made, completed, or altered. The terms "forgery" and "counterfeiting" and their variants are intended to be synonymous in legal effect;

8. "Utter" means to issue, authenticate, transfer, publish, sell, transmit, present, use, or otherwise give currency to;

9. "Possess" means to receive, conceal, or otherwise exercise control over;

10. The term "obligation or other security of this state" means a bond, certificate of indebtedness, coupon, fractional note, certificate of deposit, a stamp, or other representative of value of whatever denomination, issued pursuant to a statute;

11. "Security" other than as provided in subsection 10 includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter

of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in tangible or intangible property, instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise, uncanceled stamp issued by a foreign government (whether or not demonetized); or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant or right to subscribe to or purchase any of the foregoing;

12. "Tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a state, or evidence of the discharge thereof;

13. A "deceptive writing" is a writing which (a) has been procured by deception, or (b) has been issued without authority.

SECTION 1755. MAKING OR UTTERING SLUGS.)

1. OFFENSE. A person is guilty of an offense if he makes or utters a slug with intent to deprive a supplier of property or service sold or offered by means of a coin machine or with knowledge that he is facilitating such a deprivation by another person.

2. GRADING. The offense is a class A misdemeanor if it involves slugs which exceed fifty dollars in value. Otherwise it is a class B misdemeanor.

3. DEFINITIONS. In this section:

a. "Slug" means a metal, paper, or other object which by virtue of its size, shape or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill, or token;

b. "Coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed:

(i) To receive a coin or bill of a certain denomination or a token made for the purpose; and

(ii) In return for the insertion or deposit thereof, automatically to offer, provide, assist in providing or permit the acquisition of property or a public or private service;

c. "Value" of the slugs means the value of the coins, bills, or tokens for which they are capable of being substituted.

The Committee Counsel said these sections deal with the offenses of forgery or counterfeiting, issuance of deceptive writings, and the making or passing of slugs. One of the general theories of these sections is that the terms "forgery" and "counterfeiting" are of synonymous legal significance. These sections would replace the present North Dakota provisions on forgery and counterfeiting contained in Chapter 12-39.

Section 1751 provides that a person commits forgery or counterfeiting if he knowingly makes or alters a "writing", which word is defined in Section 1754, or knowingly utters or possesses a forged or counterfeited writing. Section 1751 offenses are graded from a Class B felony to a Class A misdemeanor. Thus, the maximum punishments under Section 1751 run from 15 years' imprisonment to one year imprisonment. The present maximum punishment for forgery in North Dakota is 10 years' imprisonment, so the FCC gradation is not radically different. In addition, the Committee should note that the offense is only graded as a Class B felony if the offender forges or counterfeits an obligation or other security of the State, or if the offense is committed as part of a scheme to defraud a person of money or property in excess of $100,000 in value.

The offense is a Class C felony if the offender commits the forgery or counterfeiting in pursuance of a scheme to defraud another of money in excess of $500 in value; or forges a writing which purports to have been made by the government; or forges a writing through the use of plates, dies, forms, or other similar instruments designed for multiple reproduction; or forges or counterfeits foreign money (or utters same); or where the offender is a public servant or an officer or employee of a financial institution and commits the offense under color of office. In all other cases, forgery or counterfeiting is a Class A misdemeanor.

The Committee Counsel noted that the provision prohibiting the forging of foreign money was retained in the staff redraft because Sections 12-39-12, 12-39-13, and 12-39-21 presently prohibit the counterfeiting or possession of counterfeited foreign coins. It is doubtful whether such a provision is necessary in North Dakota law, because such an offense, were it to occur, would also be prosecutable by the Federal Government, which would have a greater interest in that type of offense.

The Committee Counsel noted that Section 12-39-28 would not be replaced by the FCC forgery provisions, but that the gravamen of the offense defined in that section could be considered to be covered by Section 1705 dealing with criminal mischief. Section 12-39-28 provides that if a person destroys or obliterates an instrument "the false making of which would be forgery" the offense is punishable in the same manner as though it were forgery. This seems to be a harsh penalty for simple destruction of a written instrument, nor does there seem to be an adequate rationale for keying this offense to forgery penalties.

Section 1752 makes it an offense for a person to make, sell, buy, or possess counterfeiting implements; or to photograph or copy molds, dies, etc., from which counterfeited impressions can be made; or to knowingly sell or possess copies of molds, dies, etc., the making of which is prohibited. Section 1752 is graded as follows: If the implement or impression copied or possessed relates to the forging or counterfeiting of an obligation or security of the State, the offense is a Class B felony. In all cases, the offense is a Class C felony. Section 1752 would replace Section 12-39-09, which prohibits the making of plates or engravings in the form of negotiable instruments. The maximum punishment for a Section 12-39-09 offense is 10 years' imprisonment.

Section 1753 provides that a person commits an offense if he "knowingly" issues a writing when unauthorized to do so, or utters or possesses a "deceptive writing". The offender must also intend to deceive or harm the government or another person, or have knowledge that his action is facilitating such deception or harm by still another person.

The Section 1753 offense is graded as a Class B felony if it is part of a scheme to defraud someone of property in excess of $100,000 in value. It is a Class C felony if the offender is a public servant or an officer or employee of a financial institution and acts under color of office; or if the offense is committed pursuant to a scheme to defraud another of money or property in excess of $500 in value. In all other cases the offense is a Class A misdemeanor.

The term "deceptive writing" is defined in Section 1754 as a writing which either has been procured by deception, or has been issued without authority. The term "deception" is defined in Section 1741 (under the "theft" provisions), and is incorporated by reference into Section 1754.

As previously mentioned, Section 1754 contains numerous definitions relevant to the preceding three sections, including a definition of "utter", and a definition of the words "forge" and "counterfeit", which are specifically stated to be "synonymous in legal effect".

The Committee Counsel stated that Section 1755 prohibits the making or uttering of a "slug" with intent to deprive a supplier of property or services offered by means of a vending machine. If the slug exceeds $50 in "value", the offense is a Class A misdemeanor. In all other cases, the offense is a Class B misdemeanor.

A "slug" is defined to include tokens, bills, or any other object which is capable of being inserted into a machine. The value of a slug is determined by reference to the coin, bill, or token for which the slug is intended to be substituted. "Coin machine" is defined to include turnstiles and money changers.

Section 1755 would replace Sections 12-38-15, 12-38-16, and 12-38-17, which prohibit the use of slugs in automatic vending machines, coin box telephones, or other receptacles designed to receive "lawful coin"; and which also prohibit the manufacture of slugs. Those three sections classify the offenses as misdemeanors, so the maximum punishment available under Section 1755 would not differ from existing law. Section 1755 reflects a valuable modernization of existing North Dakota law because it includes machines capable of receiving paper money, whereas present North Dakota law only relates to machines capable of receiving "lawful coin".

Judge Pearce inquired as to whether Subdivision (i), Subparagraph a, Subsection 2 of Section 1751 should not refer to all governmental organizations within the State, rather than simply to state government. He felt the words "this state" contained in Line 10 of Section 1751 did not include political subdivisions. The Committee Counsel noted that the word

"government" is defined in Section 109, which has not yet been adopted by the Committee, to include political subdivisions, and that maybe the words "the government" should be substituted for the words "this state" in Line 10 of Section 1751.

The Committee discussed the desirability of changing the minimum amounts required in Subsection 2 for the offense to be a Class B felony from $100,000 to $10,000 (see Lines 12 and 13 of Section 1751) in order to accord with the previous change made in the "theft" provisions.

Mr. Webb said he felt the penalty for forgery involving a scheme to defraud a person in an amount less than $500 should be set higher than a Class A misdemeanor.

Professor Lockney wondered whether a "first-time" check forger who forged a check for an amount under $500 should be considered a felon. He said he would not raise the question in regard to a person who had forged several such checks, but wondered as to the first-time offender.

After further discussion, IT WAS MOVED BY SENATOR PAGE, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the word "five" in Line 29 of Section 1751 be deleted, and the word "one" be inserted in lieu thereof, and that similar changes be made in the related theft provisions.

Representative Hilleboe noted that the grading of the offense based on a scheme to defraud a person of property in excess of $100 was worded so that it was limited to a scheme to defraud a single person. He felt that the offense should be worded so that it covered a scheme to defraud a single person or several persons as a single offense.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that the words "or others" be inserted after the word "another" in Line 28 of Section 1751.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the words "the government" be substituted for the words "this state" in Lines 10 and 20 of Section 1751; that the word "government" be substituted for the word "state" in Line 7 of Section 1752; that the word "government" be substituted for the word "state" in Line 11 of Section 1752; that the words "of any" be substituted for the word "a" in Line 11 of Section 1752; and that the words "the government" be substituted for the words "this state" in Line 23 of Section 1752.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the words "one hundred" in Line 12 of Section 1751 be deleted and the word "ten" be inserted in lieu thereof; that the words "or others" be inserted following the word "another" in Line 11 of Section 1751; that the words "or others" be inserted after the word "another" in Line 7 of Section 1753; that the words "one hundred" be deleted and the word "ten" be inserted in lieu thereof in Line 7 of Section 1753; that the words "or others" be inserted after the word "another" in Line 10 of Section 1753; and that the word "five" in Line 11 of Section 1753 be deleted and the word "one" be inserted in lieu thereof.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the Committee adopt Sections 1751 through 1755, as amended.

Senator Page said that he would like to make a motion to make the appropriate change in Section 1735 (theft penalties), previously considered, regarding the dollar limitation for gradation as a Class C felony. IT WAS MOVED BY SENATOR PAGE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED, that the word "five" in Line 7 of Section 1735 be deleted, and the word "one" be inserted in lieu thereof.

Mr. Hill said that, during the noon hour, he had a telephone conversation with Mr. Paul Kalin of the National Conference on Crime and Delinquency. Mr. Kalin said he would be available for consultation with the Committee regarding sentencing on July 20-21, 1972; or July 24 through 27, 1972. Mr. Hill said he felt it would be valuable for the Committee to hear Mr. Kalin, and, if possible, the next Committee meeting should be scheduled to include one of those dates.

The Committee discussed the next meeting date, and in addition discussed the completion of the Committee's work and whether a bill should be presented to the Legislative Council.

Committee Counsel noted that he had always believed that the Committee would submit a resolution calling for a continuation of the criminal code revision effort during the next biennium, so as to revise all of the substantive criminal offense definitions which were not contained in Title 12. The consensus of the Committee was that such a resolution should be recommended by the Committee to the full Legislative Council.

After further discussion, it was decided that the Committee should next meet on July 20-21, 1972, in Bismarck.

The Chairman noted that Mr. Kalin should be invited to attend the next meeting and present his views regarding sentencing philosophy. In addition, a special invitation should be extended to Professor Larry Kraft, since, as the Committee realized, he was particularly interested in sentencing philosophy.

The Chairman called on the Committee Counsel for an overview of Sections 1757, 1758, and 1771, which reads as follows:

SECTION 1757. RIGGING A SPORTING CONTEST.)

1. INTERFERENCE WITH A SPORTING CONTEST. A person is guilty of a class C felony if, with intent to prevent a publicly exhibited sporting contest from being conducted in accordance with the rules and usages purporting to govern it, he:

a. Confers or offers or agrees to confer any benefit upon, or threatens any harm to, a participant, official or other person associated with the contest; or

b. Tampers with any person, animal, or thing.

2. SOLICITING OR ACCEPTING BENEFITS. A person is guilty of a class C felony if he knowingly solicits, accepts, or agrees to accept any benefit the giving of which is prohibited under subsection 1.

3. DEFINITION. A "publicly exhibited sporting contest" is any contest in any sport, between individual contestants or teams of contestants, the occurrence of which is publicly announced in advance of the event.

4. STATUS OF CONTESTANT. The status of the contestant as amateur or professional is not material to the commission of the offense described in this section.

SECTION 1758. COMMERCIAL BRIBERY.)

1. GIVING BRIBE. A person is guilty of a class A misdemeanor if he:

a. Confers or agrees or offers to confer any benefit upon an employee or agent without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs; or

b. Confers or agrees or offers to confer any benefit upon any fiduciary without the consent of the beneficiary, with intent to influence the fiduciary to act or conduct himself contrary to his fiduciary obligation.

2. RECEIVING BRIBE. A person is guilty of a class A misdemeanor if he knowingly solicits, accepts, or agrees to accept any benefit the giving of which is prohibited under subsection 1.

SECTION 1771. ENGAGING IN OR FINANCING CRIMINAL USURY BUSINESS.)

1. OFFENSE. A person is guilty of a class C felony if he knowingly engages in, or directly or indirectly provides financing for, the business of making extensions of credit at such a rate of interest that repayment or performance of any promise given in consideration thereof is unenforceable through civil judicial process ((((a) in the jurisdiction where the debtor, if a natural person, resided at the time credit was extended or (b) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time credit was extended))) in this state.

2. PRESUMPTIONS. Knowledge of unenforceability shall be presumed, in the case of a person engaging in the business, if any of the following exist, and in the case of a person directly or indirectly providing financing, if he knew any of the following:

a. It is an offense (((in the relevant jurisdiction described in subsection (1))))
to charge, take, or receive interest at the rate involved;

b. The rate of interest charged, taken, or received is fifty or more percentum greater than the maximum enforceable rate of interest (((in the relevant jurisdiction described in subsection (1)))); or

c. The rate of interest involved exceeds forty-five percentum per annum or the equivalent rate for a longer or shorter period.

3. RATE OF INTEREST. Unless otherwise provided by (((the))) law (((of the relevant jurisdiction described in subsection (1)))), the rate of interest is to be calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

4. DEFENSE. It is a defense to a prosecution under this section that the defendant was licensed or otherwise authorized by the United States or by any state government to engage in the business of making extensions of credit.

5. DEFINITIONS. In this section:

a. An "extension of credit" means any loan, or any agreement tacit or express whereby the repayments or satisfaction of any debt, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred;

b. "Debtor" means any person to whom an extension of credit is made, or who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same;

c. The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

((((6) JUDICIAL NOTICE OF STATE LAW. For the purposes of this section, relevant state law, including conflicts of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This subsection does not impair any authority which any court would otherwise have to take judicial notice of any matter of state law.)))

The Committee Counsel stated that Sections 1757 and 1758 deal with a type of bribery not covered under the general bribery provisions contained in Sections 1361 through 1365. The general bribery provisions cover bribes given to or received by public servants, whereas Sections 1757 and 1758 deal with bribery designed to interfere with a sporting contest; and with commercial bribery, i.e., bribery involving private persons as opposed to public servants.

Section 1757, dealing with sports bribery, would replace Sections 12-23-08 and 12-23-09, which prohibit the offering or acceptance of a bribe to affect the result of an "athletic event", game, or contest. Thus, Section 1757 would not be an entirely new provision. On the other hand, Section 1758, dealing with commercial bribery, would create a new offense in North Dakota.

Section 1758 makes it a Class A misdemeanor for a person to offer a bribe to an employee or agent with intent to influence the recipient's conduct in relation to his employer's or principal's affairs; or to give a bribe to a fiduciary with intent to cause him to act contrary to his obligation of fidelity. This section also provides that it is a Class A misdemeanor for anyone to solicit or accept such a bribe. The corresponding provision of the Model Penal Code, Section 224.8, adds a prohibition against bribery of one who is in a position in which he acts as an arbitrator or appraiser. The Committee Counsel noted that the Committee might want to add that category to Section 1758.

The other section in this grouping, Section 1771, prohibits "loan sharking" and states that no one shall engage in or finance a business which makes "extensions of credit" at a rate of interest which is usurious. The section provides a defense where the alleged offender was licensed by the United States or by any state to engage in the loan business.

Section 1771 also provides presumptions that the offender knew that the rate of interest he was charging was unenforceable. The alleged offender will be presumed to have known such fact if: He knew that the rate charged constituted usury; the rate charged was 50 percent or more above the maximum enforceable rate of interest; or the rate charged exceeded 45 percent annual interest.

Section 1771 would replace Section 47-14-11, which makes it a misdemeanor to charge a usurious rate of interest. The primary policy question presented by Section 1771 is that it does not apply to individual, isolated instances of usury, but rather applies to a "criminal usury business" (loan sharking). Present North Dakota law does apply to individual, isolated acts of usury, and the question is whether that application should continue. It is possible that the Committee might decide to leave individual, isolated acts of usury to recompense through civil litigation under Section 47-14-10.

Representative Murphy, referring to Section 1757, asked whether it could allow prosecution of a television station for broadcasting a professional wrestling match, since it was obvious that such a match was "rigged". The Committee Counsel stated that the fact that professional wrestling was obviously "rigged" would not constitute an offense under Section 1757, either because it could not fit the definition of a sporting contest, or because it was in fact "being conducted in accordance with the rules and usages purporting to govern it", and therefore the gist of the offense aimed at would not occur.

The Committee discussed Section 1771 prohibiting the maintenance of a criminal usury business, and whether North Dakota needed such a statute. Representative Hilleboe inquired as to why the penalty for this offense was so high. He questioned whether this was not in the category of a "panic statute" in relation to North Dakota, since "loan sharking" is not common in North Dakota.

Mr. Bucklin inquired as to whether Section 1771 might apply to the small businessman who accidentally gets involved in a usurious transaction through lack of knowledge concerning the law. After discussion, the Committee seemed to believe that Section 1771 would not apply to a small businessman because he would not actually be in the "business of making extensions of credit".

Professor Lockney noted that the redraft of Section 1771 provides that the offense is related to the unenforceability of the loan provisions "in this state", and wondered whether conflict of laws provisions would allow a prospective offender to get around Section 1771 by providing that the loan contract should be performed in some other state with appropriate allowable interest rates.

Representative Hilleboe noted Section 1757 made it a felony to give or receive a sports bribe, while Section1758 made it only a Class A misdemeanor to engage in commercial bribery. He wondered whether the two offenses were not of similar seriousness. In addition, he wondered whether an athlete, particularly an amateur athlete, receiving a sports bribe should be branded a felon.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE that the words "C felony" in Lines 2 and 3 and in Line 8 of Section 1757 be deleted and the words "A misdemeanor" be substituted therefor. THIS MOTION DIED FOR LACK OF A SECOND.

IT WAS THEN MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY JUDGE PEARCE, AND CARRIED that the words "A misdemeanor" in Lines 2 and 9 of Section 1758 be deleted and the words "C felony" be substituted in lieu thereof.

Mr. Bucklin noted that the Committee should consider the fact that North Dakota had, in many instances, peculiar provisions regarding sentences for offenses that were felonies, wherein the judge could sentence to the county jail, in which case the offense would be deemed to be a misdemeanor. The Committee Counsel noted that, in addition to Mr. Bucklin's comments, if a judge sentenced a person to the State Farm, his record showed conviction of a misdemeanor rather than a felony, even though the offense committed was defined as a felony.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY SENATOR PAGE, AND CARRIED that the Committee adopt Sections 1757, 1758, and 1771, as amended.

The Chairman called on the Committee Counsel for an overview of Section 1801 through 1805 covering riot and related provisions, and reading as follows:

SECTION 1801. INCITING RIOT.)

1. OFFENSE. A person is guilty of an offense if he:

a. Incites or urges five or more persons to create or engage in a riot; or

b. Gives commands, instructions, or directions to five or more persons in furtherance of a riot.

2. DEFINITION. "Riot" means a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function.

3. ATTEMPT, SOLICITATION, AND CONSPIRACY. A person shall be convicted under sections 1001, 1003, or 1004 of attempt, solicitation, or conspiracy to commit an offense under this section only if he engages in the prohibited conduct under circumstances in which there is a substantial likelihood that his conduct will imminently produce a violation of this section.

4. GRADING. The offense is a class C felony if it is under subsection 1 b and the riot involves one hundred or more persons. Otherwise it is a class A misdemeanor.

SECTION 1802. ARMING RIOTERS.)

1. A person is guilty of a class C felony if he:

a. Knowingly supplies a firearm or destructive device for use in a riot;

b. Teaches another to prepare or use a firearm or destructive device with intent that any such thing be used in a riot; or

c. While engaging in a riot, is knowingly armed with a firearm or destructive device.

2. "Riot" has the meaning prescribed in section 1801.

SECTION 1803. ENGAGING IN A RIOT.)

1. OFFENSE. A person is guilty of a class B misdemeanor if he engages in a riot, as defined in section 1801.

2. ATTEMPT, SOLICITATION, AND CONSPIRACY; PRESENCE. The provisions of subsection 3 of section 1801 are applicable to attempt, solicitation, and conspiracy to commit an offense under this section. Mere presence at a riot is not an offense under this section.

SECTION 1804. DISOBEDIENCE OF PUBLIC SAFETY ORDERS UNDER RIOT CONDITIONS.) A person is guilty of an infraction if, during a riot as defined in section 1801, or when one is immediately impending, he disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot. A public safety order is an order designed to prevent or control disorder, or promote the safety of persons or property, issued by an official having supervisory authority over at least ten persons in the police, fire, military, or other forces concerned with the riot.

SECTION 1805. USURPING COMMAND OF A VESSEL.) A person is guilty of an offense if by force, threat of force, or deception, he usurps command of a vessel. The offense or attempt to commit the offense is a class C felony.

The Committee Counsel noted that Sections 1801 through 1805 deal with the offenses of inciting or urging a riot; arming rioters; engaging in a riot; disobeying safety orders during a riot; and usurping command of a "vessel".

For the purpose of the first four sections, a riot is defined as a group of five or more persons engaging in violent conduct which creates "grave danger" of damage to persons or property, or which obstructs law enforcement or some other governmental function.

Inciting or urging a riot, or giving commands or directions in furtherance of a riot, under Section 1801 is a Class A misdemeanor, unless the offender incites or urges a riot involving at least 100 persons, in which case the offense is classified as a Class C felony. Thus, the maximum punishments for inciting or urging a riot, under Section 1801, are seven years' imprisonment and one year imprisonment. The maximum punishments under present North Dakota law are life imprisonment and 10 years' imprisonment. However, it should be noted that one of the potential life imprisonment penalties applies if a murder, maiming, robbery, rape, or arson was committed in the course of the riot. The federal drafters propose that if such events should occur, they be prosecuted as such, and not prosecuted under the riot provisions.

The Committee Counsel noted the FCC riot provisions do not specifically give law enforcement officers the right to disperse a riot after an order to disperse has been given and disobeyed. Presently, Section 12-19-19 does specifically give a law enforcement officer the power to disperse a riot. It should also be noted that Section 12-19-22 commands law enforcement officers to attempt, where it is not unreasonably dangerous to do so, to induce rioters to disperse (verbally?) before taking "action" against the rioters which may result in risk of death or serious bodily injury.

Section 1802 makes it a Class C felony to supply a firearm or other weapon to a rioter; to teach a rioter to use a firearm or other weapon; or to be armed with a weapon while engaging in a riot. This section corresponds to Subsection 3 of Section 12-19-04 which increases the punishment for a person participating in a riot if that person was armed with a deadly weapon at the time. Committee Counsel noted, however, that no provision is made in Chapter 12-19 for prohibition of supplying weapons to rioters, or against teaching rioters how to use weapons. Thus, Section 1802 would create two essentially new offenses for North Dakota.

Section 1803 makes it a Class B misdemeanor to engage in a riot. This section goes on to provide that "mere presence" at the scene of the riot is not a violation of Section 1803. Subsection 2 of Section 1803 also has the effect of allowing a solicitation charge to be made when the primary offense is a misdemeanor, notwithstanding the provisions of Section 1003.

Section 1803 represents a lessening of penalties from current law, because a Class B misdemeanor is punishable by a maximum of 30 days' imprisonment, whereas simple riot (see Subsection 5 of Section 12-19-04) is punished as a misdemeanor, which means that a maximum of one year's imprisonment could be imposed. The Committee Counsel suggested that perhaps the Committee would want to change the Section 1803 classification to a Class A misdemeanor in order to make it accord with present North Dakota law.

Section 1804 makes it an "infraction" to disobey a "reasonable public safety order" during a riot or when a riot is imminently impending. The section defines a "public safety order" as one issued by an official having authority over at least 10 other persons in a government organization concerned with the riot. The number of persons over whom the official may have authority (before he can issue a public safety order) may be the basis for a Committee policy decision, since many rural police organizations consist of less than 10 persons.

Section 1805 makes it a Class C felony to usurp command of a "vessel". This section was included for Committee consideration, even though a similar section, regarding the usurping of command of an aircraft, was deleted by the Committee at its last meeting.

The Committee Counsel noted that the Committee had previously considered provisions on riot at its November 22-23, 1971, meeting, and at that time the minimum number of persons constituting a riotous group was set at six. However, at the last meeting of the Committee it was decided that a riotous group should consist of at least a minimum of five persons in accordance with the draft of the FCC, since the selection of any minimum number of persons to be defined as a riotous group was essentially an arbitrary process.

Representative Murphy inquired regarding Section 1804 and its provision that a "public safety order" could only be given by a person in charge of at least 10 other persons working for a governmental agency concerned with the riot. He asked whether it would not be preferable to allow any law enforcement officer to give the "public safety order". The Committee Counsel noted this provision was aimed primarily at urban riot situations, and was an attempt by the federal drafters to ensure that the person giving the "public safety order" was one who should be trained in proper riot control methods.

Professor Lockney inquired whether it wouldn't be reasonable to allow a "public safety order" to be given by any person with supervisory authority over any number of other persons concerned with the riot. Mr. Travis suggested that Section 1804 provide that the public safety order must be given by the "chief law enforcement officer on the scene".

Senator Page inquired as to whether it was desirable to limit the ability to issue "public safety orders" to only law enforcement officers. He suggested that there were other persons with legitimate interests in controlling riots who should be able to issue public safety orders.

IT WAS MOVED BY REPRESENTATIVE MURPHY that the words "an official having supervisory authority over" in Line 6 of Section 1804 be deleted and that Line 7 of Section 1804 be deleted, and that the words "the chief law enforcement officer on the scene." be inserted in lieu thereof. After discussion of Representative Murphy's motion, IT WAS SUBSEQUENTLY WITHDRAWN.

IT WAS THEN MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED that the words "an official having supervisory authority over" in Line 6 of Section 1804 be deleted; that Line 7 of Section 1804 be deleted; and that the words "the senior law enforcement official on the scene." be inserted in lieu thereof. Professor Lockney stated it was the intent of his motion that the word "official", used in place of the word "officer", be construed as including other persons with an interest in stopping the riot who might not necessarily be classified as law enforcement officers, e.g.,a city mayor.

The Committee discussed the desirability of retaining a section similar to Section 1805 prohibiting the usurping of command of a "vessel". IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that Section 1805 be deleted.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY SENATOR PAGE, AND CARRIED that the Committee adopt Sections 1801 through 1804, as amended.

The Committee Counsel noted that at its next meeting the Committee would take up Sections 1811 through 1861, and that the staff redrafts of those sections would be mailed out shortly after this meeting. Thereafter, without objection, the Chairman declared the meeting adjourned at 4:20 p.m. on Wednesday, June 21, 1972.

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John A. Graham
Assistant Director

SECTION 1701. ARSON.) A person is guilty of arson, a class B felony, if he starts or maintains a fire or causes an explosion with intent to destroy an entire or any part of a building or inhabited structure of another or a vital public facility.

SECTION 1702. ENDANGERING BY FIRE OR EXPLOSION.)

1. OFFENSE. A person is guilty of an offense if he intentionally starts or maintains a fire or causes an explosion and thereby recklessly:

a. Places another person in danger of death or bodily injury;

b. Places an entire or any part of a building or inhabited structure of another or a vital public facility in danger of destruction; or

c. Causes damage to property of another constituting pecuniary loss in excess of five thousand dollars.

2. GRADING. The offense is a class B felony if the actor places another person in danger of death under circumstances manifesting an extreme indifference to the value of human life. Otherwise it is a class C felony.

SECTION 1703. FAILURE TO CONTROL OR REPORT A DANGEROUS FIRE.) A person who knows that a fire which was started or maintained, albeit lawfully, by him or with his assent, is endangering life or a substantial amount of property of another is guilty of a class A misdemeanor if he willfully fails either to take reasonable measures to put out or control the fire when he can do so without substantial risk to himself, or to give a prompt fire alarm.

SECTION 1704. RELEASE OF DESTRUCTIVE FORCES.)

1. CAUSING CATASTROPHE. A person is guilty of a class B felony if he intentionally causes a catastrophe by any means, and is guilty of a class C felony if he does so willfully.

2. RISKING CATASTROPHE. A person is guilty of a class C felony if he willfully creates a risk of catastrophe, although no fire, explosion, or other destruction results.

3. FAILING TO PREVENT CATASTROPHE. A person who knowingly does an act which causes or which he knows is likely to cause a catastrophe, or assents to the doing of such act, is guilty of a class C felony if he willfully fails to take reasonable measures to prevent the catastrophe.

4. CATASTROPHE DEFINED. Catastrophe means serious bodily injury to ten or more people or substantial damage to ten or more separate habitations or structures, or property loss in excess of five hundred thousand dollars.

SECTION 1705. CRIMINAL MISCHIEF.)

1. OFFENSE. A person is guilty of an offense if he:

a. Willfully tampers with tangible property of another so as to endanger person or property;

b. Willfully damages tangible property of another.

2. GRADING. The offense is:

a. A class C felony if the actor intentionally causes pecuniary loss in excess of five thousand dollars or damages tangible property of another by means of an explosive or a destructive device; and

b. A class A misdemeanor if the actor recklessly causes pecuniary loss in excess of five thousand dollars or if the actor intentionally causes pecuniary loss in excess of five hundred dollars.

Otherwise the offense is a class B misdemeanor.

SECTION 1706. TAMPERING WITH OR DAMAGING A PUBLIC SERVICE.)

1. OFFENSE. A person is guilty of an offense if he causes a substantial interruption or impairment of a public communication, transportation, supply of water, gas, power, or other public service by: (a) tampering with or damaging the tangible property of another; (b) incapacitating an operator of such service; or (c) negligently damaging the tangible property of another by fire, explosive, or other dangerous means.

2. GRADING. The offense is a class C felony if the actor engages in the conduct intentionally, and a class A misdemeanor if the actor engages in the conduct knowingly or recklessly. Otherwise it is a class B misdemeanor.

SECTION 1708. CONSENT A DEFENSE TO SECTIONS 1701 TO 1706.) Whenever in sections 1701 to 1706 it is an element of the offense that the property is of another, it is a defense to a prosecution under those sections that the other has consented to the actor's conduct with respect to the property.

SECTION 1709. DEFINITIONS FOR SECTIONS 1701 TO 1709.) In sections 1701 to 1709:

1. "Inhabited structure" means a structure or vehicle:

a. Where any person lives or carries on business or other calling;

b. Where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or

c. Which is used for overnight accommodation of persons.

Any structure or vehicle is deemed to be "inhabited" regardless of whether a person is actually present. If a building or structure is divided into separately inhabited units, any unit which is property of another constitutes an inhabited structure of another;

2. Property is that "of another" if anyone other than the actor has a possessory or proprietary interest therein;

3. "Vital public facility" includes a facility maintained for use as a bridge (whether over land or water), dam, tunnel, wharf, communications installation, or power station.

SECTION 1641. RAPE AND GROSS SEXUAL IMPOSITION.)

1. OFFENSE. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:

a. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. He has substantially impaired the victim's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance;

c. He knows that the victim is unaware that a sexual act is being committed on him or her; or

d. The victim is less than thirteen years old.

2. GRADING. The offense is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subsection 1d, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise the offense is a class B felony.

SECTION 1642. AGGRAVATED SEXUAL IMPOSITION.) A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of a class C felony if:

1. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct; or
2. He compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

SECTION 1645. (TO BE REDRAFTED.)

SECTION 1646. SEXUAL ABUSE OF WARDS.) A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of a class A misdemeanor if:

1. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person; or
2. The other person is less than eighteen years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare.

SECTION 1647. SEXUAL ASSAULT.) A person who knowingly has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of a class B misdemeanor if:

1. He knows that the contact is offensive to the other person;
2. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;
3. The other person is less than thirteen years old;

4. He has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;

5. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over him or her; or

6. The other person is less than eighteen years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare.

SECTION 1648. GENERAL PROVISIONS FOR SECTIONS 1641 TO 1647.)

1. MISTAKE AS TO AGE. In sections 1641 to 1647: (a) when the criminality of conduct depends on a child's being below the age of thirteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than twelve; (b) when criminality depends on the child's being below a critical age older than twelve, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

2. SPOUSE RELATIONSHIPS. In sections 1641 to 1647, when the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse as accomplice in an offense which he or she causes another person, not within the exclusion, to perform.

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under sections 1641 to 1647 unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specifically interested in the victim, other than the alleged offender, learned of the offense.

SECTION 1649. DEFINITIONS FOR SECTIONS 1641 TO 1649.) In sections 1641 to 1649:

1. (To be redrafted.)

2. "Sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

SECTION 1711. BURGLARY.)

1. OFFENSE. A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.

2. GRADING. Burglary is a class B felony if:

a. The offense is committed at night, and is knowingly perpetrated in the dwelling of another; or

b. In effecting entry or while in the premises or in immediate flight therefrom, the actor inflicts or attempts to inflict bodily injury or physical restraint on another, or menaces another with imminent serious bodily injury, or is armed with a firearm, destructive device or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

Otherwise burglary is a class C felony.

SECTION 1712. CRIMINAL TRESPASS.)

1. DWELLING; HIGHLY SECURED PREMISES. A person is guilty of a class C felony if, knowing that he is not licensed or privileged to do so, he enters or remains in a dwelling or in highly secured premises.

2. BUILDING; STRUCTURE; ENCLOSED PREMISES. A person is guilty of a class A misdemeanor if, knowing that he is not licensed or privileged to do so, he:

a. Enters or remains in any building, occupied structure, or storage structure, or separately secured or occupied portion thereof; or

b. Enters or remains in any place so enclosed as manifestly to exclude intruders.

3. ANY PREMISES. A person is guilty of a class B misdemeanor if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by actual communication to the actor by the person in charge of the premises or other authorized person or by posting in a manner reasonably likely to come to the attention of intruders.

SECTION 1713. BREAKING INTO OR CONCEALMENT WITHIN A VEHICLE.)

1. OFFENSE. A person is guilty of an offense if, knowing that he is not licensed or privileged to do so, he breaks into a vehicle, vessel or aircraft, or, with intent to commit a crime, conceals himself therein.

2. GRADING. The offense is a class B felony if the actor is armed with a firearm, destructive device, or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury. Otherwise it is a class C felony.

SECTION 1714. STOWING AWAY.) A person is guilty of a class A misdemeanor if, knowing that he is not licensed or privileged to do so, he surreptitiously remains aboard a vessel or aircraft with intent to obtain transportation.

SECTION 1719. DEFINITIONS FOR SECTIONS 1711 to 1719.)

In Sections 1711 to 1719:

1. "Occupied structure" means a structure or vehicle:

a. Where any person lives or carries on business or other calling; or

b. Which is used for overnight accommodation of persons.

Any such structure or vehicle is deemed to be "occupied" regardless of whether a person is actually present;

2. "Storage structure" means any structure, truck, railway car, (((vessel))) or aircraft which is used primarily for the storage or transportation of property;

3. "Highly secured premises" means any place which is continuously guarded and where display of visible identification is required of persons while they are on the premises;

4. "Dwelling" has the meaning prescribed in section 619;

5. "Night" means the period between thirty minutes past sunset and thirty minutes before sunrise.

SECTION 1721. ROBBERY.)

1. OFFENSE. A person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another, or threatens or menaces another with imminent bodily injury.

2. GRADING. Robbery is a class A felony if the actor fires a firearm or explodes or hurls a destructive device or directs the force of any other dangerous weapon against another. Robbery is a class B felony if the robber possesses or pretends to possess a firearm, destructive device, or other dangerous weapon, or menaces another with serious bodily injury, or inflicts bodily injury upon another, or is aided by an accomplice actually present. Otherwise robbery is a class C felony.

3. DEFINITIONS. In this section:

a. An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, whether or not the theft is successfully completed, or in immediate flight from the commission of, or an unsuccessful effort to commit, the theft;

b. "Dangerous weapon" means a weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

SECTION 1731. CONSOLIDATION OF THEFT OFFENSES.)

1. CONSTRUCTION. Conduct denominated theft in sections 1732 to 1734 constitutes a single offense designed to include the separate offenses heretofore known as larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like.

2. CHARGING THEFT. An indictment, information, or complaint charging theft under sections 1732 to 1734 which fairly apprises the defendant of the nature of the charges against him shall not be deemed insufficient because it fails to specify a particular category of theft.

The defendant may be found guilty of theft under such an indictment or information if his conduct falls under any of sections 1732 to 1734, so long as the conduct proved is sufficiently related to the conduct charged that the accused is not unfairly surprised by the case he must meet.

SECTION 1732. THEFT OF PROPERTY.) A person is guilty of theft if he:

1. Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;
2. Knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat; or
3. Knowingly receives, retains, or disposes of property of another which has been stolen, with intent to deprive the owner thereof.

SECTION 1733. THEFT OF SERVICES.) A person is guilty of theft if:

1. He intentionally obtains services, known by him to be available only for compensation, by deception, threat, false token, or other means to avoid payment for the services; or
2. Having control over the disposition of services of another to which he is not entitled, he knowingly diverts those services to his own benefit or to the benefit of another not entitled thereto.

Where compensation for services is ordinarily paid immediately upon their rendition, as in the case of hotels, restaurants, and comparable establishments, absconding without payment or making provision to pay is prima facie evidence that the services were obtained by deception.

SECTION 1734. THEFT OF PROPERTY LOST, MISLAID OR DELIVERED BY MISTAKE.) A person is guilty of theft if he:

1. Retains or disposes of property of another when he knows it has been lost or mislaid, or

2. Retains or disposes of property of another when he knows it has been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property,

and with intent to deprive the owner of it, he fails to take readily available and reasonable measures to restore the property to a person entitled to have it.

SECTION 1735. GRADING OF THEFT OFFENSES UNDER SECTIONS 1732 to 1734.)

1. CLASS B FELONY. Theft under sections 1732 to 1734 is a class B felony if the property or services stolen exceed ten thousand dollars in value or are acquiredor retained by a threat to commit a class A or class B felony or to inflict serious bodily injury on the person threatened or on any other person.

2. CLASS C FELONY. Theft under sections 1732 to 1734 is a class C felony if:

a. The property or services stolen exceed one hundred dollars in value;

b. The property or services stolen are acquired or retained by threat and are acquired or retained by a public servant by a threat to take or withhold official action, or exceed fifty dollars in value;

c. The property or services stolen exceed fifty dollars in value and are acquired or retained by a public servant in the course of his official duties;

d. The property stolen is a firearm, ammunition, explosive or destructive device or an automobile, aircraft, or other motor-propelled vehicle;

e. The property consists of any government file, record, document, or other government paper stolen from any government office or from any public servant;

f. The defendant is in the business of buying or selling stolen property and he receives, retains, or disposes of the property in the course of that business;

g. The property stolen consists of any implement, paper, or other thing uniquely associated with the preparation of any money, stamp, bond, or other document, instrument, or obligation of this state; or

h. The property stolen consists of a key or other implement uniquely suited to provide access to property the theft of which would be a felony and it was stolen to gain such access.

3. CLASS A MISDEMEANOR. All other theft under sections 1732 to 1734 is a class A misdemeanor, unless the requirements of subsection 4 or 5 are met.

4. CLASS B MISDEMEANOR. Theft under sections 1732 to 1734 of property or services of a value not exceeding fifty dollars shall be a class B misdemeanor if:

a. The theft was not committed by threat;

b. The theft was not committed by deception by one who stood in a confidential or fiduciary relationship to the victim of the theft; and

c. The defendant was not a public servant or an officer or employee of a financial institution who committed the theft in the course of his official duties.

The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.

6. ATTEMPT. Notwithstanding the provisions of section 1001(3), an attempt to commit a theft under sections 1732 to 1734 is punishable equally with the completed offense when the actor has completed all of the conduct which he believes necessary on his part to complete the theft except receipt of the property.

7. VALUATION. For purposes of grading, the amount involved in a theft under sections 1732 to 1734 shall be the highest value by any reasonable standard, regardless of the actor's knowledge of such value, of the property or services which were stolen by the actor, or which the actor believed that he was stealing, or which the actor could reasonably have anticipated to have been the property or services involved. Thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be charged as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense.

SECTION 1736. UNAUTHORIZED USE OF A VEHICLE.)

1. OFFENSE. A person is guilty of an offense if, knowing that he does not have the consent of the owner, he takes, operates, or exercises control over an automobile, aircraft, motorcycle, motorboat, or other motor-propelled vehicle of another.

2. DEFENSE. It is a defense to a prosecution under this section that the actor reasonably believed that the owner would have consented had he known of the conduct on which the prosecution was based.

3. GRADING. The offense is a class C felony if the vehicle is an aircraft or if the value of the use of the vehicle and the cost of retrieval and restoration exceeds five hundred dollars. Otherwise the offense is a class A misdemeanor.

SECTION 1737. MISAPPLICATION OF ENTRUSTED PROPERTY.) A person is guilty of a class A misdemeanor if he disposes of, uses, or transfers any interest in, property which has been entrusted to him as a fiduciary, or in his capacity as a public servant or an officer, director, agent, employee of, or a person controlling a financial institution, in a manner that he knows is not authorized and that he knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.

SECTION 1738. DEFRAUDING SECURED CREDITORS.)

1. OFFENSE. A person is guilty of an offense if he destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent to prevent collection of the debt represented by the security interest.

2. GRADING. The offense is a class A misdemeanor if the property has a value exceeding five hundred dollars and a class B misdemeanor if the property has a value exceeding fifty dollars. Otherwise it is an infraction. Value is to be determined as provided in section 1735(7).

SECTION 1739. DEFENSES AND PROOF AS TO THEFT AND RELATED OFFENSES.)

1. DEFENSES. It is a defense to a prosecution under sections 1732 to 1738 that:

a. The actor honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him; or

b. The victim is the actor's spouse, but only when the property involved constitutes household or personal effects or other property normally accessible to both spouses and the parties involved are living together. The term "spouse", as used in this section, includes persons living together as man and wife.

2. PROOF. a. It shall be a prima facie case of theft under sections 1732 to 1734 if it is shown that a public servant or an officer, director, agent, or employee of, or a person connected in any capacity with a financial institution has failed to pay or account upon lawful demand for money or property entrusted to him as part of his official duties or if an audit reveals a shortage or falsification of his accounts. b. It shall be prima facie evidence that the actor knows that property has been stolen if it is shown that, being a dealer, he acquired it for a consideration which he knew to be far below its reasonable value. "Dealer" means a person, whether licensed or not, who has repeatedly engaged in transactions in the type of property involved.

SECTION 1741. DEFINITIONS FOR THEFT AND RELATED OFFENSES.) In sections 1731 to 1741:

1. "Deception" means: (i) creating or reinforcing a false impression, including false impressions as to fact, law, status, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not substantially perform the promise unless it is part of a continuing scheme to defraud; or (ii) preventing another from acquiring information which would affect his judgment of a transaction; or (iii) failing to correct a false impression which the actor previously created or reinforced, or which he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or (iv) failing to correct an impression which the actor previously created or reinforced and which the actor knows to have become false due to subsequent events; or (v) failing to disclose a lien, adverse claim, or other impediment to the enjoyment of property which he transfers

or encumbers in consideration for the property obtained or in order to continue to deprive another of his property, whether such impediment is or is not valid, or is or is not a matter of official record; or (vi) using a credit card, charge plate, or any other instrument which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer (A) where such instrument has been stolen, forged, revoked, or cancelled, or where for any other reason its use by the actor is unauthorized, and (B) where the actor does not have the intention and ability to meet all obligations to the issuer arising out of his use of the instrument; or (vii) any other scheme to defraud. The term "deception" does not, however, include falsifications as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares in communications addressed to the public or to a class or group;

2. "Deprive" means: (i) to withhold property or to cause it to be withheld either permanently or under such circumstances that a major portion of its economic value, or its use and benefit, has, in fact, been appropriated; or (ii) to withhold property or to cause it to be withheld with the intent to restore it only upon the payment of a reward or other compensation; or (iii) to dispose of property or use it or transfer any interest in it under circumstances that make its restoration, in fact, unlikely.

3. "Fiduciary" means a trustee, guardian, executor, administrator, receiver, or any other person acting in a fiduciary capacity, or any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary;

4. "Financial institution" means a bank, insurance company, credit union, safety deposit company, savings and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment;

5. "Obtain" means: (i) in relation to property, to bring about a transfer or purported transfer of an interest in the property, whether to the actor or another; or (ii) in relation to services, to secure performance thereof;

6. "Property" means any money, tangible or intangible personal property, property (whether real or personal) the location of which can be changed (including things growing on, affixed to, or found in land and documents although the rights represented thereby have no physical location), contract right, chose-in-action, interest in or claim to wealth, credit, or any other article or thing of value of any kind. "Property" also means real property the location of which cannot be moved if the offense involves transfer or attempted transfer of an interest in the property;

7. "Property of another" means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. "Owner" means any person or a government with an interest in property such that it is "property of another" as far as the actor is concerned;

8. "Receiving" means acquiring possession, control, or title, or lending on the security of the property;

9. "Services" means labor, professional service, transportation, telephone, mail or other public service, gas, electricity and other public utility services, accommodations in hotels, restaurants or elsewhere, admission to exhibitions, and use of vehicles or other property;

10. "Stolen" means property which has been the subject of theft or robbery or a vehicle which is received from a person who is then in violation of section 1736;

11. "Threat" means an expressed purpose, however communicated, to (i) cause bodily injury in the future to the person threatened or to any other person; or (ii) cause damage to property; or (iii) subject the person threatened or any other person to physical

confinement or restraint; or (iv) engage in other conduct constituting a crime; or (v) accuse anyone of a crime; or (vi) expose a secret or publicize an asserted fact, whether true or false, tending to subject a person living or deceased, to hatred, contempt, or ridicule or to impair another's credit or business repute; or (vii) reveal any information sought to be concealed by the person threatened; or (viii) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (ix) take or withhold official action as a public servant, or cause a public servant to take or withhold official action; or (x) bring about or continue a strike, boycott, or other similar collective action to obtain property or deprive another of his property which is not demanded or received for the benefit of the group which the actor purports to represent; or (xi) cause anyone to be dismissed from his employment, unless the property is demanded or obtained for lawful union purposes; or (xii) do any other act which would not in itself substantially benefit the actor or a group he represents but which is calculated to harm another person in a substantial manner with respect to his health, safety, business, employment, calling, career, financial condition, reputation, or personal relationship. Upon a charge of theft, the receipt of property in consideration for taking or withholding official action shall be deemed to be theft by threat regardless of whether the owner voluntarily parted with his property or himself initiated the scheme.

SECTION 1751. FORGERY OR COUNTERFEITING.)

1. OFFENSE. A person is guilty of forgery or counterfeiting if, with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such deception or harm by another person, he:

a. Knowingly and falsely makes, completes, or alters any writing; or

b. Knowingly utters or possesses a forged or counterfeited writing.

2. GRADING. Forgery or counterfeiting is:

a. A class B felony if:

(i) The actor forges or counterfeits an obligation or other security of the government; or

(ii) The offense is committed pursuant to a scheme to defraud another or others of money or property of a value in excess of ten thousand dollars;

b. A class C felony if:

(i) The actor is a public servant or an officer or employee of a financial institution and the offense is committed under color of office or is made possible by his office;

(ii) The actor forges or counterfeits foreign money or other legal tender, or utters or possesses any forged or counterfeited obligation or security of the government or foreign money or legal tender;

(iii) The actor forges or counterfeits any writing from plates, dies, molds, photographs, or other similar instruments designed for multiple reproduction;

(iv) The actor forges or counterfeits a writing which purports to have been made by the government; or

(v) The offense is committed pursuant to a scheme to defraud another or others of money or property of a value in excess of one hundred dollars;

c. A class A misdemeanor in all other cases.

SECTION 1752. FACILITATION OF COUNTERFEITING.)

1. COUNTERFEITING IMPLEMENTS. A person is guilty of an offense if, except as authorized by statute or by regulation, he knowingly makes, executes, sells, buys, imports, possesses, or otherwise has within his control any plate, stone, paper, tool, die, mold, or other implement or thing uniquely associated with or fitted for the preparation of any forged or counterfeited security or tax stamp or any writing which purports to be made by this government or any foreign government.

2. COUNTERFEITING IMPRESSIONS. A person is guilty of an offense if, except as authorized by statute or by regulation, he:

a. Knowingly photographs or otherwise makes a copy of:

(i) Money or other obligation or security of this government or of any foreign government, or any part thereof; or

(ii) Any plate, stone, tool, die, mold, or other implement or thing uniquely associated with or fitted for the preparation of any writing described in subsection 1; or

b. Knowingly sells, buys, imports, possesses, or otherwise has within his control any photograph or copy the making of which is prohibited by subsection 2a.

3. AUTHORIZATION AS DEFENSE. In a prosecution under this section, authorization by statute or by regulation is a defense.

4. GRADING. An offense defined in this section is a class B felony if the implement or the impression relates to the forging or counterfeiting of an obligation or security of the government. Otherwise it is a class C felony.

SECTION 1753. DECEPTIVE WRITINGS.)

1. OFFENSE. A person is guilty of an offense if, with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such a deception or harm by another person, he knowingly issues a writing without authority to issue it or knowingly utters or possesses a deceptive writing.

2. GRADING. The offense is a class B felony if it is committed pursuant to a scheme to defraud another or others of money or property of a value in excess of ten thousand dollars. The offense is a class C felony if (a) the actor is a public servant or an officer or employee of a financial institution and the offense is committed under color of office or is made possible by his office; or (b) the offense is committed pursuant to a scheme to defraud another or others of money or property of a value in excess of one hundred dollars. Otherwise it is a class A misdemeanor.

SECTION 1754. DEFINITIONS FOR SECTIONS 1751 TO 1754.) In sections 1751 to 1754:

1. The definitions prescribed in section 1741 apply;

2. "Writing" means (a) any paper, document, or other instrument containing written or printed matter or its equivalent, including money, a money order, bond, public record, affidavit, certificate, contract, security, or obligation, and (b) any coin

or any gold or silver bar coined or stamped at a mint or assay office or any signature, certification, credit card, token, stamp, seal, badge, decoration, medal, trademark, or other symbol or evidence of value, right, privilege, or identification which is capable of being used to the advantage or disadvantage of the government or any person;

3. "Without authority" includes conduct that, on the specific occasion called into question, is beyond any general authority given by statute, regulation, or agreement;

4. "Falsely makes" means to make a writing which purports to be made by the government or another person, or a copy thereof, but which is not because the apparent maker is fictitious or because the writing was made without authority;

5. "Falsely completes" means to make an addition to or an insertion in a writing, without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker;

6. "Falsely alters" means to make a change in a writing, without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker;

7. To "forge" or to "counterfeit" a writing means to falsely make, complete, or alter the writing, and a "forged" or "counterfeited" writing is a writing which has been falsely made, completed, or altered. The terms "forgery" and "counterfeiting" and their variants are intended to be synonymous in legal effect;

8. "Utter" means to issue, authenticate, transfer, publish, sell, transmit, present, use, or otherwise give currency to;

9. "Possess" means to receive, conceal, or otherwise exercise control over;

10. The term "obligation or other security of this state" means a bond, certificate of indebtedness, coupon, fractional note, certificate of deposit, a stamp, or other representative of value of whatever denomination, issued pursuant to a statute;

11. "Security" other than as provided in subsection 10 includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in tangible or intangible property, instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise, uncanceled stamp issued by a foreign government (whether or not demonetized); or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant or right to subscribe to or purchase any of the foregoing;

12. "Tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a state, or evidence of the discharge thereof;

13. A "deceptive writing" is a writing which (a) has been procured by deception, or (b) has been issued without authority.

SECTION 1755. MAKING OR UTTERING SLUGS.)

1. OFFENSE. A person is guilty of an offense if he makes or utters a slug with intent to deprive a supplier of property or service sold or offered by means of a coin machine or with knowledge that he is facilitating such a deprivation by another person.

2. GRADING. The offense is a class A misdemeanor if it involves slugs which exceed fifty dollars in value. Otherwise it is a class B misdemeanor.

3. DEFINITIONS. In this section:

a. "Slug" means a metal, paper, or other object which by virtue of its size, shape or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill, or token;

b. "Coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed:

(i) To receive a coin or bill of a certain denomination or a token made for the purpose; and

(ii) In return for the insertion or deposit thereof, automatically to offer, provide, assist in providing or permit the acquisition of property or a public or private service;

c. "Value" of the slugs means the value of the coins, bills, or tokens for which they are capable of being substituted.

SECTION 1757. SPORTS BRIBERY.)

1. INTERFERENCE WITH A SPORTING CONTEST. A person is guilty of a class C felony if, with intent to prevent a publicly exhibited sporting contest from being conducted in accordance with the rules and usages purporting to govern it, he:

a. Confers or offers or agrees to confer any benefit upon, or threatens any harm to, a participant, official or other person associated with the contest; or

b. Tampers with any person, animal, or thing.

2. SOLICITING OR ACCEPTING BENEFITS. A person is guilty of a class C felony if he knowingly solicits, accepts, or agrees to accept any benefit the giving of which is prohibited under subsection 1.

3. DEFINITION. A "publicly exhibited sporting contest" is any contest in any sport, between individual contestants or teams of contestants, the occurrence of which is publicly announced in advance of the event.

4. STATUS OF CONTESTANT. The status of the contestant as amateur or professional is not material to the commission of the offense described in this section.

SECTION 1758. COMMERCIAL BRIBERY.)

1. GIVING BRIBE. A person is guilty of a class C felony if he:

a. Confers or agrees or offers to confer any benefit upon an employee or agent without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs; or

b. Confers or agrees or offers to confer any benefit upon any fiduciary without the consent of the beneficiary, with intent to influence the fiduciary to act or conduct himself contrary to his fiduciary obligation.

2. RECEIVING BRIBE. A person is guilty of a class C felony if he knowingly solicits, accepts, or agrees to accept any benefit the giving of which is prohibited under subsection 1.

SECTION 1771. ENGAGING IN OR FINANCING CRIMINAL USURY BUSINESS.)

1. OFFENSE. A person is guilty of a class C felony if he knowingly engages in, or directly or indirectly provides financing for, the business of making extensions of credit at such a rate of interest that repayment or performance of any promise given in consideration thereof is unenforceable through civil judicial process in this state.

2. PRESUMPTIONS. Knowledge of unenforceability shall be presumed, in the case of a person engaging in the business, if any of the following exist, and in the case of a person directly or indirectly providing financing, if he knew any of the following:

a. It is an offense to charge, take, or receive interest at the rate involved;

b. The rate of interest charged, taken, or received is fifty or more percentum greater than the maximum enforceable rate of interest; or

c. The rate of interest involved exceeds forty-five percentum per annum or the equivalent rate for a longer or shorter period.

3. RATE OF INTEREST. Unless otherwise provided by law, the rate of interest is to be calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

4. DEFENSE. It is a defense to a prosecution under this section that the defendant was licensed or otherwise authorized by the United States or by any state government to engage in the business of making extensions of credit.

5. DEFINITIONS. In this section:

a. An "extension of credit" means any loan, or any agreement tacit or express whereby the repayments or satisfaction of any debt, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred;

b. "Debtor" means any person to whom an extension of credit is made, or who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same;

c. The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

SECTION 1801. INCITING RIOT.)

1. OFFENSE. A person is guilty of an offense if he:

a. Incites or urges five or more persons to create or engage in a riot; or

b. Gives commands, instructions, or directions to five or more persons in furtherance of a riot.

2. DEFINITION. "Riot" means a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function.

3. ATTEMPT, SOLICITATION, AND CONSPIRACY. A person shall be convicted under sections 1001, 1003, or 1004 of attempt, solicitation, or conspiracy to commit an offense under this section only if he engages in the prohibited conduct under circumstances in which there is a substantial likelihood that his conduct will imminently produce a violation of this section.

4. GRADING. The offense is a class C felony if it is under subsection 1 b and the riot involves one hundred or more persons. Otherwise it is a class A misdemeanor.

SECTION 1802. ARMING RIOTERS.)

1. A person is guilty of a class C felony if he:

a. Knowingly supplies a firearm or destructive device for use in a riot;

b. Teaches another to prepare or use a firearm or destructive device with intent that any such thing be used in a riot; or

c. While engaging in a riot, is knowingly armed with a firearm or destructive device.

2. "Riot" has the meaning prescribed in section 1801.

SECTION 1803. ENGAGING IN A RIOT.)

1. OFFENSE. A person is guilty of a class B misdemeanor if he engages in a riot, as defined in section 1801.

2. ATTEMPT, SOLICITATION, AND CONSPIRACY; PRESENCE. The provisions of subsection 3 of section 1801 are applicable to attempt, solicitation, and conspiracy to commit an offense under this section. Mere presence at a riot is not an offense under this section.

SECTION 1804. DISOBEDIENCE OF PUBLIC SAFETY ORDERS UNDER RIOT CONDITIONS.) A person is guilty of a class B misdemeanor if, during a riot as defined in section 1801, or when one is immediately impending, he disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot. A public safety order is an order designed to prevent or control disorder, or promote the safety of persons or property, issued by the senior law enforcement official on the scene.

C. EMERSON MURRY
DIRECTOR

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STATE CAPITOL
BISMARCK 58501

*

TELEPHONE
(701) 224-2916

North Dakota Legislative Council

June 29, 1972

TO: ALL MEMBERS OF THE COMMITTEE ON JUDICIARY "B"

The Chairman, Senator Howard Freed, is calling the next meeting of the Committee on Judiciary "B" for Thursday and Friday, July 20-21, 1972, to commence at 9:30 a.m. in Committee Room G-2 of the State Capitol, Bismarck, North Dakota.

The agenda will include consideration of Sections 1811 through 1861 of the proposed Federal Criminal Code, staff redrafts of which are enclosed with this notice. In addition, the Committee will consider a redraft of the sections dealing with Rape and other sexual offenses (to be mailed later), and will discuss sentencing plans.

If any member should be unable to attend on these dates, it would be appreciated if he would notify this office as soon as possible.

Sincerely,

C. Emerson Murry
Director

CEM:ms
Encs.

Copies to: Senators Freed, Page
Representatives Atkinson, Hillebce, Kieffer, Murphy, Stone
Judges Erickstad, Lynch, Smith, Pearce
Messrs. Wolf, Webb, Lockney, Hill, Travis

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

COMMITTEE ON JUDICIARY "B"

Meeting of Thursday and Friday, July 20-21, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:40 a.m. on Thursday, July 20, 1972, in Committee Room G-2 of the State Capitol in Bismarck.

Legislative members present:	Senator Freed Representatives Hilleboe, Kieffer, Murphy, Stone
Legislative members absent:	Senator Page Representative Atkinson
Citizen members present:	Judges Erickstad, Pearce; Messrs. Webb, Wolf; Professor Lockney
Citizen members absent:	Judges Lynch, Smith
Also present:	Mr. Joe Louwagie; Mr. Leonard Bucklin; Mr. Vance Hill; Mr. Stuart Hilleboe; Mr. Paul Kalin; Mr. Robert Wefald; Mr. Kenneth Dawes; Mr. Richard Gross; Mr. Bob Holte

(Note: The above listing of persons present does not necessarily reflect their attendance during the whole of the Committee meeting, although there was a quorum of Committee members present at all times.)

The Chairman asked if there were any additions or corrections to the minutes of the meeting of June 20-21, 1972. The Committee Counsel noted that there was an error on Page 8 of the minutes in the penultimate paragraph. The word "of" following the word "examples" should be deleted, and the word "if" inserted in lieu thereof. Thereafter, IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the minutes of the meeting of June 20-21, 1972, be approved as corrected.

The Chairman welcomed Mr. Paul Kalin, Midwestern Director, National Council on Crime and Delinquency, and called on Mr. Kalin for a discussion regarding sentencing philosophy. (Mr. Kalin left two printed documents with the Committee which are attached to these minutes as Appendices "A" and "B".)

Mr. Kalin stated that he was happy to return to North Dakota where he had been before, and he was pleased that North Dakota was engaged in a criminal code revision. He stated

that if he sensed the feeling of the Nation correctly in regard to criminal code revision, the thought was that criminal codes should be made tougher and more restrictive. He stated that this was a tragic situation, as those thoughts were based on myths rather than facts. He noted that the United States, including both federal and state jurisdictions, imprisons more people than any other country in the world, but its crime rate is still the highest.

Mr. Kalin noted that on his previous visit he had been impressed by an innovative report by the Combined Law Enforcement Council, which had been written in part by Mr.Vance Hill in 1969. He noted that this report had recommended the increased use of probation and the creation of regional penal facilities. He stated that, with this report as partial impetus, Des Moines and Polk County, Iowa, had developed a Community Corrections Center, which tries to deal with offenders in a nonpunitive way. The Center has been successful, and it is now proposed to expand it to a 16-county area around Des Moines.

Mr. Kalin noted that, where reforms have taken place, the legislators have played a large part in reform of the criminal justice system. He said that recent reforms in California were the result of legislative studies followed by legislative action.

In regard to the North Dakota prison population, he noted that North Dakota probably has very few really dangerous convicts, and that keeping most current incarcerated persons in penitentiaries is costly and usually futile.

Mr. Kalin stated that much of the legislative inaction in regard to criminal code revision is based on the fact that the public would not accept liberalization of criminal laws, which theory is based on the fact that the public is essentially interested in "retribution" against criminal elements. Mr. Kalin questioned whether this was in fact the case. He stated that many people who estimated public reaction to certain legislative action based their estimations on letters to the editor and similar indicators, which may not be reliable, and, in fact, could be examples of radical thought. He asked that the Committee take such action as it felt best, and not automatically feel that a liberal attitude would be rejected by the general populace.

Legislative criminal code revision efforts often get into a vicious circle when the revision effort is based on revisions completed in other jurisdictions, Mr. Kalin noted. He stated that this was the case because the other jurisdictions faced the same type of problems regarding worry about public reaction, and therefore did not take the most desirable action. He stated that he hoped the Committee would break out of this "vicious circle" and take such action as it felt in the best interests of the citizens of the State.

Mr. Kalin stated that the National Council on Crime and Delinquency had presented testimony to Congress regarding the proposed Federal Criminal Code. He stated that there were several items in the FCC with which the NCCD disagreed.

Mr. Wefald inquired as to what Mr. Kalin meant by his statement that "more people are imprisoned in the United States than in any other country of the world". Mr. Kalin replied that he was talking in terms of the rate per 100,000 population. He stated that the whole system of penology in the United States should undergo some

re-evaluation. He noted that the Quakers, who had originally developed the United States' version of the penitentiary system, were now rethinking their whole attitude towards a penitentiary system.

Mr. Kalin noted that many of the so-called crimes which are prosecuted in the United States are simply ignored in other countries of the world. For instance, simple assault, drunkenness, vagrancy, prostitution, and so on are not treated criminally. He stated that many countries feel it is a waste of their law enforcement capability to arrest and prosecute people who have perpetrated the so-called "victimless crimes".

Mr. Wefald inquired as to whether Mr. Kalin felt that the U.S. had a stronger attitude in favor of retribution against criminals than other countries. Mr. Kalin replied that that was the case, noting that Norway, for instance, incarcerates only one percent of its convicted criminals.

Representative Murphy told of a man living in his legislative district who had shot another person, but was now harmless in terms of danger to society. He wondered what could be done about a person like that if retribution for his particular crime were not the answer. In other words, Representative Murphy wanted to know whether there was any justification in sentencing to the penitentiary as a means of deterring other potential offenders. Mr. Kalin replied that the Committee, and the Legislature, was justified in doing whatever made sense in the larger context. However, he questioned the deterrent effect of prison sentences. He stated that one of the best deterrents is an assurance that the criminal wrongdoer will be caught in his crime.

Representative Kieffer asked Mr. Kalin what he thought the reasons were for North Dakota having a lower crime rate. Mr. Kalin stated that one of the reasons was the low population in North Dakota; in other words, fewer persons per square mile. In addition, he noted that many North Dakotans had been long-time residents of the State, and therefore realized that they would be frowned upon in their social culture if they committed a criminal act.

Professor Lockney asked Mr. Kalin what specific actions the Committee should take in regard to sentencing. Mr. Kalin stated that first he would like to point out that he was not in favor of the concept of a "Mandatory Parole Component". He noted that in the State of Ohio no one is sent back to a penal institution for parole violation. The only reason a person is reincarcerated after being on parole is for conviction of a new offense. In addition, he noted that as high as one-third of the parolees in Ohio get no supervision after the first month on parole.

Mr. Kalin also criticized the provision for an extended term for dangerous offenders as contained in the proposed sentencing plan of the Committee's Subcommittee on Sentencing Classification. He stated that the provisions for extended terms were difficult to understand and that a provision for a 25-year sentence was as long as was necessary. In addition, he noted that doubling a one-year sentence is of no avail. Further, sentences of 30 days or less are simply not rehabilitative.

Mr. Webb inquired whether a person of the status of Judge Erickstad would not be more deterred and rehabilitated by a one-day jail sentence than by a fine of $100. Mr. Kalin noted that what Mr. Webb was talking about was the effect of being "disgraced".

The Committee discussed the desirable extent to which parole should be used as a rehabilitative penal tool. Mr. Kalin stated that not all offenders need to be on parole, and the best theoretical basis for the use of parole was not to use it unless an offender needs nonincarcerative supervision.

Mr. Webb stated that one of the most difficult tasks of a prosecutor was the problem of carrying a liberal sentencing philosophy into the practice of prosecution of offenses. He stated that it was difficult for a prosecutor to rationalize his representation of the community's desire to prosecute offenders with the need to treat an offender as an individual in regard to sentencing.

Mr. Kalin stated that the prime item for the Committee to keep in mind was to be openminded regarding its deliberation. For instance, he stated that a New York attorney had seriously suggested that prosecutors be given an option to prosecute, and that they only prosecute those cases where imprisonment of the offender is to be sought. He said that while he did not necessarily recommend that proposition, it was an example of the range of alternatives available to an openminded committee.

The Chairman asked how Mr. Kalin would react to a draft which broadened judicial sentencing discretions so that sentencing judges had a whole range of alternatives available to them so that they could deal with each case on an individual basis. Mr. Kalin replied that that would be a worthwhile advance, but that the range of sentencing alternatives should not contain a "Mandatory Parole Component", or provision for extended sentences for "dangerous offenders".

He felt that the only valid category for a dangerous offender was where the offender used a dangerous weapon, and that the maximum terms already provided in the Committee proposals would be adequate for such an offender.

The Committee Counsel noted that Mr. Kalin had been making reference to the sentencing classification plan drafted by the Subcommittee on Sentencing Classification. He inquired as to whether the Mandatory Parole Component and provision for extended sentences as contained in the proposed Federal Criminal Code were also objectionable. Mr. Kalin stated that he also felt those provisions to be objectionable, since they would not accomplish their rehabilitative objective.

Mr. Hill inquired as to what number of crimes classifications there should be in a sentencing classification plan. Mr. Kalin replied that there was no magic number; however, there should be one category for the so-called heinous crimes; a 25 to 30-year maximum imprisonment period for "dangerous offenses" (one in which dangerous weapons were used); and a third category for primarily property offenses. Mr. Webb inquired as to whether these classifications were all within the general crimes classification range known as "felony". Mr. Kalin replied that that was what he was thinking about.

Representative Kieffer discussed the fact that generally most persons tend to react to their cultural needs. If they do not have the tools necessary to maintain their identity in their cultural environment, the tools are not going to be provided for them during a 10-year term of imprisonment any more so than they would be provided during a shorter term of imprisonment. Mr. Kalin stated that he agreed with Representative Kieffer. He noted that at one institution in Ohio, it was discovered that it was costing

$13,000 per child per year for institutionalization. He stated that many of the children incarcerated at that institution were there for auto theft, and that it would have been cheaper for the State to purchase an auto for each of them so they could fit into their cultural environment, rather than to incarcerate them. He indicated that this was probably not a feasible solution, but it pointed out some of the errors of the penal system philosophy.

Mr. Wolf stated that, in regard to Mr. Kalin's statements on a Mandatory Parole Component, the possibility of parole supervision is one of the factors which causes the Parole Board to release people on parole. He wondered what the alternative would be if we did away with mandatory parole supervision.

The Committee discussed the proper authority to carry out sentencing. Mr. Kalin stated he felt that judges who have heard the case should do sentencing, because the creation of sentencing commissions or boards carried more potential for abuse than did the present system.

Mr. Kalin stated that extended parole periods are what he was opposed to. He noted that parole was an overused concept, and that the public would probably not react adversely to unsupervised releases of convicts who were deemed fit to return to society.

Mr. Kalin stated that it would be a long step forward in correcting some of the evils in the criminal justice system if corrections personnel, judges, and prosecutors could all get together and formulate a comprehensive sentencing and parole philosophy. He stated that it was important for the Committee to look to the future in its drafting, rather than to a draft which would just solve the immediate problems for the remainder of the decade.

The Committee Counsel asked Mr. Kalin whether he would support the concept of providing minimum sentences for various classes of crimes. Mr. Kalin stated that he does not favor minimum sentences under any circumstances.

Mr. Webb noted that North Dakota uses the deferred imposition of sentence, and thought that it was a valuable tool. However, he noted that you can use the record of a deferred imposition as showing a criminal record in other prosecutions in North Dakota, but that it could not be done under the proposed sentencing provisions of the FCC. Mr. Kalin asked whether in fact it should be allowed to be brought into the record of future criminal prosecution. He stated that this was an area in which members of the Committee could reexamine their attitudes, and perhaps come up with different answers.

The Chairman talked about the desirability of providing harsher penalties for a person who commits an offense while carrying a gun. The Chairman asked whether such harsher penalties would really serve as a deterrent. Mr. Kalin replied that they probably would not. He said the net result of harsher penalties where the offender carries a gun is to cause more plea bargaining to be carried on between the prosecutor and the defense attorney. He stated that if an offender has used a dangerous weapon, the penalties should be harsher and plea bargaining should not be allowed.

Prior to his departure, Mr. Kalin stated that he would be happy to review any of the Committee's work products and make comments which the Committee could use for whatever they felt they were worth. The Committee then recessed for lunch at 12:05 p.m. and reconvened at 1:15 p.m.

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The Chairman called on Mr. Hill for some comments regarding his meeting with the State's Attorneys Association in Grand Forks (during the last meeting of the Committee). Mr. Hill stated that the Association's reaction to the idea of revising the whole of Title 12 was mixed.

Mr. Webb stated he felt that, on the whole, most of the State's Attorneys present were agreeable to what, to them, was a "radical" idea. He indicated that he had explained the Idaho situation to them, and noted their support would be important in passing the proposed new criminal code. Mr. Webb stated the State's Attorneys Association would meet again in November, and that it had appointed a legislative committee, chaired by Mr. Tom Kelsch, which would be interested in working with the Committee on Judiciary "B". The Committee Counsel stated that he would contact Mr. Kelsch following this meeting and invite him and members of his Committee to attend future meetings of the Committee, and, in addition, would furnish them with relevant material.

Professor Lockney suggested that the Committee should contact persons involved in corrections and probation and parole to get their views regarding the Committee's project. He suggested that perhaps Mr. Irv Riedman could be invited to attend and comment. The Chairman stated that he agreed with Professor Lockney and directed the Committee Counsel to invite Mr. Riedman to attend the Committee meeting when sentencing is to be discussed.

Judge Erickstad suggested that the Chairman of the Parole Board also be invited. Mr. Hill suggested that the penitentiary be represented and that perhaps the Warden, or the Director of Institutions, should be invited. The Chairman directed the Committee Counsel to invite Warden Dwight Woodley.

The Chairman inquired as to the Committee's wish in regard to providing reimbursement to Mr. Kalin for his travel expenses in attending the Committee meeting. He stated that if the Committee so desired, Mr. Kalin's travel expenses could be reimbursed from the federal grant to the Committee, if a change in the grant budget were allowed by the Combined Law Enforcement Council.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that Mr. Paul Kalin's travel expenses in attending this meeting of the Committee be reimbursed, such reimbursement being conditioned upon approval by the Combined Law Enforcement Council for a change in the budget of the federal grant to the Committee.

The Chairman called on the Committee Counsel for an overview of the second draft of Sections 1641 through 1650, dealing with gross sexual imposition and other sexual offenses and reading as follows:

(Note: The text of all sections considered by the Committee, with amendments adopted, are appended to these minutes as Appendix "C".)

SECTION 1641. RAPE AND GROSS SEXUAL IMPOSITION.)

1. OFFENSE. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:

a. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. He has substantially impaired the victim's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance;

c. He knows that the victim is unaware that a sexual act is being committed upon him or her; or

d. The victim is less than thirteen years old.

2. GRADING. The offense is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subparagraph d of subsection 1, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise the offense is a class B felony.

SECTION 1642. SEXUAL IMPOSITION.) A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of a class C felony if:

1. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;

2. He knows that the other person is unaware that a sexual act is being committed upon him or her; or

3. He compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

SECTION 1643. SEXUAL ACTS WITH MINORS [former Section 1645].) Any person committing a sexual act with another is guilty of a class A misdemeanor if the victim is a minor and the actor is an adult.

SECTION 1644. FORNICATION.) A person is guilty of a class B misdemeanor if he engages in a sexual act with another who is not the actor's spouse.

SECTION 1645. ADULTERY.) 1. A married person is guilty of a class A misdemeanor if he or she engages in a sexual act with another person, not the actor's spouse.

2. No prosecution shall be instituted under this section except on the complaint of the spouse of the alleged offender, and the prosecution shall not be commenced later than one year from commission of the offense.

SECTION 1646. UNLAWFUL COHABITATION.) A person is guilty of a class A misdemeanor if, with intent to defraud another or others of money or property, he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.

SECTION 1647. SEXUAL ABUSE OF WARDS.) A male who engages in a sexual act with a female not his wife or any person who engages in a sexual act with another or causes another to engage in a sexual act is guilty of a class A misdemeanor if:

1. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person; or

2. The other person is less than eighteen years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare.

SECTION 1648. SEXUAL ASSAULT.) A person who knowingly has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of a class B misdemeanor if:

1. He knows that the contact is offensive to the other person;
2. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;
3. The other person is less than thirteen years old;
4. He has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;
5. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over him or her; or
6. The other person is less than eighteen years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare.

SECTION 1649. GENERAL PROVISIONS FOR SECTIONS 1641 TO 1648.)

1. MISTAKE AS TO AGE. In sections 1641 to 1648: (a) when the criminality of conduct depends on a child's being below the age of thirteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than twelve; (b) when criminality depends on the child's being below a critical age older than twelve, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

2. SPOUSE RELATIONSHIPS. In sections 1641 to 1648, when the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to

persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a female, this shall not preclude conviction of a spouse or female as accomplice in an offense which he or she causes another person, not within the exclusion, to perform.

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under sections 1641 through 1644 and sections 1646 through 1648, unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specifically interested in the victim, other than the alleged offender, learned of the offense.

SECTION 1650. DEFINITIONS FOR SECTIONS 1641 TO 1649.) In sections 1641 to 1649:

1. "Sexual act" means sexual contact between two persons who are not married to each other consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, or the mouth and the vulva. For the purposes of this subsection, sexual contact between the penis and the vulva, or between the penis and the anus, occurs upon penetration, however slight. Emission is not required.
2. "Sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

The Committee Counsel noted that the Committee had considered a first draft of these sections at its Grand Forks meeting on June 20-21, and that this redraft was ordered at that meeting. The essential changes in this draft were to add sections dealing with fornication, adultery, and unlawful cohabitation (Sections 1644 through 1646). In addition, the draft reflected action at the last meeting based on Representative

Hilleboe's redefinition of the term "sexual act"; and a redrafting of former Section 1645 to prohibit sexual acts between adult offenders and minor victims (shown in the draft as Section 1643).

Mr. Webb stated that he maintained his objection to Subparagraph d of Subsection 1 of Section 1641 dealing with the minimum age for absolute liability for "statutory rape". He stated that his objection was both personal, and on the grounds that leaving the minimum age at "less than thirteen years old" would cause the failure of the bill containing the proposed revision.

Professor Lockney stated that he could acquiesce in raising the age to "less than fifteen years old" if the proposed language of Section 1643 were deleted and the language of the previous Section 1645 were reinstated in its place. The Chairman noted that the fate of the entire proposed revision of Title 12 could ride or fall, depending on what the Committee does in regard to sexual offenses.

Mr. Wefald stated that he agreed with Professor Lockney's desire to reinstate the original language of Section 1645, since the gist of Section 1645 was the relative age differential between the offender and the victim. He stated that this is an important provision in terms of rationalizing that type of sexual offense.

Mr. Webb restated his position, taken at the last meeting, that absolute criminal liability must be imposed on persons who engage in sexual intercourse with females below a certain age, and that that age should be higher than "less than thirteen years old".

The Committee discussed Subparagraphs b and c of Subsection 1 of Section 1641 providing that the offense of "gross sexual imposition" is committed if the offender knows that his victim is unaware that a "sexual act" is being committed upon the victim, or where the offender has deliberately impaired the victim's power to resist. The Committee discussed the fact that Subparagraph b was limited to intentional action on the part of the offender, and wondered if the offense should not also be defined as having been committed if someone else were responsible for the substantial impairment of the victim's power to resist.

IT WAS MOVED BY MR. WOLF AND SECONDED BY PROFESSOR LOCKNEY that the words "or someone with his knowledge" be added after the word "He" in Subparagraph b of Subsection 1 of Section 1641.

Judge Erickstad inquired as to whether this draft removed criminal liability for sodomy of a consensual nature between adults. The Committee Counsel stated that that was the effect of the second draft of Sections 1641 through 1650.

Judge Erickstad then inquired as to Representative Hilleboe's position on inclusion of redrafted provisions relating to fornication, adultery, and unlawful cohabitation. He wondered what the public reaction would be to deleting these offenses from the new criminal code. Professor Lockney stated that public reaction is impossible to judge, since no one really knows what the public feels concerning sexual offenses.

Representative Hilleboe, responding to Judge Erickstad's question, stated that the draft provision should only provide criminal liability for "public fornication",

and that the crime of "adultery" should be stricken from the code. He stated that he believed a crime of unlawful cohabitation should be retained as long as the emphasis was on the commission of fraud.

Professor Lockney and Mr. Hill felt that it would be almost impossible to prosecute under the redrafted version of Section 1646, since it would be extremely difficult to prove that persons were cohabiting with an intent to defraud someone else.

Judge Erickstad stated he felt there is a definite difference between types of sexual acts, and that some types of sexual acts should not be allowed even between consenting adults.

The Chairman noted that there was a motion pending, and thereafter, MR. WOLF'S MOTION amending Subparagraph b of Subsection 1 of Section 1641 PASSED.

The Chairman noted that Mr. Leonard Bucklin was present, and that Mr. Bucklin had an interest in making a brief presentation regarding revision of the obscenity statutes. Therefore, he requested that the Committee delay further consideration of the redraft of the sexual offense provisions and consider the redraft of Sections 1851, 1852, and 1861, covering dissemination of obscenity and other offenses. The Chairman called on the Committee Counsel for an overview of those sections, which reads as follows:

SECTION 1851. DISSEMINATING OBSCENE MATERIAL.)

1. OFFENSE. A person is guilty of an offense if he disseminates obscene material, or if he produces, transports, or sends obscene material with intent that it be disseminated. "Disseminate" means sell, lease, advertise, broadcast, exhibit, or distribute.

2. DEFENSES. It is a defense to a prosecution under this section that dissemination was restricted to:

a. Institutions or persons having scientific, educational, governmental, or other similar justification for possessing obscene material; or

b. Noncommercial dissemination to personal associates of the actor[; or

c. Dissemination carried on in such a manner as, in fact, to minimize risk of exposure to children under eighteen or to persons who had no effective opportunity to choose not to be so exposed].

3. GRADING. The offense is a class C felony if dissemination is carried on in reckless disregard of risk of exposure to children under eighteen or to persons who had no effective opportunity to choose not to be so exposed. Otherwise the offense is a class A misdemeanor. [The offense is a Class A misdemeanor.]

SECTION 1852. INDECENT EXPOSURE.) A person is guilty of a class A misdemeanor if, with intent to arouse or gratify the sexual desire of any person, including the actor, he exposes his genitals or performs any other lewd act under circumstances in which, in fact, his conduct is likely to be observed by a person who would be offended or alarmed.

SECTION 1861. DISORDERLY CONDUCT.)

1. OFFENSE. A person is guilty of an offense if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior, he:

a. Engages in fighting, or in violent, tumultuous or threatening behavior;

b. Makes unreasonable noise;

c. In a public place, uses abusive or obscene language, or makes an obscene gesture;

d. Obstructs vehicular or pedestrian traffic, or the use of a public facility;

e. Persistently follows a person in or about a public place or places;

f. While loitering in a public place for the purpose of soliciting sexual contact, he solicits such contact; or

g. Creates a hazardous, physically offensive, or seriously alarming condition by any act which serves no legitimate purpose.

2. GRADING. The offense is a class B misdemeanor if the defendant's conduct violates subsection 1 f. Otherwise it is an infraction.

3. COMPLAINT BY MEMBER OF THE PUBLIC REQUIRED. Prosecution under paragraphs c, e, and f, of subsection 1 shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer.

The Committee Counsel noted that the three sections cover dissemination of obscene material, indecent exposure, and disorderly conduct. Section 1851 makes it a Class A misdemeanor to disseminate obscene material, unless the dissemination is carried on in "reckless disregard of exposure to children under eighteen" or to anyone who has no opportunity not to be exposed to the material, in which case the offense is a Class C felony.

Section 1851 does not contain a definition of obscenity. The federal drafters chose not to include such a definition due to the "current state of flux in the relevant constitutional law". The federal drafters' decision was to leave the definition of obscenity to evolution through judicial decision.

The Committee Counsel noted that the Committee had discussed the topic of obscenity before, and at the previous discussion it was decided not to provide a defense to a prosecution for dissemination of obscenity based on the fact that the dissemination was to an institution or person having a scientific, educational, governmental, or similar justification for possession. The Committee Counsel noted that the draft of Section 1851 contains such a proposed defense.

The Committee Counsel also pointed out that the federal drafters have presented a bracketed defense (Subparagraph c of Subsection 2 of Section 1851) allowing dissemination to adults which was done in a way to minimize the risk of exposure to minors or to adults who did not have an effective opportunity not to be exposed. The question of allowing that type of a defense was one of policy for the Committee. The effect of such a defense would be to allow free dissemination of "pornography" to adults.

The Committee Counsel also pointed out another bracketed provision (Subsection 3 of Section 1851) which would provide that the offense of dissemination of obscenity would simply be graded as a Class A misdemeanor.

The Committee Counsel noted that should the Committee desire to add a definition of "obscene material", it could use the definition contained in the draft of the sections covering obscenity previously considered by the Committee.

Section 1852 makes it a Class A misdemeanor for a person to perform a lewd act, including exposure of his genitals, under circumstances where his actions are likely to be seen by someone "who would be offended or alarmed". This section would replace Subsection 1 of Section 12-21-10, which prohibits indecent exposure in any place "where there are present other persons to be offended or annoyed thereby". Thus, Section 1852 does not work major change in that area of the criminal law.

However, the second subsection of Section 12-21-10 makes it a misdemeanor for a person to procure another to expose himself. That offense is not covered by the proposed FCC, since the solicitation provisions of Section 1002 apply only to felonies. Therefore, the Committee Counsel noted that a policy question was presented regarding the procuring of indecent exposure on the part of another person.

The Committee Counsel noted that Section 1861 prohibits disorderly conduct, which is defined as acting with intent to harrass, annoy, or alarm another person, or acting in reckless disregard of the fact that another person is harrassed, annoyed, or alarmed, when the action consists of fighting or other threatening behavior; making unreasonable noise; using abusive or obscene language or obscene gestures in public places; obstructing traffic or use of a public facility; persistently following somone in a public place; loitering for the purpose of soliciting sexual contact and soliciting such contact; or otherwise creating a hazardous, physically offensive, or alarming condition by an act which "serves no legitimate purpose".

Disorderly conduct is classified as an "infraction", unless the offense consists of loitering in a public place for the purpose of soliciting sexual contact and actually soliciting such contact, in which case the offense is a Class B misdemeanor.

The Committee Counsel noted that Subsection 3 of Section 1861 requires that prosecution be instituted only upon complaint by "someone other than a law enforcement officer" if the action complained of consists of using abusive or obscene language or gestures in a public place; persistently following a person about a public place; or loitering for the purpose of soliciting sexual contact and doing so in a public place. Present North Dakota law contains no such provision. The federal drafters' rationale is that the criminal law ought not to worry about the sensibilities of the law enforcement officer, but rather about the sensibilities of private persons. If a private person is not offended by the action, the offender should not be prosecuted simply because the law enforcement officer happens to notice the action. As a practical matter, police practice may require a complaint before offenses of this nature result in arrests and prosecution.

Mr. Webb stated that he did not approve of Section 1861 for several reasons; first,because of its classification, for the most part, as an "infraction", but most especially because of Subsection 3. He stated that he felt Subsection 3 was an indication of distrust of the competence of law enforcement personnel. In regard to denominating offenses as "infractions", Mr. Webb stated that he felt an offense should either be denominated a "crime", or it should not be included in the criminal code.

IT WAS MOVED BY JUDGE ERICKSTAD AND SECONDED BY REPRESENTATIVE HILLEBOE that the grading of Section 1861 be increased so that all offenses listed therein were Class B misdemeanors, and that Subsection 3 of Section 1861 be deleted.

Professor Lockney noted that the result of the motion would be to allow arrest of a person making obscene gestures where private citizens who view those gestures are not offended thereby. After further discussion, JUDGE ERICKSTAD'S MOTION PASSED with Professor Lockney voting nay.

The Committee discussed Section 1852, and thereafter IT WAS MOVED BY MR. WOLF, SECONDED BY MR. WEBB, AND CARRIED that the Committee approve Sections 1851 and 1852, as amended.

The Chairman called on Mr. Leonard Bucklin for a brief presentation concerning obscenity provisions. (A copy of the material presented to the Committee by Mr. Bucklin is appended to these minutes as Appendix "D".)

Mr. Bucklin made the following recommendations:

1. Any proposed obscenity legislation should specifically spell out the element of "Scienter" or knowledge which is required on the part of an alleged offender relative to the type of material he is disseminating.

2. The statutes proposed should contain a definition of "obscene material", and that definition should have uniform statewide application. Political subdivisions should be preempted from enacting their own definitions of obscenity.

3. Exemptions should be provided for an alleged offender which is a school, museum, library, or governmental agency with a legitimate research or collection purpose in mind.

4. If the Committee is to provide specific, stricter legislation regarding distribution to minors, then exceptions should be provided where parents want their children to have the material, or where the alleged offender had reasonable cause to believe that the receiver of the material was of legal age.

Mr. Bucklin stated that he felt present North Dakota obscenity laws were unenforceable, and that a majority of the citizens of North Dakota wanted laws forbidding dissemination of obscene material on the statute books.

Mr. Wolf noted that, in essence, the Committee was discussing two separate offenses; one being dissemination of obscene material in general, and the second being dissemination to minors. He suggested that the section, or sections, relating to obscenity be redrafted to take into consideration the distinction between the two separate offenses.

Mr. Wolf inquired as to whether it would be valuable to provide for injunctive procedures against persons disseminating obscene material. He also noted that some of the material distributed by Mr. Bucklin provided that prosecutions should not commence until the prosecuting attorney had previously determined that the material was obscene and the defendant had been notified of that fact. Mr. Webb stated that he did not feel it appropriate for a state's attorney to make that type of decision.

Mr. Wolf again suggested that the staff redraft the provisions on obscenity separating commercial dissemination generally from dissemination to minors. The Committee Counsel noted that he could present material previously considered by the Committee which did contain two separate offenses. The Chairman directed the Committee Counsel to do so, and noted that the Committee would consider this redrafted material during this meeting.

The Chairman called on the Committee Counsel for an overview of Sections 1811 through 1814, which reads as follows:

SECTION 1811. SUPPLYING FIREARMS, AMMUNITION, DESTRUCTIVE DEVICES, OR EXPLOSIVES FOR CRIMINAL ACTIVITY.)

1. OFFENSE. A person is guilty of a class C felony if he:

a. Knowingly supplies a firearm, ammunition therefor, destructive device, or explosive to a person who intends to commit a crime of violence or intimidation with the aid thereof or while armed therewith; or

b. Procures or receives the same with like intent.

2. DEFINITION. In this section, "crime of violence or intimidation" means such a crime defined in chapters 16 and 17 of this title when the offense is a felony.

SECTION 1812. ILLEGAL FIREARMS, AMMUNITION, OR EXPLOSIVE MATERIALS BUSINESS.)

1. OFFENSE. A person is guilty of an offense if he knowingly supplies a firearm, ammunition, or explosive material to, or procures or receives a firearm, ammunition, or explosive material for, a person prohibited by the regulatory law from receiving it.

2. DEFINITIONS. In this section:

a. "Firearms" includes the weapons described in sections 62-01-01 and 62-02-01; and

b. "Regulatory law" means chapters 62-01, 62-02, and 62-03.

3. GRADING. The offense is a class C felony if the actor:

a. Was not licensed or otherwise authorized by law to handle, transfer, or engage in transactions with respect to the firearm, destructive device, or explosive material; or

b. Engaged in the forbidden transaction under circumstances manifesting his readiness to supply or procure on other occasions in disregard of lawful restrictions.

Otherwise the offense is a class A misdemeanor.

SECTION 1813. TRAFFICKING IN AND RECEIVING LIMITED-USE FIREARMS.)

1. OFFENSE. A person is guilty of a class C felony if he:

a. Traffics in limited-use firearms in violation of the regulatory law; or

b. Receives a limited-use firearm with knowledge that it is being transferred to him in violation of the regulatory law.

2. DEFINITIONS. In this section:

a. "Traffics" means:

(i) Transfers to another person;

(ii) Possesses with intent to transfer to another person;

(iii) Makes or manufactures; or

(iv) Imports or exports;

b. "Limited-use firearm" has the meaning prescribed in section 62-02-01; and

c. "Regulatory law" means chapter 62-02.

SECTION 1814. POSSESSION OF EXPLOSIVES AND DESTRUCTIVE DEVICES IN GOVERNMENT BUILDINGS.) A person is guilty of a class A misdemeanor if he possesses an explosive or destructive device in a government building without the written consent of the government agency or person responsible for the management of such buildings. "Government building" means a building which is owned, possessed, or used by or leased to the state of North Dakota, or any of its political subdivisions.

The Committee Counsel stated that Sections 1811 through 1814 present definitions of offenses dealing with the supplying of weapons or explosives to criminals; supplying of weapons or explosives to persons prohibited by law from receiving them; trafficking in "limited-use firearms"; and possessing explosives in government buildings. These sections would not replace any existing sections in Title 12, but could either complement or replace sections in Title 62, which deal with weapons control. In fact, the Committee Counsel noted that the sections had been redrafted to include, in several instances, reference to provisions in Title 62.

Section 1811 makes it a Class C felony for a person to "knowingly" supply a weapon or explosive to another who intends to commit a "crime of violence or intimidation". It is also a Class C felony for a person to "procure or receive" a weapon or explosive with intent to commit such a crime. A "crime of violence or intimidation" is a felony defined in Chapters 16 and 17 of the proposed FCC. Thus, the phrase "crime of violence or intimidation" would include such offenses as murder, manslaughter, aggravated assault, terrorizing, kidnapping, rape, arson, criminal mischief, and robbery.

The Committee Counsel stated that the provisions of Sections 1811 through 1814 do not prohibit the carrying of concealed weapons or the carrying of explosives. Both of these acts are presently prohibited by sections in Title 62. The Committee Counsel stated that the Committee could prohibit that type of action in Title 12 by adding a third subsection to Section 1811 which could be based on the language of the draft on firearms control previously considered by the Committee.

The Committee Counsel stated that these sections dealing with the supplying of weapons and trafficking in "limited-use firearms" provided a policy question for the Committee which could be stated in several alternative ways. First, the Committee could adopt the staff redraft of Sections 1811 through 1814 and essentially leave the provisions of Title 62 alone. Second, the Committee could forego adoption of Sections 1811 through 1814 and, in the future, do a thorough redraft of the provisions of Title 62. And, third, the Committee could call for substantial amendment of the redraft of Sections 1811 through 1814 and repeal those sections in Title 62 which deal with everything but the licensing of buyers and sellers of certain firearms.

The Committee Counsel stated that Section 1812 makes it an offense to knowingly supply a firearm or explosive material to a person prohibited by the applicable regulatory law from receiving it. The offense is graded as a Class C felony if the offender was not licensed to deal in the materials supplied, or if he engaged in the transaction

in a manner indicating his willingness to continue to take such action. In other cases, the offense is graded as a Class A misdemeanor.

The "regulatory law" referred to above has been shown in the draft as Chapters 62-01, 62-02, and 62-03 of the Century Code, which deal with the sale and licensing of pistols, sale and licensing of machine guns, etc., and the control of explosives and concealed weapons.

The word "firearms" is defined as pistols (under Section 62-02-01) and machine guns, submachine guns, and automatic rifles (as defined in Section 62-02-01). Should Section 1812 be adopted by the Committee, the Committee could give some thought to either amending provisions in Title 62 to provide a more comprehensive definition of "firearms", or making the reference in Section 1812 to the definition of "firearms" contained in Section 109 of the proposed FCC.

Section 1813 makes it a Class C felony to "traffic" in "limited-use firearms" and, by the definitional reference to Section 62-02-01, that term has been limited to machine guns, submachine guns, and automatic rifles.

Section 1814 makes it a Class A misdemeanor for a person to possess an explosive or destructive device in a government building without the written consent of the agency or person responsible for management of the building. This section is new law and the Committee must determine whether it is needed. The section seems designed as a deterrent to deliberate bombings, allowing law enforcement officials to apprehend offenders prior to the actual planting or utilization of such explosives.

Representative Hilleboe stated that he thought Sections 1811 and 1812 define substantially similar offenses and wondered whether they could not be combined. The Committee Counsel noted that the two sections were aimed at different types of actions, but perhaps they could be combined by redrafting.

The Committee discussed the sections at length, and IT WAS MOVED BY JUDGE ERICKSTAD AND SECONDED BY MR. WEBB that the Committee adopt the staff redraft of Sections 1811 through 1814.

Mr. Webb, stating that his second was for the purposes of discussion, asked whether it would not be advisable for the Committee to wait on adoption of the sections until it has had a chance to thoroughly study the topic of weapons control, including the provisions of Title 62.

Mr. Wefald inquired as to whether Section 1814 shouldn't be broadened to include the possession of explosives or destructive devices in private buildings. The Committee Counsel noted that the section only applied to the carrying of such explosives without written consent, and would apply even though the carrying of explosives was lawful in the general sense. Thus, it was probably appropriate that the section be limited to governmental buildings.

Professor Lockney stated that he would vote against Judge Erickstad's motion because he felt the area needed more study, especially the relationship between these sections and Title 62. MR. WOLF, WITH A SECOND BY PROFESSOR LOCKNEY, OFFERED A SUBSTITUTE MOTION to defer consideration of Sections 1811 through 1814 until some later date. The Committee Counsel asked, for the purpose of clarity in the minutes, whether it was understood that the deferral of consideration would result in no consideration during this legislative interim. Mr. Wolf stated that that was his intent.

Judge Erickstad said that if there is some merit in having this type of legislation, which he felt there was, then it should be adopted at this time. Thereafter, MR. WOLF'S MOTION LOST.

Mr. Webb explained his vote in favor of Mr. Wolf's motion as not being a vote in direct opposition to Sections 1811, 1812, and 1813, but rather it should be interpreted as a desire for more study on the topic. Thereafter, JUDGE ERICKSTAD'S MOTION, STATED ABOVE, CARRIED with three members voting in the negative.

The Chairman discussed the fact that the Committee had a great deal of work to do to complete its agenda for this meeting, and therefore, without objection from the Committee, he would desire to recess and reconvene in the evening at 7:30 p.m. There being no objection from the Committee, the Committee recessed at 5:05 p.m. and reconvened at 7:30 p.m. on Thursday, July 20, 1972.

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The Chairman called on Mr. Wefald for an overview of Sections 1841 through 1849 which reads as follows:

SECTION 1841. PROMOTING PROSTITUTION.)

1. OFFENSE. A person is guilty of an offense if he:

a. Operates a prostitution business or a house of prostitution;

b. Induces or otherwise intentionally causes another to become engaged in sexual activity as a business; or

c. Knowingly procures a prostitute for a prostitution business or a house of prostitution.

2. GRADING. The offense is a class C felony if it is under paragraphs b or c of subsection 1, or if it is under paragraph a and the actor owns, controls, manages, or otherwise supervises the prostitution business or house of prostitution. Otherwise the offense is a class A misdemeanor.

SECTION 1842. FACILITATING PROSTITUTION.)

1. OFFENSE. A person is guilty of an offense if he:

a. Knowingly solicits a person to patronize a prostitute;

b. Knowingly procures a prostitute for a patron;

c. Knowingly leases or otherwise permits a place controlled by the actor,

alone or in association with others, to be regularly used for prostitution, promoting prostitution, or facilitating prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means;

d. Knowingly induces or otherwise intentionally causes another to remain a prostitute. A person who is supported in whole or substantial part by the proceeds of prostitution, other than the prostitute or the prostitute's minor child or a person whom the prostitute is required by law to support, is presumed to be knowingly inducing or intentionally causing another to remain a prostitute.

2. GRADING. The offense is a class C felony if the actor intentionally causes another to remain a prostitute by force or threat, or the prostitute is the actor's wife, child, or ward, or a person for whose care, protection, or support he is responsible, or the prostitute is, in fact, less than sixteen years old. Otherwise it is a class A misdemeanor.

SECTION 1843. PROSTITUTION.) A person is guilty of prostitution, a class B misdemeanor, if he or she:

1. Is an inmate of a house of prostitution or is otherwise engaged in sexual activity as a business; or

2. Solicits another person with the intention of being hired to engage in sexual activity.

SECTION 1848. TESTIMONY OF SPOUSE IN PROSTITUTION OFFENSES.) Testimony of a person against his or her spouse shall be admissible to prove offenses under sections 1841 to 1843 involving that person's prostitution.

SECTION 1849. DEFINITIONS FOR SECTIONS 1841 TO 1849.) In sections 1841 to 1849:

1. "Sexual activity" means sexual intercourse, deviate sexual intercourse, or

sexual contact as defined in section 1649;

2. A "prostitution business" is any business which derives funds from prostitution regularly carried on by a person under the control, management, or supervision of another;

3. A "house of prostitution" is any place where prostitution is regularly carried on by a person under the control, management, or supervision of another;

4. A "prostitute" is a person who engages in sexual activity for hire;

5. An "inmate" is a prostitute who acts as such in or through the agency of a house of prostitution.

Mr. Wefald stated that the subchapter (Sections 1841 through 1849) would replace the present North Dakota prostitution law contained in Sections 12-22-14 through 12-22-19.

The subchapter is aimed principally at those persons who promote prostitution, facilitate prostitution, or earn their living by inducing or forcing someone to engage in prostitution. The prostitute herself is regarded as a minor offender, or as more or less the victim of her own "victimless" crime.

The subchapter is not directed toward sexual activity per se, but rather is directed toward the promotion of sexual activity as a business.

Mr. Wefald pointed out that Section 1841 punishes those persons who promote prostitution through operation of a prostitution business, by facilitating or intentionally causing another to engage in sexual activities as a business, or by knowingly procuring a prostitute for a prostitution business. Anyone promoting prostitution in these ways is guilty of a Class C felony.

Section 1842, on facilitation of prostitution, is punished as a Class C felony where force is involved, or where the prostitute is the actor's wife, child, or ward, or other person for whom the actor is responsible.

Mr. Wefald reiterated that Section 1843 treats the prostitute as a minor offender by making the actual act of engaging in prostitution a Class B misdemeanor. On the other hand, he noted that Section 12-22-17 punishes prostitution by potential imprisonment for not less than one year nor more than five years.

Mr. Webb questioned whether Section 1842 covers the present provisions of Section 12-22-28 concerning maintenance of a house used for indecent purposes. Mr. Wefald stated that, in his opinion, Subparagraph c of Subsection 1 of Section 1842 adequately covered the present provisions of Section 12-22-28.

At the suggestion of Judge Erickstad, the word "taking" was added to Subparagraph c of Subsection 1 of Section 1842 in Line 9 between the words "or" and "other".

Representative Hilleboe questioned the use, by the federal drafters, of the phrase "he or she" in Section 1843, since in other sections relating to sexual offenses we have simply used the term "he". Representative Hilleboe proposed that the words "or she" be deleted.

Judge Erickstad stated that if those words were eliminated, the minutes should note that Section 109 defines the term "he" to include both genders. Professor Lockney pointed out that Section 1-01-34 of the Century Code also provides that the pronoun "he" includes both genders.

Judge Erickstad voiced serious objection to the fact that Section 1843, by its reference to "sexual activity", provides that deviate sexual behavior would be punished by only a maximum of 30 days' imprisonment. His objection sparked a lengthy discussion on a fundamental policy question which was stated by Professor Lockney to be whether or not the Committee was going to make acts of deviate sexual intercourse between consenting adults subject to criminal liability.

Judge Erickstad stated that he objected to the treatment of persons who engage in deviate sexual behavior on the same basis as persons who engage in "normal" sexual behavior. However, he stated that a person who practices "deviate sexual behavior" should be treated rather than punished.

Mr. Webb raised the question of whether homosexuality was in fact a disease. Judge Erickstad stated that, in his opinion, it was a disease.

Professor Lockney questioned what the opinion of the majority of North Dakotans would be regarding deviate sexual acts, and how that majority would react to apparent Committee approval of those acts which would be evidenced by removing criminal liability for engaging in them. The Chairman suggested that perhaps the Committee's proposed new criminal code should be a consensus draft with the possibility of minority reports being submitted.

Judge Erickstad stated he felt that by making deviate sexual behavior between consenting adults noncriminal, the Committee would, in effect, be sanctioning it.

The Committee discussed the definition of deviate sexual behavior. Mr. Wefald pointed out that Subsection (b) of Section 1649 of the proposed FCC had contained a definition of deviate sexual behavior and read that definition, as follows:

> "(b) 'Deviate sexual intercourse' means sexual contact between human beings who are not husband and wife consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, or any form of intercourse with an animal;"

Judge Erickstad stated he felt that was a rather good definition of deviate sexual acts. It was noted that the definition exempts the actions of husband and wife. Mr. Hill pointed out that current North Dakota law does not exempt a husband and wife from criminal liability from sodomy.

After further discussion concerning a differentiation between rape and other deviate sexual intercourse, and "normal sexual intercourse" and deviate sexual intercourse in relation to prostitution, IT WAS MOVED BY JUDGE ERICKSTAD AND

SECONDED BY MR. WEBB that the staff draft a proposal, in addition to the present draft on prostitution, to differentiate between normal and abnormal sexual behavior with emphasis on treating rather than punishing the offender who engages in abnormal sexual behavior.

Mr. Webb raised the question as to whether there is some sexual activity which the Legislature has no interest in controlling. Representative Hilleboe suggested that the staff redraft the basic proposal on prostitution to change the phrase "sexual activity" to "sexual act" wherever it appears. Thereafter, JUDGE ERICKSTAD'S MOTION PASSED.

Representative Hilleboe suggested that Subsection 2 of Section 1842 be changed by substituting the words "a minor" for the words "less than sixteen years old".

The Committee decided that in Section 1843 the punishment for engaging in prostitution ought to be raised from a Class B misdemeanor to a Class A misdemeanor to adequately cover those persons who might engage in deviate sexual activities. Mr. Hill also noted that Mr. Kalin had pointed out that a sentence of 30 days' imprisonment, or less, was absolutely useless in terms of rehabilitation.

The Chairman directed the staff to change the sentence classification for Section 1843 as indicated by the Committee consensus.

The Committee discussed Section 1848, allowing admission of testimony of a person against his spouse to prove offenses under Sections 1841 through 1843. It was the consensus of the Committee that the section was acceptable notwithstanding the fact it is contrary to present North Dakota law as contained in Section 31-01-01.

The Chairman called on Mr. Wefald for an overview of Sections 1571 through 1573 (which have no counterpart in the FCC) reading as follows:

SECTION 1571. LIBEL.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he makes, composes, or dictates a libel, or procures the same to be done, or willfully publishes or circulates a libel, or in any way knowingly or willfully aids or assists in making, publishing, or circulating a libel. (12-28-03)

2. MALICE PRESUMED. A publication having the tendency or effect described in section 1573(1) is deemed malicious if no justification or excuse therefor is shown.

3. DEFENSES. It is a defense to a prosecution under this section that:

a. The matter alleged to be libelous is true and was published with good motives and for justifiable ends; (12-28-04)

b. The matter alleged to be libelous was contained in a privileged communication; (12-28-11)

c. The matter complained of was published by the editor or proprietor of a book, newspaper, or serial publication, or the manager of a partnership or incorporated association by which a book, newspaper, or serial publication is issued, without his knowledge or fault and against his wishes by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known; (12-28-08)

d. A reporter, editor, publisher, or proprietor of a newspaper published a fair and true report of any judicial, legislative, or other public and official proceeding, or of any statement, speech, argument, or debate in the course of the same, without actual malice. (12-28-09)

SECTION 1572. SLANDER.)

1. OFFENSE. A person is guilty of a class B misdemeanor if he falsely and maliciously uses, utters, or publishes slander over, through, or by means of radio or television. (12-28-15)

2. DEFENSES. It is a defense to a prosecution under this section that the words used, uttered, or published were true, and were used with good motives and for justifiable ends. (12-28-16)

SECTION 1573. DEFINITIONS FOR SECTIONS 1571 AND 1572.)

In sections 1571 and 1572:

1. "Libel" means a malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy tending to expose such person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation made public as aforesaid designed to blacken and vilify the memory of one who is dead and tending to scandalize or provoke his surviving relatives and friends; (12-28-01)

2. "Publication" means a knowing display of a libel, or the parting with its immediate custody under circumstances which exposed the libel to be read

or seen or understood by a person other than the publisher of the libel, although it is not necessary that the matter complained of should have been seen or read by another; (12-28-07)

3. "Privileged communication" means a communication made to a person entitled to or interested in the communication by one who is also entitled to or interested or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent; (12-28-11)

4. "Slander" means the use, utterance, or publishing of words which in their common acceptance tend to blacken the memory of one who is dead or to impeach the honesty, integrity, virtue, or reputation of a living person, or to publish the natural defects of one who is alive and thereby to expose him or her to public hatred, contempt, ridicule, or financial injury. (12-28-15)

Mr. Wefald noted that the proposed Federal Criminal Code contained no provisions on criminal libel and slander, and that the section numbers were assigned because they were not used in the FCC.

Mr. Wefald stated that Sections 1571 through 1573 did not contain anything more than the present substantive North Dakota law on criminal libel and slander put into the FCC format. He stated that no attempt had been made to update North Dakota law with respect to present constitutional standards.

Professor Lockney noted that libel ought to be simply a civil matter and not a criminal matter. He quoted from Perkins, Criminal Law, Page 425 as follows: "Most of the libel cases in modern times have been tort cases and there is substantial support for the view that this is an area properly left to control by civil sanctions. It is not in the Model Penal Code."

Thereafter, IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WEBB that the new draft of Title 12 contain no provisions on criminal libel or slander.

Judge Erickstad stated that it was probably a good idea to abolish libel as a crime. Mr. Webb raised the question concerning the public's interest in libel and slander. He also raised the possibility that libel could be subject to injunctive procedures rather than criminal penalties. Mr. Hill noted that criminal statutes of this type may be desirable, and stated his own experience with a state official as one which could be covered under present North Dakota law.

Representative Murphy pointed out that, in his judgment, criminal libel is more important than civil libel, since, for the most part, a monetary recovery was not what was really important. After further discussion, PROFESSOR LOCKNEY WITHDREW HIS MOTION WITH THE CONSENT OF HIS SECOND.

Judge Erickstad proposed that the staff do further research on the present constitutional law on libel and slander to allow the Committee to make a more informed judgment as to whether or not libel and slander are to be retained as crimes. The Chairman directed the staff to do the research suggested by Judge Erickstad.

Thereafter, the Committee recessed until 9:00 a.m. on Friday, July 21, 1972.

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The Committee Counsel presented a redraft of obscenity provisions based on the previous sections on obscenity considered at the November 22-23, 1971, meeting of the Committee. Those sections read as follows:

SECTION 1. OBSCENITY - DEFINITIONS - DISSEMINATION - CLASSIFICATION OF OFFENSES.) 1. A person is guilty of a class A misdemeanor if, knowing of its character, he disseminates obscene material, or if he produces, transports, or sends obscene material with intent that it be disseminated.

2. A person is guilty of a class A misdemeanor if he presents or directs an obscene performance, or participates in any portion of a performance which contributes to the obscenity of the performance as a whole.

3. As used in this section, the terms "obscene material" and "obscene performance" mean material or a performance which, considered as a whole:

a. Predominantly appeals to a prurient or morbid interest in nudity, sex, excretion, sadism, or masochism; and

b. Goes substantially beyond customary limits of candor in describing or representing such matters; and

c. Is utterly without redeeming social value.

That material or a performance predominantly appeals to a prurient or morbid interest shall be judged with reference to ordinary adults, unless it appears from the character of the material or the circumstances of its dissemination to be designed for minors or other specially susceptible audience, in which case, the material or performance shall be judged with reference to that type of audience.

4. As used in this section, the term "disseminate" means to sell, lease, advertise, broadcast, exhibit, or distribute.

5. As used in this section, the term "material" means any physical object used as a means of presenting or communicating information, knowledge, sensation, image, or emotion to or through a human being's receptive senses.

6. As used in this section, the term "performance" means any play, motion picture, dance, or other exhibition presented before an audience.

SECTION 2. PROMOTING OBSCENITY TO MINORS - DEFINITIONS.) As used in section 3:

1. "Promote" means to produce, direct, manufacture, issue, sell, lend, mail, publish, distribute, exhibit, or advertise for pecuniary gain.

2. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when such description or representation:

a. Predominantly appeals to the prurient, shameful, or morbid interest of minors; and

b. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

c. Is utterly without redeeming social importance for minors.

3. "Material" and "performance" shall be defined as in section 1, subsections 5 and 6, respectively.

SECTION 3. PROMOTING OBSCENITY TO MINORS - MINOR PERFORMING IN OBSCENE PERFORMANCE - CLASSIFICATION OF OFFENSES.) 1. It shall be a class C felony for a person to knowingly promote to a minor any material or performance which, taken as a whole, is harmful to minors; or to admit a minor for monetary consideration to premises where a performance harmful to minors is exhibited or takes place.

2. It shall be a class C felony to permit a minor to participate in a performance which, taken as a whole, is harmful to minors.

The Committee Counsel noted that the three sections primarily accomplished three things. First, they present definitions of obscenity in general and definitions regarding a relationship to dissemination to minors. Second, they prohibit the dissemination of obscene material or the presentation of obscene performances in general. And third, they prohibit the promotion of obscenity to minors.

The Committee discussed Subsection 6 of Section 1 and noted that, while dissemination had to be "for pecuniary gain" the giving of a performance did not. Thereafter, IT WAS MOVED BY JUDGE PEARCE, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the words "for pecuniary gain" be added after the word "audience" in Line 27 of Section 1 of the obscenity redraft.

The Chairman digressed from the agenda momentarily to ask the Committee what its wishes were in regard to Chapter 12-25, NDCC, relating to abortion. He stated that the Committee could leave it entirely alone in accord with its previous decision, or it could amend the chapter simply to bring its sentence classifications in accordance with the classification plan being used by the Committee.

The Committee then discussed Section 2 of the redraft obscenity provisions. It was noted that promotion to minors also was defined as containing a requirement that it be "for pecuniary gain". The consensus of the Committee was that this should not be the case, and IT WAS MOVED BY JUDGE ERICKSTAD AND SECONDED BY JUDGE PEARCE that the words "for pecuniary gain" be deleted from Line 4 of Section 2, and the words "for monetary consideration" be deleted from Line 4 of Section 3.

Mr. Hill suggested two further amendments should be included in Judge Erickstad's motion as follows, the words "for pecuniary gain" should be added after the word "performance" in Line 9 of Section 1; and the words "for pecuniary gain" should be added after the word "distribute" in Line 22 of Section 1. These suggested amendments were accepted by Judge Erickstad and his second, and are included in the MOTION ABOVE, WHICH CARRIED.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the obscenity redraft be adopted as amended.

Mr. Wefald stated that, for clarity in staff direction, he understood that in the redrafting in relation to prostitution and sexual offenses, three alternatives would be presented: First, an alternative allowing sexual relations between consenting adults; second, an alternative separating rape and deviate sexual intercourse and including provisions on fornication, adultery, and unlawful cohabitation, regardless of the fact that the offenders are consenting adults; and third, a draft similar to the second draft presented to the Committee except that the offenses of fornication and adultery would be deleted.

Judge Erickstad stated that it was his feeling that a draft should place emphasis on the differing aspects of normal sexual intercourse and deviate sexual intercourse, and should provide for the offenses of fornication and adultery. Representative Hilleboe stated that he would accept the second draft presented to the Committee, except that the offenses of fornication and adultery should be dropped therefrom, with the possible exception of providing for an offense of "public fornication" which was probably adequately covered under the disorderly conduct and indecent exposure provisions.

Mr. Wefald inquired as to the Committee's desires concerning Section 1645 as contained in the proposed FCC. He wondered whether it should be presented as a section specifically relating to corruption of minors by offenders who are a specified age level older than the victim. Professor Lockney stated that he desired inclusion of such section in one of the drafts, and Mr. Webb stated that he was opposed to such a section.

The Chairman inquired as to whether the Committee wished to decide the minimum age for a victim, below which any kind of sexual activity would be considered "statutory rape". After much discussion, the consensus of the Committee was that it not be decided at this time.

Representative Hilleboe stated that he did not like the use of the word "deviate" to define some of the contacts set out in the previously adopted definition of "sexual act".

Professor Lockney suggested that the staff look at and present to the Committee the American Bar Association recommendations regarding "victimless crimes".

The Committee then again discussed Chapter 12-25, NDCC, dealing with abortion-related offenses. IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED, with Mr. Webb voting in the negative, that the staff was to classify Chapter 12-25 to bring the sentences contained therein in line with the Committee's sentencing plan, but was to effect no other substantive change in the abortion statutes.

The Committee Counsel presented a staff revision of statutes relating to bigamy, Sunday closing, and public profanity, which reads as follows:

SECTION 1. BIGAMY - DEFENSE.) 1. It shall be a class A misdemeanor for a married person to willfully and knowingly contract a subsequent marriage in this state while a prior marriage, to the knowledge of the offender, is still subsisting and undissolved; or for a married person to contract a subsequent marriage outside this state and hold himself out as married to the subsequent spouse in this state.

2. It shall be a class A misdemeanor for an unmarried person to knowingly marry another in this state under circumstances which would render the other person guilty of an offense under subsection 1.

3. This section does not apply to parties to a marriage, lawful in the country of which they are nationals or residents, while they are in transit through or temporarily visiting this state. Inapplicability under this subsection is a defense.

SECTION 2. BUSINESS OR LABOR ON SUNDAY - EXEMPTIONS - CLASSIFICATION OF OFFENSES.) 1. Except as otherwise provided in sections 3 and 4, it shall be a class

B misdemeanor for any person on Sunday to engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public, or to authorize or direct his employees or agents to take such action. This subsection shall not apply to any person who in good faith observes a day other than Sunday as the Sabbath, if he refrains from engaging in or conducting business or labor for profit and closes his place of business to the public on that day.

2. The attorney general, a state's attorney, a mayor, a city manager, or a municipal attorney may petition a district court, for the district where a violation is occurring, to enjoin a violation of this section.

SECTION 3. PERSONAL PROPERTY SALES ALLOWABLE ON SUNDAY.) The sale of any of the following items of personal property shall be allowed during any and all hours on Sundays:

1. Drugs, medical and surgical supplies, or any object purchased on the written prescription of a licensed medical or dental practitioner for the treatment of a patient.
2. Food prepared for consumption on or off the premises where sold.
3. Newspapers, magazines, and books.
4. Gasoline, fuel additives, lubricants, and antifreeze.
5. Tires.
6. Repair or replacement parts and equipment necessary to, and safety devices intended for, safe and efficient operation of land vehicles, boats, and aircraft.
7. Emergency plumbing, heating, cooling, and electrical repair and replacement parts and equipment.
8. Cooking, heating, and lighting fuel.
9. Infant supplies.
10. Camera and school supplies, stationery, and cosmetics.
11. Beer and alcoholic beverages but only until one o'clock a.m.

SECTION 4. BUSINESSES ALLOWED TO OPERATE ON SUNDAY.) The operation of any of the following businesses shall be allowed on Sundays:

1. Restaurants, cafeterias, or other prepared food service organizations.
2. Hotels, motels, and other lodging facilities.
3. Hospitals and nursing homes.
4. Dispensaries of drugs and medicines.
5. Ambulance and burial services.
6. Generation and distribution of electric power.
7. Distribution of gas, oil, and other fuels.
8. Telephone, telegraph, and messenger services.
9. Heating, refrigeration, and cooling services.
10. Railroad, bus, trolley, subway, taxi, and limousine services.
11. Water, air, and land transportation services and attendant facilities.
12. Cold storage warehousing.
13. Ice manufacturing and distribution.
14. Minimal maintenance of equipment and machinery.
15. Plant and industrial protection services.
16. Industries where continuous processing or manufacturing is required by the very nature of the process involved.
17. Newspaper publication and distribution.
18. Radio and television broadcasting.
19. Motion picture, theatrical, and musical performances.
20. Automobile service stations.
21. Athletic and sporting events.
22. Parks, beaches, and recreational facilities.
23. Scenic, historic, and tourist attractions.
24. Amusement centers, fairs, zoos, and museums.

25. Libraries.

26. Educational lectures, forums, and exhibits.

27. Service organizations (USO, YMCA, etc.).

28. Grocery stores operated by the owner-manager who regularly employs not more than three employees for the operation of said store.

29. Premises licensed to dispense beer and alcoholic beverages within the limits prescribed in section 5-02-05.

SECTION 5. PUBLIC PROFANITY AND ABUSIVE LANGUAGE - DEFINITIONS - CLASSIFICATION OF OFFENSE.) 1. As used in this section, "profanity" means language which is patently offensive and goes substantially beyond customary limits of verbal candor within the community. Profanity includes language which is obscene and language which is obviously coarse and abusive.

2. It shall be a class B misdemeanor for anyone to use profanity where other persons may hear it and be offended, alarmed, or annoyed.

The Committee Counsel noted that the Committee had previously considered these sections, and that they were being presented here primarily for approval by the Committee in a form which accords with the general format of the proposed FCC and Committee revision thereof. The Committee Counsel noted that the Sunday closing statutes were substantially the same as the present Sunday closing law.

The Committee Counsel noted that the present law provides for an injunction against Sunday closing violations, and that that provision is still contained in Subsection 2 of Section 2 of the staff revision presented during this meeting. He noted that the last time the Committee had discussed this section, there was some concern with this subsection, and some regard was had concerning the desirability of creating a general section allowing injunction against criminal acts. Mr. Webb stated he felt that injunctions might be useful against corporations. The Committee Counsel noted special remedies against corporations would be considered when the draft on sentencing provisions was considered.

Representative Murphy noted that the exemptions for businesses allowed to operate on Sunday, provided in Section 4 of the draft, were not all inclusive and left out some obvious items, such as "custom combining" during the harvest season. He stated that he realized the Committee did not want to make substantive changes in the Sunday closing law, but thought that somebody should take those items into account.

Representative Hilleboe inquired whether Section 5 of the redraft, dealing with public profanity, was not a rehash of the provisions of Subparagraph c of Subsection

1 of Section 1861. The Committee Counsel noted that that was essentially the case. Thereafter, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE ERICKSTAD, AND CARRIED that Section 5 of the staff revision of the statutes relating to bigamy, Sunday closing, and public profanity be stricken. Judge Erickstad stated that his second of that motion, and favorable vote, were with the understanding that its provisions were substantially covered in Subsection 1 of Section 1861.

IT WAS MOVED BY REPRESENTATIVE KIEFFER AND SECONDED BY REPRESENTATIVE MURPHY that the Committee adopt the staff revision of the statutes relating to bigamy and Sunday closing, as amended.

Judge Pearce discussed the last sentence of Subsection 3 of Section 1 relating to bigamy. He stated he did not feel that that sentence was necessary. The Committee Counsel noted that the sentence was added in accordance with the format of the proposed FCC, because the proposed FCC differentiated between the "defense" and "affirmative defense".

A SUBSTITUTE MOTION WAS MADE BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the last sentence of Subsection 3 of Section 1, covering the offense of bigamy, be stricken, and that the sections on bigamy and Sunday closing, as amended, be adopted by the Committee.

The Chairman called on the Committee Counsel for an overview of Sections 1831 and 1832 relating to gambling and reading as follows:

SECTION 1831. ILLEGAL GAMBLING BUSINESS.)

1. OFFENSE. A person is guilty of an offense if he engages or participates in the business of gambling. Without limitation, a person shall be deemed to be engaged in the business of gambling if he:

a. Conducts a wagering pool or lottery;

b. Receives wagers for or on behalf of another person;

c. Alone or with others, owns, controls, manages, or finances a gambling business;

d. Knowingly leases or otherwise permits a place to be regularly used to carry on a gambling business;

e. Maintains for use on any place or premises occupied by him a coin-operated gaming device;

f. Is a public servant who shares in the proceeds of a gambling business whether by way of a bribe or otherwise.

2. DEFINITIONS.

a. As used in this section, the term "coin-operated gaming device" means

any machine which is:

(1) A so-called "slot" machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens; or

(2) A machine which is similar to machines described in paragraph (1) and is operated without the insertion of a coin, token, or similar object.

b. The term "coin-operated gaming device" does not include a bona fide vending or amusement machine in which gambling features are not incorporated as defined in section 53-04-01.

3. GRADING. The offense is a class C felony if:

a. The defendant employed or utilized three or more persons to carry on the gambling business;

b. The defendant, or the gambling business or part thereof which he owned, controlled, managed, or financed, accepted wagers in excess of two thousand dollars in a single day;

c. The defendant received lay-off wagers or otherwise provided reinsurance or wholesaling functions in relation to persons engaged in a gambling business; or

d. A public servant was bribed in connection with the gambling enterprise.

Otherwise the offense is a class A misdemeanor.

SECTION 1832. IMPORTING GAMBLING DEVICES.)

1. OFFENSE. A person is guilty of a class A misdemeanor if he knowingly carries or sends any gambling device into this state.

2. DEFENSES. This section shall not apply to:

a. A gambling device en route to a state, or any part thereof, where such gambling was legal;

b. Any carriage in the usual course of business by a common or public contract carrier;

c. Any newspaper or similar publication; or

d. Any ticket or other embodiment of the claim of a player or bettor which was carried or sent by him.

Inapplicability under this subsection is a defense.

3. DEFINITION OF "GAMBLING DEVICE". In this section "gambling device" means:

a. Any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (1) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (2) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

b. Any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (1) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (2) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

c. Any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part; or

d. Any record, paraphernalia, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, bolita or similar game.

4. EXCLUDED DEVICES. The definition of "gambling device" does not include:

a. Any machine or mechanical device, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and (1) which when operated does not deliver, as a result of the application of an element of chance, any money or property, or (2) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money or property; or

b. Any so-called claw, crane, or digger machine and similar devices which are not operated by coin, are actuated by a crank, and are designed and manufactured primarily for use at carnivals or fairs.

The Committee Counsel noted that Sections 1831 and 1832 prohibit the engaging in or participation in the "business of gambling", which is defined as conducting a lottery; receiving wagers; controlling, managing, or financing a gambling business; leasing a place to be used to carry on a gambling business; maintaining "coin-operated gaming devices" on premises occupied by the offender; or sharing in the proceeds of a gambling business while acting as a public servant. In addition, Section 1832 makes it a Class A misdemeanor to carry or send a "gambling device" into North Dakota.

Section 1831 offenses are Class A misdemeanors, unless the offender employed three or more persons to carry on the gambling business; the gambling business accepted wagers in excess of $2,000 per day; the defendant received "lay-off bets"; or a public servant was bribed in connection with the gambling enterprise, in which cases the offense is graded as a Class C felony.

The Committee Counsel said Sections 1831 and 1832 do not include common gambling as an offense, nor do they prohibit the purchase of a lottery ticket or the isolated sale of a lottery ticket. North Dakota law covers these offenses. Committee Counsel said Article 1 of the Amendments to the North Dakota Constitution provides that the Legislature shall pass laws prohibiting lotteries. It might be questionable, he said, whether Section 1831, which simply prohibits the running of a lottery, is adequate coverage of lotteries under the constitutional mandate of Article 1.

The Committee Counsel also noted that the prohibition in Section 1832 is against the importation of "gambling devices" whereas North Dakota law, contained in Section 12-23-03, provides that the keeping of "gambling apparatus" is a misdemeanor. Further, the provisions of Chapter 12-23 include prohibitions against "bucket shops", and also provide penalties for racing animals for a wager. Neither of these offenses would be covered under Sections 1831 or 1832.

The Committee Counsel suggested that the Committee might make a policy decision to adopt Sections 1831 and 1832, and also to redraft Chapter 12-23 and as much of Chapter 12-24 as the Committee might feel necessary to give additional coverage to common gambling, the keeping of gambling apparatus, and lotteries.

The Committee Counsel stated that Subparagraph d of Subsection 2 of Section 1832 makes it a defense to a charge of importing gambling devices that the person simply carried in a lottery ticket which he had purchased for himself. This provision is opposite from current North Dakota law which prohibits the receipt or acceptance of lottery tickets (Section 12-24-03), and provides that the lottery provisions apply to lotteries drawn outside of North Dakota (Section 12-24-11). Thus, Subparagraph d presents a policy question regarding its retention.

The Committee Counsel then presented a draft of sections covering gambling and lotteries as previously considered by the Committee and reading as follows:

SECTION 16. GAMBLING - DEFINITIONS.) As used in section 17:

1. "Gambling" means risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including an election or sporting event, over which the person taking the risk has no control. Gambling does not include: (a) lawful contests of skill, speed, strength, or endurance in which awards are made only to entrants or to the owners of entries; or (b) lawful business transactions, or other acts or transactions now or hereafter expressly authorized by law.
2. "Lottery" means any plan for the distribution of a thing of value, whether tangible or intangible, or a person or persons selected by chance from among participants, some or all of whom have given a consideration for the chance of being selected.
3. "Bucket shop" means any location wherein the pretended buying or selling of securities or commodities for future delivery is carried on without any intention of future delivery, whether such pretended contract is to be performed

within or without this state.

4. "Gambling apparatus" means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons, or gambling by a person involving the playing of a machine. Gambling apparatus does not include an amusement game or device as defined in section 53-04-01.

5. "Gambling house" means any location or structure, stationary or movable, wherein gambling is permitted or promoted, or where a lottery is conducted or managed. In the application of this definition, any place where gambling apparatus is found is presumed to be a gambling house, provided that this presumption shall not apply where cards, dice, or other games are found in a private residence.

SECTION 17. GAMBLING - RELATED OFFENSES - CLASSIFICATION OF OFFENSES.)

1. It shall be a class D offense to engage in gambling.

2. It shall be a class C offense to knowingly maintain, or to knowingly aid or permit the maintenance of, a gambling house or bucket shop.

3. It shall be a class C offense to:

   a. Conduct a lottery; or

   b. Sell, purchase, receive, or transfer a chance to participate in a lottery; or

   c. Disseminate information about a lottery with intent to encourage participation in it.

4. Subsection 3 shall apply to a lottery drawn or to be drawn outside of this state, whether or not such lottery is lawful in such other state or country.

The Chairman suggested that for the purpose of future reference during this meeting, these provisions on gambling be referred to as the "old draft". The Committee discussed the concept of a "bucket shop". Representative Hilleboe, noting that most licensed brokers in the State violate the existing prohibition against bucket shops, said the activities of brokers who deal in future transactions are well regulated by the State Securities Commissioner and the Federal Securities and Exchange Commission, and that there is no need for a state anti-bucket shop provision.

The Committee discussed the possibility of joining the "old draft" and the draft of Sections 1831 and 1832. The Committee then launched into a general discussion concerning the extent to which gambling should be made the subject of criminal liability. Mr. Webb stated that he would like to see the Committee provide for some limited form of gambling in North Dakota, so that the present types of gambling which go on in private clubs would no longer be criminal. Representative Murphy stated that, to the extent allowable by Article 1 of the Constitution, he would like to see gambling opened up in North Dakota. The Committee discussed these questions at length. Committee Counsel noted that at a previous meeting a motion had called for two drafts on gambling, one to tighten the criminal prohibitions against gambling as much as possible, and the other to allow it in charitable institutions and private clubs. He said he had not completed those two drafts because thereafter the Committee had decided to follow the proposed FCC as its basic draft, and the proposed FCC contained Sections 1831 and 1832 dealing with gambling.

Judge Pearce noted that the bucket shop provisions contained in Subsection 3 of Section 16 referred to the "pretended buying or selling of securities or commodities for future delivery" and wondered whether, under applicable concepts of contract law, the section could be construed to cover licensed respectable brokerage houses. He thought it could not, and Professor Lockney agreed.

After further discussion, IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE KIEFFER, AND CARRIED that all language referring to bucket shops be deleted from the "old draft" on gambling (that is, that Subsection 3 of Section 16 be deleted), and that the words "or bucket shop" be deleted from Line 4 of Section 17.

The Committee recessed for lunch.

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The Committee reconvened at 1:15 p.m., at which time the Chairman called for action on the gambling provisions considered by the Committee.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY JUDGE ERICKSTAD that the Committee adopt the "old draft" as amended. Judge Erickstad noted that his second was for the purposes of promoting discussion, and questioned whether the State wouldn't also be well served to adopt Sections 1831 and 1832 in addition to the "old draft".

Mr. Hill suggested that Section 1831 covering persons who engage in the "business of gambling" be added to Judge Pearce's motion. Thereafter, Judge Pearce amended his motion to add Subsections 5 and 6 to Section 17 to read as follows:

"5. It shall be a class C felony for a person to engage or participate in the business of gambling. Without limitation, a person shall be deemed to be engaged in the business of gambling if he:

a. Conducts a wagering pool or lottery;

b. Receives wagers for or on behalf of another person;

c. Alone or with others, owns, controls, manages, or finances a gambling business;

d. Knowingly leases or otherwise permits a place to be regularly used to carry on a gambling business;

e. Maintains for use on any place or premises occupied by him a coin-operated gaming device;

f. Is a public servant who shares in the proceeds of a gambling business whether by way of a bribe or otherwise.

6. As used in subsection 5, the term "coin-operated gaming device" means any machine which is:

(1) A so-called "slot" machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens; or

(2) A machine which is similar to machines described in paragraph (1) and is operated without the insertion of a coin, token, or similar object.

The term "coin-operated gaming device" does not include a bona fide vending or amusement machine in which gambling features are not incorporated as defined in section 53-04-01.

JUDGE ERICKSTAD AGAIN SECONDED JUDGE PEARCE'S MOTION AS AMENDED BY JUDGE PEARCE.

The Committee discussed at length the question of the desirability of Subsection 4 of Section 17, relating to jurisdiction in this State over lotteries drawn in another state. However, there was no Committee motion on this subject. JUDGE PEARCE'S MOTION STATED ABOVE THEN CARRIED, WITH MR. WEBB AND REPRESENTATIVE MURPHY VOTING IN THE NEGATIVE.

Mr. Webb stated that he felt that the Committee minutes and other records of the Committee should explain to the Legislative Council that the subject of gambling

is one of great controversy, and should be the subject of further study by the Legislature during the next biennium, including possible recommendation for revision of the constitutional provisions prohibiting lotteries.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY MR. WEBB, AND CARRIED that the staff draft a Legislative Council study resolution to specifically include gambling within the continuing study of the criminal offense definitions in the Century Code, and such specific inclusion of gambling was to include reference to possible revision of existing constitutional provisions on lotteries.

The Chairman called on the Committee Counsel to present a staff redraft of Section 109 of the proposed FCC containing general definitions, and reading as follows:

SECTION 109. GENERAL DEFINITIONS.) As used in this title, unless a different meaning plainly is required:

1. "Act" or "action" means a bodily movement, whether voluntary or involuntary;
2. "Acted", "acts", and "actions" include, where relevant, "omitted to act" and "omissions to act";
3. "Actor" includes, where relevant, a person guilty of an omission;
4. "Bodily injury" means any impairment of physical condition, including physical pain;
5. "Court" means any of the following courts: the supreme court, a district court, a county court with increased jurisdiction, a county justice, and a county court;
6. "Dangerous weapon" means any switch blade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles or sand club; any slungshot; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance;
7. "Destructive device" means any explosive, incendiary or poison gas bomb, grenade, mine, rocket, missile, or similar device;
8. "Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, and any chemical

compounds, mechanical mixture, or other ingredients in such proportions, quantities or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, or material or any part thereof may cause an explosion;

9. "Firearm" means any weapon which will expel, or is readily capable of expelling, a projectile by the action of an explosive and includes any such weapon, loaded or unloaded, commonly referred to as a pistol, revolver, rifle, gun, machine gun, shotgun, bazooka, or cannon;

10. "Force" means physical action;

11. "Government" means (a) the government of this state or any political subdivision of this state; (b) any agency, subdivision, or department of the foregoing, including the executive, legislative, and judicial branches; (c) any corporation or other entity established by law to carry on any governmental function; and (d) any commission, corporation, or agency established by statute, compact; or contract between or among governments for the execution of intergovernmental programs;

12. "Governmental function" includes any activity which one or more public servants are legally authorized to undertake on behalf of government;

13. "Harm" means loss, disadvantage, or injury to the person affected, and includes loss, disadvantage,or injury to any other person in whose welfare he is interested;

14. "Included offense" means an offense: a. which is established by proof of the same or less than all the facts required to establish commission of the offense charged; b. which consists of criminal facilitation of or an attempt or solicitation to commit the offense charged; or c. which differs from the offense charged only in that it constitutes a less serious harm or risk of harm to the same person, property, or public interest, or because a lesser degree of culpability suffices to establish its commission;

15. "Includes" should be read as if the phrase "but is not limited to" were also set forth;

16. "Judge" includes a county justice;

17. "Law enforcement officer" or "peace officer" means a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law;

18. "Local" means of or pertaining to any political subdivision of the state;

19. "Official action" means a decision, opinion, recommendation, vote, or other exercise of discretion;

20. "Official proceeding" means a proceeding heard or which may be heard before any government agency or branch or public servant authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with any such proceeding;

21. "Omission" means a failure to act;

22. "Person" includes, where relevant, a corporation, partnership, unincorporated association, or other legal entity. When used to designate a party whose property may be the subject of action constituting an offense, the word "person" includes a government which may lawfully own property in this state;

23. "Property" includes both real and personal property;

24. "Public servant" means any officer or employee of government, including law enforcement officers, whether elected or appointed, and any person participating in the performance of a governmental function, but the term does not include witnesses;

25. "Reasonably believes" designates a belief which is not recklessly held by the actor;

26. "Serious bodily injury" means bodily injury which creates a substantial risk

of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ;

27. "Signature" includes any name, mark, or sign written or affixed with intent to authenticate any instrument or writing;

28. "Thing of value" or "thing of pecuniary value" means a thing of value in the form of money, tangible or intangible property, commercial interests or anything else the primary significance of which is economic gain to the recipient; and

29. "Writing" includes printing, typewriting, and copying.

Words used in the singular include the plural, and the plural the singular. Words in the masculine gender include the feminine and neuter genders. Words used in the present tense include the future tense, but exclude the past tense.

The Committee Counsel noted that Section 109 contains definitions relevant to the whole of the proposed Federal Criminal Code, and now to the whole of the Committee's revision thereof. He stated that it would specifically replace Section 12-01-04. The Committee Counsel noted that some of the more important definitions in the section were those of the terms "dangerous weapon", "destructive device", "firearm", and "thing of value".

Representative Murphy inquired as to whether the word "action" did not also refer to lawsuits. The Committee Counsel said that was the case, but that use of the term to mean lawsuits was not relevant in the context of the Criminal Code.

The Committee discussed the definition of "court", and it was noted that the municipal court was not included in the definition. It was suggested the words "and where relevant municipal courts" be added to Subsection 5 of Section 109.

The Committee then discussed the definition of "dangerous weapon", especially with relation to where it appeared elsewhere in the proposed FCC. The Committee Counsel noted that it appeared in Section 1721, Subsection 3, and there it was limited by language indicating "an intent or readiness to inflict serious bodily injury". Mr. Webb stated that the definition as used in Section 1721 should not be as limited as it is in Subsection 6 of Section 109. Thereafter, IT WAS MOVED BY MR. WEBB, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the words "a weapon defined in subsection 6 of section 109 or a" be added before the second word "weapon" in the first line of Subparagraph b of Subsection 3 of Section 1721.

The Committee discussed the definition of "firearm", and it was noted the definition would not include a bow and arrow or crossbow. After further discussion,

the Committee decided a crossbow or a bow and arrow should not be specifically included in any definitions relating to weapons since the use of them as weapons could be covered under provisions dealing with the intent with which a "weapon" is used.

Mr. Webb raised questions concerning the definition of "included offense" contained in Subsection 14 of Section 109. He wondered whether the definition would help or hurt the cause of clarity in relation to the concept of "included offense". Judge Erickstad replied that he wasn't sure, but thought that such a definition would probably lend clarity to those who had to deal with the concept of "included offense".

The Committee discussed Subsection 19 defining "official action". It was thought it should be limited to governmental agencies, since otherwise anyone's exercise of this discretion would be "official action".

IT WAS MOVED BY MR. WEBB, SECONDED BY JUDGE PEARCE, AND CARRIED that the word "means" in Subsection 19 of Section 109 be deleted and the word "includes" be inserted in lieu thereof, and that the words "by any government agency or branch, or public servant" be added after the word "discretion" in Subsection 19.

IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY REPRESENTATIVE KIEFFER, AND CARRIED that in Line 10 of Section 109 the words ", where relevant, a municipal court and" be added after the word "and".

Thereafter, IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the Committee adopt Section 109, as amended.

Professor Lockney again brought up the subject of criminal libel and noted that the case to which he had wanted to make reference previously was Rosenbloom v. Metromedia, Inc. He also reviewed his previous arguments against criminal libel. Representative Murphy and Mr. Webb stated that they maintained their disagreement with Professor Lockney, and that the staff should carry on with its redraft of criminal libel provisions.

The Committee then discussed when it should meet next, and it was agreed that the Committee should next meet on August 24-25, 1972, subject to change due to conflict with other Legislative Council meeting dates. Thereafter, without objection, the Chairman declared the meeting adjourned subject to the call of the Chair.

John A. Graham
Assistant Director

NATIONAL COUNCIL ON CRIME AND DELINQUENCY
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November 1971

STATEMENT OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY ON THE PROPOSED NEW FEDERAL CRIMINAL CODE IN THE FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

The National Council on Crime and Delinquency, organized in 1907, incorporated in 1921, has long had an interest in improving sentencing and the quality of our penal systems. Through surveys and consultation, it has worked in many states, studying existing systems, and recommending improved methods. It has published a number of model legislative acts, those most relevant to the present Proposed Code being the Model Sentencing Act, authored by the Council of Judges of NCCD, published in 1963; and the Standard Act for State Correctional Services, by a joint committee of the NCCD and the American Correctional Association (published by NCCD in 1966).

In this statement, we deal principally with provisions that affect imprisonment and the prison system.

We start with Chapter 32, Imprisonment, since the character of a penal system is determined principally by the proportion of commitments to dispositions allowing a person to remain in the community, length of terms, flexibility of release, as well as other factors. Unless one takes pride in a swollen, expensive, wasteful, prison system, Chapter 32 requires change.

There are a number of elements proposed in this chapter that would very likely worsen the system of prisons and release in the federal jurisdiction. Terms would be needlessly lengthened, release procedures would be more complicated and less flexible. The net effect would be to substantially increase the prison population, already grossly swollen as compared with what might be expected of a prison system limited to federal violations. These ingredients are (a) long maximum terms, (b) automatic parole components in prison terms, (c) minimum terms of parole eligibility.

Maximum Terms Section 3202 provides for maximum terms for felonies at 20 years for Class A, 10 years for Class B, 5 years for Class C. But it then authorizes higher terms than these if the court finds the defendant to be a "dangerous special offender," defined as follows:

(a) One who has previously been convicted of two or more felonies, of any kind, dangerous or not. The Model Sentencing Act rejects the notion that a repeated offender should be subjected to substantially longer terms than a defendant convicted for the first time, if the crime he commits is not a dangerous one. The repetition of offense may have little bearing on dangerousness. The increased penalty for a non-dangerous offender is really an increased term for a nuisance offender. Such studies as have been made of the habitual offender statutes, such as this subdivision, reveal that they are enforced without any guiding principle, that most defendants who might be subject to the statutes are not made subject to them, that their principal use is as a bargaining element for a negotiated plea, and that they do not serve the goals of either rehabilitation or public protection.

(b) One who commits a felony as part of a pattern of criminal conduct which constituted a substantial source of his income, and in which he manifested special skill or expertise. This extended sentence can be imposed on a sole offender, even one whose crimes are limited to property, and are never assaultive. It can be imposed on a first offender, presumably, and the other operative ingredients of the criminal career would be established presumably in the sentencing operation. To call such a defendant a "dangerous special offender" is to exaggerate the term. The Model Sentencing Act would limit any term of over five years to dangerous offenders defined as those who commit serious assaultive crimes, not a property offender under any circumstances (other than racketeering offenses).

(c) A felony offender--any grade--whose mental condition is abnormal. Again, if a defendant is not a seriously assaultive person, and his crimes are property crimes only, a long term of imprisonment serves no rehabilitative or deterrent purpose, and only clutters up the prisons with people who are likely to become worse after a period of time.

Subdivision (d) is a definition applicable in general to organized crime, calling as it does for a felony committed with others as a pattern of criminal conduct. We support the idea that organized crime is a very serious menace, but if the ordinary terms are five, ten, and twenty years for felonies, certainly the twenty year term is adequately long, without calling for lengthening every grade of offense.

Subdivision (e) again reflects a proper concern that an offender who uses a firearm or destructive device is dangerous; but we repeat that the maximum term structure is long enough without increasing these terms.

In brief, the quite long terms provided for in the "general plan" is exceeded in a second set of maximum terms, most of which are needlessly long, not particularly protective of the public since those they affect are not markedly dangerous in the usual sense of the term.

To return to the general structure of terms: In cases in which the judge has not decided that the defendant fits into one of the "dangerous" categories, the maximum terms are -- felony A, twenty years: felony B, ten years; felony C, five years.

Under the Model Sentencing Act, provision is made for lengthy terms of imprisonment--up to thirty years--imposed on dangerous offenders. But it then provides that the outside limit of a commitment of a non-dangerous offender may be five years, including parole. It permits, indeed requires, that the judge determine the maximum term within that. To provide, as section 3202 does, that even for the lowest grade of felony, class C, the maximum term must be at least five years, must have the effect, if enacted, of substantially increasing prison terms where the need for it is surely not established for these offenders.

We similarly oppose any provision that authorizes a class A or B felony sentence except for seriously assaultive crimes. We oppose such long terms for mere property offenses. Scanning the various crimes, we find

such a crime in §1751 (2), forgery or counterfeiting, made a grade B felony. There may be few such offenses. We recommend that it be stated in the code as a general principle governing sentences that any offense not involving a seriously assaultive act or threatening serious bodily harm shall not be classified as more severe than grade C.

Parole Component Section 3201 (2) provides that the maximum term of every indefinite sentence shall include a prison component and a parole component, the latter to be one-third of terms of nine years or less, which the judge can in any case make three years; three years for terms of 9-15 years, and five years for terms of more than fifteen years. The prison component is the remainder of the maximum term authorized.

The idea of a mandatory parole component is an innovation in American penology. As built into the proposed sentencing system here, it would (a) impede the free operation of a parole system, (b) it would once more lengthen actual time served by prisoners.

When a prisoner is released on parole and subsequently recommitted, he must serve not only the remainder of his parole time, but also the remainder of his prison time. Thus, on a felony B commitment, if the sentence is ten years, three years are said to be a parole component. But if paroled after three years, and revoked a year later, he must serve an additional six or seven years--§ 3403(3) (a). Thus, the "parole component" will often add to prison time, and the phrase "prison component" is seen to be deceptive. What first appears to be seven years of "prison component" (in our illustration) may turn out to be a few years more, in actual time required to be served.

Or, using the same illustration, the parole board may refuse parole until just short of the end of seven years. Again, if parole is violated, the seven-year-prison component may turn out to be nine years or more.

The idea of a mandatory parole component is an innovation in American penology. There is nothing in the history of parole that suggests that such an ingredient is needed. The entire history of parole has been characterized by an undesirable lengthening of terms of imprisonment. In view of the fact that prison terms in the United States are now substantially longer than in any other western country, without any justification in public protection or treatment needs, ingredients that serve to further lengthen terms are destructive. This is especially true for the federal system, which in earlier years was known for its relatively short terms, which were then quite adequate for public protection, and so far as one can see would still be adequate. If there is anything the federal system does not need, it is devices that will lengthen prison terms for the general offender.

Minimum Terms The Model Sentencing Act would prohibit the use of minimum terms, either fixed automatically by statute or at the discretion of the judge. The basic reason is that a minimum term prevents a parole board from releasing a prisoner who in its judgment is suitable for release before the expiration of the minimum term. It thus ousts parole boards from the full exercise of their responsibility. If a minimum term is substantial, the usual parole decision must be to grant parole in most instances, since more than enough time to ready the prisoner for parole has expired. The parole operation becomes a negative one, rather than a positive approach to timely releases.

Section 3201 (3) declares that generally there shall be no minimum term of parole eligibility in an indefinite sentence for a Class A or B felony. But it is provided that the judge in any case of an A or B felony may, if he wishes, fix a minimum term of up to one-third of the maximum, which is an appreciable period of time for Class A or B felonies. The discretionary feature belies the stated policy of no minimum terms: and permitting it at discretion assures disparity of sentences with respect to the minimum terms. The judge who for whatever reason likes the idea of a minimum term will impose it, others will not. The decisions will usually have little bearing on the needs of rehabilitation, treatment, or timely release.

-The concept of parole and the indeterminate sentence is that a man will be released when ready. The introduction of minimum terms, which was brought in with parole, has had unfortunate results, in deterring releases, lengthening time in prison, and adversely affecting the moral of inmates.

Some years ago the Department of Justice said: "Many prisoners convicted of the commission of a felony are serving terms of 1 year and less. It frequently happens that such prisoners respond so well to the rehabilitation program that their release becomes most desirable. Yet, because of the present restriction against the release of such prisoners on parole, they are continued in confinement for the full terms of their sentences. This leads to the anomalous result of having prisoners sentenced to 1 year and 1 day eligible for release after serving four months, while a prisoner whose offense and record warrants his receiving a sentence of less than 1 year is required to serve his full term." (Federal Probation, Sept. 1951. p. 49.)

This observation would also suggest eliminating from section 3402 the sentence, "Except in the most extraordinary circumstances, a prisoner sentenced to an indefinite term of imprisonment for a felony which does not contain a minimum term under section 3201 (4) shall not be released on parole during the first year of imprisonment." Probably not many instances would occur; but this would deter early paroles in those scattered cases in which it would be indicated.

We would also condemn the minimum terms--from ten to twenty-five years--for life terms, provided for in section 3601. Aside from all other observations already made about minimum terms, experience shows that defendants convicted of murder or manslaughter make unusually good parolees. In any event, we argue not for any mandatory release but only that the parole board have discretion to release, without the extraordinary minimum.

In summary, we express the fear that the sentencing structure will increase prison time, will increase the number of prisoners in the federal prisons. The federal prison population has increased from 12,964 in 1930, to 19,260 in 1940, 19,134 in 1950, 24,925 in 1961, the highest reached. It dropped in 1962 to 1967, but commenced increasing again in 1968 and at the end of 1968 was 20,183. The average length of federal sentences of those committed has risen steadily each year since 1959. In 1968 the average was 77.2 months.

Will the sentencing system proposed in this draft continue to swell the length of terms and the number of prisoners? If our analysis is correct,

it will. We may be wrong; we may be right. We suggest that a study be made as to what the impact on sentences would be if the proposed code were adopted, as compared with existing sentences, and sentences at an earlier period.

Misdemeanors

§3003--Persistent Misdemeanants. As stated above, we reject the idea of cumulating penalties for repeated offenses. If the offense is not a serious one, as presumably can be said of misdemeanors, the increased penalty is not meaningful for rehabilitation, or treatment, but only as retribution.

§3201--Sentence of Imprisonment for Misdemeanor. This section does not permit parole on misdemeanor sentences of six months or less. There is a need in the field for improved standards of release on misdemeanor sentences, but most jurisdictions have one device or another (judge, sheriff or warden, parole board) with authority to grant conditional releases, and it appears to be useful. If the maximum is to be even three or six months we recommend some structure for parole.

In §3201, the issue is raised as to whether the term for a class A misdemeanor shall be one year or six months. A term of six months rather than a year seems supported by several factors. Presumably a misdemeanor is a relatively minor offense, at least in a code, such as this draft, that attempts a rational structure basing classifications of crime on danger to society. To provide for misdemeanor sentences at one year, and felony sentences of over one year, is to make the difference one day only.

To make the difference meaningful, a spread of six months would reflect the difference between serious and minor offenses.

But it should not be considered that six months is a short term. In the United States, sentences are so much longer than in other western countries that we forget that six months is quite a long time in a man's life.

The Supreme Court has chosen the cut off point of six months for cases requiring a jury trial. At least one state has responded to this by reducing misdemeanor penalties from one year to six months. This not only avoids the requirement of a jury trial but it makes a tangible distinction between misdemeanor and felony penalties.

If the foregoing supports the maximum for misdemeanors at not over six months, what argument supports continuing it at one year? Only that we fear to reduce penalties for crime. It is hard to justify the additional six months by suggesting that there is more deterrence in one year than in six months.

Split Sentence Section 3106 provides that when imposing a sentence to probation the court in addition to imposing the usual conditions governing the probationer's behavior, may also require him to serve a term in jail.

To require incarceration and call it probation is to contradict probation usage, defeat the purpose of probation, which is to allow the defendant to remain in the community, and probably reduces the use of true probation This type of sentence was criticized in Watkins v. Merry, 106 F. 2d 360 (1939). The Standard Probation and Parole Act does not authorize im-

prisonment as a condition of probation, as this section does.

A California study in 1969 found that felons admitted to straight probation did significantly better than those given probation and jail. (Superior Court Probation and/or jail sample, one year follow-up for selected counties. Criminal Statistics Bureau, Sacramento, California.) This is not surprising. Jail is a destructive experience and should be used only where necessary for public protection against serious offenses.

The people receiving a split sentence are not much different--if at all--from those receiving straight probation. Another California study found that fully one-half of all inmates in California prisons are no more serious offenders than others placed on probation. (Report on the Cost and Effects of the California Criminal Justice System, Assembly Office of Research, Sacramento, 1969.) This would be even truer for those on split probation sentences.

Chapter 31 deals with probation and unconditional discharge. Section 3105 permits unconditional discharge. We support this provision. The counterpart in state law (suspended sentence without probation) is useful when no further controls are needed to prevent recidivism by the defendant. As the comment to this section points out, there is no legal provision in the federal law today to accomplish this.

However, the last section states that if the court imposes such a sentence "the court shall set forth in detail the reasons for its action." Setting forth reasons for a sentence is desirable, but there is no provision of this kind in the proposed code for sentences generally. There should be. The Model

Sentencing Act requires that in felony cases the "sentencing judge shall . . . make a brief statement of the basic reasons for the sentence he imposes."

Sentence of Death, §3601 The NCCD Board of Trustees in the formal position statement favors the abolition of capital punishment: and the Model Sentencing Act does not authorize the death penalty.

Review of Decisions Section 3406 provides that "the federal courts shall not have jurisdiction to review or set aside, except for the denial of constitutional rights for procedural rights conferred by statute, regulation or rule," discretionary action of the Board of Parole with respect to release of a prisoner on parole, or any other decision.

This section is objectionable. The parole process, especially in decisions whether or not to release on parole, is comparable to the sentencing of a defendant by a judge, in that the decision determines whether the person will be at liberty or be imprisoned. Sentencing decisions are subject to review on many counts; and the proposed new code proposes that sentencing decisions shall be even more reviewable than they are now (§1291).

The courts have declared that they have the power to review abuse of discretion by a parole board, and it is hard to see how abuse of discretion should not be reviewable. Yet proposed §3406 would appear to attempt to do that. It would be better to omit this section, if nothing positive for review of parole decisions is to be included. In most jurisdictions, the parole consideration process is a meager one, highly autocratic, and as a result having very bad effects on prisoner morale.

The federal parole process has not been exempt from this criticism. Kenneth Culp Davis, in Discretionary Justice, states, "An outstanding example of completely unstructured discretionary power that can and should be at least partially structured is that of the United States Parole Board. In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines: it does not structure through statements of findings and reasons: it has no system of precedents: the degree of openness of proceedings and records is about the least possible and procedural safeguards are almost totally absent." (P. 126)

Section 1291, as already noted, would clearly establish the power of federal courts to review sentences. To some extent courts already exercise this power. The commission comments on this section (p. 217) that the draft is intended to do more than express its view that there should be some kind of sentence review.

We suggest that the proposed amendatory language be amplified to give appellate courts the power to correct sentences of marked disparity. Disparity of sentences is a notorious defect in sentencing in the federal and state courts. Although equality of sentencing is constitutionally required, neither trial courts nor appellate courts pay much attention to this requirement. We suggest language such as the following: "Such review shall in criminal cases include the power to review the sentence and to modify it or set it aside if in violation of a defendant's right to a sentence not markedly unequal to other sentences imposed on defendants with similar backgrounds having committed similar crimes; or if it is excessive for the crime committed." See Rubin "Disparity and Equality of Sentences--A Constitutional Challenge," 40

Federal Rules Decisions 55 (1966).

Commitment for Study Section 3004 provides for presentence diagnostic workups, but in all instances requiring the defendant to be committed. In many cases the ultimate sentence will be a commitment, but in others a defendant will be placed on probation. To commit for ninety days would be destructive. The section should give the judge the choice of an out-patient diagnostic referral.

Use of Force Upon Children in Custody Section 605 (a) provides that a person responsible for the care and supervision of a minor under eighteen, or a teacher or other person responsible for the care and supervision of such a minor "for a special purpose," may use force upon the minor "for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct, and the maintenance of proper discipline."

We oppose this provision. It is an invitation to use corporal punishment against children in detention facilities, training schools and reformatories, and even in schools. The same objection applies to subdivisions (b) with respect to force against an incompetent person in custody, and (d) permitting a parent, for example, to consent to force against a minor.

The thousands of children who are seriously injured by their parents or custodians each year--nowadays called "battered children"--are not the product of mentally ill parents. A study of thousands of such cases found that it is the result of the widespread acceptance among Americans of the use of physical force as a legitimate procedure in child rearing. The findings are reported in a book, "Violence Against Children," by Dr. David G. Gil The American experience is contrasted by Dr. Gil with the very low

incidence of abuse in cultures that have strong taboos against striking children, such as the American Indians. The Indians discipline their young mainly through example and shame.

Dr. Gil calls for a change in the laws that permit corporal punishment. Instead, we need laws that forbid it. At least, Section 605 (a) should not be allowed to stand.

Crimes Without Victims Attached to this statement is a policy statement issued by the Board of Trustees of the National Council on Crime and Delinquency on the subject of crimes without victims, that is, statutes making behavior criminal whereit is not harmful to anyone else, often not even harmful to the person himself. These statutes are principally codifications in criminal law of moral positions on which people differ. The position we take is one held by many, including the President's Crime Commission.

Included in the proposed code are provisions making obscenity (dissemination of certain types of sexual material) a crime (§1851), and prostitution (§1843), and possession of drugs for one's own use (§1824). We urge elimination of these crimes.

CRIME and DELINQUENCY

NATIONAL COUNCIL ON CRIME AND DELINQUENCY

Volume 17 April 1971 Number 2

Crimes without Victims

A Policy Statement

BOARD OF TRUSTEES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY

LAWS creating "crimes without victims" should be removed from criminal codes. They are based not on harm done to others but on legislatively declared moral standards that condemn behavior in which there is no victim or in which the only one hurt is the person so behaving. The commonest examples of such so-called crimes are drunkenness, drug addiction, homosexual and other voluntary sexual acts, vagrancy, gambling, and prostitution, and, among children, truancy and running away from home—acts which, if committed by an adult, would not be considered crimes.

Some types of victimless behavior are socially disapproved; none of them is criminal in any real sense. Whatever harm occurs is done to the participants, not to society.

The use of criminal penalties, in effect for many years, has proved ineffective in controlling these acts. The laws bearing on them are, in the main, disregarded: the alcoholic or drug addict remains addicted; the statutory threat of punishment does not deter homosexuality or any other voluntary sexual behavior. Widespread indifference to these laws in particular diminishes respect for the law in general. Moreover, the punishment of those who are apprehended under these laws carries no likelihood of producing any change in their behavior. Again, the addict released from jail remains an addict; the homosexual remains a homosexual, etc. They are not reformed; on the contrary, they become embittered and often criminalized.

At the same time, the prosecution of such individuals imposes on the criminal justice system an enormous burden, significantly sapping the capacity of the police, courts, and correction to deal effectively with truly criminal conduct. Some measure of the problem is found in statistics: More than one-half of all arrests are for "crimes without victims"; more than one-third of all police arrests are for drunkenness or disorderly conduct (usually an alcohol-related act); one-half of all commitments to local institutions are for drunkenness. For many of these persons, the appropriate measures required are not the futile and destructive sanctions imposed by the police and the court and the jail but the voluntary services offered by a medical or social agency.

For these reasons, laws creating "crimes without victims" should be removed from criminal codes, and persons now prosecuted under these laws should be removed from the criminal justice system.

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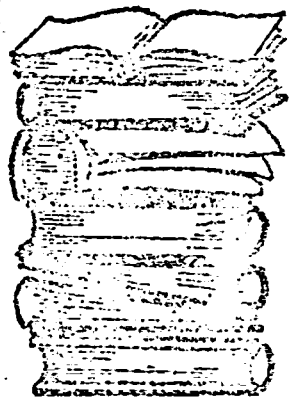


Information Review
on
Crime
and
Delinquency

The Deterrent Effect of Legal Punishment

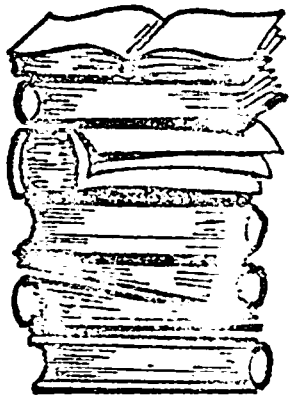
A Review of the Literature

by

Eugene Doleschal

Assistant Director

Information Center, NCCD



Information Review on Crime and Delinquency

Vol. 1, No. 7 June 1969

The Deterrent Effect of Legal Punishment

EUGENE DOLESCHAL

Introduction

INCREASING PENALTIES in order to deter an increased criminal activity is a typical response of society to a rise in crime. A corollary belief on the part of many is that criminals are coddled by American courts and prisons.

This attitude is in marked contrast to that of individuals who have devoted their careers to helping convicted offenders. James V. Bennett, former Director of the U.S. Prisons Bureau, contends that the offender in America is dealt with harshly indeed.[1] Our criminal laws, says Mr. Bennett, are the most severe in the world, and our legislatures are at work making them even more severe. The length of sentence for an offender in the American criminal justice system is several times longer than that of his counterpart anywhere else in the world. Only in the United States do we find sentences of 100 to 199 years and, commonly, sentences of 30, 40, and 50 years.

In comparing American sentences with the sentences of foreign countries, Mr. Bennett's contentions are validated. During the course of

[1] Bennett, James V. "A cool look at the crime crisis." In: Knudten, Richard D. *Criminological controversies.* New York, Appleton-Century Crofts, 1968. pp. 15-20.

the year in England, no more than 150 offenders are given sentences of five years or more; in the United States the number is 15,000. A comparison with the practices of Scandinavian countries is even more striking: in Norway, out of the 1,824 sentenced to prison in 1965, only eight (0.8 percent) received three years or more.[2] In the United States, out of 72,540 offenders sent to state prisons in 1964, 53,531 (73.8 percent) received sentences of three years or more.[3]

Severe punishment and the threat of punishment have long been assumed to be a deterrent to crime. Whether this assumption holds true under close investigation has been the subject of numerous research projects.

Definition of Terms

Several theoretical discussions on the nature of deterrence distinguish between "general deterrence" and "special deterrence." Andenaes considers general deterrence to mean the threat of punishment and special deterrence the actual experience of punishment.[4] Packer also makes this distinction, referring to deterrence as "utilitarian prevention" and special prevention as "intimidation."[5] Karl Menninger, in his recent book *The crime of punishment*, differentiates penalties and punishments.[6] While accepting the former, he rejects the latter as an unnecessary and cruel infliction of pain.

In the research to date little or no attention has been given to terminology, and researchers have used variously, and often interchangeably, such terms as "the effectiveness of criminal laws," "the effect of the knowledge of laws," "the effect of censure," "the influence of criminal sanctions," "the effect of the severity of punishment," and many others, including the European favorite, "the effectiveness of the execution of punishment."

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[2] Christie, Nils, ed. *Scandinavian studies in criminology*, vol. 2. Oslo, Universitetsforlaget, 1968. p. 13.

[3] U. S. Prisons Bureau. *State prisoners: admissions and releases, 1964.* Washington, D. C. 1967. pp. 16 and 19.

[4] Andenaes, Johannes. "Does punishment deter crime?" *Criminal Law Quarterly*, 11 (1):76-93, 1968.

[5] Packer, Herbert L. *The limits of the criminal sanction.* Stanford, Stanford University, 1968. p. 45.

[6] Menninger, Karl. *The crime of punishment.* New York, Viking, 1968. p. 202.

Research Findings on the Deterrent Effect of Punishment

Finding: Knowledge of penalties does not deter crime

In 1967 the California Assembly Committee on Criminal Procedure undertook to study both the effectiveness of current criminal penalties in deterring crime and possible alternative methods to accomplish the same results. The investigation revealed unique and previously unknown information.

Members of the California Committee found that increasing the penalty for a crime does not always accomplish the desired effect. A prime example is the use of marijuana. In 1961 California significantly increased the penalties for possession, yet use increased at an explosive rate thus rendering legislative action ineffective.

The Committee commissioned a survey to discover what the public knows of criminal penalties.[7] It was reasoned that if a deterrent is to be effective the potential offender, in order to weigh the consequences of a criminal act, must know which penalty fits the crime and thus that individuals with the most knowledge of criminal penalties would engage in the least amount of crime.

The representative sample surveyed included 3,348 male registered California voters selected from six California counties; the total number of questionnaires returned was 1,567. The sample of the general public used in the research totaled 1,024 completed questionnaires.

Results showed that Californians were extremely ignorant of penalties for crime: of 11 possible items the mean score was only 2.6 correct answers. Most people underestimated the severity of current penalties. However, while the general population had the least amount of knowledge of penalties, prison inmates had the greatest, but this knowledge did not deter at least half from criminal action.

Even with knowledge of penalties, the more criminal the behavior, the less likely were subjects to be deterred. Penalties appeared to be important to the criminal group not as a deterrent, but as a bargaining tool after arrest.

It was observed that the current rising incidence of crime apparently was related to factors other than punishment as a deterrent no matter

[7] Social Psychology Research Associates. *Public knowledge of criminal penalties: a research report.* San Francisco, Social Psychology Research Associates, 1968. 20 p.

how severe or cruel.

Finding: Fear of arrest and imprisonment deters many from crime; fear of long imprisonment does not

A second study, prepared for the California Committee on Criminal Procedure by the Assembly Office of Research, dealt with the effectiveness of California penalties and correctional programs for adult offenders.[8] An analysis was made of national and state statistics on crime rates, penalties, parole programs, and related material.

No evidence was found to show that more severe penalties deter crime more effectively than less severe penalties. High and low crime rates were found at both ends of a scale of median time served in prison in the 50 states. The median stay in California prisons is 30 weeks, fifth highest in the nation. Thus the State was found to maintain one of the most expensive correctional systems in the country, implementing a penalty policy of entirely unproven effectiveness. There was evidence that critical deterrents vary according to type of individual and type of offense. Some offenders respond to external police controls, others to internal moral restraints.

There was evidence that fear of arrest, conviction, and imprisonment deter many persons from many types of crimes, but there was no evidence to indicate that fear of lengthy imprisonment affects a significant number of criminal decisions. From this it was concluded that time served can be reduced without increasing recidivism.

There was no evidence that prisons rehabilitate most offenders. It appears that larger numbers of offenders can be effectively supervised in the community at a minimum risk and with a considerable saving of public expense. The timing of parole release for lesser offenders was found to be determined by arbitrary and unscientific criteria that do not further the ends of justice, economy, or public safety.

It was recommended that the California legislature direct the Adult Authority to parole all offenders at the expiration of the statutory minimum parole-eligibility period, with the exception of those who were convicted of willful homicide, aggravated assault, forcible rape, or other specified crimes of serious personal violence, and those with histories of professional criminality or habitual extreme violence.

The resulting savings in annual prison costs and further capital outlay should be appropriated to subsidize local supervision of offenders, to increase the use of local custody, and to improve statewide crime control, technical resources, and local law enforcement.

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[8] California. Assembly Office of Research. *Crime and penalties in California.* Sacramento, California Legislature, 1968. 124 p.

Finding: Increased penalties for rape do not decrease the incidence of rape

Following a widely publicized case of multiple rape in 1966,[9] a study of the incidence of rape in Philadelphia was undertaken to analyze the effectiveness of a new law which had increased sanctions. Statistical data from the period before and after the enactment of the new law indicated no decrease in the commission of this type of offense by adults or juveniles, and no diminution of violence accompanying the offenses committed. The study concluded that since intensified police control would hardly affect the incidence of rape, which is typically committed on private premises, social prevention appeared as the only means of combating the crime.

Finding: Police are no safer in states which demand the death penalty for killing an officer

In an analysis of 140 police officers killed in the United States between 1961 and 1963 as a result of criminal action, it was found that police killings correspond quite closely to the general rates of homicide.[10] No evidence substantiates the belief that states with the death penalty for killing a policeman are any less dangerous for the police officer. The easy availability of firearms in the United States is believed to contribute significantly to the problem.

Finding: Substantial reduction of prosecutions for drunkenness does not affect the state of public order

To determine the need for changing the system of fines for drunkenness, a Finnish pilot project studied the effects of a change in the prosecution policy. The study also attempted to elucidate the abstract relationship between crime and punishment.[11]

The prosecution policy regarding public drunkenness was changed in three medium-sized Finnish towns. Drunken people continued to be arrested, but the average prosecution percentage was brought down from 40-50 percent to 9-24 percent. A comparison of drunkenness arrests in the three experiment towns and three control towns of the

[9] Schwartz, Barry. "The effect in Philadelphia of Pennsylvania's increased penalties for rape and attempted rape." *Journal of Criminal Law, Criminology and Police Science,* 59 (4) :509-515, 1968.

[10] Cardarelli, Albert P. "An analysis of police killed by criminal action: 1961-1963." *Journal of Criminal Law, Criminology and Police Science,* 59 (3): 447-453, 1968.

[11] Törnudd, Patrick. "The preventive effect of fines for drunkenness." In: *Scandinavian studies in criminology,* Vol. 2. Oslo, Universitetsforlaget, 1968. pp. 109-124.

same size over a three-year period revealed no systematic differences.

The assumption that there is a strong causal relationship between prosecution for drunkenness and the state of public order was therefore not supported by the results. As for information regarding the general effect of punishment, the data were not useful.

Finding: It is not possible to determine that punishments deter crime

In another attempt to determine whether punitive measures deter crime in the United States, two sets of data for each state were examined: (1) the number of persons admitted to prison during 1960 on a sentence for homicide; and (2) the median number of months served on a sentence for homicide by all persons in prison on December 31, 1960.[12] When related to reports of cases of criminal homicide known to police in the years 1959 and 1960, the statistics on persons admitted to State prisons provided an estimate of the certainty of imprisonment as a legal response to homicide. The estimate was obtained by dividing the number of persons admitted to prison by the 1959-1960 average number of criminal homicides occurring in the state.

Both certainty and severity of imprisonment appeared related to the criminal homicide rate, but the degree of correlation was much greater for the former. However, alternative interpretations of these findings are possible and it was concluded that deterrence should be treated as an open question.

Finding: Capital punishment is ineffective in deterring murder

The opposition of behavioral scientists to the idea that punishment might act as a deterrent has been supported by research which demonstrates that capital punishment does not deter homicide.[13] Even a well publicized execution was demonstrated to have had no subsequent effect on the homicide rate.[14]

William Chambliss, in an article in *Crime and Delinquency*, argues that the broad interpretation of these studies, although important in indicating that capital punishment is ineffective as a deterrent to

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[12] Gibbs, Jack P. "Crime, punishment and deterrence." *Southwestern Social Science Quarterly*, 48 (4):515-530, 1968.

[13] Schuessler, Karl. "The deterrent influence of the death penalty." *Annals of the American Academy of Political and Social Science*, 284 (November): 54-82, 1952.

[14] Savitz, Leonard. "A study in capital punishment." *Journal of Criminal Law and Criminology*, 49 (4):338-341, 1958.

murder, has rendered a disservice to the general issue of punishment as a deterrent to all kinds of criminal behavior.[15] Such a conclusion, Chambliss points out, is not justified because murder is a unique type of offense.

Finding: Increased penalties for parking violations result in a substantial decrease in this offense

Chambliss made an intensive study of parking violations and found that, at least in this limited area, an increase in the severity and certainty of punishment does act as a deterrent to further violation. He suggests that further research be conducted on (1) other types of offenders and on the circumstances under which particular types of punishment do in fact act as a deterrent and (2) the circumstances under which particular types of punishment have little or no effect.[16]

Finding: The law punishes most severely those offenses which are least deterrable, and least severely those that are most deterrable

In another study Chambliss reviews empirical data on (1) the deterrent influence of capital punishment; (2) the deterrent effect of punishment on drug addiction: (3) the effect of punishment on parking violations; and (4) the effect of penalties on white collar crime.[17]

A number of research studies have shown (1) that homicide rates remain constant in spite of a substantial decrease in the use of the death penalty, (2) that where one state has abolished the death penalty and another has not, the homicide rate is no higher in the abolition state than in the retention state, and (3) that the consequences of murder are not considered by the murderer at the time of the offense. Chambliss concludes that the evidence overwhelmingly indicates that capital punishment does not function as a deterrent to murder. The evidence also suggests that drug addiction is relatively unaffected by the threat or imposition of drastically increased penalties.

On the other hand, in the study of parking violations[18] it was found that the propensity to violate these rules is directly related to the likelihood that offenders will be punished. Similarly, studies on the impact of enforcement of sanctions on business crimes indicate that

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[15] Chambliss, William J. "The deterrent influence of punishment." *Crime and Delinquency*, 12 (1):70-75, 1966.

[16] *Ibid.*

[17] Chambliss, William J. "Types of deterrence and the effectiveness of legal sactions." *Wisconsin Law Review*, no vol. (3):703-719, 1967.

[18] *Op. cit. supra* note 15.

punishment may serve as a deterrent to this type of offender. Findings of a study of shoplifting suggest that while the amateur shoplifter may be deterred from further shoplifting by punishment, the professional thief will be little affected.[19]

From these findings, Chambliss derives a "typology of crime and deterrence," first by contrasting acts that are "expressive," such as murder and drug addiction, with acts that are "instrumental," that is, the goal is beyond the proscribed act itself; secondly, by distinguishing between persons who are highly committed to crime and persons whose commitment is low. He then formulates the thesis that where a high commitment to crime as a way of life is combined with an act that is expressive, one finds the greatest resistance to deterrence through threat of punishment. Our legal system, he concludes, may be operating inefficiently by punishing most severely persons and offenses which are least capable of being deterred and by punishing least severely those persons and crimes which are most capable of being deterred.

Chambliss suggests that the law might conceivably prescribe, for offenders who committed an act as a means to achieving some other goal, a punishment different from the punishment prescribed for persons who committed a crime because it was satisfying in itself.

In apparent agreement with the proposition that business crimes are deterrable by criminal sanctions are three legal studies, all published in 1967, and all demanding that federal antitrust violations be enforced by criminal sanctions. It is argued that corporate executives must recognize that antitrust violations are as harmful to society as any other crime.[20]

Finding: Severe censure, such as imprisonment, does not increase sensitivity to censure

An investigation by Salomon Rettig of predictors of crime explored whether experience with severe public censure, such as imprisonment, and the fear associated with such experience would in any way alter the attention paid to censure in the future.[21]

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[19] Cameron, Mary O. "The booster and the snitch: department store shoplifting." New York, Free Press, 1964. 202 p.

[20] Davids, Leo. "Penology and corporate crime." *Journal of Criminal Law, Criminology and Police Science*, 58 (4):524-531, 1967; "Antitrust criminal sanctions." *Columbia Journal of Law and Social Problems*, 3 (June): 146-157, 1967; Flynn, John J. "Criminal sanctions under state and federal antitrust sanctions." *Texas Law Review*, 45 (7) :1301-1346, 1967.

[21] Rettig, Salomon. "Ethical risk sensitivity in male prisoners." *British Journal of Criminology*, 4 (6) :582-590, 1964.

A sample group of young male prisoners were requested to make predictions as to whether a hypothetical bank teller would embezzle funds under the following varying circumstances: that the embezzlement would bring great or little gain to the teller, that he would or would not be caught, and would or would not be censured. Similar predictions were made utilizing a sample of college students of similar age, sex, and socioeconomic status.

It was predicted that prisoners would vary their predictions more with the severity of censure than with the remaining determinants. It was also hypothesized that prisoners would be more sensitive to censure than students since they themselves were experiencing the effect of severe censure. While the first prediction was fully supported, the latter was not. It was concluded that having experienced severe censure once and having been defined as criminals by society, inmates saw little risk in further engagement in crime. Thus severe censure, particularly censure of a permanent and irreversible nature such as imprisonment, does not seem to increase sensitivity to censure. The findings are thought to raise serious questions about the efficacy of imprisonment as a deterrent to recidivism.

Finding: Fines have a greater deterrent effect on chronic drunkenness offenders than workhouse sentences

While the results of a 1958 investigation completely negated the assumption that imprisonment acts as a deterrent to the chronic public inebriate,[22] a recent study examined the reactions to various degrees of punishment meted out to 1,649 Minneapolis recidivists.[23] Data were gathered from the police department and the court rather than from prison records; a one-way analysis of variance was utilized to investigate the relationship between differences in response to different types of court dispositions among chronic drunkenness offenders.

Contrary to expectations, the most striking fact revealed by the findings was that, regardless of the number of arrests, court fines have a greater deterrent effect than workhouse sentences. Five of six comparisons showed longer periods of time between arrests when offenders were given fines compared with workhouse or suspended sentences. Thus, financial loss among Skid Row alcoholics apparently deters further drunkenness episodes more effectively than does incarceration.

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[22] Pittman, David J. and Gordon, C. Wayne. *Revolving door: a study of the chronic public inebriate.* Glencoe, Ill., Free Press, 1958. 154 p.

[23] Lovald, Keith and Stub, Holger R. "The revolving door: reactions of chronic drunkenness offenders to court sanctions." *Journal of Criminal Law, Criminology and Police Science,* 59 (4) :525-530, 1968.

The economic status of the Skid Row resident may be one reason why the workhouse is less of a deterrent than a fine to future drunkenness behavior. Another reason is that Skid Row alcoholics attach no particular stigma to serving time in jail.

Finding: "Aggressive patrol" and imprisonment are not very effective deterrents for property offenders

In 1966, the Bureau of Social Research in Washington, D. C., undertook a study of the deterrent value of aggressive patrol by police and the imprisonment of offenders. Interview data were obtained from a sample of prisoners in the Lorton Reformatory for Men who had two or more convictions for property offenses and from a number of chronically unemployed men who served as a control group.[24] The data indicated that, except for very special conditions, aggressive patrol and imprisonment were not conspicuously deterrent for most of the subjects.

Conclusion

Deterrence research must be regarded as being in the initial stages of development. Problems of methodology have not been adequately resolved and many research findings are inconclusive.

For example, of three studies on the effectiveness of various penalties on the traffic offender, each found a different type of sanction to be the most effective. A study reported by Garth Mecham found that ordering a juvenile traffic violator to write a paper on traffic safety was the most effective disposition to control recidivism; traffic school was less effective; and fines were least effective.[25] On the other hand, a study by Claude Owens concluded that an assignment to drivers school without probation was the most effective of four sentences.[26] Finally, Wolff Middendorf reports that the greatest effect is gained from

[24] "A study of the deterrent value of crime prevention measures as perceived by criminal offenders." Recorded as Current Project P1031 by the Information Center, National Council on Crime and Delinquency. *Correspondent:* Leonard H. Goodman, Bureau of Social Science Research, Inc., 1200 17th St., N.W., Washington, D.C. 20036.

[25] Mecham, Garth D. "Proceed with caution: which penalties slow down the juvenile traffic violator?" *Crime and Delinquency*, 14 (2) :142-150, 1968.

[26] Owens, Claude M. "Report on a three-year controlled study of the effectiveness of the Anaheim-Fullerton Municipal Court drivers improvement school." *Municipal Court Review*, 7 (2) :7-14, 1967.

disqualification from driving.[27]

While the studies are not strictly comparable, they nevertheless illustrate the confusion and the knowledge gap still prevalent in the field. On the strength of these findings, "base expectancy tables" predictive of the effectiveness of certain penalties upon certain offenders cannot be constructed.

The Chambliss model of deterrence and punishment is a hopeful beginning, as are several current and proposed projects reported by the University of Chicago and others. The correspondent in the Chicago project emphasizes that genuine experiments in criminal controls are expensive, sometimes dangerous, and should be based only on well thought out hypotheses and procedures.[28] It is expected that research will provide some answers in the near future.

Another theoretical model, proposed by Frank Zimring, deals with deterrence and marginal groups and provides a frame of reference for planning research in the field and for interpreting the results.[29] Zimring observes that very few writers indicate precisely the class of persons for whom deterrent measures are intended. Throughout the literature these persons are designated as "society as a whole," "would-be criminals," etc. His model suggests an overall perspective and makes a number of distinctions which must be recognized if research is to be effective. Within this model, society is visualized as a continuum consisting of law-abiding citizens, criminal groups, and marginal groups. Zimring identifies five areas in which the marginal-group concept is directly related to the threat of punishment.

With regard to research, Professor Zimring suggests that other disciplines, especially psychology, are capable of contributing to the knowledge of deterrence. Educational psychologists, researchers studying the concept of cognitive dissonance, and those working with animal behavior also can assist in the manipulation of penalties for general deterrent purposes. Zimring feels that the trend in research ultimately should move to a cost-benefit analysis of different criminal-deterrent

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[27] Council of Europe. European Committee on Crime Problems. *The effectiveness of punishment and other measures of treatment.* Strasbourg, 1967. 257 p.

[28] "Studies in deterrence." Recorded as Current Project P1371 by the Information Center, National Council on Crime and Delinquency. *Correspondent:* Frank Zimring. Center for Studies in Criminal Justice, University of Chicago Law School, 1111 East 60 St., Chicago, Ill., 60637.

[29] Zimring, Frank and Hawkins, Gordon. "Deterrence and marginal groups." *Journal of Research in Crime and Delinquency,* 5 (2) :100-114, 1968.

strategies. While historical, comparative, and survey methods can all provide relevant data on the central question, the most important results are likely to come from experimental research.[30] A review of studies on the effects of positive and negative reinforcement of behavior, which has relevance to the subject of deterrence, is presented in *Punishment: issues and experiments,* edited by Erling Boe and Russell Church.[31]

In reviewing psychological experiments, Richard Ball attempts an explanation for the failure of punishment to change deviant behaviors.[32] Ball observes that the psychologist Maier differentiates four types of irrational, frustration-instigated behavior: fixation, regression, aggression, and resignation. These are tension-reducing mechanisms, and in this sense they serve a purpose to the actor, although they do not contribute to a lasting solution. Punishment fails essentially because it increases frustration, negates the possibility of goal orientation, and encourages more tension-reducing behaviors. The punitive methods employed in correctional institutions tend to produce the types of behavior described by Maier: fixation, the obstinate clinging to deviant patterns, is prominent; resignation is manifest in the "doing your time" response; aggression, or an explosion of tension, is common; and repression occurs when punishment breaks a man and reduces him to dependency. Punishment tends to aggravate these human responses, and the institution, by providing more frustration, dramatically increases pressures toward further deviant behavior.

Two general trends may be discerned from the available research on deterrence. The first is a growing realization that existing penal codes have been addressing themselves to the wrong kind of law-breaker. It appears that the white collar offender, the tax evader, the amateur shoplifter, the antitrust violator, the traffic offender, and other "instrumental" offenders are the more likely subjects for deterrence. For obvious reasons, they have escaped the full attention of the law. As Karl Menninger explains, we approve of severe penalties for those offenses which most of us feel little temptation to commit.[33]

The second trend indicates a willingness on the part of some with the

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[30] Morris, Norval and Zimring, Frank. "Deterrence and corrections." *Annals of the American Academy of Political and Social Science,* 381:137-146, 1969.

[31] Boe, Erling E. and Church, Russell M., eds. *Punishment: issues and experiments.* New York, Appleton-Century Crofts, 1968. 329 p.

[32] Ball, Richard A. "Why punishment fails." *American Journal of Correction,* 31 (1):19-21, 1967.

[33] *Op. cit. supra* note 6, p. 209.

power to initiate reforms (such as the California Legislature) to experiment with alternatives to criminal penalties. Crime prevention today is based almost entirely upon unproven postulates concerning penalties or on moral attitudes of society. There is considerable evidence that neither punishments nor social restraints are sufficient to prevent most crimes. Many offenders are too impulsive or too clever to be restrained by either morality or punishment.

An alternative method of deterrence is that of making the commission of offenses more difficult by utilizing physical or mechanical means to reduce opportunities or increase the chances of apprehension. With the exception of a few selected crimes such as embezzlement, this method has received little attention. While offenses of violence probably cannot be reduced by such methods, violent crimes constitute only a small percentage of all crimes. Property crime, the most common offense, is capable of being influenced by physical means.

A research proposal by the California Assembly Office of Research will evaluate the feasibility and effectiveness of a program utilizing such methods.[34] The four crimes selected for examination are auto theft, burglary, robbery, and bookmaking.

The University of Chicago's Center for Studies in Criminal Justice reports that it will study alternatives to deterrence including, for example, an experiment with the effect of a Peace Bond, an unusual traffic sanction which both prospectively threatens non-conforming behavior with great financial sacrifice and rewards conforming behavior over a period of six months with a substantial return of a subject's deposit.[35]

Sutherland and Cressey point out that instead of deterring, punishment develops a sense of caution in many offenders.[36] They will indeed think twice before repeating a crime, not in an effort to refrain from committing it but in contriving methods of evading punishment or detection. Punishment, in this instance, has not reformed the offender but has taught him to develop skills and practices which will enable him to better evade detection. The hope of escaping justice may be greater than the fear of punishment.

From research findings reported to date it can be concluded only that as there is no single reason why a person commits a crime, there is

[34] California. Assembly Office of Research. "Request for proposal." In: California. Assembly Committee on Criminal Procedure. *Deterrent effects of criminal sanctions.* Sacramento, 1968. pp. 65-71.

[35] *Op. cit. supra* note 28.

[36] Sutherland, Edwin H. and Cressey, Donald R. *Principles of criminology.* 6th ed. Philadelphia, Lippincott, 1960. 646 p.

no one type of punishment that fits all offenders. What is punishment for one may have no effect on another. Some offenders are sensitive to pain, others to censure and humiliation, others to imprisonment, others to economic loss, and still others require guidance for the effect of penalties to be successful.

The deterrent effect of legal penalties appears to work best with those who have been subjected to the influences of law-abiding society. Punishment does not deter those whose lives are already no better than any punishment that society can devise; it does not improve the morals of those who are closed to change; and for those whose crime is a symptom of unconscious or compulsive drives, deterrence is not possible even with the aid of severe repression and excessive punishments. For such offenders, the "crime of punishment" is that punishment aggravates crime.

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SECTION 1641. RAPE AND GROSS SEXUAL IMPOSITION.) [To be redrafted in alternative forms.]

SECTION 1642. SEXUAL IMPOSITION.) [To be redrafted in alternative forms.]

SECTION 1643. SEXUAL ACTS WITH MINORS.) [To be redrafted in alternative forms.]

SECTION 1644. FORNICATION.) [To be included in certain redrafts.]

SECTION 1645. ADULTERY.) [To be included in certain redrafts.]

SECTION 1646. UNLAWFUL COHABITATION.) A person is guilty of a class A misdemeanor if, with intent to defraud another or others of money or property, he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.

SECTION 1647. SEXUAL ABUSE OF WARDS.) A male who engages in a sexual act with a female not his wife or any person who engages in a sexual act with another or causes another to engage in a sexual act is guilty of a class A misdemeanor if:

1. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person; or
2. The other person is less than eighteen years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare.

SECTION 1648. SEXUAL ASSAULT.) A person who knowingly has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of a class B misdemeanor if:

1. He knows that the contact is offensive to the other person;
2. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;
3. The other person is less than thirteen years old;
4. He has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;
5. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over him or her; or

6. The other person is less than eighteen years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare.

SECTION 1649. GENERAL PROVISIONS FOR SECTIONS 1641 TO 1648.)

1. MISTAKE AS TO AGE. In sections 1641 to 1648: (a) when the criminality of conduct depends on a child's being below the age of thirteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than twelve; (b) when criminality depends on the child's being below a critical age older than twelve, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

2. SPOUSE RELATIONSHIPS. In sections 1641 to 1648, when the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a female, this shall not preclude conviction of a spouse or female as accomplice in an offense which he or she causes another person, not within the exclusion, to perform.

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under sections 1641 through 1644 and sections 1646 through 1648, unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specifically interested in the victim, other than the alleged offender, learned of the offense.

SECTION 1650. DEFINITIONS FOR SECTIONS 1641 TO 1649.) In sections 1641 to 1649:

1. "Sexual act" [To be redrafted in alternative forms.]

2. "Sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

SECTION 1851. OBSCENITY - DEFINITIONS - DISSEMINATION - CLASSIFICATION OF OFFENSES.) 1. A person is guilty of a class A misdemeanor if, knowing of its character, he disseminates obscene material, or if he produces, transports, or sends obscene material with intent that it be disseminated.

2. A person is guilty of a class A misdemeanor if he presents or directs an obscene performance for pecuniary gain, or participates in any portion of a performance which contributes to the obscenity of the performance as a whole.

3. As used in this section, the terms "obscene material" and "obscene performance" mean material or a performance which, considered as a whole:

a. Predominantly appeals to a prurient or morbid interest in nudity, sex, excretion, sadism, or masochism; and

b. Goes substantially beyond customary limits of candor in describing or representing such matters; and

c. Is utterly without redeeming social value.

That material or a performance predominantly appeals to a prurient or morbid interest shall be judged with reference to ordinary adults, unless it appears from the character of the material or the circumstances of its dissemination to be designed for minors or other specially susceptible audience, in which case, the material or performance shall be judged with reference to that type of audience.

4. As used in this section, the term "disseminate" means to sell, lease, advertise, broadcast, exhibit, or distribute for pecuniary gain.

5. As used in this section, the term "material" means any physical object used as a means of presenting or communicating information, knowledge, sensation, image, or emotion to or through a human being's receptive senses.

6. As used in this section, the term "performance" means any play, motion picture, dance, or other exhibition presented before an audience.

SECTION 1852. PROMOTING OBSCENITY TO MINORS - DEFINITIONS.) As used in section 1853:

1. "Promote" means to produce, direct, manufacture, issue, sell, lend, mail, publish, distribute, exhibit, or advertise.

2. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when such description or representation:

a. Predominantly appeals to the prurient, shameful, or morbid interest of minors; and

b. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

c. Is utterly without redeeming social importance for minors.

3. "Material" and "performance" shall be defined as in section 1851, subsections 5 and 6, respectively.

SECTION 1853. PROMOTING OBSCENITY TO MINORS - MINOR PERFORMING IN OBSCENE PERFORMANCE - CLASSIFICATION OF OFFENSES.) 1. It shall be a

class C felony for a person to knowingly promote to a minor any material or performance which, taken as a whole, is harmful to minors; or to admit a minor to premises where a performance harmful to minors is exhibited or takes place.

2. It shall be a class C felony to permit a minor to participate in a performance which, taken as a whole, is harmful to minors.

SECTION 1854. INDECENT EXPOSURE.) A person is guilty of a class A misdemeanor if, with intent to arouse or gratify the sexual desire of any person, including the actor, he exposes his genitals or performs any other lewd act under circumstances in which, in fact, his conduct is likely to be observed by a person who would be offended or alarmed. [Former Section 1852.]

SECTION 1861. DISORDERLY CONDUCT.) A person is guilty of a class B misdemeanor if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior, he:

1. Engages in fighting, or in violent, tumultuous or threatening behavior;
2. Makes unreasonable noise;
3. In a public place, uses abusive or obscene language, or makes an obscene gesture;
4. Obstructs vehicular or pedestrian traffic, or the use of a public facility;
5. Persistently follows a person in or about a public place or places;
6. While loitering in a public place for the purpose of soliciting sexual contact, he solicits such contact; or
7. Creates a hazardous, physically offensive, or seriously alarming condition by any act which serves no legitimate purpose.

SECTION 1811. SUPPLYING FIREARMS, AMMUNITION, DESTRUCTIVE DEVICES, OR EXPLOSIVES FOR CRIMINAL ACTIVITY.)

1. OFFENSE. A person is guilty of a class C felony if he:

a. Knowingly supplies a firearm, ammunition therefor, destructive device, or explosive to a person who intends to commit a crime of violence or intimidation with the aid thereof or while armed therewith; or

b. Procures or receives the same with like intent.

2. DEFINITION. In this section, "crime of violence or intimidation" means such a crime defined in chapters 16 and 17 of this title when the offense is a felony.

SECTION 1812. ILLEGAL FIREARMS, AMMUNITION, OR EXPLOSIVE MATERIALS BUSINESS.)

1. OFFENSE. A person is guilty of an offense if he knowingly supplies a firearm, ammunition, or explosive material to, or procures or receives a firearm, ammunition, or explosive material for, a person prohibited by the regulatory law from receiving it.

2. DEFINITIONS. In this section:

a. "Firearms" includes the weapons described in sections 62-01-01 and 62-02-01; and

b. "Regulatory law" means chapters 62-01, 62-02, and 62-03.

3. GRADING. The offense is a class C felony if the actor:

a. Was not licensed or otherwise authorized by law to handle, transfer, or engage in transactions with respect to the firearm, destructive device, or explosive material; or

b. Engaged in the forbidden transaction under circumstances manifesting his readiness to supply or procure on other occasions in disregard of lawful restrictions.

Otherwise the offense is a class A misdemeanor.

SECTION 1813. TRAFFICKING IN AND RECEIVING LIMITED-USE FIREARMS.)

1. OFFENSE. A person is guilty of a class C felony if he:

a. Traffics in limited-use firearms in violation of the regulatory law; or

b. Receives a limited-use firearm with knowledge that it is being transferred to him in violation of the regulatory law.

2. DEFINITIONS. In this section:

a. "Traffics" means:

(i) Transfers to another person;

(ii) Possesses with intent to transfer to another person;

(iii) Makes or manufactures; or

(iv) Imports or exports;

b. "Limited-use firearm" has the meaning prescribed in section 62-02-01; and

c. "Regulatory law" means chapter 62-02.

SECTION 1814. POSSESSION OF EXPLOSIVES AND DESTRUCTIVE DEVICES IN GOVERNMENT BUILDINGS.) A person is guilty of a class A misdemeanor if he possesses an explosive or destructive device in a government building without the written consent of the government agency or person responsible for the management of such buildings. "Government building" means a building which is owned, possessed, or used by or leased to the state of North Dakota, or any of its political subdivisions.

SECTION 1841. PROMOTING PROSTITUTION.) [To be redrafted.]

SECTION 1842. FACILITATING PROSTITUTION.) [To be redrafted.]

SECTION 1843. PROSTITUTION.) [To be redrafted.]

SECTION 1848. TESTIMONY OF SPOUSE IN PROSTITUTION OFFENSES.) [To be redrafted.]

SECTION 1849. DEFINITIONS FOR SECTIONS 1841 TO 1849.) [To be redrafted.]

SECTION 1571. LIBEL.) [To be redrafted.]

SECTION 1572. SLANDER.) [To be redrafted.]

SECTION 1573. DEFINITIONS FOR SECTIONS 1571 AND 1572.) [To be redrafted.]

SECTION 109. GENERAL DEFINITIONS.) As used in this title, unless a different meaning plainly is required:

1. "Act" or "action" means a bodily movement, whether voluntary or involuntary;
2. "Acted", "acts", and "actions" include, where relevant, "omitted to act" and "omissions to act";
3. "Actor" includes, where relevant, a person guilty of an omission;
4. "Bodily injury" means any impairment of physical condition, including physical pain;
5. "Court" means any of the following courts: the supreme court, a district court, a county court with increased jurisdiction, a county justice, and where relevant a municipal court and a county court;
6. "Dangerous weapon" means any switch blade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles or sand club; any slungshot; and any projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance;
7. "Destructive device" means any explosive, incendiary or poison gas bomb, grenade, mine, rocket, missile, or similar device;
8. "Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, and any chemical compounds, mechanical mixture, or other ingredients in such proportions, quantities or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, or material or any part thereof may cause an explosion;
9. "Firearm" means any weapon which will expel, or is readily capable of expelling, a projectile by the action of an explosive and includes any such weapon, loaded

or unloaded, commonly referred to as a pistol, revolver, rifle, gun, machine gun, shotgun, bazooka, or cannon;

10. "Force" means physical action;

11. "Government"means (a) the government of this state or any political subdivision of this state; (b) any agency, subdivision, or department of the foregoing, including the executive, legislative, and judicial branches; (c) any corporation or other entity established by law to carry on any governmental function; and (d) any commission, corporation, or agency established by statute, compact, or contract between or among governments for the execution of intergovernmental programs;

12. "Governmental function" includes any activity which one or more public servants are legally authorized to undertake on behalf of government;

13. "Harm"means loss, disadvantage, or injury to the person affected, and includes loss, disadvantage,or injury to any other person in whose welfare he is interested;

14. "Included offense" means an offense: a. which is established by proof of the same or less than all the facts required to establish commission of the offense charged; b. which consists of criminal facilitation of or an attempt or solicitation to commit the offense charged; or c. which differs from the offense charged only in that it constitutes a less serious harm or risk of harm to the same person, property, or public interest, or because a lesser degree of culpability suffices to establish its commission;

15. "Includes" should be read as if the phrase "but is not limited to" were also set forth;

16. "Judge" includes a county justice;

17. "Law enforcement officer" or "peace officer" means a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law;

18. "Local" means of or pertaining to any political subdivision of the state;

19. "Official action" includes a decision, opinion, recommendation, vote, or other exercise of discretion by any governmental agency;

20. "Official proceeding" means a proceeding heard or which may be heard before any government agency or branch or public servant authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with any such proceeding;

21. "Omission" means a failure to act;

22. "Person" includes, where relevant, a corporation, partnership, unincorporated association, or other legal entity. When used to designate a party whose property may be the subject of action constituting an offense, the word "person" includes a government which may lawfully own property in this state;

23. "Property" includes both real and personal property;

24. "Public servant" means any officer or employee of government, including law enforcement officers, whether elected or appointed, and any person participating in the performance of a governmental function, but the term does not include witnesses;

25. "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ;

26. "Signature" includes any name, mark, or sign written or affixed with intent to authenticate any instrument or writing;

27. "Thing of value" or "thing of pecuniary value" means a thing of value in the form of money, tangible or intangible property, commercial interests or anything else the primary significance of which is economic gain to the recipient; and

28. "Writing" includes printing, typewriting, and copying.

Words used in the singular include the plural, and the plural the singular. Words in the masculine gender include the feminine and neuter genders. Words used in the present tense include the future tense, but exclude the past tense.

SECTION 1. BIGAMY - DEFENSE.) 1. It shall be a class A misdemeanor for a married person to willfully and knowingly contract a subsequent marriage in this state while a prior marriage, to the knowledge of the offender, is still subsisting and undissolved; or for a married person to contract a subsequent marriage outside this state and hold himself out as married to the subsequent spouse in this state.

2. It shall be a class A misdemeanor for an unmarried person to knowingly marry another in this state under circumstances which would render the other person guilty of an offense under subsection 1.

3. This section does not apply to parties to a marriage, lawful in the country of which they are nationals or residents, while they are in transit through or temporarily visiting this state.

SECTION 2. BUSINESS OR LABOR ON SUNDAY - EXEMPTIONS - CLASSIFICATION OF OFFENSES.) 1. Except as otherwise provided in sections 3 and 4, it shall be a class

B misdemeanor for any person on Sunday to engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public, or to authorize or direct his employees or agents to take such action. This subsection shall not apply to any person who in good faith observes a day other than Sunday as the Sabbath, if he refrains from engaging in or conducting business or labor for profit and closes his place of business to the public on that day.

2. The attorney general, a state's attorney, a mayor, a city manager, or a city attorney may petition a district court, for the district where a violation is occurring, to enjoin a violation of this section.

SECTION 3. PERSONAL PROPERTY SALES ALLOWABLE ON SUNDAY.) The sale of any of the following items of personal property shall be allowed during any and all hours on Sundays:

1. Drugs, medical and surgical supplies, or any object purchased on the written prescription of a licensed medical or dental practitioner for the treatment of a patient.
2. Food prepared for consumption on or off the premises where sold.
3. Newspapers, magazines, and books.
4. Gasoline, fuel additives, lubricants, and antifreeze.
5. Tires.
6. Repair or replacement parts and equipment necessary to, and safety devices intended for, safe and efficient operation of land vehicles, boats, and aircraft.
7. Emergency plumbing, heating, cooling, and electrical repair and replacement parts and equipment.
8. Cooking, heating, and lighting fuel.
9. Infant supplies.
10. Camera and school supplies, stationery, and cosmetics.
11. Beer and alcoholic beverages but only until one o'clock a.m.

SECTION 4. BUSINESSES ALLOWED TO OPERATE ON SUNDAY.) The operation of any of the following businesses shall be allowed on Sundays:

1. Restaurants, cafeterias, or other prepared food service organizations.
2. Hotels, motels, and other lodging facilities.
3. Hospitals and nursing homes.
4. Dispensaries of drugs and medicines.
5. Ambulance and burial services.
6. Generation and distribution of electric power.

7. Distribution of gas, oil, and other fuels.

8. Telephone, telegraph, and messenger services.

9. Heating, refrigeration, and cooling services.

10. Railroad, bus, trolley, subway, taxi, and limousine services.

11. Water, air, and land transportation services and attendant facilities.

12. Cold storage warehousing.

13. Ice manufacturing and distribution.

14. Minimal maintenance of equipment and machinery.

15. Plant and industrial protection services.

16. Industries where continuous processing or manufacturing is required by the very nature of the process involved.

17. Newspaper publication and distribution.

18. Radio and television broadcasting.

19. Motion picture, theatrical, and musical performances.

20. Automobile service stations.

21. Athletic and sporting events.

22. Parks, beaches, and recreational facilities.

23. Scenic, historic, and tourist attractions.

24. Amusement centers, fairs, zoos, and museums.

25. Libraries.

26. Educational lectures, forums, and exhibits.

27. Service organizations (USO, YMCA, etc.).

28. Grocery stores operated by the owner-manager who regularly employs not more than three employees for the operation of said store.

29. Premises licensed to dispense beer and alcoholic beverages within the limits prescribed in section 5-02-05.

SECTION 1831. GAMBLING - DEFINITIONS.) As used in section 1832:

1. "Gambling" means risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including an election or sporting event, over which the person taking the risk has no control. Gambling does not include: (a) lawful contests of skill, speed, strength, or endurance in which awards are made only to entrants or to the owners of entries; or (b) lawful business transactions, or other acts or transactions now or hereafter expressly authorized by law.

2. "Lottery" means any plan for the distribution of a thing of value, whether tangible or intangible, or a person or persons selected by chance from among participants, some or all of whom have given a consideration for the chance of being selected.

3. "Gambling apparatus" means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons, or gambling by a person involving the playing of a machine. Gambling apparatus does not include an amusement game or device as defined in section 53-04-01.

4. "Gambling house" means any location or structure, stationary or movable, wherein gambling is permitted or promoted, or where a lottery is conducted or managed. In the application of this definition, any place where gambling apparatus is found is presumed to be a gambling house, provided that this presumption shall not apply where cards, dice, or other games are found in a private residence.

SECTION 1832. GAMBLING - RELATED OFFENSES - CLASSIFICATION OF OFFENSES.)

1. It shall be a class B misdemeanor to engage in gambling.

2. It shall be a class A misdemeanor to knowingly maintain, or to knowingly aid or permit the maintenance of, a gambling house.

3. It shall be a class A misdemeanor to:

   a. Conduct a lottery; or

   b. Sell, purchase, receive, or transfer a chance to participate in a lottery; or

   c. Disseminate information about a lottery with intent to encourage participation in it.

4. Subsection 3 shall apply to a lottery drawn or to be drawn outside of this state, whether or not such lottery is lawful in such other state or country.

5. A person is guilty of a class C felony if he engages or participates in the business of gambling. Without limitation, a person shall be deemed to be engaged in the business of gambling if he:

   a. Conducts a wagering pool or lottery;

   b. Receives wagers for or on behalf of another person;

   c. Alone or with others, owns, controls, manages, or finances a gambling business;

   d. Knowingly leases or otherwise permits a place to be regularly used to carry on a gambling business;

e. Maintains for use on any place or premises occupied by him a coin-operated gaming device; or

f. Is a public servant who shares in the proceeds of a gambling business whether by way of a bribe or otherwise.

6. DEFINITIONS.

a. As used in subsection 5, the term "coin-operated gaming device" means any machine which is:

(1) A so-called "slot" machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens; or

(2) A machine which is similar to machines described in paragraph (1) and is operated without the insertion of a coin, token, or similar object.

b. The term "coin-operated gaming device" does not include a bona fide vending or amusement machine in which gambling features are not incorporated as defined in section 53-04-01.

APPENDIX "D"

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July 18, 1972

TO ALL MEMBERS OF THE COMMITTEE ON JUDICIARY "B":

I hope to be present when the Committee discusses the redraft of FCC sections 1851. It is my hope that I can contribute something toward the search for workable legislation concerning obscenity.

I think we can safely start with the assumption that the present North Dakota statutes would not survive attack in the courts (because of the present constitutional standards). Therefore, the present statutes do not provide the prosecutor a workable tool. The question, therefore, is: what sort of legislation should there be? Probably a majority of the people of this state "feel" that there should be some statute outlawing dissemination of pornography.

The present Supreme Court cases indicate that properly drafted statutes can control commercial distribution of pornography.

In addition, present Supreme Court cases indicate that a state may be somewhat stricter in regard to distribution of materials to minors and that a statute which would be illegal as regards adults would be legal regarding distribution to minors.

The above thoughts lead us to believe that therefore there should be (a) one general statute regarding commercial distribution of obscene materials and (b) a separate, stricter statute regarding dissemination of materials to minors.

There are Supreme Court decisions indicating that the government cannot attempt to control the effect of materials on people's minds and it is not a proper subject of government to control the possession or dissemination of materials on a noncommercial basis among consenting adults. The basic case is the 1969 case of Stanley v. Georgia in which the Supreme Court held that the First and Fourteenth Amendments prohibit making private possession of obscene material a crime, and further held that an individual has a right protected by the First and Fourteenth Amendments to read or observe what he pleases even if the material

involved is entirely without social value and considered obscene by most people and the governmental authorities.

From a policy standpoint, I believe that the four most important elements that should be contained in modern obscenity legislation (aside from the difficult definition of what is "obscene") are:

1. The element of knowledge. (That is, before there is a crime for offering materials, a person should have general knowledge of the type of material he is offering or reasonable ground to believe he should inspect or inquire regarding it.)

2. Uniform statewide application. (The best thing that can be worked out should be the state law and we should not get into a patchwork of criminal laws which might vary between city and county.)

3. Exemptions where the accused is a school, museum, library or governmental agency with a legitimate research or collection purpose in mind.

4. (In regard to any specific, stricter legislation regarding distribution to minors), exceptions where parents want their children to have the material or where the accused had reasonable cause to believe the minor was of legal age.

The enclosed materials are sent to you with the idea that you might want to look them over in advance to see what different approaches there are available.

Yours truly,

Leonard H Bucklin

Leonard H. Bucklin

LHB:kn
Encl.

COMMERCIAL DISTRIBUTION OF OBSCENE MATERIAL

Section 1. Definitions.

In this article:

(1) Material means any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty, device, or other similar item.

(2) Obscene means that material which is made up in whole or almost entirely of, words concerning, or pictures or three dimensional representations of, human sexual intercourse, masturbation, sodomy (i.e., bestiality or oral or anal intercourse), direct physical stimulation of unclothed genitals, or flagellation or torture in the context of a sexual relationship, and which includes, as part of its depictions, depictions of sex organs, and their condition; provided that material shall not be deemed to be obscene if it has artistic, literary, historical, scientific, educational or other similar social value (except that in the case of material with slight social value that value shall not remove the material from the foregoing definition if that value is so slight as to make it extremely improbable that the material will be disseminated to any significant number of persons on the basis of social value). Advertising and manner of distribution may be considered, where relevant, in determining the obscenity of material for the purposes of this Article.

(3) Knowing means having general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry of the character and content of any material described herein, which is reasonably susceptible of examination.

Section 2. Commercial Distribution.

A person is guilty of a misdemeanor who, knowingly:

(1) Prints, copies, manufactures, prepares, produces or reproduces obscene material for the purpose of sale or commercial distribution.

(2) Publishes, sells, rents, transports in intrastate commerce, or commercially distributes or exhibits any obscene material.

(3) Has in his possession with intent to sell, rent, transport or commercially distribute any obscene item.

Section 3. Penalty.

Any person violating Section 2 of this Act shall be punished by imprisonment of_____or by a fine of _____or both.

Section 4. Uniform Application.

In order to provide for the uniform application of laws concerning the dissemination of obscene material within this state, no municipality, county, or other governmental unit within this state shall make any law, ordinance or regulation concerning the subject matter of this act.

DISSEMINATION OF MATERIALS HARMFUL TO MINORS

Definitions. As used in this Act:

(a) "Minor" means any unmarried person under the age of seventeen years.

(b) "Nudity" means the showing of the male or female genitals, pubic area or buttocks with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or other wise physically restrained.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominatly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein, which is reasonably susceptible of examination by the defendant; and

(ii) the age of the minor.

SECTION 2

Offenses. It shall be unlawful for person knowingly to sell, deliver, distribute, display for sale or provide to a minor, or knowingly to possess with intent to sell, deliver, distribute, display for sale or provide to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, or any replica, article of device having the appearance of either male or female genitals which depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse and which is harmful to minors, or

(b) Any book, pamphlet, magazine, printed matter however produced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

SECTION 3

It shall be unlawful for any person knowingly to exhibit to a minor or knowingly to provide to a minor an admission ticket or pass or knowingly to admit a minor to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

SECTION 4

(a) No prosecution based under this Act shall be commenced unless the District Attorney of the county in which the offense occurs shall have previously determined that the matter or performance is harmful to minors and the defendant shall have received actual or constructive notice of such determination. Persons shall be presumed to have constructive notice of such determination on the fifth business day following publication of a notice of such determination in a newspaper of general circulation in the county in which the prosecution takes place.

(b) Any person adversely affected by such determination may, at any time within thirty days after such notice is given, seek a judicial determination of its correctness under (insert reference to State Declaratory Judgment Act, or appropriate Civil Practice Act Sections). Such actions shall have precedence over all other actions, and shall be tried within five court days after filing of such complaint.

The court shall, unless otherwise agreed by the parties, render judgment not later than two court days following trial. Filing of an action under this section shall stay prosecution under sections 4 (a), (b) and (c) until a judicial determination is rendered, but no appeal shall have such effect unless so ordered by the trial court.

(c) No criminal action shall be commenced in any other Judicial District within this State during the pendency of the civil action authorized by Section 4(b) regarding the same matter, exhibition or performance.

SECTION 5

No person shall be guilty of violating the provisions of this Act:

(a) Where such person had reasonable cause to believe that the minor involved was 17 years old or more, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was 17 years old or more; or

(b) That the minor was accompanied by his parent or guardian, or the parent or guardian has in writing waived the application of this Act either generally or with reference to the particular transaction; or

(c) Where such person had reasonable cause to believe that the person was the parent or guardian of the minor; or

(d) Where such person is a bona fide school, museum or public library, or is acting in his capacity as an employee or such organization, or as a retail outlet affiliated with and serving the educational purposes of such organization.

SECTION 6

(a) It shall be unlawful for any minor to falsely represent to any person mentioned in Section 2 or Section 3 of this Act, or to his agent, that such minor is 17 years of age or older, with the intent to procure any material set forth in Section 2 of this Act, or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Section 3 of this Act.

(b) It shall be unlawful for any person to knowingly make a false representation to any person mentioned in Section 2 or Section 3 of this Act, or to his agent, that he is the parent or guardian of any minor, or that any minor is 17 years of age, with the intent to procure any material set forth in Section 2 of this Act, or with the intent to procure such minor's admission to any motion picture, show or other presentation as set forth in Section 3 of this Act.

SECTION 7

(a) A person convicted of violating Section 2 or 3 of this Act shall be punished by imprisonment of not less than_____ or by a fine not to exceed $_____or both.

(b) Any person violating the provisions of Section 6 of this Act shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as for a misdemeanor.

SECTION 8

In order to provide for the uniform application of this Act to all minors within this State, it is intended that the sole and only regulation of the sale, distribution or provision of any matter described in Sections 2(a) and (b), or admission to, or exhibition of, any performance described in Section 3, shall be under this Act, and no municipality, county or other governmental unit within this State shall make any law, ordinance or regulation relating to the sale, distribution or provision of any matter described in Sections 2 (a) and (b), or admission to any performance described in Section 3, including but not limited to criminal offenses, classification of suitable matter or performances for minors, or licenses or taxes respecting the sale, distribution, exhibition or provision of matter regulated under this Act. All such laws, ordinances, regulations, taxes or licenses, whether enacted before or after this Act, shall be or become void, unenforceable and of no effect upon the effective date of this Act.

SECTION 9

This Act shall become effective_____

SECTION 10

All laws and parts of laws in conflict with this Act are hereby repealed.

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

COMMITTEE ON JUDICIARY "B"

Meeting of Thursday and Friday, August 24-25, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:35 a.m. on Thursday, August 24, 1972, in Committee Room G-2 of the State Capitol, Bismarck, North Dakota.

Legislative Members Present:	Senator Freed Representatives Atkinson, Hilleboe, Murphy, Stone
Legislative Members Absent:	Senator Page Representative Kieffer
Citizen Members Present:	Professor Lockney, Messrs. Webb, Wolf
Citizen Members Absent:	Judges Erickstad, Lynch, Pearce, Smith
Also Present:	Mr. Robert Wefald, Mr. Vance Hill, Mr. Stuart Hilleboe, Mr. Tom Kelsch, Mr. Conrad Ziegler, Mr. Chuck Travis, Mr. Irv Riedman, Mr. Bob Holte

The Chairman inquired as to whether there were any additions or corrections to the minutes. Professor Lockney noted that the statement attributed to himself in the sixth paragraph of Page 23 of the minutes was more likely said by Judge Erickstad. Representative Murphy noted that he also might have said something to that effect at the last meeting.

IT WAS MOVED BY MR. WOLF, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the minutes be approved with the following amendment: Strike the words "Professor Lockney" in the sixth paragraph of Page 23 and substitute the words "It was" in lieu thereof.

The Chairman introduced Mr. Tom Kelsch, the Burleigh County State's Attorney, and noted that Mr. Kelsch is serving as Chairman of the Legislative Committee of the State's Attorneys Association and was acting as liaison between that Association and this Committee.

The Chairman then called on Mr. Wefald for an overview of three alternative proposals dealing with rape and other sexual offenses. The alternate proposals on rape and other sexual offenses read as follows:

PROPOSAL A

STAFF REDRAFT OF SECTIONS 1641 THROUGH 1653

SECTION 1641. RAPE.)

1. OFFENSE. A male who has sexual intercourse with a female not his wife is guilty of rape if:

a. He compels her to submit by force, or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. He or someone with his knowledge has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge intoxicants or other means with intent to prevent resistance;

c. He knows that the victim is unaware that she is engaging in sexual intercourse with the actor, or he knows that she is submitting because she mistakenly supposes that he is her husband; or

d. The victim is less than thirteen years old.

2. GRADING. Rape is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates paragraph d of subsection 1, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise rape is a class B felony.

SECTION 1642. GROSS SEXUAL IMPOSITION.) A male who has sexual intercourse with a female not his wife is guilty of a class C felony if:

1. He knows that she suffers from a mental disease or defect which renders her incapable of understanding the nature of her conduct; or

2. He compels her to submit by any threat that would render a female of reasonable firmness incapable of resisting.

SECTION 1643. AGGRAVATED INVOLUNTARY SODOMY.)

1. OFFENSE. A person who engages in deviate sexual intercourse with another, or who causes another to engage in deviate sexual intercourse, is guilty of an offense if:

a. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being; or

b. He or someone with his knowledge has substantially impaired the victim's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance;

c. He knows that the other person is unaware that a sexual act is being committed upon him or her; or

d. The victim is less than thirteen years old.

2. GRADING. The offense is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subparagraph d of subsection 1, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise the offense is a class B felony.

SECTION 1644. INVOLUNTARY SODOMY.) A person who engages in deviate sexual intercourse with another, or who causes another to engage in deviate sexual intercourse, is guilty of a class C felony if:

1. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct; or

2. He compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

SECTION 1645. SODOMY.) A person is guilty of a class A misdemeanor if he engages in deviate sexual intercourse under circumstances not amounting to aggravated involuntary sodomy, section 1643, or involuntary sodomy, section 1644.

SECTION 1646. CORRUPTION OF MINORS.) A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of a class C felony if the other person is a minor and the actor is an adult.

SECTION 1647. SEXUAL ABUSE OF WARDS.) A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of a class A misdemeanor if the other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person.

SECTION 1648. SEXUAL ASSAULT.) A person who knowingly has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of a class B misdemeanor if:

1. He knows that the contact is offensive to the other person;
2. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;
3. The other person is less than thirteen years old;
4. He or someone with his knowledge has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;
5. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over him or her;
6. The other person is a minor and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare; or
7. The other person is a minor and the actor is an adult.

SECTION 1649. FORNICATION.) A person is guilty of a class B misdemeanor if he engages in sexual intercourse with another who is not the actor's spouse.

SECTION 1650. ADULTERY.) 1. A married person is guilty of a class A misdemeanor if he or she engages in a sexual act with another person, not the actor's spouse.

2. No prosecution shall be instituted under this section except upon the complaint of the spouse of the alleged offender, and the prosecution shall not be commenced later than one year from the commission of the offense.

SECTION 1651. UNLAWFUL COHABITATION.) A person is guilty of a class A misdemeanor if, with intent to defraud another or others of money or property, he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.

SECTION 1652. GENERAL PROVISIONS FOR SECTIONS 1641 TO SECTION 1651.)

1. MISTAKE AS TO AGE. In sections 1641 to 1648: (a) when the criminality of conduct depends upon a child's being below the age of thirteen it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than thirteen; (b) when criminality depends upon the victim's being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult.

2. SPOUSE RELATIONSHIPS.) In sections 1641 to 1650, when the definition of an offense excludes conduct with a spouse; the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a female, this shall not preclude conviction of a spouse or female as accomplice in an offense which he or she causes another person, not within the exclusion, to perform.

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under sections 1641 to 1650 unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specifically interested in the victim, other than the alleged offender, learned of the offense.

SECTION 1653. DEFINITIONS FOR SECTIONS 1641 TO 1652.) In sections 1641 to 1652:

1. "Sexual intercourse" means sexual contact between a male and female consisting of contact between the penis and the vulva. "Sexual intercourse" occurs upon penetration, however slight; emission is not required;

2. "Deviate sexual intercourse" means sexual contact between human beings who are not husband and wife consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, or any form of sexual intercourse with an animal;

3. "Sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

PROPOSAL B

STAFF REDRAFT OF SECTIONS 1641 THROUGH 1650

SECTION 1641. RAPE OR GROSS SEXUAL IMPOSITION.)

1. OFFENSE. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:

a. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. He or someone with his knowledge has substantially impaired the victim's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance;

c. He knows that the victim is unaware that a sexual act is being committed upon him or her; or

d. The victim is less than thirteen years old.

2. GRADING. The offense is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subparagraph d of subsection 1, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise the offense is a class B felony.

SECTION 1642. SEXUAL IMPOSITION.) A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of a class C felony if:

1. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct; or

2. He compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

SECTION 1643. SEXUAL ACTS WITH MINORS.) Any person who engages in a sexual act with someone other than the actor's spouse or any person who causes another to engage in a sexual act is guilty of a class A misdemeanor [class C felony] if the victim is a minor and the actor is an adult.

Alternative Section 1643:

[SECTION 1643. CORRUPTION OF MINORS.) Any person who engages in a sexual act with a person not his spouse or causes the other person to engage in a sexual act is guilty of a class A misdemeanor [class C felony] if the other person is less than eighteen [sixteen] years old, and the actor is at least five years older than the other person.]

SECTION 1644. SEXUAL ABUSE OF WARDS.) A person who engages in a sexual act with another person not the actor's spouse or any person who causes another to engage in a sexual act is guilty of a class A misdemeanor if the other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person.

SECTION 1645. SEXUAL ASSAULT.) A person who knowingly has sexual contact with another not the actor's spouse, or who causes the other person, not the actor's spouse, to have sexual contact with the actor, is guilty of a class B misdemeanor if:

1. He knows that the contact is offensive to the other person;

2. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;

3. The other person is less than thirteen years old;

4. He or someone with his knowledge has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;

5. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over him or her;

6. The other person is less than eighteen years old and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare; or

7. The other person is a minor and the actor is an adult.

SECTION 1646. FORNICATION.) A person is guilty of a class A misdemeanor if he engages in a sexual act in a public place.

SECTION 1647. ADULTERY.) 1. A married person is guilty of a class A misdemeanor if he or she engages in a sexual act with another person, not the actor's spouse.

2. No prosecution shall be instituted under this section except on the complaint of the spouse of the alleged offender, and the prosecution shall not be commenced later than one year from commission of the offense.

SECTION 1648. UNLAWFUL COHABITATION.) A person is guilty of a class B [A] misdemeanor if [, with intent to defraud another or others of money or property,] he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.

SECTION 1649. GENERAL PROVISIONS FOR SECTIONS 1641 TO 1648.)

1. MISTAKE AS TO AGE. In sections 1641 to 1648: (a) when the criminality of conduct depends on a child's being below the age of thirteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than

twelve; (b) when criminality depends on the victim's being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult.

2. SPOUSE RELATIONSHIPS. In sections 1641 to 1647, when the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a female, this shall not preclude conviction of a spouse or female as accomplice in an offense which he or she causes another person, not within the exclusion, to perform.

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under sections 1641 through 1647 unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was a minor or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specifically interested in the victim, other than the alleged offender, learned of the offense.

SECTION 1650. DEFINITIONS FOR SECTIONS 1641 TO 1649.) In sections 1641 to 1649:

1. "Sexual act" means sexual contact between human beings who are not husband and wife consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, or the mouth and the vulva. For the purposes of this subsection, sexual contact between the penis and the vulva, or between the penis and the anus, occurs upon penetration, however slight. Emission is not required.

2. "Sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

PROPOSAL C

STAFF REDRAFT OF SECTIONS 1641 THROUGH 1656

SECTION 1641. RAPE.)

(Same as Proposal A)

SECTION 1642. GROSS SEXUAL IMPOSITION.)

(Same as Proposal A)

SECTION 1643. AGGRAVATED INVOLUNTARY SODOMY.)

(Same as Proposal A)

SECTION 1644. INVOLUNTARY SODOMY.)

(Same as Proposal A)

SECTION 1645. CORRUPTION OF MINORS.)

(Same as Section 1646 in Proposal A)

SECTION 1646. SEXUAL ABUSE OF WARDS.)

(Same as Section 1647 in Proposal A)

SECTION 1647. SEXUAL ASSAULT.)

(Same as Section 1648 in Proposal A)

SECTION 1648. FORNICATION.) A person is guilty of a class B misdemeanor if he engages in sexual intercourse in a public place. (This is the same as Section 1646 in Proposal B.)

SECTION 1649. ADULTERY.)

(Same as Section 1650 in Proposal A)

SECTION 1650. UNLAWFUL COHABITATION.)

(Same as Section 1651 in Proposal A)

SECTION 1652. INCEST.) A person who intermarries, cohabits, or has sexual intercourse with another person related to him within a degree of consanguinity within which marriages are declared incestuous and void by section 14-03-03, knowing such other person to be within said degree of relationship, is guilty of a class C felony.

SECTION 1653. BESTIALITY.) A person who has any form of sexual contact with an animal or bird with the intent to arouse or gratify his sexual desire is guilty of a class A misdemeanor.

SECTION 1654. BIGAMY.)

1. OFFENSE. A person who marries another person, while married to another person, is guilty of a class C felony.

2. EXCEPTIONS. Subsection 1 above does not extend to:

a. A person whose spouse has been absent for five successive years and is believed by him or her to be dead;

b. A person whose spouse has absented himself or herself from his spouse and has continually remained without the United States for the space of five successive years;

c. A person whose former marriage has been pronounced void, null, or dissolved by the judgment of a competent court; or

d. A person whose spouse has been sentenced to _____.

SECTION 1655. GENERAL PROVISIONS FOR SECTIONS 1641 TO 1653.)

1. MISTAKE AS TO AGE. In Sections 1641 to 1647: ...(The balance of this subsection is the same as Subsection 1, Section 1652 in Proposal A.)

2. SPOUSE RELATIONSHIPS. In Sections 1641 to 1649: ...(The balance of this subsection is the same as Subsection 2, Section 1652 in Proposal A.)

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under Sections 1641 to 1649 and Section 1652, unless the alleged offense... (the balance of this subsection is the same as Subsection 3, Section 1652 in Proposal A.)

SECTION 1656. DEFINITIONS FOR SECTIONS 1641 TO 1654.) In sections 1641 to 1654:

1. (Same as Subsection 1, Section 1653 in Proposal A.)

2. "Deviant sexual intercourse" means sexual contact between human beings who are not husband and wife consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

7 3. (Same as Subsection 3, Section 1653 in Proposal A.)

Mr. Wefald noted that Proposal A essentially followed the original FCC draft, but went further to ensure that sexual intercourse or deviate sexual intercourse between consenting adults rendered those adults subject to criminal liability. In addition, Proposal A also included sections covering the existing North Dakota offenses of fornication, adultery, and unlawful cohabitation. Mr. Wefald noted that the definition of "sexual intercourse" in Section 1653 of Proposal A had been expanded to include a first sentence specifically indicating that sexual intercourse could only occur between a male and a female.

Mr. Wefald noted that Proposal B was a redraft of the FCC provisions using a previously adopted definition of "sexual act", thus allowing several FCC sections to be consolidated with each other, and, in addition, Proposal B did not prohibit sexual activity between consenting adults. In addition, Mr. Wefald stated that Section 1643 of Proposal B was presented in the alternative, with the second alternative placing emphasis on the idea of corruption of minors by offenders who are at least five years older than their victims. Further, Mr. Wefald noted that the crime of fornication, defined in Section 1646 of Proposal B, was limited to the performance of a sexual act in a public place.

Proposal C was designed to follow the original FCC format, but not to prohibit sexual activity between consenting adults, and further, contained definitions of the offenses of incest, bestiality, and bigamy, so that those offenses could be logically grouped with the sexual offense provisions. Mr. Wefald noted that the definitions of "deviate sexual intercourse" had been shortened to exclude intercourse with an animal, since Proposal C contained a particular provision dealing with bestiality.

The Chairman said that the Committee would have to make a choice between the drafts for the purposes of using one as the basis for discussion. Representative Murphy inquired as to why Section 1646 in Proposal A limited potential victims of the "sexual intercourse" portion of the offense to females. The Committee discussed the fact that it had previously reached a conclusion that either sex could be the victim of illegal sexual intercourse or illegal deviate sexual intercourse.

The Committee Counsel stated that he had discussed the three sexual offense proposals with Judge Erickstad and that Judge Erickstad favored Proposal A, but wanted the Committee to note that Section 1645, defining sodomy, reduced the potential penalty under North Dakota law from the present 10-year maximum imprisonment to one-year maximum imprisonment. The Committee Counsel noted that Judge Erickstad would also like to see the definitions of incest, bestiality, and bigamy (contained in Proposal C) included in Proposal A.

Representative Hilleboe noted that recently a federal district court for the District of Columbia had rendered a decision striking down the District of Columbia sodomy statute as being unenforceably vague. Professor Lockney noted that there were two radically different philosophies represented in Proposals A and B, and that the Committee would probably never resolve the differences. Therefore, he suggested again that the Committee present alternative proposals to the Legislative Council and the Legislature so as to forego the possibility that the main body of the Code revision could be killed on the basis of choosing the wrong tack in regard to sexual offenses.

Mr. Wolf suggested that, should alternative proposals be submitted, he would put Proposal A in the main bill and would offer Proposal B as an alternative. The Chairman called on Mr. Webb and Mr. Kelsch for their comments regarding the feeling of the prosecuting attorneys concerning Proposal A or Proposal B.

Mr. Kelsch stated he felt that the majority of state's attorneys would only be opposed if the sexual offense definitions represented great change and that their opposition would probably be much less if alternatives were offered. He felt that, as a whole, the state's attorneys would probably find Proposal A most acceptable.

Mr. Webb stated that speaking for himself he would favor Proposal B, noting that he would require some revision of that Proposal, as the main proposal, with Proposal A as an alternate.

Representative Stone said she felt that the Committee had definitely decided that males could be the victims of sexual offenses. The Committee Counsel noted that this was probably the case, with the exception that, at the last meeting, Judge Erickstad had indicated an interest in maintaining a sharp delineation between forceful rape and forceful sodomy, with forceful rape remaining essentially as it is defined today, that is, with the victim being a female and the perpetrator being a male.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the Committee limit its consideration of the various sexual offense proposals to Proposal A and Proposal B, with Proposal A to include the definitions of incest, bestiality, and bigamy contained in Proposal C.

IT WAS THEN MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WEBB for purposes of discussion that Proposal B be recommended for inclusion in the main revision bill, with the second alternate Section 1643 being included therein as a Class A misdemeanor, with the age of "sixteen" in brackets being stricken, and the bracketed language in Section 1648 being included.

Mr. Webb stated that he was not satisfied with either alternative Section 1643 presented in Proposal B because of the fact that neither alternative called for criminal liability for sexual experimentation between minors. He stated he believed that the Committee could not be put in a position of condoning sexual acts between consenting minors.

Mr. Webb also stated that he thought the absolute prohibition against sexual activity with a person less than thirteen years old should be changed so that the absolute prohibition applied to victims of less than fifteen years old. He stated that aside from these objections, he favored Proposal B because it seemed to rationalize the sexual offenses. He therefore suggested that Section 1646 be amended to specifically prohibit sexual acts between consenting minors.

Mr. Kelsch questioned whether a minor could not be handled as an unruly child rather than make consenting sexual offenses between minors criminal. Mr. Webb suggested that if the person involved were to be treated in the Juvenile Courts, it should be for a delinquent act rather than an unruly act, and a child cannot be guilty of a delinquent act unless there was underlying criminal liability for that act.

Representative Hilleboe suggested that a sentence be added at the end of Section 1646 reading as follows: "A minor engaging in a sexual act is guilty of a Class A misdemeanor."

IT WAS THEN MOVED BY MR. WEBB AND SECONDED BY REPRESENTATIVE HILLEBOE that Professor Lockney's motion regarding acceptance of Proposal B as the main proposal be amended so that the first alternative Section 1643 would be included therein and a sentence would be added to Section 1646 to read as follows: "A minor engaging in a sexual act is guilty of a Class A misdemeanor."

Professor Lockney stated that should that motion carry, he would prefer Proposal A over Proposal B. Mr. Wefald stated that he had difficulty with the title of Section 1646 reading "Fornication", since the offense was defined as including both sexual intercourse and deviate sexual intercourse through use of the new definition of "sexual act". The Committee Counsel noted that he recognized the problem but did not know what else to call the offense.

Mr. Webb stated that he felt it was important to liberalize certain of the statutes relating to sexual offenses, but not insofar as those statutes related to acts between consenting minors.

Mr. Wefald noted that the victim in Section 1643 was the offender in Section 1646. Mr. Kelsch said that statutes similar to Section 1643 and Section 1646 were very difficult to prosecute, especially Section 1646 where the prosecuting witness would also be an offender.

Mr. Webb suggested an amendment to his amending motion to accept the second alternative Section 1643, but to strike the words "less than eighteen [sixteen]" in Line 3 of that section and to substitute the words "a minor." therefor, and in addition, to strike Line 4 of that section. Representative Hilleboe, as second to Mr. Webb's original motion, gave his consent to this change.

Mr. Hill noted that with that change, the additional sentence proposed for Section 1646 would not be necessary. The Committee discussed this proposition, but no consensus was reached. Representative Murphy stated that he felt the consenting acts between minors should not be treated differently from consenting acts between adults. The Committee Counsel noted that that result was reached in Proposal A.

Mr. Wolf suggested that the Committee was being bogged down in drafting problems and thereafter, MADE A SUBSTITUTE MOTION TO MR. WEBB'S AMENDATORY MOTION, which was seconded by Mr. Webb for purposes of discussion, to the effect that the Committee accept the philosophy, for inclusion in Proposal B, that sexual acts between consenting minors should be Class B misdemeanors, and that Sections 1643 (second alternative) and 1646 remain as they are presented in Proposal B, except for necessary staff redrafting. The Chairman noted that this motion might require further action at a future Committee meeting and hoped that the matter could be settled now. Thereafter, MR. WOLF'S SUBSTITUTE MOTION CARRIED with Professor Lockney voting in the negative.

IT WAS MOVED BY MR. WEBB, SECONDED BY MR. WOLF, AND CARRIED, with Professor Lockney voting in the negative, that the word "thirteen" as found in Line 12 of Section 1641, Line 7 of Section 1645, and Line 3 of Section 1649, all in Proposal B, be deleted and the word "fifteen" be substituted in lieu thereof.

Representative Murphy inquired regarding the philosophical basis for treating sexual activity between consenting minors differently than sexual activity between consenting adults. Mr. Wolf stated that the prime rationale was that the consent given by a minor was not knowledgeable and therefore the minor needed to be protected. It was similar to the rationale for allowing minors to avoid the expressed intention to contract.

Mr. Wolf then questioned the inclusion of the language in Line 2 of Section 1648 which reads "with intent to defraud another or others of money or property". He stated that he felt that that language should be excluded, as an intent to defraud, carried out in that manner, would be covered under other criminal definitions. Representative Hilleboe explained that the rationale for inclusion of that language was that unlawful cohabitation only became harmful when someone else was defrauded because of the acts

of the cohabitators. Mr. Kelsch stated that the "openly and notoriously" language of Section 1648, Proposal B, could be the gist of the offense, as it is in current North Dakota law.

IT WAS MOVED BY MR. WOLF AND SECONDED BY MR. WEBB for discussion that Professor Lockney's main motion be amended so as to strike the bracketed material contained in Line 2 of Section 1648, Proposal B.

Thereafter, PROFESSOR LOCKNEY MADE A MOTION IN SUBSTITUTION OF MR. WOLF'S MOTION to strike Section 1648 altogether and place its provisions, if necessary, in the theft statutes. PROFESSOR LOCKNEY'S SUBSTITUTE MOTION FAILED FOR LACK OF A SECOND. Thereafter, Mr. WOLF'S AMENDATORY MOTION LOST.

Mr. Wolf stated that Section 1648, with the bracketed language included, is a very hypocritical section. Thereafter, IT WAS AGAIN MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WOLF that Section 1648 be deleted from Proposal B.

Representative Hilleboe stated that he had voted on the prevailing side in the defeat of Mr. Wolf's motion to strike the bracketed material, and that, therefore, HE WAS MOVING TO RECONSIDER THAT MOTION and to again strike the bracketed material from Section 1648. The Chairman requested that Representative Hilleboe hold his motion in abeyance and vote on Professor Lockney's motion to strike, WHICH MOTION THEREAFTER LOST by a vote of 3-ayes and 4-nays.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED, with Professor Lockney voting in the negative, that Mr. Wolf's motion to strike the bracketed language in Section 1648 be reconsidered and that the bracketed language in Section 1648 (Line 2) be stricken.

The Committee recessed for lunch and reconvened at 1:15 p.m., at which time IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED, that the words "RAPE OR" be inserted in the title of Section 1641 of Proposal B before the words "GROSS SEXUAL IMPOSITION".

The Committee discussed the fact that sexual acts with the dead were not included as an offense in either Proposal A or Proposal B. It was noted that the current North Dakota definition of sodomy did prohibit sexual acts with the dead.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED that Proposal B have incorporated into it the definitions of incest and bigamy contained in Proposal C, and that an additional section be added to Proposal B entitled "DEVIATE SEXUAL ACTS" to read as follows: "Any person engaging in a deviate sexual act shall be guilty of a Class A misdemeanor", and that a third subsection be added to Section 1650, Proposal B, defining "deviate sexual acts" as follows: "'Deviate sexual act' means sexual contact with an animal or bird, or with the dead."

In response to a question from the Chairman, Professor Lockney agreed that his main motion to include Proposal B in the main revision bill included the possibility of presenting an alternative bill containing some other definitions of sexual offenses.

The Chairman stated that it was his personal opinion that Proposal A should be contained in the main revision bill and that Proposal B should be the alternative so as not to run the risk of jeopardizing the entire main revision bill on the grounds that a sizeable body of persons would object to Proposal B. Professor Lockney suggested that both proposals should be alternatives presented outside of the main bill.

Representative Stone inquired of the prosecutors present whether private fornication (that is, not performed in a public place) was ever prosecuted. Mr. Webb stated that he had never had such a case and Mr. Kelsch indicated that it was rarely prosecuted; however, the availability of prosecution for fornication was often used as a tool to force other results affecting the marital relationship.

Representative Hilleboe stated that if private fornication were considered a criminal offense, then, if carried to its logical conclusion, every unwed mother should be prosecuted, as she has clearly engaged in the offense of fornication. In addition, where unwed persons who had contracted venereal disease were discovered, they should also be prosecuted in most cases.

Mr. Wolf noted that persons responsible for tracing and preventing venereal disease would have an easier job if fornication were not a crime. He suggested that this would be so because persons with venereal disease would be more likely to report it if they were sure that they were not subject to criminal liability.

The Committee discussed at length the proposition of having two alternative bills containing sexual offense definitions with neither set of definitions to be included in the main revision bill. Mr. Kelsch noted that, whichever one should pass, should a referral petition be filed against it, the main revision bill could still go into effect without being referred.

Representative Stone stated that she would offer a substitute motion to Professor Lockney's main motion to have the staff draft two bills presenting alternative sexual offense definitions to be submitted to the Legislative Council without recommendation, and that, in addition, she would wish to have Proposal A amended so that the word "thirteen" would be changed to "fifteen" wherever it appeared.

That proposal not receiving a second, IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY MR. WOLF, AND CARRIED, with two members voting in the negative, that Proposal A be amended to strike the word "thirteen" wherever it appears, and to substitute the word "fifteen" in lieu thereof.

The Committee discussed Section 1646, Proposal A, and it was noted that insofar as that offense definition related to sexual intercourse, only a female could be a victim. Mr. Wefald suggested that the section be amended to read as follows: "A person who has sexual intercourse with a person not his spouse or who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of a Class C felony if the other person is a minor and the actor is an adult."

The Chairman asked whether anyone would be willing to second Representative Stone's substitute motion (to Professor Lockney's main motion) to submit two alternative bills containing sexual offenses without recommendation. Representative Atkinson stated that he would second that motion if there were accord that that was the way to proceed.

The Committee Counsel noted that the two proposals did, in the main, represent different philosophies in that Proposal A prohibited sexual activity between consenting adults, while Proposal B did not do so. Thereafter, PROFESSOR LOCKNEY SECONDED REPRESENTATIVE STONE'S MOTION to submit two alternative bills defining sexual offenses without recommendation, and HER MOTION CARRIED with Representatives Hilleboe and Murphy voting in the negative.

Mr. Webb suggested that Subsection 2 of Section 1652, Proposal A, could cause numerous problems, especially in relation to the section on unlawful cohabitation, and in relation to the provision in Section 1649 dealing with fornication. Thereafter, IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE ATKINSON AND MR. WEBB, AND CARRIED that Subsection 2 of Section 1652, Proposal A, and Subsection 2 of Section 1649, Proposal B, be amended to read as follows: "In Sections 1641 to 16__, the offenses exclude conduct with the actor's spouse. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where an offense excludes conduct with a spouse or conduct by a female, this shall not preclude conviction of a spouse or female as accomplice in an offense which he or she causes another person, not within the exclusion, to perform."

Representative Hilleboe also noted that Subsection 2 of Section 1653 defines deviate sexual intercourse as applying to persons who are not husband and wife, but intimates that such acts are not deviate sexual intercourse if the parties were married.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the words "who are not husband and wife" contained in Line 7 of Section 1653, Proposal A, be deleted.

Representative Hilleboe stated he thought that the Committee should note that Proposal A outlaws consenting homosexual conduct between adults, while Proposal B does not. The Committee then discussed the bigamy offense definition carried from Proposal C to both Proposals A and B. Representative Murphy inquired as to the need for Subparagraph d of Subsection 2 of Section 1653 (bigamy definition). He stated that a person whose spouse has been sentenced to any given term of imprisonment could, under the divorce statutes, seek a divorce, and that that was probably the proper way to proceed.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that Subparagraph d of Subsection 2 of Section 1653, as contained in Proposal C, be stricken in both Proposals A and B.

The Committee discussed the redraft of Section 1643 in Proposal B, which reads as follows: "Any person who engages in a sexual act with a person not his spouse or causes the other person to engage in a sexual act is guilty of a class A misdemeanor if the other person is a minor." Representative Hilleboe noted that this section resulted in the same offense as did the last sentence (added during this meeting) of Section 1646. He stated that to clarify this situation, the word "adult" should be substituted for the word "person" in the first line of Section 1643.

Thereafter, IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY MR. WOLF, AND CARRIED that Section 1643 be amended by substituting the word "adult" for the word "person" in Line 1 (after the word "Any") of Section 1643.

The Chairman noted that this completed consideration of the proposals on sexual offense definitions and that the staff would now prepare two bills to be submitted in addition to the main revisory bill. The two bills would contain essentially Proposals A and B, as amended by the Committee.

The Chairman called upon Mr. Wefald for an overview of the redrafted provisions on "Prostitution", Sections 1841 through 1849.

SECTION 1841. PROMOTING PROSTITUTION.)

1. OFFENSE. A person is guilty of an offense if he:

a. Operates a prostitution business or a house of prostitution;

b. Induces or otherwise intentionally causes another to become engaged in sexual activity as a business; or

c. Knowingly procures a prostitute for a prostitution business or a house of prostitution.

2. GRADING. The offense is a class C felony if it is under paragraphs b or c of subsection 1, or if it is under paragraph a and the actor owns, controls, manages, or otherwise supervises the prostitution business or house of prostitution. Otherwise the offense is a class A misdemeanor.

SECTION 1842. FACILITATING PROSTITUTION.)

1. OFFENSE. A person is guilty of an offense if he:

a. Knowingly solicits a person to patronize a prostitute;

b. Knowingly procures a prostitute for a patron;

c. Knowingly leases or otherwise permits a place controlled by the actor, alone or in association with others, to be regularly used for prostitution, promoting prostitution, or facilitating prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or taking other legally available means;

d. Knowingly induces or otherwise intentionally causes another to remain a prostitute. A person who is supported in whole or substantial part by the proceeds of prostitution, other than the prostitute or the prostitute's minor child or a person whom the prostitute is required by law to support, is presumed to be knowingly inducing or intentionally causing another to remain a prostitute.

2. GRADING. The offense is a class C felony if the actor intentionally causes another to remain a prostitute by force or threat, or the prostitute is the actor's wife, child, or ward, or a person for whose care, protection, or support he is responsible, or the prostitute is, in fact, less than sixteen years old. Otherwise it is a class A misdemeanor.

SECTION 1843. PROSTITUTION.) A person is guilty of prostitution, a class B misdemeanor, if he:

1. Is an inmate of a house of prostitution or is otherwise engaged in sexual activity as a business; or

2. Solicits another person with the intention of being hired to engage in sexual activity.

[SECTION 1843. PROSTITUTION.)

1. OFFENSE. A person is guilty of prostitution if he:

a. Is an inmate of a house of prostitution or is otherwise engaged in sexual activity as a business; or

b. Solicits another person with the intention of being hired to engage in sexual activity.

2. GRADING. Prostitution is a class B misdemeanor if the sexual activity engaged in as a business or solicited is sexual intercourse or sexual contact as defined in section 1649. Prostitution is a class A misdemeanor if the sexual activity engaged in as a business or solicited is deviant sexual intercourse as defined in section 1649.]

SECTION 1848. TESTIMONY OF SPOUSE IN PROSTITUTION OFFENSES.) Testimony of a person against his or her spouse shall be admissible to prove offenses under sections 1841 to 1843 involving that spouse's prostitution.

SECTION 1849. DEFINITIONS FOR SECTIONS 1841 TO 1849.) In sections 1841 to 1849:

1. "Sexual activity" means sexual intercourse, deviate sexual intercourse, or sexual contact as defined in section 1649;

2. A "prostitution business" is any business which derives funds from prostitution regularly carried on by a person under the control, management, or supervision of another;

3. A "house of prostitution" is any place where prostitution is regularly carried on by a person under the control, management, or supervision of another;

4. A "prostitute" is a person who engages in sexual activity for hire;

5. An "inmate" is a prostitute who acts as such in or through the agency of a house of prostitution.

Mr. Wefald stated that the prostitution provisions were essentially as previously submitted with the exception of Section 1643 which was submitted in two alternatives. The first alternative would punish prostitution as a Class B misdemeanor, regardless of the particular types of sexual activity in which the prostitute engaged. The second alternative would punish prostitution as a Class B misdemeanor if the sexual activity engaged in was "sexual intercourse" or "sexual contact" as defined in Section 1649. However, prostitution would be a Class A misdemeanor if the sexual activity engaged in was "deviate sexual intercourse". The Committee Counsel noted that, in his discussions with Judge Erickstad, Judge Erickstad had indicated that he favored the second alternative Section 1843.

Mr. Travis noted that the recent Knapp Commission report on prostitution in New York had indicated that perhaps prostitution should not be a criminal offense. He suggested that the Committee wait until further study could be made before prostitution be continued as a criminal offense because it was essentially a victimless crime.

Professor Lockney noted that a prostitute's patron could not be prosecuted under Section 1843. The Committee Counsel stated that the patron could be prosecuted under the fornication provisions of Proposal A, and that if he patronized the prostitute for deviate sexual intercourse, he could be prosecuted under the sodomy provisions of Proposal A.

Mr. Travis suggested that the Committee should only concern itself with regulation of the venereal disease aspects of prostitution. He again reiterated that prostitution is essentially a victimless crime. The Chairman suggested that the people of North Dakota were not so interested in revision of the current criminal code that they would allow a bill to pass which did not penalize prostitution. Professor Lockney suggested that the whole topic of victimless crimes needed a great deal more study, but that the Committee has a more important job to do at the present time, which is to revise the entire criminal code.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WEBB that Sections 1841 through 1849 be accepted with the second alternative Section 1843 stricken from the draft.

The Committee Counsel noted that Judge Erickstad had also indicated an interest in providing treatment for persons involved in sexual offenses involving deviant sexual acts. Judge Erickstad had felt that deviate sexual activity indicated a mental abnormality. Where such abnormality is evidenced during a criminal prosecution, the judge's sentencing authority should include power to sentence the offender to a place where he or she would receive appropriate treatment.

Representative Hilleboe questioned the desirability of the Section 1849 definitions differing from the definitions contained in Proposals A and B. He felt that the same terminology should follow through all sexually related offenses. The Committee Counsel said Section 1849 would be contained in both alternative bills on sexual offenses.

Thereafter, PROFESSOR LOCKNEY'S MOTION accepting Sections 1841 through 1849 CARRIED.

The Chairman called on Mr. Wefald for an overview of the statutes relating to criminal libel and slander and reading as follows:

SECTION 1571. CRIMINAL LIBEL.)

1. OFFENSE. A person is guilty of a Class A misdemeanor if he makes, composes, or dictates a libel, or procures the same to be done, or willfully publishes or circulates a libel, or in any way knowingly or willfully aids or assists in making, publishing, or circulating a libel. (12-28-03)

2. DEFENSES. It is a defense to a prosecution under this section that:

a. The matter alleged to be libelous is true; (12-28-04)

b. The matter alleged to be libelous was contained in a privilege communication; or (12-28-11)

c. The matter complained of was published by the editor or proprietor of a book, newspaper, or serial publication, or the manager of a partnership or incorporated association by which a book, newspaper, or serial publication is issued, without his knowledge or fault and against his wishes by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known. (12-28-08)

SECTION 1572. SLANDER.)

1. OFFENSE. A person is guilty of a class B misdemeanor if he falsely and maliciously uses, utters, or publishes slander over, through, or by means of radio or television. (12-28-15)

2. DEFENSES. It is a defense to a prosecution under this section that the words used, uttered, or published were true. (12-28-16)

SECTION 1573. DEFINITIONS FOR SECTIONS 1571 AND 1572.)

In sections 1571 and 1572:

1. "Libel" means a defamation of a person made public with actual malice or with reckless disregard of the truth by any printing, writing, sign, picture, representation, or effigy tending to expose such person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any defamation made public as aforesaid designed to blacken and vilify the memory of one who is dead and tending to scandalize or provoke his surviving relatives and friends. (12-28-01)
2. "Publication" means a knowing display of a libel, or the parting with its immediate custody under circumstances which exposed the libel to be read or seen or understood by a person other than the publisher of the libel, although it is not necessary that the matter complained of should have been seen or read by another. (12-28-07)
3. "Privileged communication" means a communication made to a person entitled to or interested in the communication by one who is also entitled to or interested or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent. (12-28-11)
4. "Slander" means the use, utterance, or publishing of words with actual malice or with reckless disregard of the truth which in their common acceptance tend to blacken the memory of one who is dead or to impeach the honesty, integrity, virtue, or reputation of a living person. (12-28-15)

Mr. Wefald noted that this draft was a result of the Committee's decision at the last meeting to ask for research concerning the constitutionality of adopting criminal libel and slander statutes. He stated that such statutes could constitutionally be adopted if truth were an absolute defense and if the libel or slander were made with actual malice or reckless disregard of the truth.

Professor Lockney inquired as to how the criminal libel and slander provisions proposed squared with situations regarding invasions of privacy. In addition, he questioned whether there should not be differentiation made between slander of public figures, where truth would be an absolute defense, and libel or slander of private citizens, where it is not necessary that truth be a defense. The Committee discussed this proposition at great length.

The Committee also discussed the fact that slander was limited to utterances or publications made by means of radio or television. IT WAS MOVED BY REPRESENTATIVE ATKINSON AND SECONDED BY REPRESENTATIVE STONE that all the words after the word "slander" in Line 3 of Section 1572 be deleted; that the word "a" be added before the word "slander".

The Committee discussed this motion and it was suggested that the words "or publishes" also be deleted, and that the word "or" be added before the word "utters" in Subsection 1 of Section 1572. The Committee further discussed the need for providing for both criminal libel and slander.

Thereafter, the Chairman suggested that the Committee discontinue consideration of libel and slander provisions and consider adoption of the nonsubstantive revision of Chapter 12-25, NDCC, providing for sentencing classifications for the current abortion sections. The Chairman noted that absolutely no substantive change had been made in the abortion statutes. The only change was to make the penalty provisions in the abortion statutes correspond to the Committee's sentencing classifications. He noted that in many instances, this resulted in a greater penalty for present abortion offenses than was currently the case. The nonsubstantive revision of abortion statutes considered by the Committee reads as follows:

SECTION 1. AMENDMENT.) Section 12-25-01 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-25-01. PROCURING AN ABORTION - PUNISHMENT.) Every person who administers to any pregnant woman, or who prescribes for any such woman, or who advises or procures any such woman to take, any medicine, drug, or substance, or uses or employs, or procures or advises the use, of any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be (((punished by imprisonment in the penitentiary for not less than one year nor more than three years, or in a county jail for not more than one year))) guilty of a class C felony.

SECTION 2. AMENDMENT.) Section 12-25-02 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-25-02. ABORTION - IF MOTHER OR CHILD DIES - PUNISHMENT.) Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or who advises or procures any such woman to take, any medicine, drug, or substance whatever, or who uses or employs, or procures or advises the use, of any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, in case the death of the child or of the mother is produced thereby, is guilty of (((manslaughter in the first degree))) a class B felony.

SECTION 3. AMENDMENT.) Section 12-25-03 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-25-03. KILLING UNBORN QUICK CHILD IN PERFORMING ABORTION - PUNISHMENT.) The willful killing of an unborn quick child by an injury committed upon the person of the mother of such child, and not prohibited in the preceding section, is (((manslaughter in the first degree))) a class B felony.

SECTION 4. AMENDMENT.) Section 12-25-04 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-25-04. SOLICITING OR SUBMITTING TO ATTEMPT AT ABORTION - PUNISHMENT.) Every woman who solicits of any person any medicine, drug, or substance whatever and takes the same, or who submits to any operation or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, shall be (((punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment))) guilty of a class A misdemeanor.

SECTION 5. AMENDMENT.) Section 12-25-05 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-25-05. CONCEALING STILLBIRTH OR DEATH OF INFANT - PUNISHMENT.) Every woman who endeavors either by herself or by the aid of others to conceal the stillbirth of an issue of her body, or the death of any issue under the age of two years, shall be (((punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment))) guilty of a class A misdemeanor.

SECTION 6. AMENDMENT.) Section 12-25-06 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-25-06. CONCEALING STILLBIRTH OR DEATH OF CHILD - SECOND OFFENSE - PUNISHMENT.) Every woman who, having been convicted of endeavoring to conceal the birth of any issue of her body or the death of any such issue under the age of two years,

subsequently to such conviction endeavors to conceal any such birth or death of issue of her body, shall be (((punished by imprisonment in the penitentiary for not less than two years nor more than five years))) guilty of a class C felony. Every person convicted in any other state (((, government,))) or country of this offense shall be punished for any subsequent conviction in this state to the same extent as if the first conviction had taken place in a court of this state.

NOTE: Section 12-25-07, which does not require amendment, reads as follows:

12-25-07. ABORTION - TESTIMONY OF PERSON INJURED MUST BE CORROBORATED.) Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the person upon whom the abortion was performed unless her testimony is corroborated by other evidence.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE ATKINSON, AND CARRIED that the Committee adopt the nonsubstantive revision of Chapter 12-25, NDCC, which made no change in current abortion law except to make the punishments attached to current abortion offenses accord with the Committee's sentencing classification plan.

The Committee Counsel presented, as an alternative to the provisions on criminal libel and slander, a draft defining "criminal defamation" based on a Georgia statute and reading as follows: "A person commits criminal defamation, a class A misdemeanor, when, without privilege to do so and with intent to defame another, living or dead, he communicates matter which tends to blacken the memory of anyone who is dead or which exposes one who is alive to hatred, contempt, or ridicule. It shall be a defense that the matter stated was true and was published with good motives and justifiable ends."

The Committee discussed this proposal at length and it was suggested by the Chairman that the staff do further drafting in regard to this whole area, basing the redraft on a general "criminal defamation" statute. Representative Atkinson inquired as to whether the defendant should have the burden of proving that he acted with "good motives and justifiable ends". The Committee Counsel noted that that was the case under current North Dakota law.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE that the Committee adopt the proposed "criminal defamation" statute. THIS MOTION DIED for lack of a second and the Chairman directed the staff to redraft a statute in this area using criminal defamation as a base. Thereafter, the Committee recessed at 5:05 p.m. and reconvened at 9:00 a.m. on Friday, August 25, 1972, with Vice Chairman Atkinson presiding.

The Chairman noted that the Committee would take up the two alternative drafts on sentencing, which read as follows:

ALTERNATIVE 1

STAFF DRAFT OF SENTENCING CLASSIFICATION PLAN
BASED ON PREVIOUS REPORT OF SENTENCING
CLASSIFICATION SUBCOMMITTEE

ALTERNATIVE "A":

SECTION 1.) Offenses are divided into five classes, which are to be distinguished from one another by the following maximum penalties which are authorized upon conviction:

1. Class A offenses, for which a maximum penalty of twenty-five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
2. Class B offenses, for which a maximum penalty of five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
3. Class C offenses, for which a maximum penalty of one year's imprisonment, a fine of two thousand five hundred dollars, or both, may be imposed.
4. Class D offenses, for which a maximum of thirty days' imprisonment, a fine of five hundred dollars, or both, may be imposed.
5. Violations, for which only a penalty consisting of a fine, restitution, forfeiture, or a combination of the foregoing may be imposed. A fine imposed upon conviction of a violation shall not exceed one hundred dollars, except as otherwise provided by law.

This section shall not be construed to forbid sentencing under section 3, relating to extended sentences.

ALTERNATIVE "B":

[SECTION 1.) Offenses are divided into six classes, which are denominated and subject to maximum penalties as follows:

1. Class A felony, for which a maximum penalty of thirty years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.
2. Class B felony, for which a maximum penalty of fifteen years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.

3. Class C felony, for which a maximum penalty of seven years' imprisonment, a fine of five thousand dollars, or both, may be imposed.

4. Class A misdemeanor, for which a maximum penalty of one year's imprisonment, a fine of one thousand dollars, or both, may be imposed.

5. Class B misdemeanor, for which a maximum penalty of thirty days' imprisonment, a fine of five hundred dollars, or both, may be imposed.

6. Violation, for which a maximum penalty of a fine of five hundred dollars may be imposed.

This section shall not be construed to forbid sentencing under section 3, relating to extended sentences.]

SECTION 2.) 1. Every person convicted of an offense, other than a violation, shall be sentenced to one or a combination of the following alternatives:

a. Deferred imposition of sentence.

b. Probation.

c. A term of imprisonment, including intermittent imprisonment.

d. A fine.

e. Restitution for damages resulting from the commission of the offense.

f. Restoration of damaged property, or other appropriate work detail.

g. Commitment to an appropriate licensed public or private institution for treatment of alcoholism, drug addiction, or mental disease or defect.

Sentences imposed under this subsection shall not exceed in duration the maximum sentences provided by section 1, section 3, or as provided specifically in a statute defining an offense. This subsection shall not be construed as not permitting the unconditional discharge of an offender following conviction.

2. Every person convicted of a violation may have imposed upon him one or a combination of the following alternative dispositions:

a. Unconditional discharge.

b. Probation.

c. Deferred imposition of sentence.

d. A fine.

e. Restitution for damages resulting from commission of the offense.

f. An appropriate work detail.

3. A court may, at any time prior to the time custody of a convicted offender is transferred to a penal institution or institution for treatment, suspend all or a portion of any sentence imposed pursuant to this section.

4. A court may, prior to imposition of sentence, order the convicted offender committed to an appropriate licensed public or private institution for diagnostic testing for such period of time as may be necessary, but not to exceed thirty days. The court may also order such diagnostic testing without ordering commitment to an institution. Validity of a sentence shall not be challenged on the ground that diagnostic testing was not performed pursuant to this subsection. If an offender is sentenced to imprisonment following a commitment for diagnostic testing, the number of days he was confined to an institution shall be credited against his term of imprisonment.

5. All sentences imposed shall be accompanied by a written statement by the court setting forth the reasons for imposing the particular sentence. The statement shall become part of the record of the case.

SECTION 3.) 1. A court may sentence a convicted offender to an extended sentence in accordance with the provisions of this section upon a finding that:

a. The convicted offender is a dangerous, mentally abnormal person. The court shall not make such a finding unless the presentence report, including a psychiatric examination, concludes that the offender's conduct has been characterized by persistent aggressive behavior, and that such behavior makes him a serious danger to other persons.

b. The convicted offender is a professional criminal. The court shall not make such a finding unless the offender is an adult and the presentence

report shows that the offender has substantial income or resources derived from criminal activity.

c. The convicted offender is a persistent offender. The court shall not make such a finding unless the offender is an adult and has previously been convicted of [two offenses classified as class B or above, or of one offense classified as class B or above plus two offenses classified as class C or below,] [two felonies of class B or above, or of one class B felony or above plus two offenses classified below class B felony,] committed at different times when the offender was an adult.

d. The offender was convicted of an offense which seriously endangered the life of another person, and the offender had previously been convicted of a similar offense.

e. The offender is especially dangerous because he used a destructive device in the commission of the offense or during the flight therefrom.

2. The extended sentence may be imposed in the following manner:

a. If the offense for which the offender is convicted is a class A [offense] [felony], the court may impose a sentence up to a maximum of life imprisonment.

b. If the offense for which the offender is convicted is a class B [offense] [felony], the court may impose a sentence up to a maximum of imprisonment for [ten] [thirty] years.

c. If the offense for which the offender is convicted is a class C [offense] [felony], the court may impose a sentence up to a maximum of imprisonment for [two] [fourteen] years.

[d. If the offense for which the offender is convicted is a class A misdemeanor, the court may impose a sentence up to a maximum of imprisonment for two years.]

3. The court shall make the finding required by subsection 1 in writing, and the finding of the court shall be incorporated in the record of the case.

SECTION 4.) If an offender is sentenced to a term of imprisonment for a class A, class B, or class C [offense] [felony, or a class A misdemeanor], he shall be subject to the following mandatory parole components:

1. For a sentence to a term of years in a range from fifteen years to life imprisonment, the parole component shall be five years.
2. For a sentence to a term of years in a range from three years to fifteen years less one day, the parole component shall be three years.
3. For a sentence to a term in a range from one year to one day less than three years, the parole component shall be one year.

The mandatory parole components set forth in this section shall not be served unless the convicted offender shall serve the whole of the term of imprisonment to which he was sentenced. Nothing in this section shall prohibit the parole of the offender in accordance with other provisions of law.

SECTION 5.) Where an offense is defined by a statute outside of this title without specification of its classification pursuant to section 1, the offense shall be punishable as provided in the statute defining it, or:

1. If the offense is declared to be a felony, without further specification of punishment, it shall be punishable as if it were a [class B offense] [class C felony].
2. If the offense is declared to be a misdemeanor, without further specification of punishment, it shall be punishable as if it were a [class C offense] [class A misdemeanor].

The sentencing alternatives available under section 2 shall be available to a court sentencing an offender for commission of an offense defined by a statute outside this title. The mandatory parole component provided by section 4 shall apply to sentences imposed for offenses defined by statutes outside this title.

[SECTION 5.) For the purpose of making determinations, other than sentence imposition, wherein the terms "felony" or "misdemeanor" are relevant, the term "felony" shall be deemed to mean class A and class B offenses; and the term "misdemeanor" shall be deemed to mean class C and class D offenses.]

SECTION 6. RIGHTS LOST.) 1. A person sentenced for a felony, from the time of his sentence until his final discharge, may not:

a. Vote in an election, but if execution of sentence is suspended with or without the defendant being placed on probation or he is paroled after commitment to imprisonment, he may vote during the period of the suspension or parole; or

b. Become a candidate for or hold public office.

2. A public office held at the time of sentence is forfeited as of the date of the sentence if the sentence is in this state, or, if the sentence is in another state or in a federal court, as of the date a certification of the sentence from the sentencing court is filed in the office of [secretary of state] who shall receive and file it as a public document. An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section, but if the conviction is reversed the defendant shall be restored to any public office forfeited under this section from the time of the reversal and shall be entitled to the emoluments thereof from the time of the forfeiture.

SECTION 7. RIGHTS RETAINED BY CONVICTED PERSON.) Except as otherwise provided by law, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to hold public office or employment, to vote, to hold, receive, and transfer property, to enter into contracts, to sue and be sued, and to hold offices of private trust in accordance with law.

SECTION 8. CERTIFICATE OF DISCHARGE.) 1. If the sentence was in this state, the order, certificate, or other instrument of discharge, given to a person sentenced for a felony upon his discharge after completion of service of his sentence or after service under probation or parole, shall state that the defendant's rights to vote and to hold any future public office are thereby restored and that he suffers no other disability by virtue of his conviction and sentence except as otherwise provided by law. A copy of the order or other instrument of discharge shall be filed with the clerk of the court of conviction.

2. If the sentence was in another state or in a federal court and the convicted person has similarly been discharged by the appropriate authorities, the [governor] of this state, upon application and proof of the discharge in such form as the [governor] may require, shall issue a certificate stating that such rights have been restored to him under the laws of this state.

3. If another state having a similar statute issues its certificate of discharge to a convicted person stating that the defendant's rights have been restored, the rights of which he was deprived in this state, under section 6, are restored to him in this state.

SECTION 9. SAVINGS PROVISIONS.) Sections 6, 7, and 8 do not:

1. Affect the power of a court, otherwise given by law to impose sentence or to suspend imposition or execution of sentence on any conditions, or to impose conditions of probation, or the power of the parole board to impose conditions of parole.
2. Deprive or restrict the authority and powers of officials of a penal institution or other penal facility, otherwise provided by law, for the administration of the institution or facility or for the control of the conduct and conditions of confinement of a convicted person in their custody.

3. Affect the qualifications or disqualifications otherwise required or imposed by law for a designated office, public or private, or to serve as a juror or to vote or for any designated profession, trust, or position, or for any designated license or privilege conferred by public authority.

4. Affect the rights of others arising out of the conviction or out of the conduct on which the conviction is based and not dependent upon the doctrines of civil death, the loss of civil rights, the forfeiture of estate, or corruption of blood.

5. Affect laws governing rights of inheritance of a murderer from his victim.

ALTERNATIVE 2

STAFF REDRAFT OF SECTIONS 3001 - 3304, FCC SENTENCING

PART C - SENTENCING
CHAPTER 30 - GENERAL SENTENCING PROVISIONS

SECTION 3001. AUTHORIZED SENTENCES.)

1. IN GENERAL. Every person convicted of an offense against this state shall be sentenced in accordance with the provisions of this chapter. The term "court", as used in part C of this title, includes county justices to the extent of their powers as provided elsewhere by law.

2. FELONIES AND MISDEMEANORS. Every person convicted of a felony or a misdemeanor shall be sentenced to one of the following alternatives:

a. Probation, a split sentence or unconditional discharge as authorized by chapter 31;

b. A term of imprisonment as authorized by chapter 32; or

c. A fine as authorized by chapter 33. A fine authorized by chapter 33 may be imposed in addition to a sentence to probation or to a term of imprisonment.

[3. INFRACTIONS. Every person convicted of an infraction shall be sentenced to one of the following alternatives:

a. Probation or unconditional discharge as authorized by chapter 31; or

b. A fine as authorized by chapter 33. A fine authorized by chapter 33 may be imposed in addition to a sentence to probation.]

4. ORGANIZATIONS. Every organization convicted of an offense against this state shall be sentenced to one of the following alternatives:

a. Probation or unconditional discharge as authorized by chapter 31;

b. A fine as authorized by chapter 33; or

c. The special sanction authorized by section 3007.

A fine authorized by chapter 33 or the special sanction authorized by section 3007 or both may be imposed in addition to a sentence to probation.

5. CIVIL PENALTIES. This chapter shall not be construed to deprive the courts of any authority conferred by law to decree a forfeiture of property, suspend, or cancel a license, require forfeiture of or disqualification from office or position, or impose any other civil penalty. An appropriate order exercising such authority may be included as part of the judgment of conviction.

6. This section shall not be construed as prohibiting deferred imposition of sentence under section 12-53-13.

SECTION 3002. CLASSIFICATION OF OFFENSES.)

1. FELONIES. Felonies are classified for the purpose of sentence into the following three categories:

a. Class A felonies;

b. Class B felonies; and

c. Class C felonies.

2. MISDEMEANORS. Misdemeanors are classified for the purpose of sentence into the following two categories:

a. Class A misdemeanors; and

b. Class B misdemeanors.

[3. INFRACTIONS. Infractions are not further classified.]

SECTION 3003. PERSISTENT MISDEMEANANTS.)

1. CRITERION. A defendant convicted of a class A misdemeanor may be sentenced as though convicted of a class C felony if the court is satisfied that there is an exceptional need for rehabilitative or incapacitative measures for the protection of the public, in view of the fact that this is the third conviction against the defendant within five years for class A misdemeanors or more serious crimes.

2. COMPUTATION OF PRIOR CRIMES. The second crime to be counted must have been committed after defendant was sentenced for the first crime to be counted and the misdemeanor for which defendant is being sentenced under this section must have been committed after defendant was sentenced for the second crime to be counted.

3. REASONS. The court shall set forth in detail the reasons for its action whenever the sentence authorized in subsection 1 is imposed.

SECTION 3004. PRESENTENCE COMMITMENT FOR STUDY.) In cases where a term of imprisonment of more than one year is authorized and the court is of the opinion that imprisonment presently appears to be warranted but desires more detailed information as a basis for determining the appropriate sentence than has been provided by the presentence report, the court may commit a convicted defendant to the custody of the _____ _____ for a period not exceeding ninety days. The _____ shall conduct a complete study of the defendant during that time, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the rehabilitative resources or programs which may be available to suit his needs. By the expiration of the period of commitment, or by the expiration of such additional time as the court shall grant, not exceeding a further period of ninety days, the defendant shall be returned to the court for final sentencing and the court shall be provided with a written report of the results of the study, including whatever recommendations the _____ believes will be helpful to a proper resolution of the case. An order committing a defendant under this

section shall be a provisional sentence to imprisonment for the maximum term authorized by chapter 32. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives available under section 3001.

[SECTION 3005. RESENTENCES.)

1. INCREASED SENTENCES. Where a conviction has been set aside on direct review or collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously satisfied, unless the court concludes that a more severe sentence is warranted by conduct of the defendant occurring subsequent to the prior sentence.

2. REASONS. The court shall set forth in detail the reasons for its action whenever a more severe sentence is imposed on resentencing.]

SECTION 3006. CLASSIFICATION OF MISDEMEANORS DEFINED OUTSIDE THIS TITLE.) If the maximum imprisonment authorized for a misdemeanor defined outside this title exceeds thirty days, the offense shall be a class A misdemeanor; if such imprisonment is thirty days or less, a class B misdemeanor; if there is no such imprisonment, an infraction. Notwithstanding the classification provided in this section, the term of imprisonment imposed shall not exceed the maximum authorized by the statute defining the offense, and the offense shall not be deemed a crime if the statute defining the offense provides that it is not a crime.

SECTION 3007. SPECIAL SANCTION FOR ORGANIZATIONS.) When an organization is convicted of an offense, the court may require the organization to give notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise.

CHAPTER 31 - PROBATION AND UNCONDITIONAL DISCHARGE

SECTION 3101. CRITERIA FOR UTILIZING CHAPTER.)

1. ELIGIBILITY. A person who has been convicted of an offense may be sentenced to probation or unconditional discharge as provided in this chapter.

2. CRITERIA. The court shall not impose a sentence of imprisonment upon a person unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public because:

a. There is undue risk that during a period of probation the defendant will commit another crime;

b. The defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment under chapter 33; or

c. A sentence to probation or unconditional discharge will unduly depreciate the seriousness of the defendant's crime, or undermine respect for law.

3. FACTORS TO BE CONSIDERED. The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations called for by subsection 2:

a. The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

b. The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property;

c. The defendant acted under strong provocation;

d. There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

e. The victim of the defendant's conduct induced or facilitated its commission;

f. The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

g. The defendant has no history of prior delinquency or criminal activity, or has lead a law-abiding life for a substantial period of time before the commission of the present offense;

h. The defendant's conduct was the result of circumstances unlikely to recur;

i. The character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;

j. The defendant is particularly likely to respond affirmatively to probationary treatment;

k. The imprisonment of the defendant would entail undue hardship to himself or his dependents;

l. The defendant is elderly or in poor health;

m. The defendant did not abuse a public position of responsibility or trust; and

n. The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise cooperated.

Nothing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

SECTION 3102. INCIDENTS OF PROBATION.)

1. PERIODS. Unless terminated as provided in subsection 2, the periods during which a sentence to probation shall remain conditional and be subject to revocation are:

a. For a felony, five years;

b. For a misdemeanor, two years;

c. For an infraction, one year.

2. EARLY TERMINATION. The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection 1 if warranted by the conduct of the defendant and the ends of justice.

3. FINAL JUDGMENT. Notwithstanding the fact that a sentence to probation can subsequently be modified or revoked, a judgment which includes such a sentence shall constitute a final judgment for all other purposes.

SECTION 3103. CONDITIONS OF PROBATION; REVOCATION.)

1. IN GENERAL. The conditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding

life or to assist him to do so. The court shall provide as an explicit condition of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

2. APPROPRIATE CONDITIONS. When imposing a sentence to probation, the court may, as a condition of the sentence, require that the defendant do any one or more of the following:

a. Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;

b. Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose;

c. Attend or reside in a facility established for the instruction, recreation, or residence of persons on probation;

d. Support his dependents and meet other family responsibilities;

e. Make restitution or reparation to the victim of his conduct for the damage or injury which was sustained, or perform other reasonable assigned work. When restitution or reparation is a condition of the sentence, the court shall fix the amount thereof, which shall not exceed an amount the defendant can or will be able to pay, and shall fix the manner of performance;

f. Pay a fine authorized by chapter 33;

g. Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the court or probation officer;

h. Refrain from excessive use of alcohol, or any use of narcotics or of another dangerous or abusable drug without a prescription;

i. Report to a probation officer at reasonable times as directed by the court or the probation officer;

j. Permit the probation officer to visit him at reasonable times at his home or elsewhere;

k. Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer;

l. Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment;

m. Satisfy any other conditions reasonably related to his rehabilitation.

3. CERTIFICATE. When a defendant is sentenced to probation, he shall be given a certificate explicitly setting forth the conditions on which he is being released.

4. MODIFICATION; REVOCATION. The court may modify or enlarge the conditions of a sentence to probation at any time prior to the expiration or termination of the period for which the sentence remains conditional. If the defendant violates a condition at any time prior to the expiration or termination of the period, the court may continue him on the existing sentence, with or without modifying or enlarging the conditions, or, if such continuation, modification, or enlargement is not appropriate, may impose any other sentence that was available under section 3001 at the time of initial sentencing.

5. TRANSFER TO ANOTHER COURT'S JURISDICTION. Jurisdiction over a probationer may be transferred from the court which imposed the sentence to another court of this state, with the concurrence of both courts. Retransfers of jurisdiction may also occur in the same manner. The court to which jurisdiction has been transferred under this subsection shall be authorized to exercise all powers permissible under this chapter over the defendant.

SECTION 3104. DURATION OF PROBATION.)

1. COMMENCEMENT; MULTIPLE SENTENCE. A period of probation commences on the day it is imposed. Multiple periods, whether imposed at the same time or at different times, shall run concurrently. Periods of probation shall also run concurrently with any federal, state, or local jail, prison or parole term for another offense to which the defendant is or becomes subject during the period.

2. DELAYED ADJUDICATION. The power of the court to revoke a sentence to probation for violation of a condition shall extend for the duration of the period provided

in section 3102 and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

SECTION 3105. UNCONDITIONAL DISCHARGE.) The court may sentence a person convicted of an offense other than a class A or class B felony to an unconditional discharge without imprisonment, fine, conditions, or probationary supervision if it is of the opinion that imposition of conditions upon the defendant's release would not be useful. If a sentence of unconditional discharge is imposed for a crime, the court shall set forth in detail the reasons for its action.

SECTION 3106. SPLIT SENTENCE.) When imposing a sentence to probation for a felony or a class A misdemeanor, the court, in addition to imposing conditions under section 3103, may as part of the sentence commit the defendant to the custody of _____ _____ at whatever time or for such intervals within the period of probation as the court shall determine. The period of commitment shall not exceed six months. Interval commitments shall not be required unless the _____ has certified that appropriate facilities are available. That the defendant submit to commitment imposed under this section shall be deemed a condition of probation for the purposes of subsection 4 of section 3103.

CHAPTER 32 - IMPRISONMENT

SECTION 3201. SENTENCE OF IMPRISONMENT; INCIDENTS.)

1. AUTHORIZED TERMS. The authorized terms of imprisonment are:

   a. For a class A felony, no more than thirty years;

   b. For a class B felony, no more than fifteen years;

   c. For a class C felony, no more than seven years;

   d. For a class A misdemeanor, no more than one year;

   e. For a class B misdemeanor, no more than thirty days.

Such terms shall be administered as provided in part C of this title.

2. COMPONENTS OF MAXIMUM TERM FOR INDEFINITE SENTENCE. A sentence of imprisonment of more than six months shall be an indefinite sentence. The maximum term of every indefinite sentence imposed by the court shall include a prison component and a parole component. The parole component of such maximum term shall be one-third for terms of nine years or less; three years for terms between nine and fifteen years; and five years for terms more than fifteen years; and the prison component shall be the remainder of such maximum term. If, however, the parole component so computed is less than three years, the court may increase it up to three years.

(((3. MINIMUM TERM. An indefinite sentence for a class A or class B felony shall have no minimum term unless by the affirmative action of the court a term is set at no more than one-third of the prison component actually imposed. No other indefinite sentence shall have a minimum term. The court shall not impose a minimum term unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case, such as warrant imposition of a term in the upper range under section 3202. The court shall set forth its reasons in detail. Except in the most extraordinary cases, the court shall obtain both a presentence report and a report from the _____ _____ under section 3004 before imposing a minimum term.

4. MINIMUM TERM; ALTERNATIVE; FURTHER POWERS. In lieu of imposing a minimum term, the court may make a recommendation to the parole board as to when the defendant should first be considered for parole. The court shall not recommend a parole eligibility date which is beyond the time when the court could have fixed a minimum term under subsection 3. The court shall have the authority to reduce an imposed minimum term to time served upon motion of _____ made at any time, upon notice to the United States Attorney.)))

SECTION 3202. UPPER-RANGE IMPRISONMENT FOR DANGEROUS FELONS.)

1. AUTHORIZATION. The maximum term for a felony shall not be set at more than twenty years for a class A felony, ten years for a class B felony, or five years for a class

C felony unless, having regard to the nature and circumstances of the offense and the history and character of the defendant as it relates to that offense, the court is of the opinion that a term in excess of these limits is required for the protection of the public from further criminal conduct by the defendant because the defendant is a dangerous special offender.

2. DEFINITIONS. A defendant is a dangerous special offender for purposes of this section if:

a. He has previously been convicted of two or more felonies committed on occasions different from one another and from such felony and for one or more of such convictions he has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either his release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous felony; or

b. He committed such felony as part of a pattern of criminal conduct which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

c. His mental condition is abnormal, and makes him a serious danger to the safety of others, and he committed such felony as an instance of aggressive behavior with heedless indifference to the consequences of such behavior. An offender shall not be found to be a dangerous special offender under this paragraph unless the court has obtained a report from the _____ _____ under section 3004 which includes the results of a comprehensive psychiatric examination;

d. Such felony was, or he committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of criminal conduct and he did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct; or

e. He manifested his special dangerousness by using a firearm or destructive device in the commission of the offense or flight therefrom.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of subparagraph a. In support of findings under subparagraph b, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of subparagraph b, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 stat. 1602, as amended 80 stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under chapter 57-38. For purposes of subparagraph b, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution, or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension of such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of subparagraphs b and c, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

3. NOTICE. Whenever an attorney charged with the prosecution of a defendant in a court of this state for an alleged felony committed when the defendant was over the age of eighteen years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a

plea of guilty (((or nolo contendere,))) may sign and file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection 1, and setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed, before any plea of guilty (((or nolo contendere))) or verdict or finding of guilt, to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

4. HEARING. Upon any plea of guilty (((or nolo contendere))) or verdict or finding of guilt of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. Except in the most extraordinary cases, the court shall obtain both a presentence report and a report from _____ _____ under section 3004 before holding a hearing under this subsection. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the prosecution at least ten days prior thereto. The court shall permit the prosecution and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In

connection with the hearing, the defendant shall be entitled to the assistance of counsel, and the defendant and the prosecution shall be entitled to compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term as specified in subsection 1. The court shall place in the record its findings including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

SECTION 3203. COMMITMENT TO CORRECTIONAL INSTITUTIONS.)

1. IN GENERAL. A person sentenced to imprisonment for a felony (((or a misdemeanor))) under this chapter or for nonpayment of a fine under chapter 33 shall be committed for the term designated by the court to the custody of _____ which shall specify the place of confinement where the sentence shall be served.

2. ALCOHOLICS OR NARCOTICS ADDICTS. If the court determines after a study by _____ under section 3004 that an offender is an alcoholic or a narcotics addict and that he can be treated, the court as part of its sentence may recommend that he be confined and treated in appropriate licensed facilities for the rehabilitation of alcoholics or narcotics addicts.

SECTION 3204. CONCURRENT AND CONSECUTIVE TERMS OF IMPRISONMENT.)

1. AUTHORITY OF COURT. When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, the sentences shall run concurrently or consecutively as determined by the court. Sentences shall run concurrently unless otherwise specified by the court.

2. MULTIPLE SENTENCES. A defendant may not be sentenced consecutively for more than one offense to the extent:

a. One offense is an included offense of the other;

b. One offense consists only of a conspiracy, attempt, solicitation, or other form of preparation to commit, or facilitation of, the other; or

c. The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

3. MAXIMUM LIMITS WHERE FELONY INVOLVED. The aggregate maximum of consecutive sentences to which a defendant may be subject shall not exceed the maximum term authorized by subsection 1 of section 3201 for the most serious felony involved, except that a defendant being sentenced for two or more class C felonies may be subject to an aggregate maximum not exceeding that authorized by subsection 1 of section 3201 for a class B felony if each class C felony was committed as part of a different course of conduct or each involved a substantially different criminal objective and a defendant being sentenced for two or more class B felonies may be subject to an aggregate maximum not exceeding that authorized by subsection 1 of section 3201 for a class A felony if each class B felony was committed as part of a different course of conduct or each involved a substantially different criminal objective.

4. MAXIMUM LIMITS FOR MISDEMEANORS. When sentenced only for misdemeanors, a defendant may not be consecutively sentenced to more than one year, except that a defendant being sentenced for two or more class A misdemeanors may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a class C felony if each class A misdemeanor was committed as part of a different course of conduct or each involved a substantially different criminal objective.

5. CRITERIA AND REASONS. The court shall not impose a consecutive sentence unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such term is required because of the exceptional features of the case, for reasons which the court shall set forth in detail.

6. APPLICATION TO MULTIPLE PROCEEDINGS. The limitations provided in this section shall apply not only when a defendant is sentenced at one time for multiple offenses but also when a defendant is sentenced at different times for multiple offenses all of which were committed prior to the imposition of any sentence for any of them.

7. EFFECT OF CONSECUTIVE TERMS. In determining the effect of consecutive sentences and the manner in which they will be served, the parole board shall treat the defendant as though he has been committed for a single term which is the aggregate of the maximum terms validly imposed. Any such term longer than six months shall have the following incidents: The parole component of such single term shall be one-third for terms of nine years or less, except that, if one-third of such single term is less than three years, the parole component shall be the aggregate of the parole components of the terms imposed, but no more than three years; three years for terms between nine and fifteen years; and five years for terms more than fifteen years.

8. EFFECT OF FEDERAL SENTENCES. Subject to any permissible cumulation of sentences explicitly authorized by this section, the _____ shall automatically award credit against the maximum term of any sentence for all time served in a federal penal institution since the commission of the state offense or offenses.

SECTION 3205. CALCULATION OF TERMS OF IMPRISONMENT.)

1. COMMENCEMENT OF SENTENCE. The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the institution at which the sentence is to be served.

2. CREDIT. The _____ shall give credit toward service of the maximum term of a sentence to imprisonment for all time spent in custody as a result of the offense or acts for which the sentence was imposed.

3. OTHER CHARGES. If a defendant is arrested on one charge and later prosecuted on another charge growing out of conduct which occurred prior to his arrest, the _____ _____ shall give credit toward service of the maximum term of any sentence to imprisonment resulting from such prosecution for all time spent in custody under the former charge which has not been credited against another sentence.

CHAPTER 33 - FINES

SECTION 3301. AUTHORIZED FINES.)

1. DOLLAR LIMITS. Except as otherwise provided for an offense defined outside this title, a person who has been convicted of an offense may be sentenced to pay a fine which does not exceed:

a. For a class A or a class B felony, ten thousand dollars;

b. For a class C felony, five thousand dollars;

c. For a class A misdemeanor, one thousand dollars;

d. For a class B misdemeanor or an infraction, five hundred dollars.

2. ALTERNATIVE MEASURE. In lieu of a fine imposed under subsection 1, a person who has been convicted of an offense through which he derived pecuniary gain or by which he caused personal injury or property damage or loss may be sentenced to a fine which does not exceed twice the gain so derived or twice the loss caused to the victim.

SECTION 3302. IMPOSITION OF FINES.)

1. CRITERIA. In determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of the defendant. The court shall not sentence a defendant to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of the offense, or which the court is not satisfied that the defendant can pay in full within a reasonable time. The court shall not sentence the defendant to pay a fine unless:

a. He has derived a pecuniary gain from the offense;

b. He has caused an economic loss to the victim; or

c. The court is of the opinion that a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant.

2. INSTALLMENT OR DELAYED PAYMENTS. When a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time

or in specified installments. If no such provision is made a part of the sentence, the fine shall be payable forthwith.

3. NONPAYMENT. When a defendant is sentenced to pay a fine, the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid. The response of the court to nonpayment shall be determined only after the fine has not been paid, as provided in section 3304.

SECTION 3303. REMISSION OF FINE.) A defendant who has been sentenced to pay a fine and who has paid any part thereof may at any time petition the sentencing court for a remission of the unpaid portion. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine in the amount imposed no longer exist or that it would otherwise be unjust to require payment of the fine in full, the court may remit the unpaid portion in whole or in part or may modify the method of payment.

SECTION 3304. RESPONSE TO NONPAYMENT.)

1. RESPONSE TO DEFAULT. When an individual sentenced to pay a fine defaults in the payment of the fine or in any installment, the court upon the motion of the state's attorney or the attorney general, or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment. The court may issue a warrant of arrest or a summons for his appearance.

2. IMPRISONMENT; CRITERIA. Following an order to show cause under subsection 1, unless the defendant shows that his default was not attributable to an intentional refusal to obey the sentence of the court, or not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the defendant imprisoned for a term not to exceed six months if the fine was imposed for conviction of a felony or thirty days if the fine was imposed for conviction of a misdemeanor or an infraction. The court may provide in its order that payment or satisfaction of the fine at any time will entitle the defendant to his release from such imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.

3. MODIFICATION OF SENTENCE. If it appears that the default in the payment of a fine is excusable under the standards set forth in subsection 2, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the fine or of each installment, or remitting the unpaid portion in whole or in part.

4. ORGANIZATIONS. When a fine is imposed on an organization, it is the duty of the person or persons authorized to make disbursement of the assets of the organization, and their superiors, to pay the fine from assets of the organization. The failure of such persons to do so shall render them subject to imprisonment under subsections 1 and 2.

5. CIVIL PROCESS. Nothing in this section shall be deemed to alter or interfere with employment for collection of fines of any means authorized for the enforcement of money judgments rendered in favor of this state.

The Chairman called on Committee Counsel for an overview of the two alternative drafts on sentencing.

The Committee Counsel noted that Alternative 1 was based on the work of the Committee's Subcommittee on Sentence Classification. The first section of Alternative 1 was split into two alternatives: one representing the offense classification first used by the Committee (wherein the terms "felony" and "misdemeanor" were not used); and the other divided according to the sentence classification contained in the proposed FCC.

The Committee Counsel noted that Section 2 of Alternative 1 provided a wide range of sentencing alternatives including intermittent imprisonment, restitution for damages, restoration of damaged property, appropriate work details, and commitment to appropriate institutions for treatment of alcoholism, drug addiction, or mental disease or defect. That same range of sentences was available for conviction of "violations", with the exception that imprisonment would not be allowed.

Section 2 also provides for presentence commitment of a convicted offender for diagnostic testing with the period limited to 30 days.

Section 3 of Alternative 1 is a provision for an extended sentence when certain findings are made, such as the fact that the offender is dangerous and mentally abnormal. A sentence can be extended under Section 3 up to life imprisonment in the case of a Class A felony, and double the maximum potential imprisonment for the other felonies and Class A misdemeanors.

The Committee Counsel explained that Section 4 provided for a "mandatory parole component" which is a parole component which would be served by an offender who served his total term of imprisonment.

The Committee Counsel noted that Section 5 of Alternative 1 provided for the situation where an offense was defined outside of Title 12 simply as a "felony" or a

"misdemeanor". In that case, the offense would be referred to the adopted sentence classification plan and would be either a Class C felony or a Class A misdemeanor as the case may be.

In addition, the Committee Counsel stated that under Section 5 the sentencing alternatives available to the court and the mandatory parole component provision would be available for handling offenders convicted of crimes defined outside of Title 12.

The Committee Counsel noted that Sections 6 through 9 of Alternative 1 provided a general statement concerning disqualifications resulting from conviction. Section 6 indicates that a person sentenced for a felony, from the time of sentence until final discharge, was prohibited from voting (unless the sentence was suspended, or he was paroled); becoming a candidate for or holding public office; or completing a term of public office to which he was appointed or elected prior to the date of sentence. In addition, Section 8 provides for automatic issuance of a certificate of discharge upon completion of a sentence, which is an opposite provision from current North Dakota law. Current North Dakota law requires a former convict to affirmatively seek restoration of his civil rights from the Pardon Board. The Committee Counsel noted that Section 76 of the State Constitution did not mandate that the Board of Pardons retain jurisdiction over restoration of civil rights.

The Committee Counsel noted that Alternative 2 is based on the provisions of Sections 3001 through 3304 of the FCC. Alternative 2 is broken into four chapters dealing with sentencing in general; use of probation, unconditional discharge, and split sentence; sentences to imprisonment; and criteria for the use of fines.

Section 3001 of Alternative 2 sets forth the general range of sentences available for felonies, misdemeanors, and "infractions". They include probation, a split sentence, unconditional discharge, a fine, and, in the case of felonies or misdemeanors, a term of imprisonment.

The classification of offenses is the same as that which the Committee has been working with since late spring of this year. In addition, the length of potential sentence for that offense classification is the same.

Section 3004 authorizes a presentence commitment for study, and differs from Alternative 1 in that the period of commitment may be initially for 90 days, with an additional period of up to 90 more days upon order of the Court.

Section 3005 authorizes resentences after a conviction has been set aside which may be more severe than the prior sentence, with credit given for that portion of the prior sentence served. The Committee Counsel noted that Alternative 1 contained no such provision, nor is such a provision contained in present North Dakota statutory law.

Section 3007 of Alternative 2 provides a special criminal sanction for organizations which would require "organizations" to give notice of a conviction to the person or class of persons who seem to have been harmed by the offense committed by the organization. The notice is to be given by mail or by appropriate advertising media.

The Committee Counsel stated that Chapter 31, comprising Sections 3101 through 3106, set forth the criteria for utilizing the sentences to probation, a split sentence of imprisonment, or "unconditional discharge". Subsection 2 of Section 3201 sets forth the sentencing philosophy that probation should be the first sentence considered, with

imprisonment not being imposed unless there is great risk that the defendant will commit another crime during his probationary period; or that he is in need of correctional treatment which can only be provided in an incarcerative institution; or that sentencing him to probation would unduly depreciate the seriousness of his crime, or undermine respect for the law.

The Committee Counsel stated that Section 3202 placed time limits on periods of probation by providing that they should only be revocable for a period of five years in the case of a felony, for a period of two years in the case of a misdemeanor, and for a period of one year in the case of an infraction. Of course, the court retains authority to terminate a probationary period earlier than those dates.

Section 3103 sets forth certain conditions which the court may assign as the basis for granting probation. The court must provide as an explicit condition of every sentence that the defendant not commit another offense during his probationary period. In addition, Section 3103 provides that a defendant sentenced to probation is to be given a certificate which explicitly sets forth the conditions of his release.

Section 3106 authorizes the "split sentence" which means that the defendant could be sentenced to probation with intermittent periods of imprisonment. For instance, a defendant could be sentenced to probation so that he could work at his normal employment during the week, but spend the weekends in an incarcerative facility.

Chapter 32 of Alternative 2, comprising Section 3201 through 3205 has to do with sentencing a defendant to a term of imprisonment. The Committee Counsel noted that the provisions of Section 3201 relating to minimum terms had been deleted from the draft since the Committee had previously indicated that no provision should be made for minimum terms.

Section 3202 deals with upper range imprisonment for dangerous special offenders, and is based at setting the maximum punishment for felonies at 20 years for a Class A felony, 10 years for a Class B felony, and 5 years for a Class C felony. The upper range punishment authorized would thereafter be set within the limits established by Section 3201, which are familiar to the Committee.

Subsection 3 of Section 3202 would require a prosecutor to give notice of the fact that he was seeking sentencing of a particular offender under the extended sentence provision, and a separate hearing would be held to determine whether that type of sentence should be used.

Subsection 2 of Section 3203 allows the court to recommend confinement for treatment of those offenders who are either alcoholics or narcotics addicts.

Section 3205 provides that sentences of imprisonment are to commence from the date when the person is received at the institution in which the sentence is to be served, and the offender is to be given credit for all time previously spent in custody as a result of arrest for the offense for which the sentence was imposed. This is contrary to current North Dakota law which provides that a sentence is to commence on the date of the judgment.

The Committee Counsel also noted that Subsection 2 of Section 3201 provided for a parole component for every term of imprisonment exceeding six months.

This parole component differs from the mandatory parole component contained in Alternative 1 in that it would apply to every term of imprisonment. For terms of nine years or less, the parole component would be one-third, but could be increased to three years if

it computed at less than that. For terms of from nine to 15 years, the parole component would be three years; and for terms in excess of 15 years, the parole component would be five years.

Committee Counsel said that Chapter 33, comprising Sections 3301 through 3304 established criteria for the imposition of a sentence to a fine, as follows: for a Class A or Class B felony, $10,000; for a Class C felony, $5,000; for a Class A misdemeanor, $1,000; and for a class B misdemeanor or infraction, $500. In addition, Subsection 2 of Section 3301 provided for an alternative fine based on an amount equal to twice the pecuniary gain derived by the offender, or twice the loss caused to a victim.

Section 3302 provides that a defendant shall not be sentenced to pay a fine unless he has deprived pecuniary gain from the offense, has caused economic loss to the victim, or the court believes that a fine is uniquely adapted to correction of the defendant or deterrence of future occurrences of the offense.

The court is not allowed to sentence in the alternative, that is, to pay a fine or, in lieu thereof, to be incarcerated. And, in fact, may not jail for failure to pay a fine imposed unless the failure to pay is willful. The court can provide that a fine can be paid in installments, or that payment can be delayed.

If the fine is imposed as a result of a finding of criminal liability of an organization, the persons authorized to disburse the assets of the organization, and their superiors, must pay the fine, and if they do not do so those persons are subject to imprisonment.

Mr. Riedman, State Parole Officer, indicated that he favored the concept of a mandatory parole component as provided in Alternative 1. Mr. Webb stated that he, too, favored the mandatory parole component, and, in addition, liked the fact that Alternative 1 specifically sets out a wide range of sentencing alternatives available to the court.

Professor Lockney inquired as to whether Alternative 2 provides for restitution by the offender to his victim. The Committee Counsel noted that Alternative 2 did not specifically provide for restitution. Professor Lockney stated that he was bothered by the concept of restitution, and thought that it could be abused. He thought that, at the very least, its application should be limited to property damages caused by a criminal act.

The Vice Chairman noted that Alternative 1 seemed to provide a broader base of sentencing alternatives in more general language, while the language of Alternative 2 was more specific and seemed to provide more guidelines for judicial action. Professor Lockney noted that the net result of Committee deliberation on the two alternatives would probably be an amalgamation of provisions from each of them.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY MR. WEBB, AND CARRIED that the Committee use Alternative 1 as the basic sentencing draft, and consider that draft for amendment.

Thereafter, IT WAS MOVED BY MR. WEBB, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that Alternative B, Section 1 of Alternative 1, Sentencing Draft, be used, and that Alternative A, Section 1, be stricken.

Mr. Wefald inquired as to whether the Committee desired to continue the concept of a "violation" offense for which an incarcerative penalty could not be imposed. Representative Murphy stated it was his feeling that if an act rose to the status of a crime, it should be defined as such, with incarceration available as a potential punishment.

Thereafter, IT WAS MOVED BY REPRESENTATIVE MURPHY AND SECONDED BY MR. WEBB to strike all references to "violations" in Alternative 1, Sentencing Classification Plan.

PROFESSOR LOCKNEY MADE A SUBSTITUTE MOTION to change the word "violation" to the word "infraction" where relevant. THIS MOTION DIED for lack of a second.

After further discussion, including notation of the fact that the concept of a "violation" may be useful in revision of those criminal definitions outside of the Code, REPRESENTATIVE MURPHY'S MOTION LOST.

Mr. Wefald noted that in many instances the "violation" classification would be used in relation to regulatory offenses. In that case, he wondered whether a $500 fine would be adequate, since a regulatory offense would likely be committed by a corporate entity.

After further discussion, IT WAS MOVED BY MR. WOLF, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the words "or as otherwise provided by the statute defining the offense" be added after the word "imposed" in Line 15 of Section 1 of Alternative 1.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WOLF for the purposes of discussion to strike all reference to "restitution" throughout Alternative 1.

Professor Lockney explained his motion on the basis that restitution is better left to recovery through civil action, rather than through imposing an added burden on criminal procedures. He stated that if the defendant has the assets, the victim should be left to his civil remedies, as restitution is essentially a vindictive process and would not seem to be appropriate in the criminal law. In addition, Professor Lockney noted that restitution could cause many problems where damages were not specifically liquidated.

Mr. Webb stated that he disagreed, and felt that the general populace expected the criminal law to help them to recover any financial losses incurred as a result of the offense committed against them. He stated that the criminal law would be a more respected institution if it provided for restitution to victims of crime. Mr. Webb inquired as to whether Alternative 1 provided that a judge could sentence in the alternative, that is could sentence to imprisonment, and suspend the sentence based on the defendant making restitution.

The Committee Counsel noted that Line 24 of Section 2 gave specific authority to a court to suspend all or a portion of any sentence imposed, thus, it could be implied that a judge could sentence in the alternative.

Mr. Wolf noted that in some situations, other creditors of the defendant may get at his assets before a criminal complainant can get restitution from the defendant.

Mr. Hill noted that the judges of the State are probably evenly split concerning the question of their authority to order restitution, and those that favored restitution would probably appreciate a specific statutory statement of their authority. Mr. Ziegler stated that it was the feeling of the populace of the State that criminal offenders should not be allowed to keep the fruits of their crime, and therefore he felt that restitution would be favored. Mr. Riedman noted that the Parole Board often authorizes work release for persons incarcerated in the Penitentiary so that they can earn funds with which to make restitution to their victims.

Professor Lockney noted that what the Committee was talking about was a failure on the part of civil procedure to provide speedy redress to criminal victims. He asked why the criminal laws should be burdened with the restitution system simply because civil actions are slow and expensive. He thought the better solution would be to speed up civil procedures.

MR. WOLF MADE A SUBSTITUTE MOTION that the staff be directed to redraft Subparagraph e of Subsections 1 and 2 of Section 2 of Alternative 1 to allow a separate hearing on the question of the amount of appropriate restitution, and to give restitution in criminal cases the status of civil judgments for the purpose of enforcement. After discussion, MR. WOLF WITHDREW HIS MOTION, and thereafter, PROFESSOR LOCKNEY'S MOTION FAILED.

IT WAS MOVED BY MR. WOLF AND SECONDED BY PROFESSOR LOCKNEY for the purpose of discussion that the staff be directed to draw language for implementing restitution, which language would include provision for a separate hearing on the amount of restitution which is reasonable in the case, and to provide that an order for restitution is equivalent to a civil judgment for purposes of execution and collection.

Professor Lockney inquired as to what would happen in a County Court with Increased Jurisdiction if the amount of restitution ordered exceeded the jurisdiction of the county court in relation to the amounts which could be claimed in a civil action. Professor Lockney stated that if restitution is to be provided for, the State should consider creating a fund for payment on behalf of criminal defendants who do not have any assets. This fund could be similar to the present unsatisfied judgment fund.

Representative Murphy inquired if it were not a fact that when the defendant still has the proceeds of his crime, the courts see that those proceeds get back to the victims. Mr. Webb pointed out that this is not always the case, as other creditors often acquire priority against those assets. Thereafter, MR. WOLF'S MOTION regarding redrafting concerning restitution CARRIED.

Representative Stone stated she thought that provision for criminal restitution was a step forward, and that the phrase "crime does not pay" must be made to come true. Mr. Webb stated he believed that provision for restitution would make the criminal law more credible.

Mr. Webb then raised questions concerning the sentencing alternative relating to assignment to an "appropriate work detail". He inquired as to whether workmen's compensation would cover convicts who were assigned to work details. In addition, he wondered what other liabilities might accrue should a prisoner be injured while on a work detail sentence. He noted that judges in his area would like to use "work detail" sentences, but these type of questions had forestalled them.

IT WAS MOVED BY MR. WEBB, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the staff draft appropriate provisions in the overall sentencing provisions dealing with the sentence to an "appropriate work detail" taking into account the comments at this meeting.

The Committee then discussed Subsection 4 of Section 2 of Alternative 1 providing for a presentence commitment for diagnostic testing. Professor Lockney inquired as to who would make payment if the commitment for diagnostic testing were to a private institution. He noted that the Governor's Conference on Corrections had recommended such presentence diagnostic testing, and had further recommended that it be at public expense. Mr. Wolf suggested that responsibility for payment, on behalf of indigents, should be placed on the Social Service Board to the extent that that Board had moneys available for payment.

Professor Lockney felt that the Committee should provide that the payment be at public expense as otherwise provided by law so that the problems raised by this section could be specifically brought to the attention of the Legislature, and the Legislature could make appropriate provision for payment if it desired.

Mr. Wolf noted that in many cases the defendant's attorney may make arrangements for his client with the Welfare Board prior to sentencing, so that the attorney can recommend a sentence to commitment to an institution with an assurance that it will be paid for if his client is indigent.

Professor Lockney noted that the problem of providing commitment at public expense should be given more publicity, and he wondered how that could best be done.

The Committee considered Section 3 of Alternative 1 relating to extended sentences. Professor Lockney stated that he was opposed to Section 3 as it would result in extremely long sentences which seemed to serve no valid purpose. Mr. Webb stated that he was in favor of the concept of Section 3, but had questions concerning the procedures to be used. For instance, if an offender were to be given an extended sentence under Subparagraphs c or d of Subsection 1 of Section 3, would the prosecutor have to prove again, in essence, the previous offenses.

Mr. Hill noted that the equivalent provisions of Alternative 2 provide that the long-term sentence is up to the maximum stated in the statutes and limits normal sentences to a lesser term, rather than providing for a doubling of the stated maximum sentences. He said he believed that the provisions of Section 3 of Alternative 1 resulted in sentences too long to be justified on the basis of utility.

The Committee then discussed Section 3202 of Alternative 2 which was the "extended sentence provision" of the FCC. The Committee Counsel noted that it would be possible to move Section 3202 from Alternative 2 to Alternative 1 without requiring other major changes in the text of Alternative 1.

IT WAS MOVED BY MR. WOLF, SECONDED BY MR. WEBB AND REPRESENTATIVE STONE, AND CARRIED that the provisions of Section 3202 of Alternative 2 be substituted for or be inserted in supplementation of Section 3 of Alternative 1.

The Committee then discussed the desirability of providing for appellate review of sentences. Mr. Wolf noted that, since extended sentences were now to be provided for by statute, appellate review of sentences imposed was of major importance. He stated that such review is only allowed at present to determine that the sentence actually imposed was within the maximum limits allowable by law. He said that he believed a defendant should have an opportunity to seek appellate review only of the sentence if that were desired, and that the scope of appellate review could consider the propriety of a sentence imposed even though it is within the maximum limits allowable by law.

IT WAS MOVED BY MR. WOLF AND SECONDED BY PROFESSOR LOCKNEY that the Committee go on record and notify those persons or organizations considered appropriate that the Committee favored the concept of appellate review of sentences, especially, should the Legislature approve provisions allowing for extended sentences for "dangerous special offenders".

Mr. Hill stated that the Committee could take action to ensure appellate review of sentences on its own motion. Mr. Wolf noted that the Board of Pardons can also review the actual sentence imposed, but that that review would probably not be as procedurally sound as a formal appellate review would be. Thereafter, MR. WOLF'S MOTION CARRIED. Mr. Webb stated that he had objections to the provisions of Section 3202 contained in

Subsection 3 as those provisions related to the fact that the prosecutor could not make an issue of the fact that the offender was a dangerous special offender upon trial of the offense. Mr. Webb stated that many times in his oral arguments to the jury he would categorize an offender as dangerous, and he did not want to run the risk of having a mistrial declared for that reason. The Committee Counsel suggested that the issue could be resolved by providing that the information not to be brought before the trier of fact be limited to information giving notice that the prosecutor is seeking to have the defendant sentenced as a dangerous special offender. Mr. Webb stated that he would be satisfied with that resolution. Thereafter, the Committee recessed for lunch at 11:55 a.m. and reconvened at 1:00 p.m.

The Committee discussed Section 4 of Alternative 1 relating to provision for mandatory parole components. Professor Lockney inquired as to why the parole component had to be mandatory. He felt that the parole component should be provided, but that the Parole Board be allowed to terminate it if circumstances warranted.

The Committee discussed the parole component at length, and it was noted that the parole component would only apply to an offender who had served the whole of his sentence of imprisonment. There was some feeling among Committee members that a mandatory parole component should also apply to persons who are paroled prior to completion of their sentence of imprisonment. Mr. Hill suggested that there may be constitutional objections to an automatic extension of parole service time for a person who served his whole term of imprisonment. Mr. Riedman stated that he was in favor of the concept of a mandatory parole component, but agreed that it should be terminable upon decision by the Parole Board that termination is warranted.

The Committee discussed the fact that the sentencing alternatives available under Alternative 1 with inclusion of Section 3202 from Alternative 2 did not include provision for a life sentence.

Mr. Webb stated that while he believed the provisions of Section 3202 were needed in reference to procedure, the Committee's final proposal regarding sentencing should contain provision for life sentences, as well as provision for doubling the sentences imposed for the Class B and Class C felonies.

IT WAS MOVED BY MR. WEBB AND SECONDED BY REPRESENTATIVE MURPHY that the provisions of Subsection 2 of Section 3 of Alternative 1 be included in the redrafted sentencing provisions along with the provisions of Section 3202 limiting the normal maximum sentences to 20 years, 10 years, and 5 years for the three grades of felonies. Professor Lockney noted that the net result of that motion would be that longer sentences would be authorized in North Dakota than is the case in almost all other jurisdictions. Mr. Webb stated that that was true, but only in those cases where the prosecutor made a special effort to have the defendant sentenced as a dangerous special offender. Thereafter, MR. WEBB'S MOTION CARRIED.

The Committee again discussed Section 4 relating to the mandatory parole component, and IT WAS MOVED BY PROFESSOR LOCKNEY that the staff be directed to redraft Section 4 to give the Parole Board discretion to apply and terminate the parole component, and to make the parole component possibility apply to situations in which the offender had served less than his full sentence to imprisonment.

PROFESSOR LOCKNEY'S MOTION DID NOT RECEIVE A SECOND, and after further discussion, IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WEBB that the staff be directed to redraft Section 4 to provide a mandatory parole component, but to

allow the parole period to be terminated at the discretion of the Parole Board when circumstances warrant it. Representative Murphy suggested the possibility that the parole component should be five years in every case. Mr. Riedman noted that this would authorize the exercise of power on the part of the Parole Board which it does not now have. He stated that the Parole Board cannot terminate a parole period now, but can only recommend termination to the Board of Pardons which does have that authority. He stated, however, that he favored placing authority for termination of the mandatory parole component in the Parole Board. Thereafter, PROFESSOR LOCKNEY'S MOTION CARRIED.

The Committee discussed Section 5 which makes provision for referring offenses defined outside of Title 12 to the offense classification plan established in the Committee's revision of Title 12. The Committee made no objection or comment concerning this section.

The Committee discussed Sections 6 through 9 of Alternative 1 relating to disqualifications attendant upon criminal conviction, and restoration of rights lost as a result of criminal conviction. The consensus of the Committee was that it was desirable to provide for automatic restoration of rights upon completion of a sentence. Mr. Riedman noted that, in many instances, offenders who had completed their sentences were not aware of the fact that they needed to make application for restoration of their rights, and consequently did not do so. He noted that the Parole Board had many files open which were open simply because the person named in the file had never sought to have his lost rights restored.

Mr. Hill suggested that there was a possibility that Section 8, providing for an automatic certification of discharge, might be unconstitutional under Section 127 of the Constitution of North Dakota, on the basis that that section required an affirmative legislative restoration to civil rights. After discussion, it was the consensus of the Committee that a general legislative statement that the responsible authority should issue a certificate of restoration of rights was sufficient compliance with Section 127.

The Committee then discussed the requirement of issuance of a certificate of discharge containing a restoration of rights. It was noted that no agency or individual was specifically indicated as being responsible for issuance of such certificate. The Committee Counsel suggested that a sentence be inserted in Line 7 of Section 8 after the word "law" reading essentially as follows: "The parole board, or its designated agent, shall issue the certificate of discharge upon completion of the sentence."

IT WAS MOVED BY MR. WEBB, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that Section 8 of Alternative 1 be amended to add after the word "law" in Line 7 the following sentence: "The parole board, or its designated agent, shall issue the certificate of discharge upon completion of the sentence."

The Committee then discussed the desirability of inserting the words "parole board" in lieu of the bracketed word "governor" in Subsection 2 of Section 8, and IT WAS MOVED BY MR. WEBB that this be done. Since there was Committee consensus on this point, the Chairman directed the staff to make that change. The Committee then discussed the meaning and necessity for the phrase "corruption of blood" contained in Line 3 of Section 7, Alternative 1, and Line 18 of Section 9. It was determined that the phrase did not have any potential for harm, and thus, a motion to delete it was not made.

Thereafter, the Committee discussed its previous tentative decision to repeal the so called "good time" statutes. Mr. Riedman noted that the "good time" statutes were a very confusing body of law, and that the question of "good time" could be more appropriately

handled by administrative decision of the Parole Board. Thereafter, IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the bill draft embodying the code revision proposed by the Committee contain a repealer of the "good time" statutes.

The Committee again discussed Subsection 4 of Section 2, Alternative 1, relating to presentence diagnostic testing. IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the staff be directed to add appropriate language to Subsection 4 allowing for a further period of commitment, not to exceed 30 days, for diagnostic testing upon order of the courts.

The Committee Counsel noted that Section 3007 of Alternative 2 provided a special sanction against "organizations", and that Alternative 1 contained no equivalent provision. IT WAS THEN MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WEBB, AND CARRIED that the language of Section 3007 of Alternative 2 or its substance, be moved to Alternative 1.

The Committee discussed the fact that under either sentencing alternative, probation would be a sentence rather than the result of suspension of sentence. However, it was noted that a deferred imposition of sentence would still result in placing the offender on probation without specifically sentencing him to probation. Mr. Webb said he felt that causing probation to be a "sentence" would be more judicially acceptable than is the present system.

The Committee discussed Section 3101 of Alternative 2 which sets forth criteria for the utilization of probation as a "sentence". Professor Lockney stated that he would favor inclusion of Section 3101 in Alternative 1 . Thereafter, IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WEBB for the purpose of discussion that Section 3101 be inserted, with necessary drafting changes, in Alternative 1.

Mr. Webb then stated that he objected to Subsection 2 of Section 3101 because of the philosophy stated therein, i.e., that sentences of imprisonment should not be imposed, but rather that there should be a presumption in favor of sentencing to probation. The Chairman stated that Subsection 2 seems to provide the criminal offender another method for attacking his sentence, because it would require the court to satisfy all of the requirements set forth in that subsection before a sentence of imprisonment could be imposed.

Mr. Webb stated that Subsection 2 would create a presumption in favor of a sentence to probation, and would, in effect, chill the use by the sentencing judge of any of the other sentencing alternatives.

Professor Lockney stated he felt that Subsection 2 did not at all limit the discretion of sentencing judges, and that, were they so inclined, sentencing judges could prepare a stamp which they could use to indicate their finding that they were satisfied that imprisonment was the appropriate sentence. He stated the value of Subsection 2 was that it might possibly serve to reverse the present sentencing philosophy held by many judges to the effect that a sentence of imprisonment is required, and reasons need be found for placing a defendant on probation. Professor Lockney stated that relevant statistics indicate that imprisonment is not generally working as a means of rehabilitation, that it was an expensive means of disposition of an offender, and that probation was a relatively inexpensive means of dealing with an offender.

Thereafter, Mr. Webb MADE A SUBSTITUTE MOTION which was SECONDED BY REPRESENTATIVE STONE that the essence of Subsection 3 of Section 3101 be incorporated in Alternative 1.

Professor Lockney then read the following from Page 1268 of Volume II of the Working Papers in favor of his position:

> "The purpose of this provision (Subsection 2 of Section 3101) is to suggest for the proposed Criminal Code, for the guidance of those who will impose sentence, that probation, or some other form of nonincarcerative sentence, should presumptively be the appropriate disposition unless there are affirmative reasons specifically indicating that a prison term is necessary. The ABA Report has recommended the same thing, though it broadened the principle to suggest that every sentence should involve the least amount of incapacitation of the offender as is compatible with other, necessarily overriding, interests of the public.
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> "There are two major reasons for this attitude. The first is a conviction, supported by the limited empirical research that has been conducted on the subject and by the experience of many federal, and state judges, that probation is likely to be the most effective form of sentence in a great many cases--perhaps the majority--because it does not involve the complete dislocation of the offender from the community in which he will ultimately have to learn to live. All but a very few offenders will return to the open society, whatever their sentence, and it clearly should be one of the most important objectives of the sentence to assure [to] the greatest extent possible that the return will not be accompanied by renewal of a criminal career. Of course, it may be that the best thing for the offender, as well as for the public in a particular case, would be to reorient the offender in a different community or incapacitate him for a substantial period of time until he no longer presents a great danger to the safety of the public. It is precisely factors such as these which the quoted section of the Model Penal Code (Section 7.01) would recognize as legitimate reasons for the imposition of a prison sentence. But the important point is that in the absence of such factors--that is, where the defendant does not pose a significant public danger, where there is no particular rehabilitative reason for sentencing him to prison, or where a sentence to probation will not unduly depreciate the seriousness of the offense--it would seem clear that a sentence to probation should be used. The second reason for the attitude which is shared by the Model Penal Code and the ABA Report is economic. Probation as presently administered in the federal system costs less than one-tenth of the costs of institutionalization. The annual costs in fiscal 1967 averaged $285 to supervise an offender on probation as opposed to $3,100 for his institutionalization. These figures do not include the substantial cost of construction of prison facilities or the more intangible costs represented by the earnings which an inmate could produce for his family if he were on probation, the welfare payments made to his family could be eliminated, and so on."

Mr. Webb reiterated the fact that Subsection 2 of Section 3101 did, and was intended to, create a presumption in favor of a sentence to probation, and could well result in an unjustifiable hampering of a court's sentencing discretion. Thereafter, MR. WEBB'S SUBSTITUTE MOTION CARRIED.

The Chairman inquired as to the Committee's desires concerning Section 3103 which enumerates certain conditions which can be attached to a sentence to probation. Professor Lockney stated he felt that such a listing was useful, as long as it was made entirely clear that the list was not exclusive, and that use of any one or more of the conditions on the

list was a matter of judicial discretion. Mr. Riedman noted that the conditions should include one allowing parole officers to search parolees. He indicated that such a provision is in use in North Dakota, and has been upheld in at least one North Dakota District Court.

Mr. Wefald noted that Section 3103 provided for issuance of a certificate specifically setting forth the conditions under which probation is granted. He inquired as to whether this was a desirable provision. It was the consensus of the Committee that it was, and Mr. Riedman noted that in many cases that certificate is already being given to probationers.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. WEBB that the provisions of Section 3103 be incorporated in Alternative 1 with staff amendments to provide language assuring that the sentencing judge is not limited to the conditions listed, and has discretion concerning their use.

IT WAS THEN MOVED BY MR. WEBB, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the previous motion be amended to provide for a specific condition allowing parole agents to search parolees as is presently allowed by North Dakota law and Parole Board practice. Thereafter, PROFESSOR LOCKNEY'S MOTION, AS AMENDED, CARRIED.

The Committee then discussed Section 3102 which provides that sentences to probation are to be subject to revocation for limited periods, which are: In the case of a felony, five years; in the case of a misdemeanor, two years; and in the case of an infraction, one year. IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that Section 3102 be incorporated into Alternative 1, with the word "violation" substituted for the word "infraction".

The Committee then discussed Section 3104 which makes policy statements regarding multiple sentences and concurrent and consecutive sentences. Professor Lockney noted that some statutory statement regarding presumptions in favor of concurrent sentences should be in the Committee's draft, but that Section 3104 and Section 3204 represented a more complex statutory statement than was necessary. The Committee Counsel noted that the final draft relating to imprisonment would contain a staff revision setting forth a statement concerning the use of either concurrent or consecutive sentences, and in relation to multiple sentences. That material, as it appears in the final draft, would be underlined to alert Committee members that it was material not previously considered by them.

The Committee Counsel said that the staff would make every effort to have the final draft in complete form prior to the next meeting of the Committee, and that all materials in that draft not previously considered by the Committee would be underlined so that the Committee would be alerted to the fact that they had not previously considered that material.

There being no further business before the Committee, the Chairman declared the meeting adjourned, subject to the call of the Chair, at 4:35 p.m. on Friday, August 25, 1972.

John A. Graham
Assistant Director

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

COMMITTEE ON JUDICIARY "B"

Meeting of September 21-22, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:35 a.m. on Thursday, September 21, 1972.

Legislative members present:	Senator Freed Representatives Atkinson, Hillieboe, Kieffer, Stone
Legislative members absent:	Senator Page Representative Murphy
Citizen members present:	Judge Erickstad, Judge Pearce, Mr. Webb, Mr. Wolf, Professor Lockney
Citizen members absent:	Judge Lynch, Judge Smith
Also present:	Charles Travis; Vance Hill; Bob Wefald; Irv Riedman; Richard Gross; Conrad Ziegler; Linda Catalano; Lucy Werner; Jerry Engelman; Maury Thompson; Stephen McLean; Robert Lee; Russell J. Myhre; John C. Hart; Jonathon Garaas; Murray G. Sagsveen

IT WAS MOVED BY REPRESENTATIVE ATKINSON, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the Committee dispense with the reading of the minutes of the last meeting, and that those minutes be approved as mailed.

The Chairman called on the Committee Counsel for an overview of the second draft of the sentencing code which reads as follows:

SECTION 1.) Offenses are divided into six classes, which are denominated and subject to maximum penalties, as follows:

1. Class A felony, for which a maximum penalty of twenty years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.
2. Class B felony, for which a maximum penalty of ten years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.

3. Class C felony, for which a maximum penalty of five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.

4. Class A misdemeanor, for which a maximum penalty of one year's imprisonment, a fine of one thousand dollars, or both, may be imposed.

5. Class B misdemeanor, for which a maximum penalty of thirty days' imprisonment, a fine of five hundred dollars, or both, may be imposed.

6. Violation, for which a maximum penalty of a fine of five hundred dollars may be imposed or such fine as may otherwise be provided by the statute defining the offense.

This section shall not be construed to forbid sentencing under section 8, relating to extended sentences.

SECTION 2.) 1. Every person convicted of an offense, other than a violation, shall be sentenced to one or a combination of the following alternatives:

a. Deferred imposition of sentence.

b. Probation.

c. A term of imprisonment, including intermittent imprisonment.

d. A fine.

e. Restitution for damages resulting from the commission of the offense.

f. Restoration of damaged property, or other appropriate work detail.

g. Commitment to an appropriate licensed public or private institution for treatment of alcoholism, drug addiction, or mental disease or defect.

Sentences imposed under this subsection shall not exceed in duration the maximum sentences provided by section 1, section 8, or as provided specifically in a statute defining an offense. This subsection shall not be construed as not permitting the unconditional discharge of an offender following conviction. Sentences under subparagraphs e, f, or g shall be imposed in the manner provided in section 7.

2. Every person convicted of a violation may have imposed upon him one or a combination of the following alternative dispositions:

a. Unconditional discharge.

b. Probation.

c. Deferred imposition of sentence.

d. A fine.

e. Restitution for damages resulting from commission of the offense.

f. An appropriate work detail.

Sentences under subparagraphs e and f shall be imposed in accordance with section 7.

3. A court may, at any time prior to the time custody of a convicted offender is transferred to a penal institution or institution for treatment, suspend all or a portion of any sentence imposed pursuant to this section.

4. A court may, prior to imposition of sentence, order the convicted offender committed to an appropriate licensed public or private institution for diagnostic testing for such period of time as may be necessary, but not to exceed thirty days. The court may, by subsequent order, extend the period of commitment for not to exceed thirty additional days. The court may also order such diagnostic testing without ordering commitment to an institution. Validity of a sentence shall not be challenged on the ground that diagnostic testing was not performed pursuant to this subsection. If an offender is sentenced to imprisonment following a commitment for diagnostic testing, the number of days he was confined to an institution shall be credited against his term of imprisonment.

5. All sentences imposed shall be accompanied by a written statement by the court setting forth the reasons for imposing the particular sentence. The statement shall become part of the record of the case.

SECTION 3. SPECIAL SANCTION FOR ORGANIZATIONS.) When an organization is convicted of an offense, the court may, in addition to any other sentence which may

be imposed, require the organization to give notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise.

SECTION 4. FACTORS TO BE CONSIDERED IN SENTENCING DECISION.) The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment:

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

12. The defendant is elderly or in poor health.

13. The defendant did not abuse a public position of responsibility or trust.

14. The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise cooperated.

Nothing herein shall be deemed to require explicit reference to these factors in a pre-sentence report or by the court at sentencing.

SECTION 5. INCIDENTS OF PROBATION.)

1. PERIODS. Unless terminated as provided in subsection 2, the periods during which a sentence to probation shall remain conditional and be subject to revocation are:

a. For a felony, five years;

b. For a misdemeanor, two years; and

c. For an infraction, one year.

2. EARLY TERMINATION. The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection 1 if warranted by the conduct of the defendant and the ends of justice.

3. FINAL JUDGMENT. Notwithstanding the fact that a sentence to probation can subsequently be modified or revoked, a judgment which includes such a sentence shall constitute a final judgment for all other purposes.

SECTION 6. CONDITIONS OF PROBATION; REVOCATION.)

1. IN GENERAL. The conditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life or to assist him to do so. The court shall provide as an explicit condition of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

2. APPROPRIATE CONDITIONS. When imposing a sentence to probation, the court may impose such conditions as it deems appropriate, and may include any one or more of the following:

a. Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;

b. Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose;

c. Attend or reside in a facility established for the instruction, recreation, or residence of persons on probation;

d. Support his dependents and meet other family responsibilities;

e. Make restitution or reparation to the victim of his conduct for the damage or injury which was sustained, or perform other reasonable assigned work. When restitution, reparation, or assigned work is a condition of the sentence, the court shall proceed as provided in section 7;

f. Pay a fine;

g. Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the court or probation officer;

h. Refrain from excessive use of alcohol, or any use of narcotics or of another dangerous or abusable drug without a prescription;

i. Permit the probation officer to visit him at reasonable times at his home or elsewhere;

j. Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer;

k. Answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment;

l. Report to a probation officer at reasonable times as directed by the court or the probation officer;

m. Submit to a medical examination or other reasonable testing for the purpose of determining his use of narcotics, marijuana, or other controlled substance whenever required by a probation officer;

n. Refrain from associating with known users or traffickers in narcotics, marijuana, or other controlled substances; and

o. Submit his person, place of residence, or vehicle to search and seizure by a probation officer at any time of the day or night, with or without a search warrant.

3. CERTIFICATE. When a defendant is sentenced to probation, he shall be given a certificate explicitly setting forth the conditions on which he is being released.

4. MODIFICATION; REVOCATION. The court may, upon notice to the probationer, modify or enlarge the conditions of a sentence to probation at any time prior to the expiration or termination of the period for which the sentence remains conditional. If the defendant violates a condition at any time prior to the expiration or termination of the period, the court may continue him on the existing sentence, with or without modifying or enlarging the conditions, or, if such continuation, modification, or enlargement is not appropriate, may impose any other sentence that was available under section 2 at the time of initial sentencing.

5. TRANSFER TO ANOTHER COURT'S JURISDICTION. Jurisdiction over a probationer may be transferred from the court which imposed the sentence to another court of this state, with the concurrence of both courts. Retransfers of jurisdiction may also occur in the same manner. The court to which jurisdiction has been transferred under this subsection shall be authorized to exercise all powers permissible under this chapter over the defendant.

SECTION 7.) 1. Prior to imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the defendant. At or following the hearing, the court shall make determinations as to:

a. The reasonable damages sustained by the victim or victims of the criminal offense, which damages shall be limited to fruits of the criminal

offense and expenses actually incurred, or to be reasonably incurred in the future, as a direct result of the defendant's criminal action;

b. The ability of the defendant to restore the fruits of the criminal action or to pay monetary reparations, or to otherwise take action to restore the victim's property; and

c. The likelihood that attaching a condition relating to restitution or reparation will serve a valid rehabilitational purpose in the case of the particular offender considered.

The court shall fix the amount of restitution or reparation, which shall not exceed an amount the defendant can or will be able to pay, and shall fix the manner of performance of any condition or conditions of probation established pursuant to this subsection.

[An order that a defendant make restitution or reparation as a condition of probation may, if the court so directs, be enforced by the person entitled to the restitution or reparation in the same manner as civil judgments rendered by the courts of this state may be enforced.]

2. The court may order the defendant to perform reasonable assigned work as a condition of probation, which assigned work need not be related to the offense charged, but must be of a governmental nature and not solely for the benefit of a private individual. The state or any of its political subdivisions shall not be liable for any injuries to the probationer, nor for any injuries caused to third parties as a result of performance of the assigned work. The person responsible for direct supervision of the assigned work shall not be liable for any injuries caused by his actions within the scope of his duties or employment. The immunity from liability granted by this subsection shall be waived to the extent of the dollar limit coverage of any insurance which may be in force and which covers the state or a political subdivision against the type of risk out of which a claim under this subsection may arise.

SECTION 8.) 1. A court may sentence a convicted offender to an extended sentence as a dangerous special offender in accordance with the provisions of this section upon a finding that:

a. The convicted offender is a dangerous, mentally abnormal person. The court shall not make such a finding unless the presentence report, including a psychiatric examination, concludes that the offender's conduct has been characterized by persistent aggressive behavior, and that such behavior makes him a serious danger to other persons.

b. The convicted offender is a professional criminal. The court shall not make such a finding unless the offender is an adult and the presentence report shows that the offender has substantial income or resources derived from criminal activity.

c. The convicted offender is a persistent offender. The court shall not make such a finding unless the offender is an adult and has previously been convicted of two felonies of class B or above, or of one class B felony or above plus two offenses classified below class B felony, committed at different times when the offender was an adult.

d. The offender was convicted of an offense which seriously endangered the life of another person, and the offender had previously been convicted of a similar offense.

e. The offender is especially dangerous because he used a firearm, dangerous weapon, or destructive device in the commission of the offense or during the flight therefrom.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the offender has been pardoned on the ground of innocence shall be disregarded for purposes of subparagraph c. In support of findings under subparagraph b, it may be shown that the offender has had in his own name or under his control income or property not explained as derived from a source other than criminal activity. For purposes of

subparagraph b, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the offender's declared adjusted gross income under chapter 57-38.

2. The extended sentence may be imposed in the following manner:

a. If the offense for which the offender is convicted is a class A felony, the court may impose a sentence up to a maximum of life imprisonment.

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

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

(((d. If the offense for which the offender is convicted is a class A misdemeanor, the court may impose a sentence up to a maximum of imprisonment for two years.)))

3. NOTICE. Whenever an attorney charged with the prosecution of a defendant in a court of this state for an alleged felony committed when the defendant was over the age of eighteen years has reason to believe that the defendant is a dangerous special offender, such attorney, at a reasonable time before trial or acceptance by the court of a plea of guilty, may sign and file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection 2, and setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender be disclosed to the jury, or be disclosed, before any plea of guilty or verdict or finding of guilt, to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record

may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

4. HEARING. Upon any plea of guilty, or verdict or finding of guilt of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. Except in the most extraordinary cases, the court shall obtain a presentence report and may receive a diagnostic testing report under subsection 4 of section 2 before holding a hearing under this subsection. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the prosecution at least (((ten))) five days prior thereto. The court shall permit the prosecution and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant shall be entitled to the assistance of counsel, and the defendant and the prosecution shall be entitled to compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term within the limits specified in subsection 2. The court shall place in the record its findings including

an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

SECTION 9.) If an offender is sentenced to a term of imprisonment for a class A, class B, or class C felony, or a class A misdemeanor, he shall be subject to the following mandatory parole components:

1. For a sentence to a term of years in a range from fifteen years to life imprisonment, the parole component shall be five years.
2. For a sentence to a term of years in a range from three years to fifteen years less one day, the parole component shall be three years.
3. For a sentence to a term in a range from one year to one day less than three years, the parole component shall be one year.

The mandatory parole components set forth in this section shall not be served unless the convicted offender shall serve the whole of the term of imprisonment to which he was sentenced. A mandatory parole component may be terminated by the board of pardons upon recommendation to that effect by the state parole board. Nothing in this section shall prohibit the parole of the offender in accordance with other provisions of law.

SECTION 10.) 1. Separate sentences of commitment imposed on a defendant for two or more offenses constituting a single criminal episode shall run concurrently. Sentences for two or more offenses not constituting a single criminal episode shall run concurrently unless the court specifically orders otherwise. (Source: Model Sentencing Act, section 22.)

2. Unless the court otherwise orders, when a person serving a term of commitment imposed by a court of this state is committed for another offense or offenses, the shorter term or the shorter remaining term shall be merged in the other term. When a person on probation or parole for an offense committed in this state is sentenced for another offense or offenses, the period still to be served on probation or parole shall be merged in any new sentence of commitment or probation.

A court merging sentences under this subsection shall forthwith furnish each of the other courts previously involved and the penal facility in which the defendant is confined under sentence with authenticated copies of its sentence, which shall cite the sentences being merged. A court which imposed a sentence which is merged pursuant to this subsection shall modify such sentence in accordance with the effect of the merger. (Source: Model Sentencing Act, sections 19, 20, and 21.)

3. If sentences for multiple offenses are imposed to run consecutively, the aggregate total term of imprisonment resulting from such consecutive sentences shall not exceed the maximum term allowable under section 8 for the highest classification of offense for which the defendant is being sentenced. (Source: Kentucky Penal Code, section 3460.)

4. MAXIMUM LIMITS FOR MISDEMEANORS. When sentenced only for misdemeanors, a defendant may not be consecutively sentenced to more than one year, except that a defendant being sentenced for two or more class A misdemeanors may be subject to an aggregate maximum not exceeding that authorized by section 1 for a class C felony if each class A misdemeanor was committed as part of a different course of conduct or each involved a substantially different criminal objective.

SECTION 11. RIGHTS LOST.) 1. A person sentenced for a felony to a term of imprisonment, from the time of his sentence until his final discharge, may not:

a. Vote in an election, but if he is paroled after commitment to imprisonment, he may vote during the period of the parole; or

b. Become a candidate for or hold public office.

2. A public office held at the time of sentence is forfeited as of the date of the sentence if the sentence is in this state, or, if the sentence is in another state or in a federal court, as of the date a certification of the sentence from the sentencing court is filed in the office of the secretary of state who shall receive and file it as a public document. An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section, but if the conviction is reversed,

the defendant shall be restored to any public office forfeited under this section from the time of the reversal and shall be entitled to the emoluments thereof from the time of the forfeiture.

SECTION 12. RIGHTS RETAINED BY CONVICTED PERSON.) Except as otherwise provided by law, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to hold public office or employment; to vote; to hold, receive, and transfer property; to enter into contracts; to sue and be sued; and to hold offices of private trust in accordance with law.

SECTION 13. CERTIFICATE OF DISCHARGE.) 1. If the sentence were in this state, the order, certificate, or other instrument of discharge, given to a person sentenced for a felony upon his discharge after completion of service of his sentence or after service under probation or parole, shall state that the defendant's rights to vote and to hold any future public office are thereby restored and that he suffers no other disability by virtue of his conviction and sentence except as otherwise provided by law. The parole board, or its designated agent, shall issue the certificate of discharge upon completion of the sentence. A copy of the order or other instrument of discharge shall be filed with the clerk of the court of conviction.

2. If the sentence were in another state or in a federal court and the convicted person has similarly been discharged by the appropriate authorities, the parole board of this state, upon application and proof of the discharge in such form as the parole board may require, shall issue a certificate stating that such rights have been restored to him under the laws of this state.

3. If another state having a similar statute issues its certificate of discharge to a convicted person stating that the defendant's rights have been restored, the rights of which he was deprived in this state, under section 11, are restored to him in this state.

SECTION 14. SAVINGS PROVISIONS.) Sections 11, 12, and 13 do not:

1. Affect the power of a court, otherwise given by law to impose sentence or to suspend imposition or execution of sentence on any conditions, or to impose conditions of probation, or the power of the parole board to impose conditions of parole.
2. Deprive or restrict the authority and powers of officials of a penal institution or other penal facility, otherwise provided by law, for the administration of the institution or facility or for the control of the conduct and conditions of confinement of a convicted person in their custody.
3. Affect the qualifications or disqualifications otherwise required or imposed by law for a designated office, public or private, or to serve as a juror or to vote or for any designated profession, trust, or position, or for any designated license or privilege conferred by public authority.
4. Affect the rights of others arising out of the conviction or out of the conduct on which the conviction is based and not dependent upon the doctrines of civil death, the loss of civil rights, the forfeiture of estate, or corruption of blood.
5. Affect laws governing rights of inheritance of a murderer from his victim.

SECTION 15.) Where an offense is defined by a statute outside of this title without specification of its classification pursuant to section 1, the offense shall be punishable as provided in the statute defining it, or:

1. If the offense is declared to be a felony, without further specification of punishment, it shall be punishable as if it were a class C felony.
2. If the offense is declared to be a misdemeanor, without further specification of punishment, it shall be punishable as if it were a class A misdemeanor.

The sentencing alternatives available under section 2 shall be available to a court sentencing an offender for commission of an offense defined by a statute outside this title. The mandatory parole component provided by section 9 shall apply to sentences imposed for offenses defined by statutes outside this title.

SECTION 16.) Whenever a minor is convicted of a felony, the sentencing court may, in its discretion, sentence the person so convicted to a county jail or commit the person so convicted to the state industrial school as provided in this title. (Source: section 12-06-13, NDCC.)

SECTION 17. AMENDMENT.) Section 12-53-14 of the 1971 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-53-14. DEFENDANT PLACED UNDER CONTROL OF PAROLE BOARD - SPONSOR OF DEFENDANT.) In the event the court shall suspend the imposition of sentence of a defendant, the court shall place the defendant on probation during the period of suspension. During the period of probation the defendant shall be under the control and management of the parole board (((, subject to the same rules and regulations as apply to persons placed on probation under suspended sentence as provided in this chapter))). The parole board shall assume and undertake the supervision of said probationer, promulgating rules and regulations for the conduct of such person during the period of his probation, except that if the defendant was found guilty of a misdemeanor, the court by order may waive the supervision of the defendant by the parole board, and direct that the defendant shall make his monthly reports to the state's attorney of the county in which the action is pending. The court may designate the clerk of district court, the sheriff, the state's attorney, or any other person to act as sponsor for the defendant. It shall be the duty of the sponsor to assist the probationer in making his monthly reports to the parole board or to the state's attorney, to report any violations, and to counsel and direct said probationer whenever possible.

SECTION 18. AMENDMENT.) Subsection 1 of section 12-55-07 of the 1971 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

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

SECTION 19. AMENDMENT.) Section 12-55-21 of the 1971 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-55-21. POSTING OF NOTICE OF APPLICATION IN CERTAIN CASES.) If the applicant for a pardon, reprieve, or commutation of sentence is serving under a conviction for murder, manslaughter (((in the first degree))), rape (((by force))), kidnapping, or robbery (((in the first degree))), the notice described in section 12-55-20, in addition to being served as therein specified, shall be posted in a conspicuous place at the front door of the courthouse in the county in which the information was filed or indictment returned for four consecutive weeks prior to the hearing. Proof of the posting of such notice shall be filed with the clerk of the board before the hearing.

SECTION 20. AMENDMENT.) Section 12-59-11 of the 1971 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-59-11. POSTING OF NOTICE OF APPLICATION IN CERTAIN CASES.) If the applicant for a parole is serving under a conviction for murder, manslaughter (((in the first degree))), rape (((by force))), kidnapping, or robbery (((in the first degree))), the notice described in section 12-59-10, in addition to being served as therein specified, shall be posted in a conspicuous place at the front door of the courthouse in the county in which the information was filed or indictment returned for four consecutive weeks prior to the hearing.

SECTION 21. AMENDMENT.) Section 12-59-17 of the 1971 Supplement to the North Dakota Century Code is hereby amended and reenacted to read as follows:

12-59-17. CAUSING PAROLEE OR PROBATIONER TO VIOLATE PAROLE OR PROBATION - PENALTY.) Any person knowing that another person is on parole, or on probation (((under a suspended sentence or a deferred imposition of sentence))), who willfully causes such parolee or probationer to violate the terms or conditions of his parole or probation is guilty of a class A misdemeanor.

SECTION 22. REPEALS.) Chapter 12-50 and chapter 12-54 and sections 12-06-01, 12-06-04, 12-06-05, 12-06-07 through 12-06-32, 12-53-01, 12-53-03, 12-53-05, 12-53-09, 29-26-20, and 31-01-08 of the North Dakota Century Code; and sections 12-53-04, 12-53-06, 12-53-07, 12-53-08, 12-53-10, 12-53-11, 12-53-12, 12-59-13, and 12-59-13.1 of the 1971 Supplement to the North Dakota Century Code are hereby repealed.

The Committee Counsel noted that he had taken a somewhat different tack in revising the sentencing draft, since the original philosophy behind the draft was that all of the alternatives available to the trial judge would be in the form of "sentences". The Committee Counsel said he had changed that reference, so that restitution, reparation, and work detail "sentences" would be assigned as conditions of probation, so that the sentencing court would have more appropriate sanctions available should the offender refuse to perform one of the conditions of probation.

The Committee Counsel noted that, at first glance, he had decided to delete restitution, restoration, and work details from Section 2 and only leave them as possible conditions of probation. However, after reflection, he had decided to leave them as sentences so as to widen judicial sentencing discretion. If an offender were directly sentenced to make restitution, the only sanction available for failure to do so would be a contempt citation.

The Committee Counsel noted that Subdivisions m, n, and o of Subsection 2 of Section 6 were added because of the discussion at the last meeting regarding giving authority to probation and parole officers to search, without warrant, probationers and parolees. The Committee Counsel noted that the three additional probation conditions were contained in a single paragraph of a current probation order, so he was submitting them all for Committee discussion.

Section 7 of the second draft was new, and was in answer to the requirement that provisions be drafted establishing the procedures for imposition of restitution or reparation as a condition of sentence, and for the use of a condition which required the defendant to perform a work detail.

In addition, the Committee Counsel noted that Section 10 represented new material designed to cover instances in which a defendant was being sentenced for multiple offenses, and to define policy regarding the use of concurrent and consecutive sentences.

The Committee discussed Section 1 of the sentencing draft, and it was noted that Subsection 6, providing for the category of "violation", might be more appropriately labeled "infraction". Mr. Hill stated that this change would probably be appropriate in light of the fact that the Committee on Judiciary "A" was recommending the use of the word "violation" to describe minor noncriminal traffic offenses. Mr. Wolf suggested that the Judiciary "A" draft should be amended to change reference to minor noncriminal traffic "violations", and call them "infractions", since "infraction" carried a lesser connotation of wrongdoing than did "violation". Mr. Wolf stated that it would be valuable to differentiate between criminal violations and traffic infractions, if only to help the news media in categorizing types of offenses.

Professor Lockney suggested that the language added to Subsection 6 of Section 1 should be broadened so it provided that wherever an offense was defined in the Century Code and only punished by a fine, it should be categorized as a "violation".

The Committee discussed the question of whether the "violation" category should be criminal or noncriminal. Mr. Wolf stated that he felt it should be noncriminal. The Committee Counsel noted that making "violations" noncriminal raised difficult questions concerning the procedure to be used, and that the Committee on Judiciary "A" had wrestled at length with that very problem. Mr. Hill stated he agreed with Mr. Wolf, and thought that violations should be noncriminal. Mr. Webb disagreed, and thought that what the Committee was really talking about was "nonincarcerable misdemeanors".

Mr. Wolf stated that the reason that he felt violations should be "noncriminal" was because it will only be a matter of time before the Supreme Court of the United States will extend the right to counsel to situations wherein a criminal defendant is only subject to a fine. Mr. Webb stated that that is not yet the case, and he didn't feel the Committee should overreact. He noted that from a practical standpoint, the concept of a "criminal" violation would be useful.

The Chairman wondered whether it wouldn't be appropriate to create a separate section in the bill dealing with violations, which section could make some statements concerning the procedures to be followed. Mr. Wolf stated that he did not feel the Committee should provide for a category of offense which would result in giving a man a criminal record without requiring that the State provide counsel for him if he is indigent.

IT WAS MOVED BY JUDGE ERICKSTAD AND SECONDED BY JUDGE PEARCE that the Committee reconsider its action and remove the concept of a "violation" offense category, and that the concept of "violations" be deleted from all drafts finally adopted by the Committee.

A SUBSTITUTE MOTION WAS MADE BY MR. WOLF that the language "under procedures established for the handling of noncriminal violations" be added after the word "offense" in Line 15, Section 1. THIS MOTION FAILED for lack of a second.

Judge Erickstad, speaking in support of his motion, stated that he felt the Class B misdemeanor category was the most minor category which should be created in a "criminal code". Professor Lockney stated that he was opposed to the motion, if for no other reason than because of the procedures which the rest of the sentencing draft made available to a sentencing judge who was handling an offender convicted of commission of a "violation". He suggested that Subsection 6 be amended to read as follows: "'Violation' as defined in this title for which a maximum penalty of a fine of five hundred dollars may be imposed, or an offense defined by a statute outside this title for which only a fine may be imposed as punishment."

Judge Pearce noted that, aside from assignment of counsel, the whole range of criminal procedures would be available for a person charged with a "violation" under the present sentencing draft. He noted that there were essentially three types of procedures which could be used: 1. criminal procedures; 2. civil procedures; and 3. administrative procedures; the latter of which was essentially the tack taken by the Committee on Judiciary "A". Judge Pearce questioned whether criminal procedures were the appropriate ones to be used in prosecution of a person charged with a "violation".

Mr. Webb stated that a person should be entitled to be prosecuted under criminal procedures, because a person should not be subject to a fine without all the protection of criminal procedure (except assigned counsel) available.

The Chairman summed up the arguments for and against the motion, and noted that the whole subject of a "violation" category of offenses could be studied during the next interim, when the remaining offense definitions in the Century Code were studied.

Professor Lockney stated that he felt the concept of a "violation" offense should be retained, at least in regard to the so-called regulatory offenses. Mr. Wolf stated

that he felt we should keep the concept of "violations" as contained in the draft, rather than to eliminate it altogether. The Chairman stated that he did not believe the feeling of the Committee was in opposition to a concept of a "violation" offense category, but rather that the Committee believed that the problems involved in creating that classification were too great to be solved during this interim. Thereafter, JUDGE ERICKSTAD'S MOTION CARRIED, with Professor Lockney, Mr. Webb, and Mr. Wolf voting in the negative.

Professor Lockney stated that the Committee should be certain to take special notice of deletion of the "violation" offense category when it discusses Section 1006, dealing with regulatory offenses.

The Committee then discussed Section 7 of the bill draft, providing procedures for use of the concept of restitution and work detail assignment for criminal offenders.

Judge Erickstad stated that he was opposed to the limitation of liability, provided in Subsection 2 of Section 7, because the whole trend in the law was to extend liability in similar situations. Mr. Webb stated he agreed with Judge Erickstad, but that judges in his area were loath to use a work detail assignment as part of a sentence because of this type of question. Judge Erickstad suggested that provision should be made allowing courts to order that type of condition of probation, but that, should they desire to do so, they should be responsible for making provision for liability insurance coverage. He suggested that Subsection 2 of Section 7 be amended by striking everything after the word "individual." in Line 26, Section 7.

Judge Erickstad also had some questions concerning the procedures available for imposing restitution or reparation as a sentence or condition of probation. For instance, he wondered whether restitution would preclude later civil damages arising out of the same occurrence. In addition, how would the court go about determining the amount of restitution to be made. Mr. Wolf noted that North Dakota courts have the authority to order restitution now, without any of the protection available under the proposed Section 7.

Judge Erickstad suggested that the draft should set a dollar limit on the amount of restitution which could be ordered, and should specifically provide that restitution was in lieu of all civil remedies for damages arising out of the same occurrence.

Mr. Wolf noted that, before the Committee discussed the various details of use of "restitution", the Committee should go on record as either favoring or opposing the concept, since much of the discussion seemed to be in opposition to the concept.

Mr. Hill inquired as to the status of courts with limited dollar amount jurisdiction in civil cases. Would those courts be able to order restitution in excess of that amount?

Judge Erickstad suggested that a $500 limit be placed on the amount which could be ordered as restitution. Mr. Wolf then inquired what would happen to a person who was charged with issuing a $2,000 "bad check". Would the storekeeper be limited to recovering only $500 of that amount?

Representative Kieffer noted that there was a bill introduced during the last session to allow recovery of bad check amounts, and that it was killed. Mr. Wolf noted that that bill allowed accumulation of all bad checks issued during a given month, and that opposition to it was based on that fact.

Professor Lockney noted that the concept of allowing restitution might run afoul of any constitutional right to a jury trial in civil cases. Mr. Hill noted that the constitutional right to a jury trial in civil cases was limited to that right as it existed in 1889.

The Chairman inquired as to whether there was a definite need for provision for all of the procedures surrounding the ordering of "restitution". He wondered whether a simple statement to the effect that sentencing courts have authority to order restitution would not be sufficient. Mr. Wolf stated he felt that provision for a hearing should be contained in the statutes to ensure that the judge's decision regarding restitution was not arbitrary, and to give notice to the defendant that the prosecution, or the judge, was considering restitution as a condition of probation, or as a sentence.

Professor Lockney stated that what the Committee was discussing was the whole area of compensation for criminal victims, and that that should be a study in itself. For instance, he noted that provision should be made for the defendant to be paid for assigned work, which payment should be given to the victim by way of restitution.

The Committee recessed for lunch at 12:05 p.m. and reconvened at 1:15 p.m.

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IT WAS MOVED BY JUDGE ERICKSTAD, SECONDED BY MR. WOLF, AND CARRIED that Lines 27 through 34, Section 7, be deleted, and that everything after the word "individual." in Line 26, Section 7 be deleted.

Mr. Wolf suggested that the words "filed, transcribed, and" be added before the word "enforced" in Line 20, Section 7. Mr. Ziegler inquired as to whether the word "enforced" did not cover the field, and allow filing and transcription of a restitution order. Mr. Wolf noted that some Clerks of Court didn't think so, and needed specific direction in order to transcribe an order of restitution.

IT WAS MOVED BY MR. WOLF, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the words "filed, transcribed, and" be added after the word "be" in Line 20, Section 7, and that the brackets enclosing the material in Lines 19 through 22 be deleted; and that the words "as to the nature and amount thereof" be added after the word "defendant" in Line 3, Section 7.

The Committee again discussed the desirability of limiting the amount of restitution or reparation which could be ordered, especially where that amount was by way of damages, rather than in regard to a return of the "fruits of the crime". The Committee Counsel noted that he had, pursuant to motion at the last meeting, discussed the matter of appellate review of sentences with the Chief Justice. He stated that the Chief Justice had agreed to bring the matter up with the other members of the court, so that the possibility of including a rule, in the Rules of Appellate Procedure, providing for appellate review of sentences. The Committee Counsel stated that appellate review of sentences would be particularly relevant in regard to use of restitution or reparation as a sentence or condition of probation. Judge Erickstad noted that the subject of appellate review of sentences had been broached at the last conference of the court, and it was his feeling that the court would be loath to add a new rule to the Rules of Appellate Procedure dealing with appellate review of sentences.

The Committee discussed the treatment of payments made as restitution in relation to future civil actions arising out of the same occurrence. Mr. Wolf suggested that the following language be added after the word "subsection" in Line 18, Section 7: "Any payments made pursuant to such order shall be deducted from damages awarded in a subsequent civil action arising from the same incident." Thereafter, IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE ERICKSTAD, AND CARRIED that the language suggested above by Mr. Wolf be added after the word "subsection" in Line 18, Section 7.

The Committee again discussed the means of limiting the amount of restitution which could be ordered, which restitution was actually not a return of "fruits of the criminal offense". Mr. Wolf suggested that the words ", or to be reasonably incurred in the future," be deleted from Lines 7 and 8, Section 7. This would result in limiting damages, above return of the fruits of the crime, to those damages which were expenses actually incurred by the victim.

Professor Lockney suggested that the concept of restitution be limited to amounts which the defendant agrees to pay, so that the courts would not be in a position of having to make determinations as to damages without all the procedural safeguards of a full civil trial.

IT WAS MOVED BY MR. WOLF AND SECONDED BY REPRESENTATIVE ATKINSON AND JUDGE PEARCE that Section 7, as amended, be further amended to delete the words ", or to be reasonably incurred in the future," from Lines 7 and 8, Section 7, and with that further amendment that Section 7 be approved. Judge Erickstad suggested that the motion be amended to add a $500 limit on the amount of "damages" recoverable over and above a return of the "fruits of the crime"; however, no action was taken in this regard. Thereafter, MR. WOLF'S MOTION CARRIED.

Professor Lockney raised the question concerning Subsection 2 of Section 7, and noted that it probably should not be limited to only governmental work, but that the defendant should also be allowed to work of a charitable nature. Thereafter, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that Lines 25 and 26, Section 7, be amended to read as follows: "charged, but must not be solely for the benefit of a private individual other than the victim."

The Committee then discussed Section 2 of the sentencing draft, and most particularly the fact that the draft proposed that the suspended sentence be abolished. Mr. Riedman noted that when a court suspends sentence and places a person on probation, jurisdiction over the probationer is exclusively in the State Parole Board. If the probationer violates conditions of his probation, he is immediately subject to incarceration for the term of the sentence originally imposed.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that Section 2 be approved, but that it, and the remainder of the sentencing draft, be redrafted to maintain the provision allowing a court to suspend sentences to imprisonment.

Mr. Travis inquired, in regard to Subsection 4 of Section 2, whether it would not be appropriate to allow credit for all time spent in custody prior to actual incarceration under a sentence, rather than just limiting it to certain instances. Mr. Travis noted that the ABA standards on "Sentencing Alternatives and Procedures", Standard 3.6,

had what he felt to be appropriate language reading as follows: "3.6 Credit. (a) credit against the maximum term and any minimum term should be given to a defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based."

Thereafter, IT WAS MOVED BY MR. TRAVIS, SECONDED BY JUDGE PEARCE, AND CARRIED that the staff prepare a draft of Subsection 2 of Section 2 (in lieu of the former language thereof) to provide credit for time served in jail in accordance with the philosophy and language used in the first sentence of Standard 3.6, ABA, "Sentencing Alternatives and Procedures".

The Committee discussed the difference between suspended sentences and deferred imposition of sentence. Mr. Riedman noted that he had 800 active parole and probation files, and 1,500 inactive files. He stated that many of the inactive files represented former parolees or probationers who simply had not gone into court to have their plea of guilty stricken from the record at the end of their period of deferred imposition of sentence.

The Committee discussed Section 6 of the sentencing draft, and the Committee Counsel noted that Subdivisions m, n, and o were new, and were, in part, inserted upon the suggestion of Mr. Riedman. Mr. Riedman stated that he was in favor of those subdivisions.

The Committee discussed Section 8 dealing with extended sentences. It was suggested by Mr. Hill that the word "that" be deleted from Line 3, Section 8, and that the words "of any one or more of the following" be inserted in lieu thereof. The Committee Counsel said he believed that the periods made the subdivisions subjunctive; however, Mr. Hill's suggestion could certainly be adopted for clarity's sake. The Chairman directed that that be done.

The Committee Counsel noted the language changes in Lines 53 and 54, Section 8, and noted that those changes were made in light of a request by Mr. Webb to ensure that prosecutors could still comment on the dangerousness of the defendant. Mr. Webb stated that he felt the new language was satisfactory.

The Committee discussed Section 9 relating to the "mandatory parole component". Mr. Hill stated that he felt the section should be drafted so the mandatory parole component can be terminated by the State Parole Board. The Committee Counsel stated it had been drafted the way in which it was presented due to the fact that there was some constitutional doubt as to whether the State Parole Board could terminate a sentence, since that termination would be in effect a commutation. Mr. Hill stated it was his feeling that the Pardon Board did not have exclusive jurisdiction over commutation. Thereafter, IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE PEARCE, AND CARRIED that Lines 12 and 13 be amended to read as follows: "sentenced. A mandatory parole component may be terminated by the state parole board or by the board of pardons. Nothing in".

The Committee then discussed Section 10 dealing with sentencing for multiple offenses, and the policies surrounding sentencing to consecutive or concurrent terms. IT WAS MOVED BY MR. WOLF, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that Section 10 be adopted as present.

The Committee discussed Section 16 on Page 12, and the Committee Counsel noted that this was current North Dakota law, and that Section 16 was inserted in the draft to replace Section 12-06-13 of the present Title 12. Representative Hilleboe inquired as to the status of the 17-year old who is sentenced to the State Industrial School for a felony, and becomes too old to be handled by that facility. The Committee Counsel noted that if a minor were sentenced, after conviction of a felony, to the Industrial School, it would be under the same procedures as any other minor who was sentenced to the Industrial School. It was noted that Section 12-46-17 provides that a minor who is an inmate of the Industrial School and who is incorrigible or dangerous to the good order, government, and welfare of the School can be returned to the county from which he was committed, and proceedings against him can continue from that point as if no order of commitment had been made.

The Committee discussed Sections 19 and 20 of the bill which amend current law requiring the posting of notice of application for parole, pardon, reprieve, or commutation. IT WAS MOVED BY JUDGE PEARCE, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that Sections 12-55-21 and 12-59-11 of the Century Code be repealed.

The Committee discussed Section 18 of the bill, and the fact that it would result in the extension of Parole Board jurisdiction to supervision of persons paroled after misdemeanor convictions. Mr. Riedman stated that he favored such supervisory authority, but, practically speaking, could not get the money for the 25 new agents which would be necessary in order to handle parolees. Mr. Wolf suggested that the supervisory authority could be extended to the extent that funds were available.

IT WAS MOVED BY MR. WOLF that the following language be added to Section 18: "to have supervision over and to look after the welfare of persons who are on probation after conviction of a misdemeanor to the extent that resources and personnel are available;". THIS MOTION DID NOT RECEIVE A SECOND.

Mr. Webb noted that misdemeanants are now being supervised by parole agents after conviction of a misdemeanor under the procedures allowing deferred imposition of sentence. After further discussion, no action was taken to amend Line 7, Section 18.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the sentencing draft, as amended, be accepted by the Committee.

The Chairman called on Mr. Wefald for an overview of the flag desecration provisions which read as follows:

SECTION 1871. DESECRATION OF THE FLAG OF THE UNITED STATES.) 1. A person is guilty of a class A misdemeanor if he knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it.

2. The term "flag of the United States" as used in this section shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standard, colors, or ensign of the United States of America. (Source: 33 U.S.C.A. Section 700 [1968].)

Mr. Wefald noted that the flag desecration section was taken from current federal law (33 U.S.C.A. Section 700 [1968]). He stated that this federal law had originally applied only to the District of Columbia, but had been extended in 1968 following several incidents of flag burnings. Mr. Wefald stated that the proposed section was close to current North Dakota law regarding flag desecration, except that it did not prohibit the use of a United States flag in "advertising".

Judge Pearce inquired as to the necessity for a North Dakota statute on flag desecration, in light of the federal statute. Mr. Wefald stated that it was primarily because the Federal Government would not prosecute all cases which might arise in North Dakota, and that North Dakota probably has an interest in prosecuting when the Federal Government does not. The Committee Counsel noted that the language contained in Subsection 2 of the draft was essentially the language contained in the current North Dakota statutes on flag desecration.

Mr. Hill commented that Section 250.9 of the Model Penal Code covered desecration of venerated objects, including desecration of the flag, and said maybe that was the way to approach the problem.

IT WAS MOVED BY MR. WEBB, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the Committee accept the flag desecration section as presented.

The Committee discussed Sections 1501 through 1503 which read as follows:

SECTION 1501. OFFICIAL OPPRESSION.) A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity is guilty of a class A misdemeanor if, knowing that his conduct is illegal, he:

1. Subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or

2. Denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity.

SECTION 1502. INTERFERENCE WITH ELECTIONS.) A person is guilty of a class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force or by economic coercion, intentionally injures, intimidates, or interferes with another because he is or has been, or in order to intimidate him or any other person from voting for any candidate or issue or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in any primary, special, or general election.

SECTION 1503. DISCRIMINATION IN PUBLIC PLACES.) A person is guilty of a class B misdemeanor if, whether or not acting under color of law, he, by force or threat of force or by economic coercion, intentionally injures, intimidates, or interferes with another because of his sex, race, color, religion, or national origin and because he is or has been, or in order to intimidate him or any other person from exercising or attempting to exercise his right to full and equal enjoyment of any facility open to the public, or to intimidate him or prevent him from aiding another to exercise his civil rights.

Representative Stone inquired as to whether Section 1502 could be redrafted to make it read with more clarity. The Chairman directed the staff to redraft Section 1502.

Mr. Travis questioned the use of the words "knowing that his conduct is illegal" in Line 3 of Section 1501. He thought that that would place an undue burden on the prosecution of proving subjective intent. Mr. Webb disagreed, and stated that he felt it was an important part of the offense definition that the official, acting in his official capacity, must know that his conduct is illegal before it becomes an offense.

Professor Lockney noted that the last two lines of Section 1503 seem to establish a different offense, not strictly related to discrimination in public places. The Committee Counsel stated that the reason for that was to bring the section in accordance with motions made at the meeting at which these sections were previously discussed. Professor Lockney suggested that Section 1503 be broken down into two sections. One dealing with discrimination in public places, and the other dealing with preventing

a person from aiding another to exercise civil rights. Thereafter, the Committee recessed at 5:10 p.m., and reconvened at 9:00 a.m. on Friday, September 22, 1972. At that time the Committee discussed a redraft of Sections 1503 and 1504 (note that Section 1503 was broken into two sections) which read as follows:

SECTION 1503. DISCRIMINATION IN PUBLIC PLACES.) A person is guilty of a class B misdemeanor if, whether or not acting under color of law, he, by force or threat of force or by economic coercion, intentionally injures, intimidates, or interferes with another because of his sex, race, color, religion, or national origin and because he is or has been or in order to intimidate him or any other person from exercising or attempting to exercise his right to full and equal enjoyment of any facility open to the public.

SECTION 1504. PREVENTING EXERCISE OF CIVIL RIGHTS - HINDERING OR PREVENTING ANOTHER AIDING THIRD PERSON TO EXERCISE CIVIL RIGHTS.) A person is guilty of a class B misdemeanor if, whether or not acting under color of law, he, by force or threat of force or by economic coercion, intentionally:

1. Injures, intimidates, or interferes with another because he is or is about to exercise his civil rights, or because he has exercised his civil rights.
2. Intimidates or prevents another from aiding a third person to exercise his civil rights.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WEBB, AND CARRIED that Sections 1501 through 1504 be adopted, with the staff to redraft Sections 1502 and 1503. Mr. Wefald stated that he could probably prepare a redraft before the meeting adjourned.

The Chairman called on Mr. Wefald for a discussion of the staff redraft relating to criminal defamation which reads as follows:

SECTION 1. CRIMINAL DEFAMATION.)

1. A person is guilty of a class A misdemeanor if he willfully disseminates or publishes defamatory matter or knowingly procures such dissemination or publication, or in any way knowingly aids or assists in the same being done. (12-28-03)

2. It is a defense to a prosecution under this section that:

a. The matter alleged to be defamatory is true; or (12-28-04)

b. The matter alleged to be defamatory was contained in a privileged communication. (12-28-11)

3. In this section:

a. "Defamatory matter" means any written or oral communication concerning a natural person made public with actual malice or with reckless disregard of the truth by any utterance, printing, writing, sign, picture, representation, or effigy tending to expose such person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any written or oral communication concerning a natural person made public as aforesaid designed to blacken and vilify the memory of one who is dead and tending to scandalize or provoke his surviving relatives and friends. (12-28-01)

b. "Publication" means a knowing display of defamatory matter, or the parting with its immediate custody under circumstances which exposed the defamatory matter to be read or seen or understood by a person other than the publisher of the defamatory matter, although it is not necessary that the matter complained of should have been seen or read by another. (12-28-07)

c. "Privileged communication" means a communication made to a person entitled to or interested in the communication by one who is also entitled to or interested or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent. (12-28-11)

Mr. Wefald discussed a supplementary memorandum on the question of constitutionality of drafting a criminal defamation statute, and of drafting it in such a way that it did not provide a defense to a person who made a true but malicious statement concerning a private individual. Mr. Wefald noted that this suggestion was in essence the creation of the offense of criminal invasion of privacy. He said he felt that since the whole concept of privacy (in the civil law) was so unsettled, it would be unwise to make invasion of privacy a criminal offense.

Professor Lockney agreed that it was primarily a matter of "privacy", and that the United States Supreme Court may well extend the doctrine of the cases of New York Times v. Sullivan and Rosenbloom v. Metromedia, Inc., but that, until the Court did so, we should do something to protect "private" citizens from malicious defamation.

Judge Erickstad stated he agreed with Mr. Wefald, and that, in addition, he thought the field of criminal invasion of privacy should not be grafted on to the criminal law, as it was an extremely complicated one, and should be left to redress by the civil law. Professor Lockney noted that he had made a motion to that effect at a previous meeting, but that the motion was defeated.

Mr. Ziegler noted that in some instances, allowing truth as a defense can cause more hardship to the complainant than does the original statement, as it gives a forum in which the defendant can prove that what he said was true, and causes the material to be repeated in the press to the detriment of the complaining witness.

IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY MR. TRAVIS that the words ", unless the defamatory matter relates to an individual and is not a matter of public concern" be added after the word "true" in Line 6 of the section on criminal defamation. THAT MOTION FAILED. Thereafter, IT WAS MOVED BY PROFESSOR LOCKNEY AND SECONDED BY JUDGE PEARCE that the criminal defamation section be deleted, and that the relevant sections of the Century Code be repealed.

Mr. Hill noted that a person who makes a defamatory statement is usually judgment proof, and that the only way that he can be punished is under the criminal law. Professor Lockney inquired as to who would listen to defamatory statements coming from a person who was judgment proof. Judge Erickstad stated that he thinks there should be some statute prohibiting criminal defamation, but that it should not get into the area of protecting private individuals from true statements. Thereafter, PROFESSOR LOCKNEY'S MOTION LOST.

IT WAS MOVED BY REPRESENTATIVE STONE AND SECONDED BY MR. WEBB that the defamation draft, as presented, be approved. Judge Pearce inquired as to why the draft did not provide a definition of the term "dissemination". He stated that it should be defined, since the term "publication" is defined, and since construction of the word "dissemination" could cause judicial problems. REPRESENTATIVE STONE AMENDED HER MOTION, WITH THE CONSENT OF HER SECOND, to include a staff draft of a definition of "dissemination".

The Committee Counsel suggested that the draft would be acceptable if reference to "disseminates" and "dissemination" were deleted therefrom. IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the Committee reconsider its action whereby it approved the draft of the defamation section and that the section be amended to delete the words "disseminates or" in Line 2 and the words "dissemination or" in Line 3.

Thereafter, IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY REPRESENTATIVE KIEFFER, AND CARRIED that the criminal defamation draft, as amended, be approved.

The Committee then discussed a draft of a concurrent resolution calling for a continuing of the study in revision of the criminal laws in North Dakota and reading as follows:

A concurrent resolution directing the Legislative Council to continue the study directed by House Concurrent Resolution No. 3050 adopted by the Forty-second Legislative

Assembly, relating to the revision and modernization of the criminal laws of this state, and directing the Legislative Council to seek available federal funds to assist the Council in carrying out the study.

WHEREAS, the Legislative Council's interim Committee on Judiciary "B" has, after considerable effort, completed a revision of the basic criminal code of North Dakota, contained in Title 12 of the Century Code; and

WHEREAS, that Committee was assigned the task of completing a revision of the entire body of criminal laws of North Dakota, but was unable to do more than revise Title 12, due to lack of time; and

WHEREAS, there is now even greater need for revision of the remainder of the statutory definitions located throughout the Century Code to make them conform with the new sentencing and offense classification plans; and

WHEREAS, the state statutes relating to gambling and the constitutional provision on lotteries are in need of more thorough study; and

WHEREAS, the provisions of the new Title 12 will not go into effect until July 1, 1975, and should be continuously studied during the interim prior to the Forty-fourth Legislative Assembly;

NOW, THEREFORE, BE IT RESOLVED BY THE _____ OF THE STATE OF NORTH DAKOTA, THE _____ CONCURRING THEREIN:

That the Legislative Council is hereby directed to continue its substantive and formal study and revision of the criminal statutes of the state of North Dakota, with emphasis on the constitutional and statutory provisions relating to gambling. The Council shall direct its efforts towards a revision of the substance, form, and style of current criminal statutes, towards integration and correlation of those statutes where possible, and towards deletion of outmoded or unnecessary statutory material. The Council may

seek the aid and assistance of the Judicial Council and of other members of the bench and bar, and may counsel with interested citizens. The Council shall seek federal funds to aid in defraying the cost of this revision, and so much of the appropriation to the Legislative Council as may be necessary may be used as matching funding for the revision study. The Legislative Council shall prepare necessary revision legislation and shall make its report and submit the accompanying legislation to the Forty-fourth Legislative Assembly.

Professor Lockney suggested that the resolution should also specifically call for a continuing study of sexual offense definitions, including the possibility of doing attitudinal surveys to determine the actual feelings of the populous concerning sexual offenses. The Chairman suggested that maybe the draft should also provide for a specific study of the viability of the concept of a "violation" category of offenses.

Judge Erickstad suggested that the study resolution should be left as general as possible, and that gambling, sex offenses, and a category of offense known as "violations", could be included within the ambit of a study defined in general language.

Thereafter, IT WAS MOVED BY JUDGE ERICKSTAD, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that Lines 15 and 16 of the resolution be deleted, and that the language in Lines 23 and 24, reading "with emphasis on the constitutional and statutory provisions relating to gambling" also be deleted.

Mr. Hill inquired, in light of Judge Erickstad's motion, whether the Committee should make a specific recommendation to the Forty-third Legislative Assembly concerning gambling. The Committee consensus was that it should not make such a recommendation.

The Committee then discussed the two alternatives defining sexual offenses. Judge Erickstad noted that there were now provisions in the alternative he had favored which bothered him, and he felt that those persons who favored a more orthodox version should be allowed to shape it, with a more liberal version being shaped by those interested in that point of view. Mr. Webb stated there were certain things, such as the minimum age after which any sexual intercourse would be rape, which he wanted to see in both alternatives.

The Chairman suggested that the Committee split into two groups according to which sexual offense alternatives they favored, that those groups work out the changes or amendments they want to make to their alternative, and that they report these changes to the Committee. Mr. Webb stated that, as far as some items are concerned, he could not be split.

Professor Lockney read from the Spring 1972, Oregon Law Review quoting State Senator Anthony Yturri, who was Chairman of the Senate Judiciary Committee at the time that the Oregon Legislature considered their Code revision, as follows:

> "In considering the task at hand and in examining the Oregon laws, the Model Penal Code, and the new codes of some of our sister states, the majority of Commission members arrived inescapably at the conclusion that a modern

criminal code must realistically distinguish between criminality and immorality. The old code contained unenforced and unenforceable criminal sanctions for moral transgressions, laws which frequently defined "crimes without victims. As a representative of the FBI stated to the President's Commission on Law Enforcement and Administration of Justice:

> "The Criminal Code of any jurisdiction tends to make a crime of everthing that people are against, without regard to enforceability, changing social concepts, etc. The result is that the Criminal Code becomes society's trash bin. The police have to rummage around in this material and are expected to prevent everything that is unlawful. They cannot do so because many of the things prohibited are simply beyond enforcement both because of human inability to enforce the law and because, as in the case of prohibition, society legislates one way and acts another way. If we would restrict our definition of criminal offenses in many areas, we would get the criminal codes back to the point where they prohibit specific, carefully defined, and serious conduct, and the police could then concentrate on enforcing the law in that context and would not waste its officers by trying to enforce the unenforceable as is now done.

"Probably no single part of the new Code presented a more difficult -- or explosive -- policy question than did the sex offenses article. An 'agonizing reappraisal' was made of statutes denouncing adultery and fornication, statutes that had remained in force since 1864, as well as statutes prohibiting consensual sodomy, lewd cohabitation, and seduction. We had to decide to what extent conduct that is generally considered repugnant or immoral, but which does not produce demonstrable harm to others, should be made criminal. To most persons, the most abhorrent of such conduct is homosexuality; and yet, except for cases involving force, minor victims, or public activity, the criminal laws have been dismal failures in preventing such conduct or other private, consensual sexual activity. In line with the general philosophy of the new Code, i.e., that it should try realistically to distinguish between crime, conduct which poses a threat to society by presenting a clear and present danger of injury to persons and property or to the citizenry through the corruption of its officials, and sin or immorality, a matter that would seem best left to the church or other moral authorities, the new laws for the most part do not prohibit private consensual sexual activity between competent adults.

"As the Chairman of the National Commission on Reform of the Federal Criminal Laws has stated, 'If criminal law is to be respected, it must be respectable.' The Commission view was that laws that either are not or cannot be enforced not only waste our limited law enforcement machinery, but also create disrespect for the entire criminal justice system.

"The new Code, however, does prohibit certain related conduct such as prostitution, bigamy, incest, acts of indecent behavior in public, and open solicitation of persons to engage in sexual activities. At first blush, these prohibitions may appear inconsistent and hypocritical, but each of these areas can be distinguished by important additional considerations, i.e., commercialization, protection of children, or protection of individual sensibilities. The new sex-offense statutes reflect an earnest effort to formulate a sensible and realistic approach to the role of the state in the sex lives of its citizens."

(Note: The two sexual offense alternatives are attached to these minutes as Appendices "A" and "B".)

Judge Pearce noted that Section 1642 of both alternatives results in a lowering of the classification of the offense if the sexual intercourse is committed upon a person who suffers from mental disease or defect rendering the victim incapable of understanding the nature of the conduct. He questioned why this was the case, since this was not the situation under current North Dakota law.

The Committee Counsel noted that that was the way the original FCC language for those two sections read. The Committee Counsel quoted from Page 871 of Volume 2, Working Papers as follows: "We do not propose the maximum penalties for these acts (sexual intercourse with mentally incompetent victims), however. Intercourse obtained under the circumstances proscribed by the proposed section is graded as a Class C felony. Compared to the other felonious sexual conduct dealt with in the proposed provisions, such behavior 'does not lead to a general sense of insecurity in the community, as does the forceful rape, and the harm done is not as great, if outraged to the feelings of the victim be regarded as the essential evil against which we legislate.' Such conduct does, however, constitute a substantial physical and psychological abuse of another human being. Obtaining intercourse by deception, trick, or nondeadly threat is therefore graded equivalent to the penalty for a serious assault."

MR. WOLF MOVED ADOPTION OF BOTH OF THE SEXUAL OFFENSE ALTERNATIVE DRAFTS, with the staff to make the necessary amendments reflected by the discussion here, and in order to make them accord with the main revision bill. THIS MOTION DID NOT RECEIVE A SECOND.

Thereafter, the Chairman directed the Committee to split into two subcommittees according to their preference for the first or second sexual offense alternatives. After deliberation and amendments by both groups, the Chairman called on the Committee Counsel for a report on the changes made in the first sexual offense alternative. (Alternative "A").

The Committee Counsel stated that the first alternative was to be amended by moving Sections 1655 ("General Provisions") and 1656 ("Definitions") to the front of the draft. In addition, the classification of Section 1647, Sexual Abuse of Wards, was to be raised from a Class A misdemeanor to a Class C felony.

The section heading for Section 1653 was to be changed from "BESTIALITY" to "DEVIATE SEXUAL ACT".

In Line 2 of Section 1655 the word "to" is to be changed to "through"; in Line 7 the word "to" is to be changed to "through"; and in Line 13, the word "to" is to be changed to "through".

The Chairman then called on Mr. Wefald for a presentation of the changes made by the group interested in the second alternative (Appendix "B"). Mr. Wefald noted that Subsection 1 of Section 1642 was moved to Section 1641 as Subdivision e of Subsection 1, and the appropriate grammatical changes were made to Section 1642.

Section 1643 was amended to read as follows: "An adult who engages in a sexual act with another person or who causes another person to engage in a sexual act, is guilty of a class A misdemeanor if the other person is a minor and the actor is at least three years older than the other person."

Mr. Wefald stated that Subsection 7 of Section 1645 was stricken; the last sentence of Section 1646 was stricken; and Section 1647 was deleted.

Judge Erickstad stated that the moving of Subsection 1 of Section 1642 and relettering it as Subdivision e of Subsection 1 of Section 1641, first alternative, would meet with his approval. The remaining members of the group interested in the first sexual offense alternative (Appendix "A") agreed, and that change was made.

Representative Hilleboe inquired as to whether the classification of penalties for Sections 1643 and 1644, second alternative, should not be raised to Class C felonies as was the case in the first sexual offense alternative.

Mr. Webb stated that he was not entirely satisfied with either sexual offense alternative, after the changes reflected by the subcommittee decisions. Therefore, he felt that in all fairness there should be a third alternative which should read exactly as did the former second sexual offense alternative, except that a new Subdivision e should be added to Subsection 1 of Section 1641 which should be worded exactly as is Subsection 1 of Section 1642, and the latter subsection should be deleted.

Professor Lockney stated that the minutes should reflect the fact that the subcommittee which made changes in the second alternative, deleting criminal penalties for teenage sexual experimentation, intended that promiscuous teenagers be treated by the Juvenile Court to the extent that their promiscuity was in direct disobedience to parental commands.

Mr. Webb questioned whether you could find a child to be unruly if his sexual activity was not criminal, since his activity would not be immoral if it was not denominated a crime. Representative Stone stated that she did not believe that to be the case, and felt that such action would be immoral regardless of whether criminal liability attached.

The Committee discussed Mr. Webb's suggestion that there be a third alternative. Representative Stone suggested that Mr. Webb's comments be recorded in the minutes, but that there be no more than two alternatives.

IT WAS MOVED BY MR. WEBB AND SECONDED BY JUDGE ERICKSTAD that the Committee authorize preparation of a third bill defining sexual offenses which would be worded as per Mr. Webb's suggestion outlined above.

Representative Stone felt that the motion should be defeated, and that the Committee should present no more than two alternatives defining sexual offenses, because those two alternatives did not please everyone, and there should be some compromise made. Representative Kieffer and Professor Lockney stated their agreement with Representative Stone's belief. Mr. Webb suggested that, that being the case, he be authorized to submit a minority report. He stated that his desire for a third alternative, or a minority report, was based on the fact that the second alternative, as amended, no longer outlawed sexual experimentation between teenagers. Thereafter, MR. WEBB'S MOTION CARRIED, and the staff was directed to prepare a third bill presenting sexual offense definitions in the alternative.

The Chairman welcomed the members of Professor Lockney's Law School Legislation Class. The Chairman explained the background of the three sexual offense drafts, and asked for class opinion as to which one they believed would be the most appropriate. On a show of hands, the members of the class unanimously approved the second sexual offense alternative, as amended, which allowed sexual relationships between consenting adults, where the public was not affronted, or force was not used.

Mr. Travis noted that the Committee had often wrestled with the sexual offense definition problems and with other problems, and that what the Committee did in any area does not always reflect the majority viewpoint of the "best" solution. He stated that the Committee often had to recognize the practical aspects of what they were doing, and to realistically appraise the chances of passage of any solution which radically changed current North Dakota law.

The Committee discussed a redraft of Sections 1501 through 1504 which read as follows:

SECTION 1501. OFFICIAL OPPRESSION.) A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity is guilty of a class A misdemeanor if, knowing that his conduct is illegal, he:

1. Subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or
2. Denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity.

SECTION 1502. INTERFERENCE WITH ELECTIONS.) A person is guilty of a class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force or by economic coercion, intentionally:

1. Injures, intimidates, or interferes with another because he is or has been voting for any candidate or issue or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in any primary, special, or general election.
2. Injures, intimidates, or interferes with another in order to intimidate him or any other person from voting for any candidate or issue or qualifying to

vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in any primary, special, or general election.

SECTION 1503. DISCRIMINATION IN PUBLIC PLACES.) A person is guilty of a class B misdemeanor if, whether or not acting under color of law, he, by force, or threat of force or by economic coercion, intentionally:

1. Injures, intimidates, or interferes with another because of his sex, race, color, religion, or national origin and because he is or has been exercising or attempting to exercise his right to full and equal enjoyment of any facility open to the public.
2. Injures, intimidates, or interferes with another because of his sex, race, color, religion, or national origin in order to intimidate him or any other person from exercising or attempting to exercise his right to full and equal enjoyment of any facility open to the public.

SECTION 1504. PREVENTING EXERCISE OF CIVIL RIGHTS - HINDERING OR PREVENTING ANOTHER AIDING THIRD PERSON TO EXERCISE CIVIL RIGHTS.) A person is guilty of a class B misdemeanor if, whether or not acting under color of law, he, by force or threat of force or by economic coercion, intentionally:

1. Injures, intimidates, or interferes with another because he is or is about to exercise his civil rights, or because he has exercised his civil rights.
2. Intimidates or prevents another from aiding a third person to exercise his civil rights.

The Chairman directed the staff to change the word "intimidate" to "prevent" in Lines 9 of Section 1502 and 9 of Section 1503. Mr. Hill suggested that the words "injures, intimidates, or interferes with" be substituted for the words "intimidates or prevents" in Subsection 2 of Section 1504. The Chairman directed that this change be made. Thereafter, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED that Sections 1501 through 1504, as redrafted, be approved.

The Committee considered the first draft of the main revision bill. (Note: All members of the Committee have received copies of the main revision bill, either

at this meeting, or in the mail.) The Committee Counsel noted that the staff comments to accompany the main bill had not yet been prepared, but would be prepared prior to the next meeting. The Committee Counsel noted that the bill draft, as presented, would repeal all chapters between Chapter 12-01 and Chapter 12-43 with the exception of Chapter 12-30, and certain sections in Chapter 12-22. That chapter and those sections would be repealed in each of the alternative bills dealing with sexual offenses, so that, should all of those bills fail, the current law dealing with those subjects would remain on the books.

The Committee Counsel noted that in preparation of the staff comments, he might discover one or two sections which should be included in the bill draft, and, that being the case, they would be included underlined, so that the Committee would realize that they were new material.

The Committee Counsel stated that he wished the Committee to particularly consider the following items:

On Pages 9 and 10, Sections 12-04-04 and 12-04-05, which provide for the situation wherein a criminal defendant is "insane" at the time of trial. The Committee Counsel noted that these provisions were taken from a prior draft by Mr. Hill.

On Page 13, the brackets around the words "involving violence" in Subdivision d of Subsection 2. The Committee Counsel noted that the bracketed language was presented to accord with a suggestion by Mr. Webb that that subdivision be drafted so as to present alternatives reflecting current North Dakota law on the authority of a law enforcement officer to use "deadly force".

On Page 18, the provision in Subdivision a of Subsection 2 of Section 12-06-06 which classifies a failure to conform to a penal regulation as a "violation". The Committee Counsel noted the changes would have to be made here in light of the previous action deleting the penalty classification of "violation".

The Committee Counsel stated that on Page 24, Section 12-09-04, additional language had been added to limit the scope of the word "communicates", so that a person would not be guilty of illegal influence of a juror simply by displaying a sign in the approximate vicinity of the court or jury room. This addition was made in accordance with a motion passed at a previous meeting of the Committee.

The Committee Counsel noted that the next addition was on Pages 33 and 34 (Section 12-13-03), and was designed to provide a section to replace Section 12-10-06 of current law. He stated that the new section was equivalent in substance to current law, but was redrafted to accord with the format for the new Code revision which the Committee was using.

On Page 35, the Committee Counsel noted the addition of Section 12-14-03 which was derived from Section 1531 of the FCC. He stated that this section was added to encompass numerous sections in the present Title 12 which dealt with safeguarding of elections, and had been previously overlooked.

The next change was on Page 39, Section 12-17-01, in which Subsection 2 was amended, according to Committee motion, to differentiate between an assault on a peace officer, and an assault on any other person.

The final changes which the Committee Counsel noted were on Page 50. The first consisted of the addition of a new Subdivision h, which was designed to ensure that cattle theft would be treated as a Class C felony regardless of the value of the cattle stolen. The second change was in Subsection 5 of Section 12-23-05 which defined a certain petty theft as a "violation". The Committee Counsel noted that, since the concept of "violation" was deleted, this subsection could also be deleted, since the particular type of offense defined thereunder was also included in the category of offense defined under Subsection 4, which was classified as a Class B misdemeanor.

The Committee discussed Sections 12-04-04 and 12-04-05. Mr. Hill noted that these sections were interrelated with Chapter 29-20 of the Century Code, and that that chapter should either be amended, or these provisions should be inserted into that chapter. After further discussion, the Chairman requested Mr. Hill to redraft these two sections as he determines appropriate.

The Committee then discussed Subdivision d of Subsection 2 of Section 12-05-07 dealing with the propriety of use of deadly force by peace officers. It was noted by Mr. Webb that current North Dakota law allows the use of such force when attempting to prevent an escape after commission of any felony, or when attempting to arrest someone who is committing any felony.

IT WAS MOVED BY PROFESSOR to delete the brackets in Lines 32 and 33 of Section 12-05-07 (Page 13). THIS MOTION DID NOT RECEIVE A SECOND.

Mr. Webb stated that limiting the authority to use that type of force to "felonies involving violence" would be a substantial change in North Dakota law, and would require substantial retraining of peace officers. Mr. Hill noted that he favored retention of the words "involving violence", especially in light of high speed chases which result in deaths of innocent third parties.

Mr. Webb stated that if law enforcement officers were so limited, then all persons, including law enforcement officers, should be limited to use of such force in self-defense, or in the immediately necessary defense of others.

IT WAS MOVED BY REPRESENTATIVE ATKINSON AND SECONDED BY MR. WEBB AND REPRESENTATIVE HILLEBOE that the bracketed language, and the brackets, contained in Lines 32 and 33 of Page 13 (Section 12-05-07) be deleted.

The Committee discussed the present law as it relates to federal law enforcement officers. Mr. Wefald read from Pages 268-269 of Volume I, Working Papers, with regard to the FBI rule on the use of force as follows:

> "The FBI has one rule on the use of force which is an exception, administratively made, to the law on the subject. The law (i.e., federal law) allows an officer to shoot a fleeing felon to prevent escape. The FBI forbids it. FBI agents are instructed that they may shoot in self-defense only. They are not to fire warning shots and they are not permitted to shoot a felon, either to kill or to wound, to prevent his escape. . . .
>
> "While we express no opinion on the propriety of this special firearms policy for law enforcement agencies whose problems differ from our own, the policy has

served the FBI well. The policy leaves some little room for the escape of a criminal who might otherwise be brought in at that time, dead or alive, but such escapes are rare and they almost never result in defeating the ends of justice in the case. Operating on a national basis, with international sources of information, we are almost certain of eventual apprehension. In the meantime, we have avoided the unnecessary sacrifice of human life, either criminal or innocent, by either accident or design."

In addition, Mr. Wefald noted that the Treasury Department has the following policy in regard to its agents:

"A firearm may be discharged only as a last resort when, in the considered opinion of the officer, his life or the life of another person is in danger."

Mr. Travis stated it was his feeling that, since the death sentence had been abolished, it seemed strange and inconsistent to allow a peace officer to kill a felon, unless it was in actual self-defense, or to protect the life of an innocent third person. Thereafter, REPRESENTATIVE ATKINSON'S MOTION FAILED.

The Committee then discussed the desirability of issuing a minority report on this issue, but no motions were made in this regard.

Mr. Webb suggested that the words "arson, burglary," in Line 24 of Page 13; and "or burglary" in Line 26 of Page 13 be deleted. He said that he believed it was inconsistent for civilian persons to have greater authority to use deadly force than due law enforcement officers. The Committee discussed this suggestion, and it was determined that it would be more appropriate simply to prevent private persons from pursuing a felon and using deadly force during the pursuit. A private person should be limited to protection of his immediate dwelling or place of business during the course of the felony.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that Subparagraph (2) of Subdivision c of Subsection 2 of Section 12-05-07 be deleted, and that the language "and the use of force other than deadly force for such purposes would expose anyone to substantial danger of serious bodily injury" be added to the end of Subparagraph (1).

The Committee discussed Section 12-06-06 (Page 18 of the bill) dealing with regulatory offenses. It was noted that, in light of deletion of the "violation" category of offenses, some changes would have to be made in Section 12-06-06. Mr. Hill suggested that the section be deleted entirely, as its use was solely prospective in nature, and it could not come into play until another statute made specific reference to it.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE KIEFFER, AND CARRIED that Section 12-06-06 be deleted from the main revision bill.

The Committee discussed Section 12-13-03, and the Committee Counsel noted that it was substantially the same as present Section 12-10-06. Mr. Wolf suggested that the word "first" be added before the word "unanimously" in Line 6 of Page 34; and that the words "at a meeting" be added after the word "body" in Line 7 of Page 34. Mr. Wolf explained that he suggested this language change in order to ensure that the finding and action by the governing body is not informal, and is, in fact, taken at a formal meeting.

Thereafter, IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED that Subdivision a of Subsection 2 of Section 12-13-03 be amended in accordance with Mr. Wolf's suggestion.

The Committee discussed Section 12-17-01 defining assault, and providing a felony classification for an assault upon a law enforcement officer. IT WAS MOVED BY MR. WEBB AND SECONDED BY REPRESENTATIVE STONE that Section 12-17-01 be approved as presented.

Mr. Hill noted that the result of making an assault on a peace officer a felony would probably be that there would be fewer prosecutions. In addition, an officer would have the power to use deadly force on the offender under Section 12-05-07. Mr. Webb stated that he felt making it a Class A misdemeanor would be sufficient, and that simple assault could be lowered to a Class B misdemeanor. Thereafter, MR. WEBB, WITH THE CONSENT OF HIS SECOND, WITHDREW HIS MOTION.

IT WAS THEN MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WOLF, AND CARRIED that Subparagraph b of Subsection 2 of Section 12-17-01 be deleted, and that an assault on a peace officer be graded as a Class A misdemeanor, with the remaining offenses under Section 12-17-01 graded as Class B misdemeanors.

The Committee discussed Subdivision h of Subsection 2 of Section 12-23-05, which is the provision to ensure that cattle rustling is a felony. Mr. Wolf noted that the provision, as drafted, could include cattle in feedlots, etc. He said that he felt the real gist of the offense was the fact that it was so difficult to protect cattle from rustling when they were on the open range, or at large in a fenced field. Mr. Ziegler noted that the definition of grand larceny under present law could be used as Subdivision h.

IT WAS MOVED BY MR. WOLF, SECONDED BY REPRESENTATIVE KIEFFER, AND CARRIED that Subdivision h be amended to read as follows: "The property stolen consists of livestock taken from the premises of the owner; or".

The Committee discussed Subsection 5 of Section 12-23-05 which makes it a "violation" to steal "services" which do not exceed $10 in value where the offender was not a public servant acting in the course of his official duties in committing the theft. The Committee Counsel noted that this section was no longer necessary in view of the deletion of the concept of a "violation" offense classification. IT WAS MOVED BY JUDGE ERICKSTAD, SECONDED BY MR. WEBB, AND CARRIED that Subsection 5 of Section 12-23-05 (Page 50 of the main bill) be deleted.

Mr. Webb suggested that, at the final meeting of the Committee, we should invite interested persons to attend and to discuss the bill draft with the Committee. Mr. Wolf suggested that the list of persons invited to attend should include officers of the League of Women Voters. The Chairman noted that the last meeting could possibly be a one-day meeting held in late October.

Thereafter, the Committee adjourned, subject to the call of the Chair.

John A. Graham
Assistant Director

Appendix "A"

FOURTH DRAFT:
Prepared by the staff of the Legislative Council for consideration by the Committee on Judiciary "B"
September 1972

FIRST SEXUAL OFFENSE ALTERNATIVE
(To be submitted, after final approval, to the Legislative Council without recommendation. Will be accompanied by second sexual offense alternative after final approval, to be submitted without recommendation.)

SECTION 1641. RAPE.)

1. OFFENSE. A male who has sexual intercourse with a female is guilty of rape if:

a. He compels her to submit by force, or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. He or someone with his knowledge has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge intoxicants or other means with intent to prevent resistance;

c. He knows that the victim is unaware that she is engaging in sexual intercourse with the actor, or he knows that she is submitting because she mistakenly supposes that he is her husband; or

d. The victim is less than fifteen years old.

2. GRADING. Rape is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates paragraph d of subsection 1, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise rape is a class B felony.

SECTION 1642. GROSS SEXUAL IMPOSITION.) A male who has sexual intercourse with a female is guilty of a class C felony if:

1. He knows that she suffers from a mental disease or defect which renders her incapable of understanding the nature of her conduct; or

2. He compels her to submit by any threat that would render a female of reasonable firmness incapable of resisting.

SECTION 1643. AGGRAVATED INVOLUNTARY SODOMY.)

1. OFFENSE. A person who engages in deviate sexual intercourse with another, or who causes another to engage in deviate sexual intercourse, is guilty of an offense if:

a. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being; or

b. He or someone with his knowledge has substantially impaired the victim's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance;

c. He knows that the other person is unaware that a sexual act is being committed upon him or her; or

d. The victim is less than fifteen years old.

2. GRADING. The offense is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subparagraph d of subsection 1, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise the offense is a class B felony.

SECTION 1644. INVOLUNTARY SODOMY.) A person who engages in deviate sexual intercourse with another, or who causes another to engage in deviate sexual intercourse, is guilty of a class C felony if:

1. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct; or

2. He compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

SECTION 1645. SODOMY.) A person is guilty of a class A misdemeanor if he engages in deviate sexual intercourse under circumstances not amounting to aggravated involuntary sodomy, section 1643, or involuntary sodomy, section 1644.

SECTION 1646. CORRUPTION OF MINORS.) An adult who has sexual intercourse or who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of a class C felony if the other person is a minor.

SECTION 1647. SEXUAL ABUSE OF WARDS.) A person who has sexual intercourse or who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of a class A misdemeanor if the other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person.

SECTION 1648. SEXUAL ASSAULT.) A person who knowingly has sexual contact with another or causes such other to have sexual contact with him, is guilty of a class B misdemeanor if:

1. He knows that the contact is offensive to the other person;

2. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;

3. The other person is less than fifteen years old;

4. He or someone with his knowledge has substantially impaired the other person's power to appraise or control his or her conduct, by administering

or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;

5. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over him or her;

6. The other person is a minor and the actor is his or her parent, guardian, or otherwise responsible for general supervision of the other person's welfare; or

7. The other person is a minor and the actor is an adult.

SECTION 1649. FORNICATION.) A person is guilty of a class B misdemeanor if he engages in sexual intercourse with another.

SECTION 1650. ADULTERY.) 1. A married person is guilty of a class A misdemeanor if he or she engages in a sexual act with another person, not the actor's spouse.

2. No prosecution shall be instituted under this section except upon the complaint of the spouse of the alleged offender, and the prosecution shall not be commenced later than one year from the commission of the offense.

SECTION 1651. UNLAWFUL COHABITATION.) A person is guilty of a class A misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.

SECTION 1652. INCEST.) A person who intermarries, cohabits, or has sexual intercourse with another person related to him within a degree of consanguinity within which marriages are declared incestuous and void by section 14-03-03, knowing such other person to be within said degree of relationship, is guilty of a class C felony.

SECTION 1653. BESTIALITY.) A person who performs a deviate sexual act with intent to arouse or gratify his sexual desire is guilty of a class A misdemeanor.

SECTION 1654. BIGAMY.)

1. OFFENSE. A person who marries another person, while married to another person, is guilty of a class C felony.

2. EXCEPTIONS. Subsection 1 above does not extend to:

a. A person whose spouse has been absent for five successive years and is believed by him or her to be dead;

b. A person whose spouse has voluntarily absented himself (((or herself from his spouse))) and has continually remained without the United States for the space of five successive years; or

c. A person whose former marriage has been pronounced void, null, or dissolved by the judgment of a competent court.

SECTION 1655. GENERAL PROVISIONS FOR SECTION 1641 TO SECTION 1654.)

1. MISTAKE AS TO AGE. In sections 1641 to 1648: (a) when the criminality of conduct depends upon a child's being below the age of fifteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than fifteen; (b) when criminality depends upon the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult.

2. SPOUSE RELATIONSHIPS. In sections 1641 to 1650, an offense excludes conduct with an actor's spouse. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse as accomplice in an offense which he or she causes another person to perform.

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under sections 1641 to 1650 and section 1653 unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian, or other competent person specifically interested in the victim, other than the alleged offender, learned of the offense.

SECTION 1656. DEFINITIONS FOR SECTION 1641 TO SECTION 1655.) In sections 1641 to 1655:

1. "Sexual intercourse" means sexual contact between a male and female consisting of contact between the penis and the vulva. "Sexual intercourse" occurs upon penetration, however slight; emission is not required;
2. "Deviate sexual intercourse" means sexual contact between human beings consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva. For the purposes of this subsection, sexual contact between the penis and the vulva, or between the penis and the anus, occurs upon penetration, however slight; emission is not required.
3. "Sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.
4. "Deviate sexual act" means any form of sexual contact with an animal, bird, or dead person.

SECTION 1849. DEFINITIONS FOR SECTION 1841 TO SECTION 1849.) In sections 1841 to 1849:

1. "Sexual activity" means sexual intercourse, deviate sexual intercourse, <u>deviate sexual act,</u> or sexual contact as defined in section 1656;

2. A "prostitution business" is any business which derives funds from prostitution regularly carried on by a person under the control, management, or supervision of another;

3. A "house of prostitution" is any place where prostitution is regularly carried on by a person under the control, management, or supervision of another;

4. A "prostitute" is a person who engages in sexual activity for hire; and

5. An "inmate" is a prostitute who acts as such in or through the agency of a house of prostitution.

FOURTH DRAFT:
Prepared by the staff of the Legislative Council for consideration by the Committee on Judiciary "B"
September 1972

Appendix "B"

SECOND SEXUAL OFFENSE ALTERNATIVE
(To be submitted, after final approval, to the Legislative Council without recommendation. Will be accompanied by first sexual offense alternative, also, after final approval, to be submitted without recommendation.)

SECTION 1641. RAPE OR GROSS SEXUAL IMPOSITION.)

1. OFFENSE. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:

a. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

b. He or someone with his knowledge has substantially impaired the victim's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance;

c. He knows that the victim is unaware that a sexual act is being committed upon him or her; or

d. The victim is less than fifteen years old.

2. GRADING. The offense is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subparagraph d of subsection 1, or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise the offense is a class B felony.

SECTION 1642. SEXUAL IMPOSITION.) A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of a class C felony if:

1. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct; or

2. He compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

SECTION 1643. CORRUPTION OF MINORS.) An adult who engages in a sexual act with another person or who causes another person to engage in a sexual act, is guilty of a class A misdemeanor if the other person is a minor.

SECTION 1644. SEXUAL ABUSE OF WARDS.) A person who engages in a sexual act with another person or any person who causes another to engage in a sexual act is guilty of a class A misdemeanor if the other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person.

SECTION 1645. SEXUAL ASSAULT.) A person who knowingly has sexual contact with another, or who causes such other person to have sexual contact with him, is guilty of a class B misdemeanor if:

1. He knows that the contact is offensive to the other person;
2. He knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;
3. The other person is less than fifteen years old;
4. He or someone with his knowledge has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;
5. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over him or her;
6. The other person is less than eighteen years old and the actor is his or her parent, guardian, or is otherwise responsible for general supervision of the other person's welfare; or
7. The other person is a minor and the actor is an adult.

SECTION 1646. FORNICATION.) A person is guilty of a class A misdemeanor if he engages in a sexual act in a public place. A minor engaging in a sexual act is guilty of a class B misdemeanor.

SECTION 1647. ADULTERY.) 1. A married person is guilty of a class A misdemeanor if he or she engages in a sexual act with another person.

2. No prosecution shall be instituted under this section except on the complaint of the spouse of the alleged offender, and the prosecution shall not be commenced later than one year from commission of the offense.

SECTION 1648. UNLAWFUL COHABITATION.) A person is guilty of a class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.

SECTION 1649. INCEST.) A person who intermarries, cohabits, or has sexual intercourse with another person related to him within a degree of consanguinity within which marriages are declared incestuous and void by section 14-03-03, knowing such other person to be within said degree of relationship, is guilty of a class C felony.

SECTION 1650. DEVIATE SEXUAL ACT.) A person who performs a deviate sexual act with the intent to arouse or gratify his sexual desire is guilty of a class A misdemeanor.

SECTION 1651. BIGAMY.)

1. OFFENSE. A person who marries another person, while married to another person, is guilty of a class C felony.

2. EXCEPTIONS. Subsection 1 above does not extend to:

a. A person whose spouse has been absent for five successive years and is believed by him or her to be dead;

b. A person whose spouse has voluntarily absented himself (((or herself from his spouse))) and has continually remained without the United States for the space of five successive years; or

c. A person whose former marriage has been pronounced void, null, or dissolved by the judgment of a competent court.

SECTION 1652. GENERAL PROVISIONS FOR SECTIONS 1641 TO 1647.)

1. MISTAKE AS TO AGE. In sections 1641 to 1646: (a) when the criminality of conduct depends on a child's being below the age of fifteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than fourteen; (b) when criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult.

2. SPOUSE RELATIONSHIPS. In sections 1641 to 1647 an offense excludes conduct with an actor's spouse. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where an offense excludes conduct with a spouse this shall not preclude conviction of a spouse as an accomplice in an offense which he causes another person to perform.

3. PROMPT COMPLAINT. No prosecution may be instituted or maintained under sections 1641 through 1646 unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was a minor or otherwise incompetent to make complaint, within three months after a parent, guardian, or other competent person specifically interested in the victim, other than the alleged offender, learned of the offense.

SECTION 1653. DEFINITIONS FOR SECTIONS 1641 TO 1652.) In sections 1641 to 1652:

1. "Sexual act" means sexual contact between human beings who are not husband and wife consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, or the mouth and the vulva. For the purposes of this subsection, sexual contact between the penis and the vulva, or between the penis and the anus, occurs upon penetration, however slight. Emission is not required.

2. "Sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

3. "Deviate sexual act" means any form of sexual contact with an animal, bird, or dead person.

SECTION 1849. DEFINITIONS FOR SECTIONS 1841 TO 1849.) In sections 1841 to 1849:

1. "Sexual activity" means sexual act, deviate sexual act, or sexual contact as defined in section 1653;

2. A "prostitution business" is any business which derives funds from prostitution regularly carried on by a person under the control, management, or supervision of another;

3. A "house of prostitution" is any place where prostitution is regularly carried on by a person under the control, management, or supervision of another;

4. A "prostitute" is a person who engages in sexual activity for hire; and

5. An "inmate" is a prostitute who acts as such in or through the agency of a house of prostitution.

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

COMMITTEE ON JUDICIARY "B"

Meeting of Thursday and Friday, October 26-27, 1972
Room G-2, State Capitol
Bismarck, North Dakota

The Chairman, Senator Howard Freed, called the meeting of the Committee on Judiciary "B" to order at 9:40 a.m. on Thursday, October 26, 1972, in Committee Room G-2 of the State Capitol.

Legislative members present:	Senators Freed, Page Representatives Atkinson, Hilleboe, Murphy, Stone
Citizen members present:	Judges Erickstad, Pearce; Professor Lockney; Mr. Webb; Mr. Wolf
Legislative member absent:	Representative Kieffer
Citizen members absent:	Judges Lynch, Smith
Also present:	Mr. Vance Hill; Mr. Charles Travis; Mr. Tom Kelsch; Mr. John Jacobson

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY REPRESENTATIVE STONE, AND CARRIED that the Committee approve the minutes of the last meeting as mailed.

The Committee discussed Sections 12-04-04 through 12-04-10 dealing with a defendant's capacity to stand trial or mental capacity at the time of the offense. These sections were drafted by Mr. Hill, and read as follows:

SECTION 12-04-04.) No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures. (Source: Mr. Hill's draft of 5/11-12/1972.)

SECTION 12-04-05.) Evidence of mental disease or defect submitted for the purpose of excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the court may for good cause permit, files a written notice of his purpose to rely on such defense.

SECTION 12-04-06.) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect for the purpose of excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect will otherwise become an issue in the case, the court may order the defendant to undergo a psychiatric examination and may order him committed to the state hospital or other suitable facility for a period not to exceed thirty days for such examination. The court shall allow any qualified psychiatrist retained on behalf of the defendant to witness and participate in the examination. While the defendant is committed, his legal counsel, family, and others necessary to assist in his case shall have reasonable opportunity to examine and confer with him.

SECTION 12-04-07.) The report of the examining psychiatrist shall be given in writing to the court, who shall cause copies to be delivered to the prosecutor and counsel for the defendant. If the findings of the report are contested, the court shall hold a hearing prior to deciding the issue. Upon hearing, the prosecution and defense shall have the right to summon and cross-examine the persons responsible for the report and to offer evidence upon the issues.

SECTION 12-04-08.) If the court determines that the defendant lacks fitness to proceed, the proceedings against him shall be suspended, except as provided in section 12-04-09, and the court shall commit him to the custody of the superintendent of the state hospital or the state school for so long as such unfitness shall endure. Such commitment shall not exceed the maximum period for which the defendant could be sentenced and in no event shall exceed three years, and such commitment

must be justified by the reasonable probability that the defendant will regain fitness to proceed. When the court determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If prosecution of the defendant has not resumed prior to the expiration of the maximum period for which the defendant could be committed, or it is obvious that the defendant will not regain fitness to proceed, the charges against him shall be dismissed and the defendant shall be subject to laws governing civil commitment of persons suffering from mental disease or defect.

SECTION 12-04-09.) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

SECTION 12-04-10.) When the defendant is acquitted on the ground of mental disease or defect which excludes responsibility and the court determines there is need for institutional custody, care, or treatment, the court shall order him to be committed to the custody of the superintendent of the state hospital or state school for custody, care, and treatment.

Mr. Hill explained that these sections were redrafted from similar sections previously considered by the Committee, and that they were an amalgamation of provisions of the Model Penal Code, the FCC, and Chapter 29-20 of the present Century Code. He noted that the sections were designed to replace Chapter 29-20, NDCC. Mr. Hill explained that in Section 12-04-08, he had added language in Lines 6, 7, and 8; and Lines 11 and 12 to take into account the decision of the United States Supreme Court in Jackson v. Indiana, which required that a defendant not be held indefinitely in a mental institution pending trial unless there is reason to believe that there is a substantial probability that he will regain fitness to proceed with the trial.

The Chairman inquired concerning Section 12-04-06, and asked why the psychiatrist retained by the defendant must be allowed to participate at any examination made by the psychiatrist appointed by the Court.

Representative Murphy inquired as to why Section 12-04-10 limited institutional commitments to the State Hospital or the State School at Grafton. Mr. Hill replied that those institutions have authority to transfer to other institutions where the welfare of the patient requires it. Mr. Webb noted that the State Hospital often transfers patients to Veterans' Administration hospitals.

Mr. Tom Kelsch asked whether Section 12-04-09 doesn't raise problems. For instance, he wondered whether there wasn't a need for the defendant to be at suppression of evidence hearings, etc. Professor Lockney noted that the decision in Jackson v. Indiana, 32 L.ED2d 435, commented on this question at Page 452 as follows:

> "Both courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant's incompetency. For instance, Section 4.06 (3) of the Model Penal Code would permit an incompetent accused's attorney to contest any issue susceptible of fair determination prior to trial and without the personal participation of the defendant . . . We do not read this Court's previous decisions to preclude the State from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions, through counsel."

The Committee Counsel suggested that the language contained in Subsection 4 of Section 12-32-02 which allowed commitment to "an appropriate licensed public or private institution" could be substituted for the words specifying the State Hospital or State School in Section 12-04-10. The Chairman stated that that might be appropriate. Mr. Webb stated that it would be desirable to permit a 30-day extension of commitment in Section 12-04-06, equivalent to the 30-day extension of commitment permitted in Section 12-32-02.

Professor Lockney, speaking about Section 12-04-10, noted that the principles of Jackson v. Indiana would forbid summary commitment following acquittal based on the mental disease or defect of the defendant. The Chairman noted that Section 25-01-02 of the Century Code provided for transfers between the State Hospital, the State School, and the State Sanatorium.

The Committee discussed Professor Lockney's contention that there could not be any direct commitment by the trial judge following an acquittal on the basis of the mental disease or defect of the defendant. The Committee discussed the desirability of allowing the trial judge to commence civil commitment proceedings by order to the State's Attorney.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY PROFESSOR LOCKNEY that Section 12-04-10 be amended by deleting everything after the words "shall" in Line 3 of that section and deleting Lines 4 and 5; and inserting the words "direct the state's attorney to file a written application with the county mental health board under the provisions of chapter 25-03."

Representative Murphy inquired as to why this motion was necessary, in light of the fact that the court could have made a determination as to the defendant's need for institutional custody, care, or treatment. The Chairman noted that the motion seemed necessary because, after acquittal of a defendant, there is no basis for committing him under other than the civil commitment procedures available for any other person.

Mr. Wolf inquired why the sentencing court couldn't automatically call the Mental Health Board to order after an acquittal on the basis of mental disease or mental defect. He stated that the motion as made duplicated the procedures for determining whether a defendant was in need of institutional custody, care, or treatment. He said that he felt that the Mental Health Board ought to hold a hearing on the mental capacity of a defendant in every instance where that defendant was acquitted due to mental disease or defect.

Thereafter, IT WAS MOVED BY MR. WOLF AND SECONDED BY PROFESSOR LOCKNEY that in Line 2 of Section 12-04-10, after the word "responsibility", the remainder of the line be deleted and that Lines 3, 4, and 5 be deleted; and that the words "the state's attorney shall file a written application with the county mental health board for determination of his need for institutional custody, care, or treatment pursuant to section 25-03-11." be inserted in lieu of the deleted language.

Judge Pearce stated that he objected to the motion on the basis that in some cases it would be clear to the court that institutionalization simply would not be necessary. In those cases, he did not see why the statutes should mandate that the State's Attorney should take steps to convene a Mental Health Board hearing. Mr. Wolf stated he believed that the public would be entitled to have a determination made by the Mental Health Board following an acquittal on the basis of mental disease or defect. He said that the public should know whether a man who was alleged to have committed a crime and acquitted because of his mental incapacity is still mentally incapacitated.

Thereafter, MR. WOLF'S MOTION, AMENDING THE MAIN MOTION, CARRIED with Judge Pearce dissenting. JUDGE PEARCE'S MAIN MOTION THEN CARRIED without dissent.

Professor Lockney raised a question concerning Section 12-04-03, as to why "insanity" was not an affirmative defense rather than simply a defense. He noted that the Model Penal Code made it an affirmative defense. The Committee Counsel noted that the section, as originally submitted to the Committee, had not provided that it be an affirmative defense, and that the FCC provision equivalent to Section 12-04-03 also did not provide that it be an affirmative defense.

Professor Lockney inquired as to why the psychiatric examination provided by Section 12-04-06 was not mandated rather than being discretionary with the court. Mr. Hill replied that there may be instances in which there will be a need for the court to have discretion to order a psychiatric examination.

Judge Pearce questioned the necessity for the sentence in Lines 7 through 9 of Section 12-04-06. He noted that there was no constitutional right that the defendant's retained psychiatrist be present during any psychiatric examination of the defendant. He said that he believed the sentence to be unnecessary, since it could create an adversary atmosphere at the psychiatric examination, which would not be desirable. In addition, he wondered whether the sentence might not be construed to mean that the State must furnish a psychiatrist on behalf of the defendant if the defendant is indigent.

Professor Lockney said he felt that the word "retained" in Line 8 made it clear that the defendant must pay for his own psychiatrist if he desires to have one in addition to those appointed by the court. The Committee Counsel stated that he was not certain that the word "retained" only referred to payment of the psychiatrist by the defendant. The word could also refer to retention by the State on behalf of an indigent defendant.

Judge Pearce again reiterated that forcing the "defendant's" psychiatrist into the examining room will cause the examination to take on an adversary nature. He felt that it was possible that psychiatric examinations could get out of hand, with the psychiatrists arguing among themselves concerning the methodology to be used in the examination.

The Committee discussed the desirability of ensuring that the court-ordered psychiatric examination be made by a licensed psychiatrist, and in addition discussed the fact that such an examination may also include examinations by psychologists and sociologists. It was noted that the psychiatric examination report was signed by the psychiatrist in charge, and that, as a general rule, he took responsibility for any psychological or sociological examinations done.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WEBB, AND CARRIED that the words "psychiatric examination" in Line 5 of Section 12-04-06 be deleted, and that the words "examination by a licensed psychiatrist" be inserted in lieu thereof.

Professor Lockney noted that the Model Penal Code provided a relatively detailed statement as to what should be contained in the psychiatric examination report. He wondered whether it would not be desirable to have such a statutory statement of the contents of a psychiatric examination report in the Committee's provisions. After much discussion, it was decided that it would not be necessary to have a detailed statutory statement as to what should be in such a report, since the court generally will state the questions which it wishes the psychiatrist to answer as a result of the examination, and the court will generally be knowledgeable as to the issues in the case regarding mental disease or defect.

IT WAS MOVED BY JUDGE PEARCE AND SECONDED BY MR. WEBB that the sentence commencing in Line 7 and ending in Line 9 of Section 12-04-06 be deleted, and that the following sentence be inserted in lieu thereof: "The court may, by subsequent order, extend the period of commitment for not to exceed thirty additional days."

Professor Lockney suggested that the word "shall" in Line 7 of Section 12-04-06 be deleted and the word "may" be substituted therefor. Thereafter, JUDGE PEARCE'S MOTION CARRIED, with Professor Lockney voting in the negative.

Professor Lockney noted that the language used in Section 12-04-08 to make that section comport with requirements of Jackson v. Indiana did not follow exactly the language used by the Supreme Court of the United States. For instance, he noted that the words "reasonable probability" in Line 7 of that section should be changed to "substantial probability" to comport with the holding in Jackson. Professor Lockney stated he felt that the statutory language should follow the language of the holding of the case to the greatest extent possible.

Thereafter, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED that the words "However, the defendant cannot be held for more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain fitness to proceed in the foreseeable future." be added between Lines 4 and 5 of Section 12-04-08, and that in Line 6 a period be inserted after the word "years" and the balance of the line be deleted; and that Line 7 be deleted; and that the words "to proceed." be deleted from Line 8.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED that the Committee accept Sections 12-04-04 through 12-04-10 as amended.

Mr. Kelsch suggested that the words "prior to or" be added before the word "at" in Line 2 of Section 12-04-05, to ensure that the defendant was not restricted to giving notice of the mental disease or defect defense only at the time of entering his plea of not guilty, or within 10 days thereafter.

IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE PEARCE, AND CARRIED that the Committee reconsider its action by which it approved of Sections 12-04-04 through 12-04-10 and that the word "at" in Line 2 of Section 12-04-05 be deleted and the words "not later than" be substituted therefor, and that, as amended, Sections 12-04-04 through 12-04-10 be again approved.

The Committee Counsel brought to the Committee's attention the addition of a new Subsection 5 to Section 12-08-06 dealing with the crime of escape from official custody. The new subsection read as follows:

5. Costs of prosecution for an escape from the penitentiary shall be borne by the state.

The Committee Counsel noted that this section was to replace Section 12-16-17, NDCC, which presently provides that the state treasury is to bear all costs of prosecution of persons escaping from the Penitentiary. The Committee discussed this proposition at length, noting that all prosecutions for escapes from the Penitentiary are tried in Burleigh County, and that the County does not presently seek reimbursement.

Mr. Wolf suggested that the language of the new Subsection 5 read as follows: "Expenditures incurred by a county for prosecution for an escape from the penitentiary shall be reimbursed by the state." He said that he was suggesting this change since the present language might prohibit a county from first making an expenditure and then being reimbursed.

The Committee discussed at length what would be encompassed within the phrase "costs of prosecution". The Committee Counsel noted that what was primarily on his mind in drafting the subsection was the cost of providing defense counsel for an indigent defendant. Mr. Kelsch noted that there are from six to 10 escapes from the Penitentiary per year, and that most of the escapees, when recaptured, plead guilty to "escape", if they are charged with an offense.

IT WAS MOVED BY SENATOR PAGE, SECONDED BY MR. WOLF, AND CARRIED that Subsection 5 of Section 12-08-06 be deleted (Lines 32 and 33 of Section 12-08-06).

The Committee discussed Section 12-11-06 which read as follows:

SECTION 12-11-06. PUBLIC SERVANT REFUSING TO PERFORM DUTY.) Any public servant who knowingly refuses or neglects to perform any duty imposed upon him by law is guilty of a class A misdemeanor, and, unless he is subject to impeachment, the sentencing court may also, as part of its sentence, remove him from governmental office.

The Committee discussed at length the desirability of the language of the section following the word "misdemeanor". It was noted that it would probably be more desirable for the person to have a hearing on removal, rather than being removed summarily by the trial court.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY JUDGE PEARCE, AND CARRIED that a period be inserted after the word "misdemeanor" in Line 28, Page 30; and that the balance of the section be deleted.

The Committee recessed for luncheon at 12:05 p.m., and reconvened at 1:15 p.m. at which time it considered a redrafted version of Section 12-04-08 which read as follows:

SECTION 12-04-08.) If the court determines that the defendant lacks fitness to proceed, the proceedings against him shall be suspended, except as provided in section 12-04-09, and the court shall commit him to the custody of the superintendent of the state hospital or the state school. However, the defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain fitness to proceed in the foreseeable future. Continued commitment of the defendant must be justified by progress toward fitness to proceed. The entire period of such commitment shall not exceed the maximum period for which the defendant could be sentenced and in no event shall exceed three years. When the court determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceedings shall be resumed. If prosecution of the defendant has not resumed prior to the expiration of the maximum period for which the defendant could be committed, or it is obvious that the defendant will not regain fitness to proceed, the charges against him shall be dismissed and the defendant shall be subject to laws governing civil commitment of persons suffering from mental disease or defect.

IT WAS MOVED BY SENATOR PAGE, SECONDED BY MR. WEBB, AND CARRIED that the Committee's action in adopting Sections 12-04-04 through 12-04-10 be reconsidered; that Section 12-04-08 be deleted; that a new Section 12-04-08 be created to read as quoted above; and that, with that new Section 12-04-08, Sections 12-04-04 through 12-04-10 be readopted.

The Committee Counsel noted that the staff was proposing an amendment to Section 12-11-05 (Page 30) dealing with "tampering with public records". The amendment would simply provide that the offense was a Class C felony if committed by a public servant, and a Class A misdemeanor in other cases.

IT WAS MOVED BY REPRESENTATIVE MURPHY, SECONDED BY MR. WEBB, AND CARRIED that Section 12-11-05 be amended as follows: In Line 2, delete the words "a class A misdemeanor" and substitute the words "an offense" therefor; between Lines 5 and 6 of the section insert the following new subsection:

2. The offense is:

a. A class C felony if committed by a public servant who has custody of the government record; and

b. A class A misdemeanor if committed by any other person.

and renumber the former Subsection 3.

The Committee Counsel noted that he was proposing a new section to be numbered 12-06-06 and to read as follows:

12-06-06. PROHIBITED ACT.) When the performance of an act is prohibited by any statute and no penalty for the violation of such statute is specifically imposed, the doing of such act is a class A misdemeanor.

The Committee Counsel noted that this section would be in replacement for Section 12-17-27 which currently provides the same thing. He noted particularly that the section only made it a misdemeanor to perform a prohibited act, but did not create a misdemeanor offense for the failure to perform a required act. The Committee discussed the proposed section at great length, and it was determined that it was not desirable to have such a blanket section creating criminal liability. Since the section was not contained in the draft, no motion was necessary to reject it.

The Committee Counsel noted the insertion of Section 12-12-01.1 into the draft which read as follows:

SECTION 12-12-01.1. ILLEGAL INFLUENCE BETWEEN LEGISLATORS OR BETWEEN LEGISLATORS AND GOVERNOR.) Any person who violates the provisions of section 40 or section 81 of the Constitution of this state is guilty of a class C felony. Any legislators convicted of a violation of this section or section 12-12-01 shall forfeit his office and thereafter be disqualified from holding any public office in this state.

The Committee Counsel noted that the last sentence of the proposed section comported with current law, but that it probably contravened the constitutional provision that the Legislature itself would be the sole body capable of determining the qualifications of its members.

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY REPRESENTATIVE MURPHY, AND CARRIED that the second sentence of Section 12-12-01.1 be deleted, and that, with that amendment, the section be approved.

The Committee Counsel noted that a subsection had been added to Section 12-12-03 which prohibits trading in public office to provide that an appointment of a public servant made in violation of the section is void, but the subsection goes on to validate any official action taken before a conviction under the section is had. The Committee

discussed the fact that this would validate acts which, in themselves, might have been the reason for the unlawful appointment. However, Judge Pearce pointed out that it would only validate the "official action" by the public servant, but would not validate a contract which would otherwise be void as against public policy, or void because it violated some existing criminal statute.

Thereafter, IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY MR. WEBB, AND CARRIED that the proposed Subsection 3 of Section 12-12-03, as presented, be accepted.

The Committee considered a new Subsection 2 of Section 12-32-02 which provides that credit is to be given against any sentence of imprisonment for all time spent in custody as a result of the criminal charge for which sentence was imposed, or as the result of conduct on which the criminal charge was based. MR. TRAVIS MOVED THE ADOPTION of Subsection 2 of Section 12-32-02. Thereafter, the Committee discussed the necessity of specifically stating which agency was to give the credit.

IT WAS MOVED BY MR. WEBB, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the words "by the court" be added after the word "given" in Line 16 of Section 12-32-02 (Line 18, Page 70); and that the words "and containing a notation of any credit against the sentence" after the sentence in Line 34 of Section 12-32-02 (Line 36, Page 70).

Professor Lockney noted that the language in Subsection 4 of Section 12-32-02 specifically provided for credit against a sentence of imprisonment where the defendant was committed for presentence diagnostic testing. Professor Lockney suggested that the sentence beginning in Line 32, Page 70 and ending in Line 34, Page 70, be stricken, and that the words "in involuntary confinement for testing or treatment prior to trial or time spent" be inserted after the word "spent" in Line 21, Page 70. Professor Lockney noted that it was desirable to delete the language in Subsection 4 of Section 12-32-02, in order that an inference not arise that credit is not to be given for time spent in a mental institution under a commitment to determine the defendant's capacity to stand trial.

Mr. Wolf noted that in many instances a defendant will have himself voluntarily committed prior to any court order, and that the defendant should definitely not receive credit against any sentence of imprisonment for time spent in custody due to a voluntary commitment.

After further discussion, IT WAS MOVED BY MR. WOLF, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that the words "in a jail or mental institution" be added after the second word "custody"; and that a comma be added after the word "charged"; and that the words "whether that time is spent" be added before the word "prior" in Line 22; that the word "and" in Line 22 be deleted and the word "or" be inserted in lieu thereof; and the sentence commencing in Line 32 and ending in Line 34, Page 70, be deleted.

The Committee discussed Subsection 6 of Section 12-32-03 which provided that a term of imprisonment was to commence to run at the time custody of the offender is transferred to the person responsible for receiving him at the place of imprisonment. IT WAS MOVED BY MR. WEBB, SECONDED BY PROFESSOR LOCKNEY, AND CARRIED that everything after the word "commences" in Subsection 6 of Section 12-32-02 be deleted, and that the words "at the time of sentencing" be inserted in lieu thereof.

The Committee discussed Section 12-32-04.1 dealing with the guidelines to be used prior to or in the imposition of a monetary fine, and reading as follows:

SECTION 12-32-04.1. IMPOSITION OF FINE - RESPONSE TO NONPAYMENT.)

1. The court, in making a determination of the propriety of imposing a sentence to pay a fine, shall consider the following factors:

a. The ability of the defendant to pay without undue hardship.

b. Whether the defendant, other than a defendant organization, gained money or property as a result of commission.

c. Whether the sentence to pay a fine will interfere with the defendant's capacity to make restitution.

d. Whether a sentence to pay a fine will serve a valid rehabilitative purpose.

2. The court may allow the defendant to pay any fine imposed in installments. In no case shall a defendant be sentenced to pay or, in the event of nonpayment, to be imprisoned.

3. If the defendant does not pay the fine, or make any required partial payment, the court, upon motion of the prosecuting attorney or on its own motion, may issue an order to show cause why the defendant should not be imprisoned for nonpayment. Unless the defendant shows that his default is excusable, the court may sentence him to the following periods of imprisonment for failure to pay a fine:

a. If the defendant was convicted of a misdemeanor, to a period not to exceed thirty days.

b. If the defendant was convicted of a felony, to a period not to exceed six months.

Mr. Hill suggested that the language of the second sentence of Subsection 2 of Section 12-32-04.1 could be improved upon, and that the language used in Subsection 3 of Section 3302 of the FCC might better serve.

Thereafter, IT WAS MOVED BY MR. WEBB, SECONDED BY MR. WOLF, AND CARRIED that Lines 11 and 12 of Section 12-32-04.1 be deleted and that the following be substituted in lieu thereof: "When a defendant is sentenced to pay a fine, the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid."

IT WAS MOVED BY JUDGE PEARCE, SECONDED BY MR. WOLF, AND CARRIED that Section 12-32-04.1 be adopted, as amended, and renumbered to correspond to the other numbering of the second draft of the main revision bill.

The Committee discussed a proposed Section 12-31-03 which would replace current Section 12-18-11 making it a misdemeanor to leave an abandoned icebox in any place accessible to children. It was noted that most newer iceboxes are fitted with magnetic doors which can be opened from the inside.

Thereafter, IT WAS MOVED BY MR. WEBB, SECONDED BY MR. WOLF, AND CARRIED that Section 12-31-03, as proposed, not be adopted and that current Section 12-18-11 be repealed.

Judge Pearce then noted that Subsection 2 of Section 12-33-01 which provides that a public office is forfeited if the officer is sentenced to imprisonment for a felony should probably be amended to take into account the fact that certain public officers are only subject to impeachment as a method of removal. IT WAS MOVED BY MR. WOLF, SECONDED BY JUDGE PEARCE, AND CARRIED that the words ", other than an office held by one subject to impeachment," be added after the word office in Line 18, Page 79.

The Committee discussed the proposed creation of Section 29-03-01.1, which replaces Section 12-06-02, and Section 29-03-21, which replaces Section 12-01-09. The sections indicate first which persons are liable for prosecution in this state for crimes commenced outside of this state, and second, when mailing of a letter is the criminal act where venue of the case will be.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY JUDGE PEARCE, AND CARRIED that proposed Sections 29-03-01.1 and 29-03-21 be accepted as presented.

The Committee Counsel presented a proposed amendment to Section 16-12-14 to change the internal reference therein to make it refer to the new Code's numbering for the criminal offense of perjury. In addition, the Committee Counsel presented a new proposed Section 16-12-16 which read as follows:

16-12-16. VOTING FRAUDS.) It shall be a class A misdemeanor for any person to knowingly:

1. Vote or offer to vote more than once in any election.

2. Vote when he is not qualified to do so.

3. Vote at the wrong precinct.

The Committee discussed the sections, and it was noted that in many instances problems were encountered where farmers sold their farms and moved to town, but continued to vote in their old farm precincts.

IT WAS MOVED BY PROFESSOR LOCKNEY, SECONDED BY REPRESENTATIVE HILLEBOE, AND CARRIED, with Judge Pearce voting in the negative, that Sections 16-12-14 and 16-12-16 be accepted as presented.

The Committee discussed the penalty provided for forceful interference with elections in Section 12-14-03. It was noted that that penalty was equivalent to a class A misdemeanor, whereas several of the present offenses which would be encompassed in Section 12-14-03 are presently felonies. For instance, destroying ballot boxes and mutilating election returns. After discussion, the Committee made no motion to change the penalty classification.

Representative Hilleboe noted that the Fargo City Attorney had recently issued an opinion in which he stated that Fargo's home rule ordinances could provide that Fargo businesses could be open on Sunday regardless of the state law prohibiting Sunday opening. The Committee discussed Representative Hilleboe's comment, and the Chairman directed that the staff draft a proposal for presentation during this meeting. Thereafter, the Committee recessed at 5:00 p.m. on Thursday, October 26, 1972, and reconvened at 9:30 a.m. on Friday, October 27, 1972.

The Committee Counsel presented a proposed Section 12-01-05 which read as follows:

12-01-05. CRIMES DEFINED BY STATE LAW NOT TO BE SUPERSEDED BY HOME RULE CITY'S CHARTER OR ORDINANCES.) No offense defined in this title (or elsewhere by law) (or felony defined outside this title) shall be superseded by any city home rule charter, or by an ordinance adopted pursuant to such charter, and all such offenses shall have full force and effect within the territorial limits and other jurisdiction of home rule cities.

The Committee Counsel noted that there was some danger in proceeding in this manner, since a court might construe that to mean that other sections of state law could be superseded by home rule city ordinance. In addition, the Committee Counsel noted that, although the language of the relevant sections in Chapter 40-05.1 (the home rule chapter) were ambiguous, he was not at all sure that the City Attorney for Fargo had correctly interpreted the law. The Committee Counsel noted that the Home Rule Chapter was contained in a bill prepared as a result of a Legislative Council study, and the study report regarding the bill stated the following:

> "It has been generally held that state laws pertaining to police powers bind home rule cities. That is, home rule cities can enact ordinances in police power areas as long as such laws are consistent with state general law. For example, a home rule city could not allow its liquor establishments to sell to minors. Neither could it allow sale of certain items on Sunday, Sunday sale of which is prohibited by state law."

Professor Lockney suggested that the field was too large a one to take up at this time, and that the Committee should not consider the proposed Section 12-01-05.

Representative Atkinson stated that, if the City Attorney of Fargo had a point, it presented a grave situation in terms of the statewide operation of state criminal laws, and the Committee should do what it can to settle the matter at this time. Representative Murphy noted that reorganized school districts can, in certain instances, set up school district rules which are contrary to current provisions of state law, after they comply with other provisions of state law.

Mr. Hill inquired as to whether it would not be desirable for the Committee to go a step further than the proposed Section 12-01-05 and prohibit any city from enacting an ordinance which conflicts with state criminal laws. The Committee Counsel noted that the draft of Section 12-01-05 was only designed to answer one particular question, and that was whether home rule cities could "supersede" state criminal laws within

their territorial jurisdiction. The draft answers that question in the negative, but does not go into the question of the desirability of cities being able to enact ordinances which conflict with state criminal laws.

Mr. Wolf suggested that the section proposed read in the affirmative, rather than the negative, and that it be designed to include all state statutes, so that no state statute could be superseded within the territorial limits of a home rule city. The Committee Counsel stated that, to the extent that any proposed section went beyond criminal law, it would be a subject which the Committee should have time to study at length. The Committee does not have that time, and it would be inappropriate to determine whether all state statutes should be ensured of full force and effect in home rule cities at this time.

It was then suggested that a separate bill embodying essentially the text of Section 12-01-05 as proposed be drafted, so as to bring the problem squarely before the Legislature, and so as to allow the Legislature to extend to the principle of the bill if testimony regarding the powers of home rule cities indicates that it is necessary. Thereafter, IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY MR. WOLF, AND CARRIED that the staff of the Legislative Council draft a separate bill embodying essentially the text of Section 12-01-05 as presented, and that that bill be submitted to the full Legislative Council at Camp Grafton.

The Committee Counsel submitted another proposed Section 12-31-03 dealing with the sale of tobacco to minors, and the use of tobacco by minors. It was noted that this section would replace the provisions of Sections 12-43-01, 12-43-02, and 12-43-04. This section presented read as follows:

12-31-03. SALE OF TOBACCO TO MINORS AND USE BY MINORS PROHIBITED.)

1. It is a class B misdemeanor for any person to sell or furnish to a minor or to procure for a minor cigarettes, cigarette papers, cigars, snuff, or tobacco in any other form in which it may be utilized for smoking or chewing. As used in this subsection, "sell" includes dispensing from a vending machine under the control of the actor.

2. It is a class B misdemeanor for a minor to smoke or use, in a public place, cigarettes, cigars, cigarette papers, snuff, or tobacco in any other form in which it may be utilized for smoking or chewing.

The Committee discussed this proposed statute at length, and it was noted that current law on the subject gave one of the prime examples of a law which was not enforced. Mr. Webb stated that he believed the enforceability of a statute should not always be the main criteria for its existence. Judge Pearce suggested that the problem of keeping minor children from smoking was primarily one of parental concern, and that the State neither had the resources nor the desire to enforce its criminal statutes against children who smoked. Mr. Wolf suggested that perhaps the section should be adopted, but that the age limit provided therein should be lowered to children under 16 years of age, rather than simply to encompass all minors.

The Committee discussed the fact that the real evil was that retailers sold the cigarettes to minors. Judge Pearce noted that this was one of the so-called victimless crime statutes in that children, in trying to determine the validity of the statute, can

see no inherent harm which the State should have an interest in preventing, except in regard to the smoker's own personal health. Judge Pearce wondered whether this was enough of a basis for creating criminal liability for children who smoked.

IT WAS MOVED BY MR. WOLF AND SECONDED BY REPRESENTATIVE ATKINSON that Section 12-31-03 be accepted as presented, with the age limit provided therein lowered to under 16 years of age, and further providing that purchasers or attempted purchases by persons under 16 years of age also be made criminal.

PROFESSOR LOCKNEY, WITH A SECOND BY MR. TRAVIS, MOVED A SUBSTITUTE MOTION to create another companion bill embodying the text of Section 12-31-03 as presented. Representative Murphy suggested that no alternative be prepared, and that the subject simply be deleted from the new Code revision. Representative Hilleboe suggested that alternatives seemed to indicate that the Committee has abdicated its responsibility. Representative Atkinson thought that an alternate simply suggested that the Committee had wrestled with the problem, and could not find a common ground for solution.

Judge Pearce suggested that the Committee only create an offense relating to selling cigarettes to a minor, as the criminal law loses credibility when it consists of unenforceable statutes which seem to the persons involved to have no rational basis. Thereafter, PROFESSOR LOCKNEY'S SUBSTITUTE MOTION CARRIED by a vote of 6 to 5. Professor Lockney stated that he hoped the Legislature would see fit to kill the alternative bill.

The Committee considered a proposed draft of Section 12-31-04 which read as follows:

12-31-04. SALE OF CONTRACEPTIVES AND DRUGS FROM VENDING MACHINES.) It is a class B misdemeanor for any person to sell or offer for sale from a vending machine any drugs, medicines, or devices for the prevention of pregnancy or for the prevention or treatment of disease. A person is deemed to be selling or offering for sale within the meaning of this section if the vending machine is located within his place of business.

The Committee Counsel noted that this section was to replace Section 12-43-12 which presently prohibits the selling of contraceptives, drugs, and medicines from vending machines. Mr. Wolf stated that the section should probably only apply to the sale of contraceptive devices, drugs, and medicines, and that this could be accomplished by adding the word "venereal" before the word "disease" in Line 4 of the proposed section.

IT WAS MOVED BY MR. WEBB AND SECONDED BY JUDGE PEARCE that Section 12-31-04 as proposed not be adopted, and that Section 12-43-12, NDCC, be repealed.

MR. WOLF MADE A SUBSTITUTE MOTION that Section 12-31-04 be adopted with the word "venereal" inserted before the word "disease" in Line 4 of that section. MR. WOLF'S MOTION DIED FOR LACK OF A SECOND. Thereafter, MR. WEBB'S MOTION CARRIED, with Mr. Wolf voting in the negative.

Professor Lockney, noting that the Committee had discussed the possibility of a prosecution in municipal court for an ordinance violation could be followed by a prosecution in state court for a violation of a state statute prohibiting the same act, mentioned that the recent Supreme Court case of Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184 (1970) had held that a person was subjected to double jeopardy if he were prosecuted in a state court after conviction or acquittal in a municipal court for an offense arising out of the same factual situation.

Representative Hilleboe distributed a table which he had prepared indicating the differences and similarities between the three sexual offense alternatives previously adopted by the Committee. That table is attached to these minutes as Appendix "A". In addition, Representative Hilleboe distributed some comments concerning the three sexual offense alternatives which he had also prepared. Those comments are attached to these minutes as Appendix "B". The Chairman directed the staff to review Representative Hilleboe's comparative table, and to use the table as a portion of the Committee's report.

The Committee Counsel distributed a table showing the disposition of those sections of the Century Code presently contained in Chapter 12-01 through 12-43, which chapters would be repealed by the proposed Criminal Code revision bill. The Committee Counsel noted that the chart would require some updating in light of the Committee's action at this meeting.

The Chairman directed the staff to keep the membership of the Committee informed as to developments which might occur vis-a-vis the proposed new Criminal Code. Mr. Wolf inquired as to whether the Chairman thought that members of the Committee should hold themselves available to make presentations regarding the Code should the occasion arise. The Chairman thought that that would be appropriate. Mr. Kelsch noted that the State's Attorneys Association would be meeting in late November, and that it would be desirable that some type of presentation be made to that group.

Professor Lockney noted that the new Criminal Code would be an ideal topic for continuing legal education, and that such continuing education should go on even after the bill has passed.

The Committee discussed at length the attitude of the State's Attorneys Association to the proposed new Code as it had been indicated so far. The consensus was that the state's attorneys should be given as much time as possible to study the Code.

IT WAS MOVED BY REPRESENTATIVE HILLEBOE, SECONDED BY JUDGE PEARCE, AND CARRIED that the Committee recommend the second draft of the main revision bill, as amended at this meeting, to the full Legislative Council for its consideration.

IT WAS MOVED BY REPRESENTATIVE STONE, SECONDED BY MR. WOLF, AND CARRIED that the staff of the Legislative Council prepare the report of the Committee on Judiciary "B", subject to the approval of the Chairman.

The Chairman thanked the members of the Committee for their diligent efforts in carrying out this study. Mr. Wolf thanked the Chairman for his excellent leadership of the Committee, and extended the thanks of all members of the Committee to the Committee staff. Thereafter, without objection, the Chairman declared the meeting adjourned, sine die, at 11:50 a.m.

John A. Graham
Assistant Director

APPENDIX "A"

ALT. I	ALT. III	ALT. II
12-20-01 SAME	12-20-01 SAME	12-20-01 SAME
12-20-02 (1) & (2) Sets forth anything other than penis and vulva contact as a "Deviate Act" Same (3) Same (4)	12-20-02 1. Classifies all forms of sexual relations under term "Sexual Act" Same (2) Same (3)	12-20-02 Same as III Same (2) Same (3)
12-20-03 1. Limited to male only guilty and only in sexual intercourse 1(a) Relates to female only 1(b) Relates to female only 1(c) Relates to female only with mistaken identity as to male as spouse 1(d) Same 1(e) Limited to female 2. Same	12-20-03 1. Not limited to male,covers all persons regardless of gender and uses word sexual act which is defined to cover all acts 1(a) Covers all persons 1(b) Covers all persons 1(c) Covers all persons; eliminates mistaken identity 1(d) Same 1(e) Covers all persons Same	12-20-03 1. Same as III 1(a) Same as III 1(b) Same as III 1(c) Same as III 1(d) Same as III 1(e) Same as III Same
12-20-04 Covers sexual intercourse male as actor only	12-20-04 Covers all persons	Same as III
12-20-05 Puts separate section for "deviate" sexual intercourse	Covered in 12-20-03	Same as III
12-20-06 Puts separate section for "deviate" sexual intercourse	Covered in 12-20-03	Same as III
12-20-07 Classified as deviate any relation between persons voluntary	Eliminated	Eliminated
12-20-08 Adult has sexual intercourse or deviate or causes deviate with minor; class C felony	12-20-05 Adult engaging or causing sexual act with minor; class A misdemeanor	12-20-05 Adult engaging or causing sexual act if person is minor; must have three year age differential to apply

ALT. I	ALT. III	ALT. II
12-20-09 Same except penalty class C	12-20-06 Same except penalty class A misdemeanor	12-20-06 Same as III
12-20-10 Same	12-20-07 Same	12-20-07 Same
12-20-11 Classifies any sexual intercourse between unmarried people; class B misdemeanor	12-20-08 Classifies sex act in public place class A misdemeanor; minor engaging in sex act class B	12-20-08 Classifies sex act in public place class A misdemeanor
12-20-12 Same in III	12-20-09 Same in I	Eliminated
12-20-13 Same except penalty class A	12-20-10 Same except penalty class B	12-20-09 Same except penalty class B
12-20-14 Sexual intercourse only	12-20-10 Covers sex acts	12-20-11 Same as III
12-20-15 Same	12-20-12 Same	12-20-11 Same
12-20-16 Same	12-20-13 Same	12-20-12 Same
Not applicable	Section 2 Same as II	Section 2 Same as III
Section 2 Adds deviate sexual act	Section 3 Has sexual act; covers all form of intercourse	Section 3 Same as III

COMMENTS

Alt. I

12-20-02 Alternative I has two separate classes of intercourse - (1) sexual intercourse and deviate sexual intercourse - Alternatives II and III lump all acts between human beings as a sexual act. There seems to be no reason for separating sexual intercourse and deviate as the penalties for any of the offenses are the same. The word deviate seems to canote psychic or abnormal rather than different.

The use of deviate sexual intercourse seems to be a new expansion of the word intercourse - by definition sexual intercourse means coitus or copulation; this can only be done by the generative organs in a male and female being joined. It has no relation to the mouth, anus, etc. The only way deviate sexual intercourse could happen would be probably the more bizarre type - e.g., a male and female hanging from the 18th floor of the State Capitol by their toes and singing Home on the Range while copulating.

12-20-03 Separate section on rape in Alternative I includes only acts of a male upon a female and only sexual intercourse. Alternatives II and III do not use word rape but use the words gross imposition and cover persons both male and female. Alternative I makes it no crime for a female to impose sexual intercourse on a male not a minor or a ward. Alternative I also states that if the female mistakenly has intercourse with a male thinking he is her spouse, he is guilty. It is hard to imagine the circumstances; however, if it is possible, then the male should have the same protection(?)

12-20-04 Alternative I again makes the woman the only possible victim.

12-20-05
12-20-06 Alternative I by defining deviate sexual intercourse and sexual intercourse separately needs this section. Alternatives II and III by combining the definition as an act does not need these sections. The penalties are the same; therefore, these sections are not needed if the definition in Alternatives II or III are used.

12-20-07 This section is the anti-homosexual section; making it a crime to engage in deviate sexual intercourse voluntarily. Alternatives II and III eliminate this section.

12-20-08 Here again is used the word deviate. However, it also appears that there is no penalty for causing another to engage in sexual intercourse, only deviate sexual intercourse. The penalty is a class C felony. Alternative III uses sex act covering all acts both caused or engaged in. Alternative II also covers all sex acts as in Alternative III; however, if the person is a minor, the adult must be three years older. This language was inserted to take care of the 18-year adult and the 17 or 16-year old minor of either sex.

12-20-09 Same except class C felony in Alternative I and class C misdemeanor in Alternatives II and III. No apparent reason for difference.

12-20-11 Classifies any sexual intercourse between consenting adults is a class B misdemeanor. It must also be noted that under Section 12-20-07 these same consenting adults engaging in deviate sexual intercourse are punishable as a class A misdemeanor. This seems to be the only place in Alternative I that expressly says a deviate intercourse is a more grave crime. Alternative II stated that the sexual act in public is a crime and not in private. Alternative III is the same as Alternative II but further makes it a crime to have minors engage in sex acts.

12-20-12 Alternative II eliminated this section entirely.

12-20-13 Alternative I has penalty as class A misdemeanor.
Alternative II has penalty as class B misdemeanor.
Alternative III has penalty as class B misdemeanor.
No apparent reason.

12-20-14 Alternatives I, II, and III all relate to sexual intercourse, not sexual acts or deviate sexual intercourse.

Section 2 Alternative I adds deviate sex act.

Section 3 Alternatives I and II define sexual activity as sexual act.