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# The New Iowa Criminal Code

Kermit L. Dunahoo

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## THE NEW IOWA CRIMINAL CODE

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## I. INTRODUCTION

The new Iowa Criminal Code (Criminal Code) went into effect on January 1, 1978, having been finally passed in 1976<sup>1</sup> following three years of legislative process. The Criminal Code is the first complete revision since the passage of Iowa's first criminal code in 1851. The lengthy interim period saw many patchwork changes through "the process of ad hoc, piecemeal amendment."<sup>2</sup>

### A. Legislative History<sup>3</sup>

With the impetus of pioneer work undertaken a decade earlier by a

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1. S.F. 85, 1976 Iowa Acts 2d Sess. ch. 1245 (66th G.A.).
  2. Schantz, *Objectives of Criminal Code Revision: Guidelines to Evaluation*, 60 IOWA L. REV. 430 (1975).
  3. Unfortunately, few meaningful documents on legislative history of the new Criminal Code exist, so that the researcher must pore through individual legislative journals and multitudinous proffered amendments during a three year legislative period to determine the legislative intent. This tedious task must be done without the benefit of any explanatory comments either on the bill as proposed by the Criminal Code Review Study Committee or on the proposed Criminal Code as ultimately passed by the legislature. For an example of helpful illustrative comments on criminal code revision in another jurisdiction, see Proposed Criminal Code for the State of Missouri 8 (West pamphlet 1973). The one piece of official Iowa legislative history of any substance appears in the section-by-section commentary in Substantive Crim. Law Subcomm. of the Crim. Code Review Study Comm., (Tent. Draft No. 4, 1974) [hereinafter

committee of the Iowa State Bar Association, the general assembly established a Criminal Code Review Study Committee in 1969. This committee completed its task in December of 1972, and transmitted its final report in the form of a proposed new criminal code to the general assembly near the start of the legislative session in 1973. Extensive review of this report was completed by a special legislative subcommittee in 1973. Early in the 1974 legislative session, a bill (S.F. 1150) drafted by that subcommittee was introduced, reflecting the work of that subcommittee on the study committee's report and on other proposals. Some action was taken in the Senate, but none at all was taken in the House during the 1974 session. The bill had to be reintroduced (as S.F. 85) with the convening of a new General Assembly in 1975. That bill was passed by the Senate in 1975 and by the House in 1976, and signed into law by Governor Ray on June 28, 1976.

The effective date for its general implementation was January 1, 1978.<sup>4</sup> Three provisions, however, went into effect on July 1, 1976: (1) amendment of the accommodation provision in the controlled substances law,<sup>5</sup> (2) repeal of the requirement that motorcyclists wear helmets,<sup>6</sup> and (3) provision for the Iowa Supreme Court to propose changes in the new Iowa Rules of Criminal Procedure to the General Assembly for the 1977 session.<sup>7</sup>

Myriad corrective, as well as substantive, amendments were passed in 1977. Several additional changes were made during the 1978 and 1979 legislative sessions.<sup>8</sup>

### B. *Contents of the Criminal Code*

The entire revised Criminal Code is comprised of the Iowa Criminal Code, the Iowa Code of Criminal Procedure, and the Iowa Corrections Code. This Article is an analysis of the Iowa Criminal Code only. This part of the Criminal Code contains general principles relating to substantive criminal law, the law of complicity of the various parties to crime and the individual crimes and defenses (both general and specific) to crimes. The latter topic is included herein only as to specific defenses peculiar to particular crimes.

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cited as STUDY COMMITTEE REPORT]. Unfortunately, this document related to the proposed code in 1974 rather than to how it was submitted to the general assembly as S.F. 85 in 1975-76. Moreover, this document is not generally available, but can be examined in the office of the Iowa Legislative Service Bureau in Des Moines. An excellent unofficial source of legislative history can be found in J. YEAGER & R. CARLSON, *IOWA CRIMINAL LAW AND PROCEDURE* (1979) [hereinafter cited as J. YEAGER & R. CARLSON]. Professors John Yeager and Ronald Carlson served as the reporters for the STUDY COMMITTEE REPORT.

4. S.F. 85, 1976 Iowa Acts 2d Sess. ch. 1245, § 529 (66th G.A.).

5. *Id.* § 231, amending IOWA CODE § 204.410 (1975).

6. *Id.* § 527, repealing 1975 Iowa Acts 1st Sess. ch. 183 (66th G.A.).

7. *Id.* § 530.

8. See 1977 Iowa Acts 1st Sess. (67th G.A.); 1978 Iowa Acts 2d Sess. (67th G.A.); 1979 Iowa Acts 1st Sess. (68th G.A.) (supplementing IOWA CODE §§ 701.1-732.6 (1978)).

### 1. *Substantive Content of the Criminal Code*

Practically every crime was changed to some extent in the revision process which culminated in the new Criminal Code. Numerous crimes were eliminated completely and several were added to the Iowa Criminal Code for the first time. In addition to these substantive changes, a whole new legislative lexicon was created because many changes in terminology were made.<sup>9</sup>

a. *Inclusivity of the Criminal Code.* All crimes in Iowa are statutory,<sup>10</sup> nevertheless the new Criminal Code surprisingly does not contain all of the serious crimes included in the Iowa Code. The major omission is the Uniform Controlled Substances Act, which despite containing several felonies, was left in chapter 204 of the Iowa Code.<sup>11</sup> Numerous other felonies<sup>12</sup> (either Class C or D), as well as many aggravated misdemeanor offenses,<sup>13</sup> were also not transferred into the new Criminal Code. Similarly, nearly one hundred serious misdemeanors,<sup>14</sup> as well as hundreds of simple misdemeanors, remain scattered throughout other chapters of the Iowa Code instead of being incorporated into the new Criminal Code itself. Coordinating amendments<sup>15</sup> in the Criminal Code Revision Act conform the penalty provisions for the above regulatory offenses to the systematic penalty schedules in the new Criminal Code. Additionally, another approximately sixty-three criminal offenses remaining outside the Criminal Code have been declared to be fraudulent practices and thus punishable under the penalty schedules for that major offense,<sup>16</sup> which is a part of the Criminal Code.

In contrast, a number of *minor* offenses were surprisingly left in the new Criminal Code.<sup>17</sup> These include a series of unrepealed pre-revised of-

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9. For a discussion of archaic phraseology in the pre-revised code, see Schantz, *supra* note 2, at 434-35. Regarding the retention of the term "tumultuous" in the revised statute defining riot (now IOWA CODE § 723.1 (1979)), Professor Schantz states: "Such language gives little guidance to the public or to the police who must enforce it, and, touching as it does upon rights of expression and assembly, it is open to serious objection on policy grounds and to possible constitutional challenge." *Id.* at 435.

10. IOWA CODE § 701.2 (1979). See *State v. Brighi*, 232 Iowa 1087, 7 N.W.2d 9 (1942). Thus, no uncodified common law offenses are punishable in Iowa. Regarding over-inclusivity and under-inclusivity of the punishable conduct in the then proposed new Criminal Code, see generally Schantz, *supra* note 2, at 440-46.

11. As Professor Schantz pointed out in analyzing the proposed criminal code (then S.F. 1150), it was not necessary to include the Uniform Controlled Substances Act in the revised Criminal Code *in toto*. The central criminal provisions could have been "abstracted out and the classification scheme incorporated by reference." Schantz, *supra* note 2, at 443.

12. See, e.g., IOWA CODE §§ 321.281 (OMVUI-third offense); 422.25(8), 422.58(3) (tax evasion) (1977).

13. See, e.g., IOWA CODE §§ 321.281 (OMVUI-second offense); 657.3 (Nuisance) (1977).

14. See, e.g., IOWA CODE §§ 99B.6(4) (Gambling offense); 155.26 (Unauthorized Possession of Prescription Drugs) (1977); 321.281 (OMVUI-first offense) (1979).

15. See 1976 Iowa Acts 2d Sess. ch. 1245, pt. 4, §§ 1-531 (66th G.A.).

16. IOWA CODE §§ 714.8-13 (1979).

17. See Schantz, *supra* note 2, at 444. Professor Schantz states:

fenses relating to health, safety, and welfare,<sup>18</sup> infringement of civil rights,<sup>19</sup> blacklisting employees,<sup>20</sup> labor union membership,<sup>21</sup> labor boycotts and strikes,<sup>22</sup> political activities,<sup>23</sup> weapons permits,<sup>24</sup> and advertising and selling courses of instruction.<sup>25</sup> However, several other unrepealed pre-revised crimes of a minor nature were transferred outside of the new Criminal Code. These were offenses relating to storage batteries,<sup>26</sup> professional boxing and wrestling<sup>27</sup> and door-to-door sales.<sup>28</sup>

The fact that the new Criminal Code is not all inclusive has been clarified by the Iowa Supreme Court. In *State v. Rauhauser*,<sup>29</sup> the court held that public intoxication<sup>30</sup> was still a punishable criminal offense in Iowa even though it was not included in the new Criminal Code itself. The crux of the holding was that this offense, which was outside the main chapters of the pre-revised criminal code (in a chapter on liquor control),<sup>31</sup> was not repealed as part of the revision process. The court pointed out that the revised statute contained "a rather exhaustive listing of statutes repealed by the new Criminal Code,"<sup>32</sup> with no mention made of the statute on public intoxication. The court stated that "[h]ad the legislature intended to repeal said statutes, it is only reasonable to expect an indication of such intent where other repealed statutes are enumerated."<sup>33</sup> Having thus concluded that there was no express repeal, the court also refused to find an implied repeal. Invoking an established presumption against the implied repeal of statutes, the court noted that "[s]uch repeals are not favored by the courts and will not be sustained unless legislative intent to repeal is clear in the language

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[i]n sum, the [then proposed] Code's relocation or elimination of the "regulatory" statutes located in our present criminal Code seems rather thorough. However, one might well take exception to nearly all of [the chapter on health, safety, and welfare offenses]. Regulation of fireworks, x-rays and abandoned refrigerators, if needed at all, surely belongs outside the criminal code. *Id.*

18. See IOWA CODE §§ 727.1-.10 (1979).

19. See *id.* §§ 729.1-.4.

20. *Id.* §§ 730.1-.3.

21. *Id.* §§ 731.1-.8.

22. *Id.* §§ 732.1-.6.

23. *Id.* §§ 721.3-.7.

24. See *id.* §§ 724.5, .10, .15, .16, .21, .22.

25. *Id.* §§ 714.17-.22.

26. IOWA CODE §§ 715.1-.5 (1977) (repealed 1978).

27. *Id.* §§ 99C.1-.9 (1979).

28. *Id.* §§ 82.1-.6. Additionally, the crime of maintaining pay toilets in public places was transferred to § 135.21 pursuant to 1978 Iowa Acts 2d Sess. ch. 147, § 136 (67th G.A.), after originally being part of the new Criminal Code at § 727.11.

29. 272 N.W.2d 432 (Iowa 1978).

30. IOWA CODE §§ 123.46, .91 (1979).

31. IOWA CODE ch. 123 (1977).

32. *State v. Rauhauser*, 272 N.W.2d 432, 435 (Iowa 1978).

33. *Id.*



used and such a holding is absolutely necessary.”<sup>34</sup> Another intriguing factor in this implied repeal matter is that the public intoxication provisions were not included in the coordinating amendments sections in the Criminal Code Revision Act.<sup>35</sup>

b. *Decriminalization.* Several pre-revised crimes were completely eliminated from the new Criminal Code, in order to better reflect a modern legal code of conduct. Among them were Treason<sup>36</sup> and Misprision of Treason,<sup>37</sup> totally unused and unnecessary state crimes presumably better left to federal enforcement, since both crimes related only to treason against the United States.<sup>38</sup> Dueling,<sup>39</sup> an archaic crime, was eliminated. In addition, changing moral and sexual standards resulted in decriminalization of Adultery,<sup>40</sup> Forcible Marriage and Defilement,<sup>41</sup> and Seduction.<sup>42</sup> A growing recognition of constitutional rights to privacy explains the failure of the legislature to criminalize any private sexual activity among consenting adults in the new Criminal Code,<sup>43</sup> and the elimination of consensual sodomy between adults in the revised crime of Sexual Abuse.<sup>44</sup> Serious federal constitutional problems prompted decriminalization of four additional crimes:<sup>45</sup> Criminal Syndicalism,<sup>46</sup> Libel,<sup>47</sup> Profanity,<sup>48</sup> and Vagrancy.<sup>49</sup> Finally, the crime of Destruction of Food Products<sup>50</sup> was also decriminalized.

c. *Expanded Criminalization.* As Professor Schantz has pointed out, “[t]he converse of the decriminalization issue is whether the criminal law

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34. *Id.* at 434.

35. See 1976 Iowa Acts 2d Sess. ch. 1245, pt. 4 (66th G.A.).

36. IOWA CODE § 689.1 (1977) (repealed 1978).

37. *Id.* § 689.3.

38. Insurrection, which essentially consists of physical violence toward or disruption of state government or any subdivision thereof, is a more appropriate offense.

39. IOWA CODE §§ 692.1-4 (1977) (repealed 1978).

40. *Id.* § 702.1.

41. *Id.* § 699.1.

42. *Id.* §§ 700.1-3.

43. J. YEAGER, IOWA CRIMINAL CODE TRAINING MANUAL 51 (1977) [hereinafter cited as TRAINING MANUAL].

44. IOWA CODE §§ 709.1-10 (1979).

45. Professor Schantz has stated that “[a]t least a few provisions of the [then] current Code are rather clearly unconstitutional, at least as drafted.” Schantz, *supra* note 2, at 444.

46. IOWA CODE §§ 689.10-12 (1977) (repealed 1978). See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

47. IOWA CODE §§ 737.1-7 (1977) (repealed 1978). See *Ashton v. Kentucky*, 384 U.S. 195 (1966).

48. IOWA CODE § 728.1 (1977) (repealed 1978). See *Cohen v. California*, 403 U.S. 15 (1971).

49. IOWA CODE §§ 746.1-25 (1977) (repealed 1978). See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

50. IOWA CODE §§ 734.1-2 (1977) (repealed 1978). Professor Schantz states “[g]one, too, but not forgotten, are chapters 733 and 734, which prohibit the sale of diseased plants and the waste of food products to increase the price.” Schantz, *supra* note 2, at 444.

should be expanded to cover new areas.”<sup>51</sup> He concluded that systematic consideration was not given by the drafters of the new Criminal Code to even such timely penal concerns as expanding measures on consumer protection and environmental control.<sup>52</sup> However, several new offenses have been included in the new Criminal Code, including but not limited to the following: Indecent Exposure,<sup>53</sup> Public Indecent Exposure,<sup>54</sup> and the Sale of Hard Pornography.<sup>55</sup> The moral overtones of these new crimes indicate that morality was a significant concern of the drafters of the Criminal Code.

The new Criminal Code has also given special protection to particularly vulnerable classes of victims through the addition of such new crimes as Feticide and related offenses,<sup>56</sup> Sexual Exploitation of Children,<sup>57</sup> and Wanton Neglect of a Resident of a Health Care Facility.<sup>58</sup> Similarly, the new Code has focused attention on the special problem of weapons by adding a new offense of Possession of Firearms by a Felon,<sup>59</sup> and by expanding the scope of the pre-revised offense of Carrying Concealed Weapons.<sup>60</sup> Another noteworthy development in the new Criminal Code was the criminalization of three types of tortious conduct which heretofore had been left to civil remedies: False Imprisonment,<sup>61</sup> Malicious Prosecution,<sup>62</sup> and Setting Spring Guns.<sup>63</sup> Finally, the addition of the following new crimes has broadened extensively the general parameters of the criminal law: Solicitation,<sup>64</sup> which criminalizes unsuccessful *inchoate* activity, and Accessory After the Fact<sup>65</sup> complicity, which criminalizes the rendering of assistance to an offender *after* a crime has been committed.

## 2. Classification of Crimes

Practically all of the crimes in the new Criminal Code are categorized

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51. Schantz, *supra* note 2, at 448.

52. *Id.* One commentator states that “[i]f one were to identify important new concerns of the penal system in America, they would be consumer protection and environmental control.” Dash, *Means and Methods Employed in Penal Law*, 10 CRIM. L. BULL. 571, 579 (1974) (footnotes omitted). See IOWA CODE § 714.16 (1979) which was transferred, without change, from IOWA CODE § 713.24 (1977).

53. IOWA CODE § 709.9 (1979).

54. *Id.* § 728.5.

55. *Id.* § 728.4.

56. *Id.* §§ 707.7-10.

57. 1978 Iowa Acts 2d Sess. ch. 1188 (67th G.A.).

58. IOWA CODE § 726.7 (1979).

59. *Id.* § 724.26.

60. Compare IOWA CODE § 724.4 (1979) with IOWA CODE § 695.2 (1977) (repealed 1978).

61. IOWA CODE § 710.7 (1979).

62. *Id.* § 720.6.

63. *Id.* § 708.9.

64. *Id.* § 705.1.

65. *Id.* § 703.3.

into various classifications<sup>66</sup> of felonies and misdemeanors,<sup>67</sup> with each classification carrying a uniform maximum penalty.<sup>68</sup> There are four classes of felonies and three classes of misdemeanors.

Ameliorative sentencing alternatives to confinement are available for most felony offenses and for all of the misdemeanor offenses. These alternatives include a deferred judgment, a deferred sentence, or a suspended sentence.<sup>69</sup>

a. *Felonies.* (1) *Confinement.* Class A felonies<sup>70</sup> are punishable by a mandatory sentence for life imprisonment without probation or parole. Indeterminate<sup>71</sup> terms of imprisonment are prescribed for the other three classes of felonies,<sup>72</sup> as follows: (1) a 25 year term for class B felonies, (2) a 10 year term for class C felonies, and (3) a 5 year term for class D felonies. Whether or not a sentence of confinement is mandatory depends upon the availability of ameliorative sentencing alternatives as well as upon the scope of a new statutory provision<sup>73</sup> permitting a fine-only sanction on some felo-

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66. The only unclassified crimes in the Criminal Code are those left unrepealed and transferred into the Criminal Code. See IOWA CODE chs. 729-32 (1979).

67. Under IOWA CODE § 701.7 (1979), a "public offense" is a felony when so declared by the statute defining the crime. Coupled with IOWA CODE § 701.8 (1979), which defines misdemeanors as [a]ll public offenses which are not felonies," section 701.7 means that a public offense is to be considered a misdemeanor, indeed a simple misdemeanor, when the penalty clause is silent as to whether the crime is a felony or a misdemeanor. Contrastingly, under the pre-revised code, a felony was any public offense *potentially* punishable by imprisonment in the penitentiary or adult reformatory, even though such imprisonment was not *actually* imposed. See IOWA CODE § 687.2 (1977) (repealed 1978). See also *State v. Rauhauser*, 272 N.W.2d 432 (Iowa 1978).

68. Professor Yeager states that "[t]he purpose of this system is to provide a more rational system of sentencing than is permitted under our present law [then the 1973 Code]." Yeager, *Crimes Against the Person: Homicide, Assault, Sexual Abuse and Kidnapping in the Proposed Iowa Criminal Code*, 60 IOWA L. REV. 503, 504 (1975) [hereinafter cited as Yeager Note].

69. IOWA CODE § 907.3 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, §§ 1724-26.

70. IOWA CODE § 902.1 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 1622.

71. *Id.* § 902.3. See J. YEAGER & R. CARLSON, *supra* note 3, § 1624. Iowa's indeterminate sentencing statute "requires that the sentence, if it imposes a penitentiary term, shall not be fixed by the court. The term is imposed by law." *State v. Kulish*, 260 Iowa 138, 145, 148 N.W.2d 428, 433 (1967). This means that a sentencing judge is limited (in his judicial discretion, if any) to determining whether or not to impose (and then whether or not to suspend) a sentence of confinement. The judgment and sentence on any indeterminate term must be in the statutory terminology ("not to exceed" the statutorily-prescribed term of years), with the responsibility for determining the actual length of the prison sentence, within the maximum set by law, reposed in the board of parole. See *State v. Peckenschneider*, 236 N.W.2d 344, 347 (Iowa 1975). However, since the indeterminate sentencing law does not apply to misdemeanors, a jail sentence for a misdemeanor offense "must specify a definite term. Otherwise it is uncertain and void." *State v. Welfort*, 238 N.W.2d 781, 782 (Iowa 1976).

72. IOWA CODE § 902.9 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 1630.

73. *Id.* § 909.1.

nies, all of which is discussed below.<sup>74</sup>

(2) *Fines*. No fines are authorized on either class A or B felonies,<sup>75</sup> with the sole punishment instead being mandatory confinement. The maximum level of fines possible on class C and D felonies is \$5,000 and \$1,000,<sup>76</sup> respectively, with the exact amount, if any, a matter of judicial discretion for the sentencing court. These fines *apparently* can be in lieu of a sentence of confinement (or a suspended sentence) for non-“forcible felonies,” but only as an additional penalty for “forcible felonies”<sup>77</sup> which apparently are all punishable by mandatory imprisonment.<sup>78</sup>

All of the ameliorative sentencing alternatives are unavailable, however, for certain felonies:<sup>79</sup> (a) all class A felonies,<sup>80</sup> (b) certain class B, C, or D felonies of a violent-prone nature which are specially categorized as “forcible felonies,”<sup>81</sup> and (c) several of the major controlled substances offenses.<sup>82</sup> Additionally, a deferred judgment and a deferred sentence (but not a suspended sentence) are precluded for an aggravated form of the crime of Lascivious Acts With a Child.<sup>83</sup>

Statutory unavailability of any of these ameliorative alternatives for a particular crime means that the prescribed term of imprisonment is mandatory. All class A and B felonies clearly are punishable by mandatory confinement (“A” felonies by ameliorative alternatives being expressly prohibited and “B” felonies by all being categorized as “forcible felonies”). Whether or not mandatory confinement is applicable to class C and D felonies depends upon the meaning of Iowa Code section 909.1, which is new to Iowa law. Section 909.1 provides that upon conviction “of any public offense for which a fine is authorized, the court may impose a fine instead of any other sentence where it appears that the fine will be adequate to deter the defendant and to discourage others from similar criminal activity.”

Considered in isolation, section 909.1 clearly seems to authorize a judge to impose a fine (instead of the more onerous sanctions of either a suspended sentence or a sentence of confinement) as the only punishment for any crimes (class C and D felonies, as well as all three misdemeanor classifications) for which fines are authorized. Indeed, Professor Yeager states unequivocally that in pronouncing sentence for class C and D felonies, the court “may impose a fine, within the limits provided, without imposing a

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74. See generally text accompanying notes 84-102 *infra*.

75. IOWA CODE §§ 902.1, 902.9(1) (1979).

76. *Id.* §§ 902.9(3), (4).

77. *Id.* § 702.11. See text accompanying notes 180-203 *infra*.

78. See text accompanying notes 79-102 *infra*.

79. See generally J. YEAGER & R. CARLSON, *supra* note 3, §§ 1724-26.

80. IOWA CODE § 902.1 (1979).

81. *Id.* § 907.3.

82. *Id.* § 907.3. These offenses are Delivery, Possession With Intent, and Manufacturing. *Id.* § 204.410.

83. *Id.* §§ 907.3(1)(a), 709.8.

sentence of imprisonment."<sup>84</sup>

Reading section 909.1, *in pari materia*, with the felony penalty provisions in section 902.9, however, raises questions as to the "reach" of section 909.1. The applicable provisions read that "[a] class 'C' felon . . . shall be confined for no more than ten years, and in addition may be sentenced to a fine of not more than five thousand dollars,"<sup>85</sup> with the same approach taken in the class D felony schedule.<sup>86</sup>

The language of these penalty schedule provisions, read in isolation, suggests that the prescribed indeterminate term of confinement must be imposed ("shall be confined"), subject, of course, to the availability of a suspended sentence.<sup>87</sup> In other words, confinement would be the primary, albeit mandatory, sanction. Additionally, a secondary sanction of a fine could also be imposed (together with the sentence of confinement), but not in lieu of the prescribed confinement. The secondary nature of the sanction of a fine is evident from the phrase "and in addition may be sentenced to a fine . . . ."

By comparison, the terminology in the penalty schedules for all classes of misdemeanors clearly permits a fine as an alternative sanction in lieu of imprisonment. For the two indictable misdemeanors,<sup>88</sup> the prescribed penalty is imprisonment *or* a fine *or* both, in addition to the three ameliorative alternatives. Similarly, the prescribed penalty for a simple misdemeanor<sup>89</sup> is imprisonment *or* a fine (but not both), in addition to the three ameliorative alternatives.

The comparative penalty schedule provisions for class C and D felonies and for misdemeanors read *in pari materia* suggest different approaches to the question of a fine as an alternative sanction to mandatory imprisonment. However, if section 902.9 is read as precluding a fine, then section 909.1 is totally unnecessary, in light of a fine already being expressly authorized as the sole sanction for misdemeanors in section 903.1. Because of the general principle that every statutory provision is to be given effect<sup>90</sup> with at least

84. J. YEAGER & R. CARLSON, *supra* note 3, § 1772.

85. IOWA CODE § 902.9(3) (1979) (emphasis added). *But see* note 87 *infra*.

86. *Id.* § 902.9(4).

87. The Iowa Supreme Court has made it clear that the statutory provisions defining the substantive offense and providing for ameliorative sentencing alternatives

[T]ogether comprise a legislative plan for the sentencing of those convicted of [a] crime . . . . As used in this context, the word 'shall' does not require the trial court to sentence defendant to a penitentiary term. It means only that if the court's discretionary power to defer sentence or grant probation is not exercised, defendant must then be sentenced to the penitentiary. This conclusion is buttressed by the fact that all our sentencing statutes are couched in 'shall' language.

*State v. Robbins*, 257 N.W.2d 63, 69 (Iowa 1977).

88. IOWA CODE §§ 903.1(1),(2) (1979) (aggravated misdemeanors and serious misdemeanors, respectively). *See* J. YEAGER & R. CARLSON, *supra* note 3, § 1642.

89. IOWA CODE § 903.1(3) (1979). *See* text accompanying notes 103-11 *infra*.

90. *City of Des Moines v. Elliott*, 267 N.W.2d 44 (Iowa 1978).

an implied presumption against any provision being meaningless, there must be some intended application of section 909.1.

The conflict between sections 909.1 and 902.9 must be reconciled in order to resolve this matter. The usual approach to resolving irreconcilable statutory conflicts is for the specific provision to control over the general provision.<sup>91</sup> The problem here is in determining which is the specific provision.

A reasonable approach would be to afford section 909.1 the status of the specific provision only when there are no other specific provisions requiring a contrary result. Accordingly, section 909.1 would apply to a class C or D felony which is not a "forcible felony," since there is no other specific statute (other than section 909.1). In this circumstance, the penalty schedule provision in section 902.9 is a general statute. On the other hand, the specific statute precluding ameliorative alternatives for a "forcible felony" should control against the correlative specific provision in section 909.1. The legislative intent clearly was to make sentences of confinement mandatory for violence-prone offenses constituting "forcible felonies." It would certainly be ludicrous on "forcible felonies" to preclude a deferred judgment, a deferred sentence, and a suspended sentence, and yet permit a fine instead of a sentence of confinement. In other words, a sentencing judge, required to enter a judgment of conviction and to impose sentence, could decide that a fine was an adequate sentence. However, if he decided that a fine was not adequate, then he would be left only with a sentence of confinement, since a suspended sentence for "forcible felonies" is expressly precluded in section 907.3.

The fact that section 909.1 should not be interpreted as overriding the provision for mandatory confinement under section 902.7 for use or possession of a "firearm" during the commission of any "forcible felony" is clear on the face of section 902.7 itself.<sup>92</sup> The latter provides that under such circumstances "the convicted person shall serve a minimum of five years of the sentence imposed by law." A fine-only sanction under section 909.1 would render this provision useless,<sup>93</sup> since the defendant cannot serve "a minimum of five years of the sentence" by merely paying a fine. Moreover, the phrase "the sentence imposed by law" should be read as "the sentence required by law," since the language "imposed by law" implies that no judicial discretion is intended in a particular case. Otherwise, the terminology should be "the sentence imposed."

There is a contrary view, however. Professor Yeager, without detailed analysis of canons of statutory construction, states: "[i]t is not clear whether

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91. See, e.g., *State v. Bousman*, 278 N.W.2d 15 (Iowa 1979) (specific savings provision in new Criminal Code, § 801.5(2)(b)(2), prevails over general savings provision, § 4.13, in the Code generally).

92. But see text accompanying notes 94-96.3 *infra*.

93. See note 90 *supra*.

the court can avoid the minimum sentence provision of section 902.7 by imposing a fine only, but there appears to be no reason why the restrictions on probation in section 907.3 will affect the court's exercise of this option, and clearly the limitations on parole in section 906.5 do not."<sup>94</sup> Addressing the critical question, Professor Yeager recognizes that "the imposition of a fine without imprisonment in such cases will seldom be indicated, and would violate the intent of those provisions."<sup>95</sup>

This matter obviously awaits judicial interpretation in which the matter is squarely presented in the context of a sentencing judge taking the position that he has no discretion merely to impose a fine on a "forcible felony." The Iowa Supreme Court has already labelled section 902.7 as a mandatory minimum sentencing provision in three cases,<sup>96</sup> but the effect of section 909.1 was not argued or discussed in any of them. Nevertheless, the court has made some fairly definitive statements, as evidenced by this observation in *State v. Holmes*:<sup>96.1</sup> "We, therefore, hold that imposition of the statutory five-year minimum mandatory sentence for involvement of a firearm in commission of a felony does not inflict cruel and unusual punishment."<sup>96.2</sup> Additionally, the court said in *State v. Powers*:<sup>96.3</sup> "Here, the obvious legislative purpose of section 902.7 is to deter the use of firearms by imposition of mandatory minimum penalties . . . ."<sup>97</sup>

The crucial point, of course, is that a sentencing judge must exercise his judicial discretion in imposing sentence. If a fine-only sanction is permissible for "forcible felonies," then a sentencing judge would commit reversible error in taking the approach that confinement is mandatory.<sup>98</sup> Instead, he would have to recognize his authority to use the fine as an alternative penalty but refuse to do so in this specific case because of the particular surrounding circumstances of either the commission of the crime itself or the prior background of the offender.<sup>99</sup>

Sound public policy arguments support the aforementioned differential approach to section 909.1, depending upon whether or not a "forcible felony" offense is involved. The typical non-forcible class C or D felony does not involve violence.<sup>100</sup> Contrastingly, all of the class C or D felonies which

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94. J. YEAGER & R. CARLSON, *supra* note 3, § 1772.

95. *Id.*

96. *State v. Sanders*, 280 N.W.2d 375 (Iowa 1979); *State v. Powers*, 278 N.W.2d 26 (Iowa 1979); *State v. Holmes*, 276 N.W.2d 823 (Iowa 1979).

96.1. 276 N.W.2d 823 (Iowa 1979).

96.2. *Id.* at 829.

96.3. 278 N.W.2d 26 (Iowa 1979).

97. *Id.* at 28.

98. "The trial court's failure to exercise the discretion the statute vests in him requires a reversal for resentencing." *State v. Robbins*, 257 N.W.2d 63, 70 (Iowa 1977).

99. See Iowa R. Crim. P. 22(3)(d); *State v. Luedtke*, 279 N.W.2d 7 (Iowa 1979).

100. The class C felonies which are not "forcible felonies" are: Iowa CODE §§ 706.3 (Conspiracy); 709.7 (Detention in a Brothel); 710.5 (Child Stealing); 712.3 (Arson (2d)); 712.6 (Pos-

are "forcible felonies" require violence.<sup>101</sup> Certainly, it seems logical to focus upon violence in establishing mandatory sentences of confinement. This focus is exacerbated by tying to "forcible felonies" the collateral five-year mandatory minimum sentence for use or possession of firearms.<sup>102</sup>

b. *Misdemeanors*. A second level of indictable misdemeanor<sup>103</sup> was added to the new Criminal Code. This aggravated misdemeanor is punishable by a definite term<sup>104</sup> of imprisonment not exceeding two years or a maximum fine of \$5,000, or both.<sup>105</sup> Many less serious pre-revised felonies carrying a maximum definite term of one or two years of imprisonment were downgraded into this new classification, as well as some more serious pre-revised felonies.<sup>106</sup> The other class of indictable misdemeanor is the serious misdemeanor, which is punishable by a definite jail term not exceeding one

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session of Explosive or Incendiary Devices); 713.3 (Burglary (2d)); 713.4 (Possession of Burglary Tools); 714.2(1) (Theft (1st)); 714.9 (Fraud Practice (1st)); 715.6 (False Use of a Financial Instrument); 716.3 (Mischief (1st)); 718.1 (Insurrection); 719.5 (Assisting Prisoner to Escape); 722.2 (Accepting Bribe); 726.3 (Abandonment of a Dependent Person); 728.12 (Sexual Exploitation of Children) (1979).

The class D felonies, which are not "forcible felonies," include: IOWA CODE §§ 705.1 (Solicitation); 708.5 (Administering Harmful Substances); 708.8 (Going Armed with Intent); 709.8 (Lascivious Acts); 710.6 (Violating Custodial Order); 711.4 (Extortion); 712.7 (False Reports Regarding Explosive or Incendiary Devices); 712.8 (Threats to Place Incendiary or Explosive Devices); 714.2(2) (Theft (2d)); 714.10 (Fraudulent Practice (2d)); 716.4 (Mischief (2d)); 721.1 (Felonious Misconduct in Office); 718.5 (Falsifying Public Documents); 719.4 (Escape); 719.5 (Permitting Prisoner to Escape); 719.6 (Assisting Prisoner to Escape); 719.8 (Furnishing Controlled Substance to Inmates); 720.2 (Perjury); 720.3 (Suborning Perjury); 722.1 (Bribery); 722.10 (Commercial Bribery); 724.3 (Possession of Offensive Weapons); 725.3 (Pimping); 725.3 (Pandering); 726.2 (Incest); 726.5 (Nonsupport) (1979).

The one atypical "non-forcible" class D felony which involves violence is Involuntary Manslaughter Code § 707.5(1). This crime does not appear to be a "felonious assault." Nevertheless, while a death must result, the nature of the offender's act is the unintentional causing of death and thus is not necessarily a crime of violence.

101. The class C felonies, which are "forcible felonies," are: IOWA CODE §§ 707.4 (Voluntary Manslaughter); 707.7 (Fetocide); 707.8 (Nonconsensual Termination); 707.11 (Attempted Murder); 708.3 (Assault while Participating in a Felony); 708.4 (Willful Injury); 709.4 (Sex Abuse (3d)); 710.4 (Kidnapping (3d)); 711.3 (Robbery (3d)) (1979).

The class D felonies, which are "forcible felonies," are: IOWA CODE §§ 707.7 (Attempted Fetocide); 708.3 (Assault while Participating in a Felony); 708.6 (Terrorism) (1979).

102. IOWA CODE § 902.7 (1979). See text accompanying notes 94-96.3 *supra*.

103. An indictable public offense under the new Code, as under the pre-revised law, is any offense more serious than a simple misdemeanor. See IOWA R. CRIM. P. 4(1), (2).

104. Since the indeterminate sentencing law is not applicable to misdemeanor offenses, a sentence to jail on a misdemeanor offense "must specify a definite term. Otherwise it is uncertain and void." *State v. Welfort*, 238 N.W.2d 781, 782 (Iowa 1976) (misdemeanant's sentence to jail for a period "not to exceed six months" is indefinite and thus void).

105. IOWA CODE § 903.1(1) (1979).

106. See, e.g., IOWA CODE § 694.6 (1977) (repealed 1978) (Assault With Intent to Inflict Bodily Injury), replaced by IOWA CODE § 708.2(1) (1979) (Assault With Intent to Do Serious Injury); IOWA CODE § 321.76 (1977) (repealed 1978) (Operating Vehicle Without Owner's Consent) (replaced by IOWA CODE § 714.7 (1) (1979)).



year or a maximum fine of \$1,000, or both.<sup>107</sup> The lowest classification of crime is the simple misdemeanor,<sup>108</sup> which remains unchanged from pre-revised law. This crime remains punishable by a jail term not exceeding thirty days or a maximum fine of \$100, *but not both*.<sup>109</sup> All three of the ameliorative sentencing alternatives are available for every misdemeanor offense<sup>110</sup> in the Criminal Code.<sup>111</sup>

### C. Construction of the Criminal Code

In its first interpretations of the new Criminal Code,<sup>112</sup> the Iowa Supreme Court has indicated its unwillingness to declare a change from the pre-revised law<sup>113</sup> unless the legislative intent to make a sweeping change is clear from the new statute on its face.<sup>114</sup> In *Emery v. Fenton*,<sup>115</sup> the court reiterated normal rules of statutory construction, stating that

[c]hanges made by revision of a statute will not be construed as altering the law unless the legislature's intent to accomplish a change in its meaning is *clear and unmistakable*. An intent to make a change does not exist when the revised statute is merely susceptible to two constructions.<sup>116</sup>

Similarly, the court specifically characterized the new Criminal Code as "primarily a restatement" of prior law,<sup>117</sup> and quoted Professor Yeager<sup>118</sup>

107. *E.g.*, the penalty for the crime of Bribery in Sports was reduced from an indeterminate (felony) term of not exceeding ten years of imprisonment under IOWA CODE § 739.12 (1977) (repealed 1978) to a definite (aggravated misdemeanor) term of up to two years under IOWA CODE § 722.3 (1979).

108. IOWA CODE § 903.1(2) (1979).

109. *Id.* § 903.1(3).

110. IOWA CODE ch. 907 (1979) is applicable to misdemeanors. *See id.* § 907.1 (probation applicable to "a public offense," which includes misdemeanors). Section 907.3 does not include any misdemeanors within its provision precluding a deferred judgment, a deferred sentence or a suspended sentence.

111. At least one simple misdemeanor outside the Criminal Code — Driving While License Revoked or Under Suspension — is punishable by a mandatory sentence, however. IOWA CODE § 321.218 (1979). *See State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979).

112. *See generally* IOWA CODE § 4.2 (1979) (statutory abrogation of common law presumption of strict construction of statute in derogation of common law).

113. *See also State v. Wilson*, 287 N.W.2d 587, 589 (Iowa 1980) (presumption of legislative intent that language used in statute have usual meaning ascribed by courts "unless the context shows otherwise").

114. *See also State v. Rauhauser*, 272 N.W.2d 432, 434 (Iowa 1978) (presumption against implied repeal of unrevised criminal statutes left outside the revised new Criminal Code), which is discussed further in text accompanying notes 29-35 *supra*.

115. 266 N.W.2d 6 (Iowa 1978).

116. *Id.* at 10 (emphasis added) (citing *Kelly v. Brewer*, 239 N.W.2d 109, 114 (Iowa 1976)).

117. *Id.* at 8.

118. Professor John Yeager of the Drake University School of Law, as reporter for the STUDY COMMITTEE REPORT, wrote the early drafts of the new Criminal Code.

approvingly, stating that

[i]t was not the purpose of this committee in drafting the code, to scrap the existing criminal law, and, starting from scratch, to create new law and new concepts. For the most part, the existing law was retained, clarified where clarification was needed by adapting statutory language to incorporate existing case law, and changed only where change was felt desirable. To the casual observer, it will appear that the criminal law has been completely rewritten. However, the Criminal Code is primarily a restatement of prior law, and most responsible studies of the code recognize this.<sup>119</sup>

### 1. *Elemental Changes*

It is, of course, axiomatic that the elements of a crime are determined and changed by statute.<sup>120</sup> Thus, legislative elimination of the pre-revised element of a taking in the crime of Robbery<sup>121</sup> means that the prosecution no longer has to prove this element even though the common law name of the crime was maintained. This is because it is within the legislative prerogative to define a crime, subject only to substantive due process requirements of the United States and Iowa Constitutions. This principle was made clear by the supreme court in *State v. Pierce*,<sup>122</sup> a Robbery prosecution under the new Criminal Code. The defendant unsuccessfully contended in *Pierce* that the new statutory definition of Robbery was unconstitutionally vague because of a lack of fair notice to a person that the revised crime, by not requiring a taking,<sup>123</sup> included "conduct which was not robbery at common law or under prior [Iowa] statutes."<sup>124</sup> This argument was dismissed out of hand by the court. "The argument that a definition of crime which is otherwise clear is somehow made unclear because it departs from common law and prior statutes is novel and without support either in reason or authority."<sup>125</sup> Continuing, the court wrote that "[d]ue process does not require the legislature to give crimes the same elements they had at common law or under prior statutes."<sup>126</sup> Concluding on a legislative lexiconical note, the court noted that due process does not "bar a crime from being called robbery merely because the perpetrator does not succeed. It was not irrational

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119. TRAINING MANUAL, *supra* note 43, at 1-2.

120. *McAdams v. State*, 226 Ind. 403, 81 N.E.2d 671 (1948). *But see* *Virgin Islands v. Williams*, 424 F.2d 526 (3rd Cir. 1970) (legislative intent for abrogation of common law element of specific intent must have been "clear").

121. IOWA CODE §§ 711.1-.3 (1979).

122. 287 N.W.2d 570 (Iowa 1980).

123. The statute itself certainly is clear on its face, providing, in pertinent part: "[i]t is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen." IOWA CODE § 711.1 (1979).

124. 287 N.W.2d at 573.

125. *Id.*

126. *Id.*

for the legislature to make a person as culpable for a bungled robbery as for a successful one."<sup>127</sup>

## 2. General Definitional Clauses

a. *Overview.* The inclusion of a separate chapter of several general definitional clauses<sup>128</sup> in the new Criminal Code, as a change from the pre-revised code, means that the courts must apply these statutory definitions in place of prior common law definitions that had been developed by the courts in the absence of statutory definitional clauses. Nevertheless, courts may use common law doctrine as to the background and origin of a word or phrase if the statute imprecisely defines the way a particular word is to be interpreted, creating doubt as to its meaning.<sup>129</sup> The following twenty terms are included in the chapter of general definitional clauses: act, animal, brothel, child, controlled substance, dangerous weapon, death, deception, dwelling, forcible felony, incendiary device, occupied structure, participating in a public offense, property, prostitute, reckless, serious injury, sex act, steal, and viability.<sup>130</sup>

The general definitional clauses, unfortunately, are not uniformly applied throughout the Criminal Code itself. By the express terms of Iowa Code section 702.1, these do not apply whenever a special definition of that term is included in a particular provision.<sup>131</sup> "Child"<sup>132</sup> and "sex act"<sup>133</sup> are two major examples of terms with both general and special definitional clauses. Moreover, three slightly different definitions of the otherwise general terms "animal"<sup>134</sup> and "sex act"<sup>135</sup> are used within the individual chapters on animal and obscenity offenses, respectively.

Several of the general definitional clauses appear only once in the Criminal Code. These include the terms dwelling<sup>136</sup> and viability.<sup>137</sup> Indeed, one

127. *Id.*

128. IOWA CODE ch. 702 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, §§ 21-47.

129. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION 268 (4th ed. 1973).

130. IOWA CODE §§ 702.2-.21 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, §§ 21-47.

131. See J. YEAGER & R. CARLSON, *supra* note 3, § 22.

132. IOWA CODE § 702.5 (1979). See text accompanying notes 144-155 *infra*.

133. *Id.* § 702.17. See text accompanying notes 296-310.2 *infra*.

134. *Id.* § 702.3.

135. *Id.* § 702.17. See text accompanying notes 296-310.2 *infra*.

136. *Id.* § 702.10. See J. YEAGER & R. CARLSON, *supra* note 3, § 37. Unlike the pre-revised law which followed the common law closely in this respect, the new Criminal Code does not single out a dwelling house for particular treatment. For example, the degrees of the revised offenses of Burglary and Arson do not depend upon whether a dwelling is involved. Instead, more realistically, the focus of attention is upon personal injury or its potential. See IOWA CODE §§ 713.2 and 712.2 (1979), respectively. This term is used only in the chapter on defenses. See *id.* ch. 704.

The replacement terms — "occupied structure" and "enclosed space" — are much broader in scope. See *id.*, IOWA CODE §§ 702.12 and 713.1 (1979), respectively. See also IOWA STATE BAR ASSOCIATION, II IOWA UNIFORM JURY INSTRUCTIONS ANNOTATED (CRIMINAL) (1978) (hereinafter

defined term — steal<sup>138</sup> — does not appear anywhere in the Criminal Code except in the definitional section.

That the chapter of general definitional clauses is not static is evidenced by the fact that the term “sex act” was amended in 1978<sup>139</sup> and that two new terms, (“incendiary device”<sup>140</sup> and “viability”<sup>141</sup>) were added in 1978. Moreover, the Iowa Supreme Court has, in effect, added a new general definitional clause for “felonious assault”<sup>142</sup> by judicial interpretation of a statutorily-undefined term.<sup>143</sup>

b. “Child.” The general term “child”<sup>144</sup> refers to “any person under the age of fourteen.”<sup>144.1</sup> Essentially, this involves a reduction from the basic age of under sixteen in the pre-revised Code.<sup>145</sup> Of course, the focus is upon a “child” as the victim of a crime.<sup>146</sup> An entirely separate Juvenile Code,<sup>147</sup> also recently revised, focuses upon juveniles as the perpetrators of criminal activity.

A special definition of “child” is included in the Sexual Abuse chapter to provide different penalties for sexual assaults on children under fourteen (Sexual Abuse in the Third Degree)<sup>148</sup> and on children under twelve (Sexual Abuse in the Second Degree).<sup>149</sup> On the other hand, the upper age of an adolescent victim is raised to fifteen for two other types of non-forcible Sexual Abuse in the Third Degree. One type occurs when the defendant is a member of the same household or is related to the victim (by blood or affinity) to the fourth degree<sup>150</sup> or has used a position of authority over the vic-

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cited as UNIFORM JURY INSTRUCTIONS); J. YEAGER & R. CARLSON, *supra* note 3, §§ 39, 293.

137. IOWA CODE § 702.20 (1979).

138. “Steal” is defined as “to take by theft,” yet this term is not even mentioned in the chapter on Theft. See IOWA CODE § 702.19 (1979) and J. YEAGER & R. CARLSON, *supra* note 3, § 46.

139. 1978 Iowa Acts, ch. 1029, § 44.

140. 1978 Iowa Acts, ch. 1183, § 1.

141. 1978 Iowa Acts, ch. 148, § 1.

142. See IOWA CODE § 702.11 (1979), in which “forcible felony” is defined as including “any felonious assault.” See also text accompanying notes 180-183 *infra*.

143. See *State v. Powers*, 278 N.W.2d 26 (Iowa 1979) and text accompanying notes 326-331 *infra*.

144. IOWA CODE § 702.5 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 26.

144.1. See IOWA CODE § 702.5 (1979).

145. See, e.g., IOWA CODE §§ 698.1 & 725.10 (1977) (repealed 1978) (Statutory Rape and Lascivious Acts With a Child, respectively).

146. The general term “child” applies to the following crimes: Abandonment of a Dependent Person, Child Stealing, Lascivious Acts With a Child, Sexual Exploitation of Children, and Violating a Custodial Order. See IOWA CODE §§ 726.3, 710.5, 709.8, 728.12, & 710.6 (1979), respectively.

147. IOWA CODE ch. 232 (1979).

148. *Id.* § 709.4(3) (“child”).

149. *Id.* § 709.3(2) (“under the age of twelve”).

150. *Id.* § 709.4(4).

tim to coerce submission to the defendant;<sup>151</sup> the other occurs when the defendant is six or more years older than the victim or other participant.<sup>152</sup> Each of these instances applies only when the other participant is either fourteen or fifteen, and neither requires that the "sex act" be by force or against the will of the other participant.

Four other crimes with adolescent victims or participants<sup>153</sup> are keyed to "minors" instead of children.<sup>154</sup> The upper age limit for these crimes, age seventeen, is set forth in a specific definition,<sup>155</sup> as well as generally set out in Iowa Code section 599.1 (outside the Criminal Code itself).

c. "*Controlled Substance.*" A common sense approach is used in defining "controlled substance"<sup>156</sup> by incorporating by reference the definition of that term in the one major pre-revised chapter of crimes not being included in the consolidated Criminal Code.<sup>157</sup> Indeed, the General Assembly took essentially a hands-off approach to the entire subject of controlled substances, having comprehensively dealt with the subject a few years earlier.<sup>158</sup> The only changes made in the Uniform Controlled Substances Act were in applying the general penalty schedules and in establishing a mandatory minimum sentence for certain offenses.<sup>159</sup> Moreover, the new crime of Furnishing Controlled Substances to Inmates<sup>160</sup> is the only reference at all in the new Criminal Code to controlled substances.

d. "*Dangerous Weapon.*" (1). *Definitional Clause.* Two classes of "dangerous weapons" are established in Iowa Code section 702.7:<sup>161</sup> (1) *per se* dangerous weapons "designed primarily for use in inflicting death or injury upon a human being or animal" and (2) other instruments or devices with legitimate uses which nevertheless become dangerous weapons through being actually used in particular circumstances with the intent to inflict death or serious injury upon a human being.<sup>162</sup> A non-inclusive listing of

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151. *Id.*

152. *Id.* § 709.4(5).

153. The crimes involving "minors" (under 18 years of age) include Admitting Minors to Premises Where Obscene Material is Exhibited, Dissemination and Exhibition of Obscene Material to Minors, Nonsupport, and Wanton Neglect of a Minor. See IOWA CODE §§ 728.3, 728.2, 726.5, & 726.6 (1979), respectively.

154. One crime involving "minors" — Permitting Minors in Billiard Rooms — was included in the new Criminal Code but was repealed in 1979. See IOWA CODE § 725.13 (1978) (repealed 1979); 1979 Iowa Acts, ch. 1187, § 1.

155. See IOWA CODE § 728.1(6) (1979).

156. IOWA CODE § 702.6 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 27.

157. See IOWA CODE ch. 204 (1979).

158. *Id.*

159. *Id.* § 204.413.

160. *Id.* § 719.8. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1916-17; J. YEAGER & R. CARLSON, *supra* note 3, § 433. This crime is not discussed in this Article.

161. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 218; J. YEAGER & R. CARLSON, *supra* note 3, § 28.

162. Whether or not a particular device or instrument which is not *per se* a "dangerous

eight *per se* "dangerous weapons" is included in the Code. It is interesting that two of these eight, a razor and a knife having a blade longer than three inches, also have legitimate uses. The apparent import of including these as dangerous weapons *per se* is to automatically make them "dangerous weapons" whenever used upon a human being with the intent to injure, without requiring proof of an intent for "serious injury" or death and without requiring submission of the crime to the factfinder.<sup>163</sup>

It is immaterial whether or not a *per se* "dangerous weapon" is loaded or unloaded. In *State v. Nichols*,<sup>164</sup> the Iowa Supreme Court held that under the new Criminal Code, as under the pre-revised law,<sup>165</sup> the prosecution "is not required to establish that a pistol was loaded at the time of the offense to prove its character as a dangerous weapon in a prosecution for robbery in the first degree."<sup>166</sup> Thus, it was proper for the trial court to instruct the jury that a pistol is a *per se* "dangerous weapon," notwithstanding any prosecution evidence that the pistol was loaded at the time.<sup>167</sup>

Involvement of "dangerous weapons" in certain criminal activity is significant in two respects. First, either being armed with<sup>168</sup> or discharging<sup>169</sup> "dangerous weapons" is the requisite actus reus for three crimes. Secondly, being armed with "dangerous weapons" during the commission of five other offenses<sup>170</sup> *ipso facto* constitutes a circumstance for a higher degree of the offense.

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weapon" is nevertheless a "dangerous weapon" in the particular circumstances depends upon whether it "is actually used in such a way as to indicate the user intended to inflict death or serious injury and when so used is capable of inflicting death." UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 218. This instruction is supported by such cases as *State v. Roan*, 122 Iowa 136, 137, 97 N.W. 997, 998 (1904) ("[a] penknife may or may not be a deadly weapon. If the weapon is such that from the manner of its use it is likely to produce death, it is, of course, a deadly weapon.") and *Hopper v. Dowling*, 191 Iowa 57, 181 N.W. 759 (1921) ("[t]he pitchfork was not used as a javelin to pierce the person of plaintiff. It was only used as a club or bludgeon, and the strokes delivered with a side motion. The pitchfork used as it was used is not a 'deadly weapon' *per se* . . .").

163. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 218.

164. 276 N.W.2d 416 (Iowa 1979).

165. *State v. Ashland*, 259 Iowa 728, 145 N.W.2d 910 (1966).

166. 276 N.W.2d at 417.

167. Similarly, an inoperable firearm has been held sufficient for armed robbery. "When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be — a firearm or other dangerous weapon." *State v. Thompson*, 254 S.E.2d 526, 528 (N.C. 1979).

168. These crimes are Carrying Weapons and Going Armed With Intent. See IOWA CODE §§ 724.4 & 708.8 (1979), respectively.

169. See *id.* § 708.6(1) (Terrorism).

170. These offenses include Burglary, Interference With Official Acts, Kidnapping, Robbery, and Sexual Abuse. See IOWA CODE §§ 713.2, 719.1, 710.3, 711.2, & 709.3 (1979). Actually, the similar term "deadly weapon" is used in the sexual abuse provision. See also text accompanying notes 1-171 *infra*.

(2). *Undefined Related Terms.* The objective of uniform definitions throughout the Criminal Code is weakened considerably by the inclusion of several related statutorily undefined terms concerning weapons. These terms or phrases include: "deadly weapon,"<sup>171</sup> "firearm,"<sup>172</sup> "pistol or revolver,"<sup>173</sup> "revolver, pistol, or pocket billy,"<sup>174</sup> "rifle or shotgun,"<sup>175</sup> "spring gun,"<sup>176</sup> and "weapon."<sup>177</sup> These all seem to have generally-accepted meanings in common parlance, however. The only other related term with its own definitional clause, "offensive weapon,"<sup>178</sup> appears in only two crimes.<sup>179</sup>

e. *"Forcible Felony."* The key statutory term "forcible felony"<sup>180</sup> is defined in the form of an exhaustive enumeration of specific crimes<sup>181</sup> which automatically constitute "forcible felonies" in all circumstances.<sup>182</sup> This category encompasses a large group of felonies involving personal violence, namely "any felonious assault,"<sup>183</sup> Murder (in either degree), Sexual Abuse

171. See IOWA CODE § 709.3 (1979) (Sexual Abuse in Second Degree). This raises the question of whether the legislative intent was to refer to some different type of weapon since different language was used than in the general term "dangerous weapon." While, of course, this is a standard canon of statutory construction, nevertheless there certainly does not appear to be any public policy reason to differentiate between being armed with a "dangerous weapon" during a robbery or kidnapping and a "deadly weapon" during a sexual abuse. See IOWA CODE § 711.2, 710.3, 709.3(1) (1979), respectively. In the absence of a statutory definition, the common law definition applies. According to Professor Yeager, this term "has an established meaning in the law, which is synonymous with 'dangerous weapon.'" J. YEAGER & R. CARLSON, *supra* note 3, § 209. This conclusion is borne out generally in 11 WORDS AND PHRASES 129-41 ("Dangerous Weapon") and 11 WORDS AND PHRASES 207-30 ("Deadly Weapon").

172. The term "firearm" is used in the definition of the following crimes: Assault, Carrying Weapons, Interference With Official Acts, and Possession of Firearms by Felons. See IOWA CODE §§ 708.1(3), 724.4, 719.1, 724.26 (1979). See also UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 220-22 ("firearm").

173. See *id.* § 724.4 (Carrying Weapons). See also *id.* §§ 724.16, .17, .21 (diverse weapons permits offenses).

174. See *id.* § 724.5 (failure while armed to have weapons permit in immediate possession).

175. See *id.* § 724.22 (Sale of rifle or shotgun to minors).

176. See *id.* § 708.9.

177. See *id.* § 719.6 (Assisting Prisoner to Escape).

178. See *id.* § 724.1.

179. These two crimes are Possession of Offensive Weapons and Possession of Firearms and Destructive Devices by Felons. See IOWA CODE §§ 724.1, 724.26 (1979).

180. IOWA CODE § 702.11 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 38.

181. One generic term, "felonious assault," requires interpretation to determine which particular crimes are included within its rubric. However, the Iowa Supreme Court already has established a definitive interpretational standard for determining which particular crimes are included. See text accompanying notes 326-31 *infra*.

182. Whether or not a particular crime is a "forcible felony" is strictly a legal question to be decided on the face of the statute itself. If a particular felony offense necessarily includes an "assault" as an element, then that crime is *ipso facto* a "forcible felony," without benefit of the factual circumstances of the particular incident. See *State v. Powers*, 278 N.W.2d 26 (Iowa 1979) and text accompanying notes 328-31 *infra*.

183. See notes 326-31 *supra*.

(in all three degrees), Kidnapping (in all three degrees), Robbery (in both degrees), Arson (only in the first degree) and Burglary (only in the first degree). The apparent reason for limiting the inclusion of the latter two crimes to the highest degree only is that these are essentially property crimes, with the higher degree reserved in part to arsons or burglaries involving personal violence or at least to the reasonable probability thereof. The fact that an offense is a "forcible felony" is significant in many ways.

(1). *Mandatory Sentence of Confinement.* The key significance of a crime being included in this classification is that the ameliorative sentencing options of a deferred judgment, a deferred sentence, and a suspended sentence are foreclosed altogether for "forcible felonies."<sup>184</sup> This has the effect of mandatory confinement for apparently all "forcible felony" offenses, with no judicial discretion left to the sentencing judge in a particular case. Nevertheless, whether or not confinement is mandatory for class C and D "forcible felonies" depends upon whether or not the special fines-only alternative sanction in Iowa Code section 909.1 is determined to be applicable to these crimes, as discussed above.<sup>185</sup> Only two other types of non-forcible felony crimes carry a mandatory term of imprisonment.<sup>186</sup>

(2). *Parole Ineligibility.* In addition to its mandatory confinement aspect, the "forcible felony" classification has potential follow-through consequences of establishing a minimum term of parole ineligibility in two limited circumstances (but not *ipso facto* in all cases). With the exception of certain major controlled substances offenses,<sup>187</sup> there is no other statutorily-prescribed term of parole ineligibility. That is, a person imprisoned for any other felony is immediately eligible for parole.<sup>188</sup>

First, there is a five-year mandatory minimum<sup>189</sup> term of imprisonment for any "forcible felony" crime involving use, possession, or representation of possession of a "firearm."<sup>190</sup> Thus, a "forcible felony," by itself, does not carry any mandatory *minimum* sentence. Moreover, possession of a firearm during the commission of a crime which is not a "forcible felony" (such as Going Armed With Intent<sup>191</sup> or Burglary in the Second Degree<sup>192</sup>) is not included within the purview of the mandatory minimum, or even mandatory,

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184. IOWA CODE § 907.3 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, §§ 1724-27.

185. See text accompanying notes 84-102 *supra*.

186. These crimes are Lascivious Acts With a Child Under Twelve and the controlled substances offenses of Delivery, Possession With Intent, and Manufacturing. See IOWA CODE §§ 907.3, 709.8, 204.401 (1979).

187. IOWA CODE § 204.413 (1979).

188. See *id.* § 906.4, .5. See also J. YEAGER & R. CARLSON, *supra* note 3, §§ 1696-1700.

189. But see text accompanying notes 84-102 *supra*.

190. IOWA CODE § 902.7 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 220-22 and J. YEAGER & R. CARLSON, *supra* note 3, § 1628. For the definition of "firearm," see text accompanying notes 94-96.3 *supra*.

191. IOWA CODE § 708.8 (1979).

192. *Id.* § 713.3.



provision.

Secondly, a recidivist's prior conviction for a "forcible felony" makes him subject to ineligibility for parole until he has served one-half of the maximum term of imprisonment imposed.<sup>193</sup> Specifically, a person presently imprisoned for any felony who has a previous conviction for a "forcible felony" must serve at least one-half of his sentence. Strangely, this mandatory minimum term does not apply, on its face, to the situation where defendant is presently imprisoned for a "forcible felony" and he has a previous conviction for a non-forcible felony. This latter circumstance seems more pertinent for imposing a mandatory minimum sentence, since the emphasis should be upon the severity of the current offense. A better legislative compromise approach would have been to apply the parole-ineligibility term when *either* of the felonies is a "forcible felony."

(3). *Definitions and Grading of Crimes.* The concept of a "forcible felony" is also involved in either the definition of or grading of a few crimes. For example, threats to commit any "forcible felony" constitute one of many alternative ways to commit the offenses of Robbery in the Second Degree<sup>194</sup> and Terrorism.<sup>195</sup> Moreover, the highest of three grades of Conspiracy<sup>196</sup> occurs when the target crime of the conspiracy is a "forcible felony."

(4). *Felony Murder Rule.* The new "forcible felony" classification has affected the application of the felony murder rule in several ways. All murder is Murder in the First Degree (a class A felony) when the killing occurs during participation in a "forcible felony."<sup>197</sup> On the other hand, an unintentional killing during participation in a criminal offense, whether a felony or misdemeanor, other than a "forcible felony" constitutes the much less severe class D felony offense of Involuntary Manslaughter.<sup>198</sup> By implication this makes an intentional killing during the commission of an offense other than a "forcible felony" Murder in the Second Degree.<sup>199</sup>

Tying the felony murder rule doctrine to a general classification of offenses constituting "forcible felonies" as the includible requisite underlying felonies has broadened the scope of the first-degree felony murder rule in some ways and narrowed it in others. A smaller number of crimes, Arson, Burglary, Mayhem, Rape, and Robbery, were included under the pre-revised first-degree felony murder rule.<sup>200</sup> All of these crimes are included in the "forcible felony" classification, although two, Arson and Burglary, are no longer all-inclusive, since only the first-degree grades of these offenses are

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193. *Id.* § 906.5. See J. YEAGER & R. CARLSON, *supra* note 3, § 1698.

194. IOWA CODE § 711.3 (1979).

195. *Id.* § 708.6(2).

196. *Id.* § 706.3.

197. *Id.* § 707.2(2).

198. *Id.* § 707.5(1).

199. *Id.* § 707.3 (1979).

200. See IOWA CODE § 690.2 (1977) (repealed 1978).

"forcible felonies."<sup>201</sup> Additionally, the term "forcible felony" includes the three kidnapping offenses and the "felonious assault" crime of Terrorism.<sup>202</sup> Moreover, the revised offense of Sexual Abuse is considerably broader than the pre-revised offense of Rape<sup>203</sup> (including a killing during non-consensual sodomy).

f. *"Property."* The broadest possible definition of "property"<sup>204</sup> is included in the new Criminal Code, namely "anything of value,<sup>205</sup> whether publicly or privately owned." The scope of the Theft<sup>206</sup> provisions is particularly broader than under the pre-revised forerunner provisions in light of the express inclusion of labor and services as "property."

g. *"Serious Injury."*<sup>207</sup> Whether or not a defendant caused or attempted to inflict<sup>208</sup> a "serious injury" upon another person is one of the pervasive concepts in defining<sup>209</sup> and grading<sup>210</sup> a majority of the personal violence crimes in the new Criminal Code. That is, this Code focuses major attention upon criminal activity involving violence or potential violence.<sup>211</sup>

(1) *General Definition.* A "serious injury" is defined as either (1) "disabling mental illness," (2) bodily injury which creates "a substantial risk of death," (3) bodily injury which causes "serious permanent disfigurement" or (4) bodily injury which causes "protracted loss or impairment of the function of any bodily member or organ."<sup>212</sup> So restrictively defined, a "serious

201. IOWA CODE § 702.11 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 38.

202. See *id.* §§ 710.1-4, 708.6, respectively.

203. *Id.*

204. IOWA CODE § 702.14 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1441; J. YEAGER & R. CARLSON, *supra* note 3, § 41.

205. A broad definition of the phrase "thing of value" appears in *State v. Knutson*, 220 N.W.2d 575, 578 (Iowa 1974) ("we hold a jury could reasonably find as a matter of fact that satisfaction of sexual demands constitutes a thing of value").

206. IOWA CODE §§ 714.1-.6 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 41.

207. *Id.* § 702.18. See J. YEAGER & R. CARLSON, *supra* note 3, § 45.

208. Strangely, a whole array of terminology is used in the various statutes which refer to "serious injury" being either "inflicted," "suffered," or "caused," either as an element of the crime itself or as a factor in grading the offense for punishment purposes.

209. A "serious injury" is a necessary element of the crime of Willful Injury. IOWA CODE § 708.4 (1979). An intended "serious injury" merely is required for the crime of Assault With Intent to Inflict a Serious Injury. *Id.* § 708.2(1).

210. Although not an element of the crimes, a "serious injury" inflicted, suffered or caused during three other crimes constitutes an aggravating circumstance that raises these to the highest grades of the respective crimes. These include Assault While Participating in a Felony, Kidnapping in the First Degree, and Sexual Abuse in the First Degree. IOWA CODE §§ 708.3, 710.2, 709.2, respectively. Similarly, either purposeful infliction or attempted infliction of "serious injury" during the commission of the crimes of Interference With Official Acts and Robbery raises these crimes to their highest degrees. *Id.* § 719.1, 711.2, respectively.

211. Strangely, "serious injury" only needs to be attempted for a robbery to be considered in the first degree, whereas it must be "caused" or "suffered" for Sexual Abuse and Kidnapping to be considered in the first degree. *Id.* §§ 711.2, 709.2, 710.2, respectively. The latter two offenses are class A felonies, whereas first-degree robbery is only a class B felony.

212. *Id.* § 702.18 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 219; J.

injury" clearly amounts to "a great deal more than mere physical injury,"<sup>213</sup> thus not including a black eye or a bloody nose. This broad definition does encompass mental injury, being limited, however, to a "disabling mental illness" which would seem to rule out mere anxiety reactions.<sup>214</sup>

(2) *Bodily Injury Creating "a Substantial Risk of Death."* This type of "serious injury" is defined restrictively in the Uniform Jury Instructions as "an injury which causes or is likely to cause a real hazard or danger of death."<sup>215</sup> Thus limited, the mere use of a "dangerous weapon"<sup>216</sup> does not automatically create "a substantial risk of death." Instead, it would depend upon the exact use made of the weapon.<sup>217</sup> A "firearm"<sup>218</sup> used as a club probably would not meet this standard, unless the victim is pistol whipped on the head in a particularly vital spot. Even shooting a victim would not always meet this standard, if, for example, the victim is shot in the foot or leg.

Texas is one state with a "serious injury" statute<sup>219</sup> similar to Iowa's. A review of the Texas caselaw interpreting the crime of aggravated assault based upon creating a substantial risk of death reveals that stab wounds have been the basis for several successful prosecutions. These have included stab wounds that "penetrated to the cartilage of the rib cage,"<sup>220</sup> that "cut from the front of her neck around to the back of her head" and "severed the superficial jugular vein,"<sup>221</sup> and that cut the victim's stomach requiring twenty stitches.<sup>222</sup> On the other hand, another aggravated assault conviction was reversed where the victim merely "sustained two stab wounds in the back and a cut on the thigh."<sup>223</sup>

Interestingly, the appellate courts in each of these cases also noted collateral facts such as the degree and duration of medical attention as well as the subsequent return of the victim to his normal routine. For example, in cases affirming the convictions, the courts noted that the victim "was hysterical and was placed, for a time, in the 'trauma' room,"<sup>224</sup> that the victim "stayed overnight in the hospital" and that "the laceration was too large for surgery in the emergency room and surgery had to be performed in the op-

YEAGER & R. CARLSON, *supra* note 3, § 45.

213. J. YEAGER & R. CARLSON, *supra* note 3, § 45.

214. See text accompanying notes 277-95 *infra*.

215. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 219.

216. IOWA CODE § 702.7 (1979). See text accompanying notes 161-70 *supra*.

217. See generally *Hopper v. Dowling*, 191 Iowa 57, 181 N.W. 759 (1921); *State v. Roan*, 122 Iowa 113, 97 N.W. 997 (1904); UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 218.

218. See text accompanying notes 346-50 *infra*.

219. TEXAS PENAL CODE ANN. § 22.02 (Vernon 1974).

220. *McElroy v. State*, 528 S.W.2d 831, 834 (Tex. Crim. App. 1975).

221. *Boney v. State*, 572 S.W.2d 529, 530 (Tex. Crim. App. 1978).

222. *Hart v. State*, 581 S.W.2d 675 (Tex. Crim. App. 1979).

223. *Gonzales v. State*, 146 Tex. Crim. 108, 172 S.W.2d 97 (Tex. Crim. App. 1943).

224. 581 S.W.2d at 677.

erating room" (with twenty-three stitches required).<sup>225</sup> Contrastingly, in another case<sup>226</sup> in which the conviction was reversed for lack of evidence of a "serious injury" it was noted that the victim's two and one-half day stay in the hospital was not prompted solely by the seriousness of his injuries but rather for observation for complications or infection, neither of which materialized.<sup>226.1</sup> An injured party in another case<sup>227</sup> was noted to have gone downtown the following morning after being released from the hospital following only an hour of treatment.

(3) *Bodily Injury Causing "Serious Permanent Disfigurement."* Under section 702.18 of the Iowa Code, "serious injury" can consist of a bodily injury which causes "serious permanent disfigurement."<sup>228</sup> None of these three words is defined in the Iowa Code, thus leaving the matter of their meaning to "the usual meaning ascribed by the courts."<sup>229</sup> None of these three words has necessarily taken on a technical meaning in the law, and thus each generally has been defined judicially in its ordinary sense as discussed below.<sup>230</sup> This phrase is defined overly restrictively in the Uniform Jury Instructions as "a deforming or mutilated condition of a person."<sup>231</sup>

The logical starting point in determining if a "serious permanent disfigurement" has been caused or produced is to determine if the injured party has been "disfigured." If so, then the second requirement of "permanency" must be met, thus disregarding temporary scars. Finally, even a "disfigurement" which is "permanent" must additionally be "serious" in nature, thus disregarding *minor* scar tissue anywhere as well as more pronounced scars in normally non-visible parts of the body.

(A) *"Disfigurement."* In the absence of either a statutory definition or relevant caselaw interpretation of the term "disfigurement" in Iowa law,<sup>232</sup> it

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225. 572 S.W.2d at 530-31.

226. *Gonzales v. State*, 146 Tex. Crim. 108, 172 S.W.2d 97 (Tex. Crim. App. 1943).

226.1. *Id.* at \_\_\_, 172 S.W.2d at 99.

227. *Garrett v. State*, 164 Tex. Crim. 275, 298 S.W.2d 945 (Tex. Crim. App. 1957).

228. The term "disfigurement" appears in only two other provisions of the Iowa Code (1979). In section 717.1 of the Criminal Code, the offense of Injury to Animals can be committed, *inter alia*, by "disfiguring" any animal of another. *But see* note 232 *infra*. More relevant to injury to persons, the workmen's compensation statute was amended to include a schedule of recovery for "permanent disfigurement of the face or head . . ." Iowa Code § 85.34(2)(t) (1979). This term has not yet been interpreted by the Iowa Supreme Court.

229. *State v. Wilson*, 287 N.W.2d 587 (Iowa 1980).

230. *See also* *In re Requests of Governor and Senate*, 389 Mich. 411, \_\_\_, 208 N.W.2d 469, 482 (1973), in which the court held that the phrase "permanent serious disfigurement" is comprised "of no less commonly used or understood words of the English language, nor is the language . . . less precise than that which has been adopted to express other standards for determining tort liability. The phrases are within the province of the trier of facts and are sufficient for legal interpretation."

231. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 219.

232. In the context of the crime of Injury to Animals through an act causing maiming or disfiguring, an early Iowa Supreme Court case took a broad view of "disfiguring" by suggesting

is necessary to look to other jurisdictions for acceptable definitions. Several courts<sup>233</sup> have stated that this word has "no technical meaning and should be considered in the ordinary sense."<sup>234</sup> A common general dictionary definition of "disfigurement" adopted in workmen's compensation cases in several jurisdictions<sup>235</sup> has been "[t]hat which impairs or injures the beauty, symmetry or appearance of a person or thing, that which renders unsightly, misshapen or imperfect or deforms in some manner."<sup>236</sup> Other less common ordinary definitions of "disfigurement" followed in criminal or workmen's compensation cases have been "a change of external form to the worse;" "a deformity [that] render[s] one grotesque, unsightly, obnoxious, even repulsive to others;"<sup>237</sup> and "mar[ring] the figure and . . . render[ing] [one] less perfect or beautiful in appearance."<sup>238</sup>

(B) "*Permanent.*" A "serious disfigurement" must also be "permanent"<sup>239</sup> in order to constitute "serious injury" under Iowa law. This term apparently has no technical meaning, and thus should be interpreted in its ordinary dictionary sense essentially as follows: "[f]ixed, continuing, lasting, stable, enduring, abiding, not subject to change."<sup>240</sup> It is generally the opposite of "temporary,"<sup>241</sup> although not necessarily to be equated with "perpetually."<sup>242</sup> Indeed, evidence of permanency need only appear with reasonable

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that a "very slight" injury was sufficient so long as the injury "tend[ed] to destroy the beauty or symmetry of the animal." *State v. Harris*, 11 Iowa 414, 415 (1861). The precedential value of this case is diluted somewhat in light of the applicable statute referring both to the maiming and disfiguring animals, and the court's observation that

[t]o maim as applied to domestic animals, implies some permanent injury; but to disfigure is a lower grade of the same offense, and the disfiguring need not be of a permanent character to make the offense complete. Thus to shave a horse's mane or tail is a disfiguring of the horse, but the injury is not of a permanent character.

*Id.* at 415.

233. *E.g.*, *State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966); *State v. Nieuhaus*, 217 Mo. 332, 117 S.W. 73 (1909).

234. For "general" definitions of the word "disfigurement," see *BALLENTINE'S LAW DICTIONARY* 355 (3d ed. 1969); *BLACK'S LAW DICTIONARY* 554 (4th ed. 1968).

235. *E.g.*, *Dombrowski v. Fafnir Bearing Co.*, 148 Conn. 87, \_\_\_, 167 A.2d 458, 462 (1961); *Superior Mining Co. v. Industrial Comm'n*, 309 Ill. 339, \_\_\_, 141 N.E. 165, 166 (1923); *Duncan v. Beck*, 553 S.W. 2d 476, 478 (Ky. 1977); *Vukelich v. Industrial Comm'n*, 62 Utah 486, \_\_\_, 220 P. 1073, 1075 (1923). See *BALLENTINE'S LAW DICTIONARY* 355 (3d ed. 1969); *BLACK'S LAW DICTIONARY* 420 (5th ed. 1979).

236. *Mitchum v. Inman Mills*, 209 S.C. 307, \_\_\_, 40 S.E.2d 38, 39 (1946) (workmen's compensation). See *BALLENTINE'S LAW DICTIONARY* 355 (3d ed. 1969).

237. *Mitchum v. Inman Mills*, 209 S.C. 307, \_\_\_, 40 S.E.2d 38, 39 (1946) (workmen's compensation).

238. *State v. Nieuhaus*, 217 Mo. 332, \_\_\_, 117 S.W. 73, 78 (1909) (criminal).

239. The singular term "disfigure" in Virginia mayhem statute has been interpreted to mean "a permanent and not merely a temporary and inconsequential disfigurement." *Lee v. Commonwealth*, 135 Va. 572, \_\_\_, 115 S.E. 671, 673 (1923).

240. *BLACK'S LAW DICTIONARY* 1025 (5th ed. 1979).

241. *Id.*

242. *Id.*

medical probability. For example, medical testimony was used in an Iowa tort case in determining that plaintiff's injuries were "permanent" through the physician's expert testimony was that the injuries involved were permanent "unless there is some unexpected radical change."<sup>243</sup> Or, as stated in an Ohio workmen's compensation case,<sup>244</sup> a "permanent" disability is an injury which, with reasonable probability, will continue for an indefinite period of time without any present indication of recovery.

(C) "*Serious.*" Under the express statutory terms, a "permanent disfigurement" must also be of a "serious" nature<sup>245</sup> in order to constitute "serious injury." However, this limiting factor of "seriousness" is not included in the only other two provisions on "disfigurement" in the Iowa Code.<sup>246</sup> Accordingly, the term "serious" in this section should be interpreted liberally to exclude marginally "serious" disfigurements.

One court has made the observation, in a criminal case, that the word "serious" has "no technical meaning and shall be considered in the ordinary sense."<sup>247</sup> Accordingly, a "serious" injury in its general context must be "grave" or "momentous" in nature, as opposed to "trivial" or "superficial."<sup>248</sup>

More specifically, the term "serious" commonly has been defined in workmen's compensation cases as requiring that the disfigurement be "of such a character that it *substantially* detracts from the appearance of the person disfigured."<sup>249</sup> Under such a standard, the location of the injured party's scars is of great importance, although it is not necessarily decisive.

At first blush, any permanent blemish or scar on an injured person's face would appear to constitute "disfigurement" in light of the generally accepted definition of "disfigurement," which is to render one less perfect in appearance.<sup>250</sup> However, the limiting factor of "seriousness," with its gener-

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243. *Knudsen v. Merle Hay Plaza*, 160 N.W.2d 279, 286 (Iowa 1968).

244. *Logsdon v. Industrial Comm'n*, 143 Ohio St. 508, \_\_\_, 57 N.E.2d 75, 78 (1944).

245. Judicial gloss has resulted in reading a requirement of "seriousness" into a Kentucky tort recovery statute relating on its face only to "permanent disfigurement." See *Duncan v. Beck*, 553 S.W.2d 476 (Ky. 1977). In this automobile accident case, the injured party had "some small scars upon his right knee" which could "only be seen upon close examination of the knee." *Id.* at 478. The court determined that such minor marks did not constitute "disfigurement" within the general dictionary definition of that term. See note 234 *supra*. In actuality, it appears that the court was saying that a scar or other mutilation, although permanent in nature, has to be "serious" in order to be legally compensable as "permanent disfigurement."

246. See note 228 *supra*.

247. *State v. Ortega*, 77 N.M. 312, \_\_\_, 422 P.2d 353, 355 (1966).

248. See, e.g., *Jackson v. State*, 168 Tex. Crim. 51, 323 S.W.2d 422, (Tex. Crim. App. 1959); *McKee v. State*, 93 Tex. Crim. 217, 246 S.W. 1035 (Tex. Crim. App. 1923); *Ward v. State*, 70 Tex. Crim. 393, 159 S.W. 272 (Tex. Crim. App. 1913). See generally *BALLENTINE'S LAW DICTIONARY* 1163 (3d ed. 1969); *BLACK'S LAW DICTIONARY* 1226 (5th ed. 1979).

249. E.g., *Mitchum v. Inman Mills*, 209 S.C. 307, \_\_\_, 40 S.E.2d 38, 39 (1946); *Dombrowski v. Fafnir Bearing Co.*, 148 Conn. 87, \_\_\_, 167 A.2d 458, 462 (1960) (emphasis added).

250. See note 234 *supra*.

ally-accepted definition of *substantially* detracting from the appearance of the so-called "disfigured" person,<sup>251</sup> has been interpreted in several workmen's compensation cases to exclude "minor" blemishes or scars. Stating that "[a]ll facial injuries which result in scars are not *ipso facto* compensable,"<sup>252</sup> a New York court determined that "a one and one-half inch scar on [the] left anterior scalp at the hair line" was not "serious."<sup>253</sup> Similarly, other courts have determined that relatively short, narrow scars on more prominent parts of the face do not qualify as "serious." In one case,<sup>254</sup> the court observed that the scars were not distinguishable at a distance beyond eight feet. In another,<sup>255</sup> the court adroitly observed: "[w]e can think of no form of activity, social, political, or economic, in which plaintiff might indulge, and be subject to any embarrassment by the presence of this small scar."<sup>256</sup>

Of course, "disfigurement" is not limited to bodily areas normally visible to others.<sup>257</sup> Perhaps the preferable approach in these situations would be to require a stricter standard of substantiality. This is because a scar on the face obviously detracts more from the injured person's appearance than exactly the same scar on the buttocks, chest, legs, arms, or hands.

A Missouri case<sup>258</sup> involving aggravated assault is an example where the "disfigurement" occurred on an area of the body generally not visible to others. These included the chest, abdomen, shoulders, back, thighs, stomach and legs. The multiple whip wounds and burns (inflicted by a hot stove-lid lifter) had penetrated "entirely through the skin upon [the] body and to [the victim's] flesh,"<sup>259</sup> leaving numerous sizeable permanent scars. The only analysis of "disfigurement" in the opinion was the conclusory statement that these injuries constituted "disfigurement" as that non-technical term is considered; to wit, "to mar the figure and to render less perfect or beautiful in appearance."<sup>260</sup>

251. For "general" definitions of the word "seriousness," see note 234 *supra*.

252. *Hildreth v. Ford Motor Co.*, 14 App. Div. 2d 953, \_\_\_, 221 N.Y.S.2d 16, 18 (3d Dep't 1961).

253. *Id.* at \_\_\_, 221 N.Y.S.2d at 17.

254. *Mitchum v. Inman Mills*, 209 S.C. 307, 40 S.E.2d 38 (1946).

255. *Chisholm v. Jahncke Dry Docks, Inc.*, 10 La. App. 323, 121 So. 684 (1929).

256. *Id.* at \_\_\_, 121 So. at 684.

257. The Iowa "disfigurement" provision in IOWA CODE § 702.18 (1979) is not limited to any bodily areas. This compares to the Delaware workmen's compensation statute which requires the "serious and permanent disfigurement" to be "visible and offensive when the body is clothed normally . . . ." DEL. CODE ANN. tit. 19, § 2326(f) (1975). Judicial gloss on this restrictive language has resulted in the "clothed normally" provision to include "clothing normally worn by the employee-claimant when involved in any of his or her regular activities, including recreational, vocational, and avocational activities," rather than being limited to being clothed "in his daily routine of life." *Beam v. Chrysler Corp.*, 332 A.2d 143, 145 (Del. 1975).

258. *State v. Nieuhaus*, 217 Mo. 332, 117 S.W. 73 (1909).

259. *Id.* at \_\_\_, 117 S.W. at 78.

260. *Id.*

Similarly, a criminal conviction for aggravated battery in New Mexico has been upheld<sup>261</sup> under a statute defining "great bodily injury" as causing "serious disfigurement." The prosecution was based upon the forcible tattooing of the victim with a needle and India ink. The tattoo apparently was partially visible even when the victim was fully clothed, extending from the back of his neck to his waist. A doctor testified that "it would take 'strenuous and extensive' skin grafting to remove the tattoo."<sup>262</sup> Refusing to reverse the conviction for insufficient evidence, the court said that these circumstances presented a question of fact "as to whether or not the injuries sustained were sufficiently substantial to come within the definition of the statute."<sup>263</sup> The court observed that the word "serious" and "disfigurement" have "no technical meaning and should be considered in the ordinary sense."<sup>264</sup>

On the other hand, an injury resulting in permanent scars on the injured party's hands has been interpreted in a Connecticut workmen's compensation case<sup>265</sup> to not satisfy the statutory requirement that the disfigurement be "serious." These fine-line scars were visible only when the hand was opened and the palm exposed.

(4) *Bodily Injury Causing "Protracted" Loss of Bodily Function or Organ.* Another type of physical injury can constitute "serious injury" although it neither involves "a substantial risk of death" nor results in "serious permanent disfigurement." This is bodily injury resulting in "protracted" loss of any bodily function or organ. Unfortunately, the term "protracted" is not defined in the Criminal Code, and it does not appear to be a term with particular legal significance.<sup>266</sup> Thus, the word should be given its usual meaning in common parlance. The general dictionary meaning is: "To draw out or lengthen in time; prolong."<sup>267</sup> The words "prolong", "protract," and "extend" are synonyms. They mean "to lengthen in time or space. *Prolong* implies an increase in duration (time) beyond normal limits. *Protract* adds to *prolong* the idea of lengthening indefinitely or unnecessarily. *Extend* can refer to mere lengthening in time or space, or to increase in range or scope of activities or influence."<sup>268</sup> Slightly more elucidation can be garnered from the Uniform Jury Instructions, which state that "[a] bodily injury which causes a protracted loss or impairment is such injury as would prolong or extend the loss or use of a member or organ, or which would

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261. *State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966).

262. *Id.* at \_\_\_, 422 P.2d at 355.

263. *Id.* (citing *State v. Edwards*, 28 N.J. 292, 146 A.2d 209 (1958)).

264. 217 Mo. at \_\_\_, 117 S.W. at 78.

265. *Dombrowski v. Fafnir Bearing Co.*, 148 Conn. 87, 167 A.2d 458 (1961).

266. Indeed, this term is not even included in the standard legal dictionaries — *BALLEN-TINE'S LAW DICTIONARY* (3rd ed. 1969) and *BLACK'S LAW DICTIONARY* (5th ed. 1979).

267. *AMERICAN HERITAGE DICTIONARY* 1052 (4th ed. 1976).

268. *Id.* at 1046.



weaken, damage or reduce the use of a member or organ of a person."<sup>269</sup>

Whether or not a broken limb can be considered "protracted loss or impairment of the function of any bodily member . . ." and thus constitute "serious injury" remains for judicial interpretation, with the question for decision being the meaning of "protracted." Because of the restrictive language in the Uniform Jury Instructions, a reasonable interpretation would be that the ordinary six weeks or so in a cast for a broken leg would not be a "protracted" period. On the other hand, complications could arise causing the broken limb to not mend entirely for a prolonged or extended period of six months or so. Arguably, this would fall within the definition of "protracted," even though the initial injury itself was more or less routine in nature. Of course, it is possible (although not desirable) that the Iowa courts would interpret "protracted" as being merely a more prolonged, rather than a mere temporary, disuse of a bodily function. After all, an assault victim can suffer a wide range of injuries — from (1) merely momentary pain to (2) a bruise which will disappear in a few days to (3) incapitation of a leg for a few days while the victim is on crutches to (4) an ordinary broken leg necessitating a cast for approximately six weeks or so to (5) an extended period of incapitation due to unusual complications surrounding a broken leg to (6) indefinite (if not permanent) loss of a bodily function or organ (e.g., a leg that needs to be amputated or a collapsed lung). The question becomes at which point in this wide spectrum does an injury become "protracted" in nature. Obviously, the final point of indefiniteness or permanency is unnecessary, in light of reading, *in pari materia*, this phrase of *protracted* loss with the accompanying phrase of serious permanent disfigurement in another clause of this same sentence in the Code. On the other hand, "protracted" should be read restrictively to not include an ordinary broken leg in light of the three other types of "serious injury" in section 702.18 requiring injuries of a grave nature. These include disabling mental illness, as well as physical injuries either creating a substantial risk of death or causing serious permanent disfigurement.

Temporary amnesia has been held insufficient by itself under a similar Texas statute to show "protracted loss or impairment of any bodily member or organ."<sup>270</sup> Moreover, this same victim's "multiple superficial abrasions and contusions of head and body"<sup>271</sup> were not considered to be "serious injuries," presumably because of their temporary nature.

Protracted impairment of a victim's eye has been considered a "serious physical injury" under a similar New York law.<sup>272</sup> The victim had been kicked in the face ten or twelve times by the defendant, who was wearing heavy leather boots. Even after surgery, his "eye level had not returned to

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269. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 219.

270. *Sanchez v. State*, 543 S.W.2d 132 (Tex. Crim. App. 1976).

271. *Id.* at 134.

272. *See People v. Rumaner*, 45 App. Div. 2d 290, 357 N.Y.S.2d 735 (3d Dep't 1974).

normal and [his] left eyelid was lower than the right.”<sup>273</sup> Similarly, another New York case<sup>274</sup> essentially has held that a “serious injury” was not inflicted when the victim was struck in the back of the head with a stone which was roughly 2-½” in diameter. The injury merely had caused him to feel dizzy and to be unable to walk, and he was taken to the hospital where three sutures were taken in the head wound.<sup>275</sup> In contrast, there was no doubt that a “serious injury” was suffered in another New York case<sup>276</sup> in which the victim’s left ear was bitten off.

(5) “Disabling” Mental Illness. A fourth alternative category of “serious injury” under section 702.18 of the Code — a “disabling” mental illness — does not focus upon physical injury at all. Once again the General Assembly failed to define these terms. This means that judicial interpretations must be based upon existing legal interpretations for technical definitions, or, if none, then to common parlance.

A “disabling mental illness” is defined in the Uniform Jury Instructions as “an illness or condition which cripples, incapacitates, weakens or destroys a person’s normal and usual mental functions.”<sup>277</sup> This essentially follows the general definition of “disability” used by the Iowa Supreme Court<sup>278</sup> and in common parlance.<sup>279</sup>

The use of the unqualified singular term “disabling” raises many major questions. Must the disability be total or is a partial disability sufficient? Must the disability be permanent or is a temporary disability sufficient? What effect must this disability have on the injured party’s ordinary way of life? Or, more fundamentally, what exactly is a disability?

That a “disabling mental illness” was intended to include both permanent and temporary disabilities is evident from its non-qualified language in comparison with the expressly limited language of “serious *permanent* disfigurement” in the same statute. Similarly, Iowa’s workers’ compensation statute<sup>280</sup> contains separate provisions for temporary and permanent disabilities.

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273. *Id.* at 293, 357 N.Y.S.2d at 736-37.

274. *In re Taylor*, 62 Misc.2d 529, 309 N.Y.S.2d 368 (1970).

275. *Id.* at —, 309 N.Y.S.2d at 371.

276. *People v. Dingley*, 50 App. Div.2d 361, 378 N.Y.S.2d 90 (3d Dep’t 1976) *rev’d*, 42 N.Y.2d 888, 366 N.E.2d 877, 397 N.Y.S.2d 789 (1977).

277. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 219.

278. *See Hill v. Travelers’ Ins. Co.*, 146 Iowa 168, 124 N.W.898 (1910), in which the court used the following general dictionary meaning of “disability”: “a want of competent power, strength, or physical ability; weakness; incapacity; impotence.” *Accord State v. Chatterson*, 259 N.W.2d 766, 770 (Iowa 1977) (“disabled” means “incapacitated by . . . injury, or wounds: crippled”).

279. *See generally* BALLENTINE’S LAW DICTIONARY 351 (3rd ed. 1969); BLACK’S LAW DICTIONARY 415 (5th ed. 1979) (ordinarily, to take away the ability of, to render incapable of proper and effective action).

280. IOWA CODE § 85.34 (1979).

It appears also that the legislative intent was to include both total and partial mental disabilities in section 702.18 in the absence of any qualifying language. Contrastingly, Iowa's workers' compensation statute<sup>281</sup> contains separate sections on permanent partial disabilities and permanent total disabilities.

The phrase "mental *illness*" suggests a defect more serious in nature than a mental *condition* (although the two terms are equated in the Uniform Jury Instructions).<sup>282</sup> That is, one could have a mental condition which, unlike a mental illness, nevertheless would not render the person incapacitated. Examples of a mental condition would be temporary amnesia<sup>283</sup> or an anxiety reaction,<sup>284</sup> as opposed to mental illnesses such as psychosis or severe psychoneurosis.<sup>285</sup> Mental illness seemingly involves a lowering of intellectual capacity, although obviously not to the extent of insanity. Indeed, a mentally-ill person normally is thought of as being unable to pursue an ordinary life pattern (e.g., to care for oneself or to carry on regular employment). Indeed, for purposes of the Federal Social Security Act<sup>286</sup> the "disability" must cause inability to work (because of a medically determinable physical or mental impairment).<sup>287</sup>

Judicial interpretations of the "disability" provision in the Social Security Act also give some guidance as to the meaning of a mental disability. The parameters generally have been set as follows: on the one hand, the term "disability" has been interpreted as not meaning completely helpless or bedridden,<sup>288</sup> and, on the other hand the term has been interpreted as being required to be of long-continued and indefinite duration.<sup>289</sup>

In terms of the type of mental condition that qualifies as a "disability"

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281. *Id.*

282. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 219. This type of "serious injury" is defined therein as "an illness or a person's normal and usual mental functions." Rejecting defendant's claim that the terms "normal" and "usual" are vague, the supreme court has said: "[R]elative to words which are of ordinary usage and generally understood, further instructional definition is not required." *State v. Holmes*, N.W.2d (Iowa 1979).

283. See generally *Sanchez v. State*, 543 S.W.2d 132 (Tex. Crim. App. 1976) (temporary amnesia not a serious injury involving protracted loss of bodily function).

284. See *Alvarado v. Weinberger*, 511 F.2d 1046, 1049 (1st Cir. 1975) (interpretation of "disability" under Social Security Act).

285. See 20 C.F.R. § 404.1502(a) (1979); Annot., 23 A.L.R.3d 1034, 1047 (1969). See also *Rosay v. Gardner*, 247 F. Supp. 603 (S.D. Cal. 1965) (psychoneurosis is a mental disorder compensable under Social Security Act).

286. 42 U.S.C. § 423 (1976).

287. See *Teeter v. Fleming*, 270 F.2d 871 (7th Cir. 1959). See generally Annot., 77 A.L.R.2d 641 (1961). See also Annot., 23 A.L.R.3d 1034 (1969) (pain as "disability" under Social Security Act); *Ozark Mut. Life Assoc. v. Winchester*, 116 Okla. 116, 243 P. 735 (1926) (term "disability" in accident insurance policy means disability from performing occupation insured was following at time of accident and not some vocation which he might be able to follow after the accident).

288. *Celebrezze v. Warren*, 339 F.2d 833, 837 (10th Cir. 1964).

289. *Mims v. Celebrezze*, 217 F. Supp. 581, 585 (D.Colo. 1963).

under the Social Security Act, the courts similarly have been restrictive. For example, the First Circuit Court of Appeals<sup>290</sup> has summarily held that "[t]he mere existence of a psychoneurosis or an anxiety reaction does not constitute a disability."<sup>291</sup> Without noting the cause of the claimant's mental condition, the opinion stated that the claimant complained of "numbness in her head, insomnia, inability to work in the home, lack of appetite, waking up screaming and walking back and forth, a frightened feeling in her heart, crying spells, and an impulse to scream."<sup>292</sup> Her condition was diagnosed variously as "involutional psychotic depressive reaction" and as "a chronic depressive neurosis in almost total remission of symptoms."<sup>293</sup>

In conclusion, either an anxiety reaction or a slight neurosis should not qualify as "mental illness." For example, a rape victim would not have suffered "serious injury" merely by being afraid to go out alone at night or by being "cool" to all men or by being depressed. It would also seem that a "disabling mental illness" does not arise merely because a rape victim requires psychiatric or psychological care of an incidental nature. Indeed, emotional trauma would be an incidental fallout of most forcible sexual abuse attacks. The crux of the matter is that there are three degrees of Sexual Abuse,<sup>294</sup> with a forcible rape without more constituting only third-degree Sexual Abuse whereas a "serious injury" is necessary to upgrade the "ordinary" forcible rape into Sexual Abuse in the First Degree.

By again referring to the Social Security Act, the conclusion is fortified that incidental counselling for a mentally-disturbed crime victim is not sufficient for purposes of the "serious injury" provision. Under the *Code of Federal Regulations*<sup>295</sup> an example is given of a compensable mental "disability" as a psychosis or severe psychoneurosis requiring continued *institutionalization* or continued *supervision* of the affected individual. And the Social Security Act is interpreted liberally. By contrast, a criminal statute should be interpreted narrowly to not include anything beyond that clearly within legislative intent. The bottom line should be that a forcible rape victim should not be considered to have suffered a "serious injury" if she or he is able to carry out ordinary pursuits of life. A person who maintains ordinary gainful employment and other everyday activities clearly has not suffered a "disabling mental illness" merely because of anxieties over being outside after dark or being in the company of strangers of the opposite sex.

h. "Sex Act." An extremely broad general statutory definition of "sex act" is included in Iowa Code section 702.17 as the necessary actus reus for

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290. *Alvarado v. Weinberger*, 511 F.2d 1046 (1st Cir. 1975).

291. *Id.* at 1049.

292. *Id.* at 1048 n.1.

293. *Id.* at 1048.

294. See IOWA CODE §§ 709.1-4 (1979).

295. 20 C.F.R. § 404.1502(a) (1979).

the crimes of Sexual Abuse<sup>296</sup> and Prostitution,<sup>297</sup> as well as one alternative actus reus for the crimes of Indecent Exposure<sup>298</sup> and Lascivious Acts With a Child.<sup>299</sup> Moreover, the five obscenity offenses<sup>300</sup> contain broader, more specific definitions of "sex act" which use the general term as their starting points.

A "sex act" is defined in section 702.17 as "any sexual contact between two or more persons" in any of the four alternative ways:

[1] by penetration of the penis into the vagina or anus, [or] [2] by contact between the mouth and genitalia or [3] by contact between the genitalia of one person and the genitalia or anus of another person or [4] by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.<sup>301</sup>

Sexual contact is therefore necessary, whereas penetration is not. This, of course, represents a major expansion of the pre-revised unauthorized sex-related crimes (Rape,<sup>302</sup> Statutory Rape,<sup>303</sup> Carnal Knowledge of an Imbecile,<sup>304</sup> Sodomy,<sup>305</sup> and Prostitution,<sup>306</sup>) all of which required penetration by a sexual organ. This leaves Incest<sup>307</sup> as the only crime requiring sexual intercourse (i.e., penetration) as an element.

The broad definition of "sexual contact" thus includes a wide range of consummated and attempted heterosexual and homosexual activity, "both conventional and deviant, between members of the same or opposite sex,"<sup>308</sup> including the following: intercourse, buggery, cunnilingus, and fellatio. Nevertheless, these activities are punishable only when committed (or attempted) either: by force, with a "child," with a mentally-defective person, or with fourteen and fifteen-year olds in certain circumstances. Thus, homosexual "sex acts" and acts of sodomy are not criminalized *per se*.

The judicial gloss put on this term has seemingly broadened the concept of a "sex act" even further. In *State v. Howard*,<sup>309</sup> the Iowa Supreme Court held that intertwining or rubbing together of the pubic hair of the defendant and the intended victim constituted contact of their genital parts

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296. IOWA CODE §§ 709.1-4 (1979).

297. *Id.* § 725.1.

298. *Id.* § 709.9 (committing a "sex act" in view of a third person).

299. *Id.* § 709.8(3) (soliciting a "child" to engage in a "sex act").

300. *Id.* §§ 728.1-12.

301. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 902; J. YEAGER & R. CARLSON, *supra* note 3, §§ 44, 201.

302. IOWA CODE § 698.1 (1977) (repealed 1978).

303. *Id.*

304. *Id.* § 698.3.

305. *Id.* § 705.1.

306. *Id.* § 724.1.

307. IOWA CODE § 726.2 (1979).

308. J. YEAGER & R. CARLSON, *supra* note 3, § 202 at 58.

309. 284 N.W.2d 201 (Iowa 1979).

and thus a "sex act" sufficient to uphold a conviction for Sexual Abuse. It was also held in *Howard* that the trial court correctly took judicial notice of the exterior anatomy of genitalia as well as of the location of pubic hair.

On the other hand, the court demonstrated in *State v. Baldwin*<sup>310</sup> that it was unwilling to expand by judicial interpretation the scope of a "sex act" in situations where the offensive conduct did not involve parts of the body enumerated within the statutory definition. In a prosecution for Lascivious Acts With a Child<sup>310.1</sup> allegedly committed by solicitation to engage in a "sex act," the evidence showed only that the defendant kissed an unwilling young girl "on the forehead" and "put his hand down the front of her shirt."<sup>310.2</sup> Reversing the conviction, the court pointed out that the human breast is not one of the specifically-enumerated bodily parts within the statutory definition of "sex act" and held that the term "genitalia" (being limited only to "the reproductive organs")<sup>310.3</sup> within the definition of "sex act" does not include a human breast. Even though the defendant's conduct constituted an assault and had some sex-oriented purpose, there was nothing to indicate an intent to achieve a "sex act." As alluded to by the court, the act of fondling children other than in the genitals or otherwise taking indecent physical liberties with children is a *casus omissus* in the Iowa law covering the serious crime of Lascivious Acts With a Child.<sup>310.4</sup>

Unauthorized digital manipulation of genitalia does not appear to be included as a "sex act" — unless a finger is construed as a substitute for a sexual organ, which is highly unlikely.<sup>311</sup> Nor does bestiality or two-party masturbation<sup>312</sup> appear to fall within the definition. In interpreting this provision, one should keep in mind that this provision basically replaces the pre-revised crime of Rape, the gravamen of which was non-consensual sexual intercourse. Whether the new concept of "sexual contact" encompasses certain acts such as digital manipulation and masturbation must be clear and unmistakable in the statutory language itself, in light of *Emery v. Fenton*.<sup>313</sup>

i. *Undefined Terms.* The list of general definitional clauses in chapter 702 is by no means complete. In light of only a limited number of general definition clauses in the Criminal Code, the supreme court has had to apply general rules or canons of statutory construction to define words or phrases left undefined by the General Assembly. One such principle the court has applied is the rule that "in enacting a statute, a legislative body is presumed

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310. 291 N.W.2d 337 (Iowa 1980).

310.1. IOWA CODE § 709.8(3) (1979).

310.2. 291 N.W.2d at 339.

310.3. *Id.* at 340.

310.4. *Id.*

311. See generally J. YEAGER & R. CARLSON, *supra* note 3, §§ 44, 201-2.

312. See *State ex rel. Clemens v. ToNeCa, Inc.*, 265 N.W.2d 909 (Iowa 1978).

313. 266 N.W.2d 6 (Iowa 1978). See text accompanying notes 112-119 *supra*.

to know the usual meaning ascribed by the courts to show language and to intend that meaning unless the context shows otherwise."<sup>314</sup>

Fortunately, many of the undefined terms do have a well-defined common law meaning (e.g., the homicide-related terms of "malice aforethought," "premeditation," and "provocation"). More obscure undefined terms (e.g., abandon,<sup>315</sup> disfigure,<sup>316</sup> protracted,<sup>317</sup> and torture<sup>318</sup>) enjoy less well-defined common law meanings.

Two other terms — "explosive device"<sup>319</sup> and "minor"<sup>320</sup> — appear in several provisions without benefit of a general definitional clause in the Criminal Code. Nevertheless, both terms are defined in other titles of the Iowa Code.<sup>321</sup> Looking to these statutory definitions, *in pari materia*, for guidance in interpreting these undefined terms in the Criminal Code certainly seems appropriate, especially in light of *State v. Wilson*.<sup>322</sup> In *Wilson*, the court took into consideration the statutory definition of the word "abandon" in two provisions outside the Criminal Code in interpreting the word "abandon" as it appears, undefined, in the newly-constituted crime of Wanton Neglect of a Minor.<sup>323</sup>

(1) "*Abandonment*." The statutorily-undefined term of "abandonment" as used in the newly constituted offense of Wanton Neglect of a Minor<sup>324</sup> has been defined by the supreme court<sup>325</sup> as requiring permanency, therefore, temporary neglect or temporary absence is insufficient.

(2) "*Felonious Assault*." One new key term in the Criminal Code, which went statutorily undefined is "felonious assault." This term appears only once in the Criminal Code — in the definition of a "forcible felony,"<sup>326</sup> yet it nevertheless is important even though it does not define a crime itself. That is, any crime constituting a "felonious assault" is subject to the special provisions relating to all "forcible felonies," as discussed above.<sup>327</sup>

The Iowa Supreme Court<sup>328</sup> has filled the lexiconical gap by interpreting the term "felonious assault" to mean "any assault the commission of

314. *State v. Wilson*, 287 N.W.2d 587, 590 (Iowa 1980).

315. See IOWA CODE § 726.6(2) (1979) (Wanton Neglect of a Minor) and text accompanying notes 324-25 *infra*.

316. See *id.* § 702.18 ("serious injury") and text accompanying notes 233-38 *supra*.

317. See *id.* § 702.18 ("serious injury") and text accompanying notes 268-71 *supra*.

318. See *id.* § 710.2.

319. See *id.* §§ 712.1-.8 (Arson offenses).

320. See text accompanying notes 153-55 *supra*.

321. See text accompanying notes 153-55 *supra*.

322. 287 N.W.2d 587 (Iowa 1980).

323. IOWA CODE § 726.6(2) (1979).

324. *Id.*

325. *State v. Wilson*, 287 N.W.2d 587 (Iowa 1980).

326. IOWA CODE § 702.11 (1979). See text accompanying notes 180-83 *supra*.

327. See text accompanying notes 184-203 *supra*.

328. *State v. Powers*, 278 N.W.2d 26 (Iowa 1979).

which constitutes a felony.”<sup>329</sup> Thus, any felony in either the “Assault” chapter or elsewhere (e.g., Attempted Murder)<sup>330</sup> “which necessarily include[s] an assault”<sup>331</sup> is a “felonious assault.”

The determination of a felony classification is clear on the face of the various statutory provisions. Thus, Assault with Intent to Inflict Serious Injury<sup>332</sup> (an aggravated misdemeanor) is not a “felonious assault.” However, whether or not an assault<sup>333</sup> is “necessarily included” in some of the offenses contained in this chapter is far from clear. The determining factor seems to be that an assault is a *required* element of the greater offense charged, as determined by the elements on the face of the statute itself, rather than that the facts surrounding the commission of the greater offense indicate an assault.<sup>334</sup> The mere fact that an offense is included in a chapter entitled “Assault” is of no significance at all in determining whether that offense is a “felonious assault.”<sup>335</sup> After all, a chapter entitled “Murder” also includes Voluntary Manslaughter, Involuntary Manslaughter, and several feticide-related offenses.<sup>336</sup>

To date, that court has had occasion only to specifically determine that Attempted Murder<sup>337</sup> is a “felonious assault.”<sup>338</sup> Other clearly assaultive offenses carrying a felony penalty are Assault While Participating in a Felony,<sup>339</sup> Terrorism,<sup>340</sup> and Willful Injury.<sup>341</sup> Two other felony offenses included in the chapter entitled “Assault” — Administering Harmful Substances<sup>342</sup> and Going Armed With Intent<sup>343</sup> — do not *expressly* include an assault in their elements and thus must await judicial interpretation to determine if they are “felonious assaults.” The same circumstances apply to Voluntary Manslaughter<sup>344</sup> and unlawful act-type Involuntary Man-

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329. *Id.* at 28.

330. IOWA CODE § 707.11 (1979). *See* State v. Powers, 278 N.W.2d 26 (Iowa 1979).

331. State v. Powers, 278 N.W.2d 26, 28 (Iowa 1979).

332. IOWA CODE § 708.2(1) (1979).

333. *Id.* § 708.1.

334. The language in the definition of “felonious assault” as “a felony which necessarily include[s] an assault” in State v. Powers, 278 N.W.2d 26, 28 (Iowa 1979) (emphasis added) suggests that an Assault must be a lesser included offense of the particular greater crime in order for the latter to be a “felonious assault.” For a detailed discussion of the test for lesser included offenses, see text accompanying notes part II D 11-18 *infra*.

335. *See generally* 2A Sutherland on Statutes and Statutory Construction § 47.14 (4th ed. 1973).

336. *See* IOWA CODE ch. 707 (1979).

337. *Id.* § 707.11.

338. State v. Powers, 278 N.W.2d 26 (Iowa 1979).

339. IOWA CODE § 708.3 (1979).

340. *Id.* § 708.6.

341. *Id.* § 708.4.

342. *Id.* § 708.5.

343. *Id.* § 708.8.

344. *Id.* § 707.4.



slaughter.<sup>345</sup>

(3) "*Firearm.*" Next to "forcible felony,"<sup>346</sup> probably the most important single term in the Criminal Code is "firearm," in light of a five-year minimum sentence being mandatory for use of firearms during the commission of any "forcible felony" offense.<sup>347</sup> In addition, involvement of a "firearm" is a necessary part of four crimes.<sup>348</sup> Yet, this important term is not defined anywhere in the Iowa Code. Nevertheless, "firearm" has been interpreted under the pre-revised law to mean "a small arms weapon from which a projectile is fired by gunpowder."<sup>349</sup> The court noted additionally that "a firearm must meet two requirements. It must be able to propel a projectile and it must do so by explosive force."<sup>350</sup>

(4) "*Physical Injury.*" In contrast to the related term of "serious injury,"<sup>351</sup> the term "physical injury" is not defined anywhere in the Criminal Code, nor is there any clue as to the extent of the injury required. As Professor Yeager ponders: "Does this mean any physical injury, no matter how slight?"<sup>352</sup> This would appear to be the case, especially in light of the very restrictive definition of "serious injury." About the only definite point is that some *injury*, however slight, is necessary — thus requiring more than mere offensive contact or touching (indeed even shoving). Thus, a bruise, a cut, indeed even a scratch may be enough, albeit such injuries are minor in nature.

"physical injury" is a component of two crimes. Burglary is raised to the first degree<sup>353</sup> whenever a "physical injury" alone is intentionally or recklessly inflicted. (On the other hand, a "serious injury" is necessary for several other major crimes to be of the first (highest) degree, including Kidnapping, Robbery, and Sexual Abuse.) One of the eight forms of Extortion<sup>354</sup> occurs when the underlying threat is to inflict "physical injury."

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345. *Id.* § 707.5(1).

346. *See* IOWA CODE § 702.11 (1979) and text accompanying notes 180-204 *supra*.

347. *Id.* § 902.7. *See* *State v. Powers*, 278 N.W.2d 26 (Iowa 1979); UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 220-22; J. YEAGER & R. CARLSON, *supra* note 3, § 1628; and text accompanying notes 93-96 *supra*.

348. These offenses which expressly include presence of a "firearm" as an alternative mode of commission include: Assault, Interference With Official Acts, Carrying Weapons, and Possession of Firearms by Felons. *See* IOWA CODE §§ 708.1(3), 719.1, 724.4, and 724.26 (1979), respectively.

349. *State v. Lawr*, 263 N.W.2d 747, 749 (Iowa 1978).

350. *Id.* at 750.

351. *See* IOWA CODE § 702.18 (1979) and text accompanying notes 207-295 *supra*.

352. J. YEAGER & R. CARLSON, *supra* note 3, § 295.

353. IOWA CODE § 713.2 (1979).

354. IOWA CODE § 711.4(1) (1979).

### D. *Transitional or Savings Provision*

A savings provision in section 801.5 of the Code<sup>355</sup> permits prosecution of criminal conduct committed before the effective date of the new Criminal Code, January 1, 1978, notwithstanding the general repeal of the prior law as part and parcel of the code revision process. Moreover, any such carry-over prosecutions "are governed by the prior law, which is continued in effect for that purpose. . . ."<sup>356</sup>

Certain provisions of the new Criminal Code can apply to carryover prosecutions, however, but only at the election of the defendant. These clearly include defenses and factors of mitigation. Additionally, there appeared to be a retroactive decriminalization provision, whereby a defendant would not be prosecutable now for pre-1978 conduct which was decriminalized in the new Criminal Code,<sup>357</sup> but its impact has been sharply curtailed by several restrictive judicial interpretations.<sup>358</sup>

Although there should be few, if any, carryover prosecutions in mid-1980, nevertheless these transitional principles remain important in light of retrials following successful appeals or postconviction relief actions.

#### 1. *Substantive Provisions*

With one limited exception, the new Code provisions defining criminal conduct are not applicable to carryover prosecutions. In other words, the definition of a crime at the time of its commission controls, notwithstanding a subsequent change in the statutory language which is favorable to an offender (provided, of course, that an "applicable offense" is included in the revised Code). This provision was applied in *State v. Bousman*<sup>359</sup> to uphold the trial court's refusal in a "carryover" prosecution for Assault With Intent to Inflict Great Bodily Injury<sup>360</sup> to instruct the jury on the apparently more restrictive successor offense of Assault With Intent to Inflict Serious Injury.<sup>361</sup> Noting that this situation was not included in any of the enumerated exceptions for applying the new Code, the court held that all that was required was that the instruction accurately define the applicable law at the time of the offense.

The one exception relating to the definition of a crime is that the new Code shall apply when "based upon [its] failure . . . to define an applicable

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355. IOWA CODE § 801.5 (1979).

356. *Id.* § 801.5(1). For a discussion of several aspects of construction of the new Criminal Code, see text accompanying notes 29-35 and 112-127 *supra*.

357. IOWA CODE § 801.5(2)(a) (1979).

358. See text accompanying notes 361-63 *infra*.

359. 276 N.W.2d 421 (Iowa 1979).

360. See IOWA CODE § 694.6 (1977) (repealed 1978).

361. IOWA CODE § 708.2(1) (1979).

offense."<sup>362</sup> No judicial discretion is accorded, as application of this apparently decriminalization provision is at the defendant's request (with the court's approval not required, unlike several other of the sections in the transitional provision).<sup>363</sup>

On the face of this statute, it appears that a person would not be prosecuted for conduct which although criminal at the time of its commission was no longer criminal (in the revised Code) at the time of trial. Because the new Code failed to define as criminal this particular conduct, the philosophy is that a person who has not yet been prosecuted should get the advantage of the ameliorative provision. After all, the legislative judgment in the revision process was to the effect that this type of conduct is no longer serious enough to be treated as criminal and thus a person should not be prosecuted for an antiquated crime.

This provision was sharply restricted in the case of *State v. Buck*<sup>364</sup> which presented a showcase example for such an ameliorative provision. Buck was convicted under the pre-revised law of five counts of Lascivious Acts With a Child.<sup>365</sup> Three of his victims were either fourteen or fifteen years of age, and the other two were under fourteen. These respective ages were crucial in light of the definition of a "child" being lowered from a cutoff age of under-16 under the pre-revised law to an under-fourteen cutoff under the new law.<sup>366</sup>

Thus, all five victims were included as children under the pre-revised law, but only two were included under the revised law.

Buck was prosecuted and convicted in late 1977, but was not sentenced until 1978 (i.e., after the new Code took effect). At his request, he was sentenced under the new Code. Nevertheless, he was sentenced — even under the new Code — on all five counts, and the supreme court affirmed.

The supreme court relied solely on the general savings provision<sup>367</sup> (to the effect that the new Code does not apply to any offenses committed before its effective date) without even mentioning the enumerated exception of failure of the new Act to define an applicable offense. There is an implication in the opinion that the latter exception was not argued on behalf of the defendant, in light of the court's observation that defendant "seeks to avoid the effect of the savings clause by reason of the court's application to be sentenced under the [new Code]."<sup>368</sup> The court then noted that permission for a "carryover" offender to be sentenced under the new Code is granted, by express terms of the statute, where it is "applicable to the offense and

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362. *Id.* § 801.5(2)(a).

363. *Id.* §§ 801.5(2)(b)(1), (2).

364. 275 N.W.2d 194 (Iowa 1979). *See also* IOWA CODE § 702.5 (1979).

365. *See* IOWA CODE § 725.10 (1975) (repealed 1978).

366. IOWA CODE § 709.8 (1979).

367. *Id.* § 801.5(1).

368. 275 N.W.2d at 196.

the offender.”<sup>369</sup> Thus, sentencing under the new Code for prior offenses can occur only after the sentencing court has found an applicable provision in the new Code. Then, and apparently only then, the court can apply the new sentence. Thus, this section does not “substitute for old offenses the revision’s definition of the crime.”<sup>370</sup> Here, then, the sentencing court correctly applied the new Code’s lower sentences to all five counts of the pre-revised offenses he was convicted of, the supreme court intimated.

The import of this decision is unclear in light of defendant having already been *prosecuted* in 1977, with his only apparent argument being that he should be *sentenced* under the new Code. Perhaps the *Buck* holding means only that the apparent mitigation (*i.e.*, failure of new statute “to define an applicable offense”) applies only to the initial prosecution and not to the ultimate sentencing process. Because the defendant apparently limited his argument to the sentencing provision, it remains to be seen whether a frontal decriminalization attack on a *conviction* in circumstances similar to those in *Buck* will be successful. Such an argument should prevail, provided that the defendant had preserved his record by a timely raising of the issue in the trial court.

In *State v. Massey*,<sup>371</sup> the supreme court reversed a conviction for keeping a House of Ill Fame<sup>372</sup> under the pre-revised law and remanded it for retrial. The court, relying upon section 801.5 of the new Code, summarily noted that “[t]he statutes involved in this case were repealed as part of the criminal law revision effective January 1, 1978, but this prosecution was unaffected by that event.”<sup>373</sup> Massey had committed his crime in 1977 and had been convicted and sentenced also in 1977.

A related section of the transitional provision<sup>374</sup> gives a “carryover” defendant (upon his request and without necessity of court approval) the benefit of any “defense or mitigation” under the new Code. Nevertheless, the supreme court essentially has taken this right away. In *State v. Hanna*,<sup>375</sup> the court rejected defendant’s contention that the trial court erred in refusing his request to be tried under the new Code for an offense committed under the old Code where the new penalty schedule was particularly ameliorative. Specifically, defendant committed an Assault With Intent to Inflict Great Bodily Injury (a felony under the pre-revised law) in 1977 and was convicted of that offense in 1978. It must be noted that the “comparable” crime (if not even more serious in nature) under the new Code is a mere aggravated misdemeanor. As the supreme court pointed out, had defen-

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369. 275 N.W.2d at 194, 196. See IOWA CODE § 801.5(2)(b)(2) (1979) (emphasis added).

370. 275 N.W.2d at 196.

371. 275 N.W.2d 436 (Iowa 1979).

372. See IOWA CODE § 724.3 (1977) (repealed 1978).

373. 275 N.W.2d at 437.

374. IOWA CODE § 801.5(2)(a) (1979).

375. 277 N.W.2d 605 (Iowa 1979).

dant's request been granted, he would not have been subject to being further sentenced under the habitual criminal statute which relates only to underlying *felony* convictions. Regarding whether the statutory change of the status of this offense from a felony to a misdemeanor constituted a "mitigation" under the statute, the opinion observed:

The matter is troublesome because the statute does not define "mitigation." As pointed out in *State v. Smith*, 324 A.2d 203, 206-07 (Del. 1974), the term is susceptible of the meaning for which defendant argues. Be that as it may, we are controlled here by our *Buck* and *Massey* decisions. We therefore hold defendant was properly convicted under § 694.6, The Code, 1977.<sup>376</sup>

## 2. *Procedural Law*

It appears that a "carryover" defendant has his choice of whether to proceed under either the old or the new Code, as far as procedural law is concerned. However, the *court's approval* is required. Moreover, a *test* for the court's approval is set out: "insofar as they [procedural provisions] are justly applicable."<sup>377</sup>

A question undoubtedly will arise as to whether the defendant can elect application of only *some* of the new procedural provisions. I submit that it is an all-or-nothing proposition. Were it otherwise, the test of applicability of the new procedural provisions — "insofar as they are justly applicable" — would not be met, as far as the State is concerned. There would also be the argument that a piecemeal approach would develop, encouraging conflicting results.

That the transitional provisions on procedure and sentencing are not intertwined was decided in *State v. Kantaris*.<sup>378</sup> Defendant by implication had elected to be tried under the new Code's procedural provisions by having filed several motions pursuant to the new Code. The judge subsequently erred in *sua sponte* electing to also sentence the defendant under the new Code. Defendant quite understandably had not requested to be sentenced under the new Code, in light of its harsher penalty. Because the Code clearly conditions the application of the new Code's sentencing provisions in carry-over cases on the defendant's request, the trial court was without authority to sentence on its own motion. The State's contention that defendant had waived his right of election as to the sentencing provision by his filing of new Code procedural motions was rejected. Thus, the transitional provisions on procedure and sentencing "are independent of each other" and are not to be "yoked in their application."<sup>379</sup>

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376. 277 N.W.2d at 608.

377. IOWA CODE § 801.5(2)(b)(1) (1979).

378. 280 N.W.2d 389 (Iowa 1979).

379. *Id.* at 393.

### 3. Sentencing

The transitional provision also relates to sentencing in two respects. One aspect concerned "carryover" sentencing in instances where the defendant was already convicted under the pre-revised law but was not sentenced until January 1, 1978 or after the effective date of the new Code. The other relates to inmates serving sentences under the pre-revised law which are less severe for the same offense under the new Code, with the pertinent question being whether the new Code mandated resentencing.

a. *"Carryover" Sentencing.* Under section 801.5(2)(b)(2) of the new Code, before a "carryover" defendant may be sentenced under a comparable new Code provision for an old Code offense, the following three conditions must exist: (1) defendant must request such sentencing, (2) the trial court, in its discretion, must so approve, and (3) there must be a provision in the new Code which is both "applicable to the offense and the offender."<sup>380</sup>

The matter of approving or disapproving a defendant's request has been interpreted as a matter left "entirely to trial court discretion,"<sup>381</sup> and thus a "carryover" defendant has no *right* to the advantage of any ameliorative sentencing changes. This principle prevails in spite of the *general* savings provision in section 4.13 of the Code which requires imposition of an applicable reduced penalty in a "carryover" prosecution, because section 801.5 of the Criminal Code is a *specific* savings provision.<sup>382</sup>

b. *Resentencing Inmates.* In *Cartee v. Brewer*,<sup>383</sup> the supreme court held that the transitional provision in the new Criminal Code did not require resentencing of inmates serving sentences under the pre-revised Code although the comparable sentences under the new Code were less severe. In pertinent part, section 801.5(3) provides: "[p]rovisions of this [new Act] governing the *release . . . of prisoners . . . shall apply to persons under sentence for offenses committed before [the effective date of this Act,] except that the minimum or maximum period of their detention . . . shall in no case be increased . . .*"<sup>384</sup>

The key factor controlling *release* is the *maximum length* of the imprisonment. This subsection must have a purpose, and the purpose of applying new law to old law would be to effect either an increase or a decrease. The statutory language expressly prohibits an *increase*, thus leaving only a *decrease* as a purpose. An accepted rule of statutory construction is that the courts will not assume the legislature intended to pass a meaningless provision, and this subsection would be meaningless if it were not interpreted to

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380. The importance of the third factor is underscored in *State v. Buck*, 275 N.W.2d 194 (Iowa 1979), as discussed in text accompanying notes 364-370 *supra*.

381. *State v. Bousman*, 278 N.W.2d 15, 17 (Iowa 1979).

382. *Id.*

383. 265 N.W.2d 730 (Iowa 1978).

384. IOWA CODE § 801.5(3) (1979) (emphasis added).

require decreasing of sentences where the applicable criminal conduct carries a lesser penalty under the new Criminal Code.

Nevertheless, the supreme court determined that this provision merely makes the new Code's *procedures* for release or discharge applicable to a person under a valid sentence. The opinion seemingly was based upon the express declaration therein that nothing in the new Code shall "affect the substantive or procedural *validity* of any judgment of conviction [previously] entered . . . ." This reasoning begs the question, however, as validity was not the issue. Rather, an ameliorative sentencing equalization scheme was intended to lower valid (but excessively harsh) sentences. The most extreme example of reduction in penalty schedules is in the area of Burglary. Burglary with Aggravation was punishable under the pre-revised law by confinement for any term of years through life, and merely having an aider and abettor present was sufficient to constitute Aggravated Burglary. Contrastingly, a two-person burglary without more constitutes mere Burglary in the Second Degree, punishable under the new Code by an indeterminate term of ten years. Two inmates should not be serving potentially maximum terms of life or ten years for the same criminal conduct, especially after the legislative judgment that the harsh penalty schedule under the pre-revised law should be ameliorated.

c. *Combining Procedural and Sentencing Elections.* That a defendant may still elect sentencing under the old Code, even though he has elected to be tried (procedurally) under the new Code in a carryover prosecution, has been determined in *State v. Kantaris*,<sup>385</sup> as discussed above.<sup>386</sup>

### E. *Uniform Jury Instructions*

A comprehensive set of revised "Uniform" Jury Instructions on the major crimes<sup>387</sup> in the new Criminal Code<sup>388</sup> has been prepared by the Special Committee on Uniform Jury Instructions of the Iowa State Bar Associa-

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385. 280 N.W.2d 389 (Iowa 1979).

386. See text accompanying notes 377-378 *supra*.

387. No instructions have been prepared for any of the following classifications of offenses: IOWA CODE §§ 717.1-.3 (injury to animals); 718.1-.6 (offenses against government); 721.1-.9 (official misconduct); 722.1-.9 (bribery and corruption offenses); 727.1-.11 (health, safety, and welfare offenses); 728.1-.11 (obscenity offenses) (1979). However, chapters have been reserved for future Uniform Jury Instructions. Additionally, there is no indication that Uniform Jury Instructions will ever be prepared for the following offenses: IOWA CODE §§ 725.5-.16 (gambling); 729.1-.3 (infringement of civil rights); 730.1-.3 (blacklisting employees); 731.1-.8 (labor union membership); 732.1-.6 (labor boycotts and strikes) (1979). Moreover, some minor crimes are not included in the Uniform Jury Instructions relating to these classes of offenses: assault, sexual abuse, obstructing justice, interference with judicial process, and public disorder.

388. Minimally, the applicable Uniform Jury Instructions, if any, are cited in this Article in the discussion of the individual crimes. Additionally, many of the Uniform Jury Instructions are discussed extensively in the text.

tion.<sup>389</sup> As explained in the foreward to this volume, the use of these instructions by Iowa courts and attorneys is entirely discretionary,<sup>390</sup> and the Iowa Supreme Court has not placed its imprimatur on these instructions. Thus, their correctness will continue to be determined in appellate review of actual cases.

Nevertheless, the supreme court has repeatedly indicated that it “disagree[s] with these [uniform] instructions reluctantly”<sup>391</sup> (and sometimes even “very reluctant[ly]”).<sup>392</sup> Indeed, in one of these cases the court noted that before it would express disagreement with any instruction proved by “a distinguished committee of the Iowa State Bar Association”<sup>393</sup> it would make every effort to square the instruction with Iowa caselaw. In that case, however, the court was faced “with the alternative of disapproving several Iowa decisions . . . or of expressing disagreement with [a] substitute uniform instruction . . . ,”<sup>394</sup> it chose to go along with its own caselaw.

Although a few sections of the above committee’s earlier edition of uniform instructions on the pre-revised criminal code were declared unconstitutional by the Iowa Supreme Court,<sup>395</sup> the overall track record for the predecessor uniform instructions has been excellent. Trial judges and counsel would be well advised to use them, except in limited instances in which they appear defective. Some of these potential defects will be discussed later in this Article.<sup>396</sup>

The general pattern of the uniform instructions is to merely put the statutory language into the format of jury instructions, without changing or modifying the Criminal Code. Nevertheless, substantial amplification of general statutory language appears in the uniform instructions,<sup>397</sup> presumably

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389. See generally *UNIFORM JURY INSTRUCTIONS*, note 136 *supra*.

390. IOWA STATE BAR ASS’N, I IOWA UNIFORM JURY INSTRUCTIONS ANNOTATED (CIVIL) (1978). See generally *State v. McGranahan*, 206 N.W.2d 88, 92 (Iowa 1973), in which the court stated: “[w]e do not wish to be understood as holding or intimating trial courts are bound by any model or form in formulating instructions. We especially do not wish to be understood as intimating brief and succinct instructions are in any way discouraged.”

391. *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978); see also *Ness v. H. M. Iltis Lumber Co.*, 256 Iowa 588, 593-94, 128 N.W.2d 237, 240 (1964).

392. *McMaster v. Hutchins*, 255 Iowa 39, 45, 120 N.W.2d 509, 512 (1963).

393. *Id.*

394. *Id.* at 513.

395. See, e.g., *State v. Hansen*, 203 N.W.2d 216 (Iowa 1972) (“conclusive” statutory presumption of intoxication in OMVUI prosecutions). See also *State v. McGranahan*, 206 N.W.2d 88 (Iowa 1973). In *McGranahan*, the court noted that the uniform instruction given on reasonable doubt was defective due to its failure “[to] limit its reference to the lack or failure of evidence produced by the state.” *Id.* at 92.

396. See, e.g., text accompanying note 510 *infra*.

397. See, e.g., Uniform Jury Instruction No. 1403 which amplifies upon the “intent to deprive” element of Theft. See text accompanying notes 1124-29 *infra*. See also *State v. Fluhr*, 287 N.W.2d 857, 867 (Iowa 1980) (“Although there is some uncertainty as to the meaning of ‘intent to deprive’ under the new statute, . . . [Uniform Instruction] No. 1403 provides some guidance which could be shared with defendants offering guilty pleas.”).



incorporating existing case law definitions and other general principles. Although these expansive definitions are useful, they generally lack any meaningful annotations explaining the derivation of these amplifications.

## II. GENERAL CRIMINAL RESPONSIBILITY

### A. Parties to Crime

#### 1. Vicarious Liability Through Joint Criminal Conduct of Individuals

a. *Section 703.1 (Aiding and Abetting)*. Under section 703.1 of the Code,<sup>398</sup> all persons concerned in the commission of a public offense are punishable as principals whether they directly commit the requisite criminal act or whether they merely aid and abet its commission. There should be no significance attached to omission from the new Criminal Code of the lead-in phrase in the pre-revised statute,<sup>399</sup> which stated that no distinction was to be made between an accessory before the fact<sup>400</sup> and a principal. Thus, a common law accessory before the fact is considered to be aiding and abetting under the new Criminal Code. This is in line with the broad definition of aiding and abetting given in *State v. Buttolph*,<sup>401</sup> where it is described as "lend[ing] countenance or approval, either by active participation in [the act] or by some manner encouraging it prior to or at the time of its commission."<sup>402</sup> A similar position is taken in Uniform Jury Instruction No. 205, which states that aiding and abetting includes "by some manner knowingly

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398. IOWA CODE § 703.1 (1979); See also J. YEAGER & R. CARLSON, *supra* note 3 §§ 61-66. W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* §§ 63, 66 (1972); R. PERKINS, *PERKINS ON CRIMINAL LAW* 643-85 (2d ed. 1969).

399. IOWA CODE § 688.1 (1977) (repealed 1978).

400. Some indices for what constitutes an accessory before the fact were noted in *State v. Young*, 211 N.W.2d 352 (Iowa 1973). In *Young*, the court stated that "[k]nowledge or intent is usually inferred from the circumstances. Participation in a crime may be inferred from the presence, companionship and conduct before and after the crime is committed." *Id.* at 354. *Accord*, *State v. Lott*, 255 N.W.2d 105 (Iowa 1977). The court in *Lott* stated that "[t]he underlying precept of aiding and abetting is a requirement that the accessory in some way 'associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.'" *Id.* at 108 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). One authority has stated that the modern approach in determining parties to a crime is to hold a person legally accountable for the conduct of another when that person is an accomplice of another person in the commission of the crime. W. LAFAYE & A. SCOTT, *supra* note 398, at 501.

401. 204 N.W.2d 824 (Iowa 1973), *cert. denied*, 414 U.S. 857.

402. *Id.* at 825 (emphasis added). See also *State v. Fonza*, 254 Iowa 630, 118 N.W.2d 548 (1962). The court declared:

However for conviction there must be evidence that the accused committed the act constituting the offense or did 'aid and abet its commission.' Mere presence is not enough. To make the defendant guilty, he must have aided or abetted, or the act must have been the result of a *confederacy*.

*Id.* at 635, 118 N.W.2d at 551 (emphasis added).

advising or encouraging the act *prior* to . . . its commission.”<sup>403</sup>

A nexus (connection in their joint course of conduct) must be shown between the defendant charged with aiding and abetting and the other criminal offender charged with commission of the crime,<sup>404</sup> in order to prosecute under section 703.1 of the Code. Moreover, it is reversible error for a trial court to give an aiding and abetting instruction when the defendant is prosecuted as the sole perpetrator of the crime, with no evidence of more than one person's participation.<sup>405</sup> On the other hand, it has been held<sup>406</sup> that no fatal variance in the charge exists when the defendant is charged as a principal in a robbery but the prosecution's proof at trial shows only that he aided and abetted his armed confederate who actually carried out the robbery. The reason given by the Iowa Supreme Court is that Code section 703.1 expressly provides that an aider and abettor shall be “charged, tried and punished” as a principal.<sup>407</sup>

To be punishable, the aiding and abetting must have been done knowingly. The Iowa Supreme Court has stated that “[k]nowledge is essential; however, neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting.”<sup>408</sup> Instead, an aider and abettor may be convicted only if he participates either with requisite intent, or with knowledge that his principal has the requisite intent.<sup>409</sup> This knowledge or intent “is usually inferred from the circumstances. Participation in a crime may be inferred from the presence, companionship and conduct before and after the

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403. Uniform Jury Instructions, *supra* note 136, at No. 205 (emphasis added). While defendant's participation as an accomplice can be proved by circumstantial evidence, “subsequent conduct is relevant only insofar as it tends to prove defendant's *prior* encouragement or participation. A defendant may not be convicted as a principal on a theory of aiding and abetting for conduct which would only make him an accessory *after* the fact.” *State v. Barnes*, 204 N.W.2d 827, 828-29 (Iowa 1972). In *Barnes*, with defendant's stated purpose for his presence and location at the theft scene being lawful and there being no direct evidence that defendant saw or had knowledge of the theft, the court reversed the conviction and held the circumstantial evidence insufficient for the jury to find he was acting as a lookout (as a lookout, he would be a principal in the second degree). The court held:

One cannot be convicted of crime upon a theory of aiding and abetting unless there is sufficient evidence to show he assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it *prior to or at the time* of its commission.

*Id.* at 828.

404. See generally *State v. Gladstone*, 78 Wash.2d 306, 474 P.2d 274 (1970).

405. *State v. Mays*, 204 N.W.2d 862, 864-65 (Iowa 1973).

406. *State v. Black*, 282 N.W.2d 733 (Iowa 1979).

407. IOWA CODE § 703.1 (1979).

408. *State v. Barnes*, 204 N.W.2d 827, 828 (Iowa 1972).

409. *State v. Lott*, 255 N.W.2d 105 (Iowa 1977). But see J. YEAGER & R. CARLSON, *supra* note 3, which states that “[a]iding and abetting is usually done by one who intentionally associates himself with the commission of an offense. However, one may aid and abet another's criminally negligent conduct, and thus be guilty of a resulting crime which he did not anticipate being committed.” *Id.* § 62, at 18.

crime is committed."<sup>410</sup>

The practical import of the second clause of section 703.1 is as yet unclear. Incorporating language contained in *State v. Kittelson*,<sup>411</sup> this section states: "[t]he guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part he or she had in it, and does not depend upon the degree of another person's guilt."<sup>412</sup> One interpretation is that this section means that it is irrelevant to the guilt of one person that his accomplice is not convicted.<sup>413</sup> Professor Yeager illustrates this interpretation as follows: "[o]ne who hires an insane person to kill another is guilty of murder, even though the one who actually did the killing cannot be held responsible because of his or her insanity."<sup>414</sup>

This provision should not be construed to mean that the law of vicarious liability has been changed. This provision, read in conjunction with the next section on joint criminal conduct, means that an unarmed getaway driver who aids and abets a Robbery in the First Degree, committed directly by his armed accomplice, will also be punishable for Robbery in the First Degree, even though the driver was not armed.<sup>415</sup> Similarly, an aider and abettor to a forcible "sex act" will be guilty of Sexual Abuse in the First Degree if either the perpetrator of the "sex act" or another accomplice causes "serious injury" to the victim of the sexual abuse, or to another. This guilt is incurred even though the aider and abettor did not himself cause the "serious injury," and even though he did not himself commit a "sex act." Absent the "serious injury" which the aider and abettor did not himself cause, however, the crime would only be Sexual Abuse in the Second Degree, except for section 703.1.

These principles were reaffirmed in *State v. Sanders*,<sup>416</sup> where the supreme court held that the new provision for a mandatory five-year term of imprisonment for use or possession of a firearm<sup>417</sup> during a "forcible felony"<sup>418</sup> applies also to a mere aider and abettor (here, in a Robbery) who did not personally have the firearm. Focusing on the language in section

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410. *State v. Young*, 211 N.W.2d 352, 354 (Iowa 1973). See *State v. Cuevas*, 281 N.W.2d 627 (Iowa 1979) (evidence that defendant drove the car with prior knowledge of burglary plans is sufficient to convict defendant of felony murder on aiding and abetting theory).

411. 164 N.W.2d 157, 162 (Iowa 1969).

412. IOWA CODE § 703.1 (1979).

413. Acquittal of a common law accessory before the fact does not bar a prosecution of his principal. *State v. Gilroy*, 199 N.W.2d 63 (Iowa 1972).

414. TRAINING MANUAL, *supra* note 43, at 28.

415. The conduct of one accomplice is attributable to all. Thus, all parties participating in a robbery need not be armed. If one is armed, then all are armed, and all can be convicted of Robbery With Aggravation. See IOWA CODE § 711.2 (1977) (repealed 1978); *State v. Johnson*, 162 N.W.2d 453 (Iowa 1968).

416. 280 N.W.2d 375 (Iowa 1979).

417. See IOWA CODE § 902.7 (1979).

418. See IOWA CODE § 702.11 (1979) and text accompanying notes 86-943 *supra*.

703.1 that all persons involved in a criminal act shall be "punished as principals," the supreme court noted that this section "deals with both guilt and punishment." The court concluded:

[s]ection 711.1 defining robbery speaks in terms of a person who assaults or threatens with intent to commit a theft, yet defendant, who did not personally do so, is guilty of that crime because of section 703.1. Similarly defendant, who did not hold the gun, is liable for the enhanced punishment of section 902.7 because of section 703.1.<sup>419</sup>

This approach seemingly ignores the entire last sentence of section 703.1, which provides: "[t]he guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part he or she had in it, and does not depend upon the degree of another person's guilt."<sup>420</sup> A fair alternative reading of section 703.1 in its entirety would be that the first sentence abolishes the common law distinction between principals in the first degree, principals in the second degree, and accessories before the fact, thus rendering them all equally punishable for the generic offense of, for example, Robbery. This criminal responsibility for Robbery thus applies equally to the actual taker, the lookout or getaway driver, and the accessory before the fact who planned the robbery but did not actually participate at the scene of the robbery. The second sentence then could be read as differentiating among the various classifications of parties to a crime which, like Robbery, consists of more than one degree. Thus, the unarmed getaway driver as a mere aider and abettor would be guilty only of the lowest degree of Robbery indicated, as stated in section 703.1, by "the facts which show the part he or she had in it, and . . . not . . . upon the degree of another person's guilt."<sup>421</sup> Such facts would make the unarmed aider and abettor (as well as the accessory before the fact who is not even at the scene of the robbery) guilty of the elementary offense of Robbery in the Second Degree. Only their armed confederate would then be guilty of Robbery in the First Degree (for being armed).

b. *Section 703.2 (Joint Criminal Conduct)*. The aiding and abetting provision in section 703.1 thus relates to crimes which the defendant himself participated in to some degree, and which were jointly planned.<sup>422</sup> A companion provision in section 703.2 of the Code relates to additional or other crimes committed by defendant's accomplices without defendant's personal participation, and without joint planning of the crimes.<sup>423</sup>

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419. 280 N.W.2d at 378.

420. IOWA CODE § 703.1 (1979) (emphasis added).

421. IOWA CODE § 703.1 (1979).

422. For an analysis of how the justification concept of police activity under Code § 704.11 may create a new complicity concept as applied to law enforcement officers and their agents during "active" undercover investigative activity, see text accompanying notes 814-29, *infra*.

423. TRAINING MANUAL, *supra* note 43, at 28.

This general concept of joint criminal conduct<sup>424</sup> appears in section 703.2<sup>425</sup> as a codification of well-recognized case law.<sup>426</sup> The concept is that a person, acting in concert with others in knowingly committing a public offense, is

responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and his or her guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.<sup>427</sup>

The crux of this provision is foreseeability of other crimes being committed by accomplices or co-conspirators.<sup>428</sup> This foreseeability is implied under the felony murder doctrine to make punishable for murder all co-conspirators acting in concert in the commission of the underlying felony, upon the theory that a killing is a foreseeable consequence of inherently dangerous activity, such as robbery or sexual abuse.<sup>429</sup> This same principle should apply, as discussed above, to an aider and abettor to a forcible "sex act" who did not cause a "serious injury" himself or directly commit a "sex act," but who is punishable for Sexual Abuse in the First Degree because his co-conspirator caused a "serious injury." If death is a foreseeable consequence of sexual abuse, then obviously a "serious injury" is also foreseeable. On the other hand, an unplanned sexual abuse during a house burglary would be considered as an "independent frolic,"<sup>430</sup> not imputable to a co-conspirator in the burglary who did not aid and abet in the sexual abuse itself.

## 2. Vicarious Liability of Employers and Business Entities

Sections 703.4 and 703.5 of the Code<sup>431</sup> represent the first codification in Iowa of the general common law principle that employers and business entities can, in limited circumstances, be held criminally responsible for criminal acts of their employees. This theory of vicarious liability renders both the employer and the employee equally punishable for a crime. However, the import of these sections does not extend the concept of respondeat superior<sup>432</sup> to the criminal law in general,<sup>433</sup> without distinguishing between

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424. See generally J. YEAGER & R. CARLSON, *supra* note 3, § 63. See also UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 204.

425. IOWA CODE § 703.2 (1979).

426. See *State v. Kneedy*, 232 Iowa 21, 3 N.W.2d 611 (1942).

427. IOWA CODE § 703.2 (1979).

428. See J. YEAGER & R. CARLSON, *supra* note 3, § 63.

429. See generally W. LAFAYE & R. SCOTT, *supra* note 398, at 515-17.

430. TRAINING MANUAL, *supra* note 43, at 28.

431. IOWA CODE §§ 703.4, .5 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 223-29; J. YEAGER & R. CARLSON, *supra* note 3, §§ 65-66.

432. One commentator has noted that "[a]n employer may be civilly liable for harm

true crimes as opposed to civil offenses.<sup>434</sup> Rather, supervisory persons and the business entity itself are being made criminally responsible "for their own misfeasance or nonfeasance, the criminal act of the employee being significant only in that, being the consequence of such misfeasance or nonfea-

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caused by an employee within the scope of employment, under the doctrine of respondeat superior, even if the former had forbidden the latter to do what was done, but this has no application to criminal law." R. PERKINS, *supra* note 398, at 637.

433. See J. YEAGER & R. CARLSON, *supra* note 3, § 65.

434. Violations of public welfare measures, which in aid of the state's police power are designed to protect the public, are punishable "whether the offender was cognizant of the violation of the law." *State v. Barry*, 255 Iowa 1329, 1332, 125 N.W.2d, 833, 834 (1964). That is, vicarious liability is cognizable for a strict liability offense based upon certain regulatory measures. The statute in question in *Barry* imposed a duty upon car dealers to see that pasteboard registration-applied-for cards were not used on cars sold by them unless timely application for registration and certificate of title had been made by the buyer. Defendant Barry's conviction for violation of the statute was upheld, even though he had specifically instructed his employees not to sell the particular car in question and he was out of the country when that car was sold by one of his employees (and the registration requirements were not met by defendant's salesman).

Noting that this statute amounted to "an absolute prohibition," the court pointed out that failure to put the ultimate duty upon the licensed dealer could render the statute "a dead letter." *Id.* at —, 125 N.W.2d at 835. Moreover, the court considered it within the legislature's prerogative to adopt "such a method as the best way of preventing deleterious results to the public." *Id.*

The Iowa Supreme Court stated in *Barry*:

It is well settled in this jurisdiction that, in prohibitive statutes covering misdemeanors, as this one is, where no provision is made as to the intention, and the word "knowingly" or other apt words are not employed, to indicate that knowledge is the essential element of the crime, intention is not an element of the crime. This is especially so where the act is forbidden by a statute in aid of the police power of the state.

*Id.* at 834.

Vicarious liability pyramided on top of strict liability was upheld in *City of Iowa City v. Nolan*, 232 N.W.2d 102 (Iowa 1976). Nolan's conviction for illegal parking was affirmed even though he was merely the owner of the vehicle and not its operator at the time of the incident. One of the applicable municipal ordinances imposed strict liability by making illegal parking an offense "without regard to the state of mind of the vehicle operator." *Id.* at 107 (McCormick, J., dissenting). The other ordinance "makes the vehicle owner culpable for conduct for which the vehicle owner is strictly liable." *Id.* The supreme court held it was constitutionally permissible under the "public welfare doctrine" for this municipal ordinance to impose prima facie strict criminal responsibility upon the registered owner of an illegally parked vehicle . . . [b]y proving (1) the existence of an illegally parked vehicle, (2) registered in the name of the defendant, and (3) inability to determine the actual operator. . . ." *Id.* at 105. The court held further that a conviction could rest upon this prima facie inference, but, of course, the defendant could "come forward with evidence" to rebut that he should be held responsible as the registered owner of the vehicle. *Id.* "In the area of public welfare offenses, such burden shifting is not constitutionally infirm," the court determined. See *id.* See also, *Commonwealth v. Koczvara*, 397 Pa. 575, 155 A.2d 825 (1959), *cert. denied*, 363 U.S. 848 (1960) (respondeat superior held applicable to civil offenses involving violations of detailed regulatory provisions in fields which were essentially non-criminal); R. PERKINS, *supra* note 398, which states: "Generally accepted, however, is the view holding the employer vicariously liable for a civil offense committed by his employee in the course of his employment." *Id.* at 814.

sance, it determines the nature and degree of the employer's or supervisor's guilt."<sup>435</sup>

An administrative or supervisory person can have vicarious liability imputed to him under section 703.4 for criminal acts committed by an employee "acting under the employer's control, supervision, or direction"<sup>436</sup> in any of these three all-inclusive ways: (1) affirmative action by the employer in directing the employee to commit the offense;<sup>437</sup> (2) failure to act to stop an employee from knowingly committing a public offense with the intent that the employer will benefit thereby;<sup>438</sup> or (3) affirmative action in assigning a task to an employee with reasonable foreseeability that the task cannot be accomplished except for the employee committing a public offense.<sup>439</sup> Criminal culpability on the same level as the employee committing the crime is imputed to business entities under section 703.5 in these limited circumstances: (1) acts of misfeasance or malfeasance on behalf of the business entity itself by nonperformance of duties imposed upon it by law, without regard for any showing of intent or lack of interest, and (2) criminal acts authorized, requested, or tolerated by a person in authority<sup>440</sup> while acting within his authority and for the benefit of the business entity, with the criminal intent or negligence of this person in authority considered that of the business entity.<sup>441</sup>

### 3. *Accessory After the Fact*

The new Criminal Code has expressly invoked criminal responsibility for conduct amounting to the offender being an accessory after the fact.<sup>442</sup> This represents a change in Iowa law, since the prior law<sup>443</sup> had been interpreted as not criminalizing this type of conduct.<sup>444</sup> An accessory after the fact, of course, is not made equally responsible for the criminal acts of the person he assists, and thus vicarious liability is inapplicable to this crime. Rather, the only connection between the degree of severity of the offender's punishment and that of the person he assists depends upon whether the public offense committed was a felony or a misdemeanor. An accessory after the fact to a felony commits an aggravated misdemeanor, while an accessory

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435. J. YEAGER & R. CARLSON, *supra* note 3, § 65, at 19.

436. IOWA CODE § 703.4 (1979).

437. See generally UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 223.

438. *Id.* at No. 224.

439. *Id.* at No. 225.

440. *Id.* at No. 227. See also W. LAFAVE & A. SCOTT, *supra* note 398, at 228-37.

441. See generally UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 226.

442. IOWA CODE § 703.3 (1979). UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 301-06; J. YEAGER & R. CARLSON, *supra* note 3, § 64.

443. IOWA CODE § 688.2 (1977) (repealed 1978).

444. In *State v. Kittelson*, 164 N.W.2d 157, 165 (Iowa 1969), the pre-revised accessory after the fact statute was interpreted as not defining a crime because it did not provide for any punishment.

after the fact to a misdemeanor commits only a simple misdemeanor.

An accessory after the fact is a person, other than the accused's spouse, who (1) harbors, aids, or conceals; (2) a person accused of committing a public offense; (3) with intent to prevent his apprehension; and (4) with knowledge that a public offense has been committed.<sup>445</sup> This is a specific intent crime. The mere act of harboring, aiding, or concealing<sup>446</sup> a fugitive is not sufficient to invoke criminal culpability. Rather, as explained in Uniform Jury Instruction No. 305, it must also be proved that "in so doing there was an intent to prevent his apprehension for the commission of the offense for which he was accused."<sup>447</sup> Thus, a benevolent motive will not suffice to incur criminal culpability.<sup>448</sup>

This crime also involves a second particularized state of mind, requiring the prosecution to prove that the accessory knew that a prior public offense had been committed.<sup>449</sup> This, under Uniform Jury Instruction No. 303, requires more than merely suspicion, speculation, or conjecture of a prior offense. Rather, the accessory must be shown "to be aware of, informed, perceived, or had information of the commission [of a public offense]."<sup>450</sup>

The implication in the language of the Criminal Code, as well as the language in Uniform Jury Instruction No. 301, is that a public offense must *actually* have been committed. However, in Uniform Jury Instruction No. 304 it is stated that it is *not* necessary in convicting the accessory that the accused person he assisted was

[i]n fact guilty of the offense for which he was being sought. Rather, it is only necessary that he was being sought for the commission of a [public offense] and thereafter the [accessory] knowing that a [public offense] had been committed and [X] was accused of so doing, harbored, aided or

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445. See generally UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 301.

446. To "harbor, aid or conceal" is defined as meaning "to shelter, hide or provide a place of refuge or safety; or to lend assistance or help." UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 302.

447. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 305. For an extensive discussion of the principle that the words "harbor" and "conceal" under 18 U.S.C.A. § 1071 (1978) must be narrowly construed so as not to include all forms of assistance, see *United States v. Foy*, 416 F.2d 940 (7th Cir. 1969).

448. See *W. LAFAYE & A. SCOTT*, *supra* note 398, at 523, citing *State v. Jett*, 69 Kan. 788, 77 P. 546 (1904).

449. See *R. PERKINS*, *supra* note 398, which states that provided a party did not aid and abet the principal felony in any way:

One who is an accessory before the fact may also become an accessory to the same offense after the fact, but this is not true of one who is guilty as a principal felon. On the other hand, absence at the time of perpetration is not essential in the case of an accessory after the fact.

*Id.* at 669.

450. UNIFORM JURY INSTRUCTIONS *supra* note 136, at No. 303.



concealed him with the intent to prevent his apprehension.<sup>451</sup>

It also appears that it is unnecessary that the principal already be charged with the underlying crime.

The requirement that another offense has been committed apparently means that the underlying public offense must have been *completed* prior to the alleged act of accessoryship after the fact. Thus, it has been held that the act of knowingly giving assistance to the perpetrator of a homicidal act before the death of the victim does not constitute being an accessory after the fact to murder.<sup>452</sup> Also, mere passive failure to report a known crime does not render one an accessory after the fact.<sup>453</sup> Nor is this punishable at all as criminal conduct, since the common law crime of Misprision of Felony<sup>454</sup> is not recognized in Iowa criminal law. However, if one's failure to report another's known crime is grounded upon an agreement with the perpetrator of the crime to not do so, then the separate crime of Compounding a Felony<sup>455</sup> may have been committed, but this still does not render the "compounder" punishable for the principal's original crime.

a. *Lesser Included Offense.* The difference between charging Accessory After the Fact as a crime outright and submitting it as a lesser included offense<sup>456</sup> has been pointed out recently by the Iowa Supreme Court. In *State v. Sanders*,<sup>457</sup> the court affirmed a conviction for Robbery in the First Degree although the trial court had refused to submit defendant's pro jury instruction that would have permitted the jury to find defendant guilty instead of being only an Accessory After the Fact. Defendant's theory of the case was that the evidence merely showed that he had driven the getaway car and that he had played no part in the robbery itself. The supreme court pointed out the difference between a defendant's right in closing argument to argue to the fact finder "*as a matter of defense* to the robbery charge that the evidence only shows defendant helped the robbers get away"<sup>458</sup> and the prosecution's right "*to try to convict* defendant of the aggravated misdemeanor of accessory after the fact."<sup>459</sup> Rejecting the theory of Accessory After the Fact as being a lesser included offense of Robbery, the supreme court determined that the legal test of a lesser included offense<sup>460</sup> was not met

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451. *Id.* at No. 304.

452. *State v. Williams*, 229 N.C. 348, 49 S.E.2d 617 (1948).

453. W. LAFAYE & A. SCOTT, *supra* note 398, which states: "But under such circumstances, . . . the aider may be found to be an accessory after the fact to the felonious assault." *Id.* at 522-23 n.8.

454. *State v. Bosworth*, 170 Iowa 329, 345, 152 N.W. 581, 588 (1915). See W. LAFAYE & A. SCOTT, *supra* note 398, at 526.

455. See IOWA CODE § 720.1 (1979).

456. See part II(D), *infra*.

457. 280 N.W.2d 375 (Iowa 1979).

458. *Id.* at 376.

459. *Id.*

460. That is, "the elements of the lesser offense are an elementary part of the greater

since these two offenses require different states of mind (specifically, to prevent another's apprehension under Accessory After the Fact<sup>461</sup> and to commit a theft under Robbery).<sup>462</sup>

b. *Grading.* There are two grades of Accessory After the Fact, with the distinction based upon whether a felony or misdemeanor was the underlying crime by the other person being unlawfully assisted. An accessory is responsible for an aggravated misdemeanor<sup>463</sup> when he unlawfully aids a known felon, but merely for a simple misdemeanor<sup>464</sup> when a known misdemeanant is involved.

### B. *States of Mind*<sup>465</sup>

Unlike many revised codes in other jurisdictions, the new Iowa Criminal Code does not contain a separate chapter on states of mind.<sup>466</sup> Rather, the only specific reference to mens rea consists of including the term "reckless" in the chapter on definitional clauses.<sup>467</sup>

Seven other particularized states of mind are used in the new Criminal Code without statutory definitional clauses.<sup>468</sup> This necessitates referral to definitions made in "pre-revision court decisions."<sup>469</sup> These seven states of mind are maliciously, intentionally, willfully, voluntarily, knowingly, with the purpose of, and specific intent.<sup>470</sup> In addition, several dozen crimes appear merely to be general intent crimes. Of these states of mind, only maliciously, recklessly, knowingly, and intentionally are included in the Uniform Jury Instructions, as discussed below.

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offense." *Id.* at 377, quoting *State v. Millspaugh*, 257 N.W.2d 513, 516 (Iowa 1977). See part II(D) *infra*.

461. See IOWA CODE § 703.3 (1979).

462. See *id.*, at § 711.1.

463. An aggravated misdemeanor is punishable by either a determinate term of confinement not to exceed two years or a maximum fine of \$5000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine. See text accompanying notes 103-11 *supra*.

464. A simple misdemeanor is punishable by either a determinate jail term not exceeding thirty days or a maximum fine of \$100, but not both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine. See text accompanying notes 103-11 *supra*.

465. See generally W. LAFAYE & A. SCOTT, *supra* note 398, at §§ 27-31 and R. PERKINS, *supra* note 398, at ch. 7.

466. See Schantz, *supra* note 2, at 436-39.

467. IOWA CODE § 702.16 (1979).

468. This compares with a total of "at least 14 different terms apparently used to designate a state of mind" under the pre-revised criminal code. Schantz, *supra* note 2, at 437.

469. *Id.* at 439.

470. In addition, two specialized states of mind — malice aforethought and premeditation — relate only to the crime of Murder. See IOWA CODE § 707.1-.2 (1979).

## 1. Intent

a. *General Intent.* A general criminal intent refers to whether the defendant intended deliberate or knowing action, as opposed to causing the prohibited result through accident, mistake, carelessness, or absent-mindedness.<sup>471</sup> "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence,"<sup>472</sup> the question is whether the defendant had the general criminal intent to do the proscribed act. Intent is understood as an element and therefore is not specifically enumerated in the individual statutes dealing with true crimes (as opposed to strict liability<sup>473</sup> for regulatory offenses).

A corollary to the proposition that every man is presumed to know the law is that criminal intent can be imputed even to persons who have no realization of the wrongfulness of their act, much less an actual intent to commit a crime. Indeed, "[W]hen a person capable of entertaining criminal intent, acting without justification or excuse, commits an act, prohibited as a crime, his intention to commit the act constitutes criminal intent. . . . [I]ntent is presumed from commission of the act, on the ground that a person is presumed to intend his voluntary acts and their natural and probable consequences."<sup>474</sup> This so-called "presumption" is stated in Uniform Jury Instruction No. 215 as follows: "In determining the intent of any person you

471. *State v. Peery*, 224 Minn. 346, 28 N.W.2d 851 (1947).

472. *People v. Hood*, 1 Cal.3d 444, 456-57, 462 P.2d 370, 378, 82 Cal. Rptr. 618, 626 (1969). See also TRAINING MANUAL, *supra* note 43, at 25 ("A person may intend to act as he or she does, but may not intend the results which make the act criminal.").

473. Some minor criminal offenses, known as strict liability offenses, have no mens rea component and thus punish the offender without regard to his state of mind. These offenses "require only the proof of an act, without specific or general intent" to commit the crime or of knowledge that a crime is being committed. TRAINING MANUAL, *supra* note 43, at 25.

Legislatures have "wide latitude . . . to declare an offense and to exclude elements of knowledge and diligence from its definition," especially in light of no general constitutional doctrine of mens rea ever having been articulated. *City of Iowa City v. Nolan*, 239 N.W.2d 102, 104 (Iowa 1976). Legislation creating public welfare offenses, which have no ancestors in the common law, commonly dispense with "any awareness of wrongdoing." *Id.* The underlying rationale for invoking strict liability as to these offenses is that "[i]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.*

The Iowa Supreme Court has determined that violations of traffic regulations squarely fit into the classification of minor crimes known as public welfare offenses. The classic examples of strict liability traffic offenses are overtime parking and illegal parking. See *id.*

Minor moving traffic offenses also are examples of strict liability offenses. In *City of Des Moines v. Davis*, 214 N.W.2d 199 (Iowa 1974), it was held that speeding does not require intent or knowledge on the part of the driver. This means that a speeding driver is guilty merely because of his act of driving over the speed limit, and thus neither intended to speed nor knew he was speeding. Nevertheless, legal excuse is cognizable, even as to strict liability offenses. An example of legal excuse is the common law criminal defense of sudden emergency. See *id.*

474. J. MILLER, HANDBOOK OF CRIMINAL LAW 57-58 (1934) [hereinafter cited as J. MILLER].

may, but are not required to, infer that he intended the natural and probable consequences which ordinarily follow his voluntary acts.”<sup>475</sup>

This inference, without more, is sufficient to generate a jury question on the element of general mens rea. If, however, defendant offers offsetting evidence, then the prosecution should — but need not as a matter of law — offer rebuttal evidence in order to shore-up the inference (which may have been eroded by defendant’s theory of the case). This inference does not, however, shift the burden of proof to the defendant when relying upon absence of general intent.<sup>476</sup> although the inference by itself may be sufficient. As explained by the Supreme Courts of the United States<sup>477</sup> and Iowa:<sup>478</sup>

[T]he entirely permissive inference or presumption . . . allows — but does not require — the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that *places no burden of any kind on the defendant* . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and *does not shift the burden of proof*, it affects the application of the “beyond the reasonable doubt” standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.<sup>479</sup>

b. *Specific Intent*. A specific intent crime is “so defined as to require not merely that an act be committed voluntarily, but that its commission be accompanied by a specific intent,”<sup>480</sup> a second and separate state of mind (beyond general mens rea with respect to the *actus reus* of the crime). That is, “[W]hen the definition refers to defendant’s intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.”<sup>481</sup>

The Iowa Supreme Court has had only a few occasions to differentiate between general and specific intent. In *State v. Redmon*,<sup>482</sup> the court characterized Assault and Battery<sup>483</sup> as a general intent crime and Assault with Intent to Inflict Bodily Injury<sup>484</sup> as a specific intent crime under the pre-revised law. Its only discussion consisted of quoting from a treatise ex-

475. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 215.

476. *But see* State v. Jamison, 110 Ariz. 245, 517 P.2d 1241 (1974).

477. County Court of Ulster County, New York v. Allen, \_\_\_ U.S. \_\_\_, \_\_\_, 99 S. Ct. 2213, 2224 (1979) (emphasis added).

478. State v. Rinehart, 283 N.W.2d 319, 321 (Iowa 1979), quoting County Court of Ulster County, New York v. Allen, \_\_\_ U.S. \_\_\_, \_\_\_, 99 S. Ct. 2213, 2224 (1979) (emphasis added).

479. *Id.* Regarding the constitutionality of a jury instruction on an inference of intent (both general and specific), *see* text accompanying notes 515-27 *infra*.

480. J. MILLER, *supra* note 474, at 60.

481. P. JOHNSON, CRIMINAL LAW 331 (1975).

482. 244 N.W.2d 792 (Iowa 1976).

483. *See* IOWA CODE § 694.1 (1975) (repealed 1978).

484. *See id.* § 694.6.

cerpt,<sup>485</sup> which stated:

Specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result. General intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result.<sup>486</sup>

Similarly, in *State v. Barney*,<sup>487</sup> a prosecution for Assault With Intent to Commit Murder,<sup>488</sup> the court said that "[p]roof of a mere general felonious intent will not suffice; the crime charged requires a specific intent."<sup>489</sup> Indeed, the latter (in this instance the specific intent to kill) was deemed "the very 'gist' of the crime."<sup>490</sup>

A better comparison has been made by a commentator, as follows:

When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence; the crime is deemed to be one of specific intent.<sup>491</sup>

He goes on to state that specific intent most commonly designates "a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." An example of common law larceny was given.<sup>492</sup> That specific intent crime "requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but in addition it must be shown that there was an 'intent to steal' the property."<sup>493</sup> In other words, the act or taking and carrying away must have been done willfully and intentionally (*i.e.*, through general criminal intent) as opposed to acting merely out of carelessness, mistake, or inadvertence (which would not be criminal at all). Additionally, the intentional act of taking and carrying away must be accompanied by the specific intent to steal. Theft would not occur if the property were merely taken for a temporary use, with or without an intent to return it directly to the rightful possessor. For example, the specific intent to steal is the essential element differentiating the crimes of

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485. 1 H. UNDERHILL, CRIMINAL EVIDENCE § 55 (6th ed. 1973).

486. 244 N.W.2d at 797.

487. 244 N.W.2d 316 (Iowa 1976).

488. See IOWA CODE § 690.6 (1975) (repealed 1978).

489. 244 N.W.2d at 318.

490. *Id.*

491. P. JOHNSON, *supra* note 481, at 329.

492. *Id.* at 331.

493. *Id.*

Theft of a Motor Vehicle<sup>494</sup> and Operating Vehicle Without Owner's Consent.<sup>495</sup> Relatedly, another commentator has stated that some crimes require a specified intention in addition to an intended act.<sup>496</sup> Thus, the physical act in common law larceny may be done intentionally, deliberately, with full knowledge of all the facts and complete understanding of the wrongfulness of the act constituting larceny, and yet not constitute larceny unless the actor had an additional intention in mind — the intent to steal.<sup>497</sup>

Kidnapping<sup>498</sup> and Escape<sup>499</sup> were two pre-revised crimes which were interpreted by implication as being merely general intent crimes. In other words, whereas both crimes had to be committed willfully or intentionally, nevertheless neither one had to be done with a specific purpose. For example, in *State v. Wharff*,<sup>500</sup> an Escape case, the court held that it was unnecessary for the prosecution to prove that the prisoner left the prescribed work farm with the intent to escape to avoid further imprisonment. Instead, what mattered was that he committed the act of voluntarily leaving without permission and contrary to law. His particular motive, purpose, or intent in doing so was immaterial under the statute, since the crime charged consisted only of the doing of acts which are prohibited.<sup>501</sup>

Similarly, the court held in *State v. Wallace*<sup>502</sup> that the section of the pre-revised Kidnapping statute involved therein did not require proof of any specific intent. The court concluded:

[I]t is evident an offense is committed when an offender willfully, without lawful authority, forcibly or secretly confines or imprisons another person within the state against his or her will. The act itself is prohibited and specific intent on the part of the offender is not an essential ingredient of the crime. It is enough if the prohibited act is done willfully and unlawfully.<sup>503</sup>

Thus, the offender's intent or purpose was immaterial, and the prosecution did not need to prove anything beyond the mere unlawful act of confinement. Contrastingly, another clause in the Kidnapping statute<sup>504</sup> did establish a specific intent crime with the act of seizure being for the purpose either of secret confinement or of removal of the victim from Iowa.

In both of these cases, the supreme court recognized that "the legisla-

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494. IOWA CODE § 714.1(1), .2(2) (1979).

495. *Id.* § 714.7.

496. R. PERKINS, *supra* note 398, at 762.

497. *Id.*

498. See IOWA CODE § 706.1 (1962) (repealed 1978).

499. See IOWA CODE § 745.1 (1962) (repealed 1978).

500. 257 Iowa 871, 134 N.W.2d 922 (1965).

501. *Id.* at 875, 134 N.W.2d at 925.

502. 259 Iowa 765, 145 N.W.2d 615 (1966).

503. *Id.* at 774, 145 N.W.2d at 621.

504. See IOWA CODE § 706.1 (1962) (repealed 1978).

ture may forbid the doing of an act and make its commission a crime without regard to the intent or knowledge of the doer."<sup>505</sup> It then formulated this test for determining whether a statute is a general or specific intent crime: [w]hether a criminal intent or guilty knowledge is an essential element of a statutory offense is to be determined as a matter of construction from the language of the act, in connection with its manifest purpose and design.<sup>506</sup>

Sexual Abuse<sup>507</sup> is another example of a general intent crime. The prosecution need only prove the unauthorized act of sexual contact and essentially can rely upon the inference of intent. Although a specific intent (to gratify the defendant's sexual passions) is not an element of the crime,<sup>508</sup> nevertheless the defendant must have acted intentionally as opposed to acting through a mistake,<sup>509</sup> accident, carelessness, or absent-mindedness.

c. *Interrelationship of Specific Intent and General Intent.* Considerable confusion over the difference between general intent and specific intent is quite apparent in the Uniform Jury Instructions. The principal problem lies in using the meaningless term "intent" instead of the essential terms of either "general intent" or "specific intent." This problem is exacerbated by the only applicable Uniform Jury Instruction, which incidentally is entitled "Intent," covering only specific intent. The omission of a general intent instruction is inexcusable, especially in light of the danger of there being given no instruction on general intent.<sup>510</sup> Moreover, the specific intent instruction is fuzzy, especially on the difference between general and specific intent, which is not even mentioned.

The following suggested "model" instruction would *inter alia* clarify the meaning of general and specific intent as well as their interrelationship (by the addition of the italicized phrases to Uniform Jury Instruction No. 215):

[a] (*General Intent*)

*You must find beyond a reasonable doubt that defendant acted deliberately or intentionally and not as a result merely of inadvertence, accident, carelessness, mistake, or absent-mindedness.*

[b] (*Specific Intent*)

*In addition, specific intent is an essential element of the offense(s) charged, and it must be proved beyond a reasonable doubt. This is a*

505. *State v. Wharff*, 257 Iowa 871, 875, 134 N.W.2d 922, 925 (1965). *Accord State v. Wallace*, 259 Iowa 765, 774, 145 N.W.2d 615, 621 (1966).

506. *State v. Wharff*, 257 Iowa 871, 875, 134 N.W.2d 922, 925 (1965).

507. IOWA CODE § 709.1 (1979).

508. *See State v. Pilcher*, 158 N.W.2d 631, 637 (Iowa 1968) (interpreting pre-revised crime of Rape).

509. Strict liability does apply to statutory types of Sexual Abuse, however, as a mistake (albeit reasonable) as to a child-victim's age is no excuse for criminal responsibility. *See State v. Newton*, 44 Iowa 45 (1876).

510. *See State v. McCormack*, \_\_\_ N.W.2d \_\_\_, \_\_\_ (1980) (Uniform Jury Instruction No. 1446 defining elements of Operating Vehicle Without Owner's Consent erroneous since general criminal intent not included as element of that offense).

*particularized state of mind above and beyond the general intent requirement set out in part (a) of this Instruction. Specific intent is a mental state, emotion, or condition of the mind with a design, resolve, or determination that the doing of an act shall be with a certain purpose. In this case you must find that the defendant acted with the purpose of (set out specific intent element).*

(c) *Inference of Intent.*

Intent is seldom, if ever, capable of direct and positive proof. Rather, the intent, if any, may be arrived at by such reasonable inferences and deductions as may be drawn from the facts proved by the evidence, in accordance with common experience and observation. In determining the intent of any person you may, but are not required to, infer that he intended the natural and probable consequences which ordinarily follow his voluntary acts.<sup>510.1</sup>

Concomitantly, each of the Uniform Jury Instructions setting out the elements of a crime should be amended to include the additional element that the defendant acted intentionally or with criminal intent.

d. *Inference on Intent.* The Iowa Supreme Court has consistently taken the position that persons are presumed to intend the natural consequences of their acts. While this presumption generally is thought of in terms of supplying by implication the basic underlying general criminal intent,<sup>511</sup> nevertheless it is not limited to general intent crimes. Indeed, as the supreme court has explained:

It is a general rule, applicable to all criminal cases, including those where a specific intent is an element of the crime, that, [the] accused, if sane, is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed. Accordingly, the law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done.<sup>512</sup>

Similarly, it was noted in *State v. Rinehart*<sup>513</sup> that "this court has always allowed resort to these inferences to prove specific intent."<sup>514</sup> This reaffirmation is especially significant in the light of *Rinehart* involving a constitutional attack on the Uniform Jury Instruction which permits an inference of intent under certain circumstances, as discussed below.

This inference has come under considerable attack recently. First, in *State v. Whiteside*<sup>515</sup> the court upheld an instruction on intent which closely

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510.1 UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 215.

511. See generally *State v. Jamison*, 110 Ariz. 245, 517 P.2d 1241 (1974) (unlike general intent, which can be shown by an inference of intent, specific intent must be proved by the prosecution).

512. *State v. True*, 190 N.W.2d 405, 407 (Iowa 1971).

513. 283 N.W.2d 319 (Iowa 1979).

514. *Id.* at 323.

515. 272 N.W.2d 468 (Iowa 1978).



followed Uniform Jury Instruction No. 215.<sup>516</sup> The court summarily dismissed without merit defendant's contention that this inference "shifts the burden of proof on an essential element of the crime to him."<sup>517</sup> The only "discussion" was to the effect that the court disagrees with Uniform Jury Instructions reluctantly.

The matter did not end there, however. Several related appeals contesting the Uniform Jury Instruction followed closely upon the heels of the decisions by the Supreme Court of the United States in *Sandstrom v. Montana*,<sup>518</sup> and *County Court of Ulster County, New York v. Allen*.<sup>519</sup> In *Sandstrom*, the Court declared unconstitutional a jury instruction stating that "the law *presumes* that a person intends the ordinary consequences of his voluntary acts."<sup>520</sup> The Court determined that a reasonable jury could have interpreted this presumption as being conclusive or mandatory, that is, "as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the *defendant* proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence — thus effectively shifting the burden of persuasion on the element of intent."<sup>521</sup> Either interpretation violated the fourteenth amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

Contrary to the language in the jury instruction found constitutionally objectionable in *Sandstrom* (*viz.* "the law *presumes* that a person intends the ordinary consequences of his voluntary acts"),<sup>522</sup> Iowa's applicable Uniform Jury Instruction reads: "In determining the intent of any person you may, but are not required to, infer that he intended the natural and proba-

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516. UNIFORM JURY INSTRUCTION No. 215, *supra* note 136, reads in its entirety, as follows:

[1] Where intent is an essential element of the offense(s) (or degree(s) of offenses(s)) charged, it must be proved beyond a reasonable doubt. Intent is a mental state, emotion, or condition of the mind with a design, resolve or determination that the doing of an act shall be *with a certain purpose*. As such, intent is seldom, if ever, capable of direct and positive proof. Rather, the intent, if any, may be arrived at by such reasonable inferences and deductions as may be drawn from the facts proved by the evidence, in accordance with common experience and observation.

[2] In determining the intent of any person you may, but are not required to, infer that he intended the natural and probable consequences which ordinarily follow his acts.

*Id.* (emphasis added).

517. 272 N.W.2d at 471.

518. — U.S. —, 99 S. Ct. 2450 (1979).

519. — U.S. —, 99 S. Ct. 2213 (1979).

520. 99 S. Ct. at 2459-60.

521. *Id.* at 2456 (emphasis added).

522. *Id.* at 2454.

ble consequences which ordinarily follow his voluntary acts.”<sup>523</sup> The difference in terminology between “the law presumes” and having a right to infer was considered crucial in *State v. Rinehart*,<sup>524</sup> in which an instruction similar to Uniform Jury Instruction No. 215 was upheld against a *Sandstrom*-type challenge. The court determined that this instruction, by its language, fully apprised the jury of its permissive nature and of the jury’s implied option to reject its application. Read together with the other instructions, it was clearly indicated that the burden of proof remained on the state to prove all elemental facts of the charge and no where implied that the elemental facts inferred from those proven would stand as established absent rebuttal by defendant. The court considered it particularly significant that the instruction was “couched in permissive words: ‘you have a right to infer.’”<sup>525</sup> Nevertheless, the court observed that trial courts “would be prudent” to include qualifying language in such instructions to expressly state that the jury would be free to ignore this *permissive* inference “even without rebuttal by the defendants.”<sup>526</sup> Here, however, the absence of such qualifying or explanatory language was not fatal, in light of the concept of permissiveness of the inference being clearly conveyed in the instructions given when read as a whole.<sup>527</sup>

## 2. *Related States of Mind*

a. *Intentionally*. Three revised crimes expressly include a *mens rea* component of “intentionally.”<sup>528</sup> The inclusion of an element of *intentional* action does not appear to be of much significance, however, in light of the restrictive meaning of the term “intentional” *vis-a-vis* the entire concept of general criminal intent. Indeed, with a very few exceptions, no unintended conduct is punishable under the Criminal Code, and thus criminally-proscribed results via accident, mistake, carelessness, or absent-mindedness are not cognizable.<sup>529</sup> This means that the effect of the element requiring the

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523. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 215.

524. 283 N.W.2d 319 (Iowa 1979). The instruction in issue in *Rinehart* stated that jurors “have a right to infer that he knew the natural and probable consequences of his voluntary acts which ordinarily follow such act.” *Id.* at 321. The *Rinehart* court held that this instruction was sufficiently permissive. *Id.* at 322. Uniform Jury Instruction No. 215 states explicitly that the juror is not required to so infer. See text accompanying note 590 *supra*.

525. 283 N.W.2d 319, 322 (Iowa 1979).

526. *Id.* at 323.

527. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 215, is confusing in light of referring only to “intent” instead of either “general intent” or “specific intent.” The logical assumption is that this is an instruction only on specific intent (in light of the reference therein to “with a certain purpose”).

528. These three crimes are False Imprisonment, Criminal Mischief, and Escape. See IOWA CODE §§ 710.7, 716.1, 719.4 (1979), respectively.

529. For a discussion of general criminal intent, see text accompanying notes 471-79, *supra*.

requisite proscribed act to have been done intentionally is merely to state the obvious, *viz.* accidental or unintentional acts are not punishable under the Criminal Code irrespective of their results.

This *mens rea* is not equivalent to the particularized state of mind of specific intent. The difference between acting intentionally and acting with a specific intent was spelled out definitively and accurately in *State v. Waterman*.<sup>530</sup> The applicable state statute<sup>531</sup> therein made it a crime to deface, defile, or cast contempt upon the United States flag. The uncontroverted proof showed that defendant had worn the flag as a poncho. Affirming his conviction, the supreme court held that such an act defaces, defiles, and casts contempt upon the flag, notwithstanding defendant's contention that "the Record is replete with uncontroverted testimony demonstrating that the defendant had no such *mens rea*." <sup>532</sup> That is, defendant's very commission of the act necessarily had the effect of defacing, defiling, or casting contempt upon the flag irrespective of defendant's intent or motive in intentionally committing the act. Determining that flag desecration was not a specific intent crime, the court pointed out that the statute merely punishes "acts *intentionally* done which have the effect of desecrating our flag."<sup>533</sup> Distinguishing specific intent from acting intentionally, the court added: "The person's *reason* for doing such an act is of no importance, except in those instances where the act is in the area of symbolic speech."<sup>534</sup> Intimating that an evil intent is unnecessary, the court continued: "[E]ven if we assume that defendant had an honest political intent \*\*\* or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*."<sup>535</sup>

Under the *State v. Waterman* interpretation the three crimes explicitly requiring intentional actions without more should not be considered specific intent crimes. In this regard, the Uniform Jury Instruction<sup>536</sup> defining Criminal Mischief is erroneous. Criminal Mischief is defined in the Code as "[a]ny damage, defacing, alteration, or destruction of tangible property is criminal mischief when done *intentionally* by one who has no right to so act."<sup>537</sup> The *mens rea* element of intentional actions is delineated in the Uniform Jury Instructions as "[t]hat when he did so, it was *with the intent to* (damage), (deface), (alter), (destroy) the said property."<sup>538</sup> Under this erroneous instruction, the prosecution would, in effect, have to prove not only

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530. 190 N.W.2d 809, 813 (Iowa 1971).

531. IOWA CODE § 32.1 (1971).

532. 190 N.W.2d at 813.

533. *Id.* (emphasis added).

534. *Id.* (emphasis added).

535. *Id.*

536. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1603.

537. IOWA CODE § 716.1 (1979) (emphasis added).

538. *Id.* (emphasis added).

that the defendant's mischievous acts were done intentionally (as opposed to accidentally or carelessly) but also that these intentional acts were done with the specific intent to damage, deface, alter, or destroy the property affected. However, like the flag desecration statute in *State v. Waterman*, the Criminal Mischief statute punishes acts *intentionally* done which have the effect of damaging property of another, and the offender's *reason* for doing such act is of no importance.<sup>539</sup> Indeed, the offender's intent need not be evil and thus can be motivated by political protest (instead of any subjective desire to damage or destroy the particular property involved).<sup>540</sup> Contrastingly, the Uniform Jury Instructions defining False Imprisonment<sup>541</sup> and Escape<sup>542</sup> correctly require only that the respective act be done intentionally without also requiring that these intentional acts be done with specific purposes.

b. *Willfully*. The defendant is required to have acted willfully in committing the crimes of Willful Disturbance<sup>543</sup> and Harassment of Public Officers and Employees.<sup>544</sup> "Willfully," the Iowa Supreme Court has said, "ordinarily means *intentionally*, deliberately or knowingly, as distinguished from accidentally, inadvertently or carelessly."<sup>545</sup> This suggests that the offender "must know what he is doing, must intend to act in the way proscribed by the statute, and he must have knowledge of the facts,"<sup>546</sup> but not necessarily an evil intent so long as he acted intentionally. Nor is the willful doing of the requisite proscribed act "the equivalent of, doing the act 'with the intent' to accomplish certain named results."<sup>547</sup> Accordingly, the offender must be aware that he is disturbing a state or local governmental agency (for the crime of Willful Disturbance) and that he is preventing or attempting to prevent personnel of public agencies from performing governmental duties (for the crime of Harassment of Public Officers and Employees). In other words, the offender must know of the governmental character of the agencies, officers, or employees as well as the disruptive or harassing nature of the conduct. On the other hand, the offender's specific intent in doing so is not *ipso facto* made an element of either crime. Nevertheless, Willful Disturbance is made a specific intent crime by additional statutory language (to wit, "with the purpose of disrupting . . ."),<sup>548</sup> but there is no such language concerning the harassment offense.

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539. See IOWA CODE § 716.1 *et. seq.* (1979).

540. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1603 (emphasis added).

541. *Id.* No. 1011.

542. *Id.* No. 1907.

543. IOWA CODE § 718.3 (1979).

544. *Id.* § 718.4.

545. *State v. Wallace*, 259 Iowa 765, 773, 145 N.W.2d 615, 620 (1966) (emphasis added). *Accord* *State v. Dunn*, 199 N.W.2d 104, 107 (Iowa 1972).

546. 22 C.J.S. *Criminal Law* § 31(4) at 113 (1961) (footnotes omitted).

547. *Id.* at 114 (footnotes omitted).

548. IOWA CODE § 718.3 (1979).

c. *Maliciously*. Malice is defined in the Uniform Jury Instructions as "a state of mind which leads one to intentionally do a wrongful act . . . which is done out of actual spite, hatred, ill will, or with an evil, wicked or unlawful purpose, knowing that the act is without just cause or excuse."<sup>549</sup> Malice may be either expressed or implied (inferable from defendant's conduct).

This definition appears misplaced to the extent that it refers to an act being done out of "actual spite, hatred, [or] ill will."<sup>550</sup> Malice, at least as it pertained to the pre-revised offense of Arson,<sup>551</sup> has been interpreted as not requiring any ill will, personal hostility, or revengeful motive on the part of the defendant towards the owner or possessor of the property damaged.<sup>552</sup> Rather, the Iowa Supreme Court determined that maliciously "denotes that malice which characterizes all acts done with an evil disposition, a wrong and unlawful motive or purpose; that state of mind which actuates conduct injurious to other without lawful reason, cause, or excuse."<sup>553</sup> Continuing, the court said: "the intentional doing of a 'wrongful act,' without justification or lawful excuse, will permit an inference of a wicked state of mind, i.e., legal malice, as opposed to actual malice."<sup>554</sup> Similarly, malice in the context of murder, means "that condition of mind which prompts one to commit a wrongful act intentionally, absent legal justification or excuse."<sup>555</sup>

One of the more comprehensive definitions of the ordinary legal concept of malice consists of two ingredients, in one commentator's analysis: "On the positive side 'malice' requires an intent to cause the very harm that results or some harm of the same general nature, or an act done in wanton and wilful disregard of the plain and strong likelihood that some such harm will result. And on the negative side it requires the absence of any circumstance of justification, excuse or recognized mitigation."<sup>556</sup> He declares that "the state of mind required for malice, when less than an actual intent to cause the *actus reus* of the crime in question includes a vicious or callous disregard of the likelihood of such harm resulting from what is being done; and it is this viciousness or callousness which distinguishes malice from criminal negligence."<sup>557</sup> He claims that the customary legal meaning of "malice" in the crime of malicious mischief as requiring "actual ill-will or resentment toward [the] owner or possessor" is "quite illogical and resulted from a faulty analysis of the legal meaning of the word 'malice.'"<sup>558</sup> The confusion,

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549. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 216.

550. *Id.*

551. See IOWA CODE § 707.3 (1977) (repealed 1978).

552. *State v. Dunn*, 199 N.W.2d 104 (Iowa 1972).

553. 199 N.W.2d at 107.

554. *Id.*

555. *State v. Gilroy*, 199 N.W.2d 63, 66 (Iowa 1972).

556. R. PERKINS, *supra* note 398, at 334.

557. *Id.* at 769.

558. *Id.* at 334.

he concludes has derived from assuming that "malice, as a jural concept, must involve intent *plus* some matter of aggravation whereas, in truth, the requirement is fully satisfied by intent *minus* any matter of exculpation or mitigation."<sup>559</sup> In other words, malice "requires no more than the intentional doing of the *actus reus* in the absence of any circumstance of exculpation or recognized mitigation."<sup>560</sup> In the final analysis, the jural concept of malice is clear when these two points are kept in mind: "[f]irst, that in the absence of justification, excuse or recognized mitigation, it is malicious to intend to do what constitutes the *actus reus* of the crime in question; second, that a state of mind *may* be malicious even without an actual intent to bring out such a result."<sup>561</sup>

The foregoing analysis is borne out in terms of the Iowa law of malice, as already partially discussed.<sup>562</sup> In addition, the state of mind of malice applies only to one or two crimes in the entire Iowa Criminal Code. In one, Injury to Animals,<sup>563</sup> it would be illogical to require that the requisite malicious actions toward the owner of an animal be done out of actual ill will or resentment or for revenge in light of there being no additional requirement that the offender even know the identity of the owner of the animal. Instead, the offender merely must act intentionally in callous disregard of the property rights of another person, any person. Malice *may* also be an element of the new crime of Malicious Prosecution,<sup>564</sup> although malice is not enumerated as an element in the statute.<sup>565</sup> Even if malice is an element of this crime, nevertheless malice does not denote a requirement of ill will, resentment, or revenge. Instead, Malicious Prosecution requires intentional action without justification. An example would be a woman who falsely cries rape (now sexual abuse) to cover up her indiscretion. If a cover-up was her only motive, then the crime would still be complete although totally devoid of any evidence of ill will, resentment, or revenge toward her sex "partner."

d. *Purposely*. The particularized mental state of purposely appears to be used in the new Criminal Code synonymously with specific intent.<sup>566</sup> No

559. *Id.* at 767.

560. *Id.*

561. *Id.* at 766.

562. See text accompanying notes 551-55, *supra*.

563. See IOWA CODE § 717.1 (1979).

564. See IOWA CODE § 720.6 (1979) and text accompanying notes 1382-83, *infra*.

565. See text accompanying notes 1382-83, *infra*.

566. "Purposely" replaces specific intent altogether as the applicable state of mind in Model Penal Code § 2.02(2)(a) (T.O.D. 1962). "Purposely" is defined therein as:

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

Herbert Wechsler has noted:

The discrimination between acting purposely and knowingly is very narrow. Knowl-

logical reason for using the cumbersome phrase "for the purpose of" in the definition of a few crimes<sup>567</sup> is apparent, instead of the usual specific intent language "with the intent to."<sup>568</sup>

e. *Voluntarily*. One crime includes the related *mens rea* component of voluntariness. The crime of Permitting a Prisoner to Escape<sup>569</sup> is committed by any jailer or other public officer or employee who "*voluntarily* permits, aids or abets in the escape or attempted escape of any person in custody. . . ." <sup>570</sup> So used, "voluntarily" appears synonymous with "intentionally."<sup>571</sup> However, use of the special term "voluntarily" makes it explicit that the defendant must have acted *volitionally* and with a *criminal intent*, rather than having been coerced (e.g., captured by a prisoner and forced to open the cellblock gate). Otherwise, a "captive" guard would act intentionally by meaning to do so, as opposed to accidentally or carelessly, even though he did so without *criminal intent*.

### 3. *Knowingly*

Several crimes require as an element a particularized mental state relating to specific knowledge<sup>572</sup> of some fact.<sup>573</sup> This is separate and apart from

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edge that the requisite external, attendant circumstances exist is a common element in both conceptions. But action is not deemed purposive with respect to the nature or results of an actor's conduct unless, as the Code puts it, 'it was his conscious object to engage in conduct of that nature or to cause such a result'. Though acting knowingly suffices to establish liability for most offences, there are situations where our law has deemed it proper to require purpose; for example, treason and crimes of subversive speech, solicitation, complicity, attempts, conspiracy, and probably obtaining property by false pretenses. The Code formulations on these subjects so provide. Moreover, in determining the gravity of crimes for purposes of sentence, it is often useful to lay stress on purpose. This is frequently the case under the older law as well as in the Code.

H. WECHSLER, *The Model Penal Code and the Codification of American Law*, 419, 436.

567. See IOWA CODE §§ 711.4 (Extortion), 718.1 (Insurrection), 718.3 (Willful Disturbance), and 722.4 (Bribery of Elector) (1979).

568. Analyzing trends in criminal code revision, Herbert Wechsler has noted:

"Many of the codes and drafts employ some form of the term 'intent' in preference to 'purpose', defining it, however, to mean 'conscious object.' The danger of perpetrating the obscurities and ambiguities of old judicial exploitations of intention, often resulting in a concept indistinguishable from recklessness or negligence, is thus eliminated by the definition."

H. WECHSLER, *The Model Penal Code and the Codification of American Criminal Law*, in 419, 436 n. 45.

569. IOWA CODE § 719.5 (1979).

570. *Id.* (emphasis added).

571. For a discussion of "intentionally" as a type of *mens rea*, see text accompanying notes 528-42, *supra*.

572. Actual, as opposed to imputed, knowledge is required for all but one of these crimes with a scienter requirement. In contrast, the crime of leasing Premises for Prostitution is complete upon the offender knowing or *having reason to know* that his premises are being used for

whether a defendant acted intentionally or deliberately, as well as to whether a defendant intended any specific result from the commission of his acts.

The crucial distinction between acting willfully (or intentionally) and knowingly was made in *State v. Perry*.<sup>574</sup> In *Perry*, the defendant was charged with *unlawfully* and willfully resisting an officer in serving process, although the applicable criminal statute provided that "if any person *knowingly* and willfully resist or oppose any officer. . . ."<sup>575</sup> Reversing the conviction, the supreme court first said that the word "unlawfully" added nothing to the elements of proof, and that "[i]t did not supply the omission of 'knowingly.'"<sup>576</sup> The court continued: "An act may be knowingly done, and yet be unlawful, or it may be unlawful though done in ignorance."<sup>577</sup> Here, the prosecution had to prove that defendant not only acted willfully but also that he so acted "with knowledge that the person resisted or opposed was an officer."<sup>578</sup> Declaring that "knowingly" and "willfully" are not synonymous, the court said:

To willfully do an act implies that it be done by design or with set purpose. One might purposely do an act which would have the effect of impeding an officer in the performance of his duties, in entire ignorance of the capacity in which such officer was acting. The obstruction denounced is that, not only designedly or purposely interposed, but with knowledge that the person hindered was at the time an officer serving or attempting to serve . . . process.<sup>579</sup>

Nevertheless, this scienter requirement does not go to knowledge of the unlawfulness of the act.<sup>580</sup> Thus, the defendant merely needed to know that the person he resisted was an officer and not that resisting an officer was illegal.

The difference between specific intent and specific knowledge<sup>581</sup> was

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prostitution. See IOWA CODE § 725.4 (1979). Concerning a permissible inference of knowledge, see test accompanying notes 592-93, *infra*.

573. "Knowing facts that would cause a reasonable man to know the danger is equivalent to knowing the danger. Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Without guilty knowledge criminal intent cannot exist." 22 C.J.S. *Criminal Law* § 31(3) (1961). See also Comment, *Willful Blindness as a Substitute for Criminal Knowledge*, 63 IOWA L. REV. 466 (1977).

574. 109 Iowa 353, 80 N.W. 401 (1899).

575. *Id.* (emphasis added).

576. *Id.* at 354.

577. *Id.*

578. *Id.*

579. *Id.*

580. See 22 C.J.S. *Criminal Law* § 31(3) (1961).

581. The particularized mens rea requirement of one crime, Arson, can be satisfied alternatively by specific intent to damage property or knowledge that property probably will be damaged. See IOWA CODE § 712.1 (1979).



pointed out in an Arizona case.<sup>582</sup> The relevant statute made an assault and battery aggravated when the person committing the offense knows or has reason to know that the victim is a police officer.<sup>583</sup> Rejecting the defendant's contention that this was a specific intent crime, the appellate court determined that this was a general intent crime. Thus, the prosecution merely had to prove that the defendant committed an assault, that the person assaulted was a police officer, and that the defendant knew or should have known that his victim was a police officer. The latter element satisfies the knowledge requirement. On the other hand, since this is not a specific intent crime, there is no requirement to prove the defendant's purpose in assaulting a police officer (*e.g.*, to obstruct him in the performance of his duties). Recognizing that "[m]ere omission with knowledge of the facts is not enough, nor is an act willful which is merely careless or negligent or inadvertent,"<sup>584</sup> the court determined that the defendant had acted intentionally and thus had the requisite general criminal intent together with the requisite specific knowledge.

Concerning the relationship of specific intent and knowledge, the court said that "lack of knowledge may disprove the existence of specific intent."<sup>585</sup> For example, "one cannot intend to steal property which he believes to be his own however careless he may have been in coming to that belief."<sup>586</sup>

Judicial interpretation of the pre-revised statute prohibiting carrying of concealed weapons is an example of a statute being read as requiring that the prohibited act be done intentionally and that defendant have knowledge of the weapon's real character, even though neither of these two requirements is expressly included as an element. In *State v. Williams*,<sup>587</sup> the supreme court held that although "the object of carrying a concealed weapon is entirely immaterial" as bearing on defendant's guilt, nevertheless "[t]o be guilty of the offense one must have consciously or intentionally have carried the weapon."<sup>588</sup> Defendant's theory of the case was that he had mistakenly taken another person's coat and thus was unaware of the presence of the weapon in the pocket of the coat he was wearing. The trial court erred in refusing to instruct that the jury must find that defendant knew a weapon was in his coat pocket. Similarly, the court noted in *State v. Krana*,<sup>589</sup> a prosecution for going armed in a vehicle, that "while specific intent is not an element of this crime, the accused must be aware of the presence of the

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582. *State v. Jamison*, 110 Ariz. 245, 517 P.2d 1241 (1974).

583. *Id.*

584. 110 Ariz. at \_\_\_, 517 P.2d at 1244.

585. *Id.*

586. *Id.*

587. 184 Iowa 1070, 169 N.W.371 (1918).

588. *Id.* at 1073, 169 N.W. at 372.

589. 246 N.W.2d 293 (Iowa 1976).

gun.”<sup>590</sup>

Speeding is an example of an offense which has been interpreted<sup>591</sup> to not require knowledge on the part of the driver of the automobile. This means that a speeding motorist is guilty irrespective of being unaware of his vehicle's speed or of the speed limit.

Knowledge ordinarily is determined from the defendant's words and conduct as well as “reasonable inferences which may be drawn therefrom in accordance with common experience and observation.”<sup>592</sup> Under Uniform Jury Instruction No. 230, the requisite knowledge of the defendant (*i.e.*, a conscious awareness of the prescribed fact) *can* be inferred<sup>593</sup> by the jury as “the natural and probable consequences of his voluntary acts which ordinarily follow such acts.”

#### 4. *Recklessly*

The statutory definition of recklessness<sup>594</sup> is fairly standard, *viz.* “a wilful or wanton disregard for the safety of others.”<sup>595</sup> Suprisingly, only two crimes expressly have a mens rea comprised of recklessness: Reckless Use of Fire or Explosives<sup>596</sup> and Abandonment of a Dependent Person<sup>597</sup> (which can be committed either knowingly or recklessly). An even higher standard of criminal culpability seemingly would be required for one type of Involuntary Manslaughter<sup>598</sup> based upon “the commission of an act in a manner likely to cause death or serious injury.” However, the supreme court has interpreted this statutory definition as being equated with recklessness.<sup>599</sup>

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590. *Id.* at 295.

591. *City of Des Moines v. Davis*, 214 N.W.2d 199 (Iowa 1974).

592. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 230.

593. Concerning the constitutionality of a similar permissive inference on intent, *see* text accompanying notes 511-27, *supra*.

594. IOWA CODE § 702.16 (1979).

595. *See State v. Kernes*, 262 N.W.2d 602, 605 (Iowa 1978). Recklessness as defined in Uniform Jury Instruction No. 217, as follows, amplifies the statutory definitional clause and the prevailing case law:

A person is reckless or acts recklessly, when he willfully or wantonly disregards the safety of persons or property. It is more than a lack of reasonable care which may cause unintentional injury. Rather, recklessness is conduct, which is consciously done with willfull or wanton disregard of the consequences, when a person knows or should know a risk of harm to another or property is created.

Though recklessness is willful, that is intentional, it is not intentional in the sense that harm is intended to result. It is, however, conduct which shows that the person knew or should have known of a danger and proceeded without any care or concern for the results of his actions.

596. *See* IOWA CODE § 712.5 (1979) and text accompanying notes 911-17 *infra*.

597. *See id.* § 726.3.

598. *See id.* § 707.5(2).

599. *State v. Conner*, 292 N.W.2d 682, 684 (Iowa 1980). In addition, the court held that recklessness must be read into the other type of Involuntary Manslaughter, defined in Iowa

The court, noting that "the words 'in a manner likely to cause death or serious injury' implies an awareness of the risk or at least that the accused should have been aware of the risk," said that "[i]t is this subjective awareness of the risk, although usually determined objectively, that distinguishes civil negligence, which requires only objective awareness of the risk from criminal negligence. . . ."<sup>600</sup> Mere criminal negligence by itself is not a basis for criminal liability for true crimes under the new Iowa Criminal Code.<sup>601</sup>

### C. Venue

Venue no longer is jurisdictional in Iowa, under Code § 803.2 (and its forerunner<sup>602</sup> since July 1, 1975). Prior to 1975,<sup>603</sup> setting of venue (in the particular *county* where the crime was committed) was an essential *element* in proving (by direct or circumstantial evidence) any crime charged. Venue had to be proved beyond a reasonable doubt,<sup>604</sup> similar to proof of the substantive elements of the crime (and convictions have been reversed for insufficient evidence of venue).<sup>605</sup> Now, however, venue is merely made the *place of trial*, with the prosecutor needing to prove only the State's jurisdiction of the matter rather than also proving the particular county in Iowa in which the criminal activity occurred. Any objection defendant has to the place of trial must be made prior to trial, or it is waived.<sup>606</sup> Waiver for untimeliness is automatic irrespective of when defendant first discovers venue error.<sup>607</sup> A successful objection, however, does not force a prosecutor to prove venue as an element of the crime. Rather, it merely forces *relocation* of the trial.

Recently the Iowa Supreme Court, in *State v. Allen*, expressly held that venue is no longer an element of the crime.<sup>608</sup> Several recent cases had implied as much, but in *Allen* the supreme court decisively settled the issue. In

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CODE § 707.5(1), which punishes unintentional killings during the commission of a public offense. The court thus refused to recognize the unlawful act doctrine as the sole mens rea for involuntary manslaughter, at least in vehicular homicide cases.

600. *Id.*

601. *But see* State v. Bahl, 242 N.W.2d 298, 301 (Iowa 1976): "At least to a point, the legislature could choose to make negligence the basis of a crime."

602. IOWA CODE § 753.2 (1971) (repealed 1975).

603. IOWA CODE § 753.2 (1971) (repealed 1975) provided: "The local *jurisdiction* of the district court is of offenses committed within the county in which it is held, and of such other cases as are or may be provided by law." (emphasis added).

604. State v. Evely, 228 N.W.2d 196 (Iowa 1975). *See generally* Annot., Necessity of Proving Venue or Territorial Jurisdiction of Criminal Offense Beyond Reasonable Doubt, 67 A.L.R.3d 988 (1975).

605. *See* State v. Durham, 196 N.W.2d 428 (Iowa 1972).

606. State v. Donnelly, 242 N.W.2d 295 (Iowa 1976).

607. *Id.* In this case, the error in venue was discovered during the State's case-in-chief.

608. State v. Allen, 293 N.W.2d 16, 20 (Iowa 1980).

*State v. Donnelly*,<sup>609</sup> the supreme court took note of the change in statutory language and the familiar legislative rule of statutory construction that a legislative amendment implies legislative intent for a substantive change in the original statute. Subsequently, the court observed in *State v. Hanna*<sup>610</sup> that its recent cases “make it clear venue objections may not be raised except by motion prior to trial” and thus that “any objection to venue is waived unless raised before trial.”<sup>611</sup>

The change in statutory language makes clear that venue no longer is an element. The pre-1975 venue statute read: “The local *jurisdiction* of the district court is of offenses committed within the county. . . .”<sup>612</sup> The word “jurisdiction” was the basis for venue being required to be proved as part of the prosecution’s case. The current provision reads: “Criminal actions shall be *tried* in the county in which the crime is committed, except as otherwise provided by law. All objections to *place of trial* are waived by a defendant unless the defendant objects thereto prior to trial.”<sup>613</sup> Thus, the trial court’s jurisdiction is no longer a matter of proof *at trial*. Rather, the place of trial is to be decided on a *pretrial* motion/objection, as stated in *Allen*.<sup>614</sup> Additionally, the state has the burden of proving venue by a preponderance of the evidence.<sup>615</sup>

Even a successful objection to place of trial does not cause the prosecution to prove venue at trial, thus rendering the county as the situs of the crime jurisdictional. A trial court’s jurisdiction cannot be left to the parties’ agreements or be conditioned upon whether or not one party objects (to the place of trial) and is successful.<sup>616</sup>

The unequivocal statement by the supreme court in *Allen* should change the fact that some trial judges are continuing to include venue in their jury instructions.<sup>617</sup> Fortunately, the Iowa State Bar Association’s up-

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609. *Id. Accord* *State v. Bahl*, 242 N.W.2d 298, 303 (Iowa 1976): “Under our holding in *Donnelly* it is immaterial whether the crash occurred in the southern part or northern part of Lee County.” See *Trimble v. State*, 2 Greene 404 (1850) (division of Lee County into two separate judicial areas upheld, with exclusive *jurisdiction* of the two areas).

610. 277 N.W.2d 605 (Iowa 1979).

611. *Id.* at 608.

612. See IOWA CODE § 753.2 (1971) (repealed 1975) (emphasis added).

613. IOWA CODE § 803.2 (1979) (emphasis added).

614. “[T]he defendant must secure a ruling by the trial court before the trial after the parties have had an opportunity for an evidentiary hearing or he waives the issue of improper venue. Absent an adverse ruling by the trial court, he may not seek appellate review of the issue.” 293 N.W.2d at 18. The court’s newly expressed limit for rulings on venue objections only applies to cases where the objection is raised after June 18, 1980. *Id.* at 19.

615. *Id.* at 20.

616. See *State v. Fagan*, 190 N.W.2d 800 (Iowa 1971) (parties could not stipulate to bench trial on indictable offense under pre-revised law).

617. These alternative ways of “proving” venue other than by direct evidence have been approved. *State v. Brooks*, 222 Iowa 651, 269 N.W. 875 (1936) (venue established by *inference*); *State v. Anderson*, 209 Iowa 510, 228 N.W. 353 (1929) (affirming judicial discretion in permit-

dated Uniform Jury Instructions<sup>618</sup> do not include venue as an element.

#### D. Lesser Included Offenses

Generally, the new Criminal Code does not depart from the pre-revised law dealing with lesser included offenses,<sup>619</sup> the test in section 701.9 continuing to be whether one offense is "necessarily included in another public offense."<sup>620</sup> The statute bars conviction of a necessarily included offense upon conviction of a greater offense and permits a trial court to enter judgment of guilty of the greater offense in those cases where the jury may return a verdict of guilty on both a lesser included offense *and* the greater offense.

Section 701.9 must be read together with several rules found in the Rules of Criminal Procedure which deal with lesser included offenses. Rule 6(1) authorizes prosecution by a single charging paper of each of the separate crimes arising "out of the same transaction or occurrence."<sup>621</sup> The rule incorporates the substance of a former Code section making it unnecessary to charge lesser included offenses, it being sufficient to charge the greater offense only.<sup>622</sup> Rule 6(2) merely restates, in rule form, the essence of section 701.9, barring conviction of both the offense charged and an included offense.

The Supreme Court has held in *State v. Rouse*<sup>623</sup> that Rule 6(3) does not change the rule of former Iowa cases which required a request for an included offense instruction. Absent such request, the prior cases had held that any error in a failure of a trial court to give a lesser offense instruction was waived.<sup>624</sup> The new rule, in its entirety provides:

In cases where the public offense charged may include some lesser offense it is the duty of the trial court to instruct the jury, not only as to the public offense charged but as to all lesser offenses of which the accused might be found guilty under the indictment and upon the evidence adduced, even though such instructions have not been requested.<sup>625</sup>

The Rule requires a trial court, in every case to determine, as a matter of law, whether the offense charged carries with it any lesser included of-

ting prosecution to *reopen record* to establish proof of venue); *State v. Conley*, 176 N.W.2d 213 (Iowa 1970) (trial court properly took *judicial notice* of venue under circumstances of case).

618. See note 136 *supra*.

619. For an excellent and exhaustive critical analysis of the pre-revised standard, see Note, *The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied*, 59 IOWA L. REV. 684 (1974).

620. See generally, J. YEAGER & R. CARLSON, *supra* note 3, § 14; J. ROEHRICK, *THE NEW IOWA CRIMINAL CODE: A COMPARISON*, 513 (1978).

621. IOWA R. CRIM. P. 6(1) (1979).

622. See IOWA CODE § 773.29 (1975) (repealed 1978).

623. *State v. Rouse*, 290 N.W.2d 911 (Iowa 1980).

624. See *State v. Veverka*, 271 N.W.2d 744 (Iowa 1978).

625. IOWA R. CRIM. P. 6(3) (1979).

fenses. If the trial court determines that lesser included offenses are present under the statutory elements and evidence, then such offense must be submitted to the jury notwithstanding a failure of counsel to request such instructions. However, as noted in *Rouse*, this duty of the court does not relieve counsel "of the responsibility of urging proper objection or exception."<sup>626</sup>

An issue created by Rule 6(3) was whether the failure of a trial court to give a lesser included offense instruction *sua sponte* would automatically result in a reversal of a conviction of a greater offense. Prior caselaw had indicated that in at least two situations a reversal would not be required. In those cases in which the trial court instructs on a greater offense as well as a lesser included offense and the defendant is convicted of the greater offense, there is no reversible error in a failure to instruct on additional lesser included offenses.<sup>627</sup> The rationale of the cases so holding, being based upon the lack of prejudice to a defendant under such circumstances, would seemingly apply to cases which raise the issue under Rule 6(3). Moreover, in those cases in which the defendant objects to the submission of a lesser included offense instruction for strategic or tactical reasons and the trial court does not submit the instruction, the defendant should not be entitled to a reversal on appeal on the grounds that Rule 6(3) required jury submission over defendant's objection.<sup>628</sup> In *Rouse*, the Supreme Court refused to consider defendant's appellate claim that a lesser included offense instruction should have been given, in light of defense counsel's specific waiver by stating he had no objections to the proffered instructions and by his failure to submit an instruction on the lesser included offense, coupled with his failure to object to the trial court's failure to give such an instruction.<sup>629</sup>

The question is less easily resolved in those cases where the trial court does not instruct on a lesser included offense *sua sponte*, either through inadvertence or based upon a determination that there are no lesser included offenses of the offense for which the defendant is charged. Failure to so instruct in view of an appellate court's determination that, as a matter of law, a lesser included offense should have been submitted, seemingly would constitute reversible error in view of the Rule's apparently mandatory language. However, the Supreme Court in *Rouse* rejected such a strict application of the Rule, the implication being that the duty under Rule 6(3) is of a directory, instead of a mandatory, nature. A contrary ruling would be unfortunate in view of the ramifications of such a position. If so applied, the Rule would permit a defendant an opportunity to simply stand mute and observe reversible error creep into the record, take a chance on a jury acquittal on the offense charged, with the knowledge that, if convicted, the conviction

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626. 290 N.W.2d at 914.

627. *State v. Pilcher*, 171 N.W.2d 251 (Iowa 1969).

628. *State v. Veverka*, 271 N.W.2d 744 (Iowa 1978).

629. 290 N.W.2d 911 (Iowa 1980).

will be reversed on appeal. Otherwise, the "plain error" doctrine which has been rejected outright recently by the Iowa Supreme Court<sup>630</sup> would have this one type of limited application (to the exclusion of all others).

The practical solution on the trial court level would be for the judge to specifically ask the defense attorney if there are any lesser included offenses to be instructed upon. Surely, a negative (albeit mistaken) response would operate as a waiver. Moreover, an astute prosecutor should prompt such a discussion "to make the record."

In *State v. Holmes*,<sup>631</sup> the supreme court has already applied the pre-revised standards for determining what constitutes a lesser included offense under the new Criminal Code. Thus, the two-test standard for determining whether one offense is "necessarily included" in the other "remains as before,"<sup>632</sup> as formulated in *State v. Stewart*<sup>633</sup> and *State v. Stergion*.<sup>634</sup> The first step "focuses upon the legal or element test,"<sup>635</sup> with the lesser offense being "an elementary part of the greater offense."<sup>636</sup> The second step "requires an ad hoc factual determination,"<sup>637</sup> that is, "a factual basis in the record for submitting the included offense to the jury."<sup>638</sup>

### 1. *Same Species Requisite*

There is another apparent limiting factor which is not expressly included in the two-step standard but which nevertheless is an integral part of lesser included offense analysis, if not the starting point.<sup>639</sup> It was pointed out in *Stewart*<sup>640</sup> that lesser included offenses are thought to be of "the same nature or same species"<sup>641</sup> as the greater offense(s). The court went on in *Stewart* to find that because the offenses of reckless driving and vehicular-type manslaughter were not "the same in law or in fact,"<sup>642</sup> then reckless driving was not a lesser included offense of vehicular-type manslaughter via

630. *State v. Rinehart*, 283 N.W.2d 319 (Iowa 1979).

631. 276 N.W.2d 823 (Iowa 1979).

632. *State v. Sanders*, 280 N.W.2d 375, 377 (Iowa 1979).

633. 223 N.W.2d 250 (Iowa 1974), *cert. denied*, 423 U.S. 902 (1975).

634. 248 N.W.2d 911 (Iowa 1976).

635. *Id.* at 912.

636. *State v. Redmon*, 244 N.W.2d 792, 796 (Iowa 1976).

637. *State v. Stergion*, 248 N.W.2d 911, 912 (Iowa 1976).

638. *State v. Redmon*, 244 N.W.2d 792, 796 (Iowa 1976).

639. *See State v. Furnald*, 263 N.W.2d 751 (Iowa 1978), in which the court stated:

Certain principles are applied to determine whether one crime is a lesser included offense in another. We examine the two crimes to determine if they are of the same nature, or some species! (citation omitted). *Narrowing the focus* to determine whether one offense is 'necessarily included' within another, we apply two tests . . .

*Id.* at 752 (emphasis added).

640. *State v. Stewart*, 223 N.W.2d 250 (Iowa 1974), *cert. denied*, 423 U.S. 902 (1975).

641. *Id.* at 251.

642. *Id.* at 253.

reckless driving.<sup>643</sup> Subsequently, the court was convinced in *State v. Furnald*<sup>644</sup> that Iowa's criminal trespass crime is not "of the same nature or same species"<sup>645</sup> as the breaking and entering statute, and thus the former was not a lesser included offense of the latter. The court based its conclusion on what it considered "a logical inference" that the trespassing statute initially was enacted "at least in part to cope with the destructive fallout of the demonstrations and protests which commenced in the 1960's."<sup>646</sup> The fact remains, however, that the gravamen of both offenses is unlawful entry onto another's property. It is the purpose of the unlawful entry that differentiates burglary from trespass. In order for an unlawful entry into the limited prescribed types of property (*i.e.*, either an occupied structure or an enclosed space) to constitute Burglary, there must be an accompanying specific intent to commit either a felony, an assault, or a theft. An unlawful entry onto the same property for the mere purpose of socio-political protest, on the other hand, would merely constitute the much less severe offense of Trespass.

## 2. Legal Test

Under the legal or elemental test, the lesser offense "must be composed solely of some but not all elements of the greater crime."<sup>647</sup> That is, the lesser crime "must not require any additional element which is not needed to constitute the greater crime."<sup>648</sup> The lesser offense thus is "necessarily included within the greater."<sup>649</sup>

Put differently, to be "necessarily included in the greater offense," the lesser offense "must be such that it is impossible to commit the greater without having committed the lesser."<sup>650</sup> On the other hand, the court has noted that "[i]t is quite possible to commit one crime in the act of committing another and yet not have it be an included offense."<sup>651</sup> This is because under Iowa's two-step test for lesser included offenses the less serious crime is not included if its elements are not entirely included as a part of the elements of the major offense.<sup>652</sup>

In *State v. Inger*,<sup>653</sup> the supreme court held that the provision in section

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643. *Id.*

644. 263 N.W.2d 751 (Iowa 1978).

645. *Id.* at 754.

646. *Id.*

647. *State v. Holmes*, 276 N.W.2d 823, 825 (Iowa 1979), *quoting State v. Stergion*, 248 N.W.2d 911, 912 (Iowa 1976).

648. *Id.*

649. *State v. Stewart*, 223 N.W.2d 250, 252 (Iowa 1974), *cert. denied*, 423 U.S. 902 (1975).

650. *State v. Redmon*, 244 N.W.2d 792, 801 (Iowa 1976), *quoting approvingly State v. Leeman*, 291 A.2d 709, 710-11 (Me. 1972).

651. *State v. Furnald*, 263 N.W.2d 751, 753 (Iowa 1978).

652. *Id.* at 754.

653. 292 N.W.2d 119 (Iowa 1980).



707.4 of the Code that Voluntary Manslaughter "is an included offense"<sup>654</sup> in a murder prosecution *ipso facto* satisfies the legal test. "However, for the court to properly give a voluntary manslaughter instruction over specific objection by a party, there must also exist in the record a factual basis for such an instruction,"<sup>655</sup> the court added.<sup>656</sup>

a. *Pleadings.* In analyzing the first or legal test, "the statutes and not the accusatory pleading or charge must establish the essential elements of the offense charged."<sup>657</sup> That is, the supreme court has held in *State v. Redmon*<sup>658</sup> that "the statutory or legal element test should be the sole approach in determining what are the elements of the offense charged and that the language of the information or indictment charging the crime has no bearing on that analysis."<sup>659</sup>

b. *Applications of the Legal Test in Robbery Prosecutions.* Two decisions under the new Criminal Code have taken a restrictive view of lesser included offenses on a charge of Robbery (in either degree). In both cases, the supreme court reaffirmed the pre-revised two-step legal elements and factual basis test and held that the legal elements test was not met.

(1) *Theft.* In *State v. Holmes*,<sup>660</sup> the supreme court held that Theft is not a lesser included offense of the revised crime of Robbery, even though the pre-revised crime of Larceny<sup>661</sup> (or Larceny from a Person)<sup>662</sup> was a lesser included offense of the pre-revised crime of Robbery.<sup>663</sup> The change resulted from the revised definition of Robbery not requiring a taking (unlike under the pre-revised law).<sup>664</sup> Consequently, under the new Criminal Code, each of these offenses requires an additional element. That is, Theft requires a taking while Robbery does not, and Robbery requires either an assault or certain threats while Theft does not.

This change is unfortunate, since it will or can cause an all-or-nothing approach in a Robbery prosecution in which the evidence of the requisite assault is slim but the evidence of a taking is solid.<sup>665</sup> Under the pre-revised

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654. *Id.* at 121 (emphasis added).

655. 292 N.W.2d at 122.

656. A similar provision makes Involuntary Manslaughter a lesser included offense of Murder in either degree and of Voluntary Manslaughter. See IOWA CODE § 707.5 (1979). Compare *id.* § 714.7 (Operation Vehicle Without Owner's Consent), which states: "A violation of this section may be proved as a lesser included offense on an indictment or information charging theft." *Id.* (emphasis added).

657. *State v. Redmon*, 244 N.W.2d 792, 801 (Iowa 1976).

658. 244 N.W.2d 792 (Iowa 1976).

659. *Id.* at 801.

660. 276 N.W.2d 823 (Iowa 1979).

661. See IOWA CODE § 709.1 (1975) (repealed 1978).

662. *Id.*, § 709.6.

663. See *State v. Fonza*, 254 Iowa 630, 634, 118 N.W.2d 548, 551 (1962).

664. See text accompanying notes 1302-36, *supra*.

665. This differential in the quantum of proof as to the various essential elements of the pre-revised offense of Robbery was discussed in *State v. Taylor*, 140 Iowa 470, 474, 118 N.W.

law,<sup>666</sup> the lesser included offense of Larceny from a Person was appropriate for this situation (e.g., in a purse snatching not involving a protracted struggle).<sup>667</sup> The public interest is not served by an all-or-nothing verdict which will result in either an over-conviction for a non-violent act of Theft or an acquittal of a thief charged with Robbery. Complicating this unfortunate situation further is the fact that the prosecutor is in complete control. If he suspects that he has a weak case of a violent taking, he can follow Professor Yeager's advice<sup>668</sup> and charge the defendant in two counts, one for Robbery and the other for Theft. This dual approach covers the prosecution on both fronts, while the defense, of course, must sit passively while the prosecution selects its charging options.<sup>669</sup> Under such a dual approach, presumably the jury would be instructed to consider the count on Robbery first and to not consider Theft at all if a guilty verdict is found on the Robbery count. Otherwise, there could be the spectacle of a defendant being convicted of both Robbery and Theft for the same taking. Because Theft is not a lesser included offense of Robbery, it is a distinct possibility that double jeopardy would not preclude both convictions<sup>670</sup> however, a sense of justice certainly would. Moreover, a defendant acquitted of Robbery arguably could face a second prosecution (for Theft), in light of Theft not being a lesser included offense.<sup>671</sup> Again, a sense of justice should prevent this, whether the Consti-

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747, 748 (1908):

If there was a reasonable doubt in the minds of the jurors as to the element of force and violence, it was their duty to find the defendant guilty of no greater offense than larceny from the person. If there was a reasonable doubt in the minds of the jurors under the evidence as to whether the watch was taken from the person of the prosecuting witness, it was their duty to find the defendant guilty of no greater offense than larceny. Granting that the evidence of the prosecuting witness was sufficient, if believed, to warrant the jury in finding the element of force and violence, the jury was not bound to so find. The jury might properly hesitate to find such fact, because of the indefinite and unsatisfactory character of the evidence as to that particular question. In other words, the evidence in proof of the element of force and violence was not so strong as the evidence of the larceny or of larceny from the person. It follows that the jury could consistently have failed to find the defendant guilty of robbery, and yet have found him guilty of larceny, or of larceny from the person.

666. IOWA CODE § 711.1-3 (1975)(repealed 1978).

667. *But see* State v. Carr, 43 Iowa 418, 423 (1876), which holds that "a sudden snatching from the hand or person of another constitutes the force and violence sufficient under our statute to constitute robbery."

A better view was taken in *People v. Patton*, 389 N.E.2d 1174, 1177 (Ill. 1979), which concluded that where an article is taken "without any sensible or material violence to the person, as snatching a hat from the head or a cane or umbrella from the hand" the offense is theft from the person rather than robbery."

668. J. YEAGER & R. CARLSON, *supra* note 3, § 252.

669. See note 1050 *infra*.

670. See State v. Stewart, 223 N.W.2d 250, 253 (Iowa 1974), *cert. denied*, 423 U.S. 902 (1975).

671. *Id.*

tution does or not.

(2) *Accessory After the Fact*. In *State v. Sanders*,<sup>672</sup> the supreme court held that Accessory After the Fact<sup>673</sup> is not a lesser included offense of Robbery. The legal elements test was not met because each offense has a different state of mind (*i.e.*, to prevent another's apprehension under Accessory After the Fact and to commit a theft under Robbery).

(3) *Assault*. Another apparent change from the pre-revised law is that an Assault is no longer a lesser included offense of Robbery.<sup>674</sup> This change should occur in light of the statutory three-alternative definition of the *actus reus* of Robbery. That is, a person commits the *actus reus* component of a robbery when he does "any of the following acts . . .

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony."<sup>675</sup>

Thus, an assault is only one of three alternative ways of committing the *actus reus* component of Robbery. Although serious threats as the other two ways closely resemble an assault, nevertheless the law is clear that a mere threat, standing alone, does not constitute an assault.

Application of the existing, lesser included offense standard clearly indicates that Assault is not a lesser included offense of Robbery. In the two-step process under that standard, the first step "requires consideration of the legal elements,"<sup>676</sup> with this legal elements test being as follows: "The lesser offense must be composed solely of some but not all elements of the greater crime. The lesser crime *must not* require any additional element which is *not needed* to constitute the greater crime."<sup>677</sup>

The essential fact is that the lesser crime of Assault is "not needed" to constitute a Robbery. That is because an assault is only one of three different alternative ways of committing the *actus reus* for a Robbery. Under the prevailing test for a lesser included offense, as applied in *State v. Stewart*<sup>678</sup> (which was cited with approval in the new-Code case of *State v. Holmes*),<sup>679</sup> a lesser crime cannot be a lesser included offense if the greater crime does not *require* all of the elements of the lesser crime. It is irrelevant that the greater crime includes the lesser crime as one of its alternative ways of being committed. This point was most dramatically illustrated in *State v. Stewart*,

672. 280 N.W.2d 375 (Iowa 1979).

673. IOWA CODE § 703.3 (1979).

674. See *State v. Duffy*, 124 Iowa 705, 100 N.W. 796 (1904).

675. IOWA CODE § 711.1 (1979).

676. *State v. Holmes*, 276 N.W.2d 823, 825 (Iowa 1979).

677. *Id.*, quoting *State v. Stewart*, 223 N.W.2d 250, 252 (Iowa 1974), *cert. denied*, 423 U.S. 902 (1975).

678. 223 N.W.2d 250 (Iowa 1974), *cert. denied*, 423 U.S. 902 (1975).

679. 276 N.W.2d 823 (Iowa 1979).

which held that reckless driving<sup>680</sup> was not a lesser included offense of the pre-revised crime of Manslaughter.<sup>681</sup> So-called "vehicular" Manslaughter under the pre-revised law could result by operating a motor vehicle in either of two-ways: (1) reckless operation or (2) operation while intoxicated.<sup>682</sup> Therefore, this type of Manslaughter consisted of three elements: (1) causing unlawful death of a person; (2) without malice aforethought; (3) by operation of a motor vehicle either (a) recklessly or (b) while intoxicated. Because reckless operation of a motor vehicle was not required for Manslaughter, the supreme court held that the lesser offense of Reckless Driving was not a lesser included offense.<sup>683</sup> Similarly, the elements of the revised crime of Robbery are: (1) with intent to commit theft; (2) doing any of these acts (a) committing an assault, or (b) threatening immediate serious injury, or (c) threatening immediate commission of any forcible felony; (3) to aid in the intended theft or to escape from the scene.

This result is unfortunate, especially in these cases with slim evidence as to the defendant's intent in committing an assault. A jury could very well believe that the defendant committed an assault and yet be unsure as to whether there was an intent to steal something. This leaves the jury with the dilemma of turning a person loose who they are sure has committed Assault. Assuming that the jury will follow its instructions, legitimate concern arises over the potential over-conviction for Robbery, in these circumstances of an all-or-nothing approach. The prosecutor, on the other hand, is protected from the consequences of this all-or-nothing approach, as he can gamble on a Robbery conviction, content with the knowledge that an acquittal for Robbery would apparently not preclude him from reprosecuting for an Assault based upon the same transaction. After all, in *State v. Stewart*, the supreme court held that the state could prosecute for "vehicular" Manslaughter following an acquittal for Reckless Driving arising out of the same occurrence, without constituting double jeopardy.

c. *Critique.* The basic all-or-nothing approach — untempered by examination of the pleadings — is unfortunate. It is hoped that the Iowa Supreme Court will revise its position on this inflexible approach, especially in light of the applications analyzed above. The problem has been exacerbated by significant statutory changes in the definitions of many crimes in the new Criminal Code (especially Robbery).

Consideration of the pleadings would be reasonable in the Robbery-Theft and Robbery-Assault situations. If, for example, the defendant is charged (in the indictment or trial information) with Robbery by taking X, and the evidence at trial supports an actual taking, then Theft should be submitted to the fact-finder as a lesser included offense. Theft obviously

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680. See IOWA CODE § 321.283 (1979).

681. See IOWA CODE § 690.10 (1975) (repealed 1978).

682. See IOWA CODE § 321.281 (1979).

683. 223 N.W.2d at 253.

would not be submitted, if either the pleading or the trial evidence did not show an actual taking. This case-by-case approach would temper the potentially distorted results of the all-or-nothing approach in the Robbery-Theft situation created in *State v. Holmes*.<sup>684</sup>

The following procedure is suggested as a better approach. The prosecutor could request a lesser included offense only if he had given pre-trial notice of such intent. Absent such notice, he would be precluded from making such a request at trial. Nevertheless, the defense could (in either circumstance) request a theory of the case instruction on the lesser included offense. The court, on the other hand, should not give such an instruction *sua sponte*.<sup>685</sup>

The essentially "self-contained" elemental standard is also problematic whether the elements of the greater nor the lesser crime are being analyzed. By "self-contained" it is meant that neither the greater or the lesser crime can be committed in *any other way* in order for the lesser included offense standard to be met. For example, as noted above, Trespass was held to not be a lesser included offense of Breaking and Entering in *State v. Fernald*<sup>686</sup> because "it cannot be said the elements of the 'lesser' offense are *entirely included* as a part of the elements of the major offense."<sup>687</sup> The rationale in *Fernald* was that only a building was included in the particular Breaking and Entering statute whereas the Trespass statute referred broadly to "property." That term obviously includes land, but unauthorized entry onto land by itself can never constitute Breaking and Entering. In other words, the situs of the unlawful entry is broader for a Trespass than for a Breaking or Entering (and now Burglary) — since the broad term "property" obviously includes buildings (and now "occupied structures" and "enclosed spaces") and more (*e.g.*, land).

This "entirely included" approach appears to focus on the wrong aspect. The broad concept of "property" in the Trespass statute *vis-a-vis* a building (or "occupied structure") in the breaking and entering (now Burglary) statute does not involve a different *element* being required for the lesser offense. Rather, this means that the element of situs can be met in alternative ways. The three elements of the most common type<sup>688</sup> of Burglary are (1) unlawful entry; (2) onto another's property that consists of either an "occupied structure" or an "enclosed space;" and (3) with specific

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684. 276 N.W.2d 823 (Iowa 1979). See text accompanying notes 660-71 *supra*.

685. This suggested approach is a modified version of the one approved in *People v. Rivera*, 525 P.2d 431, 433-34 (Colo. 1974) (en banc), which was noted disapprovingly in *State v. Redmon*, 244 N.W.2d 792, 800 (Iowa 1976). See also text accompanying notes 622-30, *supra*.

686. 263 N.W.2d 751 (Iowa 1978).

687. *Id.* at 754.

688. Burglary is not limited to unlawful *entry*, however, as discussed in text accompanying notes 967-68 *infra*. This is another reason why Trespassing is not a lesser included offense of Burglary under the present standard, but would be irrelevant under the revised standard proposed in this Article.

intent to commit a felony, an assault, or a theft. The two elements of the most common type of Trespass<sup>689</sup> are (1) unlawful entry; (2) onto another's "property" of any kind. The fact that the lesser crime can be committed on different types of property than the greater crime can should not have legal significance. The crux of the matter is that the issue will never come up unless either an "occupied structure" or an "enclosed space" was unlawfully entered, since otherwise there would be no Burglary charge. However, in a Burglary prosecution, a lesser included offense instruction on Trespass should *always* be given. Under the *evidence* of the case, the case consists of an unlawful entry into another's "occupied structure" or "occupied space" — with or without a specific intent to commit a felony, as assault, or a theft. Obviously, defendant could be convicted of Trespassing if only the first two elements are present. So why shouldn't Trespassing be a lesser included offense of Burglary? Otherwise, there remains the possibility of the all-or-nothing and double prosecution spectacles that were discussed above in relation to Robbery and Theft.<sup>690</sup>

Approaching it from the opposite direction, the prevailing lesser included offense standard holds in effect that a greater offense which *can* be committed in alternative ways does not have a lesser included offense merely because the lesser offense constitutes one of these alternative ways. For example, OMVUI<sup>691</sup> has been held<sup>692</sup> under the pre-revised law not to be a lesser included offense of vehicular-type Manslaughter<sup>693</sup> because the latter can be foundationed on either OMVUI or Reckless Driving. It was apparent to the supreme court in *State v. Stergion*<sup>694</sup> that "a key element in OMVUI — driving while under the influence — is not necessarily included in the offense of vehicular manslaughter."<sup>695</sup> The upshot in *Stergion* was that the defendant's conviction for OMVUI was affirmed even though he had previously been acquitted of vehicular-type Manslaughter "arising out of the same incident and collision."<sup>696</sup> Similarly, the court in *State v. Stewart*<sup>697</sup> earlier had affirmed a conviction for Manslaughter following an acquittal for Reckless Driving<sup>698</sup> arising out of the same occurrence.

Another aspect of this "alternative element" approach deserves scrutiny, especially in light of the new Code approach of separating the major

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689. Trespassing is not limited, however, to unlawful *entry*, as discussed in text accompanying notes 1038-43 *infra*.

690. See text accompanying notes 684-85 *supra*.

691. See IOWA CODE § 321.281 (1979).

692. *State v. Stergion*, 248 N.W.2d 911 (Iowa 1976).

693. See IOWA CODE § 690.10 (1977) (repealed 1978).

694. 248 N.W.2d 911 (Iowa 1974).

695. *Id.* at 913.

696. *Id.* at 912.

697. 223 N.W.2d 250 (Iowa 1974).

698. See IOWA CODE § 321.283 (1979).

offenses into several degrees. In *State v. Redmon*<sup>699</sup> the supreme court upheld the trial court's refusal to instruct on Assault With Intent to Inflict Great Bodily Injury and on Assault<sup>700</sup> in a 1976 prosecution for the pre-revised offense of Burglary With Aggravation<sup>701</sup> (which relied upon an assault as the basis for the Burglary being of an aggravated nature). The court noted that "it would have been possible for defendant to have committed aggravated burglary without having first committed [an assault],"<sup>702</sup> and pointed to the fact that a burglary is complete upon the requisite breaking and entering with an *intent* to commit a public offense. The crucial point overlooked, however, was that defendant was not merely charged with Burglary. Instead, because the charge was aggravated burglary, the crime was not complete until the assault was inflicted. This is apparent upon a simple reading of the statute, which spoke of "*actually assault* any person being lawfully therein"<sup>703</sup> instead of with the *intent to assault* any person therein. Once again, a more practical solution could be achieved if the jury were free to choose a lesser verdict of Assault, believing that an Assault actually occurred but that the offender had not broken into the victim's dwelling. The evidence could have been conflicting over whether he was invited or trespassed, but clear as to the physical attack. The jury should not be placed in the dilemma of the all-or-nothing verdict.<sup>704</sup>

### 3. *Factual Test*

As explained by the Court in *Stewart*:<sup>705</sup> "It is only after the elements of the lesser crime are shown to be necessarily included in the greater crime that a second inquiry is made. The second inquiry is a factual one, undertaken on a case by case basis."<sup>706</sup> The factual test "merely requires there be enough evidence introduced at trial to justify the submission to the jury of an instruction on the proposed lesser included offense."<sup>707</sup>

This second step is never reached when the first test is not met. Conversely, an offense which meets the legal test for a lesser included offense will nevertheless not be submitted in a particular case in which there is no evidentiary basis in the trial record for so doing.

A lesser included offense must be determined in light of the evidence in each case.<sup>708</sup> "Where the facts present a situation in which the major offense

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699. 244 N.W.2d 792 (Iowa 1976).

700. See IOWA CODE § 708.2(2) (1979).

701. See IOWA CODE § 708.02 (1977) (repealed 1978).

702. 244 N.W.2d at 798.

703. See IOWA CODE § 708.02 (1977) (repealed 1978) (emphasis added).

704. See text accompanying notes 684-85 *supra*.

705. *State v. Stewart*, 223 N.W.2d 250 (Iowa 1974).

706. *Id.* at 252.

707. *State v. Redmon*, 244 N.W.2d 792, 797 (Iowa 1976).

708. *State v. Hawkins*, 203 N.W.2d 555 (Iowa 1973).

could not have been committed without the commission of a lesser one, the lesser will be included."<sup>709</sup> Put differently, the salient question on this second step is "whether, under the facts of the case, the greater offense could have been committed without the commission of the lesser."<sup>710</sup>

This factual determination is not affected by imagining how the major offense might have been otherwise accomplished.<sup>711</sup> Instead, the actual facts of the particular case are controlling.

Conversely, the fact that a lesser crime actually was committed during the commission of a greater crime does not give rise to a lesser included offense. The supreme court in *Everett v. Brewer*,<sup>712</sup> rejected the notion that "the elements for an included offense could be conjured from the facts alone, in the absence of a determination all the elements of the lesser offense were also elements of the greater."<sup>713</sup> In other words, the particular facts in any given case cannot supply "an included offense outside the elements of the major crime."<sup>714</sup> For example, the trial court's refusal to instruct on simple possession in a drug sale case was upheld in *State v. Habhab*<sup>715</sup> even though there clearly was evidence in the trial record of defendant's actual possession of the drug contemporaneous with the sale.

The principle that the evidence is viewed in the light most favorable to the State has been held<sup>716</sup> to have no application to the determination of whether or not to submit a lesser included offense. If there is sufficient evidence in the trial record to support a conviction for the lesser offense, it must be submitted. For example, a trial court's refusal to submit lesser forms of homicide has been held<sup>717</sup> to be reversible error where the record contained sufficient evidence of murder without the necessity for the jury to find the defendant had specific intent to kill.

Conversely, an instruction on a lesser included offense need not be submitted where there is no evidence in the trial record to support the lesser crime<sup>718</sup> (that is, the defendant was guilty of the greater crime or nothing).<sup>719</sup> Thus, where there was no evidence of criminal negligence, it was not error to refuse submission of an Involuntary Manslaughter instruction in a prosecution for Murder.<sup>720</sup> Similarly, it is proper to refuse to submit an instruction on second-degree murder where the prosecution's only theory of

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709. *State v. Habhab*, 209 N.W.2d 73, 75 (Iowa 1973).

710. *Everett v. Brewer*, 215 N.W.2d 244, 246 (Iowa 1974).

711. *State v. Hawkins*, 203 N.W.2d 555, 557 (Iowa 1973).

712. 215 N.W.2d 244 (Iowa 1974).

713. *Id.* at 246.

714. *State v. Habhab*, 209 N.W.2d 73, 75 (Iowa 1973).

715. *Id.*

716. *State v. Reese*, 259 N.W.2d 771 (Iowa 1977).

717. *Id.*

718. *State v. Hawkins*, 203 N.W.2d 555 (Iowa 1973).

719. *State v. Conner*, 241 N.W.2d 447 (Iowa 1976).

720. *State v. Millsbaugh*, 257 N.W.2d 513 (Iowa 1977).



the case is the felony-murder rule.<sup>721</sup> Moreover, it is not reversible error to fail to give lesser included offense instructions in a prosecution for first-degree murder on the felony-murder doctrine where the defense elected either to be convicted of felony murder or to be acquitted (that is, all or nothing).<sup>722</sup> On the other hand, it has been held error to refuse defense-requested lesser included offense instructions on second-degree murder and manslaughter is a prosecution for felony murder where it was possible on the record evidence for the jury to determine that the shooting was not intentional.<sup>723</sup>

### III. INCHOATE OFFENSES

Inchoate crimes<sup>724</sup> are independent crimes consisting of *incompleted* criminal activity related to other more serious criminal offenses.<sup>725</sup> These include Solicitation, Conspiracy and Attempt.<sup>726</sup> Each of these offenses "always presuppose[s] a purpose to commit another crime"<sup>727</sup> that is, a target substantive crime, such as sexual abuse. If a substantive crime is committed the defendant(s) will be punished for it. If not, however, the defendant(s) can be punished for whatever inchoate crime(s)<sup>728</sup> was committed. Although the degree of harm, if any, is considerably less for inchoate crimes than if the substantive crime had been committed, nevertheless persons who have committed inchoate crimes have shown criminal propensity and thus should be punished as a deterrence to further criminal activity. Of course, defendant(s) cannot be punished for both the inchoate and substantive crimes.<sup>729</sup>

721. *State v. Conner*, 241 N.W.2d 447 (Iowa 1976).

722. *State v. Veverka*, 271 N.W.2d 744 (Iowa 1978).

723. *State v. Cuevas*, 282 N.W.2d 74 (Iowa 1979).

724. The term "inchoate crimes" is used in G. DIX & M. SHARLOT, *CRIMINAL LAW: CASES AND MATERIALS* 684 (1973) [hereinafter cited G. DIX & M. SHARLOT], as compared to the term "anticipatory offenses" used in W. LAFAYE & A. SCOTT, *supra* note 398, §§ 58-66.

725. G. DIX & M. SHARLOT, *supra* note 724, at 684.

726. The interrelationship of these inchoate offenses is described as follows: *Solicitation* occurs when X requests Y to join him in committing sexual abuse; *Conspiracy* arises when Y agrees and an overt act in furtherance of the conspiratorial agreement is committed by one of them; an *attempt* occurs when either X or Y performs some perpetrating act sufficient to set the plan in motion (e.g., "grabbing" the intended sexual abuse victim and "announcing" his intentions). TRAINING MANUAL, *supra* note 43.

727. MODEL PENAL CODE §§ 5.01-.03, Comment to art. 5, at 24 (Tent. Draft No. 10, 1960).

728. *But see* note 729 *infra*.

729. Under common law principles of merger, Solicitation merges into Conspiracy, and thus a successful solicitor cannot be convicted of both Solicitation and Conspiracy. *Begley v. Commonwealth*, 22 Ky. L. Rep. 1546, 60 S.W. 847 (1901). See R. PERKINS, *supra* note 398, at 584. In Iowa, a person "may not be convicted and sentenced for both the conspiracy and for the public offense." IOWA CODE § 706.4 (1979). The term "public offense" appears broad enough to include both the attempted offense and the consummated substantive offense. However, a person can be convicted for Attempt even when the evidence clearly shows that the target substantive offense was consummated. See *State v. Banks*, 213 N.W.2d 483 (Iowa 1973) (upholding a

A. *Attempt*<sup>730</sup>

The new Criminal Code, like the former Code, does not contain a general attempt statute. The attempted offense is *incorporated* into the consummated substantive offense itself in many statutes in the new Code,<sup>731</sup> thus rendering the attempted offense and the consummated substantive offense equally punishable. Attempted murder,<sup>732</sup> however, is maintained as a separate offense. Another more limited way to charge attempted offenses is by way of the crime of Assault While Participating in a Felony under section 708.3 of the Code.<sup>733</sup> However, assault is an essential element of that offense.

The potential overlapping of proscribed attempt-type conduct covered by a substantive offense (e.g., Robbery) and the inchoate offense of Assault While Participating in a Felony does not render the substantive offense unconstitutional. In *State v. Pierce*,<sup>734</sup> the supreme court held both that due process does not preclude the General Assembly, in its legislative prerogative, from eliminating taking as an element of the revised crime of Robbery and that the Robbery statute "is no less clear merely because the conduct proscribed may overlap conduct which is also proscribed under a separate statute"<sup>735</sup> (referring to Assault While Participating in a Felony as it relates to an unsuccessful, or attempted, Robbery). Although not resolved by the *ratio decidendi* of *State v. Pierce*, it appears that standard principles of prosecutorial discretion<sup>736</sup> will govern on the question of whether an attempted Robbery or attempted Sexual Abuse is charged under the more severe respective substantive offenses or under the less severe inchoate-type offense of Assault While Participating in a Felony.

A *casus omissus* occurs concerning an unsuccessful theft since the crime of Theft<sup>737</sup> does not include the attempted offense within its definition.<sup>738</sup> The same situation apparently occurs with the would-be burglar who has merely attempted to break in at the time of his apprehension, since attempted burglary apparently is not included in the definition of Burglary

jury verdict of guilty for the pre-revised crime of attempted rape even though penetration indisputably occurred and defense theory was consent).

730. See generally, W. LAFAYE & A. SCOTT, *supra* note 398, §§ 59-60; R. PERKINS, *supra* note 398, at 552-90.

731. See, e.g., IOWA CODE § 711.1-.3, 712.1-.4 (1979) (Robbery and Arson).

732. See IOWA CODE § 707.11 (1979).

733. This "revised" crime consolidates the following three pre-revised crimes: IOWA CODE §§ 694.5 (Assault with Intent to Commit a Felony); 694.7 (Assault with Intent to Commit Certain Crimes); 698.4 (Assault with Intent to Commit Rape)(1977) (repealed 1978). See text accompanying notes 684-704 *infra*.

734. 287 N.W.2d 570 (Iowa 1980).

735. *Id.* at 574.

736. See note 1050 *infra*.

737. See IOWA CODE §§ 714.1-.2 (1979) and text accompanying notes 1064-1213 *infra*.

738. But see discussion of Fraudulent Practices as a limited attempted theft provision in text accompanying notes 1214-49 *infra*.

itself.<sup>739</sup>

Professor Yeager reports that "a general effort was made [in the drafting process] to avoid the problems inherent in formulating specific 'criminal attempts' legislation by defining the underlying substantive crimes broadly enough to include all the conduct which should be treated as criminal."<sup>740</sup> Contrastingly, Professor Schantz opines: "Perhaps most surprisingly, the [then] Proposed Code eschews a general attempt provision."<sup>741</sup> This "incorporating" or "equalizing" approach thus focuses upon the defendant-actor's conduct rather than upon the gravity of the harm done.

### 1. *Overt Act*

In the absence of statutory modification in the Iowa Code, the following common law principles relating to what constitutes an attempt should prevail. A criminal attempt is "a step towards a criminal offense with specific intent to commit that particular crime."<sup>742</sup> Thus, there must be an overt act "amounting to more than mere preparation and performed in furtherance of the commission of the prohibited act,"<sup>743</sup> together with proof of specific intent. The Iowa Supreme Court fashioned the following test for determining the sufficiency of the conduct constituting the overt acts under the pre-revised law:

The overt act must reach far enough towards the accomplishment, toward the desired result, to amount to the commencement of the consummation, not merely preparatory. It need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt. . . .<sup>744</sup>

The above articulated test does not apply, however, to the crime of At-

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739. IOWA CODE § 713.1 (1979). See text accompanying notes 997-1007 *infra*.

740. Yeager Note, *supra* note 68, at 513.

741. Schantz, *supra* note 2, at 442.

742. R. PERKINS, *supra* note 398, at 552.

743. Yeager Note, *supra* note 68, at 513. See also R. PERKINS, *supra* note 398, which states:

A distinction is made between measures taken by way of preparation for the commission of a crime and steps taken in the direction of its actual perpetration . . . Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.

*Id.* at 557 (cites omitted).

744. State v. Roby, 194 Iowa 1032, 1043, 188 N.W. 709, 714 (1922).

tempted Murder.<sup>745</sup> The statutory definition of that crime contains its own specific test, one which applies expressly only to Attempted Murder.<sup>746</sup> This test embodies "any act by which he or she expects to set in motion a force or chain of events which will cause or result in the death of such other person."<sup>747</sup>

The failure of the General Assembly to provide a general statutory test for determining attempt liability, while at the same time providing a specific test for one crime, should mean that the above-mentioned common law test previously adopted by the Iowa Supreme Court remains in effect for all other crimes. Because the legislature "is presumed to know the existing state of the law at the time of the enactment of a new statute,"<sup>748</sup> the failure to provide a statutory test of general applicability is a strong indication of legislative intent to leave the common law test intact except as to the one crime of Attempted Murder. Of course, the supreme court is free to adopt the section 707.11 definition relating to Attempted Murder as the general test. However, the Special Committee on Uniform Court Instructions of the Iowa State Bar Association is not privileged to make such an election to utilize the Attempted Murder test. Nevertheless, the committee's revised Uniform Jury Instructions relating to general attempt liability utilize the specific test set out in the Iowa Code § 707.11.<sup>749</sup>

## 2. Mental State

Attempt liability is grounded solely upon *specific intent*<sup>750</sup> to commit a particular crime. As such, attempt liability cannot be based upon negligence,<sup>751</sup> no matter how "great the danger or extreme the negligence."<sup>752</sup>

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745. See IOWA CODE § 707.11 (1979).

746. See *Adams v. Commonwealth*, 215 Va. 257, 208 S.E.2d 742 (1974), in which a conviction for attempted prostitution was reversed because of the application of the general test for attempt liability instead of the specific test applicable only to this offense. "Attempted prostitution, unlike attempts to commit crimes generally, is defined solely by CODE § 18.1-194 and, as so defined, is incorporated within the offense of prostitution itself." *Id.* at 258, 208 S.E.2d at 743-44.

747. IOWA CODE § 707.11 (1979).

748. *State v. Rauhauser*, 272 N.W.2d 432, 434 (Iowa 1978).

749. See IOWA CODE § 707.11 (1979).

750. See notes 480-509 *supra*.

751. "The act must be done with the specific intent to commit the particular crime the accused is charged with attempting to commit. This intent cannot be supplied by negligence, nor can there be an attempt at negligence, because a negligent act is necessarily done without intention." J. MILLER, *supra* note 474, at 96. But see W. LAFAYE & A. SCOTT, *supra* note 398, which states:

May a defendant be convicted of an attempt to commit a crime which is defined only in terms of reckless or negligent conduct? In theory at least, it is conceivable that conviction might be possible if the completed crime consists simply of reckless or negligent creation of danger and it was shown that the defendant actually intended to engage in conduct creating that danger.

Furthermore, the prosecution must prove that the defendant acted "with a certain purpose,"<sup>753</sup> as set out in the applicable statute.<sup>754</sup>

"To do an act from general malevolence is not an attempt to commit a crime, because there is no specific intent, though the act according to its consequences may amount to a substantive crime."<sup>755</sup> This difference between murder and attempted murder in this regard is an anomaly, since "to commit murder, one need not intend to take life, but to be guilty of an attempt to murder, he must so intend. It is not sufficient that his act, had it proved fatal, would have been murder."<sup>756</sup>

### B. Solicitation<sup>757</sup>

A new crime in the form of a *general* solicitation statute<sup>758</sup> was included in the new Criminal Code. Although there was no solicitation statute of general application under the pre-revised law, there were nevertheless at least three major specific solicitation statutes of limited application.<sup>759</sup> In addition to the general solicitation statute which applies to felonies of all classes as well as to aggravated misdemeanors, the new Criminal Code contains some substantive offenses which, by definition, include acts of solicitation (e.g., Suborning Perjury,<sup>760</sup> Bribery,<sup>761</sup> and Prostitution).<sup>762</sup> In these latter

*Id.* § 59, at 429.

752. R. PERKINS, *supra* note 398, at 574.

753. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 215.

754. "When a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found as a matter of fact before a conviction can be had. . . ." Thacker v. Commonwealth, 134 Va. 767, —, 114 S.E. 504, 505 (1922) (conviction for attempted murder reversed because of lack of evidence of intent to kill). *Accord*, Aikerson v. State, 295 So.2d 778 (Miss. 1974) (reversal of conviction for assault with intent to commit rape where the evidence "merely depicted a somewhat aimless attack," and was lacking as to the act of assault being done with the requisite intent to commit rape).

755. Thacker v. Commonwealth, 134 Va. 767, —, 114 S.E. 504, 506 (1922) (citing W. CLARK, HANDBOOK OF CRIMINAL LAW 111 (2d ed. 1902)).

756. *Id.* at —, 114 S.E. at 506 (citing 1 J. BISHOP, CRIMINAL LAW § 729, at 522 (9th ed. 1923)).

757. See generally J. YEAGER & R. CARLSON, *supra* note 3, §§ 101-03; W. LAFAYE & A. SCOTT, *supra* note 348, § 58; R. PERKINS, *supra* note 398, at 582-88.

758. IOWA CODE § 705.1 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 501-06. "The thought is that persons who actively promote the commission of crimes by others are sufficiently dangerous to the general welfare to be considered criminals, even when their attempts at such promotion are unsuccessful." STUDY COMM. REPORT, *supra* note 3, Comment at 31.

759. IOWA CODE §§ 690.8 (Advising or Inciting Murder); 721.3 (Attempt to Suborn Perjury); 724.2 (Solicitation for Prostitution (1977) (repealed 1978)).

760. IOWA CODE § 720.3 (1979).

761. *Id.* § 722.1.

762. *Id.* § 725.1.

instances, the prosecution, of course, would be for the substantive offense,<sup>763</sup> as the specific statute controls over the general statute.<sup>764</sup>

The elements of Solicitation are: (1) command, entreat, or otherwise attempt to persuade; (2) another person; (3) to commit a particular<sup>765</sup> felony or aggravated misdemeanor; (4) with "corroborated" intent that the "target" crime actually be committed. The gist of the offense is in the act of persuading or attempting to persuade.<sup>766</sup> Thus, the crime is complete with the act of speaking words even though the request is refused,<sup>767</sup> provided that there is sufficient corroborative evidence of defendant's intent.<sup>768</sup> Moreover, the person solicited is never guilty of Solicitation<sup>769</sup>—even if he agrees to the criminal design, as only the solicitor can be guilty of Solicitation.<sup>770</sup> The criminal responsibility of the successfully-solicited person must rest upon his participation in other inchoate crimes (*i.e.*, Conspiracy or attempted substantive offenses) or in the consummated substantive offense itself.<sup>771</sup>

### 1. Corroboration of Intent

The act of soliciting must be done with the specific intent<sup>772</sup> that the solicited act be done "under circumstances which corroborates [*sic*] that intent by clear and convincing evidence," under Iowa Code section 705.1.<sup>773</sup>

763. "[F]or such offenses this section [on Solicitation] should be disregarded as irrelevant, on the theory that one cannot be guilty of soliciting an act which is itself a solicitation." J. YEAGER & R. CARLSON, *supra* note 3, at 30.

764. *Cartee v. Brewer*, 265 N.W.2d 730 (Iowa 1978); *State v. Thompson*, 253 N.W.2d 608 (Iowa 1977).

765. "Particular" crimes must be solicited because to prohibit general exhortations would involve free speech problems. G. DIX & M. SHARLOT, *supra* note 724, at 750.

766. By including commanding, entreating, or otherwise attempting to persuade as alternative modes of the *actus reus*, the revised crime of Solicitation is much broader than the *actus reus* of the pre-revised specific solicitation statutes. *See, e.g.*, *State v. Willis*, 218 N.W.2d 921 (Iowa 1974) (the term "solicit another" in the pre-revised crime of Solicitation for Prostitution signifies the "asking or urging of another").

767. A person is guilty of Solicitation even if the person solicited immediately rejects the proposal, and regardless of whether or not there is any agreement or overt act. *Hutchins v. Municipal Court*, 61 Cal. App. 3d 77, 132 Cal. Rptr. 158 (Dist. Ct. App. 1976); *accord*, *State v. Blechman*, 135 N.J.L. 99, 50 A.2d 152 (1946) (one who counsels another to burn solicitor's insured building is guilty of Solicitation even though no step is taken to carry out the solicitor's request).

768. *See* IOWA CODE § 705.1 (1979).

769. *See* *State v. Walker*, 247 N.W.2d 1 (Iowa 1976).

770. "Conspiracy differs from solicitation in that one person alone is criminally liable for solicitation by reason of suggesting to or commanding or persuading another that he commit a crime; while in conspiracy two or more persons, with common intent and purpose, agree among themselves upon the criminal objective." J. MILLER, *supra* note 474, at 107.

771. The parameters of the criminal responsibility of the solicitor are discussed in the text accompanying notes 795-804 *infra*.

772. *See* text accompanying notes 480-509 *supra*.

773. *See* UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 503.

The purpose of corroboration is to protect against the possibility that comments made in jest<sup>774</sup> may form the basis of a criminal prosecution.<sup>775</sup> A corroborative overt act<sup>776</sup> might include producing a detailed "blueprint" of an intended robbery scene or taking a solicited person to the intended crime scene to "case" the place.

## 2. Corroboration of Testimony by the Solicited Person

The evidentiary rules set out in Rule 20(3) of the Iowa Rules of Criminal Procedure prevent a conviction based solely upon the uncorroborated testimony of a "solicited person."<sup>777</sup> By the terms of the rule, this corrobora-

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774. *E.g.*, idle machismo tavern "talk."

775. J. YEAGER & R. CARLSON, *supra* note 3, states:

[T]he [drafting] committee was somewhat apprehensive that a solicitation statute might prove to be excessively restrictive on free speech or be otherwise subject to abuse, resulting in prosecutions for casual comments which are not intended to be taken seriously; hence the unusual provision for renunciation and the requirement of corroboration of intent by clear and convincing evidence.

*Id.* § 101, at 29.

776. "Such corroboration cannot be supplied merely by the fact of the solicitation, but must be proved independently. The evidence must tend to show, strengthen, confirm or point out that the defendant, when he solicited the commission of the offense, if he did so, intended that the offense be committed. The corroboration may be proved by either direct or circumstantial evidence."

UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 503.

777. Whether an undercover police officer or agent who successfully can be a "solicited person" for purposes of the corroboration requirement in Rule 20(3) remains to be determined. On its face, Rule 20(3) does not exempt peace officers or their agents and there is no sound public policy reason for the courts to do so by judicial interpretation. This non-exemption approach would be especially meaningful in a situation in which the "solicited" crime is never attempted or completed (*e.g.*, a contract murder with an undercover police officer allegedly approached by the defendant to be the supposed "hit man").

A trickier question is whether the officer is a "solicited person" when the evidence shows that he actually initiated the contact which directly culminated in criminal activity with another. That is, can an undercover officer approach a suspected drug dealer and offer to make a buy, then be "solicited" by the dealer's offer to sell? Probably so, in light of the evident public policy protecting a person against a conviction for Solicitation, a new statutory crime unrecognized at common law and which punishes speech, based solely upon the uncorroborated word of another person claiming to have been solicited. Of course, an officer may be reluctant to establish that he actually initiated or "instigated" this course of conduct in light of the policy activity provision in IOWA CODE § 704.11 (1979), as discussed in text accompanying notes 814-24 *infra*.

In *State v. Iowa District Court*, 271 N.W.2d 704 (Iowa 1978), the supreme court refused to adjudicate on a point of law the question of whether a successful police undercover agent is a "solicited person" whose trial testimony on a charge of Delivery of a controlled substance would require corroboration under IOWA R. CRIM. 20(3). Because "a substantial factual controversy" arose with the defendant claiming that the agent "solicited" the purchase and the officer claiming that the defendant voluntarily offered the drugs to him following contact with the defendant by a third party on behalf of the officer, the supreme court held that "it is inappropriate to adjudicate the point." 271 N.W.2d at 705.

tion must be established "by other evidence which shall tend to connect the defendant with the commission of the offense [and it] is not sufficient if it merely shows the commission of the offense or the circumstances thereof." It should be permissible to prove corroboration by either direct or circumstantial evidence.<sup>778</sup>

A jury would be instructed under Uniform Jury Instruction No. 202 that it, in effect, first must find that a witness is a "solicited person," as defined therein. If it does, "then the defendant cannot be convicted solely upon the solicited person's testimony." Instead, the jury must find "other evidence which tends to connect the defendant, that is, tends to single out and point to him as one of the persons who committed the offense [of Solicitation]."<sup>779</sup>

The issue of corroboration, of course, will only arise when there is no other prosecution witness. Thus, this provision does not *ipso facto* require corroboration of the testimony by a "solicited person," upon pain of its exclusion or its being stricken.

### 3. Renunciation

A statutory defense of renunciation exists in section 705.2 of the Code. Renunciation, however, apparently must be successful and not merely attempted, notwithstanding the zealotry of such an attempt.<sup>780</sup> That is, the defendant-solicitor must either persuade the solicited person not to commit the target crime or must otherwise prevent the commission of that offense. If unsuccessful, then the defendant-solicitor is equally guilty, as an accessory before the fact, if the target substantive crime is committed or attempted by his "confederate."<sup>781</sup> The terms of the statute itself state:

A renunciation is not voluntary and complete if it is motivated in whole or in part by (a) the person's belief that circumstances exist which increase the possibility of *detection or apprehension* of the defendant or another or which makes more difficult the consummation of the offense or (b) the person's decision to *postpone* the offense until another time or, to *substitute* another *victim* or another but similar *objective*.<sup>782</sup>

Moreover, the renunciation must be timely. It must occur *before* the commission of an overt act by any of the co-conspirators. Once the conspiracy is complete upon the requisite agreement and an overt act, then renunciation is no longer operative, since renunciation is a defense only for the crime of

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778. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 50.

779. *Id.*, at No. 202.

780. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 505, which states that "the 'renunciation' by the defendant must be complete and voluntary, that is, done under such circumstances that clearly indicated he did not want or intend that the offense be committed."

781. See notes 798-800 *infra*.

782. IOWA CODE § 705.2 (1979) (emphasis added).



Solicitation and not for Conspiracy.<sup>783</sup>

The new Criminal Code is silent as to the allocation of the burden of proof where renunciation is asserted as a defense. However, the burden of disproving renunciation is placed upon the prosecution in Uniform Jury Instruction No. 504.<sup>784</sup> Pursuant thereto, the prosecution would have to prove beyond a reasonable doubt that "the persuasion and prevention was [*sic*] not done under such circumstances as to indicate the defendant's complete and voluntary abandonment or rejection of his intent that the offense be committed."

Such an approach appears to be erroneous,<sup>785</sup> because of its misunderstanding of the nature of the crime of Solicitation. This crime is complete (and thus *ipso facto* punishable) upon the very commission of the act of persuading or attempting to persuade, accompanied by the requisite intent.<sup>786</sup> The issue of renunciation therefore does not even arise until sometime *after* the crime of Solicitation is complete.<sup>787</sup> Whereas renunciation, if proved, would, in effect, vitiate the solicitor's intent, nevertheless the requisite intent is to be determined co-terminous with the commission of the criminal act.<sup>788</sup> Renunciation is therefore different from the defenses of insanity, diminished responsibility, and entrapment.<sup>789</sup> These three defenses negate the existence of the mens rea component *at the time of* the commis-

783. See J. YEAGER & R. CARLSON, *supra* note 3, § 103.

784. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 504.

785. J. ROEHRLICK, *supra* note 620, states:

This [section 705.2] is a codification of the common law defense to solicitation; that is, there was no intent and the defendant abandoned his plans. It is felt, however, that the last sentence may place a burden of proof upon the defendant to show that it falls outside of the exceptions which are listed therein. Obviously for the defense to prevail, there must be a *complete and voluntary* renunciation. Therefore, if the defendant introduces the defense of solicitation, he will have the burden of proof. Thus, this is likely to be held as an affirmative defense.

*Id.* at 57 (emphasis in original).

786. See J. YEAGER & R. CARLSON, *supra* note 3, § 103. Professor Yeager does not squarely discuss the issue of allocation of the burden of proof, but it appears that the implication from the overall tenor of his discussion is that he feels that renunciation is an affirmative defense to be proved by the defendant. See *State v. Blechman*, 135 N.J.L. 99, 50 A.2d 152 (1946).

787. Solicitation, like Burglary, is a consummated offense upon the concurrence of the requisite actus reus and requisite mens rea, irrespective of the "target" substantive crime ever being committed or even attempted. See *People v. Robles*, 207 Cal. App. 2d 891, 24 Cal. Rptr. 708 (1962) (burglary). The *Robles* court stated that "[p]roof of intent at the time of entry does not depend upon the subsequent commission of the felony or even an attempt to commit it." *Id.* at \_\_\_, 24 Cal. Rptr. at 710.

788. See note 741, *supra*.

789. None of these three defenses is defined in the Criminal Code, thus leaving intact the pre-revised common law definitions set by the Iowa Supreme Court. These defenses are set out in the UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 206, 209, 213 (respectively). Defenses are not discussed in this Article.

sion of the criminal act. As such, the substantive crime is never actually completed when any of these latter three defenses is asserted.<sup>790</sup>

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790. This conclusion is buttressed by the general approach taken in *State v. Reese*, 272 N.W.2d 863 (Iowa 1978), which is the most recent decision on the question of allocation of the burden of proof as to defenses in criminal cases. In *Reese*, the court recognized for the first time the existence of the defense of necessity in a prosecution for Escape [under IOWA CODE § 745.1 (1977) (repealed 1978)] and then held that the state has the ultimate burden of risk of non-persuasion to disprove necessity beyond a reasonable doubt once the defendant has met his burden of going forward with the evidence by generating a fact question on the defense.

In reaching its conclusion on the burden of proof, the court analogized to its prior decisions placing the burden on the state to disprove the defenses of alibi, entrapment, insanity, intoxication, and self defense. Most particularly, the court felt that the analogy with entrapment was "especially persuasive because that defense, like necessity, is a question which arises after a showing of defendant's guilt has been made. In spite of such showing, as a matter of public policy, a conviction cannot be tolerated." 272 N.W.2d at 867. The reference to entrapment "[arising] after a showing of defendant's guilt has been made" indicates that the court presently takes the traditional approach that entrapment merely operates as justification to excuse what otherwise is crystallized or completed criminal activity, that is, that the entrapped defendant nevertheless formed the requisite criminal intent to commit the crime. An alternative approach would be that an entrapped defendant lacked the requisite criminal intent because that intent had not originated in his own mind but instead was implanted there improperly by law enforcement agents. See *State v. Heeron*, 208 Iowa 1151, 226 N.W. 30 (1929).

In *Reese*, the court determined that the defense of necessity "does not negate any element of a crime." 272 N.W.2d at 866. Rather, "the question of necessity arises only after it has been determined that a crime has occurred as an entirely independent inquiry." *Id.* This tack is questionable. Alternatively, the crux of the matter is that a prisoner faced with a situation of necessity (via "a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future" with no time for complaint to the prison authorities or the courts) commits the actus reus of unauthorized departure because of this necessity and thus lacks any criminal intent in escaping. *Id.* The focus should properly be upon the motivational force in departing.

Similarly, a person acting in self defense essentially has not acted with criminal intent. He instead had intended to kill but not because of any criminal motivation. The above is the proper analysis of the defenses of entrapment, self-defense, and necessity—that is, a defendant acting in any of these circumstances did not act with the requisite criminal intent.

Nevertheless, the reference in *Reese* to "a question which arises after a showing of defendant's guilt has been made" definitely has implications for the question of burden of proof on the defense of renunciation. As noted, the crime of Solicitation is already complete before the attempted renunciation. Indeed, there would be no need for renunciation unless the crime had already been committed. Thus, under the prevailing approach of the Iowa Supreme Court, renunciation would be akin to entrapment, self-defense, and necessity in being "a question which arises after a showing of defendant's guilt has been made." Even so, renunciation does not meet the second part of the prevailing test, namely, "[i]n spite of such showing, as a matter of public policy, a conviction cannot be tolerated." A defendant who was entrapped should not be convicted because of the intolerableness of such improper law enforcement activity. A defendant who acts in self-defense should not be convicted because of his inalienable right of self-preservation. A prisoner who escapes out of necessity should not invoke criminal responsibility. And the burden of disproving these three defenses should be on the state. However, renunciation is different. There is nothing unfair about requiring a defendant who has already exhibited the requisite conduct constituting the crime of Solicitation to carry the burden of proof as to his alleged defense of renunciation. Conclusively, the defendant in a prosecution for Solicitation

On the other hand, renunciation appears more analogous to the defense of having a valid prescription, on a charge of possession of a controlled substance.<sup>791</sup> In such a case, the prescription acts as an excuse for the defendant's act of possession, but the *defendant* bears the burden of proving the existence of a valid prescription.<sup>792</sup> Likewise, it can be argued that the defense of renunciation acts as an excuse for the actual commission of the solicitation offense, and that, therefore, the defendant should have the burden of proving the renunciation defense.

Further support is found for the above argument when one considers the test which the Iowa Supreme Court has followed in determining the allocation of the burden of proof relating to statutory exceptions. That test may be articulated as follows: If the exception is material in arriving at the definition of the crime, that is, where the exception is considered an essential element of the crime, then the prosecution has the burden of showing that the exception does not apply. When an exception merely furnishes an excuse for what would otherwise be criminal conduct, however, then the duty devolves upon the defendant to bring himself within the exculpatory provision.<sup>793</sup> Additionally, if the statutory requirement for the existence of the exception may be satisfied by objective facts "inaccessible as a practical matter to the prosecution but peculiarly within defendant's knowledge," then the exception is normally considered a defense or justification and not an element of the crime.<sup>794</sup>

#### 4. *Extent of Liability*

Solicitation amounts, in effect, to an attempt to form a conspiracy.<sup>795</sup> If the solicitation is unsuccessful, then the solicitor still can be convicted of Solicitation.<sup>796</sup> If the solicitation is successful, then both the solicitor and the solicitee(s) can be convicted of at least Conspiracy, even if the target substantive crime is never completed or even attempted.<sup>797</sup> If the design is attempted or completed, then the original solicitor will be equally liable as an accomplice or co-conspirator for all acts committed within the scope of

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did have *criminal* intent at the time of his *actus reus*, absent any improper influences militating against a voluntary and informed judgment. The same certainly cannot be said about a defendant whose conduct (the *actus reus*) was motivated by entrapment, self-defense, or necessity.

791. See IOWA CODE § 204.401(3) (1979).

792. *Id.* § 204.507, which states that "[i]t is not necessary for the state to negate any exemption or exception set forth in this chapter [on controlled substances] . . . [T]he proof of entitlement to any exemption or exception by the person claiming its benefit shall be a valid defense." See *State v. Gibbs*, 239 N.W.2d 866 (Iowa 1976); *State v. Lynch*, 197 N.W.2d 186 (Iowa 1972) (upholding constitutionality of verbatim predecessor statute).

793. *State v. Lynch*, 197 N.W.2d 186 (Iowa 1972).

794. *State v. Gibbs*, 239 N.W.2d 866, 868 (Iowa 1976).

795. See generally, W. LAFAYE & A. SCOTT, *supra* note 398, § 58, at 417.

796. *State v. Blechman*, 135 N.J.L. 99, 50 A.2d 152 (1946).

797. W. LAFAYE & A. SCOTT, *supra* note 398, § 58, at 414.

the Conspiracy while he remains a member thereof<sup>798</sup> (either of attempt<sup>799</sup> or the completed target offense<sup>800</sup>).

The crime of soliciting another person to commit a crime (either jointly with the solicitor or on behalf of the solicitor) is thus distinct from Conspiracy, Attempt Liability, and Aiding and Abetting. Being a distinct offense itself, Solicitation criminalizes wrongful conduct at a much earlier stage. As such, it plugs a loophole in the Iowa criminal law, since "[t]he law of attempts and accomplice liability frequently would not reach this culpable conduct if the solicited crime did not occur."<sup>801</sup> Accordingly, the mere act of Solicitation in hiring a "hit man" to murder someone does not constitute the crime of attempted murder where the murder never was attempted.<sup>802</sup> In this circumstance, the act of soliciting is mere preparation whereas attempt liability requires a perpetrating act.<sup>803</sup> Solicitation plus some other conduct transcending preparation may constitute an attempt, however.<sup>804</sup>

## 5. Merger

A successful solicitor presumably cannot be convicted of both Solicitation and Conspiracy. Solicitation, in the nature of an attempted conspiracy,<sup>805</sup> thus merges into Conspiracy.<sup>806</sup> Nor can a solicitor be guilty of both Solicitation and the substantive offense itself.<sup>807</sup> This is because his criminal responsibility will arise from the commission of the substantive offense itself (as either a principal or as an accessory before the fact via Solicitation) or

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798. G. DIX & M. SHARLOT, *supra* note 724, at 749-50; W. LAFAVE & A. SCOTT, *supra* note 398, § 58, at 417; R. PERKINS, *supra* note 398, at 582-84.

799. "If the one solicited goes far enough to incur guilt of an attempt to commit the [target substantive] crime, the solicitor is also guilty of attempt." R. PERKINS, *supra* note 398, at 584 [citing *State v. Jones*, 83 N.C. 605 (1880); *Uhl v. Commonwealth*, 47 Va. (Gratt.) 706 (1849)].

800. "One who successfully solicits another to commit a crime is guilty of the offense committed unless some special defense is available to him." *Id.* at 582 [citing *People v. Harper*, 25 Cal.2d 862, 156 P.2d 249 (1945)].

801. Schantz, *supra* note 2, at 441.

802. *Gervin v. State*, 371 S.W.2d 449 (Tenn. 1963).

803. *Id.* at 451.

804. *Id.* at 452. Whereas a mere solicitation generally is not considered sufficient for attempt liability, "a solicitation accompanied by other overt acts, such as the furnishing of materials, is an attempt." W. LAFAVE & A. SCOTT, *supra* note 398, § 62, at 423.

805. G. DIX & M. SHARLOT, *supra* note 724, at 749.

806. *Begley v. Commonwealth*, 22 Ky. L. Rep. 1546, 60 S.W. 847 (1901); J. MILLER, *supra* note 474, at 107.

807. "The solicitation is so far merged in the resulting offense that the solicitor cannot be punished for both." R. PERKINS, *supra* note 398, at 584. Perkins continues, however:

"There is no sound reason why there should be any rule of absolute merger. If the evidence of an indictable solicitation is clear, for example, while there is a conflict as to whether the one solicited did or did not proceed far enough to have committed a criminal attempt, there should be no bar to a conviction for the solicitation."

*Id.*

from the Conspiracy (if the substantive crime is not committed).

## 6. *Classification of Crime Solicited*

Solicitation, under Code section 705.1, applies only to felonies and aggravated misdemeanors. Thus, it is not a crime to solicit another to commit serious or simple misdemeanors.

This omission is questionable, in light of wrongful conduct being left unpunishable. The public interest is not served by indirectly "permitting" persons to solicit others to commit even such a "minor" offense as a simple Assault. Granted, the potential harm is less if Solicitation of a serious or simple misdemeanor is successful (than if a more serious offense is solicited) nevertheless, the criminal law should not leave such gaps in ordering a peaceful society. This statutory gap is especially questionable in light of the revised related offense of Conspiracy<sup>808</sup> applying to all three levels of misdemeanors.

## 7. *Grading*

There are two grades of Solicitation, with the distinction based upon whether a felony or an aggravated misdemeanor is the crime which is the object of the solicitation. Solicitation of a felony of any class<sup>809</sup> is itself a class D felony.<sup>810</sup> As a non-forcible felony, however, Solicitation is not subject to the prohibition on ameliorative sentencing options (*i.e.*, a deferred judgment, a deferred sentence, or a suspended sentence) applicable to "forcible felonies"<sup>811</sup> even though a "forcible felony" is the object of the solicitation. Solicitation of an aggravated misdemeanor is itself punishable as an aggravated misdemeanor.<sup>812</sup>

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808. See IOWA CODE § 706.3 (1979) and text accompanying notes 831-61 *supra*.

809. The single penalty for Solicitation of any class of felony offenses focuses solely on defendant's act of soliciting another to commit a felony without taking into account the seriousness of the particular felony solicited. Thus, the same five-year imprisonment for Solicitation applies to Solicitation of a class A felony offense (which is punishable by a life term); Solicitation of a class B felony offense (25-year term); Solicitation of a class C felony offense (10-year term); or Solicitation of a class D felony offense (5-year term).

810. The single grade of this offense is a class D felony. It is punishable by either an indeterminate term of imprisonment of five years or a maximum fine of \$1,000 or both. Because this offense is a "forcible felony," none of the ameliorative sentencing alternatives (*i.e.*, a deferred judgment, a deferred sentence, or a suspended sentence of probation) is available, in lieu of the above-mentioned imprisonment. Moreover, being a "forcible felony," this offense is also subject to the mandatory minimum five-year sentence if a firearm is used or possessed during its commission.

811. See IOWA CODE § 702.11 (1979).

812. An aggravated misdemeanor is punishable by either a determinate term of confinement not to exceed two years or a maximum fine of \$5000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine.

This grading is unsound, especially when considered in context with the grading of the related offense of Conspiracy.<sup>813</sup> Providing in the Conspiracy statute for different grades (and corresponding different penalty levels) depending upon whether a "forcible felony" or a non-forcible felony was the target crime is preferable to the singular approach in Solicitation. Such a differentiation would focus upon the gravity of the crime solicited. An even better approach would have been a sliding scale punishing Solicitation as two classifications lower than the crime solicited (*e.g.*, Solicitation of a class A felony would be punishable itself as a class C felony).

#### 8. *Police Activity Limitation*

A new provision in section 704.11 of the Code establishing legitimate police undercover activity as justification for otherwise complicity in a crime has caused excitement in the law enforcement community, because of its arguable implications for rendering the undercover agent or informant guilty of the crime of Solicitation, if not also for the substantive offense being investigated, unless the strict requirements of the supposed defense are met. Because of poor draftsmanship, an innocuous provision intended merely to codify a well-recognized common law defense<sup>814</sup> has instead the potential of being a complicity provision extending criminal liability to law enforcement officers and their agents. Only a common sense approach by prosecutors in charging and by courts in interpreting this provision can prevent a ridiculous result. Magnifying the problem is the fact that the General Assembly has *supposedly* already "repaired" the provision. In its amended form, this provision reads:

704.11 POLICE ACTIVITY. A peace officer or person acting as an agent of or directed by any police agency who participates in the commission of a crime by another person solely for the purpose of gathering evidence leading to the prosecution of such other person shall not be guilty of that crime or of the crime of solicitation as set forth in section seven hundred five point one (705.1) of the Code, provided that *all* of the following are true:

1. He or she is not an *instigator* of the criminal activity.
2. He or she does not intentionally injure a nonparticipant in the crime.
3. He or she acts with the consent of superiors, or the necessity of immediate action precludes obtaining such consent.
4. His or her actions are reasonable under the circumstances.

This section is not intended to preclude the use of undercover or surveillance persons by law enforcement agencies in appropriate circumstances and manner. It is intended to discourage such activity to tempt, urge or persuade the commission of offenses by persons not already dis-

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813. See IOWA CODE § 706.3 (1979) and part III(C)(5) of this Article.

814. See generally W. LAFAYE & A. SCOTT, *supra* note 398, at 402-07.

posed to commit offenses of that kind.<sup>815</sup>

It is clear that *all four* of the listed provisos are necessary in order for this provision to apply. The concern is over the proviso that an officer or his agent (e.g., an informant) must not have been "an instigator of the criminal activity." The anxiety was heightened with the silence in the original form of section 704.11 regarding whether or not the officer or agent could be held criminally responsible for Solicitation, in light of express conditional exculpation for the substantive crime under investigation without mention of exculpation for Solicitation. An amendment in 1979<sup>816</sup> added a phrase also exculpating the officer or informant from the crime of Solicitation. However, the result is that an officer or agent *still* must meet the four-part test set out in section 704.11 itself in order to qualify for exculpation from personal criminal responsibility for either Solicitation or the substantive crime under investigation. The legislative response to this problem was wholly inadequate. The one change made in part one of the four-part test was changing the phraseology from the officer or agent must not be "*the* instigator of the criminal activity" to "*an* instigator of the criminal activity." The distinction between "the" and "an" is not evident. An undercover narcotics agent who attempts to make a "buy" certainly could be considered to be "an," if not "the," instigator.

The term "instigator" is not defined elsewhere in the Criminal Code and presumably the ordinary dictionary definition will be ascribed to it.<sup>817</sup> The word "instigate" is defined in Webster's Dictionary as: "To goad or urge forward: set on: provoke, incite."<sup>818</sup> Little solace is found in this broad definition<sup>819</sup> for the undercover agent or informant who initiates a meeting with a drug dealer, contract murderer, pimp, fence, or other person suspected of criminal involvement and offers money or other form of inducement for accomplishment of the criminal act by the other person.

The determinative question thus is: Did the General Assembly intend that undercover narcotics agents remain passive, without making an initial

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815. IOWA CODE § 704.11 (1979).

816. *Id.*

817. *State v. Wilson*, 287 N.W.2d 587 (Iowa 1980).

818. Webster's Third New International Dictionary 1171 (unabridged ed. 1961).

819. Although focusing upon whether the defendant had been entrapped, the Illinois Supreme Court has taken a realistically narrow approach to what constitutes "instigation" or solicitation by peace officers. In *Illinois v. Clark*, 7 Ill.2d 163, —, 130 N.E.2d 195, 199 (1955), that court held that "[i]t is not an instigation or solicitation to commit a crime for an individual or officer, having reason to believe another is committing a crime, to furnish an opportunity for the commission of the offense, if the purpose is, in good faith, to secure evidence against a guilty person and not to induce an innocent person to commit a crime." No entrapment was found in this case, in which an informant acting under the directions of a police officer contacted defendant by telephone and told defendant that he wanted to get some "stuff." Defendant told him to come over. The informant then went to defendant's apartment and was sold narcotic drugs. *Id.*

contact or overture, but being merely ready to make a "buy" once the drug dealer instigates the contact? The legislative history of this provision supports the proposition that this was not the intent. This provision first appeared in the bill recommended by the Criminal Code Revision Study Committee in its final report to the General Assembly in January 1973.<sup>820</sup> The language in the Committee's proposed bill was verbatim to that in Code section 704.11 in its original form until the 1979 amendment. Moreover, the language remained the same throughout the legislative process, appearing verbatim in S.F. 1150 and S.F. 85 (both as introduced and as passed).

The following explanatory comment to this section was made in a report by the subcommittee of the special standing committee which reviewed the study committee's proposed bill during the 1973 legislative session:

The purpose of this section is to authorize the use of informants and undercover agents in situations where the successful prosecution of persons engaging in a criminal activity should make this course of action necessary. The limits to which police officers may go in gathering evidence under these circumstances has never been clearly spelled out. The restrictions contained in the above section are suggested as adequate to permit the *effective use* of informants and undercover agents, without encouraging them to go to *excess* in performing these duties.<sup>821</sup>

The emphasis clearly was upon codification of the well-recognized principle permitting officers and their agents to use "undercover" activities.<sup>822</sup> Certainly, "*effective use*" of undercover agents cannot be made when they are rendered passive, albeit investigatorially impotent, by a provision precluding them from being "an instigator" of another's criminal activity.

Minimally, what should have been done to repair this section was to have stricken altogether any reference therein to an officer or his agent being "an instigator," thus leaving only the three other tests. Additionally, the provision should have been amended to read that an officer or agent "who, *without criminal intent*, participates in the commission of a crime by another person solely for the purpose of gathering evidence . . ." Nevertheless, proof of the officer's or agent's criminal intent would seem to be required even without such express legislative language. A basic tenet of our criminal law has been that criminal responsibility requires a "criminal" mind,<sup>823</sup> and

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820. Report of Criminal Code Rev. Study Comm., Proposed Revision of Iowa Criminal Laws § 410 at 35 (1974).

821. Substantive Law Subcomm. of the Crim. Code Review Comm., (Tent. Draft No.4, 1974), expl. comment to § 410.

822. See generally R. PERKINS, *supra* note 398, at 1031-36.

823. See *State v. Schultz*, 242 Iowa 1328, 50 N.W.2d 9 (1951). This rule, when applied to a peace officer, is best expressed in the old case of *State v. Torphy*, 78 Mo. App. 206 (1899), wherein the court stated:

Another illustration of the doctrine that the intent determines criminality is found in the rule that a detective who joins with persons in the commission of a crime for the purpose of securing their arrest and conviction is not punishable, although he so far



thus common law principles on mental state should be read into the statute. This would exculpate an officer or agent who clearly is "involved" merely as part of his assigned investigation and not also to make an illegal personal gain.

Ideally, the entire provision should be repealed in its entirety. This statutory repeal would reinstate the common law principle recognizing police activity as a defense to prosecution for the crimes participated in by an officer or agent in attempting solely to gather evidence against a criminal suspect. The legislative intent, as evidenced in the above mentioned subcommittee report, was laudable in placing some statutory restrictions upon excesses in undercover activity. But the import of the provision is grossly misplaced by, in effect, saying that an undercover agent who acts "excessively" (as defined in the very restrictive four-part test in section 704.11) becomes *criminally* responsible *himself* — for the crimes he is investigating.

A better approach to regulating an officer's or agent's "excesses" during a undercover investigation would be to establish a separate, comparatively minor, criminal offense of Excessive Investigation or something akin. There certainly is precedent for such an approach, as evidenced by the serious misdemeanor offense in Code section 808.10 for an officer who either maliciously sues out a search warrant without just cause or who willfully exceeds his authority during execution of a search warrant. This provision dates back to 1851.<sup>824</sup>

The last paragraph of section 704.11, as amended, is an interesting paradox. This paragraph was added by the General Assembly in an amendment in 1979 in response to the law enforcement community's concern over criminal responsibility of peace officers or their agents arising under the original provision for the reasons noted above. At first blush, this paragraph evinces the legislative intent that peace officers or their agents be immunized when performing their duties, including undercover activity, under ordinary circumstances. However, this explanatory paragraph is rife with qualifying language, to wit: this activity must be carried out "in appropriate circumstances and manner" in order to be immunized. The "appropriateness" of an officer's or agent's actions would seem to be subject to judging under the quad-partite statutory test, which, of course, includes the factor of the officer or agent not being "an instigator of the criminal activity."

The second sentence of the "explanatory" paragraph injects even more confusion. This sentence states that the intent merely is to "discourage" the use of undercover agents "to tempt, urge or persuade the commission of offenses by persons not already disposed to commit offenses of that kind." This statutory reference to criminal predisposition of the target of the un-

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cooperates as to be guilty if his intention had been the same as theirs.

*Id.* at \_\_\_\_\_. See also *State v. McKean*, 36 Iowa 343 (1873).

824. See IOWA CODE § 3308 (1851).

dercover activity unfortunately conjures up the subjective test of entrapment. Entrapment, of course, is a defense for the target of the undercover activity. The problem is that the currently-recognized test of entrapment in Iowa is the objective test<sup>825</sup> (which focuses upon the officer's or agent's activity rather than upon the target person's criminal predisposition).

This provision clearly does not authorize entrapment. Indeed, its very intent may be to negate the police-immunity defense of police activity in certain circumstances. The upshot of this dual approach is that section 704.11 leaves intact a defendant's right to raise entrapment (in its common law sense) as a defense to his criminal liability while at the same time immunizing a peace officer or his agent during legitimate undercover activity to the extent that "entrapment" (in its particularized sense under section 704.77) is not employed. Undercover activity short of "entrapment" is immunized under section 704.11; undercover activity constituting "entrapment" is not.

This interpretation considers "entrapment" in a particularized sense for purposes of this provision only. The starting point of the analysis is that the term "entrapment" does not appear in section 704.11. Indeed, the applicable terminology is contrary to the existing entrapment standard. This is evidenced in the last sentence of the amended provision, which states that its intent is "to discourage such activity to tempt, urge or persuade the commission of offenses by persons *not already disposed* to commit offenses of that kind."

The phrase "not already disposed" speaks the language of the subjective standard for the defense of entrapment which focuses upon the criminal defendant and especially his criminal predisposition or proclivity. Prior to the final passage of the new Criminal Code, even in its initial form in 1976, the Iowa Supreme Court had abandoned the subjective test of entrapment and substituted the objective test.<sup>826</sup> The latter focuses upon the particular activities of the undercover peace officer or his agent. The pertinent question thus is whether "a law enforcement agent induce[d] the commission of an offense using persuasion or other means likely to cause normally law-abiding persons to commit the offense."<sup>827</sup> Thus, the fact-finder must determine "what the effect of the agent's conduct would be on a normally law-abiding person."<sup>828</sup> As stated in *State v. Mullen*,<sup>829</sup> "the defense is treated primarily as a curb upon improper law enforcement techniques, to which the predisposition of the particular defendant is irrelevant."<sup>830</sup>

It bears repeating that the word "entrapment" is not used in section

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825. *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974).

826. *Id.* at 381.

827. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 213.

828. *Id.*

829. 216 N.W.2d 375 (Iowa 1974).

830. *Id.* at 382. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 213.

704.11, as it has a definite legal meaning (*i.e.*, the objective test). If the legislative intent was to change the standard for entrapment, the easiest way to accomplish this would have been to use the word "entrapment" in the aforementioned explanatory last sentence in the amended provision. Instead, however, the statutory language refers to discouraging police activity that involves persons "not already disposed to commit offenses of that kind."

Because, as noted above, the thrust of this sentence is not to change the standard for the defense of entrapment, there must have been some other purpose for this statement. A logical interpretation would be that this explanatory sentence clarifies that the word "instigator" in section one of the provision refers to entrapment in the subjective sense. This interpretation is of dual significance. First, as noted above, the word "instigate" should be read as meaning more than to merely initiate. Otherwise, effective undercover police activity would become almost a nullity. Indeed, "instigate" means to goad, provoke, or incite, as noted above.

Secondly, this amended provision, so interpreted, would qualifiedly immunize police activity which constitutes entrapment under the objective test. Under the parameters of the objective test an officer or agent must still act reasonably and under the guise of authority. Accordingly, all personal violence crimes would be off limits. Either way, however, the defense of entrapment, as interpreted under the objective test, remains available to the private individual-criminal defendant who was the object of the undercover criminal investigation.

### C. Conspiracy<sup>831</sup>

Several changes were made in the revised crime of Conspiracy.<sup>832</sup> These changes have resulted in a "desirably narrower"<sup>833</sup> crime than under pre-revised law.<sup>834</sup> The gist of this crime remains, however, centered upon an unlawful agreement or combination.<sup>835</sup> The essential elements consist of (1)

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831. See generally J. YEAGER & R. CARLSON, *supra* note 3, §§ 11-16; UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 601-12; W. LAFAYE & A. SCOTT, *supra* note 398, §§ 61-62; R. PERKINS, *supra* note 398, at 612-35.

832. IOWA CODE § 706.1 (1979). Additionally, several specific conspiracy statutes relating to controlled substances offenses appear in IOWA CODE §§ 204.401(1), .401(2), .402(2), .403(2) (1979).

833. Schantz, *supra* note 2, at 441n.99.

834. IOWA CODE §§ 719.1, 782.6 (1977) (repealed 1978).

835. As explained in UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 605, an express agreement is not necessary. Rather, the members of a conspiracy must "in some way or manner or through some contrivance, [come] to a mutual understanding to commit a criminal act." *Id.* In contrast, under UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 606, mere association with others to discuss common criminal interests "does not necessarily establish the existence of an agreement or make one a member of a conspiracy."

A conspiracy agreement can be inferred from presence at the scene of a crime together and joint participation in criminal activity. If a person understands the unlawful nature of acts

an agreement or combination of two or more persons (2) to engage in criminal activity (3) with an overt act by at least one conspirator designed to accomplish the purpose of the Conspiracy.

### 1. *Mens Rea or Purpose*

There must be a *criminal* purpose of the conspiracy, either in whole or in part, thus eliminating the alternative purpose of committing a lawful act in an unlawful manner<sup>836</sup> as existed under the pre-revised statute.<sup>837</sup> Thus, Conspiracy remains a specific intent crime.<sup>838</sup>

### 2. *Overt Act*

Another change is that the revised crime requires the additional element of an overt act (by one or more of the co-conspirators), the nature of which evidences "a design to accomplish the purpose of the conspiracy by criminal means."<sup>839</sup> This could consist of some preparatory step being taken to carry out the design, "or which at least has a tendency to forward the purpose of the conspiracy."<sup>840</sup> Examples of overt acts in a conspiracy to commit murder would be for one of the co-conspirators to hand a loaded gun and a photograph of the intended victim to the trigger man, or even for the trigger man to obtain these on his own.<sup>841</sup>

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taking place and nevertheless assists in any manner in carrying out of the common scheme, he is a co-conspirator. *Bender v. State*, 253 A.2d 680 (Del. 1969).

836. See *State v. Jennings*, 195 N.W.2d 351 (Iowa 1972); J. YEAGER & R. CARLSON, *supra* note 3, § 112.

837. One authority states:

This definition of Conspiracy changes the law in Iowa. Previously a conspiracy could involve an agreement to commit civil wrongs. However, with the new definition, it appears that a conspiracy may only exist for the purpose of committing criminal acts. Therefore, no longer will a conspiracy exist to injure the property rights of another or to do injurious acts, unless they are, in and of themselves, criminal acts under other provisions of the code.

J. ROHRICK, *supra* note 620, at 59.

838. The prosecution must prove, under the UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 602, that the defendant entered into a conspiraceous agreement "with the intent that the object or purpose of the agreement be performed." See text accompanying notes 480-509 *supra*.

839. IOWA CODE § 706.1 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 607; J. YEAGER & R. CARLSON, *supra* note 3, § 113.

840. *California v. Olson*, 232 Cal.App.2d 480, —, 42 Cal. Rptr. 760, 767 (1965).

841. Compare *United States v. Armone*, 363 F.2d 385 (2d Cir. 1966) (yes) with *New York v. Flood*, 53 Misc.2d 109, 277 N.Y.S.2d 697 (Sup. Ct. 1966) (no), for contrasting opinions on whether mere conversations between or among co-conspirators in forming and planning the conspired design constitute overt acts.

### 3. Numerical Considerations

Another apparent change will cause a conspiracy to be treated "as a single conspiracy whether one or many criminal acts are planned."<sup>842</sup> This is because of the new statutory language referring to "a course of conduct." As a result, an agreement to burglarize a dwelling with the intent to pilfer its contents will not support two separate charges of Conspiracy to Commit Burglary and Conspiracy to Commit Theft.<sup>843</sup>

### 4. Merger

The most significant change in the law of Conspiracy effected in the new Criminal Code is to eliminate multiple convictions for the inchoate offense of Conspiracy and the substantive offense which was the target crime (or objective of the conspiracy).<sup>844</sup> Therefore, multiple defendants acting in concert to commit a burglary cannot be convicted of both Burglary and Conspiracy to Commit Burglary.<sup>845</sup> Because the statutory language says that a person "may not be *convicted and sentenced* for both [offenses],"<sup>846</sup> both offenses may still be *prosecuted* by including them in multiple counts of the indictment/trial information.<sup>847</sup> Under Iowa law, a person is not convicted until entry of judgment by the court.<sup>848</sup> Accordingly, it appears that the trier of fact could be given verdict forms as to both offenses, with the prosecution then being required to elect before entry of judgment which conviction it wants recorded. If this procedure is permissible, then the prosecution will no doubt argue for a further extension whereby it would be permitted to seek deferment of entry of judgment on one of the two offenses until the conviction on the other offense has been upheld (or the time for appealing has expired).<sup>849</sup> The prosecutor's option<sup>850</sup> in selecting either Conspiracy or the target substantive offense conspiraciously achieved is especially potent

842. J. YEAGER & R. CARLSON, *supra* note 3, § 112.

843. See *State v. Caine*, 105 N.W. 1018 (Iowa, 1906). Cf. *Lievers v. State*, 3 Md.App. 597, 241 A.2d 147 (1968) (conspiracy to utter a forged check was merged into conspiracy to obtain money by false pretenses, since no false representation independent of the uttering was shown by the evidence).

844. IOWA CODE § 706.4 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 116.

845. This statutory change in section 706.4 thus overrules *State v. Reynolds*, 250 N.W.2d 434, 439 (Iowa 1977) (no double jeopardy bar for multiple prosecutions of conspiracy and target substantive offense).

846. IOWA CODE § 706.4 (1979).

847. But see J. YEAGER & R. CARLSON, *supra* note 3, § 111: "Finally, although it is still possible to charge one with both the conspiracy and the substantive offense, he may not be convicted of both."

848. *Iowa Beer & Liquor Dep't v. McBlain*, 263 N.W.2d 226 (Iowa 1977).

849. But see IOWA R. CRIM. P. 22(1) which states that "[u]pon a plea of guilty [or a] verdict of guilty . . . the court must fix a date for pronouncing judgment, which must be *within a reasonable time* . . ." *Id.* (emphasis added).

850. See J. YEAGER & R. CARLSON, *supra* note 3, § 116.

when a class D "forcible felony" (a five-year offense)<sup>851</sup> is the object of the Conspiracy (a ten-year offense). This option is untenable.

One defect in the pre-revised law of Conspiracy which was not cured in the new Criminal Code is its "multilateral" definition of Conspiracy (an agreement of two or more persons) which, according to Professor Schantz, "has created loopholes when for one reason or another one of the alleged parties to the agreement cannot be prosecuted."<sup>852</sup> He notes that "[t]he Model Penal Code attempts to close this loophole by a 'unilateral' definition of conspiracy: liability is defined in terms of the defendant's act of *agreeing* rather than in terms of an *agreement* between two or more persons."<sup>853</sup>

## 5. Grading

There are five grades of Conspiracy, with the penalty classification ranging from a class C felony down to a simple misdemeanor.<sup>854</sup> Conspiring to commit a "forcible felony"<sup>855</sup> is punishable as a class C felony,<sup>856</sup> whereas a Conspiracy to commit any other (a non-forcible) felony is itself a class D felony.<sup>857</sup> On the other hand, a Conspiracy to commit a crime included in any of the three classes of misdemeanors is punishable as a misdemeanor of the same classification as the target crime.<sup>858</sup>

This five-level grading system contrasts favorably with the one grade of Conspiracy under the pre-revised law.<sup>859</sup> The former uniform penalty was an indeterminate term of imprisonment of three years, with no authorized fine. Moreover, Conspiracy was limited under the pre-revised law to felonies as the target crimes. Thus, a conspirator was equally punishable whether he had conspired under the pre-revised law to commit a life-imprisonment offense (*e.g.*, Murder in the First Degree) or merely a one-year felony (*e.g.*, Assault with Intent to Inflict Great Bodily Injury). Moreover, the pre-revised three-year penalty was inadequate for the most major target crimes (*e.g.*, a life-imprisonment offense), as well as inequitable for the most minor felonious target crimes (*e.g.*, the one-year felony of Assault with Intent to Inflict Great Bodily Injury). The new penalty schedules are considerably higher for all felonies, with an authorized ten-year term for Conspiracy to commit a "forcible felony" and a five-year term for Conspiracy involving any other felonies. These schedules cure most but not all of the problems of

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851. See text accompanying notes 70-102 *supra*.

852. Schantz, *supra* note 2, at 441 n.99.

853. *Id.*

854. For a general discussion of the penalty schedules and various sentencing alternatives for these five classifications of crimes, see notes 70-111 *supra* and accompanying text.

855. See text accompanying notes 70-96.3 *supra*.

856. See *id.*

857. See *id.*

858. See IOWA CODE § 706.3 (1979).

859. See IOWA CODE § 719.1 (1977) (repealed 1978).

inadequacy and inequity under the pre-revised law. Nevertheless, a person conspiring to commit a life offense (e.g., Murder in the First Degree) or even a twenty-five year class B felony (e.g., Robbery in the First Degree) is subject to a term of ten years while a person who conspires to commit a forcible felony in the class C (ten years) or class D (five years) schedule range is also subject to a ten-year sentence. This schedule, of course, is untenable as to the class D felony target crimes.

One ameliorative measure in the new Criminal Code permits a fine as an alternative penalty to either imprisonment or a suspended sentence. Unlike the pre-revised law, both class C (up to \$5000) and Class D (up to \$1000) felonies in the new Criminal Code can be punishable, in the sentencing court's judicial discretion, by fine only.<sup>860</sup>

Another change is that the revised crime of Conspiracy applies to misdemeanors as target crimes. This change seems appropriate, since unlawful combinations of persons intent upon committing a crime should be punishable irrespective of the classification of target substantive crime(s). The public interest is better served by discouraging group criminal activity even of a comparatively minor nature. This is especially true with the creation of the classification of aggravated misdemeanors which includes several rather serious offenses (including some pre-revised downgraded felonies).<sup>861</sup>

#### IV. PROPERTY ABUSE OFFENSES

##### A. Arson and Related Crimes

##### 1. Arson<sup>862</sup>

The revised crime of Arson consolidated into one offense several pre-revised crimes,<sup>863</sup> including intentional unlawful burnings of both real and personal property,<sup>864</sup> damage by explosives,<sup>865</sup> and attempted Arson.<sup>866</sup> The elements of Arson are as follows: (1) either causing a fire or explosion or

860. See IOWA CODE § 909.1 (1979) and text accompanying notes 75-102 *supra*.

861. For example, the pre-revised felony offense of Assault with Intent to Inflict Great Bodily Injury was downgraded to an aggravated misdemeanor in the related newly-constituted offense of Assault with Intent to Inflict Serious Injury. *Cf.* IOWA CODE § 694.6 (1977) (repealed 1978); IOWA CODE § 708.2(1) (1979). A temporizing effect of the new classification is apparent in the statutory treatment of the so-called "victimless crime" of Prostitution, which is punishable now as an aggravated misdemeanor instead of as a five-year felony under the pre-revised law. Compare IOWA CODE § 724.2 (1977) (repealed 1978) with IOWA CODE § 725.1 (1979).

862. IOWA CODE § 712.1 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1201-11; J. YEAGER & R. CARLSON, *supra* note 3, §§ 271-76; R. PERKINS, *supra* note 398, at 216-30.

863. For an extensive discussion of the pre-revised law through the changes proposed in the 1974 bill, see Note, *Arson*, 60 IOWA L. REV. 529 (1975) [hereinafter cited as *Arson Note*].

864. See IOWA CODE §§ 707.1-4 (1977) (repealed 1978).

865. *Id.* §§ 697.3, .4.

866. *Id.* § 707.5.

placing combustible material or an incendiary or explosive device (2) in or near real or personal "property"<sup>867</sup> (3) either with intent to destroy or damage such property or knowing such property would probably be destroyed or damaged. Several related offenses comprise the remainder of chapter 712 of the Iowa Code, as discussed in the remainder of part IV(A) of this Article.

a. *Attempted Arson Included.* The revised crime of Arson is statutorily defined to include attempted Arson, thus rendering attempted burning or attempted explosion equally punishable with burning or exploding. The attempt constitutes the act of *placing* combustible material or any incendiary or explosive device in or near real or personal property.<sup>868</sup> Attempted Arson requires successful placing of these devices, and a mere *attempt to place* these devices is not part of Arson, but instead is punishable under the related but less serious offense of Threats to Place Incendiary or Explosive Devices.<sup>869</sup> Likewise, a person apprehended in possession of these devices and intending to use them to commit a public offense, but having not yet placed or attempted to place them in or near real or personal property, commits the related but less serious crime of Possession of Explosive or Incendiary Materials or Devices.<sup>870</sup>

b. *Specific Result.* Arson is no longer a specific result crime. It is neither necessary that any actual damage occur, nor that fire or explosion itself occur. This is a change from common law Arson which required at least some damage,<sup>871</sup> with mere charring generally considered to be sufficient for Arson.<sup>872</sup>

c. *Mens Rea.* The new Criminal Code eliminates the requirement of specific intent which existed under the pre-revised statute. One authority states that, "[t]he specific intent to damage or destroy, or the general intent to do the act with knowledge of its probable consequences, is all that is required"<sup>873</sup> under the revised statute. Recklessness,<sup>874</sup> however, plays no part in Arson, with Reckless Use of Fire or Explosives<sup>875</sup> being a separate, but related and less serious, offense.

Malice<sup>876</sup> was also eliminated as an element in the new offense. How-

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867. "Property" is defined broadly as "anything of value," whether real or personal, in IOWA CODE § 702.14 (1979). See text accompanying notes 204-06 *supra*.

868. *Id.* § 712.1 (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 272.

869. IOWA CODE § 712.8 (1979). See discussion in text accompanying notes 925-31 *infra*.

870. *Id.* § 712.6. See discussion in text accompanying notes 918-24 *infra*.

871. R. PERKINS, *supra* note 398, at 220-21.

872. "Hence, the discoloration, scorching, or shrivelling of wood by fire may not amount to a burning, but the charring of wood, even in the absence of an actual blaze, is designated as a burning." *Arson Note*, *supra* note 863, at 533-34 (citing *State v. Spiegel*, 111 Iowa 701, 705, 83 N.W. 722, 723 (1900)).

873. J. YEAGER & R. CARLSON, *supra* note 3, § 272.

874. See text accompanying notes 594-601 *supra*.

875. IOWA CODE § 712.5 (1979). See text accompanying notes 911-17 *infra*.

876. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 216:



ever, this change may not be of major significance in light of the restrictive interpretation given the term "maliciously" under the pre-revised law. In *State v. Dunn*,<sup>877</sup> the Iowa Supreme Court pointed out that, while the pre-revised Arson statute required willful and malicious burning, willfully means "purposely, deliberately, intentionally" and "the intentional doing of a 'wrongful act,' without justification or lawful excuse, will permit an inference of a wicked state of mind, i.e., legal malice, as opposed to actual malice."<sup>878</sup> Accordingly, the court held that the prosecution was not required to prove the defendant's unlawful burning of another's personal property stemmed from his or her personal hostility or revenge towards the other person. To the contrary, the proof was that the defendant was hired by the owner of an automobile to burn the automobile, so that the owner could collect the insurance proceeds.<sup>879</sup>

d. *Explosions*. The newly-constituted offense of Arson, unlike its common law origin, is not limited to burning<sup>880</sup> or even to attempted burning. Rather, it is a more encompassing crime of destruction which includes damage or attempted damage by explosion. The vernacular of this revised crime includes such terms as "combustible material,"<sup>881</sup> "incendiary device,"<sup>882</sup> and "explosive device."<sup>883</sup> In contrast, only incendiary and explosive devices

Where "malice" is an essential element of the offense(s) or the degree(s) of offense(s) charged, it must be proved beyond a reasonable doubt. Malice is a state of mind which leads one to intentionally do a wrongful act (to the injury of another) (in disregard of the rights of another) which is done out of actual spite, hatred, ill will, or with an evil, wicked or unlawful purpose, knowing that the act is without just cause or excuse. Malice may be either express or implied.

Express malice is that which is established by proof of spite, hatred, ill will, or an evil, wicked or unlawful purpose or by proof of a deliberate or fixed intent to do injury.

Implied malice is that which may be inferred from the acts and conduct of the accused, and the means used by him in doing the wrongful and injurious act without legal justification or excuse.

*Id.* See also text accompanying notes 549-65 *supra*.

877. 199 N.W.2d 104 (Iowa 1972).

878. *Id.* at 108.

879. *Id.*

880. See R. PERKINS, *supra* note 398, at 220-23.

881. The term "combustible material" is not defined in the Criminal Code. However, "[s]ince the ordinary meaning of 'incendiary' is 'designed to cause fires,' it is difficult to comprehend how combustible material can become incendiary material without becoming an incendiary device." J. YEAGER & R. CARLSON, *supra* note 3, § 278. For the statutory definition of "incendiary device," see IOWA CODE § 702.21 (1979).

882. IOWA CODE § 702.11 (1977), was amended in 1978 adding the following definitional clause: "An incendiary device is a device, contrivance, or material causing or designed to cause destruction of property by fire." 1978 Iowa Acts 2d Sess. ch. 1183 (67th G.A.). It would appear that the definition of "incendiary device" in the UNIFORM JURY INSTRUCTIONS will need to be revised in order to conform with the statutory standard. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1213.

883. The term "explosive material" is comprehensively defined outside the Criminal Code

are included in the coverage of the related crimes comprising the remainder of chapter 712 of the Iowa Code.

e. *Felony Murder Rule.* The definitional change in the revised crime of Arson has the additional effect of altering the scope of the application of Arson as the underlying felony in a first degree felony murder situation. The basic change was brought about by the elimination of a dwelling house as the sole subject of the revised crime of Arson. Under the pre-revised law, every Arson could be the underlying felony in a first degree felony murder prosecution.<sup>884</sup> The revised crime of Arson, even in the first degree, not only is not limited to a dwelling house but also does not automatically include a dwelling house. Moreover, an intentional murder during an Arson in the second or third degree would be Murder in the Second Degree under the second-degree felony murder rule,<sup>885</sup> whereas the crime would only be Involuntary Manslaughter<sup>886</sup> if such a killing were unintentional.

f. *Arson by Owner Exception.* The broad approach taken in the Arson statute necessitated a specific provision<sup>887</sup> authorizing burning or blowing up of one's own unwanted "property,"<sup>888</sup> either directly or through another person. This, of course, may be done provided that no insurer is defrauded and the life or property of another person is not unreasonably endangered. The latter proviso thus sets a standard of care for a person who is burning his own property lawfully, without attempting to defraud his insurer.<sup>889</sup> Both of these provisos must be present for a defendant to be within the protection of this limited defense. In order for this defense to be applicable, the prosecution must be unable to prove beyond a reasonable doubt any one (or more) of the following three factors: (1) that the defendant did not have the owner's consent to so act, (2) that an insurer "was exposed fraudulently to the risk of loss," or (3) that the defendant's acts were done "in such a way" that the life or property of another "was unreasonably endangered."<sup>890</sup>

g. *Grading.* Arson is in the first degree<sup>891</sup> when the attendant circumstances were such that presence of a person could have been reasonably anticipated on or near the property involved. "[T]he mere possibility of the presence of a person is insufficient. Rather, the property must have been

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itself in IOWA CODE § 101A.1 (1979). In light of the absence of anything to the contrary, it is appropriate to read the § 101A.1 definition into the Arson and related offenses material in Chapter 712 under the principle of compatible statutory provisions being read *in pari materia*.

884. See IOWA CODE §§ 690.2 & 707.1 (1977) (repealed 1978).

885. See IOWA CODE § 707.3 (1979).

886. See *id.* § 707.5(1).

887. *Id.* § 712.1. See J. YEAGER & R. CARLSON, *supra* note 3, § 273.

888. For the statutory definition of property, see IOWA CODE § 702.14 (1979) and text accompanying notes 204-06 *supra*.

889. See generally J. YEAGER & R. CARLSON, *supra* note 3, § 273.

890. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1209.

891. IOWA CODE § 712.2 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1204, 1208.

such that a reasonable person would have anticipated or expected a person's presence in or on the property."<sup>892</sup>

The *actual* presence of a person may not be sufficient if such presence was not "reasonably anticipated," such as a trespasser in a warehouse or in an apparently abandoned property. Conversely, actual presence of a person clearly is not required. Rather, only *reasonable* anticipation of the presence of a person is required. The anticipation would be great where the target property is a dwelling house, or other residential or commercial property normally occupied by persons.<sup>893</sup>

Occupied residential property arguably should even carry a *presumption* that presence of a person therein was reasonably anticipated. However, any such presumption should be rebuttable, with the defendant carrying the burden of proving particular circumstances which would indicate that the presence of persons was not reasonably anticipated. This situation would occur, for example, where residential occupants unexpectedly returned home early from vacation, and the defendant was only aware of their original plans. Any presumption of presence of persons in an occupied dwelling house should not be *conclusive* because of the omission of any specific reference in the Arson statute to a dwelling.

A more meaningful approach would have been to expressly include an occupied dwelling in the category of Arson in the First Degree. That approach would more closely comport with the adage that a man's home is his castle, as was statutorily exemplified in the pre-revised statute, as well as having the advantage of eliminating any technical distinctions between actual presence of persons and reasonable anticipation of persons. Express inclusion of a dwelling was contained in the Criminal Code Revision Study Committee's report<sup>894</sup> and in S.F. 85 as introduced in 1975.<sup>895</sup> The fact that S.F. 85 was amended to delete specific mention of a dwelling is a strong indication of legislative intent that actual presence of persons even in a dwelling is not sufficient when there is no reasonable anticipation of persons being present.

Arson in the Second Degree<sup>896</sup> includes acts of Arson, whether successful or not, directed toward (1) real property of any value in which presence of persons was not reasonably anticipated, (2) personal property exceeding \$500 in value, or (3) standing crops of any value.<sup>897</sup> This makes Arson in the

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892. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1208.

893. TRAINING MANUAL, *supra* note 43, at 60.

894. See STUDY COMMITTEE REPORT, *supra* note 3, § 1202, at 24 (property covered to include "a dwelling, or a building in which the presence of one or more persons can be reasonably anticipated").

895. The same language as that quoted in note 894 *supra*, was included in § 1202 of S.F. 85, as introduced, but subsequently was deleted before final passage of S.F. 85.

896. IOWA CODE § 712.3 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1205.

897. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1205.

Third Degree<sup>898</sup> a residual section, covering only Arson involving personal property valued at \$500 or less. Because Arson no longer is a specific result crime, these dollar amounts relate to the value of the property involved and not to the amount of damage caused, if any. Unlike in the Theft statute,<sup>899</sup> no standard for determining value is set out in the Arson statute, nor is there an amplifying Uniform Jury Instruction.<sup>900</sup>

h. *Sentencing Options.* Arson in the First Degree is a class B felony whereas Arson in the Second and Third Degrees are class C and D felonies, respectively.<sup>901</sup> Only first degree Arson is a "forcible felony,"<sup>902</sup> and thus potentially subject to either the five year minimum term (if a firearm was involved)<sup>903</sup> or the first degree felony murder rule. Moreover, the ameliorative sentencing options of a deferred judgment, a deferred sentence, and a suspended sentence are not available for first degree Arson,<sup>904</sup> unlike the two lower degrees of Arson.<sup>905</sup> Moreover, no fine can be imposed for Arson in the First Degree unlike for the two lower degrees of Arson, thus leaving the sentencing judge with no discretion, being limited to the one sentencing option of imposing the twenty-five year prison term.

Another important sentencing change has occurred in the treatment of attempted Arson. Under the pre-revised law, attempted Arson, without more, was punishable by either an indeterminate penitentiary term of two years or a maximum fine of \$1000,<sup>906</sup> with all three above-mentioned ameliorative sentencing options available.<sup>907</sup> The revised crime of Arson includes attempted Arson,<sup>908</sup> which means that attempted Arson, if it qualifies as a class B felony,<sup>909</sup> can be punishable by as much as an indeterminate penitentiary term of twenty-five years, without the availability of a fine only as an alternative sentence. Furthermore, none of the three ameliorative sentencing options is available<sup>910</sup> for the revised crime of attempted Arson.

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898. IOWA CODE § 712.4 (1979).

899. *Id.* § 714.3.

900. *Cf.* UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1442 (value in theft cases).

901. For a discussion of the various sentencing options, see text accompanying notes 70-102 *supra*.

902. See IOWA CODE § 702.11 (1979).

903. See *id.* § 902.7.

904. See IOWA CODE §§ 702.11, 907.3 (1979).

905. See IOWA CODE § 789A.1 (1977) (repealed 1978).

906. See *id.* § 707.5.

907. See *id.* § 789A.1.

908. See text accompanying note 868 *supra*.

909. For a comprehensive discussion of the various sentencing options, see text accompanying notes 70-102 *supra*.

910. In a related matter of strengthening arson investigations, a 1979 legislative act authorizes certain law enforcement agencies to request relevant information held by insurance companies, which must produce it. A simple misdemeanor penalty attaches to a failure either to release this information or to fail to keep it confidential. (S.F. 339).

## 2. *Reckless Use of Fire or Explosive*

The related revised offense of Reckless Use of Fire or Explosives<sup>911</sup> fills the void in the law of Arson when the defendant did not act intentionally in using fire or explosives unlawfully. The elements are: (1) recklessly<sup>912</sup> (2) using fire or any incendiary or explosive device and (3) thus endangering property or safety of another.<sup>913</sup> So defined, (as "using"), there is no such thing as an attempted reckless use. Like the other related offenses below, this offense has only one degree and thus is not concerned at all with the values of the real or personal property involved. Unlike under the pre-revised statutes,<sup>914</sup> no actual damage is required, nor is it necessary for the prosecution to show actual loss of control of any fire which was recklessly started.<sup>915</sup> Moreover, Reckless Use of Fire or Explosives was not a criminal act under the pre-revised law.<sup>916</sup> This crime is merely a serious misdemeanor.<sup>917</sup>

## 3. *Possession of Explosive or Incendiary Devices*<sup>918</sup>

This is a mere possessory offense, where defendant is apprehended in possession<sup>919</sup> of explosive<sup>920</sup> or incendiary<sup>921</sup> devices but has not yet placed or attempted to place such devices in or near real or personal property. Nevertheless, this act of possession must be accompanied by a specific intent<sup>922</sup> to use these devices to commit a public offense.<sup>923</sup> The intended offense

911. IOWA CODE § 712.5 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1203, 1212-13; J. YEAGER & R. CARLSON, *supra* note 3, § 277; Arson Note, *supra* note 863, at 540-42.

912. See text accompanying notes 594-601 *supra*.

913. IOWA CODE § 712.5 (1979).

914. See IOWA CODE §§ 707.7-.8 (1977) (repealed 1978) (setting out fire and allowing fire to escape, respectively).

915. J. YEAGER & R. CARLSON, *supra* note 3, § 277.

916. See IOWA CODE §§ 697.3-.4 (1977) (repealed 1978) (both of these offenses are specific intent crimes); J. YEAGER & R. CARLSON, *supra* note 3, § 277.

917. For a discussion of the various sentencing options, see text accompanying notes 103-11 *supra*.

918. IOWA CODE § 712.6 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1214-17; J. YEAGER & R. CARLSON, *supra* note 3, § 278.

919. "Possession" does not require the devices to be on the defendant's person. It is sufficient if defendant is exercising dominion and control over them. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1217.

920. See text accompanying note 883 *supra*, for the definition of explosives.

921. See note 882 *supra*, for the definition of incendiary devices.

922. See text accompanying notes 480-509 *supra*.

923. J. YEAGER & R. CARLSON, *supra* note 3, states:

The major problem of the state in prosecutions under this section will be the proof of intent. This may limit the use of this section to attempt situations in which the action has not progressed to the point that a violation of § 712.1 can be proved, or to conspiracies in which the possession of these devices is the overt act.

could be any of several offenses other than Arson, such as Burglary, Extortion, or Murder. This possessory offense is a class C felony, but it is not a "forcible felony."<sup>924</sup>

#### 4. *Threats to Place Incendiary or Explosive Devices*<sup>925</sup>

The elements of this revised offense<sup>926</sup> are as follows: (1) either threatening to place or attempting to place (2) any incendiary or explosive device (3) in any place endangering persons or property.<sup>927</sup> So defined, this encompasses an attempted form of attempted Arson.<sup>928</sup> The word "attempt" is not defined in the Code, but is defined in a Uniform Jury Instruction as occurring when a person, "with the intent or purpose to commit an offense, takes action toward completing the offense."<sup>929</sup> This offense is a class D felony, but it is not a "forcible felony."<sup>930</sup>

The more serious offense of Arson<sup>931</sup> would occur if this threat is carried out by either (a) causing a fire or explosion or (b) actually placing these devices in or near property, with the requisite state of mind. For some reason, the lowest degree of Arson is classified as a class D felony, the same as is the classification for this inchoate-type offense. The offense of Threats to Place Incendiary or Explosive Devices is not a "forcible felony," however, as is Arson in the Third Degree.

#### 5. *False Reports*<sup>932</sup>

This specific type of false report offense consists of: (1) conveying or causing to be conveyed (2) to any person (3) any false information (4) about placement of incendiary or explosive devices (5) in any place where persons or property would be endangered (6) with knowledge<sup>933</sup> that the information

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*Id.* § 278.

924. For a discussion of the various sentencing options, see text accompanying notes 70-102 *supra*.

925. IOWA CODE § 712.8 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1220-21; J. YEAGER & R. CARLSON, *supra* note 3, § 280.

926. See IOWA CODE § 697.7 (1977) (repealed 1978).

927. "Note that there does not appear to be a requirement that the accused knew that the location would endanger persons or property, only that it could have so endangered a person or property. This is extremely subjective and vague." J. ROHRICK, *supra* note 620, at 136.

928. "This section is one of the few attempt sections of the new code." J. ROHRICK, *supra* note 620, at 136.

929. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1221. But see text accompanying notes 742-49 *supra*, as to whether this is the proper test for attempt liability.

930. See text accompanying notes 70-102 *supra*.

931. See IOWA CODE § 712.1-.4 (1979) and accompanying notes 862-909 *supra*.

932. *Id.* § 712.7. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1218-19; J. YEAGER & R. CARLSON, *supra* note 3, § 279.

933. See text accompanying notes 572-93.

is false.<sup>934</sup> The crime is not limited to making false reports to official agencies such as fire or police departments, but includes spreading false rumors to other private individuals. Further, there is no temporal limitation, with false reports thus relating to either past, present, or future conduct.<sup>935</sup> This is a class D felony, but is not a "forcible felony."<sup>936</sup>

### B. Criminal Mischief

The revised general offense of Criminal Mischief<sup>937</sup> replaces several pre-revised specific Malicious Injury statutes<sup>938</sup> dealing with various acts of property damage or destruction. Its elements are: (1) intentionally; (2) without a right to do so; (3) damaging, defacing, altering, or destroying; (4) *tangible* "property,"<sup>939</sup> public or private.<sup>940</sup> This includes damage to both real and personal property.<sup>941</sup>

#### 1. Intentional Action

Criminal Mischief is premised upon intentional actions together with knowledge of having no right to take such actions. Thus, damaging another's property through recklessness or mere carelessness is not sufficient to incur criminal culpability. Rather, intentional conduct is required, and the prosecution must prove under the Uniform Jury Instructions that defendant intended to damage, deface, alter, or destroy the property.<sup>942</sup> Elimination of

934. IOWA CODE § 712.7 (1979).

935. J. YEAGER & R. CARLSON, *supra* note 3, § 279.

936. For a discussion of the various sentencing options, see text accompanying notes 70-102 *supra*.

937. IOWA CODE §§ 716.1-6 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1601-06; J. YEAGER & R. CARLSON, *supra* note 3, §§ 371-77; R. PERKINS, *supra* note 398, at 331-39. Malicious Mischief was the common law predecessor offense.

938. See IOWA CODE § 714 (1977) (repealed 1978).

939. This offense is expressly limited by statute to tangible property [see IOWA CODE § 716.1 (1979)], contrary to the statutory general definition of property as "anything of value" including both "tangible and intangible property." IOWA CODE § 702.14 (1979). "Because the act is one of physical damage or destruction, the subject matter of criminal mischief must be tangible property, whether real or personal." J. YEAGER & R. CARLSON, *supra* note 3, § 371. The statutory general definition appears to be controlling, nevertheless, on the point of tangible property "of any value" being covered in the provisions on criminal mischief.

940. IOWA CODE § 716.1 (1979). One commentator states that section "717.1 [Injury to Animals] should be compared with § 716.1, which is concerned with damage to tangible property. Although animals are property, and are certainly not intangible, the inclusion of both § 716.1 and this section indicates a purpose to confine § 716.1 to inanimate property." J. YEAGER & R. CARLSON, *supra* note 3, § 392.

941. See IOWA CODE § 702.14 (1979). "The term [property] includes all that is included in the terms 'real property' and personal property." *Id.* See also note 939 *supra*. An example of damage to real property would be vandals intentionally tearing up sod. This would constitute criminal mischief even though the sod could be replaced and the lawn fully restored.

942. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1603. Accord, J. YEAGER &

malice as a particularized state of mind has broadened the scope of this revised crime by not requiring that the intentional act of mischief be done "out of spite, hatred, ill will, or with an evil, wicked, or unlawful purpose, knowing that the act is without just cause or excuse," as that term questionably is defined in the Uniform Jury Instructions.<sup>943</sup>

## 2. Grading and Sentencing Options

The grading of this offense into four degrees is essentially geared to the amount of damage caused. The key is the cost of replacing, repairing, or restoring the property, rather than either the value of the property affected or the amount of property valuation decrease caused. Moreover, the act of mischief need not result in a lowering of the value of the property involved.<sup>944</sup> A special verdict form is included in the Uniform Jury Instructions<sup>945</sup> for the jury to determine the cost of repair, replacement, or restoration of the property damaged or destroyed by defendant.

There are three special situations in which the cost of the damage is immaterial. These involve: (1) substantial interruption or impairment of service rendered by a public utility; (2) damage to a signal or barricade intended to protect the public from a hazardous condition such that it is rendered substantially less effective than before and (3) damage to certain legal and commercial instruments. Additionally, intentional unlawful disinterment of human remains constitutes Criminal Mischief in the Third Degree, pursuant to an amendment in 1978.<sup>946</sup> The four classifications are simple misdemeanor<sup>947</sup> (for damage of \$100 or less); aggravated misdemeanor<sup>948</sup> (for

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R. CARLSON, *supra* note 3, § 372. *But see* text accompanying notes 528-42 *supra*, as to this not actually being a specific intent crime.

943. *See* UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 216 ("malice"). The pre-revised offense of Malicious Injury, Iowa Code § 714.1 (1977) (repealed 1978), was interpreted in *Larson v. Fireman's Fund Ins. Co.*, 258 Iowa 348, 139 N.W.2d 174 (1965), as follows: "The mere intentional doing of an act prohibited by statute or omitting the performance of a statutory duty, does not alone constitute malicious mischief, though it may damage the property of another." *Id.* at 353, 139 N.W.2d at 176. Noting that acting unlawfully and willfully does not constitute maliciousness, the court in *Larson* determined that a person acts maliciously if at the time of the act he "was bent on mischief against some person, ordinarily the owner, and was prompted by an evil mind to destroy or injure the property." *Id.* at 352. *But see* text accompanying notes 549-65 *supra*, as to "malice not requiring spite, hatred, or ill will."

944. J. YEAGER & R. CARLSON, *supra* note 3, § 372.

945. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1606.

946. 1978 Iowa Acts 2d Sess. ch. 1029 (67th G.A.), amending Iowa Code § 716.5 (Supp. 1978). This provision, however, does not include exposing of or abandoning of dead bodies. *See* Iowa Code § 714.22 (1977) (repealed 1978); *State v. Aldrich*, 231 N.W.2d 890 (Iowa 1975). A legislative bill in 1979 to include abandonment in the homicide chapter failed to pass. H.F. 75 (1979).

947. For a discussion of the various sentencing options, *see* text accompanying notes 70-102 *supra*.

948. For a discussion of the various sentencing options, *see* text accompanying notes 70-



damage from \$100-plus to \$500); class C felony<sup>949</sup> (for damage from \$500-plus to \$5000); and class D felony<sup>950</sup> (for damage in excess of \$5,000). Neither felony is classified as a "forcible felony," and both felonies are punishable, in the sentencing court's discretion, by a fine only or by any of the ameliorative sentencing options (*i.e.*, a deferred judgment, a deferred sentence, or a suspended sentence), in lieu of imprisonment.

The legislative judgment in skipping the intermediate misdemeanor penalty — the serious misdemeanor — is subject to criticism, especially in light of all of the sentences for misdemeanor offenses being of a non-indeterminate basis. That is, a sentencing judge can, in his discretion, impose a definite or fixed term of any number of days up to the maximum for the particular classification. Thus, a person convicted of the lowest degree of Criminal Mischief for causing property damage not exceeding \$100 is subject to a possible jail term of any number of days in the comparatively narrow range of one to thirty days, whereas a person convicted of the very next lowest degree of Criminal Mischief is subject to a possible term of imprisonment of any number of days in the broad range of two years (*i.e.*, one to 730 days) with any term in excess of one year potentially subject to being served in the penitentiary or adult reformatory.<sup>951</sup> At least, the less expansive schedule of imprisonment under a serious misdemeanor (up to one year) would reduce this unnecessarily broad range of discretion.<sup>952</sup> Interestingly, two other "property" offenses — Theft and Fraudulent Practices<sup>953</sup> — have five grades, including all three levels of misdemeanors. The reason for such differentiation between stealing another's property altogether or in merely damaging is unknown. Nevertheless, this very classification scheme appeared unchanged throughout the legislative process, starting with the proposal of the Criminal Code Study Committee.<sup>954</sup>

### 3. *Merger*

Section 716.2 of the Criminal Code requires merger of all acts of Criminal Mischief against several items of property attributable to "a single scheme, plan or conspiracy,"<sup>955</sup> such that only one offense has been committed. Accordingly, the total damage is to be aggregated with one charge filed, based upon the highest degree of the total value, rather than filing several

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102 *supra*.

949. For a discussion of the various sentencing options, see text accompanying notes 70-

102 *supra*.

950. For a discussion of the various sentencing options, see text accompanying notes 70-

102 *supra*.

951. See IOWA CODE § 903.4 (1979).

952. See *id.* § 714.2.

953. See *id.* §§ 714.9-.13.

954. See STUDY COMMITTEE REPORT, *supra* note 3, §§ 1603-06, at 34-35; S.F. 85.

955. IOWA CODE § 716.2 (1979).

charges based upon the non-aggregated value of the individual items. This statutory provision apparently establishes the principle of episodic immunity but only as to the crime of Criminal Mischief, in that the prosecution must include all of the acts or damage in the initial prosecution, or be barred from future prosecution of other acts of mischief committed as part of the same scheme, plan or conspiracy.<sup>956</sup>

### C. Burglary and Related Offenses

#### 1. Burglary

The revised crime of Burglary<sup>957</sup> is different in many respects from both its statutory forerunners and the common law offense. It includes the pre-revised crimes of Burglary,<sup>958</sup> Burglary by Explosives,<sup>959</sup> Burglary by Electricity or Gas,<sup>960</sup> Breaking and Entering,<sup>961</sup> Breaking and Entering Railway Cars,<sup>962</sup> Larceny in the Nighttime,<sup>963</sup> and Larceny in the Daytime.<sup>964</sup> It does not include, in their entirety, the pre-revised crimes of Entering a Bank With Intent to Rob<sup>965</sup> and Attempting to Break and Enter.<sup>966</sup>

a. *Act.* The actus reus was changed considerably by making Burglary either an unlawful entry crime or an unlawful remaining over crime. The breaking requirement has been eliminated altogether, although the revised crime of Burglary *can* be committed by a breaking, as compared to the pre-revised offense which required both a breaking *and* an entering. Moreover, the actus reus can occur by remaining on certain property after expiration of a limited right or privilege to do so. Professor Yeager reports that "[t]his is substantial departure from prior law,"<sup>967</sup> and queries:

[W]ill the state have to prove that he had formed the necessary intent at the time his presence in the place became unlawful, or will it be sufficient to prove that at some time while he was unlawfully present he formed the intent, for example, the intent to commit assault? The language sug-

956. That is, "[t]he merger of these acts into a single offense occurs as a matter of law, and not at the discretion of the prosecution . . . ." J. YEAGER & R. CARLSON, *supra* note 3, § 373.

957. IOWA CODE §§ 713.1-.3 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1301-14; J. YEAGER & R. CARLSON, *supra* note 3, §§ 291-96; W. LAFAYE & A. SCOTT, *supra* note 398, § 96; R. PERKINS, *supra* note 398, at 414.

958. See IOWA CODE §§ 708.1-.3 (1977) (repealed 1978).

959. *Id.* § 708.4.

960. *Id.* § 708.5.

961. *Id.* § 708.8.

962. *Id.* § 708.11.

963. *Id.* § 709.4.

964. *Id.* § 709.5.

965. *Id.* § 708.9. "[W]hile some of the activity which that section prohibited will be burglary under this code, most of it will be treated as robbery under Chapter 711." J. YEAGER & R. CARLSON, *supra* note 3, § 291.

966. See IOWA CODE § 708.10 (1977) (repealed 1978).

967. J. YEAGER & R. CARLSON, *supra* note 3, § 294.

gests the latter.<sup>968</sup>

b. *Nighttime*. The element of nighttime as an aggravating circumstance was eliminated in the new Criminal Code, with the time of day being totally irrelevant, as it should be. This is in line with the accompanying elimination of a dwelling house being burglarized as another aggravating circumstance.

c. *Structure*. The type of structure subject to being burglarized under the new Criminal Code is either an "occupied structure" or certain enclosed (or secure) areas, with a dwelling house no longer singled out for special treatment.<sup>969</sup> An "occupied structure" is statutorily defined as "any building, structure, land, water or air vehicle, or similar place adopted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value."<sup>970</sup> Nevertheless, by express statutory language, a person need not actually be present at the time of the burglary.<sup>971</sup> An "occupied structure" clearly encompasses an automobile which typically provides incidental storage.<sup>972</sup>

Additionally, the definition of the alternative type of real or personal property protected under the Burglary statute, an enclosed area,<sup>973</sup> is amplified in the Uniform Jury Instructions, which state: "An 'enclosed area' is one which is so designed, built or enclosed that it is secure for the keeping of valuable property, and it reasonably appears the area was meant to be secure from theft or criminal mischief. An 'enclosed area' need not be a structure or building."<sup>974</sup> An example would be a fenced enclosure containing nursery plants and gardening equipment adjacent to a shopping center.

Under such broad definitions of an "occupied structure" and an "enclosed area," any secure area can be burglarized. Professor Yeager states, "[t]he requirement is that it not be open to the public, or, if it is open, that

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968. *Id.*

969. A similar change was made in the revised crime of Arson.

970. *See id.* § 702.12.

971. *Id.*

972. That an automobile is not primarily used for storage or safekeeping of property should not exclude an ordinary automobile from coverage under the burglary statute, as the statute does not contain such qualifying language as a vehicle *primarily* used for the storage or safekeeping of property. Moreover, exclusion of automobiles from the burglary statute would mean that there would be no aggravated form of theft involving break-ins of automobiles. This is because the revised crime of Theft does not contain provisions similar to the pre-revised crimes of Larceny in the Nighttime and Larceny in the Daytime. *See* IOWA CODE §§ 709.4-.5 (1977) (repealed 1978) (respectively). *See also* Emery v. Fenton, 266 N.W.2d 6 (Iowa 1978), which characterized the new Criminal Code as "primarily a restatement" of the pre-revised law. *Id.* at 8.

973. *See* IOWA CODE § 713.1 (1979).

974. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1313.

one remain in the building or area after it is closed to the public.”<sup>975</sup>

d. *Burglarious Intent*. Burglary has remained a specific intent crime, of course. However, the scope of the burglarious intent has been narrowed somewhat from the all encompassing pre-revised burglarious intent to commit “any public offense.”<sup>976</sup> Now, Burglary occurs only when the requisite unlawful act is done with the accompanying intent to commit “a felony, assault, or theft.”<sup>977</sup> Whereas this includes all assaults and thefts of both felony and misdemeanor grades, other misdemeanors are omitted as target crimes, such as the two lowest degrees of Criminal Mischief.<sup>978</sup> These situations apparently will be left to punishment under the Criminal Trespass statute<sup>979</sup> for the unlawful entry as well as the statute covering the target crime itself (e.g., Criminal Mischief<sup>980</sup> for any damage done by vandalism).

e. *Attempted Burglary*. The revised crime of Burglary encompasses only a few of the situations of the pre-revised crime of Attempted Breaking and Entering.<sup>981</sup> There is no longer a general crime of Attempted Burglary. It is true that one form of Burglary under the new Criminal Code is by *breaking* an occupied structure or enclosed area. However, a “breaking” under the traditional common law interpretation requires *actual removal* or putting aside of an obstruction to entry.<sup>982</sup> Thus, a person caught in the act of attempting to remove such an obstruction, such as jimmying the lock on or even breaking part of a window without quite permitting entry, would not be covered.

Professor Yeager disagrees with the above discussion, claiming that the attempted offense is included, or at least enough of the attempted offense as should be punishable is included; it is not clear which.<sup>983</sup> He explains that the intent of the drafters was that “either a breaking or an entering should be required as the minimal overt act on which criminality should be predicated in these circumstances. Since that minimal overt act, if proved, will establish the offense of burglary itself, no provision need be made for an offense of attempted burglary.”<sup>984</sup>

There are several other alternative charges to Attempted Burglary, if

975. J. YEAGER & R. CARLSON, *supra* note 3, § 293.

976. See IOWA CODE § 708.1 (1977) (repealed 1978).

977. IOWA CODE § 713.1 (1979).

978. *Id.* §§ 716.5-.6.

979. *Id.* § 716.7.

980. *Id.* §§ 716.1-.6.

981. See IOWA CODE § 708.10 (1977) (repealed 1978).

982. “Making an opening into a building by trespass” occurs “when an intruder removes or puts aside some part of the structure relied on as an obstruction to intrusion.” *State v. Houghlund*, 197 N.W.2d 364, 365 (Iowa 1972). *Accord*, UNIFORM JURY INSTRUCTIONS, *supra* note 136, which states that “[t]he term ‘breaks’ or ‘broke’ means the removal or putting aside of any obstruction to entering. No damage need result to the property.” *Id.* at No. 1306.

983. J. YEAGER & R. CARLSON, *supra* note 3, § 291.

984. *Id.*

there is no such charge, when entry is not gained. Of course, the offense of Burglary itself is complete upon a *successful* breaking. Possession of Burglar's Tools<sup>985</sup> is a viable alternative since would-be burglars typically have some "tools of the trade" to facilitate gaining forceful entry. Also, the Iowa Supreme Court has been quite liberal in characterizing ordinary tools as burglar's tools.<sup>986</sup> The utility of this inchoate offense is that it is graded identically with the consummated offense of Burglary in the Second Degree.<sup>987</sup> One difficulty is that the prosecution needs to prove burglarious intent of the person found in possession of burglar's tools, and the statutory presumption of burglarious intent under the pre-revised statute was eliminated in the new Criminal Code. A third possibility is Criminal Mischief,<sup>988</sup> which would require proof of physical damage to the property. Considerable damage would be necessary, however, before the offense would be a felony (over \$500),<sup>989</sup> except in special circumstances. The last alternative would be Criminal Trespass,<sup>990</sup> which would require unlawful entry onto public or private property to be burglarized. However, Trespass is only a misdemeanor, even when the aggravated form involving personal injury is involved.<sup>991</sup>

f. *Felony Murder Rule.* Unlike under the pre-revised law,<sup>992</sup> not all burglary under the new Criminal Code is subject to being an underlying felony for application of the felony murder rule to Murder in the First Degree. This is because Burglary in the Second Degree is excluded from the statutory definition of a "forcible felony," which is the basic qualifying factor for the felony murder rule.<sup>993</sup> As the revised crime of Arson,<sup>994</sup> however, an intentional *murder* during the commission of an ordinary burglary (*i.e.*, Burglary in the Second Degree) would constitute Murder in the Second Degree under the second degree felony murder rule,<sup>995</sup> whereas the homicidal crime would only be Involuntary Manslaughter if such a killing was unintentional.<sup>996</sup> Another change is that the coverage of the revised crime of burglary is much broader, as it is not limited to break-ins of dwelling houses.

g. *Grading.* Burglary is of the first degree<sup>997</sup> when a defendant or an accomplice either (1) merely has in his possession a "dangerous weapon,"<sup>998</sup>

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985. IOWA CODE § 713.4 (1979).

986. See *State v. Knudtson*, 195 N.W.2d 698 (Iowa 1972).

987. IOWA CODE § 713.3 (1979).

988. IOWA CODE § 716.1 (1979).

989. *Id.* § 716.4.

990. *Id.* § 716.7.

991. *Id.* § 716.8(2).

992. See IOWA CODE § 690.2 (1977) (repealed 1978).

993. See IOWA CODE § 707.2(2) (1979).

994. See text accompanying notes 862-910 *supra*.

995. See IOWA CODE § 707.3 (1979).

996. See *id.* § 707.5(1).

997. *Id.* § 713.2. See UNIFORM JURY INSTRUCTION, *supra* note 136, at No. 1314.

998. IOWA CODE § 702.7 (1979).

an "explosive device,"<sup>999</sup> or an "incendiary device,"<sup>1000</sup> or (2) "intentionally or recklessly inflicts physical injury on any person."<sup>1001</sup> The first alternative is satisfied by the mere act of possession, thus rendering unnecessary any discharging or detonating of the weapon. Under the second alternative, it appears that any degree of physical injury will suffice. Why the more restrictive general term of "serious injury"<sup>1002</sup> was not incorporated herein is not clear, especially since a "serious injury" is necessary for first degree Robbery<sup>1003</sup> as well as for first degree Sexual Abuse.<sup>1004</sup> This provision, nevertheless, is more restrictive than its pre-revised counterpart. The latter only encompassed an actual assault as an aggravating circumstance to support a charge of Burglary With Aggravation,<sup>1005</sup> and an assault, by definition, necessitates no touching at all.<sup>1006</sup> The presence of a confederate, aiding and abetting, as an aggravating circumstance under the pre-revised law was eliminated altogether. All burglary other than that described above is of the second degree.<sup>1007</sup>

h. *Sentencing Options.* Burglary in the First Degree is a class B felony,<sup>1008</sup> whereas Burglary in the Second Degree is a class C felony.<sup>1009</sup> Thus, one is a twenty-five year maximum offense whereas the other is only a ten year maximum offense. This amounts to a fifteen-year add-on penalty for burglary while armed (even though the firearm does not need to be used or even displayed<sup>1010</sup> or for causing (albeit intentionally or *recklessly*)<sup>1011</sup> a physical personal injury of any nature during a burglary. Thus, a simple Burglary (ten years) plus a simple Assault (thirty days) equals twenty-five years.

One flaw in the pre-revised law was remedied, however. The former

999. See *id.* § 101A.1 and note 918 *supra*.

1000. See 1978 Iowa Acts 2d Sess. ch. 1183 (67th G.A.), amending IOWA CODE § 702.21 (Supp. 1978), by adding that "[a]n 'incendiary device' is a device, contrivance, or material causing or designed to cause destruction of property by fire."

1001. IOWA CODE § 713.2 (1979).

1002. *Id.* § 702.18.

1003. *Id.* § 711.2.

1004. *Id.* § 709.2.

1005. See IOWA CODE § 708.2 (1977) (repealed 1978).

1006. IOWA CODE § 708.1 (1979).

1007. *Id.* § 713.3.

1008. For a discussion of the various sentencing options, see text accompanying notes 70-102 *supra*.

1009. For a discussion of the various sentencing options, see text accompanying notes 70-102 *supra*.

1010. All that is necessary for the five-year minimum sentence to be imposed under IOWA CODE § 902.7 (1979), is that the defendant or an accomplice "represented that he or she was in immediate possession and control of a firearm." *Id.* (emphasis added).

1011. In contrast, the personal violence crimes of Willful Injury, Assault While Participating in a Felony, Assault With Intent to Inflict Serious Injury, and even simple Assault are strictly intentional crimes. See IOWA CODE §§ 708.4, 708.3, 708.2(1), 708.2(2) (1979) (respectively).

crime of Burglary With Aggravation was punishable, in the judicial discretion of the individual sentencing court, by any term of years to life.<sup>1012</sup> That ridiculous legislative scheme, coupled with the supreme court's essentially hands off policy in "reviewing" abuse of judicial discretion in sentencing,<sup>1013</sup> led to some disparate sentences with supreme court approval.<sup>1014</sup> Under the new Criminal Code, the scope of judicial discretion of the sentencing court has been sharply restricted. Now, an indeterminate term of twenty-five years and ten years is prescribed for Burglary in the First<sup>1015</sup> and Second Degrees,<sup>1016</sup> respectively. Moreover, none of the ameliorative sentencing options (*i.e.*, a deferred judgment, a deferred sentence, or a suspended sentence) is an available sentencing option for Burglary in the First Degree, because it is a "forcible felony."<sup>1017</sup> In contrast, considerable judicial discretion still reposes in the sentencing court in deciding on Burglary in the Second Degree (a non-forcible felony) whether to defer entry of judgment at all or if so to impose and then suspend the sentence and place the defendant on probation (*i.e.*, a bench parole).

Unlike the pre-revised law,<sup>1018</sup> the new Criminal Code provides for an alternative sentencing option of a fine-only with a maximum of \$5000 for Burglary in the Second Degree.<sup>1019</sup> This ameliorative sentencing option is welcome in light of the wide ranging activity included within the definition of Burglary. As a class B felony,<sup>1020</sup> Burglary in the First Degree is not punishable by fine at all, whether in addition to or in lieu of a term of imprisonment or for a suspended sentence.

i. *Lesser Included Offenses.* In light of the current standard, there do not appear to be any lesser included offenses of burglary, except, of course,

1012. See IOWA CODE § 708.2 (1977) (repealed 1978).

1013. See, *e.g.*, *State v. Peckenschneider*, 236 N.W.2d 344, 348 (Iowa 1975). "We have demonstrated a growing reluctance to interfere with the trial court's discretion." *Id.* See also *State v. Smith*, 242 N.W.2d 320, 327 (Iowa 1976). "[T]his court has consistently held the severity of punishment must be 'carefully considered' but when it does not exceed the statutory maximum we will interfere only where abuse of discretion is shown," with life term for second-degree murder upheld. *Id.* But see IOWA R. CRIM.P. 22(3)(d) ("court shall state on the record its reason for selecting the particular sentence") *State v. Luedtke*, 279 N.W.2d 7, 8 (Iowa 1979) (Rule 22(3)(d) is mandatory).

1014. See, *e.g.*, *State v. Kendall*, 167 N.W.2d 909, 911-12 (Iowa 1969) (upholding life term for Burglary with Aggravation).

1015. IOWA CODE § 713.2 (1979).

1016. *Id.* § 713.3.

1017. See *id.* §§ 702.11, 907.3 and text accompanying notes 180-203 *supra*.

1018. See IOWA CODE §§ 708.2-.3 (1977) (repealed 1978).

1019. See IOWA CODE §§ 713.3 (1979) (Burglary in the Second Degree); *id.* § 902.9(3) (penalty for class C felony); *id.* § 909.1 (fine without imprisonment); and text accompanying notes 997-1007 *supra*.

1020. For a discussion of the various sentencing options, see text accompanying notes 70-102 *supra*.

for Burglary in the Second Degree<sup>1021</sup> (being strictly a residual provision) being a lesser included offense that always must be submitted in a prosecution for Burglary in the First Degree.<sup>1022</sup> Because of its inchoate nature<sup>1023</sup> in not being a specific result crime (as to the objective of the unlawful entry), the crime of burglary, indeed even in aggravated forms, is complete upon the unlawful entry with the requisite intent. Thus, any crimes committed or attempted as part of the burglary (*i.e.*, Assault or Theft) are not lesser included offenses. Neither is Criminal Mischief for any property damage even though done incidental in gaining entry a lesser included offense, since this offense requires damage whereas Burglary does not.<sup>1024</sup> Similarly, Trespass is not a lesser included offense,<sup>1025</sup> since the two crimes are not of the "same species" and the elements of Trespass are not entirely included in the offense of Burglary.

## 2. Possession of Burglar's Tools

No substantive change was made in the elements of the crime of Possession of Burglar's Tools.<sup>1026</sup> These elements remain: (1) possessing (2) any burglar's tool (3) with the specific intent to use it in perpetration of a burglary.<sup>1027</sup>

It is sufficient for possession that the burglar's tools be "within [defendant's] dominion and subject to his control."<sup>1028</sup> Thus, it is not necessary that the tools be upon defendant's person.

It also is not necessary that the particular tools be designed for an unlawful purpose. Conversely, it is immaterial that the particular tools have legitimate uses. Presence of several tools in combination is to be considered in determining their burglarious character, rather than each individual tool being considered separately.<sup>1029</sup>

The requisite burglarious intent is only a general intent to commit a burglary on some occasion. Thus, the prosecution is not required to prove defendant's intent to commit "a specific burglary at any particular time or place."<sup>1030</sup> Nevertheless, burglarious intent must be proved to have existed

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1021. IOWA CODE § 713.3 (1979).

1022. *Id.* § 713.2.

1023. See W. LAFAYE & A. SCOTT, *supra* note 398, at 715.

1024. See generally text accompanying notes 977-980 *supra*.

1025. See *State v. Fernald*, 263 N.W.2d 751 (Iowa 1978), which is discussed in text accompanying note 1049 *supra*.

1026. Compare IOWA CODE § 713.4 (1979) with IOWA CODE § 708.7 (1977) (repealed 1978). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1315-19; J. YEAGER & R. CARLSON, *supra* note 3, § 297.

1027. IOWA CODE § 713.4 (1979).

1028. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1318.

1029. See, *e.g.*, *State v. Knudtson*, 195 N.W.2d 698 (Iowa 1972); *Mahar v. Lainson*, 247 Iowa 297, 72 N.W.2d 516 (1955); UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1318.

1030. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1319. See *State v. Van*



at the time defendant was found in the act of possessing burglar's tools.<sup>1031</sup>

The only major statutory change concerning this crime occurred with the elimination of the pre-revised statutory presumption<sup>1032</sup> of burglarious intent attributed to persons found in possession of burglar's tools.<sup>1033</sup> Professor Yeager explains that "[i]t was felt that presuming intent from possession, when the possession would be innocent without the intent, is a form of bootstrapping which raises serious due process questions. The intent can be proved from the circumstances of the possession."<sup>1034</sup>

There is an interesting quirk in the grading of this offense. Both the consummated offense of Burglary in the Second Degree and the "highly inchoate offense"<sup>1035</sup> of Possession of Burglar's Tools are class C felonies,<sup>1036</sup> and thus punishable identically. Neither is a "forcible felony."<sup>1037</sup>

#### D. Criminal Trespass

The substantive content of the types of conduct constituting the crime of Criminal Trespass<sup>1038</sup> essentially was left unchanged in the new Criminal

Voltenburg, 260 Iowa 200, 147 N.W.2d 869 (1967).

1031. See note 70 *supra*.

1032. See IOWA CODE § 708.7 (1977) (repealed 1978).

1033. This unsurprisingly has been characterized by a defense attorney as "a needed change." J. ROEHRICK, *supra* note 620, at 145.

1034. J. YEAGER & R. CARLSON, *supra* note 3, § 297. The impact of this statutory change is readily apparent in the evolution that the Uniform Jury Instructions have undergone. The applicable Uniform Jury Instruction (on intent to commit burglary) which was keyed to the former Code read:

If the State has established beyond a reasonable doubt the first essential of the offense; namely, that the defendant in fact had burglar's tools or implements in his possession, such possession is presumptive evidence of intent to commit burglary. This presumptive evidence creates a permissible inference to be considered along with any and all other facts and circumstances shown by the evidence which have any bearing on the issue of the intent of the defendant, and the burden is upon the State to establish by the evidence beyond a reasonable doubt that at the time the defendant possessed burglar's tools, if he did, the defendant then had the intent to commit the crime of burglary.

The current, revised instruction reads:

One of the elements which the State is required to prove beyond a reasonable doubt is the intent of the defendant to commit burglary. Such intent must exist in the mind of the defendant at the time of possession of the burglar's tools.

It is not necessary for the State to prove an intent to commit a specific burglary at any particular time or place. The intent of the defendant needs to be only a general intent to commit the crime of burglary on some occasion of his choice.

UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1319.

1035. Schantz, *supra* note 2, at 454.

1036. For a discussion of the various sentencing options, see text accompanying notes 70-102 *supra*.

1037. See text accompanying notes 180-203 *supra*.

1038. IOWA CODE § 716.7 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1607-13; J. YEAGER & R. CARLSON, *supra* note 3, §§ 378-86.

Code.<sup>1039</sup> This crime has thus retained the following elements: (1) wrongful entry or wrongful remaining (2) on public or private property (3) without permission (4) and without justification (5) under any one of the four following circumstances:<sup>1040</sup> (a) after being notified or requested to not enter or to leave,<sup>1041</sup> or (b) with the intent to commit a public offense,<sup>1042</sup> or (c) with the intent or effect of unduly interfering with the lawful use of such property by others,<sup>1043</sup> or (d) with the intent or effect of wrongfully using, removing therefrom, altering, damaging, harassing or placing thereon anything animate or inanimate.<sup>1044</sup>

### 1. *Privileged Entry*

The only significant substantive change made in the entire chapter on Criminal Trespass occurred with the addition of a provision defining privileged entry onto public or private property under limited circumstances for retrieval of personal property.<sup>1045</sup> For the defense to be applicable, *all* of the following are necessary: (1) the entry must be made for the sole purpose of retrieving an item of personal property; (2) the item must have accidentally or inadvertently ended up on the property of another; (3) the retriever must take the most direct and accessible route in retrieving; (4) the retriever must exit as quickly as possible and (5) the retriever must not unduly interfere with lawful use of the property entered upon.<sup>1046</sup> Because of the conjunctive test, the state need only prove, beyond a reasonable doubt, the negative of any *one* of the five in order for the privilege to be inapplicable.<sup>1047</sup>

### 2. *Relationship With Burglary*

Both Burglary<sup>1048</sup> and Criminal Trespass are wrongful entry crimes. Never-

1039. Cf. IOWA CODE § 729.1 (1977) (repealed 1978). See J. YEAGER & R. CARLSON, *supra* note 3, § 378.

1040. IOWA CODE § 716.7 (1979).

1041. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1610; J. YEAGER & R. CARLSON, *supra* note 3, § 382.

1042. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1609; J. YEAGER & R. CARLSON, *supra* note 3, § 381. "[T]he intent element here is stated so broadly that it is unlikely that anyone can commit a civil trespass without the intent to do at least one of the listed acts . . ." *Id.*

1043. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1611; J. YEAGER & R. CARLSON, *supra* note 3, § 383.

1044. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1612; J. YEAGER & R. CARLSON, *supra* note 3, § 384.

1045. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1613; J. YEAGER & R. CARLSON, *supra* note 3, § 385. This provision "is merely the civil justification for trespass and is not a change in the law, except for codification." J. ROEHRICK, *supra* note 620, at 230.

1046. IOWA CODE § 716.7 (1979).

1047. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1613.

1048. IOWA CODE § 713.1 (1979).

theless, Trespass has *not* been held to be a lesser included offense of Burglary. In *State v. Furnald*,<sup>1049</sup> the Iowa Supreme Court (interpreting the Burglary and Trespass statutes under the old code which were substantially similar to the new Criminal Code) reasoned that there were many ways in which one crime could be committed without the other also being committed, and thus the legal test for lesser included offenses was not met. The court also noted that Burglary under the former code was a crime solely against a building, whereas Trespass could occur on land. Because the new Criminal Code does not extend Burglary to land itself (*i.e.*, open space separate and apart from an enclosed area), the *Furnald* decision will be controlling. This prospect was enhanced by the supreme court's holdings in *State v. Sanders*,<sup>1050</sup> that the lesser included offense standard remains unchanged under the new Criminal Code<sup>1051</sup> and in *State v. Holmes*,<sup>1052</sup> that Theft is not a lesser included offense of Robbery under the new Criminal Code since Theft requires a taking but Robbery does not. Because Robbery can be committed in the alternative — either by an actual taking or by an attempted taking — and Trespass can be upon many alternative types of property — only two of which, an occupied structure and an enclosed space, can be subjects of Burglary, it appears that the *Sanders-Holmes* rationale will require extension of *Furnald* to the new Criminal Code.

### 3. Grading

There are two grades of Trespass, with the distinguishing characteristic being whether either personal injury or property damage in excess of \$100 occurred. This aggravated form of Trespass is a serious misdemeanor, whereas the ordinary form of Trespass is a simple misdemeanor. A similar scheme of grading was included in the pre-revised law,<sup>1053</sup> except that the maximum penalty for the aggravated form was imprisonment for six months instead of the one year maximum, as a serious misdemeanor under new Code section 716.8(2).

### 4. Merger

The above-mentioned grading scheme raises questions on merger of offenses in situations of Trespass in its aggravated form. Is a person who injures another person by assaulting him or her during a trespass subject *both* to aggravated Trespass and to Assault? Similarly, is a trespasser who also concurrently causes property damage in excess of \$100 subject both to ag-

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1049. 263 N.W.2d 751 (Iowa 1978).

1050. 280 N.W.2d 375 (Iowa 1979).

1051. See IOWA R. CRIM. P. 6, 21.

1052. 276 N.W.2d 823 (Iowa 1979).

1053. IOWA CODE § 729.1 (1977) (repealed 1978).

gravated Trespassing and to Criminal Mischief<sup>1054</sup> in the particular degree concomitant with the amount of damage caused?

As a matter of fundamental fairness and because of the double jeopardy mandate, only one charge should lie in either of those two situations.<sup>1055</sup> Because the physical injury or property damage would be the only basis for boot strapping an ordinary Trespass into an aggravated Trespass, neither circumstance should also be the basis for a separate charge of either Assault or Criminal Mischief.

On the other hand, a prosecutor clearly should be free to make an election of charges.<sup>1056</sup> Thus, a prosecutor could, in his basically non-reviewable discretion, decide to charge a "rowdy" trespasser with Willful Injury<sup>1057</sup> (a class D felony) or with Assault With Intent to Inflict a Serious Injury<sup>1058</sup> (an aggravated misdemeanor)<sup>1059</sup> *instead of* aggravated Trespassing (a mere serious misdemeanor).<sup>1060</sup> Of course, he could then throw in the *simple* Trespass charge as a separate count.

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1054. IOWA CODE §§ 716.1-6 (1979).

1055. See *Iannelli v. United States*, 420 U.S. 770 (1975); *State v. Gilroy*, 199 N.W.2d 63 (Iowa 1972).

1056. "The fact that there was evidence tending to show more than was required by the statute and also an attempt to violate another statute did not invalidate the prosecution of the charge here involved." *State v. Stanton*, 214 N.W.2d 125, 126 (Iowa 1974). *Accord*, *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973). "[W]here criminal statutes overlap the government is entitled to choose among them provided it does not discriminate against any class of defendants" *Id.*; *People v. Fowler*, 516 P.2d 428, 429 (Colo. 1973) "[A] single transaction that violates two criminal statutes may generally be prosecuted under either . . . . No constitutional proscription has been demonstrated which would prohibit the exercise of prosecutorial discretion in such a situation . . . ." *Id.* See *United States v. Batchelder*, — U.S. —, 99 S. Ct. 2198 (1979) (defendant sentenced under section with harsher penalty where defendant's conduct falls within two sections of same criminal statute).

1057. See IOWA CODE § 708.4 (1979).

1058. The single grade of this offense is a class D felony. It is punishable by either an indeterminate term of imprisonment of five years or a maximum fine of \$1,000 or both. Because this offense is a "forcible felony," none of the ameliorative sentencing alternatives (*i.e.*, a deferred judgment, a deferred sentence, or a suspended sentence of probation) is available, in lieu of the above mentioned imprisonment. Moreover, being a "forcible felony," this offense is also subject to the mandatory minimum five year sentence if a firearm is used or possessed during its commission.

1059. See IOWA CODE § 708.2(1) (1979).

1060. An aggravated misdemeanor is punishable by either a determinate term of confinement not to exceed two years or a maximum fine of \$5000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine.

A serious misdemeanor is punishable by either a determinate term of imprisonment of up to one year or a fine of up to \$1000 or both. The various sentencing alternatives are: imprisonment only, imprisonment and fine, fine only, a suspended sentence of probation, a deferred sentence, or a deferred judgment.

### 5. *Lesser Included Offenses*

There are, of course, no lesser included offenses<sup>1061</sup> of Trespassing. Moreover, Trespassing itself is not a lesser included offense of any other crime, including Burglary.<sup>1062</sup>

## V. THEFT AND RELATED OFFENSES

### A. *Theft*

#### 1. *Generally*

The newly-constituted comprehensive crime of Theft<sup>1063</sup> consolidates the pre-revised offenses of Larceny, Embezzlement, False Pretenses, Receiving and Concealing Stolen Property, False Drawing, and Uttering. However, several changes were made in these pre-revised offenses that resulted in expanding the scope of these pre-revised offenses,<sup>1064</sup> as discussed below. Nevertheless, like its predecessor offenses, Theft remains a specific result crime, thus not punishing attempted thefts.<sup>1065</sup>

a. *"Property" Subject to Theft.* The biggest change is in the much broader scope of "property"<sup>1066</sup> that can be the subject of this crime, as opposed to under the pre-revised offenses. This has not only enlarged the scope of this crime but also has eliminated the need for individual statutes on particularized subjects. The "property" subject to Theft has been expanded from the basic limitation of tangible personal property under the pre-revised offenses<sup>1067</sup> to include "anything of value,"<sup>1068</sup> that is, all real and personal property. The major areas of expansion include intangible property, real property, labor, and services.

b. *Defense of Claim of Right.* A modified version of the common law defense of claim of right<sup>1069</sup> has been codified in Iowa Code section 714.4.<sup>1070</sup> By terms of that provision, wrongful appropriation of another's "property" does not constitute Theft if the offender "reasonably believes that he or she

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1061. See text accompanying notes 619-723 *supra*.

1062. *State v. Fernald*, 263 N.W.2d 751 (Iowa 1978).

1063. IOWA CODE §§ 714.1-.7 (1979). See generally UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1401-51; J. YEAGER & R. CARLSON, *supra* note 3, §§ 311-28.

1064. See J. YEAGER & R. CARLSON, *supra* note 3, § 311.

1065. Regarding the theft-related crime of Fraudulent Practices being in the nature of an attempted theft offense, see text accompanying notes 1217-1225 *infra*.

1066. IOWA CODE § 702.14 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1441; J. YEAGER & R. CARLSON, *supra* note 3, § 41.

1067. J. YEAGER & R. CARLSON, *supra* note 3, § 312.

1068. IOWA CODE § 702.14 (1979) (emphasis added).

1069. See W. LAFAYE & A. SCOTT, *supra* note 398, § 88. R. PERKINS, *supra* note 398, at 322.

1070. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1440; J. YEAGER & R. CARLSON, *supra* note 3, § 325.

has a right, privilege or license to do so, or if [her or she] does in fact have such right, privilege or license."<sup>1071</sup> Contrastingly, the common law defense was attached to a bona fide claim of title or right to possession.<sup>1072</sup> This change could make the defense less restrictive in light of being tied to only a "reasonable belief" instead of a "bona fide" claim being required. This puts the matter in the hands of layman jurors to determine what "reasonable" persons like themselves would feel under the circumstances. Nevertheless, an actual belief for so acting is required by this provision, as is a reasonable factual basis for so believing.

Whenever a "claim of right" is raised by the defense, an additional element is added to the marshaling instruction in the Uniform Jury Instructions,<sup>1073</sup> as follows: "That at the time the defendant (acquired, used, etc.) the property, he did so with no claim of right." This has the effect of requiring the prosecution to disprove the alleged "claim of right." This is because appropriating another's property under a "claim of right" does not involve criminal intent.<sup>1074</sup>

c. *Grading.* There are five degrees of Theft,<sup>1075</sup> with the classification of offenses ranging from a simple misdemeanor to a class C felony. Neither of the two felonies is a "forcible felony."<sup>1076</sup>

The basic point of differentiation is the value<sup>1077</sup> of the "property" stolen. Theft in the Fifth Degree,<sup>1078</sup> a simple misdemeanor,<sup>1079</sup> involves fifty dollars or less. Theft in the Fourth Degree,<sup>1080</sup> a serious misdemeanor,<sup>1081</sup> involves fifty dollars plus to \$100; Theft in the Third Degree,<sup>1082</sup> an aggra-

1071. The phrase "right, privilege, or license" is defined in the Uniform Jury Instructions, as follows:

'[R]ight' means an interest or title in the property or a legal claim to hold, use or enjoy it. 'Privilege' means a particular permission or authority given to a particular person(s) to hold, use, or enjoy the property as opposed to a general permission. 'License' means that the owner gave either express or implied permission or authority to hold, use or enjoy the property.

UNIFORM JURY INSTRUCTIONS, *supra* note 3, at No. 1440.

1072. J. YEAGER & R. CARLSON, *supra* note 3, § 325.

1073. UNIFORM JURY INSTRUCTIONS, *supra* note 3, at No. 1440.

1074. See, e.g., *Richardson v. United States*, 403 F.2d 574 (D.C. Cir. 1968); W. LAFAYE & A. SCOTT, *supra* note 398, § 88.

1075. IOWA CODE § 714.2 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1451; J. YEAGER & R. CARLSON, *supra* note 3, §§ 320-23.

1076. IOWA CODE § 702.11 (1979). See text accompanying notes 180-203 *supra*.

1077. See *id.* § 714.3; UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1442; J. YEAGER & R. CARLSON, *supra* note 3, § 324.

1078. IOWA CODE § 714.2(5) (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 323.

1079. For a discussion of the sentencing options, see text accompanying notes 107-111 *supra*.

1080. IOWA CODE § 714.2(4) (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 323.

1081. For a discussion of the sentencing options, see text accompanying notes 106, 108-111 *supra*.

1082. IOWA CODE § 714.2(3) (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 323.

vated misdemeanor,<sup>1083</sup> involves \$100-plus to \$500; Theft in the Second Degree,<sup>1084</sup> a "non-forcible"<sup>1085</sup> class D felony,<sup>1086</sup> involves \$500-plus to \$5000 as well as thefts of motor vehicles irrespective of their value. Theft in the First Degree,<sup>1087</sup> a "non-forcible"<sup>1088</sup> class C felony,<sup>1089</sup> involves in excess of \$500 in addition to all thefts from a person and all lootings in conjunction with a disaster or a riot (the latter two circumstances being irrespective of the amount of property stolen). These five value-dichotomy schedules apply to all types of Theft (*i.e.*, wrongful takings, misappropriations, deceptions, exercising control over stolen property, false drawing and uttering of checks and share drafts, and misuse of secured property). Nevertheless, several specific theft statutes have a single penalty schedule irrespective of the value of the property stolen.<sup>1090</sup>

The special attention given to thefts of motor vehicles<sup>1091</sup> is anomolous. Whereas it fills a potential gap at the lower end of the spectrum in effectively protecting used cars with "speculative" retail values, it nevertheless does not realistically take inflation into account at the upper (or even the middle) end of the spectrum. A logical explanation for this unrealistic placement is that this provision first appeared in the report by the Criminal Code Revision Study Committee.<sup>1092</sup> That committee's work was done over a four-year period 1969 to 1973, during which time a \$5000 automobile certainly was not as commonplace as it is now. Unfortunately, no legislative attempt was made to revise the classification and make all thefts of motor vehicles a Theft in the First Degree. The General Assembly should take care of this during its next session.

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1083. For a discussion of the sentencing options, see text accompanying notes 101-105, 108-111 *supra*.

1084. IOWA CODE § 714.2(2) (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 322.

1085. See text accompanying notes 180-203 *supra*, regarding "forcible felonies." See also text accompanying notes 84-92 *supra*, regarding the probable availability of a fine-only sanction under IOWA CODE § 909.1 (1979).

1086. For a discussion of the sentencing options, see text accompanying notes 71-83 *supra*.

1087. IOWA CODE § 714.2(1) (1979). See J. YEAGER & R. CARLSON, *supra* note 3, § 321.

1088. See note 21 *supra*.

1089. For a discussion of the sentencing options, see text accompanying notes 71-83 *supra*. Regarding the probable availability of a fine-only sanction under IOWA CODE § 909.1 (1979), see text accompanying notes 84-92 *supra*.

1090. In addition to the aforementioned thefts of a motor vehicle, from a person, and during a looting in conjunction with a disaster or a riot (see text accompanying notes 27-33 and 42-46 *infra*), the other specific theft or theft-related offenses are: Operating a Vehicle Without the Owner's Consent (an aggravated misdemeanor); Consumer Frauds (apparently a simple misdemeanor); Unlawful Advertising and Selling of Courses of Instruction (a serious misdemeanor); Sale of More Than One Lifetime Contract Per Person (a serious misdemeanor). IOWA CODE §§ 714.7, .16, .17, .20 (1979), respectively. See text accompanying notes 128-142 *infra*.

1091. IOWA CODE § 714.2(2) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1443-44; J. YEAGER & R. CARLSON, *supra* note 3, § 322.

1092. STUDY COMMITTEE REPORT, *supra* note 3, § 1402(2).

The special new provision on looting in disaster areas<sup>1093</sup> was undoubtedly an outgrowth of the turbulent sixties, although the pre-revised Code included an offense of larceny from a building on fire.<sup>1094</sup> It seems a little harsh to bootstrap an otherwise simple misdemeanor petty theft (involving a trifling fifty dollars or less) into a class C felony merely because of the circumstances of the taking. As a class C felony,<sup>1095</sup> this offense can be punishable by an indeterminate term of imprisonment of *five years*.<sup>1096</sup> The real anomaly of this severely high classification is that this non-violent conduct is equally punishable with Robbery in the Second Degree,<sup>1097</sup> which is also a class C felony.

The inclusion of all thefts from the person,<sup>1098</sup> irrespective of the value of the property stolen, in the first-degree category is justifiable because of the potential for violence. Nevertheless, the rather curious result is that Robbery in the Second Degree and Theft from the Person, both of which are class C felonies, can be punished equally. The incongruity is further highlighted by the fact that Robbery in the Second Degree is a "forcible felony"<sup>1099</sup> (and thus not subject to a deferred judgement or a suspended sentence of probation) whereas Theft from the Person is not. Moreover, as a "non-forcible" class C felony, Theft from the Person can apparently be solely punished, in the sentencing court's judicial discretion pursuant to Code section 909.1, by a fine.<sup>1100</sup> This "compares" to the fifteen-year term of imprisonment which either had to be imposed or suspended without benefit of an alternative sentencing option of a fine only under the pre-revised law.<sup>1101</sup>

The common thief provision<sup>1102</sup> was incorporated as a special circumstance in determining even the most petty theft to be Theft in the Second Degree.

The major interpretational issue is whether everyone started with a clean slate on January 1, 1978, irrespective of pre-1978 convictions of lar-

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1093. IOWA CODE § 714.2(1) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1434.

1094. See IOWA CODE § 709.6 (1977) (repealed 1978).

1095. See text accompanying notes 71-83 *supra*.

1096. Of course, this is not a mandatory term of confinement. See text accompanying notes 84-92 *supra*.

1097. IOWA CODE § 711.3 (1979). Nevertheless, this penalty equalization is actually an improvement over the pre-revised law. Incredibly, simple Robbery was punishable by an indeterminate term of imprisonment of ten years whereas the lesser included offense of Larceny from a Person was punishable by a term of fifteen years. Compare IOWA CODE §§ 711.3 with 709.6 (1977) (repealed 1978). See *State v. Habhab*, 209 N.W.2d 73, 74 (Iowa 1973).

1098. IOWA CODE § 714.2(1) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1433.

1099. See IOWA CODE § 702.11 (1979) and text accompanying notes 180-203 *supra*.

1100. See text accompanying notes 84-92 *supra*.

1101. See IOWA CODE § 709.6 (1977) (repealed 1978).

1102. IOWA CODE § 714.2(2) (1979).



ceny, embezzlement, receiving and concealing stolen property, or false drawing and uttering of checks — offenses which now constitute the newly-consolidated crime of Theft. In other words, has a person with at least two prior convictions for any of those forerunner offenses of Theft been previously convicted of "theft," in light of the crime known specifically as Theft not existing before 1978? The starting point in this analysis is the fact that two somewhat similar provisions were included in the pre-revised law.<sup>1103</sup> However, larceny and receiving plus concealing stolen property were the only pre-revised<sup>1104</sup> offenses which were included. Moreover, these two pre-revised provisions were separate, thus requiring either three convictions for larceny or two convictions for receiving and concealing stolen property, without permitting a combination of these offenses in order to constitute the status of "common thief." In contrast, the new provision can be satisfied by three convictions of any of the diverse types of offenses known collectively as Theft. Moreover, changes, albeit minor, were made in the pre-revised offenses which now collectively constitute Theft. Consequently, starting with a clean slate appears to be constitutionally mandated by *ex post facto* considerations.<sup>1105</sup>

## 2. *Theft by Taking*<sup>1106</sup>

The pre-revised law crime of Larceny<sup>1107</sup> essentially has been replaced by the newly-styled and restructured crime of Theft by Taking. The elements are: (1) "knowingly;"<sup>1108</sup> (2) taking possession or control of; (3) "property" belonging to another; (4) with intent to deprive the other thereof.

a. *Aggravated Thefts.* As discussed in the section on grading, the basic element classification is the dollar value of the property stolen. These aggravated thefts are punishable by a fixed schedule, regardless of the amount actually taken. Two of the special takings are carryovers from the pre-revised offense of Larceny—Theft from a Person<sup>1109</sup> and Theft of a Motor

1103. See IOWA CODE § 709.19 (1977) (repealed 1978).

1104. See IOWA CODE §§ 709.19, 712.2 (1977) (repealed 1980).

1105. See generally *State v. Olson*, 200 Iowa 660, 668, 204 N.W. 278, 280-81 (1925).

1106. IOWA CODE § 714.(1) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1401-04; J. YEAGER & R. CARLSON, *supra* note 3, § 313. See also W. LAFAYE & A. SCOTT, *supra* note 398, §§ 85-88 (Larceny); R. PERKINS, *supra* note 398, at 234-79 (Larceny).

1107. See IOWA CODE ch. 709 (1977) (repealed 1978), which contained several separate particularized larceny provisions. In addition to the basic common law offense of Larceny, these included Larceny from Building or From the Person; Larceny of Electric Current, Water, Steam or Gas; Larceny of Domestic Fowls and Animals; Taking Goods from Officer; Larceny of Logs or Lumber; Taking Property for Boat or Vessel; Shoplifting; and Larceny from a Parking Meter. See also *id.* § 321.82 (1977) (repealed 1978) (Larceny of Motor Vehicle).

1108. See text accompanying notes 465-601 *supra*.

1109. Compare IOWA CODE § 714.2(1) (1979) with IOWA CODE § 709.6 (1977) (repealed 1978) (Larceny From the Person). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1433.

Vehicle.<sup>1110</sup> Additionally, the pre-revised offense of Operating a Motor Vehicle Without Owner's Consent,<sup>1111</sup> which appeared in the pre-revised Code chapter on highways, has been transferred with some minor changes to the new Code chapter on Theft.<sup>1112</sup> One new type of aggravated theft—Theft from a building in conjunction with a physical disaster, riot, or bombing<sup>1113</sup> has been added, apparently in response to the turbulent 1960's. On the other hand, conduct punishable under the pre-revised offenses of larceny in the Nighttime<sup>1114</sup> and Larceny in the Daytime<sup>1115</sup> (neither of which was concerned with the value of the property taken) must either fit within the revised crime of Burglary<sup>1116</sup> or be punishable merely as Theft (according to the value of the property actually taken).<sup>1117</sup> Of course, the myriad number of particularized larceny statutes under the pre-revised law<sup>1118</sup> was consolidated within the new Theft statute by its broad, general definition of "property."<sup>1119</sup>

b. *Taking Possession or Control.* The old Code requirement<sup>1120</sup> that the offender "take, steal, take, and carry away" the property was abandoned. The substitute requirement,<sup>1121</sup> taking "possession or control" of another's property, can be satisfied by proof of constructive possession or exercise of control without proof of asportation.<sup>1122</sup> The significance of this change in the actus reus of the crime will be apparent in those areas of expanded coverage of the types of "property" subject to Theft. For example, a thief can wrongfully assume possession of or control over electric current through meter tampering, but can hardly carry it away.<sup>1123</sup>

c. *Intent to Deprive.* Strangely, the mens rea of Theft by taking is an intent to deprive, as compared to an intent to *permanently* deprive under the forerunner offense of Larceny.<sup>1124</sup> This change in statutory language nat-

1110. Compare IOWA CODE § 714.2(2) (1979) with IOWA CODE § 321.82 (1977) (repealed 1978) (Larceny of Motor Vehicle). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1443-44.

1111. See IOWA CODE § 321.76 (1977) (repealed 1978).

1112. IOWA CODE § 714.7 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1445-46, J. YEAGER & R. CARLSON, *supra* note 3, § 328.

1113. *Id.* § 714.2(1). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1434.

1114. See IOWA CODE § 709.4 (1977) (repealed 1978).

1115. *Id.* § 709.5.

1116. IOWA CODE § 713.1 (1979). See note 957 *supra*.

1117. *Id.* § 714.2 See text accompanying notes 1075-1090 *supra*.

1118. See note 1107 *supra*.

1119. IOWA CODE § 702.14 (1979). See text accompanying notes 204-206 *supra*.

1120. See IOWA CODE § 709.1 (1977) (repealed 1978).

1121. IOWA CODE § 714.1(1) (1979).

1122. J. YEAGER & R. CARLSON, *supra* note 3, § 313.

1123. See IOWA CODE § 709.7 (1977) (repealed 1978) (Larceny of Electric Current, Water, Steam or Gas). This particularized pre-revised larceny statute is unnecessary under the less restrictive revised theft statute under the new Criminal Code.

1124. Although the pre-revised larceny statute did not contain express language as to an

usually raises the question of whether a mere temporary deprivation is sufficient.

The approach to this question taken in the Uniform Jury Instructions<sup>1125</sup> is unambiguous and straightforward. "Depriving" the owner is defined therein as

[t]o permanently withhold, or cause it to be so withheld for an extended period of time, or under such circumstances, that its benefit or value is lost; or, the property is disposed of in such a manner, or under such circumstances, as to render it unlikely that the owner will recover the property.<sup>1126</sup>

This approach seems correct in light of the usual meaning of the word "deprive" as "something more than a mere temporary dispossessing of another, although a deprivation is not necessarily a permanent thing."<sup>1127</sup> The Iowa Supreme Court has yet to rule<sup>1128</sup> on the parameters of "depriving" under either the pre-revised or revised law. Nevertheless, the court has strongly implied in a recent decision that it will support the definition contained in the Uniform Jury Instructions.<sup>1129</sup>

d. *Lesser Included Offenses.* Because of a change in the definition of the crime of Robbery,<sup>1130</sup> the supreme court has interpreted<sup>1131</sup> the crime of Theft under the new Criminal Code as no longer being lesser included offense<sup>1132</sup> of Robbery (unlike under the pre-revised law).<sup>1133</sup> On the other hand, the new Criminal Code<sup>1134</sup> codified the common law concept<sup>1135</sup> that the crime of Operating Another's Vehicle Without Owner's Consent *may* be

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intent to deprive, nevertheless it essentially was a codification of the common law crime of larceny (which essentially required an intent to permanently deprive). See W. LaFAVE & A. SCOTT, *supra* note 398, § 55 ("[F]or larceny, one must intend to deprive the owner of the possession of his property either permanently or for an unreasonable length of time, or intend to use it in such a way that the owner will probably be thus deprived of his property."). See also *State v. Marshall*, 206 Iowa 373, 379-80, 220 N.W. 106, 108-09 (1928) (unauthorized taking is not larceny if done so with the intent to preserve and return "stolen" property to its owner).

1125. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1403.

1126. *Id.* at No. 1403.

1127. J. YEAGER & R. CARLSON, *supra* note 3, § 313.

1128. *State v. Fluhr*, 287 N.W.2d 857 (Iowa 1980).

1129. The court stated: "Although there is some uncertainty as to the meaning of 'intent to deprive' under the new statute, § 714.1(1), The Code 1979, see J. Yeager & R. Carlson, 4 Iowa Practice, Criminal Law and Procedure § 313 (1979), II Iowa Uniform Jury Instructions No. 1403 provides some guidance which could be shared with defendants offering guilty pleas." *Id.* at 867.

1130. See IOWA CODE § 711.1 (1979) and text accompanying notes 1302-11 *infra*.

1131. *State v. Holmes*, 276 N.W.2d 823 (Iowa 1979). See text accompanying notes 1323-24 *infra*.

1132. See generally text accompanying notes 1323-24 *supra*.

1133. See *State v. Stewart*, 223 N.W.2d 250 (Iowa 1974).

1134. IOWA CODE § 714.7 (1979).

1135. *State v. Hawkins*, 203 N.W.2d 555 (Iowa 1973).

a lesser included offense on a charge of Theft of a vehicle (i.e., Theft in the Second Degree).<sup>1136</sup>

This leaves as lesser included offenses in a prosecution for Theft in the fourth or a higher degree only those degrees of Theft that are lower than the degree charged and submitted to the fact-finder.<sup>1137</sup> Moreover, there may not be any lesser included offenses in prosecutions for thefts in special circumstances which are not concerned with the value of the property taken.<sup>1138</sup>

### 3. *Theft by Misappropriation*<sup>1139</sup>

The pre-revised crime of Embezzlement<sup>1140</sup> essentially has been replaced by the crime of Theft by Misappropriation. The elements of this revised offense are: (1) misappropriation; (2) of another's "property"<sup>1141</sup> which is either held in trust<sup>1142</sup> by defendant or is in defendant's possession or control; (3) by using or disposing of the "property" in a manner inconsistent with the trust or of the owner's rights.<sup>1143</sup> In addition, this comprehensive offense also includes a particularized type of misappropriation, that is, concealment or appropriation of found property whose owner is known.<sup>1144</sup>

a. *Misappropriation.* Misappropriation is not specifically defined in the Code itself, except for notation of the two ways in which it can occur (*viz.* "by using or disposing of [the property] in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property."<sup>1145</sup> The definition is amplified in the Uniform Jury Instructions<sup>1146</sup> as

1136. See IOWA CODE § 714.2(2) (1979).

1137. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1451.

1138. See text accompanying notes 619-714 *supra*.

1139. IOWA CODE § 714.1(2) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1405-13; J. YEAGER & R. CARLSON, *supra* note 3, § 314.

1140. See IOWA CODE ch. 710 (1977) (repealed 1978), which contained several separate particularized embezzlement provisions. These included: Embezzlement by Public Officers; Embezzlement by Bailee; Embezzlement by Agents; Embezzlement by Bank Officers or Employees; Embezzlement by Carrier or Persons Entrusted; Embezzlement by Executor, Administrator or Guardian; and Leased and Rented Vehicle Offenses. See also W. LAFAYE & A. SCOTT, *supra* note 398, § 89; R. PERKINS, *supra* note 398, at 286-95.

1141. See IOWA CODE § 702.14 (1979) and text accompanying notes 204-206 *supra*.

1142. A person is considered under the UNIFORM JURY INSTRUCTIONS, *supra* note 136, to have property in his trust when:

[i]t is given to him by the owner or a third person to be held in safekeeping for the owner or another or for the owner's benefit. When the property is so given, a fiduciary relationship is then created with respect to the property, and the person who receives the property is known as a 'trustee,' whether he is called a 'trustee,' 'agent,' 'bailee,' 'broker,' 'factor,' 'attorney,' or otherwise.

*Id.* at No. 1407.

1143. *Id.* at Nos. 1405-06.

1144. See text accompanying notes 1150-56 *infra*.

1145. IOWA CODE § 714.1(2) (1979).

follows:

To 'misappropriate' means that a person, knowing he had no right or authority to do so, exercises control over the property and that by exercising control over the property, the benefit or value of the property is lost to the owner. Misappropriation may also occur when a person knowingly disposes of the property for his own benefit or the benefit of a third person.<sup>1147</sup>

b. *Inference from Untimely Return.* A new provision<sup>1148</sup> establishes an inference of misappropriation of leased personal property or of a bailment when the property is not returned within seventy-two hours of the time specified in the written agreement of lease or bailment. In other words, a jury question can be generated solely on this provision, with the practical effect being "to compel the defendant to explain why he has not returned the property."<sup>1149</sup>

c. *Found Property.* Theft by misappropriation<sup>1150</sup> also includes the pre-revised offense of Appropriating Found Property.<sup>1151</sup> This type of Theft can be committed in either of two ways: by concealing found "property" or by appropriating<sup>1152</sup> such "property" to his or her own use. In either of these situations, the owner of this property must be known<sup>1153</sup> to the offender. The Code thus places no affirmative duty on the finder of lost property to attempt to discover the owner,<sup>1154</sup> which is questionable public policy.

#### 4. Theft by "Deception"

The pre-revised offenses of obtaining money by false pretenses<sup>1155</sup> and swindling<sup>1156</sup> were incorporated into a type of Theft by "deception."<sup>1157</sup> Its

1146. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No 1408.

1147. *Id.* at No. 1408.

1148. IOWA CODE § 714.1(2) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1439; J. YEAGER & R. CARLSON, *supra* note 3, § 314.

1149. J. YEAGER & R. CARLSON, *supra* note 3, § 314.

1150. IOWA CODE § 714.1(2) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1410-13; J. YEAGER & R. CARLSON, *supra* note 3, § 314.

1151. See IOWA CODE § 709.11 (1977) (repealed 1978). See also W. LAFAYE & A. SCOTT, *supra* note 398, § 89; R. PERKINS, *supra* note 398, at 248-53.

1152. "Appropriates" is defined in the Uniform Jury Instructions to mean "to exercise control over the property, or to aid a third person to exercise control over it so as to acquire its value or benefit, or to dispose of the property for one's own benefit or use." UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1412.

1153. For an instruction on proof of knowledge of the owner, see *id.* at No. 1413.

1154. See J. YEAGER & R. CARLSON, *supra* note 3, § 314.

1155. See IOWA CODE ch. 713 (1977) (repealed 1978), which contained several particularized false pretense provisions. These included: False Pretenses, Receiving Goods by False Personation, Suppression or Destruction of Will, Fraudulent Conveyances, Frauds Upon Hotel-keepers, False Use of Credit Cards, Fraudulent Use of Wire Services and Simulated Legal Process.

1156. See *id.* § 709.1 (Larceny by Trick).

elements are: (1) using "deception," either (2a) to obtain the labor or services of another or (2b) to obtain a transfer of possession, control, or ownership of another's "property" or (2c) to obtain beneficial use of another's "property."<sup>1158</sup> However, the extremely broad, albeit all-inclusive, definitions of "property"<sup>1159</sup> and "deception" make Theft by deception a broader crime than its forerunners. First, the general term "property" means anything of value. Next, the term "deception"<sup>1160</sup> is defined less restrictively than the traditional concept of criminal fraud which was basically limited to "a false statement of a material existing fact relied on by another to his detriment."<sup>1161</sup>

a. *Acts of "Deception."* Theft by deception can occur in six different ways: (1) "knowingly"<sup>1162</sup> creating or confirming a false belief (either by a statement or non-verbal conduct);<sup>1163</sup> (2) failing to correct a false belief previously created or confirmed by defendant;<sup>1164</sup> (3) preventing another from acquiring information pertinent to disposition of property;<sup>1165</sup> (4) transferring or encumbering property without disclosure of a lien or other legal impediment therein;<sup>1166</sup> (5) promising either payment, delivery of goods, or other performance with either no intent or ability to perform;<sup>1167</sup> and (6) inserting unauthorized tokens into coin-operated machines dispensing goods or services.<sup>1168</sup>

b. *Inference of "Deception."* A new statutory inference of deception<sup>1169</sup> arises regarding goods or services for which payment ordinarily is

1157. IOWA CODE § 714.1(3) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1414-22; J. YEAGER & R. CARLSON, *supra* note 3, § 315; W. LAFAVE & A. SCOTT, *supra* note 398, § 90 (False Pretenses); R. PERKINS, *supra* note 398, at 296-319 (False Pretenses).

1158. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1415-21.

1159. See IOWA CODE § 702.14 (1979) and text accompanying notes 1066 and 204-06 *supra*.

1160. *Id.* § 702.9. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1415-21; J. YEAGER & R. CARLSON, *supra* note 3, §§ 30-36.

1161. See J. YEAGER & R. CARLSON, *supra* note 3, § 30.

1162. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 230 and text accompanying notes 437-601 *supra*.

1163. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1416; J. YEAGER & R. CARLSON, *supra* note 3, § 31.

1164. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1417; J. YEAGER & R. CARLSON, *supra* note 3, § 32.

1165. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1418; J. YEAGER & R. CARLSON, *supra* note 3, § 33.

1166. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1419; J. YEAGER & R. CARLSON, *supra* note 3, § 34.

1167. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1420; J. YEAGER & R. CARLSON, *supra* note 3, § 35.

1168. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1421; J. YEAGER & R. CARLSON, *supra* note 3, § 36.

1169. IOWA CODE § 714.1(3) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1422; J. YEAGER & R. CARLSON, *supra* note 3, § 315.

made immediately when the customer "leave[s] the premises" without either paying for goods or services received or making arrangements with the owner or operator to make later payment. This, of course, is only a permissible inference and by itself can generate a jury question on the question of deception.

One troublesome question of interpretation remains as to the parameters of the "premises." Are the premises of a restaurant confined to the inside of the building, such as inside the dining area itself, or has a customer who is in a lounge area "left" the premises since he has passed the cash register area without paying? It would seem not, since the premises should include the entire building itself. What, however, if the non-paying customer is accosted in a rest room which has an entry door from outside of the building? Is the parking lot to be considered part of the "premises?" This statutory inference, which could very well be inclusive in nature, certainly discourages a person from abortively returning to his automobile, without "permission" of the operator or presumably his agent, to shut off the lights, to get his checkbook out of the glove compartment, and so on. This latter example raises another practical question of when the act of leaving must occur. Presumably, the inference would not arise until the defendant had at least received the goods or services.<sup>1170</sup> This is because payment ordinarily is not made in a restaurant until the meal is finished, and thus a customer "caught" in the parking lot after he has ordered but before he has received his order should not be subject to this inference. Moreover, he has not yet "obtained" anything of value, and Theft is a specific result, as opposed to an inchoate crime. It thus appears that this inference arises at an earlier stage, and should be determined under the particular circumstances of the individual case. Of course, in most innocent circumstances there will be no prosecution, as the customer will return, finish his meal, and pay upon leaving permanently. The problem area will involve a wary merchant who has frequently been victimized and who is determined to "make an example" of any culprit "caught in the act." Such a situation will require the adoption of a "common sense" approach by the prosecution in making the charging decision. Yet once the prosecutor has proved beyond a reasonable doubt the requisite underlying facts, the inference should automatically arise, rather than being discretionary with the trial court. The burden would then be on

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1170. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1422. The requisite facts for invoking the inference that must be proved beyond a reasonable doubt are:

- 1.) The defendant obtained goods or services for which payment is ordinarily paid immediately upon receipt of the goods or services.
- 2.) The defendant (refused to pay) left the premises without payment (or an offer to pay).
- 3.) That when he (refused to pay) (left the premises) he had not obtained from the owner or operator the right to pay at a later time.

*Id.*

the defendant to convince the jury not to draw the inference in his particular case.

5. *Theft by Exercising Control Over Stolen Property*<sup>1171</sup>

The pre-revised crime of Receiving and Concealing Stolen Property<sup>1172</sup> was a separate offense, but was made part of Theft in the new Criminal Code. The elements of the revised crime are: (1) exercising control;<sup>1173</sup> (2) over stolen<sup>1174</sup> property; (3) with either knowledge<sup>1175</sup> or a reasonable belief that the property was stolen.<sup>1176</sup> The constitutionality of permitting a conviction in the absence of actual knowledge by defendant that the property in question was stolen was upheld in *State v. Jones*.<sup>1177</sup>

a. *Inference of "Knowledge."* There has already been a major Iowa Supreme Court decision which has strengthened this statute in two ways. In *State v. Post*,<sup>1178</sup> the court upheld the constitutionality of the new statutory inference<sup>1179</sup> that a person found in possession of property that had been stolen from two or more persons on separate occasions knew or believed the property had been stolen.<sup>1180</sup>

b. *Aggregation Value.* Concerning aggregating the value of all the stolen property found under defendant's control,<sup>1181</sup> the court also stated in *Post*: "At the time of arrest a person . . . is exercising control over all that property which is in his or her possession, and the total value of that property should be used to determine the degree of guilt."<sup>1182</sup>

c. *Defense of Intended Restoration.* A new statutory defense<sup>1183</sup> concerning intended restoration is included in the new Criminal Code. This requires for exculpation that a person found in possession of stolen property must have the purpose "to promptly restore it to the owner or to deliver it

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1171. IOWA CODE § 714.1(4) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1423-30; J. YEAGER & R. CARLSON, *supra* note 3, § 316.

1172. See IOWA CODE § 712.1 (1977) (repealed 1978).

1173. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1425.

1174. The revised IOWA CODE thus retained the common law principle that the property must remain in a stolen status at the time of the defendant's act of exercising control. See LAFAYE & SCOTT, *supra* note 398, § 88.

1175. See *id.* at No. 230 and text accompanying notes 437-601 *supra*.

1176. See *id.* at No. 1426.

1177. 289 N.W.2d 597 (Iowa 1980).

1178. 286 N.W.2d 195 (Iowa 1979).

1179. IOWA CODE § 714.1(4) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1430; J. YEAGER & R. CARLSON, *supra* note 3, § 316.

1180. See also UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1429 (inference from defendant's possession of recently stolen property that defendant stole it).

1181. See generally IOWA CODE § 714.3 (1979).

1182. 286 N.W.2d at 202.

1183. IOWA CODE § 714.1(4) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1427.



to an appropriate public officer."<sup>1184</sup> This essentially becomes an element of the crime when properly raised by the defendant, with the prosecution required to disprove it. If the prosecution does not carry its burden then the defendant will be acquitted since in effect criminal intent is lacking. Factors to be considered as bearing on this alleged intent to restore are amplified in the Uniform Jury Instructions<sup>1185</sup> as follows: "the nature of the property, its ease of transfer, the location of the defendant and the property in regard to the owner (appropriate authorities), the knowledge of who is the owner, the length of time the property was in the possession of the defendant, together with all other facts and circumstances shown by the evidence . . . ."<sup>1186</sup>

#### 6. *Theft by Bad Checks*<sup>1187</sup>

The pre-revised crime of False Drawing and Uttering<sup>1188</sup> was transferred in unchanged form into the Theft chapter in the new Criminal Code, save for a 1979 amendment adding share drafts to the coverage of the offense. The elements of this crime are: (1) making, uttering, drawing, delivering or giving; (2) to any person; (3) a check, draft, or written order; (4) knowing<sup>1189</sup> that it will not be paid when presented to the drawee; and (5) obtaining "property" or service in exchange therefore.<sup>1190</sup>

The ten-day provision of the pre-revised law was retained.<sup>1191</sup> This provision permits an inference of the requisite culpable knowledge for the offense when the defendant fails to redeem a bad check (and now, also a bad share draft) within ten days of receiving notice from the drawee that payment has been refused because of insufficient funds in the maker's account. Of course, this provision does not accord a ten-day grace period to make good a worthless check. Indeed, the defendant is not entitled to a ten-day notice; failure to afford a ten-day notice merely precludes the prosecution from invoking the evidentiary inference. Thus, failure to make good a worthless check after receiving a ten-day notice is not an element of this crime.<sup>1192</sup>

A second permissible statutory inference<sup>1193</sup> has been added to cover

1184. IOWA CODE § 714.1(4) (1979).

1185. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1427.

1186. *Id.* at No. 1427.

1187. IOWA CODE § 714.1(6) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1435-38; J. YEAGER & R. CARLSON, *supra* note 3, § 318; W. LAFAYE & A. SCOTT, *supra* note 389, § 92.

1188. See IOWA CODE §§ 713.3-.4 (1977) (repealed 1978).

1189. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1437.

1190. For an analysis of the interrelationship between the offenses of Theft by bad check and False Use of a Financial Instrument, see text accompanying notes 1294-1300 *infra*.

1191. IOWA CODE § 714.1(7) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1438; J. YEAGER & R. CARLSON, *supra* note 3, § 318.

1192. *State v. Mason*, 203 N.W.2d 292 (Iowa 1972).

1193. IOWA CODE § 714.1(6) (1979). There is no Uniform Jury Instruction, *supra* note 136,

bad checks when the defendant-maker has no account with the drawee. No provision is made for a ten-day notice, but none really is necessary in light of the entire provision which states the obvious.<sup>1194</sup>

### 7. *Theft by Misuse of Secured Property*<sup>1195</sup>

Theft by defrauding a secured party is a separate type of theft. Its elements are: (1) taking, destroying, concealing, or disposing; (2) of "property;" (3) in which another person has a security interest; (4) with intent to defraud the secured party. The principal statutory change is that the crime under the new Code applies to any person whereas the pre-revised statute<sup>1196</sup> was directed only to the debtor whose debts were the focus of the security interest.<sup>1197</sup>

### 8. *Theft-Related Offenses*

a. *Operating a Vehicle Without the Owner's Consent.*<sup>1198</sup> The pre-revised theft-related crime of Operating a Motor Vehicle Without the Owner's Consent<sup>1199</sup> was changed in two respects: (1) the type of protected vehicle was expanded from motor vehicles exclusively to any type of self-propelled vehicle; and (2) the revised actus reus requires only the unauthorized taking of possession or control of another's vehicle rather than requiring *operation* of the appropriated vehicle.<sup>1200</sup>

This crime consists of (1) taking possession and control; (2) of another's vehicle; (3) without the owner's consent; (4) but without the intent to permanently deprive the owner thereof. The fourth element which expressly sets out the mental aspect of the crime (but in the negative) thus differentiates this crime from the greater offense of Theft of a Motor Vehicle.<sup>1201</sup> This lesser crime, then, remains as merely a general intent crime.<sup>1202</sup>

(1) *Lesser Included Offense.*<sup>1203</sup> As already noted in this Article, the new Criminal Code codified the common law concept that Operating a Vehicle Without the Owner's Consent *may* be a lesser included offense on a

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embodying this permissible inference.

1194. J. YEAGER & R. CARLSON, *supra* note 3, § 318.

1195. IOWA CODE § 714.1(5) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1431-32; J. YEAGER & R. CARLSON, *supra* note 3, § 317.

1196. See IOWA CODE § 710.12 (1977) (repealed 1978).

1197. J. YEAGER & R. CARLSON, *supra* note 3, § 317.

1198. IOWA CODE § 714.7 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1445-46; J. YEAGER & R. CARLSON, *supra* note 3, § 328.

1199. See IOWA CODE § 321.76 (1977) (repealed 1978).

1200. See J. YEAGER & R. CARLSON, *supra* note 3, § 328. What constitutes taking possession and control is not defined in either the Criminal Code or the Uniform Jury Instructions.

1201. IOWA CODE § 714.2(2) (1979). See text accompanying notes 1091-92 *supra*.

1202. See text accompanying notes 437-601 *supra*.

1203. See generally text accompanying notes 619-714 *supra*.

charge of Theft of a motor vehicle<sup>1204</sup> (i.e., Theft in the Second Degree). The use of the permissive term "may" in the statute, coupled with the supreme court's first two interpretations of the general doctrine of lesser included offenses under the new Criminal Code,<sup>1205</sup> means that no change will be made in this area. Therefore, *State v. Hawkins*<sup>1206</sup> is still controlling in its determination that Operating a Vehicle Without the Owner's Consent is not automatically a lesser included offense of Theft of a vehicle. That is, even though the legal or element test is met, the trial judge may not submit a lesser included offense instruction unless the instruction is warranted by the evidence in the particular case.

(a) *Grading*. The single grade of this offense has been downgraded to an aggravated misdemeanor after being a felony under the pre-revised law.<sup>1207</sup> This single grade approach corresponds to the fact that the gravamen of this offense essentially is unauthorized use of another's property as opposed to stealing or damaging such property. Thus, the value of the property unlawfully "borrowed" has little legal significance for penalty grading purposes.

b. *Unrepealed Theft-related Offenses*.<sup>1208</sup> Four Theft-related offenses were incorporated into Chapter 714 of the new Iowa Criminal Code.<sup>1209</sup> All four crimes were unrepealed provisions of the pre-revised Code. These commercial-fraud crimes relate to pirating of sound recordings through unauthorized reproduction,<sup>1210</sup> consumer frauds,<sup>1211</sup> unlawful advertising and selling of courses of instruction,<sup>1212</sup> and selling more than one lifetime contract to the same person.<sup>1213</sup>

## B. *Fraudulent Practices*

The crime of Fraudulent Practices<sup>1214</sup> represents a consolidation of nu-

1204. IOWA CODE § 714.7 (1979).

1205. See *State v. Holmes*, 276 N.W.2d 823 (Iowa 1979) and *State v. Sanders*, 280 N.W.2d 375 (Iowa 1979) and text accompanying notes 619-38 *supra*.

1206. 203 N.W.2d 555 (Iowa 1973).

1207. Nevertheless, the *maximum* authorized penalty of confinement for two years under IOWA CODE § 714.7 (1979) is greater than the one-year maximum under IOWA CODE § 321.76 (1977) (repealed 1978).

1208. See also IOWA CODE § 714.1(8) (1979) (residual Theft provision extending uniform penalty schedule in § 714.2 to diverse Theft offenses outside the Criminal Code); J. YEAGER & R. CARLSON, *supra* note 3, § 319.

1209. There are no Uniform Jury Instructions, *supra* note 136, for any of these offenses. See generally J. YEAGER & R. CARLSON, *supra* note 3, §§ 340-44.

1210. IOWA CODE § 714.15 (1979).

1211. *Id.* § 714.16.

1212. *Id.* § 714.17.

1213. *Id.* § 714.20.

1214. IOWA CODE §§ 714.8-13 (1979); H.F. 685 (1980). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1447-50; J. YEAGER & R. CARLSON, *supra* note 3, §§ 329-39.

merous fraud crimes contained in the pre-revised Code.<sup>1215</sup> Specifically enumerated situations plus a residual provision<sup>1216</sup> constitute this crime which appears in the Code chapter on Theft and is to a large extent an attempted Theft offense.<sup>1217</sup> The interrelationship between these two crimes is especially important in this regard in view of the fact that Theft<sup>1218</sup> is a specific result crime requiring that the thief actually obtain something of value.

### 1. *Economic Underpinning*

Fraudulent Practices definitely has a economic underpinning, with the intent that the defendant perform the various proscribed acts in order to make an unauthorized economic gain. Although such an intent is not an element of some of the proscribed Fraudulent Practices, nevertheless this economic-oriented intent should deter charging someone with the crime of Fraudulent Practices when the circumstances do not suggest any pecuniary motivation. For example, one type of Fraudulent Practice consists of "mak[ing] any entry in or alteration of any public records, or any records of any . . . business enterprise . . ., knowing the same to be false."<sup>1219</sup> On its face, this provision is not limited to, nor indeed does even mention, financial records. Yet a practical reading of this statute in both its historical and contemporary contexts compels the conclusion that this crime is limited. After all, its forerunner statutes were economic fraud crimes and the crime of Fraudulent Practices appears in the Code chapter entitled "Theft." Moreover, to a large extent, it is basically an attempted Theft crime which fills the void created by categorizing Theft as a specific result crime.

### 2. *Particularized States of Mind*

All but two of the various acts constituting Fraudulent Practices must be expressly accompanied by one of two particularized states of mind. Some of these acts must have been done merely with knowledge of their falsity; others with the more specific intent to defraud.

These following "fraudulent" acts must have been done with the offender "knowing them to be false":<sup>1220</sup>

- (1) making, tendering, or keeping for sale knowingly false bills of lading or warehouse receipts; (2) knowingly attaching or altering labels on goods

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1215. See IOWA CODE §§ 321.80; 709.7; 713.11-.16, .22, .26, .28, .35-.37, .43; 714.12-13; 718.3-4, .6, .19 (1977) (repealed 1978).

1216. The residual provision brings within the realm of the uniform grading scheme of sections 714.9-.13 of the Criminal Code any other act expressly declared to be a Fraudulent Practice by any other section of the Iowa Code. See IOWA CODE § 714.8(10) (1979).

1217. But see text accompanying notes 1226-43 *infra*.

1218. IOWA CODE § 714.1 (1979). See text accompanying note 1216 *supra*.

1219. *Id.* § 714.8(4).

1220. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1448.

kept for sale so as to materially misrepresent as to such goods either their quantity, quality, maker, or source; (3) knowingly executing or tendering any false affidavit or certificate which either is required by law or is given in support of a claim for payment; and (4) making either a knowingly false entry or a knowingly false alteration in any public or business record.<sup>1221</sup>

The following "fraudulent" acts essentially are specific intent crimes which must have been done with the intent to defraud.<sup>1222</sup>

(1) manufacturing or keeping for sale any device usable as a coin-machine slug, either with the intent that the device be so used or with the representation that it may be so used; (2) manufacturing or possessing any false or counterfeit label, either with the intent that it will be used fraudulently or with the representation that it may be so used; (3) tampering with meters used in determining the value of property, with the intent to defraud any person; and (4) soliciting contributions or other assistance by falsely representing to be a veteran or a representative of any fraternal, religious, charitable, or veterans organization;<sup>1223</sup> and (5) knowingly participating in the transfer or assignment of a property interest with the intent to obtain public assistance for which a person is not eligible.<sup>1224</sup>

The two remaining types of Fraudulent Practices do not on their face contain any requirement of either (1) knowledge of the falsity of the practice or (2) an intent to defraud. One consists of removing, altering, or defacing any identification number or mark from another's property, without any mention of a fraudulent intent. Certainly such an intent is implied by the entire thrust of the chapter which is entitled "Theft." After all, mere removal, alteration, or defacement—without more—would constitute the crime of Criminal Mischief.<sup>1225</sup> The latter is a crime of vandalism whereas Fraudulent Practices is a crime of intended economic gain. The other type of Fraudulent Practice in this category consists of removing or tampering with any vehicle component part number or vehicle identification number "for the purpose of concealing or misrepresenting the identity of the component part or vehicle." This offense, too, seemingly has an underpinning of intended economic gain. Otherwise, the crime again should be merely labeled Criminal Mischief.

### 3. "Involved"

As noted in this article,<sup>1226</sup> Fraudulent Practices is to a large extent, an

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1221. *Id.*

1222. *Id.*

1223. *Id.*

1224. H.F. 685 (1980).

1225. IOWA CODE §§ 716.1-.6 (1979). See text accompanying notes 937-56 *supra*.

1226. See text accompanying note 1217 *supra*.

attempted Theft crime. The legislative intent was obvious, at least originally. This crime is included in the same chapter of the Code as Theft and Theft-related offenses, all of which require an actual obtaining of another's property.<sup>1227</sup> Requiring the same for the crime of Fraudulent Practices would lead to considerable overlapping, as many — if not practically all — consummated Fraudulent Practices would constitute Theft (by Deception).<sup>1228</sup> Moreover, there is not any language concerned with obtaining anything in the entire provision which sets forth the proscribed Fraudulent Practices. This contrasts with the terminology used in the various Theft provision,<sup>1229</sup> viz. “takes possession or control;” “misappropriates;” “obtains” property by deception; “exercises control over stolen property;” “takes, destroys, conceals or disposes” of secured property; and utters any check and “obtains” property in exchange therefore. If the General Assembly had wanted to likewise make Fraudulent Practices a specific result crime, it certainly could have followed its own lead from the Theft statutes and employed some of the aforementioned terminology in the Fraudulent Practice provisions.

The inescapable conclusion should be that Fraudulent Practices is not a specific result crime, and thus covers certain attempted Theft situations. However, Professor Yeager<sup>1230</sup> has concluded that Fraudulent Practices is indeed a specific result crime, and thus the actual obtaining of something of value is required. He bases this conclusion on the legislative history of an amendment to the Code in 1977.<sup>1231</sup> As originally passed in 1976,<sup>1232</sup> this crime had a single grade; all types of Fraudulent Practices were punishable as aggravated misdemeanors irrespective of the value of the property involved. In 1977, however, the Fraudulent Practices section of the new Criminal Code was amended to establish a five-degree crime tracking the grading and penalty schedules for Theft.<sup>1233</sup>

Professor Yeager's cause for concern arises in the explanation accompanying the house file version of the bill which became the 1977 amendment.<sup>1234</sup> The pertinent portion therein stated: “The degree of crime and severity of penalty are primarily determined by the amount of money or value of property or services *obtained* by committing a fraudulent practice.”<sup>1235</sup>

The significance of this explanation and most particularly the reference

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1227. See text accompanying note 1065 *supra*.

1228. See text accompanying notes 1240-41 *infra*.

1229. IOWA CODE § 714.1(1)-(6) (1979).

1230. J. YEAGER & R. CARLSON, *supra* note 3, § 330.

1231. H.F. 237, 67th G.A. (1977).

1232. S.F. 85, 1976 Iowa Acts 2d Sess. ch. 1245, § 1409 (66th G.A.).

1233. See text accompanying notes 1242 *infra*.

1234. See note 1090 *supra*.

1235. H.F. 237, 67th G.A. (1977) (emphasis added).

therein to "obtained" lies in ascertaining the meaning of the word "involved" which is used in determining the grading of the offense.<sup>1236</sup> The basic point of differentiation is "the amount of money or value of property involved,"<sup>1237</sup> with the same schedules as apply to Theft (which, of course, is a specific result crime). No statutory definition of "involved" appears in the Code itself. This is a defect of constitutional dimensions, in Professor Yeager's estimation.<sup>1238</sup> He explains: "This is ambiguous language, in that reasonable minds may differ as to what is meant by the word 'involved' in this context. This ambiguity would very probably have made these sections unconstitutionally vague,"<sup>1239</sup> except for resorting to the abovementioned explanatory comment which defines "involved" as "obtained." Therefore, he concludes that Fraudulent Practices does not encompass attempted appropriations (*i.e.*, Attempted Thefts).

He concedes that this offense "was initially conceived as an attempted theft provision."<sup>1240</sup> He also points out that each Fraudulent Practice act "can also be prosecuted as a violation of section 714.1(3)," thus creating "an unnecessary duplication" with the offense of Theft by Deception."<sup>1241</sup>

I disagree with Professor Yeager's ultimate conclusion. As an initial matter, the original legislative intent seems unambiguous. If the crimes of Fraudulent Practices and Theft by Deception are in fact duplications, which they appear to be, then the entire provision of Fraudulent Practices is rendered meaningless, which certainly was not the legislative intent. Moreover, such a position flies in the face of the maxim of statutory construction that each word (let alone each provision) is to be given effect. It also stretches credulity to believe that the General Assembly would have changed positions so diametrically from the 1976 legislative session to the 1977 session. Moreover, one would hope, if not expect, that such a fundamental change would appear within the purview of the statute itself instead of being found in the explanation portion of the bill (which is not an official part of the statute itself). And, of course, the statute controls and any unofficial intrinsic parts of the statute such as the explanation can be taken into account only when the meaning of the law is unclear.

The dispositive issue here is whether the statute is clear. I maintain that it is, and thus further resort to the explanation is unwarranted. The word "involved" certainly is not a word of art, and should be generally understood in its dictionary meaning as "[i]mplicated; affected or concerned in some degree."<sup>1242</sup> A taking is not suggested from the definitional context nor

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1236. See IOWA CODE §§ 714.9-13 (1979).

1237. *Id.*

1238. J. YEAGER & R. CARLSON, *supra* note 3, § 330.

1239. *Id.*

1240. *Id.* § 329.

1241. *Id.*

1242. BALLENTINE'S LAW DICTIONARY 666 (3d ed. 1969).

is it implied from a contemporaneous context. As already pointed out, these provisions appear in the Theft chapter and would be an unnecessary duplication of the offense of Theft by Deception if a taking was also required for the offense of Fraudulent Practices. It bears repeating that it is evident that the latter offense does not require a taking when the terminology of the various *acti rei* of the two offenses is compared. If a taking was intended to be required for Fraudulent Practices, the General Assembly should have used terminology such as "take," "misappropriates," or "obtains" (as it did in the Theft provisions) instead of the word "involved" (as it did in the Fraudulent Practices provisions).<sup>1243</sup>

A reasonable interpretation of the Fraudulent Practices provision is that the value of the amount of money or value of property "involved" can be reasonably determined and thus fair notice is given as to what constitutes the crime. Under section 714.8(1), the value involved would be that of the non-existent goods falsely represented in the warehouse receipt or bill of lading. The value of a false affidavit or certificate under section 714.8(3) would be the total amount of the claim if the claim is totally false but only the excess of the fraudulent claim over the value of any rightful claim. This same potential value differential would apply to falsification of public or business records under section 714.8(4). The value of the property tampered with by falsification of serial numbers and component part or vehicle identification numbers under sections 714.8(5) and 714.8(11), respectively, would control in these related situations. "Value" for purposes of the false Solicitation of contributions provision in section 714.8(6) would depend upon whether a specific amount (either in money or specific property) was improperly solicited or whether an open-ended or general request was made. The former situation would be punishable according to the dollar "value," and the latter would be punishable in the third degree under the indeterminate-value provision in section 714.11(3). The degree of this offense which occurs through manufacturing, selling, or keeping for sale coin machine slugs would quite logically correspond to the total amount of money for which the total amount of slugs confiscated were intended to substitute. Constrastingly, because of difficulty in determining the intended use or the value of the property ultimately obtained or obtainable under sections 714.8(2), (8), and (9), the fraudulent practices involving falsely attaching or altering labels on merchandise kept for sale, manufacturing or possessing false or counterfeit labels and meter tampering, are expressly made punishable in the third degree under section 714.11(2).

#### 4. *Grading*

There are five degrees of Fraudulent Practices,<sup>1244</sup> ranging from a sim-

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1243. See text accompanying note 1229 *supra*.

1244. IOWA CODE §§ 714.9-.13 (1979).



ple misdemeanor to a class C felony. The basic point of differentiation is "the amount of money or value of property involved,"<sup>1245</sup> with the same dollar-level schedules as applicable to Theft.<sup>1246</sup> Whenever the amount involved cannot be determined, a Fraudulent Practice is deemed to be in the third degree.<sup>1247</sup> Other types of Fraudulent Practices expressly declared in the statute<sup>1248</sup> to be in the Third Degree which do not depend upon the amount involved are attachment or alteration of false labels on goods kept for sale; manufacturing, possessing, or selling false or counterfeit labels; and fraudulently tampering with meters. In addition, a Fraudulent Practice in the Second Degree<sup>1249</sup> occurs when the amount involved does not involve more than \$500 but the defendant has twice before been convicted of a Fraudulent Practice. This latter provision can only have prospective application in light of the fact that no comparable habitual offender provision in the pre-revised law.<sup>1250</sup> Finally, an amendment in 1980 made it a serious misdemeanor fraudulent practice to knowingly participate in the transfer or assignment of a property interest with the intent to obtain public assistance for which a person is not eligible.<sup>1251</sup>

### C. False Use of a Financial Instrument

The newly-styled crime of False Use of a Financial Instrument<sup>1252</sup> consolidates a number of pre-revised crimes,<sup>1253</sup> the principal ones<sup>1254</sup> being Forgery,<sup>1255</sup> Uttering a Forged Instrument,<sup>1256</sup> Possession of Forged Instrument,<sup>1257</sup> and False Use of a Credit Card.<sup>1258</sup> The elements of this new crime<sup>1259</sup> are: (1) falsely using, (2) a "financial instrument,"<sup>1260</sup> (3) with

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1245. *Id.*

1246. *Id.* § 714.2. See also text accompanying notes 1229-41 *supra*.

1247. *Id.* § 714.11(3).

1248. *Id.* § 714.11(2).

1249. *Id.* § 714.10(2).

1250. Regarding the carryover application of the common thief provision during the statutory revision process, see text accompanying note 1104 *supra*.

1251. H.F. 685 (1980).

1252. IOWA CODE §§ 715.1-7 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1501-09. J. YEAGER & R. CARLSON, *supra* note 3, §§ 351-66.

1253. For an extensive discussion of the pre-revised law through the changes proposed in the 1974 bill, see Note, *False Use of a Financial Instrument*, 60 IOWA L. REV. 548 (1975) [hereinafter cited as *False Use Note*].

1254. The other consolidated pre-revised offenses included Gross Fraud or Cheat (repealed IOWA CODE § 713.40); Making or Uttering False Public Instruments (repealed IOWA CODE § 718.3); and the several counterfeiting offenses (repealed IOWA CODE §§ 718.4-.21). See *False Use Note*, *supra* note 1253, at 548 n.6.

1255. See IOWA CODE § 718.1 (1977) (repealed 1978).

1256. See *id.* § 718.2.

1257. See *id.* § 718.5.

1258. See *id.* § 713.39.

1259. IOWA CODE § 715.6 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos.

fraudulent intent, and (4) with knowledge of either the falsity of the instrument or the lack of a legal right to use a genuine instrument.

### 1. *False Use*

The proscribed false use<sup>1261</sup> of a "financial instrument" (together with special attendant circumstances) can consist of any of the following: (1) making or executing such an instrument;<sup>1262</sup> (2) endorsing such an instrument;<sup>1263</sup> (3) altering such an instrument so as to materially change its nature or its attendant obligation;<sup>1264</sup> (4) tendering or merely offering such an instrument, together with making false representations;<sup>1265</sup> or (5) possessing such an instrument, knowing it to be false or knowing there was no right to possession thereof.<sup>1266</sup> The gravamen of this offense is making false use of a "financial instrument" rather than actually obtaining anything. Hence this is a specific result offense.

The false use can arise through using either a false instrument or a genuine instrument with no right to do so, provided that either type of instrument is used with a fraudulent intent.<sup>1267</sup> An instrument need only appear to be genuine on its face in order to be covered under this statute.<sup>1268</sup>

### 2. *"Financial Instrument"*

A "financial instrument" is defined comprehensively in Code section 715.1 to include diverse instruments and devices<sup>1269</sup> in these four broad categories: (1) commercial instruments or "writings" evidencing either an obligation or release of an obligation;<sup>1270</sup> (2) title instruments (e.g., a deed or a motor vehicle certificate of title);<sup>1271</sup> (3) testamentary documents (e.g., a will);<sup>1272</sup> and (4) credit devices (e.g., a credit card).<sup>1273</sup> Additionally, the stat-

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1501-05; J. YEAGER & R. CARLSON, *supra* note 3, § 365.

1260. *Id.* § 715.1. See text accompanying notes 1269-76 *infra*.

1261. *Id.* § 715.2.

1262. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1501; J. YEAGER & R. CARLSON, *supra* note 3, § 359.

1263. *Id.*

1264. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1502; J. YEAGER & R. CARLSON, *supra* note 3, § 359.

1265. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1503-04; J. YEAGER & R. CARLSON, *supra* note 3, § 360.

1266. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1506-06; J. YEAGER & R. CARLSON, *supra* note 3, §§ 361, 363.

1267. See J. YEAGER & R. CARLSON, *supra* note 3, § 365.

1268. See *id.*, § 357, which states that if the instrument "does not appear to be genuine on its face, it has no legal tendency to effect a fraud" (citing *State v. Pierce*, 8 Iowa 231 (1859)).

1269. See generally J. YEAGER & R. CARLSON, *supra* note 3, § 352.

1270. *Id.* § 353.

1271. *Id.* § 354.

1272. *Id.*

utory definition includes certain ancillary writings (e.g., an endorsement of a codicil) which purport to affect any of these "financial instruments."<sup>1274</sup>

Whether a particular instrument or device is a "financial instrument" is, of course, a question of law<sup>1275</sup> to be decided on the face of the statute. Whether or not a particular instrument or device not enumerated in the statute is nevertheless included within the statute will depend upon statutory interpretation of the several catch-all phrases under the canon of *ejusdem generis*.

### 3. Knowledge of False Use

A scienter requirement is expressly included in the False Use statute.<sup>1276</sup> This limits the criminality to a person who knows of the falsity of the instrument or knows that he has no legal right to use a valid "financial instrument." This scienter requirement can be satisfied either by actual knowledge or by failure to make "a reasonable inquiry" although having "information which would put a reasonable person upon inquiry."<sup>1277</sup>

### 4. Fraudulent Intent

A particularized mens rea of a fraudulent intent<sup>1278</sup> is an element of this crime.<sup>1279</sup> This specific intent "to obtain fraudulently anything of value" is defined simplistically in the Uniform Jury Instructions as "an intent to wrongfully obtain. . . ."<sup>1280</sup>

The lack of limiting or qualifying language in the statute signifies that the prosecution need not prove an intent to defraud "any particular person," as noted in the Uniform Jury Instructions.<sup>1281</sup> Moreover, this is not a specific result crime, as no actual loss need be sustained by anyone.<sup>1282</sup>

Proof of the fraudulent intent must be independent of the mere act of possessing either a falsified "financial instrument" or a valid instrument which the possessor has no right to use.<sup>1283</sup> Moreover, there is no statutory inference as to intent. Indeed, other evidence must affirmatively show that the offender possessed the instrument with the intent to fraudulently obtain anything of value. One commentator has suggested that such proof "will

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1273. *Id.* § 355.

1274. *Id.* § 356.

1275. See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1507.

1276. IOWA CODE § 715.3 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1509; J. YEAGER & R. CARLSON, *supra* note 3, § 362.

1277. *Id.*

1278. See note 1268 *supra*.

1279. IOWA CODE § 715.6 (1979).

1280. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1508.

1281. *Id.*

1282. *Id.*

1283. J. YEAGER & R. CARLSON, *supra* note 3, § 363.

usually be found in some act of the possessor, something that he says, or in the circumstances of the possession."<sup>1284</sup>

An expansive statutory provision expressly includes within the fraudulent intent phrase "the intent to deliver a financial instrument to another, knowing that the other person intends to use the instrument to obtain fraudulently something of value."<sup>1285</sup> This covers a person in possession of falsified or stolen "financial instruments" who intends to sell them to others.<sup>1286</sup>

## 5. Grading

There is only one degree of this offense, unlike the related offenses of Theft and Fraudulent Practices which are graded into five different degrees depending upon the value of the property involved.<sup>1287</sup> The probable explanation for this unusual treatment is that a broad range of "financial instruments" is included, many of which have little intrinsic value in and of themselves.<sup>1288</sup>

This offense is a class C felony,<sup>1289</sup> and obviously is not a "forcible felony."<sup>1290</sup> Although the new penalty schedule (*i.e.*, an indeterminate term of ten years) is the same as for the two major pre-revised offenses,<sup>1291</sup> the new Criminal Code does not provide for an alternative sentencing option of a one-year jail term to be imposed in the sentencing court's judicial discretion, unlike under the pre-revised law. Nevertheless, a sentencing judge can accomplish approximately the same type of alternative "short" term under the new Criminal Code by exercising his right under Code section 902.4 to reconsider the sentence to imprisonment within ninety days (and thus grant "delayed" probation). Of course, a deferred judgment, a deferred sentence, and a suspended sentence are available options in all cases.<sup>1292</sup> Moreover, as a "non-forcible" class C felony, this offense also is punishable by a fine — either in addition to or in lieu of a term of imprisonment<sup>1293</sup> (whether suspended or not). The raising of the maximum fine to \$5000 under the new offense will facilitate a harsh penalty in those situations when neither a prison term nor a suspended sentence is warranted. This compares under

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1284. *Id.* at 95.

1285. IOWA CODE § 715.3 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1508; J. YEAGER & R. CARLSON, *supra* note 3, § 362.

1286. J. YEAGER & R. CARLSON, *supra* note 3, § 362.

1287. See IOWA CODE §§ 714.1-.2 and 714.8-.13 and text accompanying notes 1075-90 and 1244-51 respectively *supra*.

1288. See J. YEAGER & R. CARLSON, *supra* note 3, § 351.

1289. For the sentencing options, see text accompanying notes 71-83 *supra*.

1290. See text accompanying notes 180-203 *supra*. Concerning the availability of a fine-only penalty, see text accompanying notes 84-92 *supra*.

1291. See IOWA CODE § 718.1-2 (1977) (repealed 1978).

1292. See text accompanying notes 69 *supra*.

1293. See text accompanying notes 75-102 *supra*.

the pre-revised law to the maximum fine of only \$1000 as an additional penalty accompanying the one-year jail term and to no authorized fine at all when the ten-year prison sentence was imposed.

#### 6. *Interrelationship with Theft by Bad Check*

Both Theft<sup>1294</sup> and False Use of a Financial Instrument relate to wrongful uses of checks. In some respects these two crimes overlap while in others they do not.<sup>1295</sup> The main difference lies in the comparative penalty schedules.<sup>1296</sup>

The starting point in the analysis should focus on the effect of success in at least initially obtaining anything of value with a bad check. An attempted, but unsuccessful, passing of a bad check does not constitute Theft. This is because Theft is a specific result crime.<sup>1297</sup> Indeed, a particular element of Theft by bad checks is to "obtain" property or service in exchange therefor. On the other hand, False Use of a Financial Instrument is not a specific result crime, as evidenced by its comparable element being merely "with the *intent to obtain* fraudulently anything of value. . . ."<sup>1298</sup> Thus, a bad check that otherwise qualifies as making a "false use" of a "financial instrument" could fit within this latter offense even though the bad check was not successfully "passed."

A defendant-maker of a worthless check commits Theft when he signs his own name on a check for which he either has insufficient funds or no account at all. The worthless check constitutes Theft, provided that defendant knows at the time of utterance that the check will not be paid when presented. In this same set of circumstances, however, the crime of False Use of a Financial Instrument does not occur. This is because the latter basically is a crime of alteration, as evidenced by "false use" being defined alternatively in terms of the financial instrument not being "what it purports to be" or of the defendant-user not being "the person authorized to use" it.<sup>1299</sup> So, defined, a worthless check signed by the defendant (in his true name) is still what it purports to be, that is, a promise to pay by the defendant.

The crime of False Use of a Financial Instrument would occur in these situations: the defendant forges X's name as the drawer on a check made payable either to the defendant or to bearer; the defendant alters an other-

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1294. IOWA CODE § 714.1(6) (1979). See text accompanying notes 117-24 *supra*.

1295. Regarding the scope of prosecutorial discretion in selecting a charge from overlapping offenses, see note 1050 *supra*.

1296. The only degree of the crime of False Use of a Financial Instrument is a class D felony. Comparatively, the three lowest degrees of Theft are misdemeanors and the highest degree is a class C felony. See generally text accompanying notes 1075-1105 *supra*.

1297. See text accompanying notes 71-111 *supra*.

1298. IOWA CODE § 715.6 (1979) (emphasis added).

1299. *Id.*

wise valid check made payable by X to the defendant or to bearer (by increasing the amount payable); the defendant impersonates Y and endorses and cashes a check made payable to Y which the defendant had either stolen or found.

Attempted, but unsuccessful, passing of an insufficient funds check may not constitute any crime at all. This certainly would not constitute Theft which is a specific result crime requiring the thief to actually obtain something of value. Moreover, a check is not included at all in the subject matter of the crime of Fraudulent Practices.<sup>1300</sup> Finally, the crime of False Use of a Financial Instrument would not occur in light of the check being signed by the defendant (in his true name). Contrastingly, attempted but unsuccessful passing of a forged check would be punishable as False Use of a Financial Instrument, which is not a specific result crime.

## VI. VIOLENT PROPERTY APPROPRIATION OFFENSES

### A. Introduction

Robbery and Extortion constitute the two forms of aggravated property appropriation offenses. Unlike the totally "non-violent" property appropriation offenses of Theft, Fraudulent Practices, and False Use of a Financial Instrument which merely consist of stealing as discussed above in part V, Robbery and Extortion require, either actual or threatened violence, certain other types of threats, or being armed with a dangerous weapon. Robbery and Extortion also differ from the other property appropriation offenses by not being specific result crimes, requiring instead only an *intent* to steal or to make some other wrongful gain. Because no actual taking is necessary for Robbery or Extortion, the grading of these offenses is not keyed to the dollar value of anything either taken or attempted to be taken, unlike for Theft and Fraudulent Practices. The differences between Robbery and Extortion are summarized at the end of this part of the article,<sup>1301</sup> following a detailed individual discussion of these two offenses.

### B. Robbery

The revised crime of Robbery<sup>1302</sup> "consists of an assault or threat of physical violence made in aid of an intended theft"<sup>1303</sup> or the offender's escape from the scene thereof. Combining the pre-revised crimes of Robbery<sup>1304</sup> and Assault with Intent to Rob,<sup>1305</sup> the revised Code expressly has

1300. *Id.* § 714.8. See text accompanying notes 1214-51 *supra*.

1301. See text accompanying notes 1362-67 *infra*.

1302. IOWA CODE § 711.1 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1101-07. See generally J. YEAGER & R. CARLSON, *supra* note 3, §§ 251-54; W. LAFAYE & A. SCOTT, *supra* note 398, § 94; R. PERKINS, *supra* note 398, at 279-85.

1303. J. YEAGER & R. CARLSON, *supra* note 3, § 251.

1304. IOWA CODE § 711.1-.3 (1977) (repealed 1978).

omitted the traditional requirement that something of value be actually taken,<sup>1306</sup> requiring instead only a specific intent<sup>1307</sup> to commit a theft.<sup>1308</sup> The apparent rationale for this change is that the gravamen of the offense is "the use of violence or threat of violence as a means of accomplishing [or attempting] a theft,"<sup>1309</sup> rather than the degree of property appropriation.

The revised definition of Robbery has survived a constitutional two prong attack based on due process grounds. Concluding that the Robbery statute was not vague, the supreme court in *State v. Pierce*,<sup>1310</sup> held it was within the legislative prerogative to eliminate "taking" as an element of the revised crime of Robbery and the robbery statute "[was] no less clear merely because the conduct proscribed overlap conduct which [was] also proscribed under a separate statute"<sup>1311</sup> (referring to Assault While Participating in a Felony<sup>1312</sup> as it relates to an unsuccessful or attempted Robbery).

Under the new Criminal Code, common law robbery has been enlarged in several other ways. The time span in which the required assault or threat of physical violence must occur now extends from the theft scene through defendant's escape. Thus, force or intimidation can now occur *after* the taking of property rather than having to precede or be coterminous with the taking. For example, a thief who secretly rifles the cash register at a filling station and starts to flee, but is accosted by the manager and then pulls a gun to effectuate his escape, now commits a Robbery under the new Criminal Code, but not under the common law nor under the pre-revised statute.<sup>1313</sup> The revised Code more adequately characterizes the *overall* actions of the offender who has used violence at some time during the theft.

Another revision is that the new offense refers to Theft<sup>1314</sup> as a broader offense than the pre-revised crime of Larceny<sup>1315</sup> with the former offense of Robbery being considered as Larceny from the person by force or intimidation. Under the new Criminal Code, the use or threat of violence during the attempted commission of any type of Theft (which incorporates and consoli-

1305. *Id.* § 694.7 (Assault With Intent to Commit Certain Crimes).

1306. "It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen." IOWA CODE § 711.1 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1106.

1307. For a discussion of specific intent as a state of mind, see text accompanying notes 437-601 *supra*.

1308. See *State v. Campbell*, 214 N.W.2d 195 (Iowa 1974) (no intent to steal to support Robbery conviction where defendant "took" gun away during an altercation).

1309. J. YEAGER & R. CARLSON, *supra* note 3, § 252. For a discussion of robbery of a business entity via threatened violence directed against an employee, see *State v. Matlock*, 289 N.W.2d 625 (Iowa 1980).

1310. 287 N.W.2d 570 (Iowa 1980).

1311. *Id.* at 573-74.

1312. See IOWA CODE § 708.3 (1979).

1313. See *State v. Lewis*, 173 Iowa 643, 154 N.W. 432 (1915).

1314. See IOWA CODE § 714.1 (1979).

1315. See IOWA CODE ch. 709 (1977) (repealed 1978).

dates the former offenses of Larceny,<sup>1316</sup> Embezzlement,<sup>1317</sup> False Pretenses,<sup>1318</sup> Receiving and Concealing Stolen Property,<sup>1319</sup> and False Drawing and Uttering)<sup>1320</sup> will constitute Robbery. Thus, a person attempting to pass a bad check who draws a gun, or even merely shoves the sales clerk, to effectuate his escape apparently commits Robbery.

### 1. *Felony Murder Rule*

The principle that Robbery is an underlying felony for purposes of application of the felony murder rule to Murder in the First Degree has not been changed.<sup>1321</sup> The revision occurred because the revised crime includes both the consummated substantive offense and the inchoate attempted offense, whereas the pre-revised "first-degree" felony murder rule also applied to both Robbery and Attempted Robbery.<sup>1322</sup>

### 2. *Lesser Included Offenses*

The aforementioned statutory changes in the revised crime of Robbery have caused several accompanying changes as to the lesser included offenses of Robbery. Specifically, Theft has already been held not to be a lesser included offense of Robbery, unlike Larceny under the pre-revised law.<sup>1323</sup> Similarly, Assault no longer appears to be a lesser included offense of the newly-constituted offense of Robbery, unlike under the prior law. Additionally, it has been held that an instruction on Accessory After the Fact should not be given in a Robbery prosecution.<sup>1324</sup> These cases are discussed in detail in part II (D) of this Article.

### 3. *Grading*

Robbery is graded into two degrees, "[varying] with the risk to which the robbery victim or others are exposed."<sup>1325</sup> The three situations constituting Robbery in the First Degree<sup>1326</sup> are: purposely inflicting "serious injury,"<sup>1327</sup> purposely attempting to inflict "serious injury," and being armed with a "dangerous weapon."<sup>1328</sup> All other robbery is of the second degree.<sup>1329</sup>

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1316. *Id.*

1317. *Id.*, § 710.

1318. *Id.*, § 713.

1319. *Id.*, § 712.

1320. *Id.*, §§ 713.3-4.

1321. *See* IOWA CODE § 707.2(2) (1979).

1322. *See* IOWA CODE § 690.2 (1977) (repealed 1978).

1323. *See* State v. Holmes, 276 N.W.2d 823 (Iowa 1979).

1324. *See* State v. Sanders, 280 N.W.2d 375 (Iowa 1979).

1325. J. YEAGER & R. CARLSON, *supra* note 3, § 251.

1326. IOWA CODE § 711.2 (1979).

1327. *See* definitional clause at IOWA CODE § 702.18 (1979).

1328. *See* definitional clause at IOWA CODE § 702.7 (1979).



The new grading is an improvement over the pre-revised grading.<sup>1330</sup> Aggravating circumstances under the latter included having an armed confederate present or merely striking the victim or wounding him with a weapon. The revised focus upon "serious injury" is much more realistic. Moreover, the cumbersome pre-revised requirement (for Robbery With Aggravation) that an armed robber be shown to have the *intent to kill or maim, if resisted*, was eliminated.<sup>1331</sup>

Nevertheless, the revised grading has some defects. How is *infliction* of serious injury to be equated with *attempted infliction* of serious injury? Likewise, considerably more harm is done by infliction of "serious injury" than merely by having a "dangerous weapon" in the robber's possession. The weapon does not even need to be loaded<sup>1332</sup> nor does it need to be pointed at anyone. Three degrees of Robbery would have been more realistic, with the infliction of "serious injury" being reserved solely for the first degree level.

Another questionable aspect of the grading system is that negligent infliction of "serious injury" is not of a first-degree nature, whereas intentional attempted (*i.e.*, unconsummated infliction of) "serious injury" is. First degree robbery should include infliction of "serious injury," whether purposeful or not. Sexual Abuse is of the first degree<sup>1333</sup> whenever "serious injury" to another is caused whether intentional or not, and no rational explanation for this distinction between Robbery and Sexual Abuse is apparent.

#### 4. Sentencing Options

Because both degrees of robbery are "forcible felonies,"<sup>1334</sup> none of the ameliorative sentencing alternatives (*i.e.*, a deferred judgment, a deferred sentence, or a suspended sentence) are available. This means that the twenty-five year prison term for Robbery in the First Degree must be imposed and is not subject to being suspended (*i.e.*, a bench parole or probation) under any circumstances. Because Robbery in the Second Degree is a class C felony, there is uncertainty as to whether any prison term must be

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1329. IOWA CODE § 711.3 (1979).

1330. See IOWA CODE §§ 711.2-3 (1977) (repealed 1978).

1331. Robbery With Aggravation required not only that the offender be armed with a dangerous weapon, but that he intended while so armed, if resisted, to kill or maim the person robbed. IOWA CODE § 711.2 (1977) (repealed 1978); *State v. Ashland*, 259 Iowa 728, 732, 145 N.W.2d 910, 912 (1966). See also *State v. Buhr*, 243 N.W.2d 546, 549 (Iowa 1976) (intent to commit *larceny* is necessary for robbery but is not the intent, if resisted, to kill or maim required in robbery with aggravation).

1332. See *State v. Nichols*, 276 N.W.2d 416 (Iowa 1979).

1333. See IOWA CODE § 709.2 (1979).

1334. See *id.* § 702.11 (1979).

imposed, in light of Code § 909.1.<sup>1335</sup> One alternative reading of the latter provision would permit a sentencing judge to impose a fine of up to \$5000. Such an approach, however, contradicts the mandatory imprisonment concept for persons convicted of "forcible felonies."

The hard-nosed approach in the new Criminal Code compares unfavorably to the pre-revised law.<sup>1336</sup> A suspended sentence was an available alternative for both of the former offenses (of Robbery and Robbery with Aggravation) under all circumstances. On the other hand, either a deferred judgment or a deferred sentence was an available alternative only in the absence of violence (*i.e.*, serious injury inflicted or attempted, or dangerous weapon involved). The pre-revised approach was better in light of the distinct possibility that a nonviolent purse snatcher could be convicted of Robbery.

### C. Extortion

The revised crime of Extortion<sup>1337</sup> has been expanded in the new Criminal Code to include four additional types of threats not previously criminal under Iowa law.<sup>1338</sup> These include threats: (1) to expose another to hatred, contempt, or ridicule; (2) to harm another's credit, or one's business or professional reputation; (3) to misuse one's public position to take or withhold action in order to injure another, or to use one's influence with a public servant to cause taking or withholding of action to injure another and (4) to give or withhold information concerning another's legal claim or defense.<sup>1339</sup> The four pre-revised types of Extortion, retained in the new Criminal Code, include threats; (1) to inflict physical injury on another; (2) to commit any public offense against another; (3) to accuse another of a public offense, and (4) to injure another's property.<sup>1340</sup> Of course, any one of these eight threats must be coupled with a specific intent<sup>1341</sup> to obtain something of value for oneself or another from another, without any reasonable belief of a right to make such threats, in order to constitute Extortion.<sup>1342</sup>

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1335. Section 909.1 authorizes a court to impose a fine upon a conviction "of any public offense for which a fine is authorized." A maximum fine of \$5000 is authorized for a class D felony, in addition to an indeterminate 10-year term of imprisonment. *See* IOWA CODE § 902.9 (3) (1979).

1336. *See* IOWA CODE § 789A.1 (1977) (repealed 1978).

1337. IOWA CODE § 711.4 (1979). *See* UNIFORM JURY INSTRUCTIONS, *supra* note 136, at Nos. 1107-09; J. YEAGER & R. CARLSON, *supra* note 3, § 255-56; W. LAFAYE & A. SCOTT, *supra* note 398, § 95, at 704-07; R. PERKINS, *supra* note 398, at 367-75.

1338. *See* IOWA CODE §§ 720.1, 740.1 (1977) (repealed 1978).

1339. IOWA CODE § 711.4 (1979). None of these threatened activities would necessarily otherwise be criminal in nature, except possibly for number three which "is on the periphery of criminal activity." J. YEAGER & R. CARLSON, *supra* note 3, § 255.

1340. IOWA CODE § 711.4 (1979).

1341. Regarding specific intent as a *mens rea*, see text accompanying notes 453-92 *supra*.

1342. *See* UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1107.

### 1. *Nature of Requisite Threat*

The crime of Extortion requires only a *threat* of some type of injury to another, and thus no actual injury is needed for an extortion conviction. Obviously, the Extortion<sup>1343</sup> offense is not dependant upon a specific result (injury) occurring. For the same reason, it is not necessary for the intended victim to actually respond to the threat, such as relinquishing extorted money. An extortionist can be seeking to obtain from the victim "for oneself or another anything of value, tangible or intangible, including labor or services."<sup>1344</sup> As Robbery, Extortion is not graded by the value of any property involved.

Judicial interpretations of the nature and form of the prohibited threat, necessary under the pre-revised code to constitute Extortion, should remain viable under the new Criminal Code. "[A] threat . . . to be within the statute need not be made personally to the one threatened. In order to be a 'threat,' it must be so made, and under such circumstances, as to operate, to some extent at least, on the mind of the one whom it is expected to influence."<sup>1345</sup> There must be sufficient evidence, however, to show that defendant intended his communication to be relayed to the party threatened.<sup>1346</sup> Moreover, a threat "need not . . . be in any particular form or in any particular words, and it may be made by innuendo or suggestion. All that is necessary is that it be definite and understandable to a mind of ordinary intelligence . . . ."<sup>1347</sup> Thus, "[t]hreats of physical harm need not be directly expressed, but may be contained in veiled statements, nonetheless implying injury to the recipient when viewed in all of the surrounding circumstances. What is controlling is whether a recipient of the communication would interpret it as a threat of injury."<sup>1348</sup>

The requisite threat need not be of a *physical* injury, however, as evidenced by the seven other types of threats provided for in the statutory crime of Extortion. Also, the truth of the extortionist's claim or allegation is immaterial. For example, the crime of Extortion may be committed by a person who unlawfully threatens to accuse another of a public offense,<sup>1349</sup> even though the threatened party is guilty of the public offense. The

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1343. IOWA CODE § 711.4 (1979). See *State v. Harrington*, 260 A.2d 692, 699 (Vt. 1969) (a lawyer's demand for settlement of a civil action accompanied by a malicious threat to expose the other party's criminal conduct, if made with intent to extort payment, constitutes Extortion).

1344. IOWA CODE § 711.1-.3 (1979).

1345. *State v. Brownlee*, 84 Iowa 473, 478, 51 N.W. 25, 27 (1892).

1346. *Id.* See also *State v. McGinnis*, 243 N.W.2d 583, 589 (Iowa 1976).

1347. *State v. McGinnis*, 243 N.W.2d 583, 589 (Iowa 1976), citing, *State v. Wilbourn*, 219 Iowa 120, 125, 257 N.W. 571, 574 (1934).

1348. *State v. McGinnis*, 243 N.W.2d 583, 589 (Iowa 1976) (citations omitted).

1349. IOWA CODE § 711.4(2) (1979).

threatened party's guilt is wholly immaterial to the crime.<sup>1350</sup> Similarly, a policeman can commit Extortion even though he had the right, albeit the duty, to arrest those persons he extorted from rather than arrested.<sup>1351</sup> "It is [the] misuse of these powers for malicious purposes and with intent to extort money which [the crime of extortion] is aimed at."<sup>1352</sup>

## 2. *Grading*

There is only one grade of Extortion, a class D felony.<sup>1353</sup> At first blush, the fact that Extortion is not considered a "forcible felony" is somewhat surprising in light of the fact that the related offense of Robbery in the Second Degree is a "forcible felony."<sup>1354</sup> The gravamen of both offenses can be, in the alternative, a threat of violence, the only difference being that immediate violence must be threatened for Robbery whereas Extortion involves threats of future violence.<sup>1355</sup> The crux of the matter, however, is that threats of physical injury or threats to commit any public offense are only two of the eight types of threats which can constitute Extortion. Obviously, the other six types of threats should not be the basis for making Extortion a "forcible felony." Nevertheless, this leaves the similar offenses of Robbery in the Second Degree and Extortion by threats of violence being treated dissimilarly for purposes of sentencing options. A practical solution would be to eliminate Robbery in the Second Degree from the listing of "forcible felonies."

## 3. *Special Defense Based Upon Reasonable Belief of Right to Property*

A special statutory defense to a charge of extortion arises when the accused person "reasonably believed" he had "a right to make such threats in order to recover property, or to receive compensation for property or services, or to recover a debt to which the person has a good faith claim."<sup>1356</sup> However, this defense is unavailable in a situation where there is a threat to commit a public offense, because no one can be privileged to make such a threat.<sup>1357</sup>

The Uniform Jury Instructions correctly place the burden of disproving

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1350. Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa 1977).

1351. State v. Browning, 153 Iowa 37, 133 N.W. 330 (1911).

1352. *Id.* at 41, 133 N.W. at 333.

1353. A Class D felony is punishable by either an indeterminate term of imprisonment of five years or a maximum fine of \$1,000 or both. Because it is not a "forcible felony," a full range of ameliorative sentencing alternatives, (i.e., a deferred judgment, a deferred sentence, and a suspended sentence of probation) is also available. See IOWA CODE §§ 711.3, 907.3 (1979).

1354. See IOWA CODE § 702.11 (1979) and text accompanying notes 180-203 *supra*.

1355. See J. YEAGER & R. CARLSON, *supra* note 3, § 251.

1356. IOWA CODE § 711.4 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1109; J. YEAGER & R. CARLSON, *supra* note 3, § 256.

1357. IOWA CODE § 711.4 (1979).

this defense upon the state.<sup>1358</sup> The state must prove beyond a reasonable doubt *either* of the following: (1) that when the defendant made the threat he was not entitled to recover property or other items of value from the victim, *or* (2) "[t]hat he did not reasonably believe he had a right to make such a threat."<sup>1359</sup> The standard appears faulty in that the first alternative is directed toward a retrospective factual and legal determination, without consideration of defendant's reasonable belief. Under the disjunctive test, as set out above, all that the state need prove is that the accused *actually* had no such right to make the threat, thus rendering nugatory the second alternative, even though the second alternative is the only standard actually designated in the statute. This author submits that the first alternative should be eliminated altogether from the above instruction.

Under the second alternative described above, the reasonableness of the defendant's belief is to be determined at the time of the threat. A defendant is "not required to act with infallible judgment," but only, under the circumstances, as a reasonable man.<sup>1360</sup> It is sufficient if the defendant believed he had a right to make the threat and such belief would be so viewed by a reasonable person in the same light."<sup>1361</sup>

#### 4. *Robbery and Extortion Distinguished*

Extortion differs from Robbery in several ways.<sup>1362</sup> The most important difference is that, unlike Robbery, the threat constituting Extortion "need not be one of violence."<sup>1363</sup> In fact, the Extortion crime was created "in order to plug a loophole in the robbery law by covering sundry threats which will not do for robbery."<sup>1364</sup> Moreover, an extortionist threatens only *future* injury, whereas a robber threatens *immediate* injury or other violence.<sup>1365</sup> Additionally, an extortion victim "consents to part with his money or property, although his consent is induced by the unlawful threat, whereas in robbery the intimidation is so extreme as to overcome the will of the victim and cause him to part with his money or property without consent."<sup>1366</sup> Finally, "robbery requires that the property be taken from the person or presence of the victim, while extortion . . . has no such limitation."<sup>1367</sup>

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1358. UNIFORM JURY INSTRUCTIONS, *supra* note 136, at No. 1109.

1359. *Id.*

1360. *Id.*

1361. *Id.*

1362. See J. YEAGER & R. CARLSON, *supra* note 3, § 251.

1363. TRAINING MANUAL, *supra* note 43, at 56.

1364. W. LAFAVE & A. SCOTT, *supra* note 398, at 707.

1365. TRAINING MANUAL, *supra* note 43, at 56.

1366. R. PERKINS, *supra* note 398, at 375.

1367. W. LAFAVE & A. SCOTT, *supra* note 398, at 707.

### 5. Relationship of Extortion to Other Offenses

In addition to Robbery, Extortion relates to several other offenses.<sup>1368</sup>

a. *Theft by Deception*. As offenses involving wrongful appropriation of another's property, Extortion and Theft by Deception<sup>1369</sup> are closely related, with the difference being that an extortionist operates through threats whereas as thief lies or practices some other type of deceit to obtain success peacefully. Moreover, a thief must succeed, whereas as extortionist is punishable with or without a taking.

b. *Assault*. Extortion by way of threatening to inflict physical injury on another<sup>1370</sup> overlaps considerably with the simple misdemeanor offense of simple Assault,<sup>1371</sup> the difference being that an Assault must involve an *act* intended to cause pain, injury, or offensive touching of the victim as opposed to a mere verbal threat by an extortionist. That is, a threat standing alone does not constitute an Assault. Moreover, an Assault requires apparent ability of execution whereas Extortion does not. Of course, an extortionist's threat must have been made with the intent of obtaining wrongful gain.

c. *Terrorism*. Extortion by way of threatening to commit a public offense<sup>1372</sup> overlaps considerably with Terrorism by way of threatening to commit a forcible felony.<sup>1373</sup> Again, no intended wrongful gain is necessary for Terrorism but it is necessary for Extortion. Terrorism is a crime of violence requiring an intent "to injure or provoke fear or anger in another,"<sup>1374</sup> whereas this type of Extortion is not necessarily a crime of violence or even of threatened violence (but more of a blackmailing nature). The difference in violence contemplated in the two crimes is readily apparent on the face of the statutes themselves. Only threats of a "forcible felony,"<sup>1375</sup> by nature a violent crime, are punishable for Terrorism. In contrast, wrongful threats to commit *any* "public offense"<sup>1376</sup> suffice for Extortion. Neither of these types of Terrorism nor Extortion require any act beyond the making of the requisite threat. The threat for Extortion additionally requires that it be made "under circumstances raising a reasonable expectation that the threat will be carried out,"<sup>1377</sup> whereas there is no express comparable limitation concerning Terrorism.

d. *Compounding a Felony*. Extortion by way of threatening to accuse

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1368. See generally, J. YEAGER & R. CARLSON, *supra* note 3, § 255.

1369. See IOWA CODE § 714.1(3) (1979).

1370. *Id.* § 711.4(1).

1371. See *id.* § 708.2.

1372. IOWA CODE § 711.4(1) (1979).

1373. See *id.* § 708.6(2).

1374. *Id.* § 708.6.

1375. See *id.* § 702.11 and text accompanying notes 180-203 *supra*.

1376. See *id.* § 701.2.

1377. See *id.* § 708.6(2).

another of a public offense<sup>1378</sup> relates to the crime of Compounding a Felony.<sup>1379</sup> The latter is a specific result crime, however, unlike Extortion which is punishable merely for making the threat irrespective of success. Moreover, Compounding a Felony is a more passive crime, punishing the mere act of receiving a wrongful gain, without requiring a threat nor even that the defendant initiate the matter.

e. *Criminal Mischief*. Extortion by way of threatening to wrongfully injure another's property<sup>1380</sup> fills a gap left in the related offense of Criminal Mischief.<sup>1381</sup> The latter is a specific result crime, with actual damage caused. In other words, Criminal Mischief does not encompass a mere threat to injure another's property, nor even an attempt to injure. On the other hand, the mental states of the two crimes are quite dissimilar, one being to damage another's property (whether for the intangible benefits of revenge or for a lark) and the other being to extract some wrongful tangible gain (e.g., money).

f. *Malicious Prosecution*. Extortion by way of threatening to accuse another of a public offense<sup>1382</sup> overlaps with the crime of Malicious Prosecution.<sup>1383</sup> Again, there are many significant differences. The offense of Malicious Prosecution requires that the perpetrator go beyond a mere threat for Extortion and actually attempt to cause a prosecution. Moreover, there must be no legitimate basis for the prosecution maliciously caused or attempted by a person charged with Malicious Prosecution, unlike Extortion which punishes a person for threatening to accuse another of a public offense irrespective of the legitimacy of the accusation. The difference is that an extortionist's claim must be coupled with the intent to make a wrongful tangible gain.

g. *Felonious Misconduct in Office*. Extortion by way of misusing one's public position, or by wrongfully influencing a public servant to injure another<sup>1384</sup> can be compared with the offense of Felonious Misconduct in Office.<sup>1385</sup> The gravamen of the latter offense, however, is falsification of public records or documents. Contrastingly, Extortion can occur without any falsification, as the essence of Extortion is to threaten another in order to obtain a wrongful gain, even when the extortionist's claim is true. Additionally, Felonious Misconduct requires success, instead of punishing the essentially inchoate activity of a threat by an extortionist. Moreover, Felonious Misconduct can occur irrespective of the public officer's or employee's intention in

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1378. *Id.* § 711.4(2).

1379. *See id.* § 720.1.

1380. *Id.* § 711.4(7).

1381. *See id.* § 716.1.

1382. *Id.* § 711.4(2).

1383. *See id.* § 720.6.

1384. *Id.* § 711.4(5).

1385. *See id.* § 721.1.

doing any of the enumerated acts, provided only that he did so knowingly, whether or not intended for personal wrongful gain. Contrastingly, the extortionist wrongfully seeks personal gain.

h. *Bribery and Accepting a Bribe.* Extortion by way of threatening to give or withhold information concerning another's legal claim or defense<sup>1386</sup> relates somewhat to the offenses of Bribery<sup>1387</sup> and Accepting a Bribe.<sup>1388</sup> The latter offenses, unlike Extortion, are not tied to an intended wrongful personal gain and do not require a threat by the offender.

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1386. *Id.* § 711.4(6).

1387. *Id.* § 722.1.

1388. *Id.* § 722.2.



