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Survey of Recent Developments in Indiana Law

The staff of the *Indiana Law Review* is pleased to publish its fourth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1975, through May 31, 1976. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Foreword: Indiana's Bicentennial Criminal Code

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After a six year period of study and debate, Indiana has finally joined the growing number of states that have recently revised and modernized their criminal codes.¹ Although not planned as a bicentennial project, the state's new criminal code was enacted, appropriately enough, during the celebration of the nation's bicentennial.² The project began in April of 1970 when the Indiana

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¹Other states which have recently enacted new or revised criminal codes include the following: Iowa [4 IOWA LEGISLATIVE SERV. 577-776 (1976); (Iowa Criminal Laws, Senate File 85), effective Jan. 1, 1978]; Kentucky [KY. REV. STAT. ANN. §§ 500-34 (1975), effective Jan. 1, 1975]; Ohio [OHIO REV. CODE ANN. §§ 2901-2929 (Page 1975), effective Jan. 1, 1974]; Pennsylvania [18 PA. CONS. STAT. ANN. §§ 101-7504 (1973), effective June 6, 1973]; Texas [TEX. PENAL CODE ANN., § 1.01-47.09 (Vernon 1974), effective Jan. 1, 1974]; and Washington [WASH. REV. CODE §§ 9A.04.010-9A.88.100 (1976), effective July 1, 1976].

²See Pub. L. No. 148, 1976 Ind. Acts. 718.

Criminal Law Study Commission was created,³ and it continued for the next six years as the commission prepared first a proposed procedural code and then a new substantive code.

Work was begun in 1970 on both the procedural and the substantive codes, but the procedural code was completed first and was submitted to the Indiana General Assembly in 1973. The General Assembly enacted only approximately one third of the proposed code, however, because of opposition that developed to the remaining sections which proved to be highly controversial.⁴ The substantive code was completed and was submitted to the General Assembly in 1975, but the legislators deferred action on it for one year to permit further study and review. Finally, the proposed code was enacted in 1976, but only after numerous revisions in the code as prepared by the Study Commission, including a major rewriting of the sentencing provisions. Furthermore, the code was enacted only after the legislature decided to defer its effective date until July 1, 1977, to permit another year of study and time for the legislature to make any additional revisions found to be necessary. An interim study commission was appointed after the enactment of the code, and it is currently working on a report which will be submitted to the General Assembly in 1977.

As enacted, the new substantive code consists of eight parts or divisions, entitled "Articles." The first article (article 41) covers general matters such as jurisdiction, culpability, defenses, and bars to prosecution, and the last article (article 50) contains sentencing provisions. The remaining articles set forth various crimes and offenses grouped into six general categories, including offenses against the person (article 42), offenses against property (article 43), offenses against public administration (article 44), offenses against public health, order, and decency (article 45), miscellaneous offenses (article 46), and offenses involving controlled substances (article 48).

A. *General Substantive Provisions (Article 41)*

1. *Culpability*

One of the most confusing aspects of Indiana's criminal statutes has been the use of terms such as "intentionally," "knowingly," "wilfully," and "recklessly" to denote the requisite degree

³The Indiana Criminal Law Study Commission was created in April 1970 by an Executive Order of the Governor and was funded by the State of Indiana and the Law Enforcement Assistance Administration through the Indiana Criminal Justice Planning Agency.

⁴*Compare* INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT (1972), with Pub. L. No. 325, 1973 Ind. Acts 1750.

or degrees of culpability for offenses. The drafters of the new code attempted to overcome this confusion by using only the terms "intentionally," "knowingly," and "recklessly" to specify degrees of culpability, by including definitions for each of these terms,⁵ and by clearly stating the requisite degree or degrees of culpability in the definition of each offense. This effort should help to clarify the confusion that has existed, but it will probably not eliminate all of the confusion because of the difficulty involved in defining the terms. For example, "knowingly" is defined to include conduct engaged in by a person who "is aware of a high probability that he is doing so."⁶ Likewise "recklessly," as defined, includes a reference to a "gross deviation from acceptable standards of conduct."⁷ Undoubtedly, there will be much debate and litigation concerning such definitions and the Indiana appellate courts will have to clarify the terms on a case-by-case basis.

2. Defenses

Ten specific defenses are grouped together in one chapter of the first article of the new code, but there is no provision stating that these are or are not to be considered the only possible defenses in criminal cases. An indication that the listing of defenses is not to be considered exclusive, however, may be drawn from the fact that the legislature revised the recommendation of the Study Commission in a different section and explicitly created an eleventh defense. In defining a voluntary act, the commission stated that possession "is a voluntary act if the offender was aware of his control thereof for a sufficient time to have been able to terminate his possession."⁸ The legislature revised this to state that "it is a defense that the person who possessed the

⁵See IND. CODE § 35-41-2-2 (Burns Supp. 1976). [Citations herein to IND. CODE are to Burns' Code Edition of *Indiana Statutes Annotated*. Those sections which have been repealed effective July 1, 1977, are so designated; all sections cited to "Burns Supp. 1976" are from the new code and are effective July 1, 1977.]

In its proposed version, the commission also included a definition for the term "wilfully." The commission recommended that the term "wilfully" be read into any statute enacted without a provision concerning either a degree of culpability or strict liability and that "wilfully" should be defined to include conduct engaged in intentionally, knowingly, or recklessly. This provision was omitted by the General Assembly. See INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 13 (1974) [hereinafter cited as PENAL CODE: PROPOSED FINAL DRAFT].

⁶IND. CODE § 35-41-2-2(b) (Burns Supp. 1976).

⁷*Id.* § 35-41-2-2(c).

⁸PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 11.

property was unaware of his possession for a time sufficient for him to have terminated his possession.”⁹

Of the eleven defenses included in this first article, two (use of force to protect person or property and the insanity defense) will probably require immediate amendments before the code is to become effective and a third (avoidance of greater harm) may be sufficiently controversial to require a revision or complete elimination. Only three (unknowing possession, legal authority, and intoxication) would probably be considered noncontroversial. The other five defenses will probably not be revised by the legislature but do make significant changes in the existing law or raise serious questions of interpretation.

a. Defense of person or property—. Various provisions concerning the defense of persons and property are grouped together in the new code. Three specific provisions relate to the use of force to protect a person, a dwelling, or property other than a dwelling.¹⁰ Although these provisions generally reflect existing law in Indiana, a major change is included in the provision concerning the defense of a person.

Under a statute enacted in 1971, a person was authorized to defend “himself or his family by reasonable means necessary” or when going to the aid of another person “whom he reasonably believes to be in imminent danger of or the victim of aggravated assault, robbery, rape, murder or other heinous crime.”¹¹ This statute raised certain procedural questions,¹² but it also confused the nature of self-defense in Indiana. The statute clearly extended the right of a person to act on the mistaken belief that another person was in imminent danger but limited that right to certain specified offenses. At the same time, the statute could be interpreted as limiting the right of a person to defend himself or his family to those cases in which harm was actually threatened. The new code eliminates the confusion by providing that a person may defend himself or any other person when acting on a reasonable although mistaken belief that harm is being threatened.¹³ The provision makes no distinction concerning the nature of the crime or offense being threatened except with reference to the right to use deadly force. In this regard, the code provides that deadly force

⁹IND. CODE § 35-41-2-1(b) (Burns Supp. 1976). The code also includes special defenses with reference to child molesting (*id.* § 35-42-4-3) and bigamy (*id.* § 35-46-1-2).

¹⁰*Id.* § 35-41-3-2.

¹¹*Id.* § 35-13-10-1 (Burns 1975) (repealed effective July 1, 1975).

¹²See *Loza v. State*, 325 N.E.2d 173 (Ind. 1975).

¹³IND. CODE § 35-41-3-2(a) (Burns Supp. 1976).

may be used only to prevent serious bodily injury or the commission of a forcible felony.

The latter limitation reflects existing law and undoubtedly was an implied limitation upon the 1971 statute, but the code contains an inconsistency with reference to deadly force that should be amended by the legislature before the code takes effect. In the section discussed above concerning the defense of persons and in the later section concerning defense of property other than a dwelling, specific provisions are included concerning the right to use deadly force.¹⁴ No reference is made to deadly force, however, in the section concerning defense of a dwelling. This section provides instead for the use of force "that creates a substantial risk of serious bodily injury."¹⁵ As defined in the definitions section, "serious bodily injury" includes an injury that "causes death," and therefore the term may in fact be the same as "deadly force." Nevertheless, the section should be amended to remove any doubt and to make the three sections consistent, especially since deadly force is authorized with reference to property other than a dwelling.¹⁶

b. *Insanity*—One of the most controversial provisions in the new code is the section referring to the defense of insanity, and an amendment will undoubtedly be required to remove the confusion. The code simply provides that it is a defense that a person "lacked culpability as a result of mental disease or defect."¹⁷ This provision, at first reading, unfortunately appears to adopt the *Durham* rule concerning insanity¹⁸ and to reject the current defense in Indiana which is based on the recommendation of the American Law Institute.¹⁹ Despite this appearance, this was clearly not the intent of the Criminal Law Study Commission. Although inartfully worded, the provision was intended merely to recognize the existence of an insanity defense and to leave the definition of the defense to the appellate courts. As stated in the

¹⁴*Id.* § 35-41-3-2(a) and (c).

¹⁵*Id.* § 35-41-3-2(b).

¹⁶The term "deadly force" was used by the Study Commission in all three sections. See PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 30-36.

¹⁷IND. CODE § 35-41-3-6 (Burns Supp. 1976).

¹⁸See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954): "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75.

¹⁹See *Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Id.* at 614, 251 N.E.2d at 436 (court's emphasis).

commission's commentary, "The law of insanity is entirely a subject of case law in Indiana. No attempt is made to codify it."²⁰ In view of the confusion created by this section, the legislature should amend it by substituting the language of the American Law Institute recommendation which is currently the law in Indiana.

c. Avoidance of greater harm— A completely new defense was created by the legislature when it adopted, in a revised form, the Study Commission's recommendation concerning the "avoidance of greater harm."²¹ The provision is essentially the result of an effort to draft a defense excusing a person who, because of necessity, commits what would otherwise be a criminal act. The provision, however, reflects the difficulty in drafting such a defense. The section first apparently authorizes a person to weigh the anticipated results of his conduct and to violate the law if he reasonably believes that his conduct would prevent harm that would be greater than the harm resulting from his conduct. The section then makes an exception with reference to the prevention of harm that is "social or moral harm."²² Nowhere in the code is there a definition of "social or moral harm." The difficulty of stating this defense is emphasized by the fact that the legislature changed the language that was recommended by the Study Commission in this regard. The commission's version provided that "the necessity of such conduct shall not rest upon considerations of morality or the social policy of the penal statute defining the offense."²³ Although the legislature may have considered that its revised language made no substantive change in the defense as proposed by the commission, the two versions do appear to be substantially different. In view of the difficulties suggested by this provision, it might be better to repeal the section completely and rely upon the exercise of prosecutorial discretion to excuse those persons who may, on occasion, be compelled to act out of necessity.

d. Use of force relating to an arrest— The code modifies the existing law in Indiana and provides that a citizen may use force to make an arrest only with reference to felonies. Furthermore, the citizen may not use deadly force even with reference to felonies except in self-defense.²⁴ This change may be relatively unimportant because it applies only to arrests by citizens which may rarely occur, but the same section also appears to limit the use of force by a law enforcement officer who makes an arrest.

²⁰PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 28.

²¹IND. CODE § 35-41-3-4 (Burns Supp. 1976).

²²*Id.*

²³PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 41.

²⁴IND. CODE § 35-41-3-3(a) (Burns Supp. 1976).

Under this section, an officer may use force to make an arrest but may use "force that creates a substantial risk of serious bodily injury" only with reference to felonies or in self-defense or defense of another person. If this type of force is different from "deadly force," then an officer's authority to make an arrest has been limited by the legislature. As discussed above, the terms probably have the same meaning, but the provisions should be amended to remove any doubt. The section also provides that a person may use force to resist an arrest, but "only if the arrest is clearly unlawful."²⁵ This section represents a change from the provisions recommended by the Study Commission. According to the commission's proposed version, a person may not use force to resist any arrest which he knows is being made by an officer nor use force to resist an arrest by a private citizen unless the arrest is clearly unlawful.²⁶ As enacted, no distinction is made between an arrest by an officer and an arrest by a private citizen. Unfortunately, the code contains no guidelines for determining when an arrest is or is not "clearly unlawful," but this may reflect the commission's conclusion that there is no practical way to provide such guidelines. If so, then the appellate courts will have to develop appropriate guidelines because this provision clearly invites litigation.

e. Mistake of fact— A relatively short provision in the new code sets forth a defense that appears to be carefully drafted but in fact raises a number of serious questions. A mistake of fact is recognized as a valid defense, and the provision requires that the mistake be reasonable and negate the culpability required for the offense involved.²⁷ Both of these limitations appear to be appropriate, but it has been contended that the defense is more properly based on the existence of an "honest mistake" rather than a "reasonable mistake."²⁸ A more serious question is raised, however, by the fact that the code makes no reference to a defense based on a mistake of law. This might suggest that there is to be no defense based upon a mistake of law, but the code contains no statement that the codified defenses are considered to be exclusive, as noted above. Therefore, the possibility exists that a defense of mistake of law will be recognized by the courts in an appropriate case.²⁹ On the other hand, if the defense of mistake of fact is to be exclusive, then the provision gives no guidance for

²⁵*Id.* § 35-41-3-3(f).

²⁶PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 38.

²⁷IND. CODE § 35-41-3-7 (Burns Supp. 1976).

²⁸W. LAFAVE & A. SCOTT, CRIMINAL LAW 356-58 (1972).

²⁹For examples of possible cases, *see id.* at 362-68.

distinguishing a matter of fact from a matter of law. For example, is it a mistake of law or a mistake of fact which excuses a person from a statutory registration requirement when the person is unaware of the statutory requirement?³⁰ Likewise, is it a mistake of law or a mistake of fact that excuses a person who improperly takes property under the mistaken belief that he has the right to do so?³¹

f. Duress— The defense of duress has been recognized in Indiana³² and is codified in the new code. All offenses against the person are specifically excepted from this defense, and therefore the drafters of the code have indicated that even a minor offense against a person is to be considered more harmful than even the most serious threat of harm that is posed to the person claiming the defense of duress. Thus this section operates as a limitation on the defense of avoidance of greater harm, assuming that the General Assembly retains that defense, so that a person who claims the defense of duress could not weigh the nature of the harm to be inflicted by him on an innocent victim against the nature of the harm threatened against himself or another person.

The provision does pose a question of interpretation, however, because of a difference between the defense as enacted by the General Assembly and the version recommended by the Study Commission. In order to clarify the Indiana law, the commission included a provision expressly rejecting any defense of coercion based solely upon a marital relationship.³³ This provision was eliminated by the General Assembly, apparently on the assumption that the provision was unnecessary, but the defense apparently still exists in Indiana³⁴ and it might still be recognized under the code if it is finally decided that the codified list of defenses is not exclusive.

g. Entrapment— As codified, the defense of entrapment may be substantially different from the defense of entrapment as it has been developed by the Indiana appellate courts. The code emphasizes that entrapment has two distinct elements, inducement by a public agent and a predisposition by the suspect involved.³⁵ Whereas the Indiana Supreme Court has suggested at times that inducement can be shown by even a limited amount of

³⁰See *Lambert v. California*, 355 U.S. 225 (1957).

³¹See IND. CODE § 35-17-5-7 (Burns 1975) (repealed effective July 1, 1977).

³²*Hood v. State*, 313 N.E.2d 546 (Ind. Ct. App. 1974).

³³PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 42.

³⁴See *McCoy v. State*, 241 Ind. 104, 170 N.E.2d 43 (1960).

³⁵IND. CODE § 35-41-3-9 (Burns Supp. 1976).

activity by the public agent,³⁶ the code emphasizes that the offense must be the “product of a public servant using persuasion or other means likely to cause the person to engage in the conduct.”³⁷ With regard to both the inducement and the predisposition, the code also contains the provision that conduct “merely affording a person an opportunity to commit the offense does not constitute entrapment.”³⁸ These provisions thus suggest that entrapment would not occur unless the public agent engaged in a substantial amount of activity to persuade or cause a suspect to commit an offense. In addition, the code makes no reference to the special rule being developed in Indiana that requires an officer to have some basis for suspecting a person of illegal activity before “baiting” a trap.³⁹ This may indicate a legislative intent to eliminate this special Indiana limitation on the defense of entrapment, although it may be argued that the requirement is a procedural matter which is ultimately to be decided by the Indiana appellate courts.

h. Abandonment— In order to clarify a defense which has not been given much consideration by the Indiana courts,⁴⁰ the drafters of the code set forth the requirements for the defense of abandonment as applied to aiding and abetting, attempts, and conspiracy.⁴¹ With respect to aiding and abetting and attempts, a person has a defense if he either abandons his efforts or prevents the commission of the crime. On the other hand, a person has a defense to conspiracy only if he prevents the commission of the crime intended. This defense may be justified by a social policy that would encourage persons to refrain from continuing their criminal conduct, but the defense is of a nature completely different from the other defenses included in the code. Whereas the other defenses are based upon some justification or excuse for the person's commission of an otherwise criminal act, the defense of abandonment may operate to relieve a person of criminal liability because of the person's conduct subsequent to the time that the person has in fact completed the criminal act. If the person has taken a substantial step toward the commission of a particular crime, that person may have actually committed the crime of at-

³⁶See *Smith v. State*, 258 Ind. 415, 281 N.E.2d 803 (1972), and *Gray v. State*, 249 Ind. 629, 231 N.E.2d 793 (1967). *But cf.* *Thomas v. State*, 345 N.E.2d 835 (Ind. 1976).

³⁷IND. CODE § 35-41-3-9(a)(1) (Burns Supp. 1976).

³⁸*Id.* § 35-41-3-9(b).

³⁹See *Locklayer v. State*, 317 N.E.2d 868 (Ind. Ct. App. 1974). *See also Kerr, Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 186-87 (1975).

⁴⁰See *Hedrick v. State*, 229 Ind. 381, 98 N.E.2d 906 (1951).

⁴¹IND. CODE § 35-41-3-10 (Burns Supp. 1976).

tempt as defined by the code.⁴² Likewise, a person would be guilty of conspiracy if an overt act has occurred in furtherance of his unlawful agreement.⁴³ Instead of completely excusing a person from criminal liability once a crime has been committed, a more appropriate approach would seem to be a provision for the mitigation of punishment to be imposed if the person has taken steps to prevent or limit the harm that otherwise would have resulted from his criminal conduct.

3. Bars to Prosecution

The new code draws together various provisions of existing statutory and case law concerning limitations on prosecutions and clarifies a major question that has existed concerning prosecutions by the federal government. At common law, a prosecution in one jurisdiction would not necessarily bar a subsequent prosecution in another jurisdiction.⁴⁴ In order to change this rule, Indiana adopted a statute which barred prosecutions in Indiana subsequent to prosecutions in "another state, territory or country."⁴⁵ This statute, however, did not necessarily apply to prosecutions by the federal government, and the Federal Constitution has not been interpreted to prohibit subsequent state prosecutions.⁴⁶ Thus the Indiana statute was revised in the new code to provide that prosecutions "in any other jurisdiction" would bar subsequent prosecutions in this state.⁴⁷

The new code does need further clarification, however, concerning its provisions that a prosecution is barred if the defendant has been prosecuted "for a different offense or for the same offense based on different facts" and the latter prosecution is "for an offense with which the defendant should have been charged in the former prosecution."⁴⁸ The code does not include any provisions concerning mandatory joinder, and mandatory joinder is not explicitly covered or fully developed by the provisions in the new procedural code.⁴⁹ In particular, the code does not appear to

⁴²*Id.* § 35-41-5-1.

⁴³*Id.* § 35-41-5-2.

⁴⁴*See* W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 126-27 (1972).

⁴⁵IND. CODE § 35-1-2-15 (Burns 1975) (repealed effective July 1, 1977).

⁴⁶*See* *Bartkus v. Illinois*, 359 U.S. 121 (1959).

⁴⁷IND. CODE § 35-41-4-5 (Burns Supp. 1976).

⁴⁸*Id.* § 35-41-4-4.

⁴⁹Mandatory joinder is apparently included in the procedural code by reference to two provisions which otherwise appear to relate only to permissive joinder. The procedural code provides that two offenses "can be joined in the same indictment or information" if based on the same conduct or on a series of related acts. IND. CODE § 35-3.1-1-9(a) (Burns 1975). The code further provides that such offenses, if charged in separate indictments

provide any guidelines concerning the developing collateral estoppel doctrine.⁵⁰

4. *Offenses of General Applicability*

Although the code organizes Indiana's crimes and offenses into five specific categories and includes an article for a group of miscellaneous offenses (article 46), two offenses are set forth in the first article because they may relate to any or all of the offenses in each of the other categories. These are the offenses of attempt⁵¹ and conspiracy to commit an offense.⁵²

One of the major changes in the entire criminal code is the new provision concerning attempts. Under existing law, Indiana has no general offense of attempting to commit a crime.⁵³ Therefore, a person may be prosecuted for an attempt only if there is a specific statute making it an offense to attempt to commit a particular offense. The inclusion of a general attempt statute in the new code is a distinct improvement over the existing law, but the provision, as ultimately enacted by the legislature, unfortunately severely limits the extent or scope of the offense. As recommended by the Study Commission, a person would have to commit an act or fail to do an act that would constitute a "substantial step toward the commission of the crime."⁵⁴ This was then revised by the legislature to provide that the person must commit a substantial step toward the commission of a crime "and the crime would have been consummated but for the intervention of, or discovery by, another person."⁵⁵ Persons who attempt to commit a crime and fail to do so because of some other reason, such as inaccurate aim or being frightened by a dog, would not be covered by this provision. An amendment is therefore necessary although it may be difficult for the members of the legislature to agree on the proper definition of a "substantial step." The offense, as defined,

or informations, "shall" be joined together for trial only by the court upon motion of the defendant, the prosecuting attorney, "or on its own motion." *Id.* § 35-3.1-1-10(b). Under this latter provision, the court apparently has the responsibility to join such charges even if neither party requests joinder, but the possibility remains that the issue would be waived by a defendant's failure to make a joinder motion.

⁵⁰See *Ashe v. Swenson*, 397 U.S. 436 (1970). See also Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 190-92 (1975).

⁵¹IND. CODE § 35-41-5-1 (Burns Supp. 1976).

⁵²*Id.* § 35-41-5-2.

⁵³*State v. Sutherland*, 228 Ind. 587, 92 N.E.2d 923 (1950).

⁵⁴PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 68.

⁵⁵IND. CODE § 35-41-5-1(a) (1) (Burns Supp. 1976).

also purports to eliminate one of the most confusing common law defenses, the defense of impossibility. According to the new code, a person who acts with the requisite intent or culpability is guilty of an attempt if he engages in conduct "that would constitute the crime if the attendant circumstances were as he believed them to be."⁵⁶ This language was recommended by the Study Commission, and the commentary accompanying the commission's proposal states that this provision was intended to reject the defense of impossibility.⁵⁷ Assuming that a person's actions and accompanying intent or guilty mind should be of more concern than the results of the person's conduct, the elimination of the defense does seem appropriate and does end the confusion in distinguishing between legal and factual impossibility as a defense.⁵⁸ At the same time, the provision is open to the objection that it now permits a person to be convicted of an attempt to commit a certain offense despite the fact that he could not be convicted of the intended offense even after completing every act that he intended to commit.

With regard to conspiracy, the new code restates much of the existing law but does make at least three major changes. The most obvious change is the addition of the requirement for an overt act. An "agreement" to commit an offense was the gist of the crime of conspiracy under the former statute,⁵⁹ but the new provision now makes the Indiana offense conform to that in other states and in the federal system.⁶⁰ The new code also provides that the offense of conspiracy is to be of the same class as the crime that the conspirators intended to commit. This provision therefore provides that the penalty for conspiracy is to be the same as for the crime intended to be committed whereas the penalty for conspiracy under existing law could be higher than the penalty for the crime intended.⁶¹ Finally, the code provides that the offense of conspiracy includes a specific intent to commit the crime agreed upon by the conspirators. This change was apparently intended to protect a person who entered into an agreement for one purpose only to be charged thereafter for conspiring to commit a different offense, but it may have the effect of preventing prosecutions for conspiracy against persons who knowingly unite to violate laws

⁵⁶*Id.* § 35-41-5-1(a)(2).

⁵⁷PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 69.

⁵⁸See W. LAFAYE & A. SCOTT, CRIMINAL LAW 438-46 (1972).

⁵⁹IND. CODE § 35-1-111-1 (Burns 1975) (repealed effective July 1, 1977).

⁶⁰18 U.S.C. § 371 (1970).

⁶¹*Lane v. State*, 259 Ind. 488, 288 N.E.2d 258 (1972).

generally without having taken the time to reflect specifically on the particular violation intended.⁶²

B. Offenses Against the Person (Article 42)

1. Homicide

The organization or grouping of related offenses and the classification of offenses according to the seriousness of each offense are two of the major changes and improvements reflected in the new criminal code. Homicide, if not the most serious, is one of the most serious crimes and quite properly is placed at the beginning of the code.⁶³ It is grouped with other offenses against the person and the full range of felony classifications is reflected in its various provisions, ranging from a Class A to a Class D felony and including the capital felony category.

a. Murder— Murder, as defined, includes a number of changes from the existing law. The major change, however, is the elimination of the distinction between first and second degree murder. First degree murder has previously been defined as the killing of a human being purposely and with premeditated malice⁶⁴ whereas second degree murder was the killing of a human being purposely and maliciously but without premeditation.⁶⁵ Despite this clear definitional distinction, it has been difficult if not impossible to distinguish between the two degrees because of the view that premeditation can be proved even though there is no appreciable period of time between the forming of an intent to kill and the carrying out of that intent.⁶⁶ Under the new code, the two degrees of murder are abolished and murder is defined simply as the knowing or intentional killing of a human being. The offense is designated as a Class A felony with a determinate sentence of imprisonment for a period of from twenty to fifty years.⁶⁷ The murder definition also continues to include the felony-murder rule from the prior law but adds kidnapping and unlawful sexual deviate conduct to the prior list of arson, burglary, rape, and robbery.

⁶²The offense of conspiracy is still limited to agreements to commit a felony although the Study Commission recommended that the offense be changed to include misdemeanors. See PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 69.

⁶³IND. CODE § 35-42-1-1 (Burns Supp. 1976).

⁶⁴*Id.* § 35-13-4-1 (Burns 1975) (repealed effective July 1, 1977).

⁶⁵*Id.* § 35-1-54-1.

⁶⁶See *Sanders v. State*, 259 Ind. 43, 284 N.E.2d 751 (1972); and *May v. State*, 232 Ind. 523, 112 N.E.2d 439 (1953).

⁶⁷IND. CODE § 35-50-2-4 (Burns Supp. 1976).

Capital murder provisions are included in the code,⁶⁸ but the provisions differ in a number of significant ways from the version that was enacted in 1973.⁶⁹ For example, the killing of a judge is now a capital offense. On the other hand, hijacking was eliminated from the list of capital offense provisions but was apparently intended to be included under the kidnapping provision since kidnapping was specifically redefined to include hijacking.⁷⁰ Kidnapping was continued in the list of capital offense provisions, but its redefinition, although expanded to include hijacking, was severely limited so as to exclude all but the most serious forms of kidnapping from the felony-murder rule. Finally, the legislature specifically provided that capital murder would include no other offenses. This follows the recommendation of the Study Commission⁷¹ but represents a distinct change from the version enacted by the legislature in 1973 which specifically provided that an indictment for capital murder could not charge a lesser included offense but the defendant could be found guilty of second degree murder or manslaughter.⁷² The capital murder provisions in the new code were enacted prior to the recent decisions of the United States Supreme Court concerning capital punishment,⁷³ and it is probable that those decisions will necessitate further amendments in this area before the code becomes effective.

b. Manslaughter—Manslaughter continues to be divided into the two degrees of voluntary and involuntary manslaughter, but involuntary manslaughter is divided into two distinct offenses. The offense of voluntary manslaughter appears to be substantially revised in the new code but it may not, in fact, have been changed to any great extent. Under the old definition, voluntary manslaughter was a voluntary killing without malice but in a sudden heat.⁷⁴ The offense now is defined as a knowing or intentional killing under an intense passion resulting from grave and sudden provocation.⁷⁵ This language could be interpreted to be essentially the same, but the difference in the use of the word "sudden" suggests the possibility of a change in the offense. Under the prior definition, the emphasis was upon a person who acted in a "sudden" heat whereas the new definition refers to a person

⁶⁸*Id.* § 35-42-1-1.

⁶⁹*Id.* § 35-13-4-1(b) (Burns 1975) (repealed effective July 1, 1977).

⁷⁰*Id.* § 35-42-3-2 (Burns Supp. 1976).

⁷¹See PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 73.

⁷²IND. CODE § 35-13-4-1(b) (Burns 1975) (repealed effective July 1, 1977).

⁷³*Roberts v. Louisiana*, 96 S. Ct. 3001 (1976); *Woodson v. North Carolina*, 96 S. Ct. 2978 (1976); *Proffitt v. Florida*, 96 S. Ct. 2960 (1976); *Jurek v. Texas*, 96 S. Ct. 2950 (1976); *Gregg v. Georgia*, 96 S. Ct. 2909 (1976).

⁷⁴IND. CODE § 35-13-4-2 (Burns 1975) (repealed effective July 1, 1977).

⁷⁵*Id.* § 35-42-1-3 (Burns Supp. 1976).

acting under an intense passion caused by a “sudden” provocation. The latter definition thus might be interpreted to place a specific limitation on the time of the provocation that is not necessarily included in the earlier definition. Finally, the legislature added what appears to be a procedural provision in the section defining manslaughter, and it may well raise a serious question of interpretation. The legislature specifically provided that the state is not required to prove the existence of intense passion but that this is a mitigating factor which would reduce murder to voluntary manslaughter. Two issues are suggested by this language. If a defendant is charged with murder, this provision could be interpreted to require the defendant to prove the existence of intense passion in order to show voluntary manslaughter. Such a requirement would violate the Federal Constitution, and thus the provision can only be interpreted to mean that the defendant has the burden of going forward with some evidence of intense passion.⁷⁶ On the other hand, if a defendant is charged with voluntary manslaughter, the provision suggests that the state has no duty to prove the existence of intense passion even though voluntary manslaughter, by definition, appears to include the existence of intense passion as an element of the offense. Because this would be an illogical conclusion, the provision may mean that voluntary manslaughter is not to be charged directly as an offense but is only to be considered as a lesser included offense of a charge of murder.

Involuntary manslaughter, as proposed by the Study Commission, was essentially the same as under the prior law except that the commission recommended an added provision to include reckless homicide.⁷⁷ The legislature, however, made certain changes that may make the offenses different. The gist of the offense under the prior definition was the involuntary or unintentional killing of a human being during the commission of an unlawful act. As revised by the legislature, involuntary manslaughter is now simply the killing of a human being while committing an offense. In addition, the legislature accepted the recommendation of the commission but created a separate and distinct offense of reckless homicide, defined as the reckless killing of another human being.⁷⁸ With reference to both involuntary manslaughter and reckless homicide, the legislature provided for a reduced classification of the offense if the death was caused by an automobile. By apparently expanding involuntary manslaughter to

⁷⁶*Mullaney v. Wilbur*, 421 U.S. 684 (1975).

⁷⁷*Compare* IND. CODE § 35-13-4-2 (Burns 1975) (repealed effective July 1, 1977) with PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 80.

⁷⁸IND. CODE § 35-42-1-5 (Burns Supp. 1976).

include even intentional killings during the commission of any unlawful act, the legislature broadened a question that had already existed with reference to this offense. That question is whether or not the related unlawful acts are independent of or lesser included offenses of involuntary manslaughter. For example, if a victim is killed intentionally or unintentionally during the course of a rape, is the rape a lesser included offense of involuntary manslaughter? If so, would the proportionality provision of the Indiana Constitution⁷⁹ prevent the legislature from prescribing a greater penalty for rape than for involuntary manslaughter?⁸⁰ An amendment may be necessary to resolve this question. Finally, involuntary manslaughter, as newly defined, refers merely to a killing during an "offense" without defining the type or nature of the offense that is required for involuntary manslaughter. The Indiana appellate courts will therefore have to decide whether any and all misdemeanors and felonies are included, whether the term "offense" includes only offenses that are dangerous to life, and whether strict liability exists once an offense has been committed. Since the legislature substituted the word "offense" for the term "unlawful act" under the prior definition and created a specific offense of reckless homicide, it did, however, clarify one question that had existed with reference to the prior definition. The term "unlawful act" could be interpreted to mean not only a criminal offense but also a lawful act committed in an unlawful manner. By this definition, involuntary manslaughter could then include a killing during the commission of a lawful act that was committed negligently or recklessly.⁸¹ The new code makes it clear that a killing during the commission of a lawful act is a punishable offense, provided that the act is done recklessly.

2. Battery and Related Offenses

A battery is defined in the new code as the knowing or intentional touching of a person in a rude, insolent, or angry manner.⁸² The only change from the prior law is the substitution of "knowingly or intentionally" for the word "unlawfully."⁸³ Since intent may be inferred from rude, insolent, or angry conduct, this change may not be of any real substance, but the new emphasis on intent may tend to make proof of some batteries more difficult.

⁷⁹IND. CONST. art. 1, § 16.

⁸⁰See Kerr, *Criminal Law and Procedure, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 137, 167-68 (1974).

⁸¹See W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 594-95 (1972). See also *Minardo v. State*, 204 Ind. 422, 183 N.E. 548 (1932).

⁸²IND. CODE § 35-42-2-1 (Burns Supp. 1976).

⁸³*Id.* § 35-1-54-4 (Burns 1975) (repealed effective July 1, 1977).

A significant change has been made in the name of the offense, however, because the offense is simply and properly called a "battery" whereas the offense was designated as an "assault and battery" in the previous statute.⁶⁴ The prior usage was a continual source of confusion because of the difficulty in distinguishing between an "assault" and an "assault and battery." The definitional distinction between the two offenses was clear, but the almost interchangeable usage of the word "assault" with reference to both offenses often made it difficult to know which offense was actually being discussed or considered. Although both terms will undoubtedly still be used for many years, this change should tend to reduce the usage and the resulting confusion. Furthermore, the new code purports to eliminate the offense of "assault" as a distinct offense, and this should eventually help to end the confusion of terminology.

Under the prior law, an assault was a specific offense involving an attempt, with present ability, to commit a violent injury upon a person.⁶⁵ No offense of assault is included in the new code, and the Study Commission's commentary suggests that an assault should be prosecuted under the general attempt statute as an attempt to commit a battery.⁶⁶ Despite this suggestion, the Study Commission recommended that the legislature create a new offense to be designated "reckless conduct." Under this recommended provision, a person would be guilty of reckless conduct if he "recklessly performs any act" that would create a substantial risk of bodily injury to another person.⁶⁷ To a limited extent, this offense was similar to the former offense of assault except that recklessness was required in the creation of the threat of harm. When the legislature enacted the provision, however, it inserted the words "knowingly or intentionally" and thus virtually re-enacted an offense of assault except under a different name. Under this provision, a person who "recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person" commits the offense of recklessness.⁶⁸ Since "bodily injury" is defined to mean "any impairment of physical condition, including physical pain,"⁶⁹ the new offense appears to be the equivalent of the prior assault offense which involved an attempt to commit a violent injury upon another person.

⁶⁴*Id.*

⁶⁵*Id.* § 35-13-4-7 (Burns 1975) (repealed effective July 1, 1977).

⁶⁶See the Study Commission's commentary following the definition of battery, PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, Comments at 84.

⁶⁷PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 84.

⁶⁸IND. CODE § 35-42-2-2 (Burns Supp. 1976).

⁶⁹*Id.* § 35-41-1-2.

In addition to these two basic offenses, the new code provides for increased penalties under various circumstances such as when the battery or recklessness results in serious bodily injury or is committed with a deadly weapon. These provisions should be amended, however, because there does not appear to be any correlation between the classifications for battery and for recklessness. For example, recklessness (which is defined to include knowing and intentional conduct) resulting in serious bodily injury is only a Class D felony whereas a battery resulting in serious bodily injury is a Class C felony.

3. *Kidnapping and Confinement*

Kidnapping has been a basic offense in Indiana through the years, but false imprisonment has not been recognized as an offense. The kidnapping statute did include a provision, however, making it an offense to imprison a person with the intent to have such person carried away.⁹⁰ In order to include false imprisonment as an offense, the Study Commission recommended that the term "kidnapping" be dropped and that a new offense of "unlawful confinement" be created to include both kidnapping and false imprisonment.⁹¹ In its proposal, the commission included the recommendation that the offense include lack of consent as an element. The commission also made the controversial recommendation that there be four classes of the offense, ranging from a Class A felony to a Class D felony. In so doing, it recommended that the standard term of imprisonment for kidnapping be lowered from life imprisonment to a term of two to four years. It then recommended that the penalty be increased because of aggravating circumstances such as the use of a deadly weapon or the hijacking of a vehicle.

The commission's recommendation concerning the penalties was accepted by the legislature, but the legislature did not agree to drop the use of the term "kidnapping." As a result, the commission's recommendation was divided into two parts and the legislature enacted two separate offenses designated as "kidnapping"⁹² and "confinement."⁹³ In so doing, the legislature drastically limited the scope of the kidnapping offense, including in it only the most aggravated forms of kidnapping such as kidnapping for ransom, kidnapping during a hijacking, or holding a person as a hostage. This was designated as a Class A felony, thereby

⁹⁰*Id.* § 35-1-55-1 (Burns 1975) (repealed effective July 1, 1977).

⁹¹PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 86.

⁹²IND. CODE § 35-42-3-2 (Burns Supp. 1976).

⁹³*Id.* § 35-42-3-3.

changing the penalty from a term of life imprisonment (or even a death sentence with reference to a kidnapping for ransom⁹⁴) to a fixed term of from twenty to fifty years. All other forms of kidnapping were included in the offense of "confinement" which was divided into three classes, ranging from a Class D felony to a Class B felony, depending on the existence of aggravating circumstances. For example, a person who "removes another person, by force or threat of force, from one place to another" commits a Class D felony.⁹⁵ This is punishable only by a term of imprisonment for a period of from two to four years. On the other hand, if a deadly weapon is used as the force or threat of force, the offense is a Class B felony. This is punishable by a term of from six to twenty years. In revising the commission's recommendation, the legislature also made one other major change. As enacted, lack of consent is an element of confinement when a victim is simply confined or falsely imprisoned, but lack of consent is not an element of confinement with reference to the moving of a victim from one place to another or of the newly defined offense of kidnapping.

4. Rape

The most obvious change in the provision concerning rape is that it now permits either a man or a woman to be convicted of rape.⁹⁶ A much more significant change, however, is the lowering of the penalty for rape from a fixed term of two to twenty-one years to a fixed term of two to eight years except when force is used that creates a substantial risk of serious bodily injury. In that case, the penalty is a fixed term of from six to twenty years. Statutory rape has also been removed from the provisions concerning rape and is now included in the "child molesting" offense.

5. Unlawful Deviate Conduct

One of the more controversial changes in the new code is the elimination of sodomy as a crime when committed by consenting adults. The term "sodomy" is dropped from the code which provides only for an offense designated as "unlawful deviate conduct."⁹⁷ This offense is essentially the same as the prior offense of sodomy except for the element of consent.⁹⁸

⁹⁴*Id.* § 35-1-55-3 (Burns 1975) (repealed effective July 1, 1977).

⁹⁵*Id.* § 35-42-3-3. (Burns Supp. 1976).

⁹⁶*Id.* § 35-42-4-1.

⁹⁷*Id.* § 35-42-4-2.

⁹⁸*Id.* § 35-1-89-1 (Burns 1975) (repealed effective July 1, 1977).

6. *Child Molesting*

Three distinct offenses are grouped together under the child molesting offense, with different penalties being prescribed depending upon the age of the persons involved and the degree of force involved. These include statutory rape, unlawful deviate conduct, and lewd fondling or touching.⁹⁹ With regard to all three offenses, the legislature made a major change in the law by providing that it is a defense if the child has ever been married or if the older person involved reasonably believed that the child was sixteen years of age or older at the time of the act. Both defenses were added by the legislature and were not included in the Study Commission's recommendations.¹⁰⁰

The provision concerning lewd fondling poses an additional issue which the Study Commission's recommendation would have helped to resolve to some extent but which is still in the provision as finally enacted. According to the new provision, a person sixteen years of age or older is guilty of child molesting if he fondles or touches a child under the age of sixteen with intent to arouse or satisfy the sexual desires of either person.¹⁰¹ If this statute is valid, it suggests that a high school student could be found guilty of a felony for even slightly amorous conduct when on a date with a friend who is only days or weeks younger than he is. This is especially true in view of the general rule that the person under the age of consent cannot give a valid consent to the illegal touching.¹⁰² Under the prior statute, the offense could be committed on a victim who was not yet seventeen years of age, but no age limit was specified for the offender.¹⁰³ The Study Commission recommended that the provision be revised to make it an offense for a person eighteen years of age or older to fondle or touch a person under the age of sixteen.¹⁰⁴ This might have helped to resolve the question because of the age differential and the greater likelihood that persons of those ages would not be dating each other, but the legislature decided not to follow this recommendation.

C. *Offenses Against Property (Article 43)*

1. *Arson and Mischief*

The offense of arson has been drastically altered from the of-

⁹⁹*Id.* § 35-42-4-3 (Burns Supp. 1976).

¹⁰⁰See PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 91-92.

¹⁰¹IND. CODE § 35-42-4-3(d) (Burns Supp. 1976).

¹⁰²See *Hamilton v. State*, 237 Ind. 298, 145 N.E.2d 391 (1957).

¹⁰³IND. CODE § 35-1-54-4 (Burns 1975) (repealed effective July 1, 1977).

¹⁰⁴PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 91.

fense as it was previously defined. Under the prior law, arson consisted of four degrees and was defined primarily as the wilful and malicious burning of the property of another, although the offense contained general provisions concerning the burning of one's own property to defraud an insurer and fourth degree arson included provisions against damaging property by explosives.¹⁰⁵ The penalties ranged from a term of imprisonment for five to twenty years to a term of one to five years, depending on the degree of the offense.

Under the new code, arson has been almost completely redefined to be the knowing or intentional damaging of property by fire or explosive.¹⁰⁶ The property may be the dwelling of another person which is damaged without his consent, the property of any person if human life is endangered, or the property of another person if the loss is at least twenty thousand dollars. "Property" is defined to mean anything of value and is not limited to real estate.¹⁰⁷ The penalty for this offense is a fixed term of two to eight years, except that it is raised to a term of six to twenty years if bodily injury actually results. Additional penalties are imposed if the offense is committed by a person for hire. Finally, arson is defined to include the offense of detonating an explosive with intent to injure a person as well as to damage property, although the penalties for the two offenses are the same.

The new offense of mischief is a lesser offense to cover other instances of damage to the property of another person, whether by trespass or other injury.¹⁰⁸ Again, with reference to this offense, property is defined to include anything of value. As redefined, these offenses do simplify and replace a number of separate statutes,¹⁰⁹ but the legislature should reconsider the penalties that have been prescribed for the various types of arson.

2. *Burglary and Trespass*

Burglary has also been drastically revised in the new code and is simply the entering of the building of another with an intent to commit a felony. The penalty is imprisonment for two to four years, but the penalty is raised to two to eight years if a deadly weapon is used or to six to twenty years if bodily injury is inflicted.¹¹⁰ As redefined, the offense omits the traditional re-

¹⁰⁵IND. CODE §§ 35-16-1-1 to -8 (Burns 1975) (repealed effective July 1, 1977).

¹⁰⁶*Id.* § 35-43-1-1 (Burns Supp. 1976)

¹⁰⁷*Id.* § 35-41-1-2.

¹⁰⁸*Id.* § 35-43-1-2.

¹⁰⁹*See* PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 93-94.

¹¹⁰IND. CODE § 35-43-2-1 (Burns Supp. 1976).

quirement of a breaking along with the entering, eliminates Indiana's special provision which makes a person guilty of burglary if he enters a dwelling with intent to inflict even a minor injury upon a person therein, makes no distinction between a dwelling and other buildings, and substantially lowers some of the penalties for the offense.¹¹¹ The legislature should give serious consideration to restoring the distinction concerning dwellings and to increasing some of the penalties prescribed for this offense.

Trespass is defined to include a number of offenses relating to property, including both real estate and other property.¹¹² Burglary, as newly defined, is limited to buildings and similar structures and therefore entries into vehicles are now included only within the offense of trespass.

3. Robbery

Although robbery is defined somewhat differently in the new code, the offense does not appear to be substantially changed. As redefined, it is the knowing or intentional taking of property from the presence of another person by force or threats of force.¹¹³ The words "knowingly or intentionally" have been added, but the requisite intent probably can be inferred from the use of force or the threat of force. The word "property" is used instead of "article of value," but "property" is defined to mean "anything of value." Although it might have been better for the new definition to state "from the person or presence of another," the use of the term "from the presence of another person" probably includes from the "person of another" and is an improvement over the former statute which merely stated "from the person of another."¹¹⁴ Finally, the use of the term "force or by threatening the use of force" in place of the term "by violence or by putting in fear" eliminates the question concerning the amount of proof necessary to show that the victim was actually put in fear during the robbery.

Once again, however, the legislature should reconsider the penalties prescribed for this serious offense. The basic penalty has been reduced from a period of imprisonment for a term of ten to twenty-five years to a period of only two to four years. Additional penalties are prescribed in the new code, based on the existence

¹¹¹See *id.* § 35-13-4-4 (Burns 1975) (repealed effective July 1, 1977).

¹¹²*Id.* § 35-43-2-2 (Burns Supp. 1976).

¹¹³*Id.* § 35-43-3-1.

¹¹⁴*Id.* § 35-13-4-6 (Burns 1975) (repealed effective July 1, 1977). See also *id.* § 35-13-5-1.

of aggravating circumstances, but the highest penalty allowed is still only a period of six to twenty years as compared with a possible term of life imprisonment under the prior law. As a final note, robbery is included in the group of offenses related to property, but the gist of this offense is directed more towards the victim than to the property taken and therefore this offense should more properly be grouped with the offenses against the person.

4. *Theft and Conversion*

In 1963, the Indiana General Assembly enacted a new statute entitled the "Offenses Against Property Act"¹¹⁵ which was intended to consolidate a number of offenses related to theft and to "eliminate pointless procedural obstacles to the conviction of thieves and swindlers."¹¹⁶ Although the new statute did help to simplify some of the difficulties in this area, the statute itself posed new difficulties, especially the provision defining theft, which was somewhat cumbersome and difficult to follow. Thus the Study Commission decided to redraft the provision in an attempt to simplify the offense of theft even further.¹¹⁷ In its version, a person commits theft "when he knowingly exerts unauthorized control over property of the owner with the intent to deprive the owner of the property."¹¹⁸ The commission then included a series of permissible inferences and definitions related to the offense. In addition, the commission recommended the creation of a new offense to be called "criminal conversion" which would be a lesser offense of theft.¹¹⁹

These recommendations were substantially altered by the legislature which reverted to the former cumbersome style for defining the offenses. In the enacted version, the provision defining the offense of theft again includes a number of parts that the commission had moved to the definitions section.¹²⁰ The legislature did enact the new offense of conversion but also used the same style that was used for the theft offense.¹²¹ Furthermore, the commission's section concerning permissible inferences was revised and replaced by a section providing that certain specified types of evidence would be considered *prima facie* evidence of various facts.

¹¹⁵*Id.* §§ 35-17-5-1 to -14.

¹¹⁶*Id.* § 39-17-5-2.

¹¹⁷PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 96-100.

¹¹⁸*Id.* at 96.

¹¹⁹*Id.* at 97.

¹²⁰IND. CODE § 35-43-4-2 (Burns Supp. 1976).

¹²¹*Id.* § 35-43-4-3.

In view of the difficulty involved in defining these offenses, further amendments will undoubtedly be submitted to the General Assembly which may modify these offenses even further before the code becomes effective. Despite the benefits to be derived from simplification and consolidation, the difficulties encountered in defining theft may suggest the need to redivide theft into a number of distinct offenses that may be defined more easily. At the same time, the new offense of conversion should be reconsidered because it does not appear to be any different from the offense of theft despite the use of the words "under circumstances not amounting to theft" in the definition of conversion. If conversion is the same as theft but is included in the code as a misdemeanor to permit the filing of petty thefts in a court of limited jurisdiction, this should be acknowledged and done directly instead of purporting to create a different offense which in fact is not different.

5. *Forgery*

Indiana's previous forgery statute is one of the best examples of a statute that needed to be rewritten and simplified. For whatever reason, the statute included an exhaustive list of items subject to forgery and this tended to make the elements of the offense somewhat obscure.¹²² The new code simplifies the offense by eliminating the list of items and emphasizes the nature or manner in which a writing is made or altered.¹²³ The offense is simplified to such an extent, however, that it would probably take a somewhat extended study to determine if the scope of the offense has been narrowed. Despite the extensive revision of this statute, one appropriate change was unfortunately left for later action by the legislature. The offense of forgery, as previously defined and as defined under the new code, in fact consists of two distinct and independent offenses, making and uttering a forged instrument.¹²⁴ For purposes of clarity, the forgery statute should be divided into two parts defining each of these offenses separately.

D. *Other Offenses*

1. *Bribery and Official Misconduct*

A witness who solicits or accepts a bribe with reference to his appearance or testimony in an official proceeding is now subject to prosecution for bribery as well as the person who offers or

¹²²*Id.* § 35-1-124-1 (Burns 1975) (repealed effective July 1, 1977).

¹²³*Id.* § 35-43-5-2 (Burns Supp. 1976).

¹²⁴*See* Sanford v. State, 255 Ind. 542, 265 N.E.2d 701 (1971).

gives the bribe.¹²⁵ Official misconduct is defined to cover knowing or intentional actions of a public servant that are unlawful, such as soliciting a “kickback” from an employee,¹²⁶ but the provision does not specifically include what previously was known as the “ghost employees” offense.¹²⁷ Even if included under official misconduct, the new offense is only a misdemeanor whereas the former offense was a felony. Although the offense probably could be prosecuted as theft under the provision relating to control of property “in a manner or to an extent other than that to which the other person has consented,”¹²⁸ the former statute should be reenacted because it is much more specific and includes a civil remedy for the recovery of unearned salary payments.

2. *Perjury*

Perjury is defined as the making of a “false, material statement under oath or affirmation, before a person authorized by law to administer oaths, knowing the statement to be false or not believing it to be true.”¹²⁹ As drafted, the provision combines two prior statutes that dealt with false statements made under a required oath or affirmation¹³⁰ and false statements voluntarily made under oath or affirmation.¹³¹ In combining the two offenses, the legislature eliminated the provision that the oath be a requirement under the law. Furthermore, the new provision eliminated two other distinctions between the offenses by requiring that the statements be both false and material to the matter in question. Unfortunately, the penalty was reduced from a term of imprisonment for a period of one to ten years to a term of two to four years. This penalty should be reconsidered because the offense of perjury goes to the very basis of the judicial system.

3. *Assisting a Criminal*

The new offense of assisting a criminal¹³² also combines certain prior offenses, including harboring, concealing, or assisting an offender who has committed an offense and compounding felonies, misdemeanors, or prosecutions.¹³³ As revised, the harbor-

¹²⁵IND. CODE § 35-44-1-1(a) (7) (Burns Supp. 1976).

¹²⁶*Id.* § 35-44-1-2.

¹²⁷*Id.* §§ 35-22-8-1 to -5 (Burns 1975) (repealed effective July 1, 1977).

¹²⁸*Id.* § 35-43-4-2 (Burns Supp. 1976).

¹²⁹*Id.* § 35-44-2-1.

¹³⁰*Id.* § 35-1-90-1 (Burns 1975) (repealed effective July 1, 1977).

¹³¹*Id.* § 35-1-90-2.

¹³²*Id.* § 35-44-3-2 (Burns Supp. 1976).

¹³³*See id.* §§ 35-1-29-3, 35-1-91-1 to -3, and 35-1-92-1 (Burns 1975) (repealed effective July 1, 1977).

ing, concealing, and assisting offenses are extended to include misdemeanors and the compounding offenses are changed to include the exceptions for family relationships as well as being extended to cover both felonies and misdemeanors. The new provision may, however, raise a serious question of interpretation concerning all of the offenses because it omits any element concerning the offender's knowledge. The offender must have an intent to hinder the apprehension or punishment of the person assisted, but there is no requirement that the offender actually know that the other person has committed a particular crime or even any crime. The element of knowledge was likewise not included in the prior accessory after the fact statute, but the other statutes involved did provide that an offender was to have knowledge of the commission of a crime although not necessarily the particular crime actually committed.

4. *Disorderly Conduct*

As redefined, disorderly conduct has been expanded substantially by the elimination of the requirement that a neighborhood or family be disturbed.¹³⁴ Four types of conduct are specified, and the first two are almost certain to invite litigation. The first includes the language "tumultuous and violent conduct" and the second refers to "unreasonable noise." Since no guidelines are included with reference to these terms, they may be subject to the challenge that they are too vague.

5. *Bigamy*

Bigamy has been redefined to make doubly certain that a person can remarry in good faith without later being concerned with a bigamy prosecution. The previous statute made no reference to good faith as a defense, but the defense was recognized by the Indiana appellate courts.¹³⁵ As revised by the legislature, the new statute provides that one element of bigamy is knowledge that the spouse is alive and that it is a defense that the accused person reasonably believed that he was eligible to remarry.¹³⁶

6. *Contributing to the Delinquency of a Minor*

Although the Study Commission's comment concerning con-

¹³⁴Compare *id.* § 35-45-1-3 (Burns Supp. 1976) with *id.* § 35-27-2-1 (Burns 1975) (repealed effective July 1, 1977).

¹³⁵*Id.* § 35-1-81-1 (Burns 1975) (repealed effective July 1, 1977); *Leseuer v. State*, 176 Ind. 448, 95 N.E. 239 (1911); *Squire v. State*, 46 Ind. 459 (1874).

¹³⁶IND. CODE § 35-46-1-2 (Burns Supp. 1976).

tributing to the delinquency of a minor suggests that the revised version is based upon present law,¹³⁷ the new version appears to make a substantial change in the present law. The new code provides that the offense is committed when a person eighteen years of age or older "causes" a person under the age of eighteen years to commit an act of delinquency.¹³⁸ Under the prior act, it was sufficient if the offender "caused" or "encouraged" the minor to commit an act of delinquency.¹³⁹ This was interpreted to mean that the minor did not in fact have to commit the act for the offender to be guilty of the offense.¹⁴⁰ Acts of "encouragement" may be covered by the general attempt statute, but only in a limited way.

7. *Controlled Substances*

One complete article (article 48) of the code is devoted to controlled substances, and the article contains essentially a re-enactment of the existing law in this area.¹⁴¹ It should be noted that the possession of a small amount of marijuana or hashish is a misdemeanor for the first offense under the code.¹⁴²

E. Sentencing (Article 50)

Two of the most basic changes in the new code are included in the last article, which contains the sentencing provisions. As provided in this article, sentences will now be imposed by judges instead of juries and sentences of imprisonment will be for a determinate instead of an indeterminate period of time. This article, which also includes a number of other changes, proved to be the most controversial part of the new code as evidenced by the substantial differences between the version proposed by the Study Commission and the article as it was finally enacted.

1. *Sentencing Authority*

The new code makes a substantial improvement in the existing law and eliminates a considerable amount of confusion by simply providing that the "court shall sentence a person convicted of an offense."¹⁴³ Under the prior law, juries and judges were both involved in the sentencing process and it was somewhat dif-

¹³⁷PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 139.

¹³⁸IND. CODE § 35-46-1-8 (Burns Supp. 1976).

¹³⁹*Id.* § 35-14-1-1 (Burns 1975) (repealed effective July 1, 1977). *See also id.* § 31-5-4-2.1.

¹⁴⁰Montgomery v. State, 115 Ind. App. 189, 57 N.E.2d 943 (1944).

¹⁴¹Compare IND. CODE § 35-48-1-1 (Burns Supp. 1976) with *id.* § 35-24.1-4.1-1 (Burns 1975) (repealed effective July 1, 1977).

¹⁴²*Id.* § 35-48-4-11 (Burns Supp. 1976).

¹⁴³*Id.* § 35-50-1-1.

ficult to ascertain the respective role of each. As a general rule, juries decided the sentences for misdemeanors and for murder and treason and judges imposed sentences with reference to other offenses.¹⁴⁴ Despite this general rule, however, juries were also authorized to determine an appropriate fine in all cases and the judge's role was generally limited to imposing the legislatively prescribed indeterminate sentence of imprisonment or granting probation in appropriate cases.¹⁴⁵ Furthermore, juries were authorized to decide the appropriate sentence of imprisonment for the commission of a crime while armed with a deadly weapon¹⁴⁶ whereas judges were authorized to decide the appropriate term of imprisonment for a bank robbery and were not limited by a legislatively determined period of time.¹⁴⁷

2. *Determinate Sentencing*

Both the Study Commission and the General Assembly agreed that Indiana's indeterminate sentencing procedures should be eliminated,¹⁴⁸ but the General Assembly virtually rejected the commission's recommendation concerning the sentencing procedures to be adopted. The commission recommended that a term of life imprisonment be imposed for Class A felonies and that the judge be authorized to impose a fixed or determinate sentence of imprisonment in other cases within certain ranges, depending on the classification of the offense. For example, the judge could impose a fixed term of from one to thirty years for a Class B felony, from one to twenty years for a Class C felony, and from one to ten years for a Class D felony.¹⁴⁹ This recommendation, unfortunately, was open to the objection that it gave the judge too much uncontrolled discretion and that the penalties for various offenses could in effect be raised or lowered substantially, depending on the individual judge's point of view. Furthermore, the provision would

¹⁴⁴See *id.* §§ 35-8-2-1 to -3 (Burns 1975) (repealed effective July 1, 1977).

¹⁴⁵See *Hollars v. State*, 259 Ind. 229, 286 N.E.2d 166 (1972).

¹⁴⁶IND. CODE § 35-12-1-1 (Burns 1975) (repealed effective July 1, 1977).

¹⁴⁷*Id.* § 35-13-5-1.

¹⁴⁸See *id.* §§ 35-8-2-1 to -3. Although the prior law generally provided for indeterminate sentences, various statutes did authorize determinate sentences for specific offenses, including the following: interfering with public officials (*id.* § 35-1-77-1); riots (*id.* §§ 35-1-77-9 to -11); commission of felony while armed (*id.* § 35-12-1-1); involuntary manslaughter by motor vehicle (*id.* 35-13-4-2); bank robbery (*id.* § 35-13-5-1); escape (*id.* §§ 35-21-2-1, 35-21-5-1, 35-21-6-1, 35-21-7-1, 35-21-8-1); trafficking with an inmate (*id.* § 35-21-12-3); and handgun violations (*id.* §§ 35-23-4.1-18(b) and (c)) (all repealed effective July 1, 1977).

¹⁴⁹PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 184.

tend to permit or even encourage nonuniformity in sentences despite the apparent effort of the commission to promote uniformity through the classification system. As a result, the General Assembly adopted a different procedure for the imposition of sentences although agreeing to make such sentences determinate. Under the code as enacted, life sentences were eliminated and judges were authorized to impose fixed terms for all offenses within certain ranges, but the judge's discretion with regard to these ranges was severely restricted. For example, the judge is authorized to impose a two year term for a Class D felony but may add up to an additional two years because of aggravating circumstances.¹⁵⁰ A term of five years is prescribed for a Class C felony, but the judge may add up to three years because of aggravating circumstances or may subtract up to three years because of mitigating circumstances.¹⁵¹ Likewise, a term of ten years is prescribed for a Class B felony with provisions for an additional ten years or the subtraction of four years, depending on the circumstances.¹⁵² Unfortunately, the penalty for Class A felonies does not follow this pattern and should be amended in the interest of uniformity and clarity. The code merely provides for a penalty of from twenty to fifty years for Class A felonies.¹⁵³ The General Assembly was not satisfied with only these restrictions, however, and therefore added a section to the procedural law by which judges are also required to make a record of their reasons for imposing a particular sentence.¹⁵⁴ Such a requirement would appear to be appropriate when the judge deviates from the legislatively prescribed sentence, either by increasing or by decreasing the term of imprisonment, but the provision appears to be inappropriate if the judge adopts what the legislature has prescribed. The requirement would probably be satisfied, however, if the judge simply states that he is imposing the prescribed sentence because of the absence of any aggravating or mitigating circumstances.

3. *Definition of Offenses*

Indiana's prior criminal code began with the clear and direct statement that all crimes and offenses are to be divided into two categories, felonies and misdemeanors. A felony is defined as a crime or offense which may be punished by death or imprison-

¹⁵⁰IND. CODE § 35-50-2-7 (Burns Supp. 1976).

¹⁵¹*Id.* § 35-50-2-6.

¹⁵²*Id.* § 35-50-2-5.

¹⁵³*Id.* § 35-50-2-4.

¹⁵⁴Pub. L. No. 148, § 14, 1976 Ind. Acts 718 has been compiled in Burns' Indiana Code as § 35-8-1A-3 (Burns Supp. 1976), but designated as § 35-4.1-4-3 in the official Indiana Code.

ment in the state prison and a misdemeanor is defined as any other offense.¹⁵⁵ The Study Commission also included a basic definitional section near the beginning of its proposed code, but the commission recommended a distinct change from the existing law. As recommended, the term "offense" was the basis for the reclassification and was defined as including "crimes" and "infractions," a new category of offenses. Crimes were divided into felonies and misdemeanors, depending on the length of imprisonment instead of the place of confinement. Infractions were not subdivided further but were defined to include offenses as defined by city ordinances, any offense specifically designated as an infraction by the legislature, or any offense for which the legislature did not prescribe a term of imprisonment.¹⁵⁶ This recommendation was apparently accepted by the General Assembly, but unfortunately the commission's definitional section was omitted from the code. Thus the new code does not contain any definitional section equivalent to the provision that was placed at the beginning of the former code. The new code clearly reflects the new classifications, however, such as in the sentencing article which contains provisions concerning felonies, misdemeanors, and infractions, but it includes only a short definition of "offenses" which is found in the middle of the lengthy definitions section at the beginning of the code and a definition of "felonies" which is included in the sentencing article. In the former, an "offense" is defined simply to mean "a felony, a misdemeanor, or an infraction."¹⁵⁷ The sentencing article defines only a "felony conviction" and provides that this includes "a conviction, in any jurisdiction, with respect to which the person could have been imprisoned for more than one (1) year."¹⁵⁸ Since misdemeanors and infractions are not expressly defined in the code, their definitions must be drawn from a review of the penalties authorized for such offenses. As would be expected, a misdemeanor is thus defined as an offense punishable by imprisonment for not more than one year.¹⁵⁹ Likewise, an infraction is an offense punishable only by a fine of not more than five hundred dollars.¹⁶⁰

The new classifications concerning felonies and misdemeanors conform to the present classifications in the federal system,¹⁶¹ but the new category of infractions has no similar counterpart under

¹⁵⁵IND. CODE § 35-1-1-1 (Burns 1975) (repealed effective July 1, 1977).

¹⁵⁶PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 8-9.

¹⁵⁷IND. CODE § 35-41-1-2 (Burns Supp. 1976).

¹⁵⁸*Id.* § 35-50-2-1.

¹⁵⁹*Id.* § 35-50-3-2.

¹⁶⁰*Id.* § 35-50-4-2.

¹⁶¹*See* 18 U.S.C. § 1 (1970).

the federal law. Two infractions are included in the new Indiana code, provocation to commit a battery¹⁶² and harboring a non-immunized dog,¹⁶³ but the term will undoubtedly be applied to many other offenses that are defined in provisions outside the new code. In fact, it might be more appropriate to remove the two infractions from the code and reserve the use of the term for offenses found outside the code. As a final note, the limit of a five hundred dollar fine for infractions should be reconsidered, and the legislature should increase the maximum amount and establish a range of infractions similar to that for felonies and misdemeanors.

4. *Habitual Offenders*

Under Indiana's existing law, a person who has been convicted of three felonies may be subject to imprisonment for life as a habitual offender.¹⁶⁴ The Study Commission recommended that these provisions be retained but in a somewhat modified form. For example, the commission recommended that the life term be changed to a term of not more than thirty years.¹⁶⁵ Instead of following the commission's recommendations, however, the General Assembly decided to provide enhanced penalties for any person convicted of a third felony. The provisions concerning the penalties for each felony classification were thus revised to include such enhanced penalties,¹⁶⁶ and the provisions concerning habitual offenders were omitted from the code. This change might not have any substantial impact on the ultimate time that a person would be required to serve in prison since the code still authorizes a lengthy period of imprisonment in such cases, but the new approach does raise serious procedural questions. Because of the danger of prejudice to a defendant, Indiana has developed specialized procedures for habitual offender prosecutions, including a two-stage trial.¹⁶⁷ Such procedures may likewise be required with reference to enhanced penalties based on prior convictions,¹⁶⁸ and the legislature should clarify the question by reconsidering the commission's recommendations concerning habitual offenders or by adding appropriate provisions to the penalty sections.

¹⁶²IND. CODE § 35-42-2-3 (Burns Supp. 1976).

¹⁶³*Id.* § 35-46-3-1.

¹⁶⁴*Id.* §§ 35-8-8-1 and 2 (Burns 1975) (repealed effective July 1, 1977).

¹⁶⁵PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 185-87.

¹⁶⁶IND. CODE §§ 35-50-2-4 to -7 (Burns Supp. 1976).

¹⁶⁷*Lawrence v. State*, 259 Ind. 306, 286 N.E.2d 830 (1972).

¹⁶⁸*See United States v. Tucker*, 404 U.S. 443 (1972); *Lewis v. State*, 337 N.E.2d 516 (Ind. Ct. App. 1975).

5. Concurrent Sentencing

Indiana has generally followed a system of imposing concurrent sentences when a person has been convicted of two or more offenses, subject to certain specified exceptions.¹⁶⁹ The new code continues this system but modifies the existing law by providing that consecutive terms may be imposed for a failure to appear and for any crime committed during an escape. The code also omits the prior provision for consecutive sentences for the commission of a felony while armed.¹⁷⁰ In addition, the code purports to authorize consecutive sentences for any crime committed while a person is in prison, but the code will need to be amended before becoming effective because it appears inadvertently to have omitted the time at which a term of imprisonment for such an offense is to begin.

6. Probation

Under the code, a judge is authorized to suspend any part of a sentence for a misdemeanor and to place the defendant on probation for a fixed period of not more than one year.¹⁷¹ Likewise, subject to certain exceptions, the judge may suspend any part of a felony sentence and place the defendant on probation for a fixed period to end not later than the expiration of the suspended sentence.¹⁷² These provisions represent a change in the prior law which limited the period of probation to the maximum period for which the defendant could have been sentenced or to a period of five years, whichever was the lesser.¹⁷³ Furthermore, the provision concerning felonies leaves no discretion to the judge but requires the judge to place a defendant on probation if the sentence is suspended. On the other hand, the judge is given the discretion to suspend a sentence for a misdemeanor without placing the defendant on probation.¹⁷⁴

¹⁶⁹A judge may not impose a consecutive sentence unless a specific statute authorizes such a sentence. *Baromich v. State*, 252 Ind. 412, 249 N.E.2d 30 (1969). See IND. CODE § 11-2-1-1 (Burns 1973). Consecutive sentences are authorized with reference to commission of a felony while armed [*id.* § 35-12-1-1 (Burns 1975) (repealed effective July 1, 1977)], handgun violations [*id.* § 35-23-4.1-18(d) (Burns 1975)], jail breaking [*id.* § 35-21-8-1 (Burns 1975) (repealed effective July 1, 1977)], escape from prison [*id.* §§ 35-1-96-9 and 35-21-6-1], commission of a crime while released on bail [*id.* § 35-8-7.5-1 (Burns Supp. 1976) (repealed effective July 1, 1977)], and commission of a crime while on parole [*id.* § 11-1-1-11 (Burns 1973)].

¹⁷⁰See *id.* § 35-50-1-2 (Burns Supp. 1976) and note 169 *supra*.

¹⁷¹IND. CODE § 35-50-3-1 (Burns Supp. 1976).

¹⁷²*Id.* § 35-50-2-2.

¹⁷³IND. CODE § 35-7-2-2 (Burns 1975) (repealed effective July 1, 1977).

¹⁷⁴A form of probation is also authorized with reference to infractions,

With reference to sentences for felonies that may not be suspended, the new code reflects a number of changes from the existing law. The present law authorizes a judge to suspend the sentence for any felony except murder, arson, first degree burglary, rape, treason, kidnapping, a second conviction of robbery, and the commission of a felony while armed with a deadly weapon.¹⁷⁵ The Study Commission recommended that probation be authorized except for Class A felonies, habitual offender convictions, and commission of a felony while armed with a deadly weapon.¹⁷⁶ This recommendation was not accepted by the legislature which apparently preferred to enact a specific list of particular sentences which could not be suspended. In its list, the legislature included murder, kidnapping, arson for hire, and other specified offenses involving either serious bodily injury or the use of a deadly weapon.¹⁷⁷ This list thus enacted includes more offenses than under the prior law, but the offenses as included under the prior list have been substantially limited by the provisions concerning serious bodily harm and use of a deadly weapon. For example, arson and first degree burglary were on the prior list, but the new code includes only arson for hire or arson resulting in serious bodily injury and burglary with a deadly weapon or burglary resulting in serious bodily injury.

7. Parole

The last major change reflected in the new code is with reference to parole. Accepting the recommendation of the Study Commission,¹⁷⁸ the legislature provided that a person who is imprisoned for a felony is to be released on parole upon completing his sentence of imprisonment, less good time that has been earned.¹⁷⁹ Since this release is to be automatic, the Indiana Parole Board is to be involved in the supervision of defendants only after they have been released on parole. The Parole Board's authority is substantially limited, however, because the legislature also pro-

the judge being given authority to suspend the fine and costs for an infraction if the defendant does not repeat the offense for a fixed period of not more than one year from the date of sentencing. IND. CODE § 35-50-4-1 (Burns Supp. 1976). Provision for "shock" probation and intermittent service of sentences were also enacted by the legislature along with the criminal code. See Pub. L. No. 148, § 16, 1976 Ind. Acts 718, 808, compiled as § 35-8-1A-18 (Burns Supp. 1976), but designated as § 35-4.1-4-18 in the official Indiana Code, and § 35-7-2-1(c).

¹⁷⁵*Id.* §§ 35-7-1-1 (Burns 1975) (amended effective July 1, 1977), 35-12-1-1, 35-13-4-3 (Burns 1975) (repealed effective July 1, 1977).

¹⁷⁶PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 192.

¹⁷⁷IND. CODE § 35-50-2-2 (Burns Supp. 1976).

¹⁷⁸PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 188.

¹⁷⁹IND. CODE § 35-50-6-1 (Burns Supp. 1976).

vided that a parolee is to be discharged not more than one year after the date of his release on parole unless his parole has been revoked within that one year period of time. In this regard, the legislature decided not to follow the recommendation of the Study Commission which had proposed a period of parole until the expiration of the person's specified sentence or for a period of five years, whichever was the lesser.

F. Conclusion

Five possible arguments can be made in support of the revision and codification of Indiana's criminal laws, and these are essentially of two types, those which are concerned with matters of form and those which are concerned with matters of substance. For example, it can be argued that there has been a need to organize all of the laws relating to criminal conduct into one volume or one set of volumes in order to simplify research and bookwork for those involved in the field of criminal law or those interested in finding certain information relating to criminal law. Furthermore, since the state's criminal laws have been developed over a lengthy period of time, there has also been a need to review the laws in order to eliminate those statutes which were duplications, those which have been repealed or declared unconstitutional, and those which have become obsolete because of the passage of time. These arguments are concerned primarily with matters of form and certainly involve worthwhile objectives. On the other hand, it can be argued that certain basic changes have been needed in the Indiana criminal justice system and that these changes could be made only by a complete revision and codification of the state's criminal laws. Furthermore, there has been a need to clarify laws that were confusing or laws that appeared to be inconsistent, especially when the laws were enacted at different periods of time without any apparent effort to ensure that the provisions were consistent or would fit together into a coordinated system. Finally, it can be argued that the state's criminal laws have contained certain gaps or voids because of the uncoordinated manner in which the laws have been enacted and that the revision and codification process was necessary in order to identify the gaps or voids to be filled by the legislature.

Despite the importance of each of these arguments, there are substantial arguments that can be made against the new code. First, it can be argued that the new code still contains a number of problems and unanswered questions, as shown by this review, and the very scope of the undertaking almost ensures that there are other undetermined difficulties and issues in the code that

continue to exist because of the lack of time to study and review each item in the necessary detail. Secondly, it can be argued that the enactment of the new code will create an uncertainty concerning all of the criminal laws when it finally becomes effective. Furthermore, the uncertainty will cause confusion in the courts and will tend to encourage an increasing number of appeals in criminal cases or at least increase the number of issues being raised in criminal appeals. Finally, the revision and enactment of a controversial code of this nature must have required a certain amount of compromise, and therefore it is probable that no one is completely satisfied with the end product. Thus it can be argued that each statute should have been reviewed and submitted to the legislature individually to ensure proper consideration and review by all persons concerned and to avoid the necessity for such compromises.

The arguments opposing revision and codification are substantial and somewhat difficult to refute, and therefore the ultimate verdict on the new code must be based on the relative merits of the code and the manner in which it meets or satisfies the objective of its proponents. The new code is clearly a step in the right direction to the extent that it reorganizes the state's criminal laws and places them together in one volume, but the code is far from complete and many criminal laws still remain outside the code in an unorganized fashion. For example, the Study Commission included recommended provisions concerning abortion¹⁶⁰ and firearms¹⁶¹ in its proposed code, but the legislature omitted these provisions from the new code and allowed these subjects to be covered as they had been by the existing statutes.¹⁶² Furthermore, the Study Commission also decided to omit certain subjects from its review, such as obscenity, traffic offenses, administrative crimes, and juvenile matters. Obscenity is a subject that should properly be included in the criminal code but undoubtedly was omitted because the legislature had enacted a statute in 1975 on this subject.¹⁶³ The other three topics are generally not included in a criminal code, but they are mentioned here because it is important to realize that criminal laws are found in many other places besides the criminal code. For example, an offense of reckless homicide by use of a motor vehicle is found in

¹⁶⁰PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 116-20.

¹⁶¹*Id.* at 143-151.

¹⁶²See IND. CODE §§ 35-1-58.5-1, 35-23-4.1-1 (Burns 1975).

¹⁶³*Id.* §§ 35-30-10.1-1, 35-30-10.5-1, 35-30-11.1-1.

the Motor Vehicle Code¹⁸⁴ and the common offense of public intoxication is included in the Alcoholic Beverages Code.¹⁸⁵

As suggested by the code's proponents, many unnecessary statutes have been repealed and eliminated. For example, a number of apparently obsolete statutes have been repealed, including offenses such as profanity,¹⁸⁶ obstructing a ferryboat,¹⁸⁷ fortune telling,¹⁸⁸ trespass by turkeys, chickens, ducks and geese,¹⁸⁹ and dueling.¹⁹⁰ At the same time, others have been repealed, apparently for the same reason, but there may be some dispute as to whether they are or are not obsolete. For example, the statutes relating to seduction,¹⁹¹ adultery and fornication,¹⁹² and sodomy between consenting adults¹⁹³ have been eliminated. Other statutes have been properly eliminated, probably because they are unconstitutional, including the statutes concerning paupers, vagrants, and tramps.¹⁹⁴ Finally, statutes defining offenses such as mayhem,¹⁹⁵ murder by dueling,¹⁹⁶ and lynching¹⁹⁷ have been repealed because they appeared to be duplications or involved offenses that appeared to be included in other statutes.

The reorganization of the state's criminal laws and the elimination of unnecessary statutes are worthwhile objectives, but these improvements may not necessarily have any substantial impact on the administration of justice in the state. On the other hand, the new code does contain a number of basic changes that should make a substantial impact on the state's criminal justice system. In fact, the primary value of the revision and classification process is reflected in these basic changes which include the organization of offenses into certain basic categories, the classification of offenses according to the seriousness of each offense, the elimination of indeterminate sentences, and the elimination of juries from the sentencing process. In addition, the new code does include a number of worthwhile clarifications such as the provisions concerning culpability and the elimination of the distinction between

¹⁸⁴*Id.* 9-4-1-54 (Burns Supp. 1976).

¹⁸⁵*Id.* § 7.1-5-1-3.

¹⁸⁶*Id.* § 35-1-85-1 (Burns 1975) (repealed effective July 1, 1977).

¹⁸⁷*Id.* § 35-27-5-1.

¹⁸⁸*Id.* § 35-18-7-1.

¹⁸⁹*Id.* § 35-19-1-1.

¹⁹⁰*Id.* § 35-1-53-1.

¹⁹¹*Id.* § 35-1-82-3.

¹⁹²*Id.* § 35-1-82-2.

¹⁹³*Id.* § 35-1-89-1.

¹⁹⁴*Id.* §§ 35-1-110-1 to -3.

¹⁹⁵*Id.* §§ 35-1-54-5 and -6.

¹⁹⁶*Id.* §§ 35-1-53-1 and -2.

¹⁹⁷*Id.* § 35-1-77-3.

first and second degree murder. Likewise, the new code does include new provisions such as the general attempt statute and the unlawful confinement statute which were enacted to fill certain apparent gaps or voids in the existing law.

When all of these changes and improvements are considered together, they appear to be sufficient to outweigh the various arguments that can be made against the new code. The code does contain a number of difficulties, as discussed above, but many of these can be remedied and the General Assembly has specifically deferred the effective date of the new code to provide for appropriate amendments. When these have been enacted and the code is finally effective, the General Assembly should then consider establishing an agency such as the Indiana Criminal Law Study Commission to continue the process of review and revision of the state's criminal laws. In this way, the state can keep its criminal code up to date and avoid the need to recodify the code again during the celebration of the nation's tricentennial.

II. Administrative Law

*Lewis A. Shaffer**

A. Scope of Judicial Review

One of the more interesting cases in the area of administrative law during the survey period was *City of Evansville v. Southern Indiana Gas & Electric Co.*,¹ which may indicate a new trend in the judicial review of administrative agency decisions in Indiana. Prior to *City of Evansville*, Indiana courts had adopted as the appropriate test of an agency's factual determination, whether there was substantial evidence in the administrative record to support the agency's finding.² However, many of the decisions which had explicitly discussed the method of determining substantiality had stated that the only evidence to be considered was that most

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¹339 N.E.2d 562 (Ind. Ct. App. 1975).

²See, e.g., *Boone Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 239 Ind. 525, 159 N.E.2d 121 (1959); *Knox Co. Rural Elect. Membership Corp. v. Public Serv. Co.*, 139 Ind. App. 547, 213 N.E.2d 714 (1966); *Pennsylvania R.R. v. Town Bd. of Trustees*, 139 Ind. App. 216, 218 N.E.2d 171 (1966); *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. 232, 180 N.E.2d 110 (1962).