THE NEW IOWA CRIMINAL CODE AND THE OPINIONS OF THE IOWA SUPREME COURT

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The purpose of this article is to update this author's original two-part article[1] on the new Iowa Criminal Code which became effective on January 1, 1978. The focus of attention is primarily upon the appellate interpretations of the code through September 1982, and secondarily on the statutory amendments of the 1980-82 legislative sessions.

I. Introduction

A. *Statutory Changes*

During the 1980-82 legislative sessions two new crimes, Attempted Burglary[2] and Indecent Contact With a Child,[3] filled gaps in the law by criminalizing formerly legal but wrongful conduct. Two other crimes, Aggravated Assault[4] and Assault With Intent to Commit Sexual Abuse,[5] merely recast already-criminalized activity into new offenses. During that same period several crimes were amended, including Assault While Participating in a Felony,[6] Terrorism,[7] Criminal Mischief,[8] Criminal Trespass,[9] and Accessory After The Fact.[10]

B. *Construction of the Criminal Code*

In several interpretations of the new Criminal Code,[11] the Iowa Supreme Court has indicated its unwillingness to declare a change from prior

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1. *See* Dunahoo, *The New Iowa Criminal Code*, 29 Drake L. Rev. 237-403, 491-638 (1979-80).
2. *See infra* text accompanying notes 310-12.
3. *See infra* text accompanying notes 703-08.
4. *See infra* text accompanying notes 521-27.
5. *See infra* text accompanying notes 685-87.
6. *See infra* text accompanying notes 528-46.
7. *See infra* text accompanying notes 547-58.
8. *See infra* text accompanying notes 324-26.
9. *See infra* text accompanying notes 317-23.
10. *See infra* text accompanying notes 151-56.
11. *See generally* Iowa Code § 4.2 (1981) (statutory abrogation of common law presumption of strict construction of statute in derogation of common law).

law[12] unless the legislative intent to make a sweeping change is clear on its face from the new statute.[13] In *Emery v. Fenton*,[14] the court reiterated normal rules of statutory construction, stating that:

> [c]hanges made by revision of a statute will not be construed as altering the law unless the legislature's intent to accomplish a change in its meaning is *clear and unmistakable*. An intent to make a change does not exist when the revised statute is merely susceptible to two constructions.[15]

Similarly, the court specifically characterized the new Criminal Code as "primarily a restatement"[16] of prior law, and quoted Professor Yeager[17] approvingly, stating that:

> [i]t was not the purpose of this committee in drafting the code, to scrap the existing criminal law, and, starting from scratch, to create new law and new concepts. For the most part, the existing law was retained, clarified where clarification was needed by adapting statutory language to incorporate existing case law, and changed only where change was felt desirable. To the casual observer, it will appear that the criminal law has been completely rewritten. However, the Criminal Code is primarily a restatement of prior law, and most responsible studies of the code recognize this.[18]

1. *Elemental Changes*

It is, of course, axiomatic that the elements of a crime are determined and changed by statute.[19] Thus, legislative elimination of the element of a taking in the crime of Robbery[20] means that the prosecution no longer has to prove this element even though the common law name of the crime remained unchanged. This follows since it is within the legislative perogative to define a crime, subject only to substantive due process requirements of the United States and Iowa Constitutions. This principle was made clear by

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

13. *See also* State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978) (presumption against implied repeal of unrevised criminal statutes left outside the new Criminal Code).

14. 266 N.W.2d 6 (Iowa 1978).

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

16. *Id.* at 8.

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

18. Emery v. Fenton, 266 N.W.2d at 8 (quoting J. YEAGER, IOWA CRIMINAL CODE TRAINING MANUAL 1-2 (1977)).

19. McAdams v. State, 226 Ind. 403, 81 N.E.2d 671 (1948). *But see* Virgin Islands v. Williams, 424 F.2d 526, 527 (3rd Cir. 1970) (legislative intent for abrogation of common law element of specific intent must have been "clear").

20. IOWA CODE §§ 711.1-.3 (1981).

the supreme court in *State v. Pierce*,[21] a robbery prosecution under the new Criminal Code. The defendant unsuccessfully contended in *Pierce* that the new statutory definition of robbery was unconstitutionally vague because of a lack of fair notice to a person that the revised crime, by not requiring a taking,[22] included "conduct which was not robbery at common law or under prior [Iowa] statutes."[23] This argument was dismissed by the court. "The argument that a definition of crime which is otherwise clear is somehow made unclear because it departs from common law and prior statutes is novel and without support either in reason or authority."[24] Continuing, the court wrote that "[d]ue process does not require the legislature to give crimes the same elements they had at common law or under prior statutes."[25] Concluding on a legislative lexiconical note, the court noted that due process does not "bar a crime from being called robbery merely because the perpetrator does not succeed. It was not irrational for the legislature to make a person as culpable for a bungled robbery as for a successful one."[26]

2. *Undefined Terms*

In *State v. Wilson*,[27] the court took into consideration the statutory definition of the word "abandon" in two provisions outside the Criminal Code in interpreting the word "abandon" as it appears, undefined, in the newly-constituted crime of Wanton Neglect of a Minor.[28]

3. *Crimes Outside Criminal Code*

The fact that the new Criminal Code is not all inclusive has been clarified by the Iowa Supreme Court. In *State v. Rauhauser*,[29] the court held that public intoxication[30] was still a punishable criminal offense in Iowa even though it was not included in the new Criminal Code itself.[31] The crux of the holding was that this offense, which was outside the main chapters of the prior criminal code (in a chapter on liquor control),[32] was not repealed as part of the revision process.[33] The court pointed out that the revised stat-

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21. 287 N.W.2d 570 (Iowa 1980).
22. The statute itself is certainly clear on its face, providing, in pertinent part: "[i]t is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen." Iowa Code § 711.1 (1981).
23. 287 N.W.2d at 573.
24. *Id.*
25. *Id.*
26. *Id.*
27. 287 N.W.2d 587 (Iowa 1980).
28. Iowa Code § 726.6(2) (1981).
29. 272 N.W.2d 432 (Iowa 1978).
30. Iowa Code §§ 123.46, .91 (1981).
31. State v. Rauhauser, 272 N.W.2d at 435.
32. Iowa Code § 123 (1981).
33. State v Rauhauser, 272 N.W.2d at 435.

ute contained "a rather exhaustive listing of statutes repealed by the new Criminal Code,"[34] with no mention made of the statute on public intoxication. The court stated that "[h]ad the legislature intended to repeal said statutes, it is only reasonable to expect an indication of such intent where other repealed statutes are enumerated."[35] Having thus concluded that there was no express repeal, the court also refused to find an implied repeal.[36] Invoking an established presumption against the implied repeal of statutes, the court noted that "[s]uch repeals are not favored by the courts and will not be sustained unless legislative intent to repeal is clear in the language used and such a holding is absolutely necessary."[37] Another intriguing factor in this implied repeal matter is that the public intoxication provisions were not included in the coordinating amendments sections in the Criminal Code Revision Act.[38]

4. *Definitional Clauses*[39]

a. *"Dangerous Weapon."*[40] Because of the restrictive interpretation given the term "dangerous weapon" by the Iowa Supreme Court, there does not need to be proof that the particular weapon was either loaded or operational.[41]

It is immaterial whether or not a *per se* "dangerous weapon" is loaded or unloaded. In *State v. Nichols*,[42] the Iowa Supreme Court held that under the new Criminal Code, as under prior law,[43] the prosecution "is not required to establish that a pistol was loaded at the time of the offense to prove its character as a dangerous weapon in a prosecution for robbery in the first degree."[44] Thus, it was proper for the trial court to instruct the jury that a pistol is a *per se* "dangerous weapon," notwithstanding any prosecution evidence that the pistol was loaded at the time.[45]

In *State v. Hemminger*,[46] the court stated that since the "definition of 'dangerous weapon' goes to the character of the instrument utilized . . ., working condition should never be an issue where the instrument employed

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34. *Id.*
35. *Id.*
36. *Id.* at 437.
37. *Id.* at 434.
38. For a discussion of the cases interpreting the transitional or savings provision in Iowa Code section 801.5, see Dunahoo, *supra* note 1, at 277-82.
39. *See generally* Dunahoo, *supra* note 1, at 254-76.
40. *See generally* Dunahoo, *supra* note 1, at 256-58; (for a discussion of a razor as a dangerous weapon, see *infra* text accompanying notes 808-13).
41. *Id.* at 257.
42. 276 N.W.2d 416 (Iowa 1979).
43. *See* State v. Ashland, 259 Iowa 728, 145 N.W.2d 910 (1966).
44. 276 N.W.2d at 417.
45. *Id.*
46. 308 N.W.2d 17 (Iowa 1981).

has the character of a dangerous weapon."[47] The court thus rejected defendant's argument that "a revolver is not a 'dangerous weapon' unless it is 'capable of inflicting death,' "[48] noting that the capability requirement set forth in the statute is that the weapon be capable of inflicting death "when used in the manner for which it was designed."[49]

b. "*Forcible Felony.*"[50] A crime is a "forcible felony" if it is one of those listed in Iowa Code section 702.11; or it is (1) a felony *and* (2) necessarily includes an assault.[51] The latter situation involves a "felonious assault,"[52] a general classification of offenses instead of a specific crime. To date, the following crimes have been held to be forcible felonies under the felonious assault rubric: Attempted Murder,[53] Voluntary Manslaughter,[54] and Terrorism by Discharging a Dangerous Weapon.[55] On the other hand, Terrorism by Threats[56] and Involuntary Manslaughter[57] have been held not to be forcible felonies.

c. "*Serious Injury*"[58]—(i) *Generally.* It was noted in *State v. Welton*[59] that there were "substantial differences" but "some resemblance" between the types of injuries encompassed in the "serious injury" concept under the new Criminal Code and the injuries included within the prior offenses of Assault With Intent to Do Great Bodily Injury and Mayhem.[60]

(ii) "*Substantial Risk of Death*"[61]—(A) *Defined.* A substantial risk of death was defined in *State v. Anderson*[62] as meaning "more than just any risk of death but [it] does not mean that death was likely. If there is a 'real hazard or danger of death,' serious injury is established."[63] In doing so, the supreme court expressly adopted the definition in Uniform Jury Instruction number 219.[64]

(B) *Applied.* Sufficient evidence of bodily injury creating a substantial risk of death was found in *State v. Anderson,*[65] which affirmed a conviction

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47. *Id.* at 20.
48. *Id.*
49. *Id.*
50. *See generally* Dunahoo, *supra* note 1, at 258-61.
51. State v. Young, 293 N.W.2d 5 (Iowa 1980).
52. *See* IOWA CODE § 702.11 (1981). *See generally* Dunahoo, *supra* note 1 at 495-96.
53. State v. Powers, 278 N.W.2d 26, 28 (Iowa 1979).
54. State v. Hellwege, 294 N.W.2d 689, 691 (Iowa 1980).
55. State v. Young, 293 N.W.2d 5, 8 (Iowa 1980).
56. State v. Smith, 309 N.W.2d 454 (Iowa 1981).
57. State v. Webb, 313 N.W.2d 550, 553 (Iowa 1981).
58. *See generally* Dunahoo, *supra* note 1, at 261-71.
59. 300 N.W.2d 157 (Iowa 1981).
60. *Id.* at 160.
61. *See generally* Dunahoo, *supra* note 1, at 262-63.
62. 308 N.W.2d 42 (Iowa 1981).
63. *Id.* at 47.
64. *Id.*
65. 308 N.W.2d 42 (Iowa 1981).

for Sexual Abuse in the First Degree.[66] The 85-year old victim was frail and suffered from arthritis and hardening of the arteries.[67] During the sexual abuse she was beaten on the head and had two ribs broken.[68] She incurred minor lacerations and was hospitalized for ten days.[69] At trial a doctor testified that there was "a ten percent chance of death," thus making death "certainly possible" but not "a major risk."[70]

(C) *Constitutionality.* The phrase bodily injury creating "a substantial risk of death" was held in *State v. Anderson*[71] to not be unconstitutionally vague.[72]

(D) *Hemorrhaging.* A "wealth of evidence" of a bodily injury creating a substantial risk of death was found in *State v. Coburn*[73] which affirmed a conviction for Sexual Abuse in the First Degree.[74] The initial medical examination of the 10-year old victim depicted "contusions and bruises near the opening of the vagina, a laceration extending from the vagina to the rectum or anus, and a large blood clot protruding through the vagina."[75] During surgery for vagina reconstruction and perineum repair, she suffered "substantial loss of blood," which led the surgeon to testify that "she suffered a substantial risk of death through hemorrhaging."[76] He also indicated indicated there was "a risk of death from peritonitis and from septicemia,"[77] although neither of these conditions developed.

(E) *Shooting in Face.* Sufficient, though concededly not overwhelming, evidence of bodily injury creating a substantial risk of death was found in *State v. Epps*,[78] which affirmed a conviction for Willful Injury.[79] The supreme court noted that "the victim was shot in the face with a handgun at close range, knocking him to the floor and causing temporary unconsciousness. He remained in the hospital for six days."[80]

(iii) "*Protracted Loss or Impairment of Any Bodily Member or Organ.*"[81] The supreme court, in *State v. Welton*,[82] defined the key words in

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66. *Id.* at 50.
67. *Id.* at 47.
68. *Id.*
69. *Id.*
70. *Id.* at 47.
71. 308 N.W.2d 42 (Iowa 1981).
72. *Id.* at 46.
73. 315 N.W.2d 742 (Iowa 1982).
74. *Id.* at 749.
75. *Id.* at 747.
76. *Id.*
77. *Id.*
78. 313 N.W.2d 553 (Iowa 1981).
79. *Id.* at 558.
80. *Id.* at 557.
81. *See generally* Dunahoo, *supra* note 1, at 267-69.
82. 300 N.W.2d 157 (Iowa 1981).

this phrase by reference to the dictionary and common law.[83]

The term "protracted" means "to draw out or lengthen in time or space."[84]

The term "loss or impairment" of a body function was "borrowed from the common law crime of mayhem."[85] "Common law mayhem is the deprivation of another's use of a member as may render him less able in fighting to defend himself. . . . The gravity of the injury is obtained by the loss of function of the member or organ."[86] Nevertheless, the "serious injury" concept is broader than the permanent disablement requirement under common law mayhem. This is evidenced by the supreme court's inclusion of "any deviation from normal health" within the term "impairment,"[87] which was defined in *State v. McKee*[88] to include a harm which "substantially interferes with an organ's function" or which "makes the function of an organ intensely painful or irregular . . . ."[89] Moreover, the impairment can be the function of a single organ or the function of a group of organs.[90]

The term "member" shall be construed as "a bodily part or organ."[91] An "organ" is "a differentiated structure . . . made up of various cells and tissues and adapted for performance of some specific function . . . ."[92] The supreme court stated in *State v. Welton*[93] that the trial court "could have defined the terms 'member' and 'organ' as a matter of law and instructed the jury that the jaw was a member or organ . . . ."[94] It also has stated that "[t]he uniform [jury] instruction on protracted loss or impairment is not inconsistent with our statements in *Welton* and *McKee*."[95]

(A) *Bone Fractures.* A fractured jaw expected to take approximately a full year to heal was considered to be a "serious injury" in *State v. Welton*,[96] which affirmed a conviction for Willful Injury.[97] The victim suffered two breaks in her lower jawbone as well as contusions and bruises around her mouth.[98] She required oral surgery wherein her jaw was wired shut.[99] The jaw remained wired for six weeks during which she suffered from facial

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83. *Id.* at 160.
84. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1836 (1966)).
85. *Id.* at 161.
86. *Id.*
87. State v. McKee, 312 N.W.2d 907, 913 (Iowa 1981).
88. 312 N.W.2d 907 (Iowa 1981).
89. *Id.* at 913.
90. *Id.*
91. State v. Welton, 300 N.W.2d 157, 161 (Iowa 1981).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 162.
98. *Id.* at 159.
99. *Id.*

swelling, pain and nausea, was unable to chew food, and lost twenty to twenty-five pounds.[100] She spent a total of eight days in the hospital.[101] Recognizing that "[a]ll bone fractures may not constitute a 'protracted loss or impairment,' "[102] the supreme court stated that "each case must be determined by its own peculiar facts."[103] The fracture in this case, "which substantially impaired the victim's health,"[104] generated a jury question under the statutory definition.[105]

Similarly, physical injuries which come within the definition of "serious injury" were limited in *State v. Epps*[106] to "injuries which leave [a] victim permanently scarred or twisted . . ., [in contrast to] a black eye, a bloody nose, and even a simple broken arm or leg."[107]

(B) *Menstrual Disorders.* The supreme court's expansive definition of "impairment" of a bodily organ as "any deviation from normal health"[108] including substantial interference with an organ's function or making the function intensely painful or irregular was applied in *State v. McKee*[109] to a sexual abuse victim who suffered intensely painful menstrual cramping and menstrual irregularity for almost five months.[110] The impairment of the menstrual function was considered by the supreme court to be "an impairment of the function of an organ."[111] The five-month period of this condition was held to support a jury question regarding the impairment being "protracted."[112]

(C) *Nasal Passages.* Evidence of a protracted loss or impairment of the function of an organ was found in *State v. Epps.*[113] In this prosecution for Willful Injury, the victim was shot in the face at close range.[114] The bullet entered his right nostril, damaged his nasal bone structure, and lodged in his left sinus cavity.[115] Two months later, he testified that he still "suffered from migrane headaches, depending upon weather conditions, and that he experienced excessive discharge from his sinus."[116]

(D) *Caused by Bodily Injury.* Under this type of "serious injury," there

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100. *Id.*
101. *Id.*
102. *Id.* at 161.
103. *Id.*
104. *Id.*
105. *Id.*
106. 313 N.W.2d 553 (Iowa 1981).
107. *Id.* at 557.
108. State v. McKee, 312 N.W.2d 907, 913 (Iowa 1981).
109. 312 N.W.2d 907 (Iowa 1981).
110. *Id.* at 912.
111. *Id.* at 913.
112. *Id.*
113. 313 N.W.2d 553 (Iowa 1981).
114. *Id.* at 554.
115. *Id.*
116. *Id.* at 557.

must be a showing that the impairment was caused by "bodily injury." Because the term "bodily injury" is not defined in the Criminal Code and has no technical meaning otherwise, the supreme court in *State v. McKee*[117] adopted the ordinary or dictionary meaning of the term: "physical pain, illness, or any impairment of physical condition."[118]

(E) *Emotional Trauma.* The interrelationship of bodily injury and emotional trauma was discussed in *State v. McKee.*[119] In *McKee,* the supreme court held that the jury could find that "the victim suffered bodily injury which produced emotional trauma, in turn causing protracted loss or impairment of the function of a bodily member or organ."[120]

The court stated: "Bodily injury ordinarily 'refers only to injury to the body, or to sickness or disease contracted by the injured as a result of injury.' "[121] A victim's emotional trauma is not caused by bodily injury if it is "attributable solely to the repulsiveness and indignity"[122] of the attack upon the victim. A victim's emotional trauma may be caused by bodily injury if it is "attributable in substantial part to physical pain, illness, or other impairment of physical condition"[123] inflicted in the attack upon the victim. In the instant case, the court determined that the sexual abuse victim's emotional trauma could be found to have been caused by a brutal attack in which physical pain was inflicted.[124]

d. *"Sex Act."*[125] The revised crime of Sexual Abuse,[126] as legislatively defined and judicially interpreted, encompasses considerably more sex-oriented conduct than under the pre-revised offense of Rape. Instead of vaginal penetration, the new offense merely required a "sex act," which is legislatively defined to include sexual contact between the mouth and genitalia, between genitalia and genitalia, between genitalia and the anus, and between "artificial sexual organs or substitutes therefor" and the genitalia or anus.[127]

The judicial gloss put on this term has seemingly broadened the concept of a "sex act" even further. In *State v. Howard,*[128] the Iowa Supreme Court held that the intertwining or rubbing together of the pubic hair of the defendant and the intended victim constituted contact of their genital parts

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117. 312 N.W.2d 907 (Iowa 1981).
118. *Id.* at 913.
119. 312 N.W.2d 907 (Iowa 1981).
120. *Id.* at 914.
121. *Id.* at 913.
122. *Id.*
123. *Id.*
124. *Id.* at 914.
125. *See generally* Dunahoo, *supra* note 1, at 271-73.
126. IOWA CODE § 709.1 (1981).
127. *See id.* § 702.17.
128. 284 N.W.2d 201 (Iowa 1979).

and thus a "sex act" sufficient to uphold a conviction for Sexual Abuse.[129] It was also held in *Howard* that the trial court correctly took judicial notice of the exterior anatomy of genitalia as well as of the location of pubic hair.

The scope of the crime was expanded even more considerably in *State v. Whetstine*[130] which interpreted a *finger* to constitute a substitute sex organ. Consequently, sexual abuse can be committed by unwarranted "insertion of a finger into a vagina"[131] (or presumably into an anus). Moreover, the supreme court, rejecting a vagueness challenge, held that the statutory definition of "sex act" did not fail to give a person of ordinary intelligence fair notice that a finger was included.[132]

On the other hand, the court demonstrated in *State v. Baldwin*[133] that it was unwilling to expand by judicial interpretation the scope of a "sex act" in situations where the offensive conduct did not involve parts of the body enumerated within the statutory definition.[134] In a prosecution for Lascivious Acts With a Child, allegedly committed by solicitation to engage in a "sex act,"[135] the evidence showed only that the defendant kissed an unwilling young girl "on the forehead" and "put his hand down the front of her shirt."[136] Reversing the conviction, the court pointed out that the human breast is not one of the specifically enumerated bodily parts within the statutory definition of "sex act" and held that the term "genitalia," being limited only to "the reproductive organs,"[137] within the definition of "sex act" does not include a human breast.[138] Even though the defendant's conduct constituted an assault and had some sex-oriented purpose, there was nothing to indicate an intent to achieve a "sex act."[139]

II. General Criminal Responsibility

A. *Parties to Crime*

1. *Aiding and Abetting*[140]

a. *Application of Firearm Provision.* In *State v. Sanders*,[141] the su-

129. *Id.* at 203.
130. 315 N.W.2d 758 (Iowa 1982).
131. *Id.* at 763.
132. This duty on the layman appears slightly heavy in light of commentators having taken a contrary view. *E.g.*, Dunahoo, *supra* note 1, at 273. *See also* 4 J. Yeager & R. Carlson, Iowa Practice: Criminal Law and Procedure § 44 (1979).
133. 291 N.W.2d 337 (Iowa 1980).
134. *Id.* at 339.
135. *Id.* at 338. *See* Iowa Code § 709.8(3) (1981).
136. 291 N.W.2d at 339.
137. *Id.* at 340.
138. *Id.*
139. *Id.*
140. *See generally* Dunahoo, *supra* note 1, at 284-87.
141. 280 N.W.2d 375 (Iowa 1979).

preme court held that the new provision for a mandatory five-year term of imprisonment for use or possession of a firearm during a "forcible felony"[142] applies also to a mere aider and abettor, here in a robbery, who did not personally have the firearm.[143] Focusing on the language in section 703.1 that all persons involved in a criminal act shall be "punished as principals," the supreme court noted that this section "deals with both guilt and punishment."[144] The court concluded:

> Section 711.1 defining robbery speaks in terms of a person who assaults or threatens with intent to commit a theft, yet defendant, who did not personally do so, is guilty of that crime because of section 703.1. Similarly defendant, who did not hold the gun, is liable for the enhanced punishment of section 902.7 because of section 703.1.[145]

b. *Identity of Principal Perpetrator.* It was established in *State v. Kern*[146] that in prosecuting a defendant on an aiding and abetting theory, or likewise on a joint conduct theory, it is not required that the identity of the principal perpetrator, or joint actor, be established.[147] Instead, all that is required is that the state establish the corpus delicti of the offense and that defendant aided and abetted, or joined, someone therein.[148] In the murder prosecution of Kern the state merely had to prove that the victim was actually murdered by *someone* and that defendant had knowingly assisted the anonymous hired gunman, whose identity was unknown at the time of defendant's trial.[149]

2. *Corporate Defendants*

A statutory amendment in 1981[150] makes unavailable to corporate defendants the ameliorative sentencing alternative of a deferred judgment. This provision surely will be attacked on equal protection grounds.

3. *Accessory After the Fact*[151]

a. *Statutory Amendments.* The newly-rejuvenated offense of Accessory After the Fact,[152] the only so-called party to a crime offense which itself

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142. *See generally* Dunahoo, *supra* note 1, at 258-61.
143. 280 N.W.2d at 377.
144. *Id.*
145. *Id.* at 378. For a critical analysis of this conclusion, see Dunahoo, *supra* note 1, at 287.
146. 307 N.W.2d 29 (Iowa 1981).
147. *Id.* at 30.
148. *Id.*
149. *Id.*
150. Certain Criminal Procedures, ch. 206, 1981 Iowa Acts 624, 627 (amending IOWA CODE § 907.3(f) (1981)).
151. *See generally* Dunahoo, *supra* note 1, at 290-93.
152. *Id.* at 290.

constitutes a separate crime, has already been statutorily revised again.[153] The change has resulted in the requirement that the person being unlawfully aided be "the person who committed the offense" rather than the more restrictive term of "the accused person."[154] This change means that the identity of the fugitive felon need not be known by the authorities at the time that the accessory unlawfully harbors or assists him. This makes sense because the proper focus should be upon the accessory's knowledge that he is assisting a criminal, irrespective of the authorities' knowledge of the criminal's identity at that early time in the proceedings.

b. *Lesser Included Offenses.* Accessory After the Fact clearly is not a lesser included offense of any crime.[155] Nor does it have any lesser included offenses of its own. This is because the legal test for a lesser included offense cannot be met in either of these two situations.[156] No "greater" crime has a state of mind consisting of prevention of another's apprehension and no "lesser" crime deals with the same subject matter consisting of the *actus reus* of unlawfully assisting another who has committed a crime.

B. *States of Mind*[157]

1. *Overview*

The particular *mens rea* component of several crimes under the new Criminal Code has been interpreted thus far. One of the principal issues has been whether the particular offense is merely a general intent crime or whether a particularized state of mind is required. Theft by bad check has been the only revised crime which thus far has been interpreted by the supreme court to have a different *mens rea* than its statutory pre-revised predecessor.[158]

2. *General Criminal Intent*

General principles were set forth in two cases which appear to be of general application in the area of *mens rea.*[159] Both cases involved statutes which had no express requirement of a *mens rea,* and both nevertheless

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153. Certain Crimes, ch. 204, 1981 Iowa Acts 620 (amending IOWA CODE § 703.3 (1981)).
154. IOWA CODE § 703.3 (1981) (amended by Certain Crimes, ch. 204, 1981 Iowa Acts 620).
155. *See generally* Dunahoo, *supra* note 1, at 292-93.
156. Rejecting the theory that Accessory After the Fact is a lesser included offense of Robbery, the Iowa Supreme Court determined that the legal test of a lesser included offense was not met since these two offenses require different states of mind. State v. Sanders, 280 N.W.2d 375 (1979). *Accord* State v. Sanders, 312 N.W.2d 534 (Iowa 1981) (Accessory After the Fact is not a lesser included offense of Kidnapping). *See generally* Dunahoo, *supra* note 1 at 292-93.
157. *See generally* Dunahoo, *supra* note 1, at 293-310.
158. *See infra* text accompanying notes 362-65.
159. *See generally* Dunahoo, *supra* note 1, at 294-301.

were interpreted as defining general intent crimes.[160]

In *Eggman v. Scurr*,[161] the supreme court noted that "there is no constitutional requirement that *mens rea* be an element of a criminal offense . . . ."[162] It added that "offenses which have no express intent elements may be characterized as general intent crimes."[163]

Starting from the basic premise of criminal law that "an act alone does not make one guilty unless his mind is also guilty,"[164] the supreme court stated that the particular *mens rea*, if any, is to be determined "as a matter of construction from the language of the act, in connection with its manifest purpose and design."[165] In determining the legislative intent involving the particular offense in question, Theft by misappropriation based upon failure to timely return leased property,[166] the court was influenced significantly by the fact that "at least general criminal intent is an element of all [of the other] theft offenses."[167] Moreover, the court opined that the legislative intent was to require something more than a mere failure of performance in order to impose *criminal* liability.[168]

In *State v. McCormack*,[169] a conviction for the theft-related crime of Operating a Vehicle Without the Owner's Consent[170] was reversed because of a faulty instruction on the requisite *mens rea*.[171] General criminal intent, interpreted as being an essential element of the crime, was erroneously omitted from the jury instruction defining the crime.[172] The applicable uniform jury instruction subsequently was amended to expressly require that the defendant *intentionally* took possession or control of another's vehicle without the owner's consent.[173] No logical reason is apparent for not applying the *McCormack* principle to all other general intent crimes, thus expressly requiring, as an essential element in the jury instructions, that the requisite *actus reus* was committed intentionally.[174]

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160. *See infra* text accompanying notes 161-74.
161. 311 N.W.2d 77 (Iowa 1981).
162. *Id.* at 78.
163. *Id.* at 79.
164. *Id.* at 78.
165. *Id.*
166. *See* IOWA CODE § 714.1(2) (1981).
167. 311 N.W.2d at 79.
168. *Id.*
169. 293 N.W.2d 209 (Iowa 1980).
170. *See* IOWA CODE § 714.7 (1981).
171. 293 N.W.2d at 212.
172. *Id.*
173. IOWA UNIFORM JURY INSTRUCTION (Criminal) No. 1446.
174. *See, e.g., id. See also infra* text accompanying notes 403-08.

C. *Venue*[175]

It was a long time coming, but the supreme court finally has stated unequivocally that "venue is neither a 'jurisdictional fact' nor an element of the offenses."[176] If, however, defendant objects to the venue in a pretrial motion under Iowa Code section 803.2, the burden of proving proper venue in that county by a preponderance of the evidence lies with the state.[177] Failure of the state to carry its burden is fatal to a subsequent conviction, as illustrated in *State v. Allen*.[178] In *Allen*, defendant was charged with delivery of cocaine.[179] The only evidence of venue was the finding of drugs and paraphernalia used to weigh such drugs in Blackhawk County.[180] This evidence "may support an inference of possession with intent to deliver such drugs in that county"[181] but it does not support an inference of delivery in that county, the supreme court concluded.[182] The proof of venue was therefore insufficient and defendant's conviction on the delivery charge was reversed.[183] The case was remanded to the district court "for entry of an order dismissing [this] charge."[184] This suggests that the state will only get one opportunity to prove venue.[185]

Defendant waives the issue of improper venue unless he timely files a pretrial motion under Iowa Code section 803.2 *and* secures a ruling thereon by the trial court *before* trial following an evidentiary hearing.[186] "Absent an adverse ruling by the trial court [before trial], he may not seek appellate review of the issue,"[187] even though a pretrial motion therefor was filed.

D. *Lesser Included Offenses*[188]

1. *Overview*

Generally, the new Criminal Code does not depart from the pre-revised law dealing with lesser included offenses,[189] the test in section 701.9 continu-

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175. *See generally* Dunahoo, *supra* note 1, at 310-12.
176. State v. Hempton, 310 N.W.2d 206, 209 (Iowa 1981).
177. State v. Allen, 293 N.W.2d 16 (Iowa 1980).
178. 293 N.W.2d 16, 22 (Iowa 1980).
179. *Id.* at 17.
180. *Id.* at 22.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *But cf.* State v. Combs, 316 N.W.2d 880 (Iowa 1982) (permissible to reprosecute for Theft by bad check after acquittal for False Use of Financial Instrument).
186. State v. Hempton, 310 N.W.2d 206, 209 (Iowa 1981).
187. State v. Allen, 293 N.W.2d 16, 18 (Iowa 1980).
188. *See generally* Dunahoo, *supra* note 1, at 312-24.
189. For an excellent and exhaustive analysis of the pre-revised standard, see Note, *The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied*, 59 IOWA L. REV. 684 (1974).

ing to be whether one offense is "necessarily included in another public offense."[190] The statute bars conviction of a necessarily included offense upon conviction of a greater offense and permits a trial court to enter judgment of guilty of the greater offense in those cases where the jury may return a verdict of guilty on both a lesser included offense *and* the greater offense.

Section 701.9 must be read together with several rules found in the Rules of Criminal Procedure which deal with lesser included offenses. Rule 6(1) authorizes prosecution by a single charging paper of each of the separate crimes arising "out of the same transaction or occurrence."[191] The rule incorporates the substance of a former Code section[192] making it unnecessary to charge lesser included offenses, it being sufficient to charge the greater offense only.[193] Rule 6(2) merely restates, in rule form, the essence of section 701.9, barring conviction of both the offense charged and an included offense.

The supreme court has held in *State v. Rouse*[194] that Rule 6(3) does not change the rule of former Iowa cases which required a request for an included offense instruction.[195] Absent such request, the prior cases had held that any error from a failure of a trial court to give a lesser offense instruction was waived.[196]

The Rule requires a trial court to determine, as a matter of law, whether the offense charged carries with it any lesser included offenses.[197] If the trial court determines that lesser included offenses are present under the statutory elements and evidence, then such offenses must be submitted to the jury notwithstanding a failure of counsel to request such instructions.[198] As noted in *Rouse*, however, this duty of the court does not relieve counsel "of the responsibility of urging proper objection or exception."[199]

2. *Two-Test Standard*

The pre-revised standard for determining what constitutes a lesser included offense has been applied under the new Criminal Code. Thus, the two-test standard for determining whether one offense is "necessarily included" in the other "remains as before,"[200] as formulated in *State v. Stew-*

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190. IOWA CODE § 701.9 (1981). *See generally* J. YEAGER & R. CARLSON, *supra* note 3, § 14. *See also* J. ROEHRICK, THE NEW IOWA CRIMINAL CODE: A COMPARISON 513 (1978).
191. IOWA R. CRIM. P. 6(1).
192. *See* IOWA CODE § 773.29 (1975) (repealed 1978).
193. IOWA R. CRIM. P. 6(1).
194. 290 N.W.2d 911 (Iowa 1980).
195. *Id.* at 914.
196. *Id. See* State v. Veverka, 271 N.W.2d 744 (Iowa 1978).
197. IOWA R. CRIM. P. 6(3).
198. *Id.*
199. State v. Rouse, 290 N.W.2d at 914.
200. State v. Sanders, 280 N.W.2d 375, 377 (Iowa 1979).

art[201] and *State v. Stergion.*[202] The first step "focuses upon the legal or element test,"[203] with the lesser offense being "an elementary part of the greater offense."[204] The second step "requires an ad hoc factual determination,"[205] that is, "a factual basis in the record for submitting the included offense to the jury."[206]

a. *Legal test.* Under the legal test or elemental test, the lesser offense "must be composed solely of some but not all elements of the greater crime."[207] That is, the lesser crime "must not require any additional element which is not needed to constitute the greater crime."[208] The lesser offense thus is "necessarily included within the greater."[209]

Put differently, "[t]o be necessarily included in the greater offense," the lesser offense "must be such that it is impossible to commit the greater without having committed the lesser."[210] On the other hand, the court has noted that "[i]t is quite possible to commit one crime in the act of committing another and yet not have it be an included offense."[211] This is because under Iowa's two-step test for lesser included offenses the less serious crime is not included "if its elements are not entirely included as a part of the elements of the major offense."[212]

(i) *Statutorily-Enumerated.* In *State v. Inger,*[213] the supreme court held that the provision in Iowa Code section 707.4 that Voluntary Manslaughter "*is* an included offense"[214] in a murder prosecution *ipso facto* satisfies the legal test.[215] The supreme court added, "[h]owever, for the [trial] court to properly give a voluntary manslaughter instruction over specific objection by a party, there must also exist in the record a factual basis for such an instruction."[216]

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201. 223 N.W.2d 250 (Iowa 1974), *cert. denied,* 423 U.S. 902 (1975).
202. 248 N.W.2d 911 (Iowa 1976).
203. *Id.* at 912.
204. State v. Redmon, 244 N.W.2d 792, 796 (Iowa 1976).
205. State v. Stergion, 248 N.W.2d 911, 912 (Iowa 1976).
206. State v. Redmon, 244 N.W.2d 792, 796 (Iowa 1976).
207. State v. Holmes, 276 N.W.2d 823, 825 (Iowa 1979) (quoting State v. Stergion, 248 N.W.2d 911, 912 (Iowa 1976)).
208. *Id.*
209. State v. Stewart, 223 N.W.2d at 252.
210. State v. Redmon, 244 N.W.2d 792, 801 (Iowa 1976) (quoting approvingly State v. Leeman, 291 A.2d 709, 710-11 (Me. 1972)).
211. State v. Furnald, 263 N.W.2d 751, 753 (Iowa 1978).
212. *Id.* at 754.
213. 292 N.W.2d 119 (Iowa 1980).
214. *Id.* at 121 (emphasis added).
215. *Id.*
216. *Id.* at 122. A similar provision makes Involuntary Manslaughter a lesser included offense of Murder in either degree and of Voluntary Manslaughter. *See* IOWA CODE § 707.5 (1981). *But see id.* § 714.7 ("A violation of this section, [Operating Vehicle Without Owner's Consent], may be proved as a lesser included offense on an indictment or information charging theft.") (emphasis added).

(ii) *Pleadings.* In analyzing the first or legal test, "the statutes and not the accusatory pleading or charge must establish the essential elements of the offense charged."[217] The supreme court has held in *State v. Redmon*[218] that "the statutory or legal element test should be the sole approach in determining what are the elements of the offense charged and that the language of the information or indictment charging the crime has no bearing on that analysis."[219]

(iii) *Alternative Definitions of a Crime.* A major new approach has been developed in the legal test for lesser included offenses to accommodate the statutory scheme in the new Criminal Code of defining several offenses in the alternative. This new standard was set forth as follows in *State v. Sangster*:[220]

> When the statute defines an offense alternatively, the relevant definition is the one for the offense involved in the particular prosecution.
>
> If the minor offense is defined alternatively, the offense is included if any of the alternatives are included. Because an offense is necessarily included in another if it is an elementary part of the greater, an offense is necessarily included if one of its statutory definitions makes it an elementary part of a greater offense. When so included, the major offense cannot be committed without also committing the minor offense.[221]

Under this test, "[t]he elements of an offense are determined by the statute defining it rather than by the charge or the evidence."[222] Thus, if the greater offense is defined alternatively, then the focus is only upon "the alternative involved in the particular prosecution."[223] The necessary determination is whether in committing the greater offense "a person would necessarily commit the minor offense in any of its alternative forms."[224]

Under this standard, Trespassing[225] was held to be a lesser included offense of Burglary by Unlawful Entry[226] in *State v. Sangster*.[227] Assault[228] was held to be a lesser included offense of Robbery by Assault[229] in *State v. Law*.[230] It appears from the rationale of these cases that Trespassing and Assault could not be lesser included offenses under any of the other ways of

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217. State v. Redmon, 244 N.W.2d 792, 801 (Iowa 1976).
218. 244 N.W.2d 792 (Iowa 1976).
219. *Id.* at 801.
220. 299 N.W.2d 661 (Iowa 1980).
221. *Id.* at 663-64 (citations omitted).
222. *Id.* at 663.
223. State v. Law, 306 N.W.2d 756, 758 (Iowa 1981).
224. *Id.* at 759.
225. *See* IOWA CODE § 716.7 (1981).
226. *See id.* § 713.1.
227. 299 N.W.2d 661, 664 (Iowa 1980).
228. *See* IOWA CODE § 708.1 (1981).
229. *See id.* § 711.1(1).
230. 306 N.W.2d 756, 758 (Iowa 1981).

committing Burglary and Robbery, respectively.

(iv) *Alternative Ways of Committing a Crime.* In *State v. Webb,*[231] the supreme court drew "a distinction between alternative ways of committing an offense and alternative enumerated definitions of an offense."[232] The difference lies in the fact that the pleadings are not examined in determining whether an alternative enumerated definition of an offense is a lesser included offense.[233] The court explained that "[t]his is because the legal test for identifying lesser included offenses depends on the statutory definition of the greater offense rather than the evidence by which the offense may be proved in a particular case."[234]

In *Webb* it was determined that Assault[235] is not a lesser included offense of Involuntary Manslaughter[236] even though "[e]vidence of an assault may be used to prove the public offense element of a felonious involuntary manslaughter charge . . . ."[237] Because the public offense element could be established through a myriad of other public offenses, instead of being limited to Assault, "it is thus possible to commit the crime of involuntary manslaughter . . . without committing assault" since "the greater crime does not necessarily include an assault."[238]

b. *Factual Test.*[239] The supreme court reaffirmed in *State v. Webb*[240] the principle that the existence of a factual basis for submitting a lesser crime is irrelevant if the legal test for a lesser included offense is not met.[241] It was clear in *Webb* that Assault was the underlying public offense for the felonious Involuntary Manslaughter charge,[242] with the issue being whether the greater offense was a "forcible felony"[243] by being a "felonious assault."[244] The supreme court pointed out that the legal test depended upon the statutory definition of the greater offense "rather than the evidence by which the offense may be proved in a particular case."[245]

It has been held that "a factual basis does not exist for submission"[246] of a lesser included offense when the defendant "by his own unexplained

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231. 313 N.W.2d 550 (Iowa 1981).
232. *Id.* at 552.
233. *Id.*
234. *Id.*
235. *See* IOWA CODE § 708.1 (1981).
236. *See id.* § 707.5.
237. 313 N.W.2d at 552-53.
238. *Id.* at 553.
239. *See generally* Dunahoo, *supra* note 1, at 322-24.
240. 313 N.W.2d 550 (Iowa 1981).
241. *Id.* at 552.
242. *Id.*
243. *See* IOWA CODE § 702.11 (1981).
244. *See id.; see generally* Dunahoo, *supra* note 1, at 495-96.
245. State v. Webb, 313 N.W.2d 550, 552 (Iowa 1981).
246. State v. Donelson, 302 N.W.2d 125, 135 (Iowa 1981).

and uncontradicted testimony elevate[s] a State's allegation to a verity."[247] In *State v. Donelson*,[248] the defendant was charged with first-degree sexual abuse.[249] All witnesses to the crime, "*including defendant himself* testified that defendant stabbed the victim with a knife."[250] Under these facts the supreme court held that there was no factual basis to submit simple assault as a lesser included offense.[251]

A lesser included offense instruction is not required when there is no evidence that the offense committed was less than that charged. Thus, under *State v. Morgan*,[252] if the trial record does not contain substantial evidence from some quarter controverting an element of the greater offense, the state's case stands or falls on the major offense.[253] Morgan, who was convicted of second-degree robbery via assault,[254] denied ever seeing the robbery victim until the trial and his mother gave alibi testimony.[255] The robbery victim testified that he was assaulted, however, and "the trial court submitted the elements of robbery based on assault but, over Morgan's protest, refused to submit assault as an included offense."[256] The supreme court concluded that the record did not contain "substantial evidence controverting any of the elements which elevate this crime from assault to robbery,"[257] "[t]he principle that a not-guilty plea controverts all elements is not strictly applied when courts come to applying the factual test of included offenses."[258]

III. Inchoate Offenses

A. *Solication*[259]

The new general crime of Solicitation[260] remains uninterpreted by the Iowa appellate courts. Several other specific solicitation-type crimes[261] will be affected by a decision limiting the requirement of corroboration of the

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247. *Id.* at 134-35.
248. 302 N.W.2d 125 (Iowa 1981).
249. *Id.* at 127.
250. *Id.* at 134 (emphasis original).
251. *Id.* at 251.
252. 322 N.W.2d 68 (Iowa 1982).
253. *Id.* at 70-71.
254. *Id.* at 69.
255. *Id.*
256. *Id.*
257. *Id.* at 71.
258. *Id.*
259. *See generally* Dunahoo, *supra* note 1, at 328-42.
260. *See* Iowa Code § 705.1 (1981).
261. Bribery, Indecent Contact With a Child, Lascivious Acts With a Child, Pandering, Pimping, Prostitution, and Suborning Perjury. *See* Iowa Code §§ 722.1, 709.11, 709.8(3), 725.3, 725.2, 725.1, 720.3 (1981); respectively.

testimony of a "solicited person" to the crime of Solicitation itself.[262]

B. *Attempt Liability*[263]

The general attempt-type crime of Assault While Participating in a Felony[264] was statutorily revised in 1981[265] to exclude attempted sexual abuse which was made a separate crime. Attempted Burglary also was added as a new crime[266] covering previously inadvertently de-criminalized activity.[267]

C. *Conspiracy*[268]

The only appellate interpretation of the revised crime of Conspiracy[269] has resulted in the rule that under Iowa Code section 706.4 a defendant convicted of both Conspiracy and the target substantive offense must be sentenced "solely on the substantive offense."[270] In *State v. Waterbury*,[271] the supreme court stated that this statutory provision creates "a merger of the conspiracy and the substantive offense where the defendant has been found guilty of both offenses."[272]

IV. Property Abuse Offenses

Other than Arson and Burglary, the property abuse crimes have witnessed very little activity. The crimes of Criminal Mischief[273] and Criminal Trespass[274] remain uninterpreted by the appellate courts, but have been slightly enlarged by recent statutory amendments.[275]

A. *Arson and Related Offenses*

1. *Overview*

a. *Arson.*[276] The only statutory change did not effect the substantive

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262. *See* State v. Williams, 315 N.W.2d 45 (Iowa 1982) (discussed *infra* in text accompanying notes 711-23). *See generally* Dunahoo, *supra* note 1, at 330-31.
263. *See generally* Dunahoo, *supra* note 1, at 325-28.
264. *See* Iowa Code § 708.3 (1981).
265. *See infra* text accompanying notes 528-46.
266. *See infra* text accompanying notes 310-12.
267. *See generally* Dunahoo, *supra* note 1, at 325-28.
268. *See generally id.* at 342-46.
269. *See, e.g.*, Iowa Code § 706.1 (1981).
270. State v. Waterbury, 307 N.W.2d 45, 52 (Iowa 1981) (rejecting the position taken in Dunahoo, *supra* note 1, at 344-45).
271. 307 N.W.2d 45 (Iowa 1981).
272. *Id.* at 52.
273. *See infra* text accompanying notes 324-26.
274. *See infra* text accompanying notes 217-23.
275. *See infra* text accompanying notes 317-26.
276. *See generally* Dunahoo, *supra* note 1, at 346-51.

nature of the crime of Arson, but instead authorized arson inspection warrants based upon a lesser standard than probable cause.[277] The only judicial interpretation involved proof of ownership under the arson by owner exception.[278]

b. *Related Offenses.*[279] None of the four arson-related offenses has been amended or interpreted.

2. *Arson*

a. *Arson by Owner Exception*[280]*—Evidence of Ownership.* Whenever the defense of ownership of the destroyed property is raised in a prosecution for Arson, it is reversible error to instruct the jury that a certificate of title is conclusive on the ownership issue.[281] "Ownership," for purposes of the arson statute, was given its "general meaning" in *State v. TeBockhorst,*[282] with a certificate of title not conclusive of ownership but instead merely evidence from which the jury could find who owned the vehicle.[283] Even though TeBockhorst may have purchased the vehicle and merely failed to comply with statutory requirements to put title in his name, he nevertheless had the right to possess and use the vehicle to the exclusion of others."[284] Thus, *TeBockhorst could still be the owner of the property he burned even though at the time of the fire the certificate of title had not been transferred to him.*[285]

b. Arson Inspection Warrants. A special arson inspection warrant was legislatively created in 1981[286] in order to permit non-consensual inspection of property damaged or destroyed by fire to determine the cause of the fire.[287] This new warrant is to be issued by a district court judge if there are "legal grounds sufficient under the circumstances . . . to justify the issuance of an inspection warrant."[288] No statutory definition of "legal grounds" is provided.[289] Whatever this phrase means, it clearly is a considerably lesser standard than the traditional Fourth Amendment standard of probable cause.

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277. *See infra* text accompanying notes 286-89.
278. *See infra* text accompanying notes 280-85.
279. *See generally* Dunahoo, *supra* note 1, at 352-54.
280. *See generally* Dunahoo, *supra* note 1, at 349.
281. State v. TeBockhorst, 305 N.W.2d 705, 708 (Iowa 1981).
282. 305 N.W.2d 705, 707 (Iowa 1981).
283. *Id.* at 708.
284. *Id.*
285. *Id.*
286. Arson Inspection Warrants, ch. 47, 1981 Iowa Acts 185 (codified at IOWA CODE § 100).
287. This statute undoubtedly was prompted by a decision of the United States Supreme Court. *See* Michigan v. Tyler, 436 U.S. 499 (1978).
288. Arson Inspection Warrants, ch. 47, § 4, 1981 Iowa Acts at 186.
289. *Id.*

B. *Burglary and Related Offenses*

1. *Overview*

a. *Burglary.* The revised crime of Burglary[290] has been interpreted twice. One decision gave a broad reading to the term "enclosed space;"[291] the other held that under some circumstances Trespass can be a lesser included offense of Burglary,[292] reversing the pre-revised law.

b. *Related Offenses.* A related crime of Attempted Burglary was added to the Criminal Code in 1981.[293] The other burglary-related crime, Possession of Burglar's Tools,[294] has not been interpreted by the appellate courts.

2. *Burglary*

a. *"Enclosed Area."*[295] The revised Burglary statute protects occupied structures and enclosed areas.[296] The latter term is described therein as an "area enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft or criminal mischief."[297] In *State v. Newman*[298] the supreme court determined that these words are not technical and construed them according to their common usage.[299] "Area" was defined as "any specific extent of space or surface" and "enclosed area" as a surface with a secure exterior "surround[ing] a mathematically quantifiable volume."[300] The court also noted that the ordinary meaning of "enclosed area" is reflected in Uniform Jury Instruction No. 1313.[301]

So defined, an "enclosed area" includes a locked coin changer in a laundromat.[302] Affirming a burglary conviction in *State v. Newman,* the supreme court noted the obvious when it found that the revised statute "is substantially broader than common law burglary . . . ."[303]

b. *Lesser Included Offenses.* In a reversal of the pre-revised law, the supreme court in *State v. Sangster*[304] held that under certain, but impliedly not all, circumstances Criminal Trespass can be a lesser included offense of

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290. *See generally* Dunahoo, *supra* note 1, at 357-63.
291. *See infra* text accompanying notes 295-303.
292. *See infra* text accompanying notes 304-09.
293. *See infra* text accompanying notes 310-16.
294. *See generally* Dunahoo, *supra* note 1, at 363-64.
295. *See generally* Dunahoo, *supra* note 1, at 358.
296. *See* IOWA CODE § 713.1 (1981).
297. *Id.*
298. 313 N.W.2d 484 (Iowa 1981).
299. *Id.* at 486.
300. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 115 (1976)).
301. *Id.*
302. *Id.* at 487.
303. *Id.* at 486.
304. 299 N.W.2d 661 (Iowa 1980).

Burglary.[305] Under prior law, Criminal Trespass never could be a lesser included offense of Burglary.[306] Under the *Sangster* test, the key is the alternative way of committing Burglary which is involved in the particular prosecution.[307] Once the applicable alternative element of Burglary is established, then Criminal Trespass is a lesser included offense if in committing the Burglary defendant would necessarily commit Criminal Trespass in any of its four alternative forms.[308] Criminal Trespass by Unlawful Entry meets the legal test as a lesser included offense of Burglary by Unlawful Entry, as established in *Sangster*, because it would be "impossible" for a person to commit Burglary by Unlawful Entry without also committing Criminal Trespass by unlawful entry.[309] Presumably, the same result would apply to Burglary by Unlawful Remaining Over since remaining upon or in property without justification after being told to leave is one of the four alternative ways of committing Trespassing. By contrast, Criminal Trespass can never be a lesser included offense of Burglary by Breaking because the crime of Criminal Trespass never requires a breaking as an essential element in any of its four alternative ways of being committed.

3. *Attempted Burglary*

A legislative amendment in 1981 establishing the crime of Attempted Burglary[310] filled a gap in the new Criminal Code.[311] This new offense tracks the burglary statute except that the *actus reus* is an attempt[312] to do any of the acts constituting the alternative means of committing burglary.

a. *Grading and Sentencing Options.* Each of the two grades of Attempted Burglary carries a penalty schedule one classification below the corresponding grade of Burglary itself.[313] For example, a completed burglary while armed is a class B felony whereas an attempted burglary while armed is only a class C felony; and an unarmed burglary is a class C felony whereas an unarmed attempted burglary is a class D felony.[314] The ameliorative sentencing options are available for both grades of Attempted Burglary, since

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305. *Id.* at 664.

306. *Id.* at 663.

307. *Id.* at 664.

308. *Id.*

309. *Id.*

310. Certain Crimes, ch. 204, § 8, 1981 Iowa Acts 620, 622 (amending IOWA CODE § 713).

311. *See generally* Dunahoo, *supra* note 1, at 359-60.

312. Because the term "attempt" is not defined in the Attempted Burglary statute, the general common law definition should be applied. *See generally* Dunahoo, *supra* note 1, at 326-27.

313. This graduated penalty schedule is unlike the uniform penalty schedules in the Arson and Robbery statutes which include the inchoate act of attempt within the definition of the consummated substantive offense. *See* IOWA CODE §§ 712.1, 711.1 (1981).

314. Certain Crimes, ch. 204, § 8, 1981 Iowa Acts 620, 622 (amending IOWA CODE § 713).

this new crime is not a "forcible felony."[315]

b. *Felony Murder Rule.* Neither grade of Attempted Burglary can be used as the underlying felony under the first-degree felony murder doctrine since the crime is not a "forcible felony."[316]

c. *Lesser Included Offenses.* It would appear that Criminal Trespass cannot be a lesser included offense of Attempted Burglary under any circumstances, unlike in burglary prosecutions. This is because Attempted Burglary is an inchoate (i.e., incomplete or unconsummated) offense whereas Criminal Trespass is a consummated crime, the result being that the alleged "lesser" crime requires something (e.g., unlawful entry) which the "greater" crime does not (e.g., an unlawful entry is not required but merely an attempted unlawful entry).

C. *Criminal Trespass*[317]

The general Criminal Trespass statute was amended in 1981[318] to expressly make illegal the activity of hunting, fishing, or trapping on another's property without permission of the owner, lessee, or person in lawful possession.[319] The statute puts the onus on the sportsman to obtain permission; otherwise, he enters at his own risk.[320] *Express* permission appears to be necessary.[321] Mere absence of the posting of "No-Trespassing" sign would not suffice to excuse an unauthorized entry.

A limited privileged-entry provision does permit hunters to make an unauthorized entry to retrieve game or animals that have been wounded or killed and have come to rest upon, or escape to, another's property.[322] They must do so, however, without their weapons.[323] This limitation should prevent "hot pursuit" chases onto another's property as a subterfuge of the consent requirement. In other words, an armed hunter would not come within the protection of this exception.

D. *Criminal Mischief*[324]

A minor statutory amendment in 1980 enlarged the crime of Criminal Mischief to include the rather obscure and bizarre activity of intentional disinterment of human remains from a burial site without lawful author-

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315. *See generally* Dunahoo, *supra* note 1, at 258-60.
316. *See generally* Dunahoo, *supra* note 1, at 260-61.
317. *See generally* Dunahoo, *supra* note 1, at 364-68.
318. Trespass on Private Property, ch. 205, 1981 Iowa Acts 623 (amending IOWA CODE § 716.7(2)(a)).
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *See generally* Dunahoo, *supra* note 1, at 354-57.

ity.[325] This activity constitutes third-degree Criminal Mischief, an aggravated misdemeanor.[326]

V. Non-Violent Property Appropriation Offenses

A. *Theft and Related Offenses*[327]

1. *Overview*

Judicial guidelines have been set down by the Iowa Supreme Court for determining value[328] and for aggregating value from a series of related thefts.[329] These rules, of course, apply to thefts of all types.

The requisite state of mind and the constitutionality of certain statutory inferences evidencing the applicable state of mind have been the focus of considerable litigation under the new Criminal Code. Theft by bad check has been interpreted as no longer requiring a fraudulent intent but instead merely knowledge of the check's worthlessness.[330] On the other hand, both Theft by misappropriation and Operating a Vehicle Without Owner's Consent have been interpreted as remaining general intent crimes.[331] The constitutionality of three statutory inferences relating to evidence of either Theft by misappropriation or Theft by exercising control over stolen property has been upheld.[332]

2. *Common Thief Provision*

The common thief provision[333] was changed in 1981.[334] Previously, it was pegged to second-degree theft, a class D felony.[335] Now it is a part of third-degree theft, an aggravated misdemeanor.[336] As revised, a theft of property not exceeding $100 in value by a person who has twice before been convicted of theft constitutes third-degree theft.[337] The minimal effect of

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325. Iowa Code § 716.5 (1981). A separate subsection therein which is so similar as to appear to be subsumed within the general disinterment offense specifically outlaws intentional disinterment of "human remains that have state and national significance from an historical or scientific standpoint for the inspiration and benefit of the United States without the permission of the state archaeologist." *Id.*

326. *Id.*

327. *See generally* Dunahoo, *supra* note 1, at 368-82.

328. *See infra* text accompanying notes 339-42.

329. *See infra* text accompanying notes 343-49.

330. *See infra* text accompanying notes 354-72.

331. *See infra* text accompanying notes 373-408.

332. *See infra* test accompanying notes 373-95.

333. Iowa Code § 714.2(2) (1981).

334. Certain Crimes, ch. 204, § 9, 1981 Iowa Acts 620, 622-23 (amending Iowa Code § 714.2(2)).

335. Iowa Code § 714.2 (1981) (amended 1981).

336. Certain Crimes, ch. 204, § 9, 1981 Iowa Acts 620, 622-23.

337. *Id.*

this common thief provision is to step up the penalty for a theft of $100 or less from a serious misdemeanor to an aggravated misdemeanor,[338] since the third-degree theft otherwise requires value in excess of $500.

3. *Value*

a. *Determining.* Iowa Code section 714.3, defining the value of stolen property as "its normal market or exchange value within the community at the time it is stolen,"[339] was characterized in *State v. Savage*[340] as a restatement of the prior larceny statute.[341] According to the court, "[v]alue under our prior law was interpreted to be market value, and in the absence of a regular market value, its actual value."[342]

b. *Aggregation—Series of Acts.* Section 714.3 of Iowa's revised Theft statute scrapped common law by sharply expanding the acts which may be considered a "single theft" and aggregated for valuation purposes in two types of situations.[343] One type permits combining acts if money or property was stolen: (a) "by a series of acts;" (b) "from the same person or location."[344] The second type permits aggregation of acts if money or property was stolen: (a) "from different persons;" (b) "by a series of acts;" (c) "which occur in approximately the same location or time period;" (d) "so that they are attributable to a single scheme, plan or conspiracy."[345]

The key term "series of acts" was interpreted in *State v. Amsden*[346] as "a group of [usually] three or more things or events standing or succeeding in order and having a like relationship to each other."[347] The court said that relationship is derived from relation and is defined as " 'an aspect or quality (as resemblance) that connects two or more things or parts as being or belonging or working together or as being of the same kind . . . .' "[348] Thus, "[a] series requires something more than similar acts."[349]

c. *Jury Question.* Procedurally, as set out in *State v. Amsden*,[350] as to each of the three or more theft incidents sought to be aggregated, the trial court must submit:

> [G]uilty-not guilty verdicts with an interrogatory as to the amount of the theft if the jury [finds] that theft was proved. A final interrogatory

338. *Id.*
339. IOWA CODE § 714.3 (1981).
340. 288 N.W.2d 502 (Iowa 1980).
341. *Id.* at 503.
342. *Id.*
343. IOWA CODE § 714.3 (1981).
344. *Id.*
345. *Id.*
346. 300 N.W.2d 882 (Iowa 1981).
347. *Id.* at 885.
348. *Id.*
349. *Id.* at 887.
350. 300 N.W.2d 882 (Iowa 1981).

> should [be] submitted to be answered if the jury [finds] that three or more established thefts are to be aggregated. That interrogatory would ask the jury which thefts were to be aggregated.[351]

No incidents can be aggregated unless the aggregation requirements are "met as to three or more incidents."[352] "Aggregated incidents, if any, would be punishable as a single theft . . . . Incidents which the jury found were established but were not to be aggregated, if any, would be punishable individually, . . . unless a new trial on motion was necessary for prejudicial misjoinder and the defendant timely moved for severance."[353]

4. *Theft by Bad Check*[354]

Theft by bad check has been distinguished from False Use of Financial Instrument.[355] Additionally, conviction of the former offense does not require proof either of a fraudulent intent or of obtaining a legal interest in the property received via the bad check.[356] On the other hand, a post-dated worthless check to be held as security in a commercial transaction does not constitute a bad check for theft purposes.[357]

a. *False Use of Financial Instrument Distinguished.* In *State v. Schoelerman*,[358] the supreme court held that "a person [who] writes a check on a bank where he knows he has no account, but signs the check in his own name . . . is guilty of theft [by bad check] . . ., but not of false use of a financial instrument."[359] The FUFI statute, focusing on "the falsity of the instrument itself,"[360] was held to apply "only if a bad check signed in the defendant-maker's own name is 'not what it purports to be.' "[361]

b. *Mens Rea.* Unlike the pre-revised offense, Theft by bad check does not include an element of specific intent to defraud.[362] In *State v. Smith*,[363] the supreme court determined that the revised offense occurs when something of value is obtained by deception, which in turn is established by obtaining something of value through use of a check known to be worthless.[364] "This guilty knowledge is the mens rea of the offense."[365]

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351. *Id.* at 886.
352. *Id.* at 887.
353. *Id.*
354. *See generally* Dunahoo, *supra* note 1, at 380-81.
355. *See infra* text accompanying notes 358-61.
356. *See infra* text accompanying notes 369-72.
357. *See infra* text accompanying notes 366-68.
358. 315 N.W.2d 67 (Iowa 1982).
359. *Id.* at 75.
360. *Id.*
361. *Id.* at 70 (quoting Dunahoo, *supra* note 1, at 392).
362. State v. Smith, 300 N.W.2d 90, 93 (Iowa 1981).
363. 300 N.W.2d 90 (Iowa 1981).
364. *Id.* at 92.
365. *Id.* at 93.

c. *Credit Transaction Theory of Defense.* A conviction for Theft by bad check was reversed in *State v. James,*[366] because of the trial court's refusal to instruct the jury on defendant's "credit transaction" theory of defense that if the parties intended the check to be held merely as security while defendant obtained cash to cover it, then defendant was entitled to an acquittal.[367] In short, a conviction requires proof that the victim believed, at the time he accepted the check, that the check "would be honored when presented."[368]

d. *Legal Interest Unnecessary.* It is not necessary for the prosecution to prove that the defendant obtained a legal interest, for example a certificate of title, in the property wrongfully obtained through a worthless check.[369] "Theft involves the wrongful taking of possession of property from a person who is in rightful possession,"[370] the court pointed out in *State v. James.*[371] The element of wrongfully "obtaining property" can be satisfied by taking possession, without permission, through "any means."[372]

5. *Theft by Exercising Control Over Stolen Property*[373]

a. *Mens Rea—Knowledge.* Knowledge generally is recognized as being the particularized mens rea of this offense, the requisite knowledge relating to knowledge that the property had been stolen.[374] The statute, however, recognizes a reasonable belief that the property was stolen as an alternative to actual knowledge.[375] The constitutionality of permitting a conviction in the absence of actual knowledge was upheld in *State v. Jones.*[376] Similarly, the constitutionality of the new statutory inference, that a person found in possession of property that had been stolen from two or more persons on separate occasions knew or believed the property had been stolen, was upheld in *State v. Post.*[377]

Some limitations on use of the statutory inference of knowledge were imposed in *State v. Jones.*[378] The jury instruction therein provided that the time interval between the theft and defendant's possession of the stolen property is a matter to be considered by the jury along with the other facts in determining whether to make the inference in the particular case at

366. 310 N.W.2d 197 (Iowa 1981).
367. *Id.* at 200.
368. *Id.* at 201.
369. *Id.* at 200.
370. *Id.*
371. 310 N.W.2d 197 (Iowa 1981).
372. *Id.* at 200.
373. *See generally* Dunahoo, *supra* note 1, at 379-80.
374. *Id.* at 379.
375. *See* IOWA CODE § 714.1(4) (1981).
376. 289 N.W.2d 597 (Iowa 1980).
377. 286 N.W.2d 195 (Iowa 1979). *See* IOWA CODE § 714.1(4) (1981).
378. 289 N.W.2d 597, 599-600 (Iowa 1980).

hand.[379] One of the other relevant facts mentioned in *State v. Jones* was whether the stolen property was easily transferrable.[380]

b. *Value—Aggregation.* Concerning aggregating the value of all the stolen property found under defendant's control, the court stated in *State v. Post:*[381] "At the time of arrest a person . . . is exercising control over all that property which is in his or her possession, and the total value of that property should be used to determine the degree of guilt."[382]

6. *Theft by Misappropriation*[383]

a. *Mens Rea.* The revised crime of Theft by misappropriation[384] has been interpreted as not requiring a specific intent to defraud.[385] In *Eggman v. Scurr,*[386] the supreme court held that the mens rea of this offense is general criminal intent.[387]

Under the rule of *State v. McCormack,*[388] it appears that "intentionally" is understood as an essential element of this offense.[389] The elements of this crime, therefore, are: (1) misappropriation; (2) of another's property; (3a) held in trust by defendant; or (3b) in defendant's possession; (4) by *intentionally* using or *intentionally* disposing of it in a manner inconsistent with the trust or of the owner's rights.[390]

In a misappropriation prosecution for failure to return leased property, the prosecution thus need only prove that defendant's failure to timely return the leased property was done intentionally instead of accidentally or mistakenly. Under *Eggman v. Scurr,*[391] the specific intent to defraud the lessor is unnecessary.[392]

b. *Inference on Untimely Return of Leased Property.* The provision in Iowa Code section 714.1(2) that a bailee's or lessee's failure to return personal property within seventy-two hours after a time specified in a written lease agreement shall be evidence of misappropriation was upheld in *State v. Gates*[393] as being supported by common sense and experience and there-

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379. *Id.* at 599.
380. *Id.*
381. 286 N.W.2d 195 (Iowa 1979).
382. *Id.* at 202.
383. *See generally* Dunahoo, *supra* note 1, at 375-76.
384. *See* IOWA CODE § 714.1(2) (1981).
385. Eggman v. Scurr, 311 N.W.2d 77, 79 (Iowa 1981).
386. 311 N.W.2d 77 (Iowa 1981).
387. *Id.* at 79.
388. 293 N.W.2d 209 (Iowa 1980). *See supra* text accompanying notes 169-74.
389. *Id.* at 212.
390. Uniform Jury Instruction No. 1406 should be revised to add the element of general criminal intent as the latter is defined in Uniform Jury Instruction No. 215A.
391. 311 N.W.2d 77 (Iowa 1981).
392. *Id.* at 80.
393. 306 N.W.2d 720 (Iowa 1981).

fore clearly rational.[394] The implementing jury instruction[395] following the statutory inference must make it clear that this inference is merely permissive and not conclusive upon the jury.

7. *Theft From the Person*[396]

Iowa's Theft From the Person statute[397] has been interpreted similarly to its predecessor of Larceny From the Person.[398] In *State v. Washington,*[399] the supreme court held that this offense is not limited to the taking of property " 'directly off' or 'actually from' the victim," but also includes the taking of property from the "immediate presence" or within the "area of control" of the victim.[400]

The narrowness of this interpretation is readily apparent from the facts of that case. In *State v. Washington,* the defendant removed a billfold from the victim's purse which was lying in her shopping cart.[401] The victim was looking away at the time but did have her hand on the shopping cart although not on the purse itself.[402]

8. *Operating a Vehicle Without Owner's Consent*[403]

The theft-related crime of Operating a Vehicle Without Owner's Consent[404] has been interpreted as including general criminal intent as an essential element.[405] In *State v. McCormack,*[406] a conviction was reversed because of the omission of general criminal intent in the jury instruction, albeit copying Uniform Jury Instruction No. 1446, defining the elements of this crime.[407] General criminal intent remains an element even though the statutory section "speaks of intent only in terms of a characteristic not required: permanence of purpose need not be shown."[408]

The "hopelessly confused" uniform jury instruction was revised subsequently to require that defendant *intentionally* took possession or control of another's vehicle without the owner's consent.[409]

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394. *Id.* at 725.
395. *See* IOWA UNIFORM JURY INSTRUCTION (Criminal) No. 1439.
396. *See generally* Dunahoo, *supra* note 1, at 372-75.
397. *See* IOWA CODE § 714.2(1) (1981).
398. *See generally* Dunahoo, *supra* note 1, at 372.
399. 308 N.W.2d 422 (Iowa 1981).
400. *Id.* at 423.
401. *Id.* at 422.
402. *Id.*
403. *See generally* Dunahoo, *supra* note 1, at 381-82.
404. *See* IOWA CODE § 714.7 (1981).
405. *See generally* Dunahoo, *supra* note 1, at 381.
406. 293 N.W.2d 209 (Iowa 1980).
407. *Id.* at 212.
408. *Id.*
409. IOWA UNIFORM JURY INSTRUCTION (Criminal) No. 1406.

B. *Fraudulent Practices*[410]

The reconstituted, consolidated crime of Fraudulent Practices[411] has not been the subject of any appellate interpretation. A statutory amendment in 1980 added fraudulent obtainment of public assistance as a fraudulent practice.[412]

C. *False Use of Financial Instrument*[413]

1. *Theft by Bad Check Distinguished*

In *State v. Schoelerman*,[414] the Iowa Supreme Court sharply differentiated the offenses of False Use of Financial Instrument[415] and Theft by bad check.[416] Eliminating the overlap between these two related offenses, the court wisely said: "Any other conclusion would defeat the legislative purpose of eliminating statutory duplication and its troublesome effect on the prosecutorial charging decision,"[417] which could include prosecutorial abuse. After all, the same set of facts should constitute the same crime in all parts of the state. This uniformity is especially important in light of the widely divergent penalty schedules[418] for these two offenses.

Differentiating between the two offenses, the supreme court held that "a person [who] writes a check on a bank where he knows he has no account, but signs the check in his own name . . . is guilty of theft [by bad check] . . ., but not of false use of a financial instrument."[419] The FUFI statute was interpreted as maintaining "the traditional focus on the falsity of the instrument itself."[420]

The undisputed facts were that Schoelerman wrote two nonpersonal counter checks furnished by the merchant, "drawing on a bank where he had no account."[421] He signed his own name, and admitted that he wrote the bad checks with fraudulent intent.[422]

Under such circumstances, the supreme court determined that the essential FUFI element of the instrument being "not what it purports to

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410. *See generally* Dunahoo, *supra* note 1, at 382-88.
411. *See* IOWA CODE §§ 714.8-.13 (1981).
412. Fraudulent Transfer of Property, ch. 1189, 1980 Iowa Acts 603 (amending IOWA CODE § 714.8).
413. *See generally* Dunahoo, *supra* note 1, at 388-93.
414. 315 N.W.2d 67 (Iowa 1982).
415. *See* IOWA CODE § 715.1 (1981).
416. *See id.* § 714.1(6).
417. 315 N.W.2d at 75.
418. IOWA CODE §§ 714.1(7), 714.2, 715.6 (1981).
419. 315 N.W. 2d at 75.
420. *Id.*
421. *Id.* at 70.
422. *Id.*

be"[423] was lacking. Accordingly, the FUFI statute applies "only if a bad check signed in the defendant-maker's own name is 'not what it purports to be."[424]

2. *Genuine-Bearer Instruments Excluded*

Wrongful use of a genuine-bearer instrument was determined in *State v. Sanders* to not constitute the crime of False Use of a Financial Instrument.[425] Without John Knowles' permission to do so, Sanders unsuccessfully attempted to cash a check made out to and endorsed by Knowles.[426] Sanders claimed he found the check; the state claimed he stole it.[427] The Iowa Court of Appeals determined that in a FUFI prosecution it did not make any difference how Sanders came into possession of the check.[428] The crux of the matter was that the check was a genuine-bearer instrument.[429] The court of appeals concluded:

> [N]egotiation of a *genuine* bearer instrument, including an instrument which becomes such by endorsement, is not within the class of conduct condemned by section 715.6. Nor is negotiation of a *genuine* bearer instrument within the proscribed class of conduct if the party charged has placed his or her own endorsement on the instrument in seeking to negotiate it.[430]

VI. Violent Property Appropriation Offenses

A. *Robbery*[431]

1. *Overview*

The revised crime of Robbery[432] has been the subject of several appellate interpretations. One case upheld the constitutionality of the offense itself, which does not require a taking as well as permitting overlap with the general attempt-type crime of Assault While Participating in a Felony.[433] Another case held that the requisite taking of property in the possession of another can involve a business's property in possession of an employee.[434] First-degree "armed" robbery prosecutions were given impetus by decisions

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423. *Id.* at 75.
424. *Id.*
425. 309 N.W.2d 144, 146 (Iowa Ct. App. 1981).
426. *Id.* at 145-46.
427. *Id.* at 146.
428. *Id.*
429. *Id.*
430. *Id.*
431. *See generally* Dunahoo, *supra* note 1, at 393-97.
432. *See* Iowa Code § 711.1 (1981).
433. *See infra* text accompanying notes 439-46.
434. *See infra* text accompanying notes 447-50.

holding that the weapon need be neither loaded nor operational and that being armed with a dangerous weapon is sufficient by itself to constitute the requisite intent.[435] No longer is proof of intent to kill or maim if resisted required.[436] Theft and Accessory After the Fact have been held not be lesser included offenses of Robbery,[437] and Assault has been limited as a lesser included offense to robbery prosecutions based upon assault, as opposed to upon threats.[438]

2. *Constitutional Challenges*

The revised definition of Robbery has survived a two-pronged constitutional attack based upon due process grounds.[439] Concluding that the Robbery statute was not vague, the supreme court in *State v. Pierce*[440] held it was within the legislative prerogative to eliminate "taking" as an element of the revised crime of Robbery, and that this statutory change did not *ipso facto* render the statute vague.[441] The vagueness challenge was doomed by the plain wording of the statute, that "[i]t is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen."[442] The court deemed as novel and illogical "[t]he argument that a definition of crime which is otherwise clear is somehow made unclear because it departs from common law and prior statutes . . . ."[443] In addition, it determined that the robbery statute "[was] no less clear merely because the conduct proscribed overlaps conduct which [was] also proscribed under a separate statute,"[444] Assault While Participating in a Felony[445] as it relates to an unsuccessful or attempted Robbery.[446]

3. *Property in Possession of Another*

The requisite proof for robbery of a business entity via threatened violence directed against an employee was set forth in *State v. Matlock*.[447] The record therein established that the defendant intended to take the contents of the restaurant's cash register which were in the possession of an assistant

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435. *See supra* text accompanying notes 40-49.
436. *See infra* text accompanying notes 451-57.
437. *See infra* text accompanying notes 459-78.
438. *See infra* text accompanying notes 459-78.
439. *See infra* text accompanying notes 440-46.
440. 287 N.W.2d 570 (Iowa 1980).
441. *Id.* at 573.
442. *Id.*
443. *Id.*
444. *Id.* at 573-74.
445. *See* IOWA CODE § 708.3 (1981).
446. By contrast, the potential overlapping in the area of sexual abuse was apparently eliminated by the establishment of the new crime of Assault With Intent to Commit Sexual Abuse in 1981. *See infra* text accompanying notes 485-94.
447. 289 N.W.2d 625 (Iowa 1980).

manager.[448] This was sufficient to support a finding that the defendant intended to take "control of the property of another, or property in the possession of another."[449] It was thus unnecessary for the state to prove that defendant intended to commit a theft against the employee.[450]

4. *First-Degree Robbery Via Being Armed With a Dangerous Weapon*

a. *Mens Rea.* The mens rea of the revised crime of Robbery is simply an intent to commit a theft.[451] Being armed with a dangerous weapon is one of the three alternative ways of committing Robbery in the First Degree.[452] The court held in *State v. Sharkey*[453] that, unlike Robbery with Aggravation under the pre-revised Criminal Code, the revised "armed" robbery statute "does not require the State to prove intent to kill or maim if resisted as an element of first-degree robbery in the dangerous weapon cases."[454] Instead, the prosecution merely has to prove that defendant was armed with a dangerous weapon[455] (that is, had it in his possession) in order to raise the crime to Robbery in the First Degree. Defendant propounded an *Emery v. Fenton*[456] argument, but the supreme court correctly determined that the legislative intent clearly was to make an armed robbery by itself a sufficient aggravating circumstance for first-degree robbery.[457]

b. *"Dangerous Weapon."* As discussed above, a Robbery in the First Degree conviction based upon defendant, or an accomplice, being armed with a "dangerous weapon" does not require proof that the particular weapon was either serviceable or loaded.[458]

5. *Lesser Included Offenses*

a. *Assault.* Whether Assault is a lesser included offense in a robbery prosecution was held in *State v. Law*[459] to depend upon whether the robbery is based upon an underlying assault under Iowa Code section 711.1(1).[460] The legal test is met only when the robbery prosecution is based upon an

448. *Id.* at 626-27.
449. *See* IOWA CODE § 714.1(1) (1981) (defining theft).
450. 289 N.W.2d at 628.
451. *See* IOWA CODE § 711.1 (1981).
452. *See id.* § 711.2.
453. 311 N.W.2d 68 (Iowa 1981).
454. *Id.* at 72.
455. *See supra* text accompanying notes 40-49.
456. 266 N.W.2d 6 (Iowa 1978). *See* Dunahoo, *supra* note 1, at 252-53.
457. 311 N.W.2d at 71.
458. *See supra* text accompanying notes 40-49.
459. 306 N.W.2d 756 (Iowa 1981).
460. *Id.* at 758.

underlying assault.[461] Assault is not a lesser included offense when the prosecution is based upon any of the other so-called "non-assaultive" alternative ways of committing the underlying threatened violence for a robbery, such as "threaten[ing] another with or purposely put[ting] another in fear of immediate serious injury"[462] or "threaten[ing] to commit immediately any forcible felony."[463]

This distinction is based upon the conclusion in *State v. Law*[464] that "by threatening another with immediate serious injury, an assault is not necessarily committed."[465] This is because "[a] mere threat, without more, is not necessarily an assault by placing another in fear."[466]

The fact that the prosecution is for first-degree robbery "while armed" does not *ipso facto* alter the foregoing analysis. Therefore, "a person who commits a robbery while armed does not necessarily commit an assault,"[467] since an Assault by firearm[468] requires proof that defendant either intentionally *pointed* a firearm at another or displayed a dangerous weapon in a threatening manner. In contrast, an "armed" robbery does not *necessarily* involve pointing of the firearm or displaying the firearm in a threatening manner.

A question remains as to whether Assault is a lesser included offense in a first-degree armed robbery prosecution if the evidence shows that defendant did in fact *point* his firearm at another. The answer should depend solely upon which alternative formed the basis of the charge. Assault, therefore, can only be a lesser included offense whenever the charge is Robbery by assault. Assault will never be a lesser included offense of first-degree "armed" Robbery by threatening to inflict serious injury even though the evidence shows that an assault was committed via pointing the firearm at the robbery victim.

b. *Theft.* In *State v. Holmes,*[469] the supreme court held that Theft[470] is not a lesser included offense of the revised crime of Robbery,[471] even though the pre-revised crime of Larceny, or Larceny from a Person, was a lesser included offense of the pre-revised crime of Robbery.[472] The change resulted from the revised definition of Robbery as not requiring a "taking," unlike

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461. *Id.*
462. *See* IOWA CODE § 711.1(2) (1981).
463. *See id.* § 711.1(3).
464. 306 N.W.2d 756 (Iowa 1981).
465. *Id.* at 759.
466. *Id.*
467. *Id.*
468. *See* IOWA CODE § 708.1(3) (1981).
469. 276 N.W.2d 823 (Iowa 1979).
470. *See* IOWA CODE § 714.1 (1981).
471. 276 N.W.2d at 825.
472. *Id.*

under the pre-revised law.[473] Consequently, under the new Criminal Code, each of these offenses requires an additional element.[474] Theft requires a taking while Robbery does not, and Robbery requires either an assault or certain threats while Theft does not.

c. *Accessory After the Fact.* In *State v. Sanders*,[475] the supreme court held that Accessory After the Fact[476] is not a lesser included offense of Robbery.[477] The legal elements test was not met because each offense has a different state of mind, i.e., to prevent another's apprehension under Accessory After the Fact and to commit a theft under Robbery.[478]

B. *Extortion*[479]

The only appellate interpretation of the crime of Extortion[480] has established that the crime is complete upon defendant's making of the threat.[481] Iowa's revised Extortion statute thus was interpreted in *State v. Jackson*[482] as not requiring that the proscribed threat be communicated directly or successfully to the intended target.[483] Instead, the focus is upon defendant's intent in communicating the threat.[484]

Attributing to the word "threat" its ordinary or dictionary meaning,[485] the supreme court determined that "the focus in determining whether a threat has been made is upon the actions of the person expressing or uttering his or her intention to inflict evil, injury, or damage."[486] Whether the intended victim "actually received the threat is immaterial to defendant's clear intent that he do so."[487]

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473. *Id.*
474. *Id.*
475. 280 N.W.2d 375 (Iowa 1979).
476. *See* IOWA CODE § 703.3 (1981).
477. 280 N.W.2d at 377.
478. *Id.*
479. *See generally* Dunahoo, *supra* note 1, at 397-403.
480. *See* IOWA CODE § 711.4 (1981).
481. State v. Jackson, 305 N.W.2d 420, 424 (Iowa 1981).
482. 305 N.W.2d 420 (Iowa 1981).
483. *Id.* at 424.
484. *Id.*
485. *Id.* at 423.
486. *Id.*
487. *Id.* The threat in *State v. Jackson* was directed at Governor Ray, but the letter was opened by his office receptionist who called police without notifying the Governor. The letter, from a patient at the Iowa Security Medical Facility, threatened the lives of the governor and his family unless he pardoned defendant's friend. *See also infra* text accompanying notes 573-87.

VII. Assaults and Related Offenses

A. *Overview*

The area of assaultive offenses remains one of the most volatile areas of criminal law in Iowa. After creating no less than five new assaultive crimes in the original revised criminal code, the general assembly added two more[488] and revised two others in 1981.[489] Additionally, a legislative ban on ameliorative sentencing alternatives was imposed in 1981 when the assault victim is a peace officer.[490]

The assaultive offenses also have spawned considerable judicial interpretation. The foundational basis, "assault," for all of these crimes has been held to require an overt act,[491] thus rendering a mere threat insufficient for the requisite *actus reus*. Five cases interpreting the phrase "serious injury" have added some flesh to the two assaultive crimes with a "serious injury" as an essential element.[492]

Four of the assault-related crimes remain both legislatively unchanged and judicially uninterpreted under the new Criminal Code. These include: Administering Harmful Substances,[493] Going Armed With Intent,[494] Harassment,[495] and Setting Spring Guns and Mantraps.[496]

B. *Assault*[497]

1. *Overt Act*

An overt act is an essential element of the crime of Assault,[498] the supreme court determined in *State v. Smith*.[499] Thus, proof merely of a verbal threat by itself is insufficient to constitute an assault, even though the threat is of harmful conduct.[500] As explained in *State v. Law*, "by threatening another with immediate serious injury, an assault is not necessarily committed. A mere threat, without more, is not necessarily an assault by placing another in fear."[501]

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488. *See infra* text accompanying notes 521-31.
489. *See infra* text accompanying notes 548-58.
490. *See infra* text accompanying notes 506-12.
491. *See infra* text accompanying notes 498-501.
492. *See supra* text accompanying notes 58-124.
493. *See* Iowa Code § 708.5 (1981). *See generally* Dunahoo, *supra* note 1, at 508-10.
494. *See id.* § 708.8. *See generally* Dunahoo, *supra* note 1, at 513-14.
495. *See id.* § 708.7. *See generally* Dunahoo, *supra* note 1, at 512-13.
496. *See id.* § 708.9. *See generally* Dunahoo, *supra* note 1, at 514-15.
497. *See generally* Dunahoo, *supra* note 1, at 496-501.
498. *See* Iowa Code § 708.1 (1981).
499. 309 N.W.2d 454 (Iowa 1981).
500. *Id.* at 457.
501. 306 N.W.2d 756, 759 (Iowa 1981).

2. *Without Justification*

The phrase "without justification" in the definition of assault in Iowa Code section 708.1 was interpreted in *State v. Delay*[502] as establishing an affirmative defense rather than an element of the crime.[503] The operative procedural effect is that as an affirmative defense, the burden of going forward with the evidence of justification is on the defendant.[504] This means that "[t]here is no burden on the state to negate [justification as] an affirmative defense unless the defendant meets his initial burden by producing sufficient evidence that the defense applies."[505]

3. *Sentencing Options*

Following a legislative amendment in 1981,[506] a deferred sentence is unavailable for an assault committed against a peace officer in performance of his duty. This is a curious provision, since it does not appear to affect the two more serious assaultive crimes of Aggravated Assault[507] and Assault with Intent to Inflict Serious Injury,[508] both of which are misdemeanors. On the other hand, the other assaultive crimes—Assault While Participating in a Felony,[509] Willful Injury,[510] and Terrorism by discharging a dangerous weapon[511]—are felonies and as "forcible felonies" preclude use of the ameliorative sentencing alternatives.[512]

4. *Lesser Included Offenses*

Assault has been held to be a lesser included offense of Attempted Murder[513] and Voluntary Manslaughter[514] as well as of one type each of Robbery,[515] Sexual Abuse,[516] and Terrorism,[517] but not of Sexual Abuse of a child[518] or Involuntary Manslaughter,[519] or the other type of Terrorism.[520]

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502. 320 N.W.2d 831 (Iowa 1982).
503. *Id.* at 839.
504. *Id.*
505. *Id.* at 834. *See* State v. Sharkey, 311 N.W.2d 68 (Iowa 1981).
506. Certain Criminal Procedures, ch. 206, § 17, 1981 Iowa Acts 624, 627 (amending IOWA CODE § 907.3).
507. *See infra* text accompanying notes 521-27.
508. *See* IOWA CODE § 708.2(1) (1981).
509. *See id.* § 708.3.
510. *See id.* § 708.4.
511. *See id.* § 708.6(1).
512. *See* IOWA CODE § 903.1(3) (1981).
513. *See* State v. Powers, 278 N.W.2d 26, 28 (Iowa 1979).
514. State v. Hellwege, 294 N.W.2d 689, 690 (Iowa 1980).
515. State v. Law, 306 N.W.2d 756, 758-60 (Iowa 1981).
516. State v. Johnson, 291 N.W.2d 6, 10 (Iowa 1980).
517. State v. Young, 293 N.W.2d 5, 8 (Iowa 1980).
518. State v. Tague, 310 N.W.2d 209, 212 (Iowa 1981).
519. State v. Webb, 313 N.W.2d 550, 553 (Iowa 1981).

C. *Aggravated Assault*

A legislative amendment in 1981[521] added an aggravated assault, or battery, as an intermediate offense between simple Assault,[522] a simple misdemeanor, and Assault With Intent to Inflict Serious Injury,[523] an aggravated misdemeanor. The elements of this new serious misdemeanor offense are (1) assault; (2) causing either bodily injury or disabling mental illness.[524]

Because Assault is a specific intent crime, this offense will not criminalize negligent or reckless infliction of bodily injury. The term "bodily injury" suggests something more than touching, for example, bruising or discoloration or slitting of the skin. Nevertheless, the much more restrictive term "serious injury"[525] is not used, unlike in the more serious offenses of Assault With Intent to Inflict Serious Injury[526] and Willful Injury.[527]

D. *Assault While Participating in a Felony*[528]

1. *Statutory Change*

A legislative amendment in 1981 created a separate crime of Assault With Intent to Commit Sexual Abuse.[529] This revision had the effect of carving out Sexual Abuse as the underlying felony in the general attempt-type offense of Assault While Participating in a Felony.[530] The elements of the revised offense are (1) Assault; (2) while participating in a felony other than Sexual Abuse.[531]

2. *Attempt—Nature*

The nature of this offense as a general attempt crime was noted in *State v. Johnson*,[532] which rejected the claim that the target felony offense must have been completed in order for there to be a conviction for Assault While Participating in a Felony.[533] The plain words of the statute belie that claim, since the statute reads that "[a] person is 'participating in a public offense' during this period whether the person is successful or unsuccessful

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520. State v. Smith, 309 N.W.2d 454, 456 (Iowa 1981).
521. Certain Crimes, ch. 204, § 3, 1981 Iowa Act 620, 621 (amending IOWA CODE § 708.2).
522. *See* IOWA CODE § 708.2(2) (1981).
523. *See id.* § 708.2(1).
524. *See id.* § 708.2(2).
525. *Id.* § 702.18. *See supra* text accompanying notes 58-60.
526. *See id.* § 708.2(1).
527. *See id.* § 708.4.
528. *See generally* Dunahoo, *supra* note 1, at 503-06.
529. Certain Crimes, ch. 204, § 6, 1981 Iowa Acts 620, 622 (amending IOWA CODE § 709).
530. *See* IOWA CODE § 708.3 (1981).
531. Certain Crimes, ch. 204, § 6, 1981 Iowa Acts 620, 622 (amending IOWA CODE § 709).
532. 291 N.W.2d 6 (Iowa 1980).
533. *Id.* at 8-9.

in committing the offense."[534]

3. *Multiple Participants*

Multiple participants are not necessary in order for this offense to be committed. *State v. Johnson*[535] held that a single defendant may be convicted of this offense by his sole participation in a felony.[536] Thus, the supreme court rejected defendant's contention that the term "participating" connotes joint conduct or group activity.[537] Instead, the court noted that the term "participating" is directed "only toward the taking part in an event; *i.e.*, a public offense, and not to the number of people who have a role in that event."[538]

4. *Overlapping With Target Felony*

The distinct possibility of certain inchoate criminal activity overlapping in the substantive crime provision and this statute has been recognized by the supreme court. In *State v. Pierce*,[539] the court, in upholding the revised offense of Robbery[540] against a due process attack, stated that the Robbery statute "is no less clear merely because the conduct proscribed may overlap conduct which is also proscribed under a separate statute."[541] The court was referring to an unsuccessful robbery being punishable under either Robbery or Assault While Participating in a Felony.[542]

5. *Non-Merger With Completed Underlying Crime*

It was established in *State v. Mead*[543] that a defendant can be convicted of both Assault While Participating in a Felony and the target felony offense itself.[544] Because the felonious assault offense can be committed without having actually committed the target felony, the latter "is not necessarily included in the assault. Consequently, burglary is not merged into assault while participating in burglary."[545] Moreover, since conviction on the assault charge "is not dependent upon conviction on the burglary charge, no violation of the double jeopardy clause appears."[546]

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534. *Id.* at 8.
535. 291 N.W.2d 6 (Iowa 1980).
536. *Id.* at 8.
537. *Id.*
538. *Id.* at 9.
539. 287 N.W.2d 570 (Iowa 1980).
540. *See* IOWA CODE § 711.1 (1981).
541. 287 N.W.2d at 574.
542. *Id.*
543. 318 N.W.2d 440, 446 (Iowa 1982).
544. *Id.* at 446.
545. *Id.* at 447.
546. *Id.*

E. *Terrorism*[547]

1. *Statutory Amendments*

Both types of Terrorism were changed by the General Assembly in 1981.[548] As a result, this crime was enlarged to criminalize discharging or launching of weapons *inside* a building, instead of merely *at* a building,[549] but contracted by eliminating threatening to commit a forcible felony as an alternative *actus reus*.[550]

The revised first type now consists of: (1) discharging or launching a dangerous weapon; either (2a) at, into or *inside* any occupied building or occupied vehicle or (2b) *within an assembly of people;* and (3) placing the occupants therein in reasonable apprehension of serious injury.[551] These two changes filled crucial gaps by recognizing the danger of discharging weapons inside a building or vehicle instead of merely at it or into it; and by refocusing attention properly upon the personal danger to persons who are not necessarily in a building or vehicle at the time by including an assembly of people. A defect still remains, however, with the use of the restrictive term "assembly of people." That term definitely suggests more than one person,[552] thus resulting in a Terrorism charge not lying for discharging a weapon at one or two persons.

The revised second type of Terrorism now consists of: (1) threatening; (2) to discharge a dangerous weapon; either (3a) at, into, or inside any occupied building or occupied vehicle or (3b) within an assembly of people; and (4) with a reasonable expectation of the threat being carried out.[553] Previously, this type of Terrorism was based upon a threat to commit a forcible felony.

Unfortunately, this entire alternative method of committing the crime was not repealed, but was instead merely changed. With the possible exceptions of Kidnapping in the First Degree[554] and Assault While Participating in a Felony,[555] this is the most outrageous crime in the Criminal Code. Merely threatening to discharge a dangerous weapon is a five-year offense, with no requirement that the weapon even be produced. Yet, pointing a firearm at another constitutes Assault,[556] a simple misdemeanor carrying a

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547. *See generally* Dunahoo, *supra* note 1, at 510-12.

548. *See* Certain Crimes, ch. 204, § 5, 1981 Iowa Acts 620, 621 (amending IOWA CODE § 708.6).

549. *Id.*

550. *Id.*

551. *Id.*

552. *See* IOWA CODE § 723.2 (1981) (defining an unlawful assembly as "three or more persons assembled together . . .").

553. Certain Crimes, ch. 204, § 5, 1981 Iowa Acts 620, 621 (amending IOWA CODE § 708.6).

554. *See* IOWA CODE § 710.2 (1981); Dunahoo, *supra* note 1, at 554-55.

555. *See* IOWA CODE § 708.3; Dunahoo, *supra* note 1, at 505.

556. *See* IOWA CODE § 708.1(3) (1981).

maximum term of thirty days.[557] Moreover, mere threats, absent an accompanying act, do not constitute Assault.[558] Yet, this type of Terrorism does not require an act. The ridiculous upshot is that a bare threat, not an overt act, to kill someone with your bare hands is not punishable at all, but a bare threat to discharge a gun is a five-year offense.

2. *Terrorism by Discharging or Launching Dangerous Weapons*

a. *Reasonable Apprehension.* "[T]he state of mind of both the actor and the victim"[559] is an element of this type of Terrorism, unlike Terrorism by threat. Specifically, the element of placing the occupant/victim "in reasonable appehension of serious injury"[560] has been held to require proof that this particular victim was actually frightened to such extent.[561] Thus, it is not enough for a conviction for Terrorism that a reasonable person in the victim's position would have been frightened. The supreme court stopped short of holding that the necessary element of apprehension can never be inferred from the circumstances of any case.[562] This is unfortunate, as either the so-called victim was "apprehensive" or he was not. The proof would be elementary: "Ms. Victim, as a result of defendant's actions, were you in apprehension of being seriously injured?" Only an inept prosecutor would fail to ask such a question, provided of course he anticipated an affirmative answer.

The subjective requirement that this particular victim actually be frightened certainly did not come as a surprise. After all, the statutory definition of this element is that the victim was *placed* in reasonable apprehension of serious injury.[563] The term "placed" denotes success. This "no harm—no foul" approach is preferable to felony convictions where the intended victim was not even aware of, or made light of, defendant's actions.

The reasonable apprehension element also encompasses an objective test, for example, "this apprehension must be reasonable under the circumstances."[564] In other words, "an unjustified apprehension, one for which a jury might find no basis in fact, will not suffice."[565] This requirement is wise in order to keep this crime in its proper perspective: a violent act of an inherently frightening nature.

b. *Terrorism by Automobile.* Repeatedly maneuvering an automobile in an attempt to force another vehicle off the road was held not to constitute

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557. *See* IOWA CODE § 903.1(3) (1981).
558. *See supra* text accompanying notes 498-501.
559. *See* State v. White, 319 N.W.2d 213, 215 (Iowa 1982).
560. *See* IOWA CODE § 708.6(1) (1981).
561. State v. White, 319 N.W.2d at 215.
562. *Id.*
563. IOWA CODE § 708.6(1) (1981).
564. State v. White, 319 N.W.2d at 215 (Iowa 1982).
565. *Id.* at 215.

Terrorism via "launching" a dangerous weapon in *State v. Oldfather*.[566] An automobile "may [not] be 'launched' in the manner contemplated"[567] by the use of that term in Iowa's terrorism statute. The evidence demonstrated "that a station wagon, allegedly driven by [defendant], was repeatedly engaged in maneuvers calculated to force another vehicle off the road."[568] The state maintained that "the sudden change of course of [defendant's] car into the path of [the occupant of the other car] amounted to a launching under the statute."[569] Rejecting this contention, the supreme court limited the concept of "launching" to "releas[ing] or catapult[ing] (a self-propelled object) from a ramp, rack, or other device,"[570] although recognizing an alternative ordinary or dictionary meaning of darting or throwing forward.[571] In light of Oldfather's situation coming within the latter but not the former definition, the court, feeling that the former definition was more common applied the rule that "words in a criminal statute are to be interpreted strictly."[572]

3. *Terrorism by Threat*

a. *Threat—Defined.* The term "threaten" was given its ordinary, or dictionary, meaning in *State v. Jackson*:[573] " 'threaten' is defined as 'to utter threats against'; 'threat' is defined as 'an expression of an intention to inflict evil, injury, or damage on another.' "[574]

b. *Threat—Sufficiency.* Unlike Assault, the crime of Terrorism by threat does not require an overt act.[575] As stated in *State v. Smith*,[576] Terrorism "can be complete by merely making a threat under certain circumstances without any accompanying act."[577] Moreover, the underlying threat to support a conviction for Terrorism by threat can either be written or oral.[578]

c. *Threat—Communication of.* The Terrorism by threat statute was interpreted in *State v. Jackson*[579] as not requiring that the proscribed threat be communicated directly or successfully to the intended target.[580] "[T]he issue is not whether the victim actually believed the threat would be carried

566. 306 N.W.2d 760 (Iowa 1981).
567. *Id.* at 761.
568. *Id.*
569. *Id.* at 763.
570. *Id.* at 764.
571. *Id.*
572. *Id.*
573. 305 N.W.2d 420 (Iowa 1981).
574. *Id.* at 422-23.
575. *See supra* text accompanying notes 498-501.
576. 309 N.W.2d 454 (Iowa 1981).
577. *Id.* at 457.
578. *Id.*
579. 305 N.W.2d 420 (Iowa 1981).
580. *Id.* at 423.

out, but whether the actor so intended, and whether the actor's belief was reasonable."[581] A conviction for Terrorism by threat thus merely requires proof that the person making the threat did so "with the intent to injure or provoke fear or anger in another creating a reasonable expectation that the threat will be carried out. There is no . . . requirement [that] the fear, anger, or reasonable expectation must be experienced by the intended target of the threatened wrongdoing."[582]

4. *Sentencing Options*

The availability of ameliorative sentencing alternatives[583] for Terrorism depends upon which type of Terrorism was involved. The overt act type necessarily includes an assault and thus is a "forcible felony"[584] for which the ameliorative sentencing alternatives are unavailable.[585] The threat type does not require an assault as an element[586] and is not a "forcible felony," thus not precluding ameliorative sentencing alternatives.[587]

5. *Lesser Included Offense*

a. *Assault.* Whether or not Assault[588] is a lesser included offense in a prosecution for Terrorism depends upon which of the two types of Terrorism is involved. *State v. Young*[589] held that Assault is "necessarily included" in a charge of Terrorism via the act of discharging a dangerous weapon.[590] *State v. Smith*[591] held that Assault is not a lesser included offense when Terrorism is based upon a mere threat.[592] The difference lies in the overt act requirement for an Asaault since "assault requires some overt act supplementing the threat."[593] Discharging a dangerous weapon obviously is an overt act, whereas a mere threat by itself is not.

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581. *Id.*
582. *Id.*
583. *See* IOWA CODE § 907.3 (1981).
584. *See id.* § 702.11. *See also* State v. Young, 293 N.W.2d 5 (Iowa 1980).
585. *See* IOWA CODE § 907.3 (1981).
586. *See supra* text accompanying notes 575-78.
587. *See* IOWA CODE § 907.3 (1981).
588. *See id.* § 708.2(2).
589. 293 N.W.2d 5 (Iowa 1980).
590. *Id.* at 8.
591. 309 N.W.2d 454 (Iowa 1981).
592. *Id.* at 457.
593. *Id.*

F. *Willful Injury*[594]

1. *"Serious Injury"*

As discussed above, the supreme court has defined the term "serious injury" in several cases.[595]

2. *Felony Murder*

As discussed below, the supreme court has held that Willful Injury can be the underlying felony for the felony murder doctrine.[596]

VIII. Sex-Related Offenses

A. *Overview*

The drastically restructured *actus reus* of a "sex act" for the revised crime of Sexual Abuse and several related offenses has been broadly interpreted to include digital penetration and rubbing together of the pubic hair surrounding a defendant's genitalia and a victim's pubes,[597] but to exclude masturbation by hand.[598] Alternatively, the *mens rea* requirement has remained unchanged, since Sexual Abuse has been interpreted as a general intent crime and sexual abuse of a child as a strict liability offense.[599]

Two new sexual abuse-related crimes were established in 1981.[600] One, Indecent Contact With a Child,[601] criminalized sex-oriented activity previously excluded in part from the related offense of Lascivious Acts With a Child. The other, Assault With Intent to Commit Sexual Abuse,[602] merely carved out attempted sexual abuse as a separate crime from the general attempt-type crime of Assault While Participating in a Felony.

B. *Sexual Abuse*[603]

1. *"Sex Act"*

The revised crime of Sexual Abuse,[604] as legislatively defined and judicially interpreted, encompasses considerably more sex-oriented conduct than the pre-revised offense of Rape. Instead of vaginal penetration, the new

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594. *See* Iowa Code § 708.4 (1981). *See generally* Dunahoo, *supra* note 1, at 507-08.
595. *See* Iowa Code § 702.18 (1981). *See also supra* text accompanying notes 58-124.
596. *See generally* Dunahoo, *supra* note 1, at 582.
597. *See infra* text accompanying notes 604-10.
598. *See supra* text accompanying notes 125-39.
599. *See infra* text accompanying notes 624-37.
600. *See infra* text accompanying notes 695-702.
601. *See infra* text accompanying notes 695-702.
602. *See infra* text accompanying notes 685-94.
603. *See generally* Dunahoo, *supra* note 1, at 515-32.
604. *See* Iowa Code § 709.1 (1981).

offense merely requires a "sex act,"[605] which is legislatively defined to include sexual contact between the mouth and genitalia, between genitalia and genitalia, between genitalia and the anus, and between "artificial sexual organs or substitutes therefor" and the genitalia or anus.[606] The requisite sexual "contact" was given an expansive interpretation in *State v. Howard*,[607] which held that intertwining or rubbing together of the pubic hair of the defendant and the intended victim constituted contact of their genital parts.[608] A finger was interpreted in *State v. Whetstine*[609] to constitute a substitute sexual organ,[610] thus making digital manipulation of a vagina or anus sexual abuse.

2. *Against the Will*

In a major departure from its interpretations of the pre-revised Rape law, the supreme court's decision in *State v. Bauer*[611] has established that it is sufficient under Iowa Code section 709.5 of the revised Sexual Abuse offense to prove a complainant's "*subjective* lack of consent" rather than requiring "proof beyond a reasonable doubt by *objective* evidence that defendant was aware of her non-consent."[612] Recognizing that there could be no conviction for Rape under the judicial gloss of the pre-revised statute unless the State proved the victim had "exerted the utmost resistance to the attack,"[613] the court pointed out that the "utmost resistance" requirement was not codified in the new Iowa Criminal Code.[614] Indeed, code section 709.5 expressly states that "it shall not be necessary to establish physical resistance" but that "the circumstances surrounding the commission of the act may be considered in determining whether or not the act was done by force or against the will of the other."[615] The latter portion of the statute was interpreted in *State v. Bauer* as meaning "*all* the circumstances, subjective as well as objective."[616]

Here, defendant had broken into the victim's apartment and slipped into bed with the victim who "made no resistance and voiced no objection" except that she was presently experiencing menstruation.[617] Undaunted, the defendant continued removing her undergarment while responding "Don't

605. *See id.* § 702.17. *See also supra* text accompanying notes 125-39.
606. *See id.* § 709.1.
607. 284 N.W.2d 201 (Iowa 1979).
608. *Id.* at 203.
609. 315 N.W.2d 758 (Iowa 1982).
610. *Id.* at 761.
611. 324 N.W.2d 320 (Iowa 1982).
612. *Id.* at 322.
613. *Id.*
614. *Id.*
615. *Id.* (quoting IOWA CODE § 709.5 (1981)).
616. *Id.*
617. *Id.* at 321.

worry about it."[618] During the ensuing sexual intercourse, "she made neither verbal nor physical protest."[619] In fact, she even "actively assisted him when he was having difficulty in achieving penetration."[620]

At trial, she explained "her failure to offer more direct and positive resistance by saying she was afraid to do so," describing herself as being "scared to death" and " 'paralyzed' as far as physical resistance was concerned."[621] The victim's fear was sufficient for the jury and for the supreme court.

Admittedly, as the supreme court pointed out, "[f]ear has always been recognized as a substitute for the resistance which [the Iowa Supreme Court's] cases otherwise required."[622] The victim's fear clearly should be sufficient, as opposed to an unrealistic and unreasonable if not outright dangerous requirement of "utmost resistance,"—provided that this fear is apparent to the defendant. Otherwise, arguably he is not volitionally acting against the will of the other participant. The sexual abuse statute focuses upon the defendant's act: "Such act is done by force or against the will of the other. In any case where the consent or *acquiescence* of the other is *procured by threats of violence* toward any person, the act is done against the will of the other."[623] The "procured by threats of violence" language in the statute itself can or should be read as an indication of legislative intent that defendant either know or should have known that his physical act was against the will of the other participant. Here, the victim merely noted her menstruation and apparently nothing more after defendant responded "Don't worry about it." Instead of protesting further that she did *not* want to have intercourse with him, she instead *even* assisted him in achieving penetration!

3. *Mens Rea*

The mens rea of the revised crime of Sexual Abuse depends upon whether the charge is sexually abusing an adult or having a sex act with a child.[624] In this regard there is no change from the pre-revised law.

a. *Sexual Abuse of Adult.* The revised crime of Sexual Abuse was interpreted in *State v. Sullivan*[625] as not requiring knowledge or intent.[626] As explained in *State v. York*,[627] it is not a specific intent crime.[628] This means

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618. *Id.*
619. *Id.*
620. *Id.*
621. *Id.* at 321-22.
622. *Id.* at 322.
623. IOWA CODE § 709.1(1) (1981) (emphasis added).
624. *See infra* text accompanying notes 625-37.
625. 298 N.W.2d 267 (Iowa 1980).
626. *Id.* at 273.
627. 293 N.W.2d 13 (Iowa 1980).

that the prosecution does not need to prove why the defendant sexually abused his victim. On the other hand, it remains a general intent crime.[629] This means that defendant acted intentionally, instead of accidentally or mistakenly. Under the rule of *State v. McCormack*,[630] it appears that Uniform Jury Instruction No. 908 is defective for omitting the element of general intent.[631]

b. *Sex Act With a Child.* Sexual abuse of a child,[632] on the other hand, is a strict liability offense. Thus, as held in *State v. Tague*,[633] general intent is not an element of the crime.[634] This means that mistake of fact as to the victim's age, no matter how reasonable, is not a defense.[635]

The constitutionality of imposing strict liability for sexual abuse of a child, albeit consensual or non-consensual, was upheld in *State v. Tague*.[636] "Statutes regarding sex offenses are common examples of employment of strict liability intended to protect the public welfare. As such they do not violate due process,"[637] the supreme court concluded.

4. *Alternative Modes of Committing*

a. *Consent—Alternative Means of Proof.* It was established in *State v. Willet*[638] that subsections (2) through (5) of Iowa Code section 709.4 provide "alternative means of committing third-degree sexual abuse, not an alternative means of providing lack of consent under section 709.4(1)."[639]

Willet was charged with violating Iowa Code section 709.4(1) which proscribes a sex act by force.[640] The theory of the defense was that the sex act was consensual.[641] In a bench trial, the trial court, reasoning that "even if the victim actually consented, his consent would be nullified by section 709.4(5),"[642] concluded that defendant violated section 709.4(1) by virtue of his violation of section 709.4(5).[643] The supreme court reversed, holding that "the trial court could not properly use section 709.4(5) to find a violation of

628. *Id.* at 14.
629. *See id.*
630. 293 N.W.2d 209 (Iowa 1980).
631. *See* IOWA UNIFORM JURY INSTRUCTION (Criminal) No. 908.
632. *See* IOWA CODE §§ 709.3(2), 709.4(3) (1981).
633. 310 N.W.2d 209 (Iowa 1981).
634. *Id.* at 211.
635. *Id.* at 212.
636. *Id.* at 211.
637. *Id.*
638. 305 N.W.2d 454 (Iowa 1981).
639. *Id.* at 456.
640. *Id.*
641. *Id.*
642. *Id.*
643. *Id.*

section 709.4(1)."[644] Proof that a sex act was done "by force or against the will" of the victim, as proscribed by section 709.4(1), cannot be established by showing that the sex act was committed in violation of section 709.4(5) which prohibits consensual sex between persons of certain varying ages.[645]

b. *Mental Defect or Incapacity.* One portion of the new Sexual Abuse statute has been declared unconstitutional as being void for vagueness.[646] This language prohibited a sex act, albeit consensual, with a participant who "lacks the mental capacity to know the right and wrong of conduct in sexual matters."[647] This language would "inevitably . . . result in convictions based not on the jury's view of the facts, but on its view of the morality of certain sexual conduct," the Iowa Supreme Court determined in *State v. Sullivan.*[648]

Another portion of this same provision was upheld in *State v. Sullivan.* This provision prohibits a sex act, albeit consensual, with a participant who "is suffering from a mental defect or incapacity which precludes giving consent."[649] This provision protects "those who are so mentally incompetent or incapacitated as to be unable to understand the nature and consequences of the sex act."[650] The supreme court has stated that this language:

> protects not only completely incompetent persons but those who "while having some degree of intellectual power and some capacity for instruction and improvement, are still so far below the normal in mental strength that they can offer no effectual resistance to the approach of those who will take advantage of their weakness."[651]

c. *Related Participants.* The constitutionality of the language in section 709.4(4) which prohibits a sex act under certain described circumstances with a participant who is "related to the other participant by blood or affinity to the fourth degree" has been upheld against a challenge of void for vagueness.[652] "The method of computing degrees of . . . affinity . . . is so well established that this court has applied it without elaborating on the mechanics of computation," the supreme court stated in *State v. Allen.*[653]

d. *Sexual Abuse of an Adolescent.* Statutory classification of Sexual Abuse of an Adolescent[654] as a forcible felony was upheld in *State v. Cobb*[655]

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644. *Id.*
645. *Id.*
646. *See* State v. Sullivan, 298 N.W.2d 267, 271 (Iowa 1980).
647. *See* IOWA CODE § 709.4(2) (1981).
648. 298 N.W.2d 267, 271 (Iowa 1980).
649. *See* IOWA CODE § 709.4(2) (1981).
650. 298 N.W.2d at 272.
651. *Id.* (quoting State v. Haner, 186 Iowa 1259, 173 N.W. 225 (1919)).
652. State v. Allen, 304 N.W.2d 203, 205 (Iowa 1981).
653. 304 N.W.2d 203, 207 (Iowa 1981).
654. *See* IOWA CODE § 709.4(4) (1981).
655. 311 N.W.2d 64 (Iowa 1981).

against an equal protection challenge.[656] The court determined that legislative classification in this situation did not involve a "suspect classification" and thus need not satisfy the "more stringent 'close scrutiny' examination."[657] Classification of sexual abuse under this section was held to be based on a rational relationship to a legitimate state interest: "the sex activities of its young citizens."[658]

The crux of the challenge in *State v. Cobb* was that probation is denied on any crime classified as a forcible felony.[659] Thus, a person convicted of Sexual Abuse of an Adolescent cannot be considered for probation.[660]

5. *Rape Shield Provision*

Rule 20(5) of the Iowa Rules of Criminal Procedure, which makes evidence of past sexual conduct of a sexual abuse victim inadmissible, with certain exceptions, was interpreted in *State v. Ogilvie*[661] to apply even where the evidence is offered to account for the presence of semen which the defendant alleges was not his.[662] The supreme court reasoned that "[a] victim's privacy will be invaded as much when the inquiry is motivated by a desire to confront real evidence as when it is motivated by a desire to impugn the victim's character. The result does not depend on the motive for the inquiry, ..."[663]

The issue was whether or not a semen stain on a bed sheet was left by Ogilvie.[664] His counsel accordingly asked the victim whether she had "any other sexual intercourse in the prior two, three, four days" before the incident with defendant.[665] The state successfully objected that defendant had not complied with Rule 20(5).[666] On appeal, defendant argued that Rule 20(5) did not apply since he was merely trying to "confront real evidence" and not trying to impugn the victim's character.[667]

The issue of the constitutionality of Rule 20(5) was not raised in *State v. Ogilvie*,[668] and still has not been determined.

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656. *Id.* at 67.
657. *Id.*
658. *Id.*
659. *Id.*
660. *Id.*
661. 310 N.W.2d 192 (Iowa 1981).
662. *Id.* at 194.
663. *Id.* at 195.
664. *Id.* at 194.
665. *Id.*
666. *Id.*
667. *Id.* at 195.
668. *Id.*

6. *Statute of Limitations*

A legislative amendment in 1981[669] eliminated the special provision for only an eighteen-month statute of limitations on prosecutions for Sexual Abuse. This means that the general three-year statute of limitations[670] applicable to all other felonies, except for Murder,[671] applies to Sexual Abuse. This change was long overdue.

7. *Lesser Included Offenses*

a. *Assaults.* Assault,[672] Assault with Intent to Inflict Serious Injury,[673] and Assault while Participating in a Felony[674] have all expressly been held to be lesser included offenses of the crime of Sexual Abuse committed *by force or against the will of the victim.* The same rule should apply to the two newest assaultive offenses, Aggravated Assault[675] and Assault with Intent to Commit Sexual Abuse.[676]

On the other hand, Assault has been held not to be a lesser included offense of the crime of sexual abuse of a child.[677] The reason for the distinction is that statutory sexual abuse can be either consensual or non-consensual, thus not necessarily requiring an assault.[678] The same rule should apply to the other types of Sexual Abuse not pinioned on force or against the victim's will, for example, sexual abuse of a mentally defective participant and sex acts with fourteen- or fifteen-year old participants under the statutorily-enumerated circumstances.

b. *Indecent Exposure.* Indecent Exposure[679] was held in *State v. Allen*[680] not to be a lesser included offense of Sexual Abuse.[681]

c. *Lascivious Acts with a Child.* Lascivious Acts With a Child[682] was held in *State v. Tague*[683] not to be a lesser included offense of Sexual Abuse.[684]

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669. Certain Crimes, ch. 204, § 12, 1981 Iowa Acts 620, 623 (repealing IOWA CODE § 802.2).
670. *See* IOWA CODE § 802.3 (1981).
671. *Id.* § 802.1.
672. State v. Johnson, 291 N.W.2d 6, 9 (Iowa 1980).
673. State v. Donelson, 302 N.W.2d 125 (Iowa 1981).
674. State v. Johnson, 291 N.W.2d 6 (Iowa 1980).
675. *See supra* text accompanying notes 521-27.
676. *See infra* text accompanying notes 685-94.
677. State v. Tague, 310 N.W.2d 209 (Iowa 1981).
678. *Id.* at 213.
679. *See* IOWA CODE § 709.9 (1981).
680. 304 N.W.2d 203 (Iowa 1981).
681. *Id.* at 208-09.
682. *See* IOWA CODE § 709.8 (1981).
683. 310 N.W.2d 209 (Iowa 1981).
684. *Id.* at 213.

C. *Attempted Sexual Abuse*

A new crime of Assault with Intent to Commit Sexual Abuse[685] was established in 1981, although apparently no new criminal activity was proscribed. Formerly, this attempted sexual abuse offense was punishable either under the substantive offense of Sexual Abuse[686] itself (if, but only if, the requisite contact for a "sex act"[687] occurred) or under the inchoate general attempt-type offense of Assault while Participating in a Felony[688] (if no "sex act" occurred). The two elements of the new crime are: (1) an assault; (2) with the specific intent to commit sexual abuse.[689]

The three-tiered penalty schedule is geared to varying degrees of injury to the victim. The crime is classified as a class "C" felony if "serious injury" is caused;[690] a class "D" felony if bodily injury other than serious injury is caused;[691] and merely an aggravated misdemeanor if no injury is caused.[692]

The two most serious grades of this offense are "forcible felonies,"[693] thus rendering the ameliorative sentencing alternatives unavailable.[694] On the other hand, all of the ameliorative sentencing alternatives are available for the lowest grade thereof.

D. *Lascivious Acts with a Child*[695]

In *State v. Baldwin*,[696] a conviction for this offense was reversed even though the evidence showed an assault in that the defendant kissed an unwilling girl on the forehead and put his "hand down the front of her shirt."[697] The case was charged and prosecuted on the only possible basis of solicitation of a child to engage in a "sex act"[698]—in light of there being no evidence of touching her genitals or of inflicting pain or discomfort upon her.[699] The supreme court pointed out that the human breast is not one of the specifically-enumerated bodily parts within the statutory definition of "sex act"[700] and held that the term "genitalia," being limited only to the reproductive organs within the definition of "sex act," does not include a

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685. Certain Crimes, ch. 204, § 6, 1981 Iowa Acts 620, 622 (amending IOWA CODE § 709).
686. *See* IOWA CODE § 709.1 (1981).
687. *See id.* § 702.17.
688. *See id.* § 708.3.
689. Certain Crimes, ch. 204, § 6, 1981 Iowa Acts 620, 622 (amending IOWA CODE § 709).
690. *Id.*
691. *Id.*
692. *Id.*
693. *See* IOWA CODE § 702.11 (1981).
694. *Id.* § 902.7.
695. *See id.* § 709.8. *See generally* Dunahoo, *supra* note 1, at 533-37.
696. 291 N.W.2d 337 (Iowa 1980).
697. *Id.* at 339.
698. *Id.*
699. *Id.*
700. *See* IOWA CODE § 702.17 (1981).

human breast.[701]

This omission in the law was plugged by the establishment of the new crime of Indecent Contact with a Child[702] during the 1981 legislative session.

E. *Indecent Contact with a Child*

The new crime of Indecent Contact with a Child,[703] an aggravated misdemeanor, was created in 1981 in response to the restrictive holding in *State v. Baldwin*[704] that fondling of a female child's breast did not constitute the crime of Lascivious Acts With a Child.[705] After *State v. Baldwin,* the only viable crime to cover fondling a child in non-genital areas had appeared to be Assault[706] (a mere simple misdemeanor).

There are two varieties of this new crime, depending upon who does the fondling. The elements of one alternative are: (1a) fondling or touching a child's inner thigh, groin, buttock, anus, or breast or (1b) touching the clothing covering the immediate area of any of these body parts; (2) by an adult who is not the child's spouse; (3) with the purpose of arousing or satisfying the sexual desires of either party.[707] The elements of the other alternative are: (1) soliciting or permitting; (2) a child; (3) to fondle or touch an adult's inner thigh, groin, buttock, anus, or breast, or the clothing covering the immediate area of these body parts; (4) by an adult who is not the child's spouse; (5) with the purpose of arousing or satisfying sexual desires of either party.[708]

F. *Prostitution and Related Offenses*[709]

1. *Overview*

The focal offense in this family of commercial sexual activity offenses—Prostitution—has been interpreted as excluding sale or purchase of masturbation by hand services.[710]

Pimping was the only new prostitution-type offense added to the Criminal Code. None of these five crimes has been statutorily amended since the new Criminal Code went into effect.

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701. *Id.*
702. Certain Crimes, ch. 204, § 7, 1981 Iowa Acts 620, 622 (amending IOWA CODE § 709).
703. *Id.*
704. 291 N.W.2d 337 (Iowa 1981).
705. *See* IOWA CODE § 709.8 (1981).
706. *See id.* § 708.2(2).
707. Certain Crimes, ch. 204, § 7, 1981 Iowa Acts 620, 622 (amending IOWA CODE § 709).
708. *Id.*
709. *See generally* Dunahoo, *supra* note 1, at 537-40.
710. *Id.* at 537.

2. *Pimping*[711]

The mens rea of the revised crime of Pimping[712] was interpreted in *State v. Williams*[713] as focusing upon the intent of the person furnishing the room for prostitution rather than upon the intent of the person being furnished the room.[714] That is, the intent of the defendant who furnishes a room or other place with the intent that it be used, or belief that it will be used, for the purpose of prostitution is controlling.[715] It is immaterial to defendant's guilt that the person for whom the place is furnished had no intent to so use it or for some other reason the room is not used for the purpose of prostitution.

3. *Pandering*[716]

a. *Prostitution Not Required.* The new crime of Pandering[717] was interpreted in *State v. Williams*[718] as not requiring an act of actual prostitution as an essential element of the offense.[719] Determining that the legislative purpose of Iowa Code section 725.3 was to prevent the spread of prostitution by punishing those who encourage commission of the crime of Prostitution, the supreme court quite rightly felt that it would be anomalous for the legislature to require the commission of the crime it sought to discourage.[720]

b. *Solicitation—Corroboration.* The supreme court has refused to apply the requirement in Rule 20(3) of the Rules of Criminal Procedure that testimony of a "solicited person" be corroborated to any crime other than the offense of Solicitation itself.[721] Specifically, the court held that the testimony of a pandering victim need not be corroborated.[722] In other words, a conviction for Pandering can stand exclusively on the testimony of the victim, with no other corroborative evidence.[723]

c. *Vagueness Challenge Rejected.* The supreme court rejected claims in *State v. Lee*[724] that the terms "persuades" and "arranges" in Iowa Code section 725.3 defining Pandering are unconstitutionally overbroad.[725] Considering these two terms to be "common words that are easily defined," the court

711. *See generally* Dunahoo, *supra* note 1, at 538-39.
712. *See* IOWA CODE § 725.2 (1981).
713. 315 N.W.2d 45 (Iowa 1982).
714. *Id.* at 51.
715. *Id.*
716. *See generally* Dunahoo, *supra* note 1, at 539.
717. *See* IOWA CODE § 725.3 (1981).
718. 315 N.W.2d 45 (Iowa 1982).
719. *Id.* at 50.
720. *Id.*
721. *Id.*
722. *Id.*
723. *Id.*
724. 315 N.W.2d 60 (Iowa 1982).
725. *Id.* at 61-62.

determined that this section "gives fair warning that it prohibits affirmative acts designed to orchestrate for or induce another to practice prostitution."[726]

G. *Obscenity Offenses*[727]

1. *Overview*

Although three of the five obscenity-type offenses were not part of the pre-revised Criminal Code, the only appellate interpretation has upheld the constitutionality of the crime of Public Indecent Exposure.[728] In addition, the penalty classification for the Sale of Hard Core Pornography was increased in 1982.[729]

2. *Public Indecent Exposure*[730]

a. *Constitutionality.* In the only appellate interpretation of these revised obscenity offenses, the constitutionality of the crime of Public Indecent Exposure[731] was upheld in *Three K.C. v. Richter.*[732] The supreme court followed the lead of the Supreme Court of the United States[733] in declaring that a state's general police power in regulating the sale of liquor outweighs any first amendment interest in nude dancing and that a state can therefore ban such dancing as a part of its liquor license program.[734] Accordingly, the statute was upheld against the contention that it constituted deprivation of property without due process of law even though "cover up" compliance with the new regulation was shown to cost the owners "substantial profits."[735]

b. *Exceptions.* Section 728.5 excepts from its coverage "a theater, concert hall, art center, museum, or similar establishment."[736] The constitutionality of this exceptions-clause was upheld in *Three K.C. v. Richter* against contentions of denial of equal protection and void for vagueness.[737]

3. *Sale of Hard Core Pornography*

A legislative amendment in 1982 increased the penalty classification for

726. *Id.* at 62.
727. *See generally* Dunahoo, *supra* note 1, at 543-51.
728. *See infra* text accompanying notes 731-35.
729. *See infra* text accompanying notes 738-40.
730. *See generally* Dunahoo, *supra* note 1, at 549-51.
731. *See* IOWA CODE § 728.5 (1981).
732. 279 N.W.2d 268 (Iowa 1979).
733. *See* California v. LaRue, 409 U.S. 109 (1972).
734. *Id.* at 118-19.
735. Three K.C. v. Richter, 279 N.W.2d at 274-75.
736. IOWA CODE § 728.5 (1981).
737. 279 N.W.2d at 275.

the crime of Sale of Hard Core Pornography from a simple misdemeanor to an aggravated misdemeanor.[738] The legislative objective was to hit the smut peddlers where it hurts—their pocketbooks (with the increase in the maximum fine from $100 to $5,000).[739] Another fiscal offshoot of the amendment will allow confiscation of all proceeds from the sale of hard core pornography, instead of confiscation merely of the material itself.[740]

The legislative inducement for this penalty classification change reportedly was to encourage more prosecutions for this offense by increasing the penalty. If this is true, then Iowa is in a sad legislative (and prosecutorial) state of affairs. A criminal penalty should be tailored to the severity of the criminal conduct, viewed in the context of the entire Criminal Code, and not in terms of whether it is worth the time and effort of law enforcement officers and prosecutors to enforce the law.

IX. Kidnapping and Related Offenses

A. *Overview*

1. *Kidnapping*[741]

The Iowa Supreme Court has adopted a tri-partite test to be applied on a case-by-case basis in determining whether the confinement or removal of a "kidnapping" victim of a related crime (such as Sexual Abuse) was sufficient to constitute the crime of Kidnapping.[742] To date, the court has taken a broad view of "incidental" confinement or removal.[743] On the other hand, it has been held that a person cannot be convicted of both Kidnapping in the First Degree and the target crime, the latter being considered a lesser included offense of the former.[744]

2. *Related Offenses*

None of the three kidnapping-related offenses[745] have been interpreted by the Iowa appellate courts.

B. *Kidnapping*

1. *Confinement or Removal*

"[B]ecause of the substantial disparty between sentences" for first-de-

738. Obscenity Offenses, ch. ___, 1982 Iowa Legis. Serv. 360 (West) (amending Iowa Code § 728.4).
739. *Id.* § 1, 1982 Iowa Legis. Serv. at 360.
740. *Id.* § 2, 1982 Iowa Legis. Serv. at 360.
741. *See generally* Dunahoo, *supra* note 1, at 551-60.
742. *See infra* text accompanying notes 746-77.
743. *See infra* text accompanying notes 746-77.
744. *See infra* text accompanying notes 778-81.
745. *See generally* Dunahoo, *supra* note 1, at 560-65.

gree kidnapping[746] via sexual abuse of a victim (a class A felony) and third-degree sexual abuse (a class C felony), the supreme court concluded in *State v. Rich*[747] that "the legislature intended the kidnapping statute to be applicable only to those situations in which confinement or removal definitely exceeds that which is merely incidental to the commission of sexual abuse."[748] Although not requiring any "minimum period," the court determined that "[s]uch confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse."[749]

The test for determining the requisite sufficiency of the confinement or removal established in *State v. Rich* is that "[s]uch confinement or removal may exist because it [1] substantially increases the risk of harm to the victim; [2] significantly lessens the risk of detection; or [3] significantly facilitates escape following the consummation of the offense . . . ."[750] This is a disjunctive test, with the state only having to show one of the three possible bases.[751] This test is to be applied in the context of the totality of the facts in determining if there is substantial evidence to support submitting a kidnapping charge to the jury.[752]

The *Rich* test expressly is applicable both to confinement and removal, but is more adaptable to questions of removal. The test for the requisite confinement was amplified further in *State v. Mead*,[753] which held that "kidnapping cannot be predicated on merely 'seizing' another person."[754] The relevant distinction is between "seizure" and "detention."[755] The authority relied upon by the court[756] defined seizure as to "put in possession" and detention as to "keep in possession for some period of time."[757] Presumably, juxtaposing the *Rich* test, this means that a kidnapping charge based upon confinement must be supported by evidence showing that the period of detention was far longer than that normally incidental to a sexual abuse.

State v. Rich illustrates that distance alone is not the sole consideration in determining whether movement of the victim constituted sufficient con-

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746. *See* IOWA CODE § 710.2 (1981).

747. 305 N.W.2d 739 (Iowa 1981).

748. *Id.* at 745.

749. *Id.* Prior to promulgation of the "merely incidental" test in *State v. Rich*, a first degree kidnapping conviction was upheld in *State v. Holderness*, 301 N.W.2d 733 (Iowa 1981), where a sexual abuse victim was transported several miles from the city into the countryside and detained there for two hours. The supreme court held that the confinement and removal were not "merely incidental" to the sexual abuse. 301 N.W.2d at 740.

750. *Id.* at 745.

751. *Id.*

752. *Id.* at 746.

753. 318 N.W.2d 440 (Iowa 1982).

754. *Id.* at 445.

755. *Id.*

756. *See* Hardie v. State, 140 Tex. Crim. 368, 377, 144 S.W.2d 571, 575 (1940).

757. *Id.* at ___, 144 S.W.2d at 575.

finement or removal of a sexual abuse victim to support a kidnapping charge. Rich grabbed the victim on an open walkway in a shopping center and dragged her into a men's restroom.[758] Although this movement of the victim "in and of itself was not sufficient confinement or removal,"[759] other factors indicated that the removal and confinement "substantially exceeded that which is incidental to the commission of sexual abuse."[760] Defendant's actions in looking into the restroom, before he grabbed the victim and led her back to the corridor to the men's restroom, indicated "that he sought the seclusion of the restroom as a means of avoiding detection."[761] Defendant's actions in "binding the victim's hands behind her back" was "not a normal incident" of sexual abuse.[762] Defendant's post-sexual abuse confinement and movement of the victim indicated that they were "for the purpose of avoiding detection or facilitating defendant's escape."[763]

The breadth, if not overbreadth, of the *State v. Rich* test was demonstrated in *State v. Knupp*.[764] Incredibly, a conviction for Kidnapping in the First Degree was upheld on this record: defendant pulled his victim into his automobile and drove a whole "six or seven blocks" away "and stopped under an overpass bridge" where the sexual abuse occurred.[765] The supreme court's opinion also seemed heavily focused on the confinement aspect, noting:

> The victim got out of the car. In the ensuing ten-minute struggle, defendant punched her in the stomach several times and she was shoved back into the front seat. As a preliminary to a resulting sex act defendant produced a knife and used it to cut through her body suit.[766]

The evidence of Kidnapping in the First Degree was held to be insufficient in *State v. Marr*[767] where: (1) defendant followed the victim home; (2) yelled for the victim to stop; (3) the victim stopped, turned to face defendant and screamed; (4) defendant covered the victim's mouth and threatened her; (5) defendant shoved the victim into the gangway some 15 feet away; and (6) pinned the victim to the ground where she was sexually abused.[768] Applying the *State v. Rich* test, the supreme court found that "substantial evidence was not presented that the defendant's actions *substantially* increased the risk of harm to the victim, that the risk of detection

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758. 305 N.W.2d at 740.
759. *Id.* at 745.
760. *Id.*
761. *Id.*
762. *Id.* at 745-46.
763. *Id.* at 746.
764. 310 N.W.2d 179 (Iowa 1981).
765. *Id.* at 181.
766. *Id.*
767. 316 N.W.2d 176 (Iowa 1982).
768. *Id.* at 177-78.

was *significantly* lessened, or that following the sexual abuse escape was *significantly* facilitated thereby."[769] Additionally, "the means by which control of the victim was secured and the duration of that control"[770] was considered to distinguish the instant case from *State v. Rich*.[771]

State v. Mead[772] is the only case solely involving confinement, as opposed to the combination of confinement and removal found in the other cases.[773] In *Mead*, defendant came out of the inside of an entrance porch and began knocking on a family's door as mother and daughter returned home.[774] As they attempted to enter their home defendant stepped alongside them.[775] He grabbed the mother from behind and held a knife to her throat, but she freed herself and ran.[776] Defendant then struck the daughter in her face with his fist, kicked her on the arm, took her purse, and ran.[777]

2. *Merger with Underlying or Target Offense*

It was determined in *State v. Whitfield*[778] that a defendant cannot be convicted both of Kidnapping in the First Degree, based upon sexual abuse of the kidnapping victim, and of sexual abuse.[779] "As alleged and proven"[780] in *Whitfield* the sexual abuse crime was a lesser included offense of first-degree kidnapping and thus became "subsumed" in the kidnapping conviction.[781]

3. *Lesser Included Offense*

a. *Target Crime.* As discussed above,[782] the target crime which prompted the kidnapping is a lesser included offense of a first-degree kidnapping conviction based upon consummation of that target crime.

b. *Accessory After the Fact.* Accessory After the Fact was held in *State v. Sanders*[783] not to be a lesser included offense of Kidnapping.[784] This ruling was based upon the different states of mind for the two crimes.[785]

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769. *Id.* at 179.
770. *Id.*
771. 305 N.W.2d 739 (Iowa 1981).
772. 318 N.W.2d 440 (Iowa 1982).
773. *Id.* at 441-42.
774. *Id.* at 441.
775. *Id.*
776. *Id.* at 442.
777. *Id.*
778. 315 N.W.2d 753 (Iowa 1982).
779. *Id.* at 755.
780. *Id.*
781. *Id.*
782. *See supra* text accompanying notes 778-81.
783. State v. Sanders, 312 N.W.2d 534 (Iowa 1981).
784. *Id.* at 539.
785. *Id.*

4. *"Torture"—Defined*

Under Iowa's revised kidnapping statute, the class A felony crime of Kidnapping in the First Degree also occurs when a kidnapping victim is intentionally tortured.[786] This term is left undefined in the Criminal Code. In *State v. Cross*[787] the supreme court determined that the term "torture" as used in Iowa Code section 710.2 has its ordinary, or dictionary, meaning: "intentional infliction of pain [either] mental or physical" and "deliberate infliction of severe pain."[788]

The supreme court held that there was "more than enough evidence in the record to allow a rational factfinder to conclude defendant intentionally tortured his victim by acts causing severe combined physical and mental pain and suffering."[789] The undisputed evidence showed that during a twelve-hour forced abduction and automobile foray into three other states, defendant ripped off the victim's clothes, apparently rendered her unconscious after he hit her several times, producing a large wound on her head, knocked her to the ground and choked her.[790] He also "bit her breasts, chained her hands, and carried her in the car trunk for miles, nude and unconscious, in the cold of late October, . . . threatened to kill [her] and to inflict oral and anal sexual abuses, . . . exposed himself, . . . fondled her breast and penetrated her vagina with his finger."[791]

X. Weapons Offenses

A. *Overview*

The new crime of Possession of Firearms by Felons is the only one of the three weapons offenses under the new Criminal Code which has been the subject of appellate interpretation,[792] including several constitutional challenges. The only statutory amendment provided a new alternative way to lawfully carry unloaded pistols or revolvers in vehicles.[793] Neither the crime of Possession of Offensive Weapons[794] nor any of the weapons-permit crimes[795] have been statutorily amended or judicially interpreted by the appellate courts. In addition, the weapons-related offense of Terrorism[796] and the special firearm-sentencing provision[797] have both been amended and

786. Iowa Code § 710.2 (1981).
787. 308 N.W.2d 25 (Iowa 1981).
788. *Id.* at 27.
789. *Id.*
790. *Id.* at 25-26.
791. *Id.*
792. *See infra* text accompanying notes 815-35.
793. *See infra* text accompanying notes 799-802.
794. *See generally* Dunahoo, *supra* note 1, at 570-71.
795. *See generally* Dunahoo, *supra* note 1, at 577-78.
796. *See supra* text accompanying notes 547-93.
797. *See infra* text accompanying notes 835-52.

interpreted.

B. *Carrying Weapons*[798]

1. *Statutory Exceptions Broadened*

The crime of Carrying Weapons[799] was slightly reduced in scope by a statutory amendment in 1980 which broadened one of the statutory exceptions by providing an alternative means to carry unloaded pistols or revolvers in vehicles.[800] Before the amendment, an unloaded pistol or revolver could be carried or transported for a lawful purpose only "inside a cargo or luggage compartment" where the weapon would not be readily accessible to any person riding in the vehicle.[801] Now the weapon also may be carried in a vehicle if it is "inside a closed and fastened container or securely wrapped package which is too large to be concealed on the person."[802]

2. *Mens Rea*

a. *Knowledge of weapon's presence.*—The going armed element in the offense of going armed within a city's limits was interpreted in *State v. Alexander*[803] as being satisfied "when an occupant of a vehicle consciously and deliberately keeps a pistol, revolver, or any loaded firearm where it is readily accessible to him or her."[804] Alexander's revolver was discovered "half sticking out of a holder, slightly behind and to the right of the driver's seat."[805] Direct evidence of a defendant's knowledge of the revolver's presence and its ready accessibility is unnecessary.[806] The court held that a reasonable inference of defendant's knowledge arose through the totality of the circumstances, which included: the defendant was the driver (with two passengers), the revolver was near the driver's seat, the van had no rear seats, and "[t]he gun was visible from the rear of the van when the doors were opened."[807]

b. *Intent to Use as Weapon.* The particular weapons expressly listed in the third sentence of Iowa Code section 702.7 are considered "dangerous weapons" per se, and thus the intent of the person carrying them is irrelevant.[808] *State v. Durham*[809] rejected defendant's contention that the statuto-

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798. *See generally* Dunahoo, *supra* note 1, at 573-74.
799. *See* IOWA CODE § 724.4 (1981).
800. Omnibus Corrections—Gifts Accepted, ch. 1015, § 68, 1980 Iowa Acts 126, 141 (amending IOWA CODE § 724.4).
801. IOWA CODE § 724.4 (1979) (amended 1980).
802. *See supra* note 800.
803. 322 N.W.2d 71 (Iowa 1982).
804. *Id.* at 72.
805. *Id.*
806. *Id.* at 73.
807. *Id.* at 72.
808. IOWA CODE § 702.7 (1981).
809. 323 N.W.2d 243 (Iowa 1982).

rily-listed weapons were not dangerous unless they were proved to be either (1) a device "designed primarily for use in inflicting death or injury" or (2) any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that defendant intends to inflict death or serious injury."[810]

Although a straight razor is not designed primarily as a weapon, the supreme court held that it is "a dangerous weapon per se under the definition [of a dangerous weapon] in section 702.7," for purposes of implementing the Carrying Weapons statute under Iowa Code section 724.4.[811] Accordingly, a straight razor when concealed on or about the person is a "dangerous weapon" and the person carrying it is guilty of the crime of Carrying Weapons, unless he comes within one of the statutory exceptions. The Iowa Supreme Court noted that the "plain language" of the statute "list[s] dangerous weapons qualification."[812] Any weapons not expressly listed in Iowa Code section 702.7 will not be considered "dangerous weapons" "unless the person used or intended to use them for the purpose of bodily assault or defense."[813]

C. *Possession of Firearm or Offensive Weapon by Felon*[814]

1. *Constitutionality*

An ex post facto challenge to this statute[815] was unsuccessful in *State v. Hall*,[816] since the *actus reus* of the crime—possession of firearm—must occur now.[817] The status of being a convicted felon, on the other hand, applies to those convicted of the underlying felony both before and after enactment of this new offense in 1978.[818]

Two other constitutional challenges concerning section 724.26 have also been resolved in favor of the statute. In *State v. Rupp*,[819] the supreme court held that this statute is a reasonable regulation of the non-fundamental right to bear arms under the second amendment and that it is not overbroad by including within its prohibition those convicted of non-violent as well as violent felonies.[820]

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810. *Id.* at 245.
811. *Id.*
812. *Id.*
813. *Id.*
814. *See generally* Dunahoo, *supra* note 1, at 571-73.
815. *See* IOWA CODE § 724.26 (1981).
816. 301 N.W.2d 729 (Iowa 1981).
817. *Id.* at 731.
818. *Id.* at 732.
819. 282 N.W.2d 125 (Iowa 1979).
820. *Id.* at 130.

2. *Mens Rea*

An intent to harm another is not an element of this crime.[821] In *State v. Pinckney*,[822] the supreme court noted that "intent is not an element of the crime and different conduct is sought to be proscribed."[823] So viewed, it is unnecessary that the firearm be serviceable.[824]

3. *Serviceability of Firearm*

There is no requirement that the "firearm" involved be serviceable.[825] In *State v. Pinckney*,[826] the supreme court determined that the legislature intended that "convicted felons are not to possess, receive, or transport firearms, whether serviceable or unserviceable."[827] Defendant argued that a recent amendment to the definition of "offensive weapon" excluded unserviceable firearms.[828] The court concluded, however, that the term "firearm" was not synonymous with the term "offensive weapons."[829] The anomalous result is that this possessory offense by felons requires serviceability when an offensive weapon is involved but not when a firearm is involved.

4. *Pardon—Limitations*

A general restoration of citizenship rights is not sufficient to trigger the statutory exception[830] permitting pardoned felons to possess firearms.[831] In *State v. Hall*,[832] defendant had received a gubernatorial restoration of citizenship rights, which provided that it "shall not be construed as a Pardon or as a remission of guilt or forgiveness of the offense" and did not specifically authorize the defendant to possess a firearm.[833] The supreme court held that the restoration itself was insufficient to constitute an authorization to possess a firearm under section 724.27.[834]

D. *Firearm Sentencing Provision*[835]

Several aspects of the new mandatory minimum five-year sentence for

821. *See* State v. Pinckney, 306 N.W.2d 726, 729 (Iowa 1981).
822. 306 N.W.2d 726 (Iowa 1981).
823. *Id.* at 729.
824. *Id.*
825. *Id.*
826. 306 N.W.2d 726 (Iowa 1981).
827. *Id.* at 728.
828. *Id.*
829. *Id.*
830. IOWA CODE § 724.27 (1981).
831. State v. Hall, 301 N.W.2d 729 (Iowa 1981).
832. 301 N.W.2d 729 (Iowa 1981).
833. *Id.* at 732.
834. *Id.*
835. *See generally* Dunahoo, *supra* note 1, at 567-69.

possession or use of a firearm during the commission of a forcible felony[836] have been decided by the supreme court.

1. *Procedure for Invoking*

Two requisite findings to be made beyond a reasonable doubt by the trier of fact are necessary before the minimum five-year sentence can be imposed under section 902.7: "[1] that the person is guilty of a forcible felony *and* [2] that the person represented he or she possessed a firearm at that time or displayed or was armed with a firearm while participating in the forcible felony."[837] The supreme court made it clear in *State v. Matlock*[838] that these requisite findings must be made at trial by the trier of fact, when it vacated a sentence imposed under section 902.7 after these findings were incorporated in the sentencing order instead of being part of the findings and conclusions of the trier of fact.[839]

The Iowa Rules of Criminal Procedure[840] were amended in 1980 to require a special pleading in the indictment or trial information whenever the state plans to seek invocation of section 902.7. Similarly, if such an allegation is supported by the evidence at trial, the trial court must submit to the jury a special interrogatory on this matter. Of course, in a bench trial, the court as the trier of fact would record its findings on this matter in its findings of fact and conclusions of law.

2. *Guilty Pleas*

Whether the trial court must specifically make a "firearm" finding in order for Iowa Code section 902.7 to be applied on a guilty plea depends upon whether or not use of a firearm is an element of the offense itself.[841] In *State v. Young*[842] the supreme court held that defendant's guilty plea waived his right to require the state to prove his guilt of Terrorism by discharging a firearm.[843] In contrast, *State v. Iowa District Court*[844] held that the trial court must make the requisite finding of fact when the crime does not include use of a firearm as an essential element.[845]

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836. IOWA CODE § 902.7 (1981).
837. State v. Matlock, 289 N.W.2d 625, 629 (Iowa 1980).
838. 289 N.W.2d 625 (Iowa 1980).
839. *Id.* at 629.
840. IOWA R. CRIM. P. 6(6).
841. *See infra* text accompanying notes 846-47.
842. 293 N.W.2d 5 (Iowa 1980).
843. *Id.* at 7.
844. 308 N.W.2d 27 (Iowa 1981).
845. *Id.* at 30.

3. *Use of Firearm as Element of Underlying Substantive Offense*

The spurious claim that the firearm provision is inapplicable when use of a firearm is an element of the underlying substantive offense itself rather than merely incidental to it was rejected outright in *State v. Young*.[846] "Section 902.7 makes the use of a firearm in committing a forcible felony equally culpable without regard to whether proof of its use is necessary under the definition of the offense or merely accompanies its commission,"[847] the supreme court concluded.

4. *Complicity*

As discussed above, section 902.7 was interpreted in *State v. Sanders* as applying to a mere aider and abettor who did not personally have the firearm.[848] Focusing on the language in section 703.1 that all persons involved in a criminal act shall be "punished as principals," the supreme court noted that this section "deals with both guilt and punishment."[849]

5. *Constitutionality*

Section 902.7 has already withstood several constitutional challenges.[850] One of these unsuccessful contentions went to the substantive content of the provision on the due process ground of void for vagueness.[851] The other focus of attack has been upon the *mandatory* feature of the sentence to be imposed under section 902.7, with an unsuccessful federal constitutional challenge being based upon grounds of equal protection, due process, cruel and unusual punishment, and separation of powers.[852]

XI. Homicide Offenses

A. *Murder*[853]

1. *Overview*

A new penalty, fifty years, was created for second-degree murder in 1982.[854] The new Uniform Jury Instruction on premeditation has been approved by the Iowa Supreme Court.[855]

Changing the pre-revised law, the new Criminal Code has been inter-

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846. 293 N.W.2d 5 (Iowa 1980).
847. *Id.* at 8.
848. *See supra* text accompanying notes 141-45.
849. State v. Sanders, 280 N.W.2d 375, 377 (Iowa 1979).
850. *See infra* text accompanying notes 851-52.
851. State v. Powers, 278 N.W.2d 26 (Iowa 1979).
852. State v. Holmes, 276 N.W.2d 823 (Iowa 1979).
853. *See generally* Dunahoo, *supra* note 1, at 579-89.
854. *See infra* text accompanying notes 884-86.
855. *See infra* text accompanyng note 858.

preted as not recognizing the felony-merger doctrine under the felony murder rule.[856] Willful Injury has been held to be a qualifying underlying felony for felony murder prosecutions.[857]

2. *"Premeditation"—Defined*

The definition of "premeditation" in Uniform Jury Instruction No. 702 was expressly approved by the supreme court in *State v. Taylor*.[858] That instruction embodied the pre-revised law's definition.

3. *Malice Aforethought—Inference*

Under the new Criminal Code, as under prior law, the jury may infer malice and intent to kill from the use of a deadly weapon in a dangerous manner and may infer premeditation and deliberation when, with opportunity to deliberate, defendant selects and uses a deadly weapon in a dangerous manner.[859] This pattern of inferences is distinct from the inference of premeditation or deliberation from malice or intent to kill, which, in the first instance, is inferred from the use of a weapon in a deadly manner.[860]

The verbatim forerunner to Uniform Jury Instruction No. 706 was upheld in *Henderson v. Scurr*[861] against the contention that the instruction unconstitutionally put the burden on defendant to rebut the inference.[862] The supreme court determined instead that the instruction clearly conveyed to the jurors that the inference of deliberation, premeditation, and specific intent to kill from the use of a deadly weapon was merely permissive.[863]

4. *Causation*

The felony murder doctrine "must be based on a causally related felony and acts causing death."[864] The requisite causal relationship between the underlying felony and the death can be shown even though the deadly assault had been completed before the underlying felony occurred.[865] A causal relationship was found in *State v. Taylor*[866] where the evidence established that defendant had gone into a tavern with the intent to rob, was rifling the cash register when the operator returned, and then fatally assaulted the op-

856. *See infra* text accompanying notes 877-82.
857. *See infra* text accompanying notes 877-82.
858. 310 N.W.2d 174 (Iowa 1981).
859. *See infra* text accompanying notes 860-63.
860. State v. Hamilton, 309 N.W.2d 471 (Iowa 1981).
861. 313 N.W.2d 522 (Iowa 1981).
862. *Id.* at 526.
863. *Id.*
864. State v. Taylor, 287 N.W.2d 576, 577 (Iowa 1980).
865. *Id.* at 578.
866. 287 N.W.2d 576 (Iowa 1980).

erator "in order to effect his escape and avoid later identification."[867] The operator's purse was also taken, which presumably was the basis of the felony murder application, since rifling a cash register in the absence of the victim would constitute mere Theft, the court's unfortunate reference to defendant's robbing the place notwithstanding.[868]

In *State v. Marti*[869] the supreme court determined that there was causation for second degree murder where defendant knowingly assisted another in committing suicide although defendant's act consisted solely of loading the victim's gun and handing it to her before the victim shot herself.[870] The court decided that Marti's conduct met both tests for causation.[871] The first perspective of "proximate cause" is "cause in fact."[872] Factual causation is often expressed in terms of the *sine qua non* test: but for the defendant's conduct, the harm or damage would not have occurred.[873] The second perspective of causation in criminal trials is "legal causation."[874] This is "essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."[875]

The supreme court, applying this causation test to aiding another to commit suicide, concluded:

> [T]he "killing" required for murder is essentially equivalent to the "causing death" required for involuntary manslaughter . . . . It is an element of causation in both crimes. It requires that the defendant did some act which resulted in the victim's death . . . . It is not essential for conviction in all cases that the accused actively participated in the immediate physical impetus of death.[876]

5. *Felony Murder Rule*

The new Criminal Code was interpreted in *State v. Beeman*[877] as scrapping the pre-revised law's[878] common law doctrine of felony-merger which had required an independent underlying felony as the basis of felony murder.[879] Accordingly, under the felony-merger doctrine, any assaultive crime would be an integral part of the death itself, unlike Robbery or Burglary

867. *Id.* at 577.
868. *Id.*
869. 290 N.W.2d 570 (Iowa 1980).
870. *Id.* at 584-85.
871. *Id.*
872. *Id.*
873. *Id.*
874. *Id.*
875. *Id.*
876. *Id.* at 579.
877. 315 N.W.2d 770 (Iowa 1982).
878. *See* State v. Hinkle, 229 N.W.2d 744 (Iowa 1975).
879. *Id.* at 751.

which would be independent of any death itself. Thus, after *State v. Beeman*, it is proper to submit first-degree murder to the jury on the felony-murder doctrine based upon the underlying felony of Willful Injury.[880] The supreme court determined that the legislative intent was to include felonious assaults as underlying felonies that may serve as the basis for a felony murder, in light of the express inclusion of "felonious assaults" in the definition of "forcible felonies"[881] and the corresponding inclusion of "forcible felonies" in the felony murder provision.[882]

6. *Murder in the Second Degree*[883]

A legislative amendment in 1982 doubled the penalty for the crime of second-degree murder from 25 to 50 years.[884] Accordingly, this offense is the only one with a 50-year indeterminate sentence in the entire Criminal Code.[885] An ill-advised house passed version would have established a determinate sentencing range of between 25 and 99 years, with the exact sentence determined by the trial judge in his discretion.[886]

7. *Lesser Included Offense*

"[P]reparing and providing a weapon for one who is unable to do so and is known to be intoxicated and probably suicidal are acts 'likely to cause death or serious injury,' within the definition of involuntary manslaughter found in section 707.5(2)."[887] Under these circumstances, there was a factual basis for submitting Involuntary Manslaughter as a lesser included offense of second degree murder in *State v. Marti*.[888]

B. *Attempted Murder*[889]

The penalty classification for this crime[890] was changed from a class C felony to a class B felony in 1982.[891] The only appellate interpretation of this offense has resulted in a holding that it is a "forcible felony" and thus the ameliorative sentencing options of a deferred judgment, a deferred sentence, and a suspended sentence are not available.[892] In *State v. Powers*,[893]

880. State v. Beeman, 315 N.W.2d 770, 771 (Iowa 1982).
881. *See* IOWA CODE § 702.11 (1981).
882. *See id.* § 707.2(2).
883. *See generally* Dunahoo, *supra* note 1, at 583-84.
884. An Act Relating to Murder, ch. ___, § 1, 1982 Iowa Legis. Serv. 943 (West).
885. *See* IOWA CODE § 707 (1981).
886. *See supra* note 884.
887. State v. Marti, 290 N.W.2d 570, 583 (Iowa 1980).
888. 290 N.W.2d 570 (Iowa 1980).
889. *See generally* Dunahoo, *supra* note 1, at 584-86.
890. *See* IOWA CODE § 707.11 (1981).
891. An Act Relating to Murder, ch. ___, § 2, 1982 Iowa Legis. Serv. 943 (West).
892. *See* IOWA CODE § 907.3 (1981).

the supreme court held that the term "felonious assault" in the definitional clause on "forcible felony" includes "any assault the commission of which constitutes a felony,"[894] and that Attempted Murder is a felony which necessarily includes an assault.[895] The court thus rejected defendant's claim that the term "felonious assault" was limited to "those felonies listed in the assault chapter,"[896] although Attempted Murder is included in the homicide chapter.

C. *Voluntary Manslaughter*[897]

1. *Overview*

The reconstituted crime of Voluntary Manslaughter[898] has been interpreted as requiring a specific intent to kill, not merely intentional action.[899] The murder-mitigating factor of provocation has been held to consist of both objective and subjective standards.[900] This offense also has been interpreted as meeting the legal test for being a lesser included offense in a murder prosecution.[901] Likewise, Assault has been declared a lesser included offense of Voluntary Manslaughter.[902]

2. *Mens Rea*

A specific intent *to kill* has been interpreted as the *mens rea* of the crime of Voluntary Manslaughter.[903] The statute itself merely states that this crime consists of causing a death "under circumstances which would otherwise be murder"[904] if defendant acted as the result of passion caused by serious provocation, but the supreme court added this requirement of intent to kill by judicial gloss in *State v. Hellwege*[905] as being inferred from the overall thrust of the language in this entire provision.[906] The importance of this interpretation is readily apparent upon consideration of the unrevised uniform jury instruction[907] which still requires the intent to do an act which resulted in death, as opposed to doing an act intended to cause a

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893. 278 N.W.2d 26 (Iowa 1979).
894. *Id.* at 28.
895. *Id.*
896. *Id.*
897. *See generally* Dunahoo, *supra* note 1, at 586-87.
898. *See* IOWA CODE § 707.4 (1981).
899. *See infra* text accompanying notes 903-08.
900. *See infra* text accompanying notes 909-16.
901. *See infra* text accompanying notes 909-16.
902. *See supra* text accompanying note 514.
903. State v. Hellwege, 294 N.W.2d 689 (Iowa 1980).
904. IOWA CODE § 707.4 (1981).
905. 294 N.W.2d 689 (Iowa 1980).
906. *Id.*
907. *See* IOWA UNIFORM JURY INSTRUCTION (Criminal) No. 716.

death.[908]

3. *Provocation*

The requisite provocation for reducing a murder to the lesser crime of Voluntary Manslaughter was interpreted in *State v. Inger*[909] as requiring both a subjective standard and an objective standard. The subjective requirement is that the defendant "must act solely as a result of sudden, violent, and irresistible passion."[910] The objective requirement is that "[t]he sudden, violent, and irresistible passion must result from serious provocation sufficient to excite such passion in a reasonable person."[911] As a final objective requirement, there must not be "an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain his or her control and suppress the impulse to kill."[912]

In *State v. Inger*,[913] there was sufficient evidence to support the objective requirement since the jury could have found either that the defendant was provoked by an assault or that he became excited during mutual combat and acted "out of passion in striking the final, probably fatal blow."[914] The subjective requirement was met by defendant's own testimony that "decedent attempted to strike him, thereby inducing defendant to swing at [decedent] out of fear or anger."[915] Therefore, the factual test for giving a Voluntary Manslaughter instruction in this second degree murder prosecution was met.[916]

D. *Involuntary Manslaughter*[917]

1. *Overview*

The unlawful act type of this reconstituted offense has been judicially interpreted to require an additional *mens rea* element of recklessness.[918] The recklessness type has been limited to reckless acts which do not constitute public offenses.[919] Facilitating another's suicide has been held to constitute Involuntary Manslaughter,[920] as has participation in a drag race result-

908. *Id.*
909. 292 N.W.2d 119 (Iowa 1980).
910. *Id.* at 122.
911. *Id.*
912. *Id.*
913. 292 N.W.2d 119 (Iowa 1980).
914. *Id.* at 122.
915. *Id.*
916. *Id.*
917. *See generally* Dunahoo, *supra* note 1, at 588-89.
918. *See infra* text accompanying notes 923-29.
919. *See infra* text accompanying note 929.
920. *See infra* text accompanying notes 945-48.

ing in the deaths of the other participant and a third party.[921]

The fact that Involuntary Manslaughter has been declared not to be a "forcible felony" means that the ameliorative sentencing options are unavailable,[922] unlike Voluntary Manslaughter or Murder.

2. *Unlawful Act Type*[923]

a. *Recklessness Required.* The more serious grade of Involuntary Manslaughter, a class D felony, is based upon the commission of an underlying unlawful act that results in the death of a human being. The elements, as set out in the Iowa Code, include: (1) unintentionally and (2) without justification (3) causing the death of a human being (4) during the commission of a public offense other than a "forcible felony" or escape (or attempted escape).[924] However, the supreme court in *State v. Conner*[925] interpreted the legislative intent in this provision to also require a showing of recklessness on the part of the offender.[926] Applying the *Emery v. Fenton* doctrine,[927] the court concluded that the legislative intent was to preserve the common law requirement of recklessness as embodied in the pre-revised law.[928] The court noted that

> [T]he only change from the common law definition made by the General Assembly was its discarding the *malum in se/malum prohibitium* distinction in favor of designating all public offenses, except forcible felonies or escapes, as possible unlawful acts which may form the basis for the unlawful act type of involuntary manslaughter.[929]

b. *Drag Racing.* In *State v. McFadden,*[930] the supreme court set forth three principles relating to prosecutions for vehicular involuntary manslaughter arising out of a drag race.[931]

(i) *Causation.* The ordinary proximate cause principles set forth in *State v. Marti*[932] were held in *State v. McFadden* to apply in prosecutions for vehicular involuntary manslaughter arising out of a drag race.[933] Specifically, the supreme court declined to adopt "the more stringent 'direct causal

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921. *See infra* text accompanying notes 930-40.
922. *See infra* text accompanying notes 966-67.
923. *See* IOWA CODE § 707.5(1) (1981).
924. *Id.*
925. 292 N.W.2d 682 (Iowa 1980).
926. *Id.* at 686.
927. *See supra* text accompanying notes 14-18.
928. 292 N.W.2d at 686.
929. *Id.*
930. 320 N.W.2d 608 (Iowa 1982).
931. *Id.* at 610-14.
932. 290 N.W.2d 570 (Iowa 1980).
933. 320 N.W.2d at 613.

connection' standard"[934] followed by the Pennsylvania Supreme Court.[935] McFadden's conviction thus was upheld strictly on the basis of his participation in a fatal drag race, even though the other participant was the only one whose vehicle went out of control (killing himself and a passenger in an oncoming third vehicle).[936]

(ii) *Withdrawal.* The supreme court held in *State v. McFadden* that defendant's asserted withdrawal from a drag race before a fatal accident involving his fellow participant "should not be viewed as an absolute defense, but only as a factor affecting the determination of proximate cause."[937] The court explained that under its theory:

> the notion of withdrawal is pertinent only insofar as it relates to the element of proximate cause. For example, if one drag racer were to abandon the race by slowing down to normal speeds or stopping, and his competitor became aware of the defendant's withdrawal but still chose to continue driving fast and recklessly, that fact might have a bearing on whether the defendant's drag racing was a proximate cause of a subsequent collision between his competitor and a third party; it might also bear on whether the competitor's decision to continue his reckless driving was an intervening, superseding cause.[938]

(iii) *Assumption of Risk.* The supreme court in *State v. McFadden* also rejected application of the assumption of risk doctrine to drag races where one of the participants is killed and the one survives.[939] The decedent's voluntary and reckless participation in a fatal drag race does not bar the survivor from conviction for vehicular involuntary manslaughter, the court held.[940]

3. *Recklessness Type*

The less serious grade of Involuntary Manslaughter, an aggravated misdemeanor, is based strictly upon recklessness as the state of mind of the offense.[941] The elements, as set out in the Iowa Code, are: (1) unintentionally and (2) without justification (3) causing the death of a human being (4) through commission of an act "in a manner likely to cause death or serious injury."[942] The latter phrase, which was left undefined in the Criminal Code, has been interpreted by the supreme court in *State v. Conner*[943] to mean

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934. *Id.*
935. *See* Commonwealth v. Root, 403 Pa. 571, 170 A.2d 310 (1961).
936. 320 N.W.2d at 609-10.
937. *Id.* at 614.
938. *Id.* at 613-14.
939. *Id.* at 611.
940. *Id.*
941. *See infra* text accompanying notes 943-56.
942. IOWA CODE § 707.5(2) (1981).
943. 292 N.W.2d 682, 684 (Iowa 1980).

recklessly. Moreover, the court ruled that recklessness, for the purposes of this statute, requires that the offender had "an awareness of the risk or at least that the accused should have been aware of the risk."[944]

Aiding and abetting another to commit suicide has been interpreted[945] to satisfy this provision, and thus it is not error for the trial court to refuse to instruct the jury that suicide is not a defense to a charge of Involuntary Manslaughter. In *State v. Marti*,[946] the defendant admitted putting three bullets in the gun, rotating the cylinder, firing twice on empty chambers, and setting the weapon down uncocked within arm's reach of the bedridden suicide victim.[947] The court concluded, "[p]reparing and providing a weapon for one who is unable to do so and is known to be intoxicated and probably suicidal are acts 'likely to cause death or serious injury' "[948] within the provision on involuntary manslaughter. On the other hand, *State v. Conner*[949] held that mere disobedience of a signal light during operation of a motor vehicle, in the absence of recklessness, does not constitute the underlying basis for Involuntary Manslaughter.[950]

The requisite act for this grade of Involuntary Manslaughter, which is based upon recklessness, was defined in *State v. Inger*[951] as being "an act that is *not* a public offense as defined in section 707.5(1),"[952] the latter being the unlawful act grade of Involuntary Manslaughter.[953] The importance of this distinction was made apparent in *Inger*, since "the only possible *act* attributable to [the] defendant" that was likely to cause death or serious injury was "an assault, a *public offense* within the meaning of section 707.5(1)."[954] Because the factual basis was not met for submitting a lesser included offense instruction, the trial court thus correctly refused to instruct on Involuntary Manslaughter in this prosecution for second-degree murder.[955] The legal test component of the lesser included offense standard, on the other hand, is satisfied in the statute itself, with Involuntary Manslaughter made a lesser included offense in a prosecution for murder in the first or second degree or for Voluntary Manslaughter.[956]

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944. *Id.* (quoting J. YEAGER & R. CARLSON, *supra* note 132, § 148).
945. State v. Marti, 290 N.W.2d 570, 583 (Iowa 1980).
946. 290 N.W.2d 570 (Iowa 1980).
947. *Id.* at 575.
948. *Id.* at 583.
949. 292 N.W.2d 682 (Iowa 1980).
950. *Id.* at 688-89.
951. 292 N.W.2d 119 (Iowa 1980).
952. *Id.* at 124.
953. *See supra* text accompanying notes 923-40.
954. 292 N.W.2d at 124.
955. *Id.*
956. *Id.* at 123.

4. *Sentencing—Multiple Victims*

Overruling a 1933 precedent,[957] the supreme court held in *State v. McFadden*[958] that "a separate and distinct offense arises from each death caused by a single act of vehicular involuntary manslaughter."[959] McFadden was a participant in a drag race that resulted in the deaths of the other participant and the passenger in another automobile.[960] He was convicted under a two-count trial information and sentenced on both counts.[961] The *McFadden* court left intact the 1933 precedent as to successive trials following an initial acquittal "where a single criminal act produces multiple victims."[962]

In overruling *State v. Wheelock*,[963] the court refocused its analysis regarding intent: "The role of intent pertains only to the commission of the act," and "not to the number of deaths which result from the act."[964] In *State v. Wheelock*, the court had said that because Involuntary Manslaughter involves an unintentional killing, the defendant can only be sentenced for a violation of the statute instead of focusing upon the number of deaths.[965]

5. *Penalty Schedule*

Involuntary Manslaughter was held in *State v. Webb*[966] not to be a "forcible felony" and thus the ameliorative sentencing options are available.[967] This conclusion is based upon the fact that an assault is not a necessarily included element of Involuntary Manslaughter. Thus, the crime is not a "felonious assault" and thus not a "forcible felony."

6. *Lesser Included Offense*

The recklessness-type of Involuntary Manslaughter under Iowa Code section 707.5(2) is not a lesser included offense of the unlawful act-type of Involuntary Manslaughter under Iowa Code section 707.5(1).[968] In *State v. Dvorsky*,[969] the court held that the legal test was not met because it would be impossible to commit the unlawful act-type (which requires an underly-

957. State v. Wheelock, 216 Iowa 1428, 250 N.W. 617 (1933).
958. 320 N.W.2d 608 (Iowa 1982).
959. *Id.* at 618.
960. *Id.* at 609-10.
961. *Id.* at 610.
962. *Id.*
963. 216 Iowa 1428, 250 N.W. 617 (1933).
964. 320 N.W.2d at 618.
965. 216 Iowa at 1438, 250 N.W. at 625.
966. 313 N.W.2d 550, 553 (Iowa 1981).
967. *Id.*
968. State v. Dvorsky, 322 N.W.2d 62 (Iowa 1982).
969. 322 N.W.2d 62 (Iowa 1982).

ing public offense) and at the same time commit the recklessness type (which, pursuant to *State v. Inger*,[970] cannot involve an act which is a public offense).

Assault was held not to be a lesser included offense of the unlawful act-type of Involuntary Manslaughter in *State v. Webb*.[971] This holding was based on Assault being a specific intent crime while Involuntary Manslaughter involves an unintentional death.[972] This means that there are no lesser included offenses of Involuntary Manslaughter, since none of the assaultive crimes qualify.

XII. Governmental Process Offenses

A. *Overview*

None of the governmental abuse offenses[973] or the official misconduct offenses[974] have been either interpreted by the appellate courts or legislatively changed since the new Criminal Code became effective. Moreover, only one crime each in the two related groups of judicial process offenses[975] (Tampering With a Witness) and obstructing justice offenses[976] (Escape) has been interpreted by the Iowa Supreme Court.

B. *Escape*[977]

1. *Escape from Detention Facility*[978]

A county jail was interpreted in *State v. Smith*[979] to be a "detention facility" within those portions of the Escape statute which prohibit escape from "any detention facility or institution to which the person has been committed."[980] "The term is not defined in the statute and does not have a technical meaning,"[981] the court concluded, adding that it will construe the term "in accordance with its context and the approved usage of the language."[982]

The fact that these portions of the Escape statute do not differentiate between escapees from detention facilities who have already been convicted

970. 292 N.W.2d 119, 124 (Iowa 1980). *See supra* text accompanying notes 950-56.
971. 313 N.W.2d at 553.
972. *Id.*
973. *See generally* Dunahoo, *supra* note 1, at 589-93.
974. *See generally* Dunahoo, *supra* note 1, at 602-05.
975. *See generally* Dunahoo, *supra* note 1, at 593-601.
976. *See generally* Dunahoo, *supra* note 1, at 606-13.
977. *See generally* Dunahoo, *supra* note 1, at 608-11.
978. Iowa Code §§ 719.4(1), (2) (1981).
979. 300 N.W.2d 90 (Iowa 1981).
980. *Id.* at 93.
981. *Id.*
982. *Id.*

and those who have merely been charged was determined in *State v. Conner*[983] to not be violative of equal protection.[984] The court concluded that the legislature "had a rational basis for imposing equal punishment for persons charged with a felony and persons convicted of a felony."[985]

2. *Absence from a Required Place*[986]

An escape under Iowa Code section 709.4(3) covering a person committed to a jail or correctional institution "who knowingly and voluntarily absents himself or herself from any place where the person is required to be"[987] was interpreted in *State v. Burtlow*[988] to include a person who is authorized to leave a detention facility and who "knowingly and voluntarily fails to return to [the] facility when required to do so. The fact that the legislature delineated separate escape offenses is some indication it did not intend subsection one to embrace all offenses which might constitute escape under a general escape statute."[989] Subsection 719.4(1) "is intended to apply [to] unauthorized departures from physical restraint. In those cases a danger of injury to persons or property exists. When the offense is a mere failure to return from an authorized release, no such danger exists,"[990] the court determined. Burtlow had failed to return to a state work release center upon expiration of a seven-day furlough.[991]

In *Burtlow,* the court also applied the consecutive sentencing mandate of Iowa Code section 901.8 to violations of subsection 719.4(3).[992] The court noted: "Even though the word 'escape' does not appear in subsection three, the crime is plainly an escape offense within the meaning of 901.8. [T]he legislature intended to incorporate all of the offenses under section 719.4 by its reference in section 901.8 to sentences 'for escape under section 719.4.' "[993]

C. *Tampering With a Witness*[994]

In *State v. Halleck,*[995] the supreme court held that an offer of restitution on the condition that the complaining witnesses "change their position

983. 314 N.W.2d 427 (Iowa 1982).
984. *Id.* at 431.
985. *Id.*
986. IOWA CODE § 719.4(3) (1981).
987. *Id.*
988. 299 N.W.2d 665 (Iowa 1980).
989. *Id.* at 669.
990. *Id.*
991. *Id.* at 667.
992. *Id.* at 669.
993. *Id.* at 668.
994. IOWA CODE § 720.4 (1981).
995. 308 N.W.2d 56 (Iowa 1981).

and testimony from favoring prosecution to not pressing prosecution"[996] was sufficient evidence of the crime of Tampering With a Witness via offering a bribe with the intent to "improperly influence"[997] the victim-witnesses' testimony. Halleck was an attorney representing a criminal defendant charged with theft.[998] The attorney offered restitution to the theft victim if he would recommend to the county attorney that the theft charges against his client be dropped.[999] The attorney also conditioned the proposed restitution on the requirement that the theft victim, if he were subpoenaed, would testify that he was not "really pressing this matter."[1000]

The court defined an offer of a bribe under section 720.4 as "an offer of anything of value or benefit to induce another to act improperly."[1001] Regarding offering of restitution to crime victims, the court stated:

> An offer of restitution, standing alone, is not a crime . . . . However, . . . the legislature intended to make it a crime to offer restitution where the person making the offer attempts to improperly influence a victim-witness's testimony . . . . To improperly influence a witness is not limited to asking a witness to lie . . . . An improper influence includes offers of a bribe to 'persuade the witness to shade or color his testimony in a certain way, without actually lying' . . . . Merely offering restitution if the witness tells the truth, however, is not prohibited.[1002]

XIII. Miscellaneous Offenses

A. *Overview*

Very little judicial activity has occurred in the seven areas of miscellaneous offenses. None of the animal abuse offenses;[1003] bribery and corruption offenses;[1004] civil rights offenses;[1005] health, safety, and welfare offenses;[1006] or labor-related offenses[1007] have been interpreted by the appellate courts since the new Criminal Code became effective. Moreover, only one crime each in the family offenses[1008] (i.e., Wanton Neglect of a Child) and public disorder offenses[1009] (i.e., Riot) have been so interpreted.

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996. *Id.* at 58.
997. *Id.* at 59-60.
998. *Id.* at 57.
999. *Id.*
1000. *Id.* at 59.
1001. *Id.* at 58.
1002. *Id.* at 59.
1003. *See generally* Dunahoo, *supra* note 1, at 613-19.
1004. *See generally* Dunahoo, *supra* note 1, at 619-23.
1005. *See generally* Dunahoo, *supra* note 1, at 624.
1006. *See generally* Dunahoo, *supra* note 1, at 631-33.
1007. *See generally* Dunahoo, *supra* note 1, at 633.
1008. *See generally* Dunahoo, *supra* note 1, at 624-31.
1009. *See generally* Dunahoo, *supra* note 1, at 633-38.

B. *Wanton Neglect of a Minor*[1010]

A charge of abandonment under sub-section two of section 726.6 has been held to require an element of permanency. For example, leaving a minor unattended through a temporary absence will not support a conviction.[1011] Reversing a conviction in *State v. Wilson*,[1012] the supreme court noted that the term "abandons" in similar criminal statutes in other jurisdictions "has generally been construed to mean an intention to leave the child permanently, as distinguished from temporary neglect."[1013] The evidentiary basis of this standard was insufficient to uphold the conviction of a single mother who left her eighteen month-old child unattended in a basement apartment for approximately ninety minutes while she went to use a public telephone for social purposes.[1014]

C. *Riot*[1015]

1. *Constitutionality*

The constitutionality of the new Riot statute was upheld in *Williams v. Osmundson*[1016] against several challenges. The court held that: (1) the statute is not overbroad by applying to lawful assemblies that become unruly, because it requires a specific intent to engage in action that is known to be a riot;[1017] (2) the statute does not create an unlawful presumption because "mere presence" at the scene of a riot is not punished;[1018] and (3) the statute is not void for vagueness since it furnishes reasonable notice as to its proscribed activity (violent group activity occurring in public).[1019]

2. *Intent*

The court also held in *Williams v. Osmundson* that "mere presence at the scene of a riot is not punishable."[1020] This is because a person must willingly and knowingly have joined in or remained a part of a riot.[1021] The requisite showing of intent requires evidence that defendant "conduct[ed] himself in a violent manner."[1022] So interpreted, this statute does not extend

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1010. Iowa Code § 726.6 (1981).
1011. State v. Wilson, 287 N.W.2d 587 (Iowa 1980).
1012. 287 N.W.2d 587 (Iowa 1980).
1013. *Id.* at 589.
1014. *Id.* at 588.
1015. Iowa Code § 723.1 (1981).
1016. 281 N.W.2d 622 (Iowa 1979).
1017. *Id.* at 624-27.
1018. *Id.*
1019. *Id.*
1020. *Id.* at 624.
1021. *Id.*
1022. *Id.*

to punishment of innocent bystanders and accordingly is not unconstitutionally overbroad.[1023]

3. *Public Place*

That "riotous activity is punishable only if it occurs in public" was determined in *Williams v. Osmundson*,[1024] notwithstanding the lack of any such restriction in section 723.1 itself.[1025] This interpretation is in line with the purpose of preserving public order, rather than of regulating "private relationships."[1026]

XIV. Conclusion

The Iowa Supreme Court has taken a firm stance in the interpretation of the new Iowa Criminal Code. The court has maintained the Iowa Legislature's desire to stiffen the criminal law. As seen above, few appeals result in reversal for the defendant. The rape victim's resistance is no longer required. A robbery need not result in a taking. A gun is a deadly weapon although not operational. And children enjoy greater protection from sexual abuse. The new Criminal Code and opinions of the Iowa Supreme Court are toughening the criminal law in Iowa.

1023. *Id.* at 624-25.
1024. *Id.* at 626-27.
1025. Iowa Code § 723.1 (1981).
1026. 281 N.W.2d at 627.