

# DRAKE LAW REVIEW

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## THE NEW IOWA CRIMINAL CODE: PART II

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### I. ASSAULTS AND RELATED OFFENSES

Several crimes of violence, threatened violence, or even potential violence are included in a chapter unfortunately entitled "Assault."<sup>1</sup> This generic nomenclature is confusing in light of several of these offenses not constituting any form of assault. Two of these non-assaultive offenses—Going Armed With Intent<sup>2</sup> and Setting Spring Guns and Mantraps<sup>3</sup>—are discussed in this Article in the more appropriate chapter on weapons offenses.

#### A. "Felonious Assault" Classification

Whether or not the various individual offenses in this chapter are actually aggravated forms of assault is crucial in several respects, all of which relate only to whether a particular offense is a "felonious assault,"<sup>4</sup> which in turn automatically qualifies as a "forcible felony."<sup>5</sup> The term "felonious assault" has been defined by the supreme court as "any assault the commission of which constitutes a felony."<sup>6</sup> Thus, any offense either in the "Assault" chapter or elsewhere in the Criminal Code<sup>7</sup> which is a felony (of any

1. Iowa Code ch. 708 (1979).

2. Iowa Code § 708.8 (1979). See text accompanying notes 769-83 *infra*.

3. *Id.* § 708.9. See text accompanying notes 784-89 *infra*.

4. See text accompanying notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

5. See Iowa Code § 702.11 (1979) and text accompanying notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

6. *State v. Powers*, 278 N.W.2d 26 (Iowa 1978).

7. That the classification "felonious assault" is not limited to offenses in the "Assault" chapter is evidenced by Attempted Murder, Iowa Code § 707.11 (1979), being determined by the supreme court in *State v. Powers*, 278 N.W.2d 26 (Iowa 1978), to be a "felonious assault."

class) "and necessarily includes an assault"<sup>8</sup> is a "felonious assault," as discussed above.<sup>9</sup>

### B. Assault

Unlike the pre-revised statute<sup>10</sup> which merely used the common law name of Assault<sup>11</sup> without defining it, the revised statute<sup>12</sup> specifically defines an assault as essentially being either an attempted battery or an activity which places another in fear of a battery<sup>13</sup> the latter type being an expansion of the prior law. Like the prior statute, however, a consummated battery<sup>14</sup> is not required and a simple battery is punishable under the Assault statute itself.<sup>15</sup> Assault, however, is now a specific intent crime,<sup>16</sup> unlike the pre-revised law,<sup>17</sup> and thus there can be no *negligent*<sup>18</sup> assaults (or batteries).

The elements of the revised crime of Assault specifically are: (1) without justification; (2) and with apparent ability to execute the act; (3) doing

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8. *State v. Young*, 293 N.W.2d 5, 6 (Iowa 1980).

9. See text accompanying notes 326-41 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

10. See IOWA CODE § 694.1 (1977) (repealed 1978).

11. "The offenses of an assault, or an assault and battery, is declared criminal by section 694.1, The Code; but for a description of the offense, or in order to ascertain what would amount to an assault, or an assault and battery, we must resort to the common law definition." *State v. Redmond*, 244 N.W.2d 792, 796 (Iowa 1976).

12. IOWA CODE § 708.1 (1979). See IOWA STATE BAR ASSOCIATION, II IOWA UNIFORM JURY INSTRUCTIONS ANNOTATED (CRIMINAL) at Nos. 801, 804 (1978) [hereinafter cited as UNIFORM JURY INSTRUCTIONS]; J. YEAGER & R. CARLSON, IOWA CRIMINAL LAW AND PROCEDURE §§ 171-77 (1979) [hereinafter cited as J. YEAGER & R. CARLSON]; W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 80-82 (1972) [hereinafter cited as W. LAFAVE & A. SCOTT]; R. PERKINS, PERKINS ON CRIMINAL LAW, at 28 (2d ed. 1969) [hereinafter cited as R. PERKINS].

13. J. YEAGER & R. CARLSON, *supra* note 12, § 172.

14. "A battery is the unlawful physical contact resulting from an assault." J. YEAGER, IOWA CRIMINAL CODE TRAINING MANUAL, at 46 (1977) [hereinafter cited as TRAINING MANUAL]; *Accord*, W. LAFAVE & A. SCOTT, *supra* note 12, § 80.

15. "One who attempts to strike another commits an assault. If he succeeds in striking the other, it is an assault only, not assault and battery." W. LAFAVE & A. SCOTT, *supra* note 12, § 80. An aggravated battery, inflicted intentionally, which results in a "serious injury" is punishable under the serious (class C felony) offense of Willful Injury, however. See IOWA CODE § 708.4 (1979).

16. For a general discussion of specific intent, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

17. See IOWA CODE § 694.1 (1977) (repealed 1978) (codification of common law crime of assault).

18. W. LAFAVE & A. SCOTT, *supra* note 12, § 80, states:

A battery of the criminal-negligence type as where motorist A by reckless driving unintentionally injures pedestrian B, does not include an assault, which requires an intent to injure or (alternatively, in many jurisdictions) to frighten. So at most it can properly be said only that every intentional battery necessarily includes an assault.

any act; (4) with the intent either to (a) cause pain or injury, (b) result in insulting or offensive physical contact, or (c) place another in fear of immediate physical contact of a painful, injurious, insulting, or offensive nature. The focus of these assaultive acts is upon the intended results, thus not requiring specified results. For example, no touching is required, nor need the victim of the assault *actually* be frightened when the assault consists of an attempt to commit a battery. Nor need there even be an *actual* intent to commit a battery, when the assault consists of a threat intended to place another person in fear of a battery.

The apparent ability requirement could be troublesome, in light of the statutory phraseology which fails to make clear to whom the ability to execute the act must be apparent.<sup>19</sup> Because the statute focuses upon the defendant-actor's conduct, Professor Yeager feels that the apparent ability refers to the actor.<sup>20</sup> Accordingly, a defendant threatening to detonate a *simulated* explosive would not be guilty of the offense, provided that *he* knew it would not explode. Such a result does not seem reasonable. The proper focus of attention should be solely upon the defendant's act of threatening to detonate what would appear to a reasonable person to be a real explosive. After all, the defendant's act was intended to place another in fear, and the act of placing another in fear is all that is necessary in order for the crime of Assault to be complete.

A third enumerated type of Assault occurs either by<sup>21</sup> (a) intentionally pointing a firearm<sup>22</sup> toward another, or (b) displaying in a threatening manner any dangerous weapon toward another. The first alternative was retained from the prior law,<sup>23</sup> while the second represents an expansion of the types of weapons covered<sup>24</sup> under the assault provisions. This type of Assault—which focuses entirely upon the defendant's conduct—contains no apparent ability requirement, nor does it require proof of any specific intent. Thus, the defendant's *purpose* in pointing the firearm is irrelevant.<sup>25</sup> Like

19. See, e.g., IOWA CODE § 708.1(1) (1979), which defines one type of assault as "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, *coupled with the apparent ability to execute the act*" (emphasis added). See *State v. Yanda*, 259 Iowa 970, 146 N.W.2d 255 (1966).

20. J. YEAGER & R. CARLSON, *supra* note 12, § 173.

21. IOWA CODE § 708.1(3) (1979).

22. There is no general definitional clause for the term "firearm" in the Code; for a discussion of the caselaw definition, see text accompanying notes 128-43 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

23. *Id.* § 694.2 (1977) (repealed 1978).

24. Only pistols, revolvers, or guns were included under the pre-revised statute. See IOWA CODE § 694.2 (1977) (repealed 1978).

25. This is subject, of course, to the "limited consent defense," which is discussed immediately below in the text accompanying notes 40-55 *infra*. "Actors in a play are not guilty of assault when one points a firearm at the other, when the script calls for this." TRAINING MANUAL, *supra* note 14, at 47.

the pre-revised law,<sup>26</sup> the weapon need not be loaded<sup>27</sup> (and, of course, the discharging of it is unnecessary). Nor should it be necessary that the person who was assaulted know or have reason to believe that the weapon was loaded,<sup>28</sup> in light of the fact that the assault statute focuses entirely upon the defendant's conduct.<sup>29</sup>

### 1. *Overt Act*

The requirement of an act for Assault means that the common law principle that mere words, even if they are threatening, do not constitute an assault<sup>30</sup> remains unchanged. Because an overt act is essential to an assault of the attempted-battery type, it has been stated that: "the force intended to be applied must be put in motion; otherwise there is merely an intention, and not an attempt, to inflict the battery. Mere preparations or mere words and threats, whatever may be the intention, can never amount to an assault; there must be some act which, if not stopped, may apparently . . . produce injury."<sup>31</sup> At first blush, it appears that mere words could be the basis of the new second type of Assault: placing another in fear of a battery. Nevertheless, the requirement of an act apparently precludes this interpretation. As summarized by one commentator:

Criminal assault [by intentional scaring] needs, in addition to (1) the intent-to-scare mental element and (2) the apprehension result element, (3) the further requirement of some conduct by the defendant, conduct of the sort to arouse a reasonable apprehension of bodily harm. Thus it is not enough to constitute an assault to give another a fierce look intended to frighten, though the other is actually frightened by the look. So, too, threatening words alone, without any overt act to carry out the threat, or indecent proposals by a man to a woman, not accompanied by any attempt to carry them out without her consent, will not do.<sup>32</sup>

Cursing another, without a show of force, has been held to not constitute an assault, even though the victim was, in fact, frightened.<sup>33</sup> In contrast, the act of "lifting the fist or a cane in a threatening manner" has been

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26. See *State v. Ashland*, 259 Iowa 728, 145 N.W.2d 910 (1966) (unloaded gun pointed at robbery victim constitutes putting in fear).

27. See *State v. Nichols*, 276 N.W.2d 416 (Iowa 1979).

28. See *State v. Shepard*, 10 Iowa 126 (1859).

29. This focus on defendant's conduct is apparent throughout the language requiring specific intent. See *Iowa Code* § 708.1 (1979).

30. "Threats are not sufficient; there must be proof of violence actually offered." R. PERKINS, *supra* note 12, at 132, quoting, *People v. Lilley*, 43 Mich. 521, 525 (1880). See W. LAFAYE & A. SCOTT, *supra* note 12, at §§ 611-12; J. MILLER, *HANDBOOK OF CRIMINAL LAW* 302-04 (1934) [hereinafter cited as J. MILLER]; see *State v. Roby*, 194 Iowa 1032, 188 N.W. 709 (1922).

31. J. MILLER, *supra* note 30, at 303.

32. W. LAFAYE & A. SCOTT, *supra* note 12, § 82.

33. *State v. Daniel*, 136 N.C. 571, 48 S.E. 544 (1904).

considered sufficient for an assault where the other requisites were present.<sup>34</sup>

Some commentators have suggested that an exception be made for informational words,<sup>35</sup> thus permitting a conviction for Assault, without an overt act. The most common example given is accosting someone from behind or in the darkness while claiming to have a weapon, such as, "make one move and I'll shoot." While this certainly would have the effect of frightening the victim, nevertheless this circumstance does not appear applicable to Iowa law, in light of the express statutory requirement that there be the apparent ability to execute the act (of shooting). Something more than a bald assertion of having a weapon should be required (e.g., sticking a blunt object against the victim's back or simulating the cocking sound of a firearm). Of course, the third type of Assault under Code § 708.1(3) occurs when a firearm actually is pointed at another or is displayed in a threatening manner.

## 2. Assault on Peace Officer

A legislative bill providing for a mandatory jail term for an assault on an on-duty peace officer failed to pass in 1979.<sup>36</sup> Not only would a deferred judgment, a deferred sentence, or a suspended sentence have been unavailable, but in addition, the defendant would have been ineligible for parole (and thus would have to serve the maximum sentence imposed by law) under this proposed law. This bill presumably would only have included the simple misdemeanor<sup>37</sup> offense of simple Assault and would not have included the aggravated assault offenses such as Assault with Intent to Inflict Serious Injury.<sup>38</sup>

A more practical approach for the General Assembly to adopt for special punishments<sup>39</sup> assaultive attacks on peace officers would be to create a new serious misdemeanor<sup>40</sup> crime for a battery intentionally inflicted on

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34. *State v. Hazen*, 160 Kan. 733, \_\_\_, 165 P.2d 234, 239 (1946).

35. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 12, § 82; R. PERKINS, *supra* note 12, at 132.

36. H.F. 170, § 11, 68th G.A. (1979).

37. A simple misdemeanor is punishable in the sentencing judge's discretion, by either a determinate or fixed period of confinement for any number of days up to thirty days or a fine in any amount not exceeding \$100, but not both. IOWA CODE § 903.2(3) (1979). All of the ameliorative sentencing alternatives (i.e., a deferred judgment, a deferred sentence, or a suspended sentence of probation) are available in lieu of the prescribed allowable confinement or fine. *Id.* § 907.3.

38. See IOWA CODE §§ 708.2(1) & 702.18 (1979) and text accompanying notes 58-69 *infra*.

39. The constitutionality of a similar statute was upheld in *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972).

40. A serious misdemeanor is punishable in the sentencing judge's discretion, by either a determinate or fixed period of confinement for any number of days up to one year or a fine in any amount not exceeding \$1,000, or both (confinement and a fine). IOWA CODE § 903.2(2) (1979). All of the ameliorative sentencing alternatives (i.e., a deferred sentence, a deferred judgment, or a suspended sentence of probation) are available in lieu of the prescribed allowable

peace officers. This would authorize a sentencing court in its sound judicial discretion to impose a jail sentence in excess of the thirty day limitation for simple Assault in situations of aggravated assaults short of being an Assault with Intent to Inflict Serious Injury.

### 3. Domestic Abuse

Amidst a flurry of legislative bills on the subject, the Iowa General Assembly in 1979 passed the Domestic Abuse Act.<sup>41</sup> Although closely tied to the offense of Assault, this new act will appear as a separate chapter in the next Iowa Code.<sup>42</sup> "Domestic abuse" is statutorily defined as an assault between co-habiting family or household members, including separated spouses not residing together at the time of the assault.<sup>43</sup> Moreover, a victim's rights are not affected by leaving the residence or household to avoid domestic abuse.<sup>44</sup> On the other hand, children under eighteen unfortunately are not protected,<sup>45</sup> thus rendering the act in essence a wife abuse act.

The primary purpose of this statute is to provide an avenue for a family or household member to seek a protective court order to prevent domestic abuse by another family or household member, including a separated spouse.<sup>46</sup> Also included are provisions for temporary and emergency orders prior to a hearing, with violations of either this order or a court-appointed consent agreement to be punishable as Contempt.<sup>47</sup> This act wisely does not include a provision included in another bill which makes it a crime for a peace officer to not speedily file assault charges upon request by an alleged victim of domestic abuse.<sup>48</sup> Police discretion in filing criminal charges is desirable; of course, the victim may file the charge directly.<sup>49</sup>

The aforementioned civil proceeding is, by express terms of the statute, "in addition to any other civil or criminal remedy."<sup>50</sup> Thus, it merely sets out the obvious as to the crime of Assault covering disputes between family or household members, without making any changes in the criminal law. No new crimes are added and no crimes are expanded. Furthermore, no changes are made in the penalty schedules.

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confinement or fine. *Id.* § 907.3.

41. 1979 Iowa Acts ch. 147.

42. *Id.* § 1.

43. *Id.* § 2.

44. *Id.* § 7(2).

45. *Id.* § 2(2).

46. *Id.* § 5.

47. *Id.* §§ 6, 8.

48. H.F. 170, § 11, 68th G.A. (1979).

49. See Iowa Code § 804.1 (1979).

50. 1979 Iowa Acts ch. 147, § 7(1).

#### 4. *Grading*

The only grade of simple Assault is a simple misdemeanor,<sup>51</sup> which is the lowest classification of criminal activity in the Iowa Code. This one grade encompasses an overly broad range of criminal activity: merely threatening another with injury, actually injuring another, and pointing a firearm at another.

#### 5. *Consent as Defense*

A "limited consent defense" has been codified to excuse contact, which otherwise would constitute an assault,<sup>52</sup> between "voluntary participants in a sport, social or other activity, not in itself criminal."<sup>53</sup> However, an otherwise assaultive act must be "a reasonably foreseeable incident of such sport or activity" and must not create "an unreasonable risk of serious injury or breach of the peace."<sup>54</sup> If both of these provisos are not met, then the defense will not be applicable. Moreover, because of the restrictive nature of these limitations, it appears that this defense is available only on a charge of simple Assault. The defense, by its express terms, does not apply at all as a general defense to criminal activity, and thus would never be available to legitimatize such inherently criminal activities as "street fights, barroom brawls, and sado-masochistic excesses."<sup>55</sup> The burden of disproving the existence of this special defense is placed upon the prosecution in Uniform Jury Instruction No. 809.

#### C. *Assault With Intent to Inflict Serious Injury*

The least serious of the aggravated forms of Assault in the new Criminal Code is the crime of Assault With Intent to Inflict Serious Injury,<sup>56</sup> as the successor to the pre-revised crime of Assault With Intent to Inflict Great Bodily Injury.<sup>57</sup> Professor Yeager is of the opinion that the two terms are comparable.<sup>58</sup> It is submitted that such an opinion is incorrect,<sup>59</sup> however,

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51. See note 37 *supra*.

52. This proviso "recognizes that acts which may constitute an assault when committed in one context may be permissible in another context, and that the statutory distinction between permissible and impermissible physical contact should be clearly delineated." Yeager, *Crimes Against the Person: Homicide, Assault, Sexual Abuse and Kidnapping in the Proposed Iowa Criminal Code*, 60 IOWA L. REV. 503, 517 (1975) [hereinafter cited as Yeager Note].

53. IOWA CODE § 708.1 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 809.

54. IOWA CODE § 708.1 (1979).

55. J. YEAGER & R. CARLSON, *supra* note 12, § 176.

56. IOWA CODE § 708.2(1) (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 802-03; J. YEAGER & R. CARLSON, *supra* note 12, § 177.

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

58. J. YEAGER & R. CARLSON, *supra* note 12, § 177, which states: "'Serious injury' in § 708.2(1) can be compared to 'great bodily injury,' the term formerly used." *Id.*

59. See *State v. Bousman*, 276 N.W.2d 421 (Iowa 1979).

because the degree of specificity in the standard of "serious injury"<sup>60</sup> appears to portend considerably more than the basically undefinable former standard of "great bodily injury."<sup>61</sup> This former term has been interpreted as "an injury to the person greater than that which ordinarily results from a single altercation between parties with the fists or the like."<sup>62</sup> This standard seems to be less than the considerably more demanding standards for a "serious injury," specifically, serious permanent disfigurement, disabling mental illness, or protracted loss or impairment of a function of any bodily organ.

### 1. *Grading*

The grading of this offense complicates matters further. As an aggravated misdemeanor,<sup>63</sup> the maximum jail sentence for this offense is two years, as opposed to the one-year maximum under the forerunner statute. Yet, the maximum penalty for the next lower misdemeanor offense, simple Assault,<sup>64</sup> remained unchanged at thirty days. The next higher offense under the revised Code is the class D felony<sup>65</sup> offense of Assault While Participating in a Felony,<sup>66</sup> which carries an indeterminate term of not more than five years. A better approach would have been to make a three-tier level of misdemeanor assaults, rather than the two misdemeanor levels discussed above. Under a three-tier approach, an intermediate assaultive offense requiring an aggravated injury would be added, with an aggravated injury to be defined as an injury other than a "serious injury" which is greater than that which ordinarily results from a simple altercation between parties with the fists or

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60. See IOWA CODE § 702.18 (1979).

61. State v. Crandall, 227 Iowa 311, 288 N.W. 85 (1939).

62. State v. Moon, 241 Iowa 1232, 1233, 44 N.W.2d 739, 740 (1950).

63. An aggravated misdemeanor is punishable, in the sentencing judge's discretion, by either a determinate or fixed period of confinement for any number of days up to two years or a fine in any amount not exceeding \$5,000, or both (confinement and a fine). IOWA CODE § 903.2(1) (1979). All of the ameliorative sentencing alternatives (i.e., a deferred judgment, a deferred sentence, or a suspended sentence of probation) are available in lieu of the prescribed allowable confinement or fine. *Id.* § 907.3.

64. See IOWA CODE § 708.2(2) (1979) and text accompanying notes 1-18 *supra*.

65. A class D felony is punishable by confinement for an indeterminate term not to exceed five years and a fine not to exceed \$1,000. IOWA CODE § 902.9(4) (1979). If the particular offense is a "forcible felony," then the term of confinement must be imposed and cannot be suspended, and a fine apparently can be imposed only as a supplemental penalty (but cannot be imposed in lieu of mandatory confinement, notwithstanding § 909.1 of the Code). See text accompanying notes 70-102 in Part I of this Article, 29 DRAKE L. REV. 238 (1980). If the particular offense is not a "forcible felony," then confinement is not mandatory. Indeed, either a deferred judgment, a deferred sentence, or a suspended sentence of probation can be utilized as ameliorative "sentencing" devices in lieu of either confinement or a fine. See IOWA CODE § 907.3 (1979). In addition, a fine clearly can be imposed in lieu of confinement or a suspended sentence. See text accompanying notes 70-102 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

66. See IOWA CODE § 708.3 (1979) and text accompanying notes 70-106 *infra*.

the like. Thus, the former offense of Assault With Intent to Inflict Great Bodily Injury would be made into an aggravated battery offense punishable as a serious misdemeanor, with a one-year maximum penalty. An aggravated battery could encompass such conduct as striking another with an object, which extends considerably beyond the mere offensive touchings or threats which commonly constitute simple Assault. The proper offense for breaking someone's nose with one's fists illustrates the dilemma of having no intermediate misdemeanor assault offense. An "overreaching" prosecutor might attempt to stretch such conduct into Assault With Intent to Inflict Serious Injury, whereas what would clearly have been an Assault With Intent to Inflict Great Bodily Injury under the prior law apparently will only be a simple Assault now.

## 2. Lesser Included Offense

Quite obviously, Assault<sup>67</sup> is a lesser included offense<sup>68</sup> of this crime. This is true since the only difference between the two crimes of assaultive conduct is the specific intent to commit a "serious injury" necessary for the greater crime.<sup>69</sup>

## D. Assault While Participating in a Felony

The former offenses of Assault With Intent to Commit a Felony,<sup>70</sup> as well as various Assaults with intent to commit specific felonies,<sup>71</sup> were incorporated into a single crime of Assault While Participating in a Felony.<sup>72</sup> Unlike its predecessor statute, however, this statute apparently "does not require any connection between the assault and the felony other than that the person committing the assault be at that time participating in a felony."<sup>73</sup> Under section 702.14 of the Code, a person is "participating"<sup>74</sup> in a felony, "whether he is successful or not."<sup>75</sup>

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67. See *id.* § 708.2(2) and text accompanying notes 1-18 *supra*.

68. See text accompanying notes 619-38 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

69. See *State v. Redmond*, 244 N.W.2d 792, 797 (Iowa 1976) ("The difference between an assault and an assault with intent to inflict great bodily injury is the specific intent to inflict an aggravated injury").

70. See IOWA CODE § 694.5 (1977) (repealed 1978).

71. *Id.* § 694.7.

72. *Id.* § 708.3. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 805-06; J. YEAGER & R. CARLSON, *supra* note 12, § 178.

73. J. YEAGER & R. CARLSON, *supra* note 12, § 178.

74. See *State v. Johnson*, 291 N.W.2d 6, 9 (Iowa 1980) which rejected the argument that participation means joint conduct and thus the complicity of two or more persons is not required in committing the crime of Assault While Participating in a Felony.

75. See *State v. Johnson*, 291 N.W.2d 6, 8 (Iowa 1980) which rejected the claim that the target felony must be completed in order for there to be a conviction for Assault While Participating in a Felony.

during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be.<sup>76</sup>

Accordingly, this term apparently includes "an attempt to commit the felony, the commission of the felony itself, and the escape from the scene of the felony."<sup>77</sup> Criminal liability for inchoate criminal conduct vests "[o]nce a felony has progressed to the point where an assault is made."<sup>78</sup>

### 1. *Attempt Liability*

This offense should encompass conduct such as a sexual assault when there is lacking a "sex act"<sup>79</sup> (i.e., neither penetration nor the requisite sexual contact) in order for the crime of Sexual Abuse<sup>80</sup> to be consummated. That is, attempted Sexual Abuse would be punishable under this offense<sup>81</sup> provided that an assault was actually committed and that the assault occurred coterminous with a felonious intent. An example would be where the defendant has torn off the intended victim's clothing, with the obvious intent to sexually abuse the victim, but for some reason or other is thwarted before making the requisite contact for a "sex act." Of course, the substantive offense of Sexual Abuse would be completed if the attack had progressed to the requisite contact for a "sex act," notwithstanding the lack of the intended penetration, before the defendant was thwarted.

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*,<sup>82</sup> the court, in upholding the revised offense of Robbery<sup>83</sup> 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,"<sup>84</sup> referring to an unsuccessful robbery being punishable under either Robbery or Assault While Participating in a Felony.<sup>85</sup>

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76. Iowa Code § 702.14 (1979).

77. Yeager Note, *supra* note 52, at 517.

78. J. YEAGER & R. CARLSON, *supra* note 12, § 178.

79. See Iowa Code § 702.17 (1979).

80. *Id.* § 709.1.

81. See J. ROEHRICK, THE NEW IOWA CRIMINAL CODE: A COMPARISON, 64 (1978) [hereinafter cited as J. ROEHRICK].

82. 287 N.W.2d 570 (Iowa 1980).

83. See Iowa Code § 711.1 (1978) ("It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen").

84. 287 N.W.2d at 574.

85. Concerning prosecutorial discretion in charging when there are overlapping statutes, see note 1056 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

## 2. *Felony-Assault Doctrine*

The scope of this provision apparently is not limited to *attempted* assaultive conduct. Professor Yeager reports that another intended purpose of this crime is to provide "an additional offense in those cases where the commission of a felony is accompanied by an assault."<sup>86</sup> Broadly interpreted, under this "felony-assault" doctrine it appears that an otherwise simply assault<sup>87</sup> can be "bootstrapped" into a felonious assault (specifically a class D felony),<sup>88</sup> simply because it is committed during participation in any felony, other than a felony, such as Robbery,<sup>89</sup> that includes an assault as an essential element of the underlying crime itself.<sup>90</sup> This could result, for example, in a person being charged with Assault While Participating in a Felony in addition to the underlying offense of False Use of a Financial Instrument<sup>91</sup> in a situation in which he offers a forged check, and in the process intentionally pushes aside a suspicious clerk who attempts to restrain him, or points a firearm at the clerk in order to effectuate his escape. The apparent public policy supporting this doctrine is that a simple assault is of a more serious nature when committed in the context of otherwise felonious conduct. Such a severe "bootstrapping" penalty should deter assaultive acts during otherwise non-violent felonious conduct.

## 3. *Grading*

This not only is a class D felony,<sup>92</sup> but is also, more importantly, a "felonious assault"<sup>93</sup> and thus a "forcible felony."<sup>94</sup> Consequently, a person convicted of this offense apparently faces a mandatory prison term.<sup>95</sup> Application of the so-called "felony-assault" doctrine<sup>96</sup> (i.e., a simple Assault during the commission or attempted commission of any felony becomes a class

86. Yeager Note, *supra* note 52, at 517.

87. See note 37 *supra*.

88. See note 65 *supra*.

89. IOWA CODE § 711.1 (1979).

90. The "integral part" doctrine enunciated in *People v. Ireland*, 75 Cal. Rptr. 188, 450 P.2d 580 (1969), arguably is applicable here by analogy. This doctrine operates as a limitation on the felony murder rule by eliminating assaultive conduct as the basic underlying felony as the unlawful act to bootstrap an unpremeditated murder into first degree murder generally. In *Ireland*, the court specifically held that it was improper to apply California's second degree felony murder rule to a situation where the claimed felony in the course of which the homicide occurred was an assault with a deadly weapon.

91. IOWA CODE § 715.6 (1979).

92. See note 65 *supra*.

93. See text accompanying notes 4-5 *supra*.

94. See IOWA CODE § 702.11 (1979) and text accompanying notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

95. See *id.* § 909.1 and text accompanying notes 184-86 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

96. See text accompanying notes 86-91 *supra*.

D felony-assault) is especially harsh in these circumstances, but appears to be required. Moreover, the prescribed indeterminate term of five years for Assault While Participating in a Felony would become a fixed five-year term (minus good time<sup>97</sup> and honor time)<sup>98</sup> if a firearm is used or possessed during the commission of this crime.<sup>99</sup> Additionally, any murder committed during this offense would be Murder in the First Degree under the revised felony-murder rule.<sup>100</sup>

#### 4. Lesser Included Offenses

The only lesser included offense of this felony crime is Assault,<sup>101</sup> a simple misdemeanor.<sup>102</sup> The intermediate related crime of Assault With Intent to Inflict Serious Injury,<sup>103</sup> an aggravated misdemeanor,<sup>104</sup> is not a lesser included offense under the prevailing Iowa standard. This is because each of the crimes requires an element which the other does not. Assault While Participating in a Felony requires that the requisite assault be committed during the commission or attempted commission of a felony, or that the assault be at an inchoate stage in the completion of a felonious assault (e.g., Sexual Abuse). No such requirement is necessary for an Assault With the Intent to Inflict Serious Injury. On the other hand, the specific intent of the latter offense obviously is not necessarily required for the more severe crime of Assault While Participating in a Felony. That is because, for example, an attempted sexual abuse punishable under Assault While Participating in a Felony does not require a specific intent to inflict "serious injury." The point becomes even stronger when considering application of the so-called "felony-assault" doctrine<sup>105</sup> to Assault While Participating in a Felony.<sup>106</sup> A simple Assault during participation in the commission or attempted commission of the property appropriation felony offense of False Use of a Financial Instrument certainly would not require a specific intent to inflict "serious injury."

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97. See Iowa Code § 246.39 (1979).

98. See *id.* § 246.43.

99. See *id.* § 902.7 and text accompanying notes 70-106 *supra*.

100. See *id.* § 707.2(2) and text accompanying notes 1252-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1979).

101. See Iowa Code § 708.2(2) (1979) and text accompanying notes 6-25 *supra*.

102. See note 37 *supra*.

103. See Iowa Code § 708.2(1) (1979) and text accompanying notes 56-69 *supra*.

104. See note 63 *supra*.

105. See text accompanying notes 86-91 *supra*.

106. Regarding Assault While Participating in a Felony being itself a lesser included offense of Sexual Abuse, see text accompanying notes 243-44 *infra*.

### E. Willful Injury

The pre-revised common law offense of Mayhem<sup>107</sup> was not only renamed Willful Injury,<sup>107.1</sup> but was also changed in scope by designating a "serious injury"<sup>108</sup> as the type of injury encompassed by this offense. The scope was broadened as to the type of injury caused to bodily limbs. Limbs no longer need to be "disabled," for now a protracted loss or impairment of function of any bodily organ is sufficient to invoke criminal culpability. On the other hand, Willful Injury now requires a "serious permanent disfigurement" instead of merely permitting the cutting or slitting of certain bodily parts (e.g., tongue, ear, nose, or lip) as was the basis for Mayhem in the predecessor statute.<sup>109</sup>

This is a specific intent<sup>110</sup> crime, with the required intent being to cause a "serious injury." Of course, this also is a specific result crime, with infliction of a "serious injury" required. Thus, negligent infliction of a "serious injury" is not covered under Willful Injury.<sup>111</sup> Indeed, this type of conduct is not encompassed by the less serious related crimes of Assault While Participating in a Felony,<sup>112</sup> Assault With Intent to Inflict Serious Injury,<sup>113</sup> or even simple Assault.<sup>114</sup> This is because an assault (that is, specific intent conduct) is an integral part of each. Hence a civil action is the only legal remedy available.

#### 1. Specific Result Crime

Willful Injury is a specific result crime. Its elements are: (1) doing any unjustified act (i.e., an Assault); (2) intended to cause "serious injury"; (3) which causes "serious injury" to another. So defined, this crime occurs when the lesser crime of Assault With Intent to Inflict a Serious Injury<sup>115</sup> is successful.

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107. See IOWA CODE § 694.7 (1977) (repealed 1978).

107.1. IOWA CODE § 708.4 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 807-08; J. YEAGER & R. CARLSON, *supra* note 12, § 179.

108. See IOWA CODE § 702.18 (1979) and text accompanying notes 207-11 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

109. See generally R. PERKINS, *supra* note 12, at 187.

110. Regarding specific intent as a state of mind, see text accompanying notes 480-509 *supra*.

111. A provision which was included in S.F. 85 as it was introduced in 1975, but was defeated in the legislative process, would have punished reckless inflictions of a "serious injury."

112. See IOWA CODE § 708.3 (1979) and text accompanying notes 70-78 *supra*.

113. See *id.* § 708.2(1) and text accompanying notes 56-69 *supra*.

114. See *id.* § 708.2(2) and text accompanying notes 1-18 *supra*.

115. See *id.* § 708.2(1) and text accompanying notes 56-69 *supra*.

## 2. Lesser Included Offenses

Both of the non-felonious classifications of assaultive crimes are lesser included offenses<sup>116</sup> of Willful Injury. This is clear in light of the three elements of Willful Injury: (1) assault (2) with intent to inflict "serious injury" and (3) causing "serious injury." The first two elements, standing alone, constitute the aggravated misdemeanor of Assault With Intent to Inflict a Serious Injury,<sup>117</sup> whereas the first element, by itself, constitutes the simple misdemeanor offense of Assault.<sup>118</sup>

## 3. Grading

The single grade of this felony is a class D felony.<sup>119</sup> As a "felonious assault,"<sup>120</sup> it is also a "forcible felony."<sup>121</sup>

## 4. Felony Murder Rule

As a "forcible felony," this offense can be the underlying basis for Murder in the First Degree under the felony murder rule.<sup>122</sup> Thus, no change has been effected as the related pre-revised offense of Mayhem applied in such a manner under prior law.<sup>123</sup>

## F. Administering Harmful Substances

A new offense of Administering Harmful Substances<sup>124</sup> was added to the Code to cover those situations in which a person is unlawfully administered certain harmful substances of such a non-lethal nature or quantity as to not approach Attempted Murder.<sup>125</sup> Yet, this type of activity is considered too grave to punish merely as simple Assault.<sup>126</sup> The elements of this offense are: (1) administering to, or causing another to take; (2) substances with certain enumerated harmful effects; (3) in sufficient quantities to cause such harmful effects; (4) and for other than medicinal purposes, (5) without the other person's consent, or by threat or deception.

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116. For an extensive discussion of the standard for determining lesser included offenses, see notes 619-638 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

117. See IOWA CODE § 708.2(1) (1979) and text accompanying notes 56-69 *supra*.

118. See *id.* § 708.2(2) and text accompanying notes 1-18 *supra*.

119. See note 65 *supra*.

120. See text accompanying notes 4-5 *supra*.

121. See IOWA CODE § 702.11 (1979) and text accompanying notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

122. See *id.* § 707.2(2) and text accompanying notes 847-48 *infra*.

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

124. IOWA CODE § 708.5 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 810-11; J. YEAGER & R. CARLSON, *supra* note 12, § 180.

125. IOWA CODE § 707.11 (1979).

126. *Id.* §§ 708.1, .2(2).

### 1. Grading

The single grade of this offense is a class D felony.<sup>127</sup> Whether this is a "forcible felony"<sup>128</sup> is unclear. Because Administering Harmful Substances is not specifically enumerated in the statutory definition of "forcible felony," it must be considered a "felonious assault"<sup>129</sup> in order to be treated as a "forcible felony." Because of the judicial definition of the term "felonious assault," ("an *assault* which is a *felony*"),<sup>130</sup> this crime will constitute a "forcible felony" only if the statute defining this offense is interpreted such that an assault is necessarily included (required) within its essential elements. Nowhere on the face of that statute is there any requirement of a specific intent, unlike Assault.<sup>131</sup> Such omission suggests that Administering Harmful Substances is not a "felonious assault" and thus not a "forcible felony." While this probably was not the legislative *intent*, it is nevertheless the legislative *result*. This conclusion is buttressed by the canon of construction of strict construction of penal statutes.<sup>132</sup> Moreover, the Iowa Supreme Court in *Emery v. Fenton*<sup>133</sup> has stated specifically in regard to the new Criminal Code that: [c]hanges made by revision of a statute will not be construed as altering the law unless the legislature's intent to accomplish a change in its meaning is clear and unmistakable. An intent to make a change does not exist when the revised statute is merely susceptible to two constructions.<sup>134</sup>

The *Emery v. Fenton* limitation should apply to determining whether Administering Harmful Substances is a "forcible felony," especially since this is a new crime which was not included in the former Criminal Code. Instead, this type of conduct would have been punishable under the pre-revised less severe offenses either as Assault<sup>135</sup> or as Assault With Intent to Inflict Great Bodily Injury.<sup>136</sup>

The one apparent argument that Administering Harmful Substances may be a specific intent crime is that the *actus reus* must have been done

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127. See note 65 *supra*.

128. A "forcible felony" is not subject to any of the ameliorative sentencing alternatives (i.e., a deferred judgment, a deferred sentence, or a suspended sentence of probation). See Iowa Code § 907.3 (1979). Thus, confinement is mandatory. Moreover, it appears that Iowa Code § 909.1 does not permit a fine as the sole sentencing alternative for a "forcible felony." See text accompanying notes 92-102 in Part I of this Article, 29 DRAKE L. Rev. 239 (1980). Moreover, being a "forcible felony," this offense is also subject to the mandatory minimum five-year sentence if a firearm is used or possessed during its commission.

129. See text accompanying notes 4-5 *supra*.

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

131. See Iowa Code §§ 708.1, .2(2) (1979) and text accompanying notes 1-18 *supra*.

132. See *State v. Nelson*, 178 N.W.2d 434 (Iowa 1979), *cert. denied*, 401 U.S. 923 (1971).

But see Iowa Code § 4.2 (1979) (statutory abrogation of common law presumption of strict construction of statutes in derogation of common law).

133. 266 N.W.2d 6 (Iowa 1978).

134. *Id.* at 10.

135. See Iowa Code § 694.1 (1977) (repealed 1978).

136. See *id.* § 694.6.

"for other than medicinal purposes."<sup>137</sup> This could suggest that there is thus an *implied* intent to injure whenever such harmful substances are non-consensually administered without a medicinal purpose. However, this offense can be committed by a person who does not harbor any intention to injure. Moreover, since knowledge of the harmful effects of these substances is not required, how can there be an *implied* intent to injure? The bottom line, of course, is that the statute does not impose a requirement that the prosecution prove beyond a reasonable doubt as an essential element that the defendant committed the proscribed act with the intent to injure. Rather, all that the prosecutor has to do under the statute is, in effect, to disprove that the act was motivated by medicinal concerns.<sup>138</sup> Once this has been accomplished, the prosecutor does not need to prove precisely why the proscribed act was committed.

## 2. Lesser Included Offenses

Assuming that an Assault is not required for this crime, there are no lesser included offenses<sup>139</sup> of Administering Harmful Substances.

## 3. Felony Murder Rule

Assuming that this is not a "forcible felony,"<sup>140</sup> as discussed above, Administering Harmful Substances cannot qualify as an underlying felony under the first-degree felony murder rule.<sup>141</sup> This means that any death caused by this type of criminal activity will have to be prosecuted either under the second-degree felony murder rule<sup>142</sup> or under the applicable homicide offense.<sup>143</sup> The key point is that the felony murder rule would be inapplicable in making any wrongful death into Murder in the First Degree, absent premeditation.<sup>144</sup>

## G. Terrorism

The gravamen of the restructured crime of Terrorism<sup>145</sup> is the specific intent<sup>146</sup> "to injure or provoke fear or anger in another."<sup>147</sup> This offense can

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137. IOWA CODE § 708.5 (1979).

138. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 810-11.

139. For an extensive discussion of the standard for determining lesser included offenses, see text accompanying notes 619-638 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

140. See IOWA CODE § 702.11 (1979) and text accompanying notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

141. See *id.* § 707.2(2) and text accompanying notes 847-48 *infra*.

142. See *id.* § 707.3 and text accompanying notes 867-71 *infra*.

143. See *id.* ch. 707 and footnotes 811-936 *infra*.

144. See text accompanying notes 835-46 *infra*.

145. IOWA CODE § 708.6 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 812-18; J. YEAGER & R. CARLSON, *supra* note 12, § 181.

146. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in

be committed in either of two ways, the first being: (1) discharging a "dangerous weapon",<sup>148</sup> (2) at or into any occupied building or vehicle, and (3) placing the occupants thereof in reasonable apprehension<sup>149</sup> of "serious injury."<sup>150</sup> Proof of the occupant's being placed in *actual* danger appears unnecessary in light of the fact that the crime only requires that the dangerous weapon be discharged *at* an occupied building or vehicle.

The second way that this crime can be committed is by: (1) threatening (2) to commit a "forcible felony,"<sup>151</sup> with (3) reasonable expectation of the threat being carried out.<sup>152</sup> So defined, this threat (to commit a "forcible felony") is more seriously punished than a simple Assault.<sup>153</sup>

### 1. Grading

Indeed, Terrorism is a class D felony.<sup>154</sup> More importantly, the first of the two types mentioned above has been held to be<sup>155</sup> a "forcible felony"<sup>156</sup> under the interpretation of a "felonious assault."<sup>157</sup> Of course, an Assault<sup>158</sup> must be a necessary part of Terrorism, in order for Terrorism to be considered a "felonious assault." However, as to the second alternative type of terrorism, this test appears not to be met in light of the overt act requirements of an Assault.<sup>159</sup> The latter offense heretofore has not been complete on the mere speaking of words (albeit threatening words).

### 2. Felony Murder Rule

If, as suggested above, Terrorism is a "forcible felony," then a murder occurring during an act of Terrorism will constitute Murder in the First Degree under the felony murder rule.<sup>160</sup> Otherwise, an intentional, but unpremeditated, murder would only constitute Murder in the Second Degree,<sup>161</sup>

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Part I of this Article, 29 DRAKE L. REV. 239 (1980).

147. IOWA CODE § 708.6 (1979).

148. See *id.* § 702.7 (1979). See also UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 813.

149. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 814.

150. See IOWA CODE § 702.18 (1979) and text accompanying notes 207-11 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

151. See *id.* § 702.11 and text accompanying notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

152. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 818.

153. IOWA CODE §§ 708.1, .2(2) (1979).

154. See note 65 *supra*.

155. State v. Young, 293 N.W.2d 5 (Iowa 1980).

156. See note 128 *supra*.

157. See text accompanying notes 4-5 *supra*.

158. See IOWA CODE § 708.2(2) (1979) and text accompanying notes 1-18 *supra*.

159. *Id.*

160. See *id.* § 707.2(2) (1979) and text accompanying notes 847-48 *infra*.

161. See *id.* § 707.3 and text accompanying notes 864-71 *infra*.

whereas an unintentional killing would be punishable merely as Involuntary Manslaughter.<sup>162</sup>

### 3. Lesser Included Offense

Assuming, as discussed above, that an assault is not an essential element of Terrorism, there would be no lesser included offenses<sup>163</sup> in a prosecution for Terrorism. On the other hand, if it is determined that an assault necessarily is included in Terrorism, then of course Assault<sup>164</sup> would be a lesser included offense. However, the aggravated misdemeanor offense of Assault With Intent to Inflict a Serious Injury<sup>165</sup> would still not be a lesser included offense of Terrorism since Terrorism does not require a specific intent to cause a "serious injury," but instead requires an intent merely to "injure" or, alternatively, to "provoke fear or anger" in another.

## H. Harrassment

The gravamen of the new crime of Harrassment,<sup>166</sup> which has been characterized as consisting of "an assortment of petty annoyances,"<sup>167</sup> is the specific intent<sup>168</sup> "to intimidate, annoy or alarm another person."<sup>169</sup> No particular harm need result, however, for this crime to occur.

This single-grade simple misdemeanor offense<sup>170</sup> can be committed in any of four ways. Harrassment by annoying communications (e.g., by telephone) requires a showing of a lack of a legitimate purpose on the part of the person making such communications.<sup>171</sup> Harrassment by the placing of a simulated bomb in or near any occupied building or vehicle could criminalize activities involving only practical joking devices such as smoke or whistle bombs.<sup>172</sup> Harrassment by falsely ordering merchandise in another's name must be shown to have been done without the harassed person's knowledge or consent.<sup>173</sup> Harrassment can also be committed by knowingly<sup>174</sup> and

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162. See *id.* § 707.5(1) and text accompanying notes 915-36 *infra*.

163. See text accompanying notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

164. See IOWA CODE § 708.2(2) (1979) and text accompanying notes 1-18 *supra*.

165. See *id.* § 708.2(1) and text accompanying notes 56-69 *supra*.

166. *Id.* § 708.7. There are no Uniform Jury Instructions for this crime. See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 182-86.

167. J. YEAGER & R. CARLSON, *supra* note 12, § 182.

168. For an extensive discussion of specific intent as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

169. IOWA CODE § 708.7 (1979). This crime of general application, unlike that of Harrassment of Public Officers and Employees (under section 718.4 of the Code), protects any person.

170. See note 37 and accompanying text *supra*.

171. IOWA CODE § 708.7(1) (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 183.

172. IOWA CODE § 708.7(2) (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 184.

173. IOWA CODE § 708.7(3) (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 185.

174. For an extensive discussion of knowledge as a particularized state of mind, see text

falsely accusing another of criminal activity, either when no crime has occurred or when the accused did not commit it.<sup>176</sup> This latter type of conduct also constitutes the crime of Making False Reports to Law Enforcement Authorities.<sup>176</sup>

The Oregon Supreme Court<sup>177</sup> has declared unconstitutional a Harassment statute strikingly similar to section 708.7(1),<sup>178</sup> which criminalizes annoying communications without legitimate purpose. The gravamen of the Oregon offense was considered to be that the offender *communicated* rather than that he subjected the victim to some defined *injury*. Finally, the proscribed communication need not cause any harm, and only needs to have been "likely" to do so—whether defendant was aware of this likelihood or not.

### I. Going Armed with Intent

The only change made in the crime of Going Armed with Intent<sup>179</sup> was to substitute the general terminology of "any dangerous weapon"<sup>180</sup> for the pre-revised lengthy listing of specific weapons. The practical effect could be to include more weapons within the province of this offense.<sup>181</sup>

Specifically, this crime consists of: (1) going armed<sup>182</sup> (2) with a "dangerous weapon,"<sup>183</sup> (3) with the intent to use it, without justification, against another person. This is a specific intent crime, thus differentiating it from the crime of Carrying Weapons,<sup>184</sup> although the prosecution does not have to prove the *particular* person against whom the defendant intended to use the

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accompanying notes 572-601 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

175. IOWA CODE § 708.7(4) (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 186.

176. IOWA CODE § 718.6 (1979). See also IOWA CODE § 720.6 (1979) (Malicious Prosecution).

177. State v. Blair, 601 P.2d 766 (Ore. 1979).

178. The Oregon statute defines Harassment as "communicat[ing] with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a matter likely to cause annoyance or harm." 26 Crim. L. Rptr. 2331 (Ore. 1979).

179. IOWA CODE § 708.8 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 819-21; J. YEAGER & R. CARLSON, *supra* note 12, § 187.

180. See IOWA CODE § 702.7 (1979).

181. However, this expanded definition still is not broad enough to encompass a starting pistol. See State v. Lawr, 263 N.W.2d 747 (Iowa 1978).

182. "Going armed" encompasses conscious and deliberate keeping of a dangerous weapon on or about the person, and available for immediate use. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 821. The distance that an armed individual has gone from his home is relevant upon the element of intent in appropriate cases. This is a matter for the jury, rather than a question of sufficiency of evidence (for a motion for judgment of acquittal). State v. Buchanan, 207 N.W.2d 784 (Iowa 1973).

183. Under the UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 820, the jury is to decide if the particular weapon used by the defendant was a "dangerous weapon," as that term is defined in UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 218.

184. IOWA CODE § 724.4 (1979).

dangerous weapon.<sup>185</sup>

### 1. Non-Assault

Although this crime is included in the chapter on Assualts, an assault clearly is not an element of this crime. Going Armed with Intent is essentially an inchoate attempted murder provision, applicable in a situation where there is not a sufficient overt act for an Attempted Murder charge.<sup>186</sup> Indeed, the crime of Going Armed with Intent "is complete without any attempt having been made to use the weapon."<sup>187</sup>

### 2. Grading

This is a class D felony.<sup>188</sup> Significantly, however, it is not a "forcible felony."<sup>189</sup> This is because an assault is not a necessary element and thus Going Armed With Intent would not come within the interpretation of a felonious assault in *State v. Powers*.<sup>190</sup> Because it is not a "forcible felony," this offense is not subject to the five-year mandatory<sup>191</sup> minimum sentence for possession or use of firearms,<sup>192</sup> and is not an underlying felony for application of the felony murder rule to Murder in the First Degree.<sup>193</sup>

### J. Setting Spring Guns and Mantraps

A new crime of Setting Spring Guns and Mantraps<sup>194</sup> appears in section 708.9 of the Code, partly in response<sup>195</sup> to the well-publicized and highly controversial civil liability case of *Katko v. Briney*.<sup>196</sup> The elements of this offense are: (1) setting either a spring gun or mantrap (2) which is intended to be sprung by a person, and (3) which can cause such person "serious injury."<sup>197</sup>

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185. See *State v. Buchanan*, 207 N.W.2d 784 (Iowa 1973).

186. See *IOWA CODE* § 707.11 (1979).

187. See *TRAINING MANUAL*, *supra* note 14, at 49.

188. See note 65 *supra*.

189. See *IOWA CODE* § 702.11 (1979).

190. 278 N.W.2d 26 (Iowa 1979).

191. See also *IOWA CODE* § 909.1 (1979) and text accompanying notes 184-86 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

192. See *id.* § 902.7 and text accompanying notes 734-53 *infra*.

193. See *id.* § 707.2(2) and text accompanying notes 847-48 *infra*.

194. *IOWA CODE* § 708.9 (1979). There are no Uniform Jury Instructions for this crime. See generally *J. YEAGER & R. CARLSON*, *supra* note 12, § 188; *TRAINING MANUAL*, *supra* note 14, at 49.

195. Professor Yeager, the draftsman of the Iowa Criminal Code, reports that this provision was already included in early drafts of the proposed revised Code prior to the decision in *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971). See *J. YEAGER & R. CARLSON*, *supra* note 12, § 188.

196. 183 N.W.2d 657 (Iowa 1971).

197. See *IOWA CODE* § 702.18 (1979) and text accompanying notes 207-11 in Part I of this

The single grade of this offense is an aggravated misdemeanor,<sup>198</sup> irrespective of whether or not the spring gun or mantrap is ever set off. Unlike several other offenses, this crime does not include a built-in higher penalty schedule for firing of the devices or for any resultant personal injury. This singular approach has the desirable effect of avoiding double punishment for any personal injury caused by a spring gun or a mantrap. Of course, any resultant harm caused to a person would be punishable as a separate substantive offense, either as a homicide offense or an aggravated type of assault offense, depending upon the degree of injury and the particular surrounding circumstances.

## II. SEXUAL ABUSE AND RELATED SEXUAL MORALITY OFFENSES

### A. Overview

Unauthorized sexual activity and conduct involving proscribed sexual morality constitute thirteen offenses in the new Criminal Code. Five of these are new crimes. These include three new obscenity offenses (Sale of Hard Core Pornography,<sup>199</sup> Public Indecent Exposure,<sup>200</sup> and Sexual Exploitation of Children),<sup>201</sup> the prostitution-related offense of Pimping,<sup>202</sup> and the "visual assault" offense of Indecent Exposure.<sup>203</sup> The latter offense had not been punishable in Iowa since the pre-revised statute was declared unconstitutional in 1974.<sup>204</sup>

Major revisions were made in all of the pre-existing crimes, except for Detention in a Brothel.<sup>205</sup> The only minor change made in this obscure offense was to extend the coverage of involuntary prostitution in a brothel to males, instead of limiting it solely to females.

#### 1. "Sex Act"

Only one of the revised "sex" crimes—Incest<sup>206</sup>—requires sexual intercourse as an element of the offense. The newly-styled offense of Sexual Abuse<sup>207</sup> (which replaces the pre-revised offenses of Rape,<sup>208</sup> Statutory Rape,<sup>209</sup> and Carnal Knowledge of an Imbecile,<sup>210</sup> as well as recriminalizes

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Article, 29 DRAKE L. REV. 239 (1980).

198. See note 63 *supra*.

199. Iowa Code § 728.4 (1979). See text accompanying notes 519-27 *infra*.

200. *Id.* § 728.5. See text accompanying notes 442-65 *infra*.

201. *Id.* § 728.12. See text accompanying notes 504-18 *infra*.

202. *Id.* § 725.2. See text accompanying notes 413-21 *infra*.

203. *Id.* § 709.9. See text accompanying notes 442-65 *infra*.

204. *State v. Kueny*, 215 N.W.2d 215 (Iowa 1974).

205. Iowa Code § 709.7 (1979). See text accompanying notes 434-41 *infra*.

206. *Id.* § 726.2. See text accompanying notes 345-89 *infra*.

207. *Id.* §§ 709.1-4. See text accompanying notes 232-343 *infra*.

208. See Iowa Code § 698.1 (1977) (repealed 1978).

209. See *id.*

nonconsensual Sodomy)<sup>211</sup> no longer requires sexual intercourse. The *actus reus*—a “sex act”<sup>212</sup>—of the new offense can be committed also merely by making unlawful sexual *contact* instead of penetration. Similarly, application of the general term “sex act” to Prostitution<sup>213</sup> (and its related offenses) has also broadened the scope of that offense, which previously had been limited to “commercial” sexual intercourse.<sup>214</sup>

Although neither a “sex act” nor actual sexual intercourse is required for any of the other sex-related crimes, nevertheless a “sex act” is, or can be, an integral part of these offenses. Solicitation of a “child”<sup>215</sup> to commit a “sex act” is one of the proscribed activities punishable as Lascivious Acts With a Child.<sup>216</sup> Committing a “sex act” in the view of a third person is one of the two alternative ways to commit the offense of Indecent Exposure.<sup>217</sup> Finally, the five obscenity offenses include specialized definitions of “sex act” in their exhaustive enumerations of what constitutes obscene or pornographic material.<sup>218</sup>

## 2. *Special Protections of Children or Adolescents*

A major focus of attention in this series of sexual-related crimes is upon protection of children. No less than three different cut-off ages<sup>219</sup> for defining children (*i.e.*, under eighteen, under fourteen, and under twelve) are used in the various offenses, however, with no apparent reason. The most serious of these offenses is statutory sexual abuse<sup>220</sup> of a “child”<sup>221</sup> either by sexual intercourse or by mere sexual contact. The most significant change was that the age of “consent” for purposes of statutory sexual abuse was lowered as part of the Criminal Code revision from sixteen to fourteen. Moreover, a higher penalty schedule, indeed a class B felony,<sup>222</sup> attaches

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210. See *id.* § 698.3.

211. Iowa's pre-revised sodomy statute (IOWA CODE § 705.1 (1973)) had been declared unconstitutional in *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976), as an invasion of privacy through its regulation of consensual sodomitical acts performed in private by adults of the opposite sex.

212. See IOWA CODE § 702.17 (1979) and text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

213. *Id.* § 725.1. See text accompanying notes 397-412 *infra*.

214. See text accompanying notes 397-412 *infra*.

215. See IOWA CODE § 702.5 (1979) and text accompanying notes 145-46 in Part I of this Article, 29 DRAKE L. REV. 239 (1980), and notes 219-28 *infra*.

216. *Id.* § 709.8 (1979). See text accompanying notes 354-90 *infra*.

217. *Id.* § 709.9. See text accompanying notes 442-65 *infra*.

218. See text accompanying notes 489-90 *infra*.

219. For a statement of the general computational rule in determining age, see UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 915.

220. IOWA CODE § 709.4(3) (1979). See text accompanying notes 232-343 *infra*.

221. *Id.* § 702.5. See text accompanying notes 145-46 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

222. Regarding the penalty schedules and sentencing options for a class B felony, see text

when the youthful victim is under twelve.<sup>223</sup>

Sexual intercourse between an adult and an adolescent (defined here as a "minor" who nevertheless is not a "child," *i.e.*, either fourteen, fifteen, sixteen, or seventeen years old) thus is not criminal except for limited special circumstances. One of these is a familial relationship, and thus sexual intercourse between a parent and a "child" (or a stepparent and a "stepchild") would be punishable as Incest.<sup>224</sup>

Certain (but not all) sexual activity with children stopping short of "sexual contact"<sup>225</sup> is punishable nevertheless as Lascivious Acts With a Child.<sup>226</sup> The cut-off age for a "child" was lowered from sixteen to fourteen. Strangely, the offender must be eighteen or over, which makes this the only crime which cannot be committed by fourteen, fifteen, sixteen, and seventeen year old persons.

A new obscenity crime—Sexual Exploitation of a Child<sup>227</sup>—focuses upon exploiting "child" models for pornographic materials. The upper age limit for a "child" is fourteen. Contrastingly, two other obscenity offenses regulating access to obscene materials relate to "minors" (*i.e.*, under eighteen) instead of merely to "children" (*i.e.*, under fourteen).<sup>228</sup> This has the anomalous result that fourteen to seventeen year old youngsters can legally be exploited as models for "child" pornography yet are "protected" against gaining access to obscene materials.

### 3. Sexual Privacy

Sexual privacy is recognized only to a limited degree in the new Criminal Code. The crimes of Adultery<sup>229</sup> and Seduction<sup>230</sup> were eliminated, and consensual sodomitic acts between adults were not re-criminalized. Nevertheless, Prostitution<sup>231</sup> was not only retained as a crime but also was expanded by changing the crux of the offense from sexual intercourse to mere sexual contacts.

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accompanying note 49 *supra*. As to those for the lower class C felony, *see* text accompanying note 120 *supra*.

223. IOWA CODE § 709.3(2) (1979).

224. *Id.* § 726.2. *See* text accompanying notes 344-53 *infra*.

225. *See* State v. Baldwin, 291 N.W.2d 337 (Iowa 1980), as discussed in text accompanying notes 383-85, *infra*.

226. IOWA CODE § 709.8 (1979). *See* text accompanying notes 354-90 *infra*.

227. *Id.* § 728.12. *See* text accompanying notes 504-18 *infra*.

228. These offenses are Dissemination and Exhibition of Obscene Material to Minors and Admitting Minors to Premises Where Obscene Material Is Exhibited. *See id.* §§ 728.2-3 (1979) and text accompanying notes 481-91 *infra*.

229. *See* IOWA CODE § 702.1 (1977) (repealed 1978).

230. *See id.* § 700.1.

231. IOWA CODE § 725.1 (1979). *See* text accompanying notes 397-412 *infra*.

### B. Sexual Abuse

#### 1. Circumstances Making Sexual Contact Illegal

The gist of the newly-styled crime of Sexual Abuse<sup>232</sup> is unwarranted sexual contact. Generically, the elements of this offense are: (1) a "sex act"<sup>233</sup> (2) between two or more persons (3) either non-consensually by force<sup>234</sup> or against the will<sup>235</sup> of the other participant or consensually with certain types of other participants considered particularly vulnerable under the sexual abuse law. These special circumstances or characteristics of the other participant include: (a) being mentally defective;<sup>236</sup> (b) lacking "the mental capacity to know the right and wrong of conduct in sexual matters";<sup>237</sup> (c) being a "child"<sup>238</sup> (i.e., under fourteen); (d) being fourteen or fifteen and a member of the same household as the defendant;<sup>239</sup> (e) being fourteen or fifteen and related to the defendant by blood or marriage to the fourth degree;<sup>240</sup> (f) being fourteen or fifteen and being psychologically "coerced" into submission through the defendant's use of a position of authority;<sup>241</sup> and (g) being fourteen or fifteen and sexually participating, whether voluntarily or not, with a defendant who is at least six years older.<sup>242</sup>

#### 2. Actus Reus

A "sex act"<sup>243</sup> is conclusively defined in explicit detail in a general definitional clause, as either penetration or sexual contact with certain enumerated body parts. This broad definition thus represents a major change in

232. *Id.* §§ 709.1-4. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 901-12; J. YEAGER & R. CARLSON, *supra* note 12, §§ 204-14; R. PERKINS, *supra* note 12, at 152-70.

233. See IOWA CODE § 702.17 (1979) and text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980) and note 246 *infra*.

234. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 911; J. YEAGER & R. CARLSON, *supra* note 12, §§ 203-04.

235. *Id.* See also State v. Nathoc, 152 Iowa 665, 133 N.W. 129 (1911) (rape of woman rendered "insensible" by drugs); R. PERKINS, *supra* note 12, at 163.

236. See State v. Haner, 186 Iowa 1259, 173 N.W. 225 (1919); J. YEAGER & R. CARLSON, *supra* note 12, § 205; R. PERKINS, *supra* note 12, at 163-64.

237. State v. Haner, 186 Iowa 1259, 173 N.W. 225 (1919). See also J. YEAGER & R. CARLSON, *supra* note 12, § 206; R. PERKINS, *supra* note 12, at 163-64.

238. See IOWA CODE § 702.5 (1979) and text accompanying notes 145-46 in Part I of this Article, 29 DRAKE L. REV. 239 (1980); UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 912; J. YEAGER & R. CARLSON, *supra* note 12, §§ 206, 210.

239. See generally J. YEAGER & R. CARLSON, *supra* note 12, § 210.

240. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 909; J. YEAGER & R. CARLSON, *supra* note 12, § 212.

241. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 910; J. YEAGER & R. CARLSON, *supra* note 12, §§ 210-11.

242. See J. YEAGER & R. CARLSON, *supra* note 12, § 210.

243. See IOWA CODE § 702.17 (1979) and text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980), and note 246 *infra*.

this area of the criminal law by eliminating penetration as a required element and by combining several pre-revised offenses.<sup>244</sup>

### 3. Mental State

Like its principal predecessor crime of Rape,<sup>245</sup> Sexual Abuse is not a specific intent crime. All that is required is that the proscribed "sex act"<sup>246</sup> be performed either (1) by force or against the will of any person, (2) with a mentally-handicapped person, or (3) with persons under sixteen under various circumstances.<sup>247</sup> Thus, a specific intent to gratify sexual passions is not an element of the crime. Rather, as under the pre-revised crime of Rape, the only mental state required is a general criminal intent<sup>248</sup> which is supplied by the unauthorized act of sexual contact.<sup>249</sup>

### 4. Special Age Circumstances

As discussed above,<sup>250</sup> the revised crime of Sexual Abuse obviously provides special protection for children. Statutory sexual abuse in some instances also involves consideration of the age of the offender. The four different situations involving age considerations of one or both parties are as follows. A "sex act" between an offender who is six or more years older than the victim constitutes Sexual Abuse in the Third Degree<sup>251</sup> if the victim is either fourteen or fifteen. If, however, the victim is fourteen or fifteen but the offender is less than six years older, then the crime of statutory Sexual Abuse does not occur.

No considerations of a special minimal age of the offender are present, however, when the victim is a "child." Thus, an offender who is of the minimal general criminal responsibility age of fourteen<sup>252</sup> can be prosecuted ultimately for sexual abuse involving a "victim" who is only one year younger (i.e., thirteen). The particular age of the victim is important for grading purposes: Sexual Abuse in the Third (or lowest) Degree<sup>253</sup> occurs with a victim who is either twelve or thirteen, whereas Sexual Abuse in the (higher) Second Degree<sup>254</sup> occurs if the victim is only eleven or younger.

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244. See text accompanying notes 206-17 *supra*.

245. See Iowa Code § 698.1 (1977) (repealed 1978).

246. State v. York, 293 N.W.2d 13 (Iowa 1980) (revised law); State v. Pilcher, 158 N.W.2d 631, 637 (Iowa 1968).

247. See text accompanying notes 232-42 *supra*.

248. Regarding general intent as a state of mind, see text accompanying notes 471-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

249. State v. Pilcher, 158 N.W.2d 631, 637 (Iowa 1968).

250. See text accompanying notes 219-28 *supra*.

251. IOWA CODE § 709.4(5) (1979).

252. *Id.* §§ 232.8-45.

253. *Id.* § 709.4(3).

254. *Id.* § 709.3(2).

The principle under the pre-revised law<sup>255</sup> that mistake as to a child's age, albeit a reasonable mistake, was no defense to a charge of statutory rape is unchanged as to a new Code charge of Sexual Abuse with a Child. As explained in the Bar's Uniform Jury Instructions: "Lack of knowledge on the part of the person as to the actual age of the child would not be a defense to the crime charged. Likewise, it would be immaterial whether the person, at the time of such sex act, if any, may have believed the child was 14 [sic] years of age or older."<sup>256</sup>

##### 5. *Spousal Immunity*

One of the most intriguing questions under the new Iowa Criminal Code is whether or not a husband can be convicted of sexual abuse of his wife (or theoretically, vice versa). No clear answer is apparent on the face of the statute<sup>257</sup> in light of shoddy draftsmanship and an obvious political compromise. Application of standard canons of statutory construction results in a literal stand-off. The bottom line, thus, is that the determining factor should be the apparent legislative purpose, coupled with a public policy stressing modern concepts of justice and sanctity of the individual instead of remaining shackled to anachronistic sexual stereotypes of an age long gone by.

Although the usual starting point in analyzing the meaning of a statute is the statute itself, nevertheless in this instance, it is necessary to start with the common law. This is because at common law a husband could not be convicted for raping his wife.<sup>258</sup> Various rationales for this short sighted doctrine have been expounded, one of the more fundamental (albeit incredible) being that a wife was the property of the husband apparently to do with as he pleased, with or without her consent.<sup>259</sup> Consequently, a wife was not considered to be a person within the protection of the early rape laws.

The general approach in other jurisdictions has been that a rape statute

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255. See *State v. Newton*, 44 Iowa 45 (1876) (Assault With Intent to Commit Statutory Rape). See generally R. PERKINS, *supra* note 12, at 168. See also *Goodrow v. Perrin*, 403 A.2d 864 (N.H. 1979) (no constitutional infirmity via absence of a scienter requirement in state's statutory rape law).

256. *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 912.

257. See *IOWA CODE* § 709.4 (1979).

258. See *State v. Smith*, 148 N.J. Super. 219, 372 A.2d 386 (1977) and extensive authorities therein. See generally J. MILLER, *supra* note 30, at 300; R. PERKINS, *supra* note 12, at 156-57; Annot., 84 A.L.R.2d 1017, 1019 (1962).

259. See, e.g., *State v. Smith*, 148 N.J. Super. 219, 372 A.2d 386, 388 (1977), quoting Sir Matthew Hale, to wit:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract. [1 Hale, *Pleas of the Crown* 629 (1847)].

Perkins agrees, but argues that a more "modern" rationale would be that spousal rape does not meet the requisite of *unlawful* sexual intercourse, since sexual intercourse between spouses obviously is authorized by law. R. PERKINS, *supra* note 12, at 156.

must expressly include husbands within its coverage (e.g., "Rape is having carnal knowledge of a female, including one's wife, without her consent").<sup>260</sup> Absent such statutory enlargement, generally worded rape statutes have been held to not include a husband's non-consensual sexual attack on his wife.<sup>261</sup>

This question was never decided by the Iowa Supreme Court under the pre-revised law. The only reference, although tangential at best, to this matter was made in *State v. Morrison*.<sup>262</sup> The following jury instruction defining rape was given by the trial court, without pertinent comment, in the opinion in *Morrison*: "Rape is the act of sexual intercourse, accomplished with a female *not the wife of the perpetrator*, when she resists . . .".<sup>263</sup>

The central question then is whether the revised sexual abuse statute contains sufficient statutory enlargement to include husband-wife rapes. The only applicable mention is in section 709.4 which states that "[a]ny sex act between persons *who are not at the time cohabiting as husband and wife* is sexual abuse in the third degree by a person when the act is performed with the other participant in any of the following circumstances . . .".<sup>264</sup> This matter is not addressed in the definition of the generic offense itself in section 709.1.

An interesting twist is that section 709.1 as originally introduced in 1975 defined sexual abuse as "[a]ny sex act between persons *who are not husband and wife, or between a husband and wife who are not at the time cohabiting as husband and wife*, is sexual abuse by either of the participants when he performs the act with the other participant in any of the following circumstances . . .".<sup>265</sup> The italicized language was stricken by a conference committee. The import of this deletion<sup>266</sup> is that the legislative intent certainly was not to exclude husband-wife rapes. The interpretational problem, however, is that the additional italicized phrase merely would have codified the existing common law. So viewed, the practical effect of deleting the proposed additional phrase would be meaningless in light of the common law.

The General Assembly is presumed to know the state of the law, including the common law, at the time that it passes legislation.<sup>267</sup> Accordingly,

260. See *State v. Smith*, 148 N.J. Super. 219, 372 A.2d 386 (1977).

261. *Id.*

262. 189 Iowa 1027, 179 N.W. 321 (1920).

263. *Id.* at 1029, 179 N.W. at 322.

264. Iowa Code § 709.4 (1979) (emphasis added).

265. H.F. 85, § 901 (1975). The genesis of this legislative proposal was the Criminal Code Revision Study Committee's report, which defined sexual abuse as "[a]ny sex act between persons who are not man and wife . . .". See *Proposed Revision of Iowa Criminal Laws* § 901 (West pamphlet 1974).

266. The italicized language was stricken in item 1 of H.F. 5682 and in item 92 of S.F. 5603 during the legislative process in 1976.

267. *State v. Wilson*, 287 N.W.2d 587, 589 (Iowa 1980); *Iowa Civil Liberties Union v.*

legislative failure to change the common law leaves the common law principle in effect. Here, however, there is a strong indication that the General Assembly was not aware of the existing state of the law. Otherwise, why was the obvious stated in the italicized phrase set out above? A reasonable interpretation is that the legislative intent in subsequently deleting this phrase was to eliminate spousal immunity rather than merely to "tidy up" the terminology by eliminating surplus words. This deletion in section 709.1 was coupled with an amendment adding the co-habiting spousal immunity clause in section 709.4 which subsequently was passed.

The apparent legislative intent not to exclude spouses from the sexual abuse statutes becomes more clear when sections 709.1-4 are read, *in pari materia*, with sections 709.8-9 which define the related offenses of Lascivious Acts With a Child<sup>268</sup> and Indecent Exposure,<sup>269</sup> respectively. Complete spousal immunity is expressly included on the face of each of the latter two statutes. Thus, in S.F. 85, in its original form as introduced in 1975, complete spousal immunity was expressly included in all three of the related sexual activity offenses.<sup>270</sup> By subsequently eliminating the spousal immunity only as to the offense of Sexual Abuse, the General Assembly clearly intended to make husbands responsible for forcible rape (except for the corresponding limitation set out in section 709.4).

Another key point in resolving this question is that the general common law presumption of strict construction of statutes in derogation of common law has been expressly abolished by statute in Iowa.<sup>271</sup> Additionally, section 4.3 of the Code provides that Code provisions "shall be liberally construed with a view to promote [the Code's] objects and assist the parties in obtaining justice." These dual statutory provisions aid considerably in resolving the matter squarely upon legislative intent rather than hypertechnically on the actual legislative result because of shoddy draftsmanship. After all, a simple additional phrase in section 709.1, ("Any sex act between persons, *including husband and wife, is sexual abuse . . . .*") would have left no doubt.

With this legislative history and the underlying philosophical approach in mind, the following interpretation of this statute appears to be correct. A husband, whether or not co-habiting with his wife at the time, can commit Sexual Abuse in either the First or Second Degree on his wife; but only a husband who is not co-habiting can commit Sexual Abuse in the Third Degree on his wife. Thus, a non-cohabiting husband can be convicted of Sexual Abuse in any of the three degrees, just as if he no longer were married to his victim, whereas a co-habiting husband can only be convicted of Sexual

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Critelli, 244 N.W.2d 564 (Iowa 1976).

268. Iowa Code § 709.8 (1979). See text accompanying notes 354-90 *infra*.

269. *Id.* § 709.9. See text accompanying notes 442-65 *infra*.

270. See S.F. 85, §§ 901, 908, 907 (1975) (respectively).

271. Iowa Code § 4.2 (1979).

Abuse of his wife in the First or Second Degrees (i.e., when he does other aggravating acts than the mere forced "sex act").

The other possible statutory interpretation is that while a husband can never be convicted of Sexual Abuse in the First or Second Degrees, whether he is co-habiting with his wife at the time or not, nevertheless he can commit Sexual Abuse in the Third Degree, but only if he is not co-habiting. Thus, a husband who is co-habiting with his wife at the time of the forced sexual assault can never be convicted of any degree of Sexual Abuse and a non-cohabiting husband can only be convicted of the lowest degree of Sexual Abuse even though he has committed aggravating acts (e.g., caused "serious injury") otherwise sufficient for Sexual Abuse of a higher degree.<sup>272</sup>

The second alternative certainly does not make sense from a public policy standpoint. It would be ridiculous for the General Assembly to include a non-cohabiting husband within the rubric of the lowest degree of Sexual Abuse, but then immunize him from the two higher degrees. The fundamental change occurred with including husbands, whether co-habiting or not with their wives-victims, at all. Once that legislative hurdle was crossed, it is unreasonable to believe that the legislature intended not to hold a non-cohabiting husband also responsible for First or Second Degree Sexual Abuse.

Several canons of statutory construction militate somewhat against the foregoing conclusion. Nevertheless, their consideration should not change the ultimate result. First and foremost, penal statutes are to be construed strictly, with doubts resolved against the state.<sup>273</sup> Nevertheless, the obvious legislative intent should not be thwarted by giving strict adherence to this principle,<sup>274</sup> in light of clear evidence that the legislature thought it had not established spousal immunity (except as to the limited circumstances discussed above).

Secondly, because this revised statute purports to make a major change in the prior law (here, especially a principle of long standing) *Emery v. Fenton*<sup>275</sup> comes into play. In *Emery*, the supreme court characterized the new Criminal Code as "primarily a restatement" of prior law,<sup>276</sup> and accordingly, at least indirectly, established a presumption of non-change. Accordingly, the following interpretational approach is used. "Changes 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

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272. One commentator seemingly accepts this interpretation. See J. ROEHRICK, *supra* note 81, at 100-101. Another's position is unclear. See J. YEAGER & R. CARLSON, *supra* note 12, § 210. See also UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 908.

273. *State v. Nelson*, 178 N.W.2d 434 (Iowa 1970).

274. See generally *State v. Prybil*, 211 N.W.2d 308, 311 (Iowa 1973).

275. 266 N.W.2d 6 (Iowa 1978).

276. *Id.* at 8.

susceptible to two constructions."<sup>277</sup> Here, however, the legislature's *intent* to change the law was clear, as evidenced by the legislative history of the sexual abuse provisions as well as legislative action on related offenses.

Finally, even the statutory organization of the sexual abuse statutes may be important. Recall that the only mention of spousal immunity is in section 709.4 granting immunity to a charge of Sexual Abuse in the Third Degree for a cohabiting husband. If the sole basis for interpreting sections 709.2 and 709.3 to include cohabiting husbands within their coverage were that these two sections do not include comparable provisions, then *Emery v. Fenton* is applicable in another way. In *Emery*, the supreme court held that the pre-revised law denying bail in post-conviction relief proceedings was left unchanged in the revision process despite new Code section 811.1, which provides: "All defendants are bailable both before and after conviction, . . . except that a defendant convicted of a class 'A' felony shall not be admitted to bail while appealing such conviction [or seeking post-conviction relief]."<sup>278</sup>

Rejecting the petitioner's claim that this provision had the effect of authorizing bail for class B, C, or D felons in post-conviction proceedings, the court said that "[i]t is unreasonable to believe that the legislature would impliedly create an affirmative right in one group of persons solely by language expressly denying the right to another group."<sup>279</sup> The flip-flop of that principle may be that criminal liability can not be created passively or impliedly in some circumstances solely by an affirmative exemption clause covering other circumstances.

Even if this is a viable extension of *Emery*, nevertheless the legislative intent is clear that the amended section 709.1 provision included husbands, especially since a contrary provision was stricken. So viewed, then sections 709.1-3 affirmatively place criminal liability upon husbands, leaving section 709.4 as a mere exceptions clause.

Moreover, a New Jersey inferior court held<sup>280</sup> in 1977 that a husband could not be convicted of raping his wife under a statute<sup>281</sup> (similar to Iowa's pre-revised rape statute)<sup>282</sup> which was determined to be essentially declaratory of the common law offense.<sup>283</sup> That court examined the common law principles in detail<sup>284</sup> and correctly concluded that a husband was exempted

277. *Id.* at 10.

278. Iowa Code § 811.1 (1979) (emphasis added).

279. 266 N.W.2d at 10.

280. *State v. Smith*, 148 N.J. Super. 219, 372 A.2d 386 (1977).

281. The pertinent part provides: "Any person who has carnal knowledge of a woman forcibly against her will . . ." N.J. STAT. ANN. § 2A:138-1 (1977) (repealed 1978).

282. The pertinent part provided: "If any person ravish and carnally know any female by force or against her will . . ." Iowa Code § 698.1 (1977) (repealed 1978).

283. 148 N.J. Super. at \_\_\_, 372 A.2d at 391.

284. This court observed: This common law principal appears to have its genesis in a statement in Sir Mathew Hale's *Pleas of the Crown* wherein it is stated:

at common law.<sup>285</sup> Invoking the principle of statutory interpretation that "if a change in the common law is to be effected by statute, legislative intent to accomplish the change must be clearly and plainly expressed,"<sup>286</sup> the court determined that there was no statutory enlargement of the common law offense. Additionally, the court recognized the general principle of strict construction of statutes in derogation of common law, as well as that of strict construction of a penal statute "lest it be applied to persons or conduct beyond the [l]egislature's contemplation."<sup>287</sup> So construed, the court considered it immaterial that the statute referred to "carnal knowledge of a woman forcibly against her will,"<sup>288</sup> without specifically excluding a wife-victim from its proscription. Because of the common law background, the court intimated that the statute would have had to affirmatively *include* a spouse in order for it to apply to forcible sexual intercourse with a spouse.

This left one remaining perplexing question, to wit: "whether this court has the authority, power, or indeed the right to denounce and depart from existing law and, by [judicial] mandate, change it?"<sup>289</sup> Although making its feelings clear that it rejected both the traditional rationale and supportive policy arguments for husband immunity, the court nevertheless concluded that it "[lacked] the authority to simply ignore the settled principles of law that bind us and depart from the common law rule because, in our judgment, it is unfair and discriminatory, and thus create, with a sweep of the pen, criminal responsibility where none has heretofore existed."<sup>290</sup>

Iowa's new Sexual Abuse statute is distinguishable from New Jersey's Rape statute, although Iowa's pre-revised Rape statute was not. As detailed above, the Iowa legislature manifested its intent to abolish spousal immunity, unlike the New Jersey legislature. The bottom line, of course, is that the Iowa statute does expressly refer, albeitly inartfully, to spousal abuse, unlike New Jersey's statute. The exact extent of the spousal coverage in Iowa's Sexual Abuse statute is not entirely clear on the face of the statute itself, but (again as detailed above) it becomes sufficiently clear upon being analyzed according to the accepted standards of statutory construction. One significant difference between Iowa and New Jersey law in reaching theulti-

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But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract. [1 Hale, *Pleas of the Crown* 629 (1847)].

*Id.* at \_\_\_, 372 A.2d at 388.

285. This principle appears to have been universally accepted in the United States. See Annot., 84 A.L.R.2d 1017, 1019 (1962).

286. 148 N.J. Super. at \_\_\_, 372 A.2d at 392.

287. *Id.*

288. *Id.* (emphasis added).

289. *Id.* at \_\_\_, 372 A.2d at 391.

290. *Id.* at \_\_\_, 372 A.2d at 393. But cf. *Shook v. Crabb*, 281 N.W.2d 616 (Iowa 1979) (judicial abrogation of common law doctrine of interspousal immunity from *tort* liability).

mate conclusion is that Iowa has statutorily abolished the general (or common law) presumption of strict construction of statutes in derogation of common law. Indeed, section 4.2 of the Iowa Code mandates instead that a statutory provision "shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."<sup>291</sup>

In conclusion, the logical interpretation of the sexual abuse provisions is that a husband no longer enjoys statutory immunity for raping his wife, except for the one limited circumstance enumerated in section 709.4. That is, a husband has immunity from a charge of Sexual Abuse in the Third Degree for an act of forced sexual intercourse with an unwilling wife with whom he is presently cohabiting. A non-cohabiting (or estranged) husband does not enjoy such immunity by express language of the statute itself. On the other hand, even a cohabiting husband—like a non-cohabiting husband—does not enjoy immunity from Sexual Abuse of his wife in either the First or Second Degrees, in light of there being no accompanying immunity provisions in the corresponding sections 709.2 and 709.3.

The net effect is to immunize a cohabiting husband from prosecution for a "sex act" by force with his wife, while criminalizing a cohabiting husband's nonconsensual "sex acts" that are accompanied by severe aggravating circumstances. Moreover, complete protection from an estranged husband is afforded. This hybrid approach appears on balance to have been the result of political compromise between proponents of the total spousal immunity approach in the original bill and proponents of a total criminalization approach.

The legislative judgment in immunizing a husband under any circumstances is open to question. After all, spousal immunity is not recognized in other violent crimes, and sexual violence should not be treated any differently.

#### 6. *Felony Murder Rule*

The consolidation of many pre-revised offenses into the new crime of Sexual Abuse has the effect of broadening the scope of the application of the felony murder rule for Murder in the First Degree.<sup>292</sup> Only Rape (which included Statutory Rape) in this category of offenses was included as an underlying felony for this purpose under the pre-revised law.<sup>293</sup>

#### 7. *Attempted Sexual Abuse*

Unlike the pre-revised Rape law,<sup>294</sup> an attempted act of sexual abuse is included within the definition of the consummated offense of Sexual Abuse

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291. Iowa Code § 4.2 (1979).

292. Iowa Code § 707.2(2) (1979). See text accompanying notes 827-63 *infra*.

293. See Iowa Code § 690.2 (1977) (repealed 1978).

294. See *id.* § 698.1.

itself—provided that there is the requisite sexual contact. This would seem to require actual physical touching of *bare* genitalia, as, for example, intertwining of pubic hair.<sup>295</sup> Of course, the contact can be made via an artificial or substitute sexual organ.<sup>296</sup>

The crime of Sexual Abuse thus does not entirely encompass attempted sexual abuse within its definition. Although a "sex act"<sup>297</sup> does not require penetration, nevertheless "sexual contact" is required. To the extent that there is proof of such contact, the "attempt" is punishable identically to the consummated act. This, however, requires dangerous proximity to success.

Absent the requisite "sexual contact," the act of attempted sexual abuse is only punishable under the general, less-serious crime of Assault While Participating in a Felony.<sup>298</sup> This inchoate crime nevertheless requires an Assault.<sup>299</sup> The requisite assault can occur at any time from the preparatory stage to the escape stage,<sup>300</sup> however, but must be coterminous with the requisite specific intent to commit Sexual Abuse.<sup>301</sup>

This crime is the successor to the pre-revised offense of Assault With Intent to Commit a Felony.<sup>302</sup> Unfortunately, there is no specific attempted sexual abuse crime similar to the pre-revised crime of Assault With Intent to Commit Rape.<sup>303</sup> The result is that the maximum penalty for this type of conduct was reduced from twenty years, whether there was any collateral injury or not, under the pre-revised law to either ten years or five years depending upon whether any "serious injury"<sup>304</sup> was caused under the new Criminal Code.<sup>305</sup> A contrasting statutory change, however, has eliminated the availability under the pre-revised law of ameliorative sentencing alternatives,<sup>306</sup> and confinement may be mandatory under the new Iowa Code.<sup>307</sup>

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295. See *State v. Howard*, 284 N.W.2d 201 (Iowa 1979), which is discussed in text accompanying notes 309 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

296. IOWA CODE § 702.17 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 44, which states: "The reference to a substitute for an artificial sex organ is puzzling. Probably what is meant is 'an artificial sex organ or a substitute for a sex organ.'" *Id.*

297. See IOWA CODE § 702.17 (1979) and text accompanying notes 296-313 Part I of this Article, 29 DRAKE L. REV. 239 (1980).

298. *Id.* § 708.3. See text accompanying notes 70-106 *supra*.

299. *Id.* § 708.2(2). See text accompanying notes 30-35 *supra*.

300. *Id.* § 702.13 (general definitional clause for "participating in a public offense"); *State v. Johnson*, 291 N.W.2d 6 (Iowa 1980) and notes 74-76 *supra*.

301. See *State v. Pilcher*, 158 N.W.2d 631, 637 (Iowa 1968) (pre-revised offense of Assault With Intent to Commit Rape).

302. See IOWA CODE § 698.4 (1977) (repealed 1978); *State v. Johnson*, 291 N.W.2d 6 (Iowa 1980).

303. IOWA CODE § 698.4 (1977) (repealed 1978).

304. See IOWA CODE § 702.18 (1979) and text accompanying notes 204-95 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

305. *Id.* § 708.3.

306. That is, a deferred judgment, deferred sentence, or suspended sentence. See IOWA CODE § 907.3 (1979).

307. This depends upon whether or not Iowa Code § 909.1 (authorizing a fine in lieu of

### 8. Incest Contrasted

One form of Sexual Abuse in the Third Degree can also constitute Incest:<sup>308</sup> *viz.* a "sex act,"<sup>309</sup> consisting of actual intercourse, with a participant who is either 14 or 15 years old and related to the defendant by blood or by marriage to the fourth degree. Like all forms of Sexual Abuse in the Third Degree,<sup>310</sup> this is a class C felony<sup>311</sup> and even more importantly is classified as a "forcible felony."<sup>312</sup>

Incest, on the other hand, is only a class D felony<sup>313</sup> and quite significantly is not a "forcible felony."<sup>314</sup> Yet, Incest covers the same situation as part of a broader spectrum of criminalizing sexual intercourse between certain known relatives without any age restrictions as to the other participant. This apparently means that the legislature intended that an incestuous party (or parties) is to be punished more harshly for having a comparatively young (*i.e.*, fifteen or sixteen) partner than for other older (*i.e.*, seventeen and up) partners. In effect, this new twist creates a hybrid statutory sexual abuse-incest offense.

### 9. Grading

Sexual Abuse is graded into three degrees, ranging in penalties from class A to class C felonies.

Sexual Abuse in the First Degree<sup>315</sup> occurs only when "serious injury"<sup>316</sup>

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confinement or a suspended sentence) applies to "forcible felonies." See text accompanying notes 75-102 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

308. See IOWA CODE § 726.2 (1979) and text accompanying notes 345-53 *infra*.

309. *Id.* § 702.17 and text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

310. *Id.* § 709.4.

311. A class C felony is punishable by confinement for an indeterminate term not to exceed ten years and a fine not to exceed \$5,000. IOWA CODE § 902.9(3) (1979). If the particular offense is a "forcible felony," then the term of confinement must be imposed and cannot be suspended, and a fine apparently can be imposed only as a supplemental penalty (but cannot be imposed in lieu of mandatory confinement, notwithstanding § 909.1 of the Code). See text accompanying notes 70-102 in Part I of this Article, 29 DRAKE L. REV. 239 (1980). If the particular offense is not a "forcible felony," then confinement is not mandatory. Indeed, either a deferred judgment, a deferred sentence, or a suspended sentence of probation can be utilized as ameliorative "sentencing" devices in lieu of either confinement or a fine. See IOWA CODE § 907.3 (1979). In addition, a fine clearly can be imposed in lieu of confinement or a suspended sentence. See text accompanying notes 75-102 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

312. See note 128 *supra*.

313. See note 65 *supra*.

314. See note 128 *supra*.

315. IOWA CODE § 709.2 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 903-04; J. YEAGER & R. CARLSON, *supra* note 12, § 208; J. ROEHRICK, *supra* note 81, at 98.

316. See IOWA CODE § 702.18 (1979), and text accompanying notes 207-95 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

of another person is caused.<sup>317</sup> This refers to a collateral injury separate and apart from the pain of the forced "sex act" itself, although this does not require any separate act of violence. The general definition of "serious injury" encompasses disabling mental illness<sup>318</sup> that might accompany an especially brutal sexual assault or an attack on an especially mentally vulnerable person. How protracted the disablement period must be is left to judicial interpretation. That it need not be permanent is clear by reading, *in pari materia*, the accompanying phrase making serious *permanent* disfigurement<sup>319</sup> another type of "serious injury." Moreover, the "serious injury" apparently can be suffered by any person, as long as it occurs "in the course of committing sexual abuse."<sup>320</sup> An example of this could be a female victim's baby being seriously injured during the *res gestae* of the sexual abuse of the mother.

Pregnancy, *by itself*, does not appear to constitute "serious injury," as that term is restrictively defined in the Criminal Code.<sup>321</sup> Absent extraordinary aggravating circumstances, pregnancy of a sexual abuse victim would neither: (1) create "a substantial risk of death,"<sup>322</sup> (2) cause "serious permanent disfigurement,"<sup>323</sup> (3) cause a "disabling mental illness,"<sup>324</sup> or (4) cause "protracted loss or impairment of the function of any bodily member or organ."<sup>325</sup>

Four aggravating circumstances render a sexual abuse to be in the Second Degree,<sup>326</sup> a class B felony.<sup>327</sup> Two closely-related circumstances involve

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317. It appears that the "serious injury" does not need to have been *intentionally* caused under this statute. Cf. Iowa Code §§ 708.4 (Willful Injury by act "intended to cause and does cause serious injury"); 711.2 (Robbery in the First Degree when offender "purposely inflicts or attempts to inflict serious injury") (1979) (emphasis added).

318. See text accompanying notes 277-95 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

319. See text accompanying notes 228-65 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

320. IOWA CODE § 709.2 (1979).

321. The contrary result, reached in *People v. Sargent*, 86 Cal. App. 3d 148, 150 Cal. Rptr. 113 (1978), is distinguishable based upon the wording of the applicable California statute which defines the phrase "great bodily injury" in these very *general* terms: "significant and substantial bodily injury or damage." This compares to the four specific components of "serious injury" in Iowa's restrictive code section 702.18. Cf. *People v. Caudillo*, 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978) (mere act of forcible rape in and of itself does not constitute great bodily harm).

322. IOWA CODE § 702.18 (1979) (emphasis added). See text accompanying notes 215-27 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

323. *Id.* (emphasis added). See text accompanying notes 228-65 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

324. *Id.* (emphasis added). See text accompanying notes 277-95 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

325. *Id.* (emphasis added). See text accompanying notes 266-76 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

326. IOWA CODE § 709.3 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos.

violence or threatened violence: (1) displaying a "deadly weapon"<sup>328</sup> in a threatening manner and (2) using or threatening to use force creating a substantial risk of death or "serious injury" to the victim or another person (e.g., threatening to harm the victim's infant unless the mother-victim cooperated). Equating use of serious force with mere threats to use serious force is inexplicable, and seems out of line with the general scheme of the new Criminal Code in focusing upon actual harm done. Moreover, the inclusion of threatened "serious injury" just about pre-empts the field, leaving little for the residual category of Sexual Abuse in the Second Degree.

A third aggravating circumstance occurs when the defendant is aided or abetted by one or more persons. This is based upon greater harm to, and greater fear by the victim, with a lesser chance for escape. However, the grading would be more meaningful if the standard were two or more assailants. A prolonged gang attack definitely should be more harshly punished than an ordinary one-on-one, but should a single assailant and his lookout also *ipso facto* be subjected to very harsh penalties (i.e., an indeterminate sentence of twenty five years as opposed to ten years for an ordinary Sexual Abuse in the Third Degree).

A fourth aggravating circumstance occurs when the victim is under twelve. On the other hand, if the victim of a statutory sexual abuse is either twelve or thirteen, then the crime is only Sexual Abuse in the Third Degree.<sup>329</sup> Presumably, the legislative concern was that the younger the child the higher the risk of physical or emotional injury.<sup>330</sup>

Sexual Abuse in the Third (or lowest) Degree<sup>331</sup> is a residual provision covering unlawful sexual contact without the presence of any of the aggravating circumstances enumerated above. That is, this offense includes an ordinary rape of a nonconsenting adult, in addition to "sexual contact" with or without the consent of a person lacking in mental capacity, or with a "child," or with an adolescent of fourteen or fifteen years of age under lim-

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905-06; J. YEAGER & R. CARLSON, *supra* note 12, § 209; J. ROEHRICK, *supra* note 81, at 99.

327. A class B felony is punishable by confinement for an indeterminate term not to exceed 25 years. No fines are authorized. Iowa Code § 902.9(1) (1979). If the particular offense is a "forcible felony," then the term of confinement apparently must be imposed and cannot be suspended. If the particular offense is not a "forcible felony," then confinement is not mandatory. Indeed, either a deferred judgment, a deferred sentence, or a suspended sentence of probation can be utilized as ameliorative "sentencing" devices in lieu of confinement. See Iowa Code § 907.3 (1979).

328. See text accompanying notes 161-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

329. IOWA CODE § 709.4(3) (1979).

330. See J. YEAGER & R. CARLSON, *supra* note 12, § 209; J. ROEHRICK, *supra* note 81, at 99.

331. IOWA CODE § 709.4 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 907-12; J. YEAGER & R. CARLSON, *supra* note 12, §§ 210-13; J. ROEHRICK, *supra* note 81, at 100-101.

ited enumerated circumstances.<sup>332</sup> Of course, these types of sexual abuse must not be accompanied by any of the statutory aggravating circumstances. For example, statutory sexual abuse of a "child" constitutes Sexual Abuse in the Second Degree<sup>333</sup> if the defendant threateningly displays a "deadly weapon"<sup>334</sup> during a non-consensual sexual assault. Moreover, the offense would be raised to the First Degree<sup>335</sup> if either the "child" or a third person is caused "serious injury"<sup>336</sup> during the sexual assault, apparently whether or not the act of intercourse or "sexual contact" was voluntary on the child's part.

#### 10. *Penalty Schedules*

Considerable judicial discretion has been eliminated in the sentencing options available for Sexual Abuse under the new Criminal Code. Indeed, the options included for First and Second Degree offenses are fixed at life imprisonment and a twenty-five year indeterminate term, respectively.<sup>337</sup> No fines can be imposed and the options of a deferred judgment, a deferred sentence, and a suspended sentence are not available.<sup>338</sup> A ten-year indeterminate term of imprisonment, without benefit of a deferred judgment, a deferred sentence, or a suspended sentence, is prescribed for Sexual Abuse in the Third Degree, a class C felony.<sup>339</sup> This term apparently is mandatory, but if not, then a fine could be imposed as the sole penalty.<sup>340</sup> The sentencing judge may impose a fine in any amount up to a maximum of \$5000, in addition to if not in lieu of the term of confinement. No fines at all were authorized under the pre-revised law for Rape.<sup>341</sup>

One major change in the penalty aspects is that Sexual Abuse, unlike any of its predecessor offenses, now carries a mandatory term of imprisonment. A suspended sentence of probation was possible under the pre-revised law on Rape and Statutory Rape, although neither a deferred judgment nor a deferred sentence was. Neither of these two ameliorative sentencing op-

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332. These are set out in text accompanying notes 219-28 *supra*.

333. IOWA CODE § 709.3 (1979).

334. See text accompanying notes 161-179 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

335. IOWA CODE § 709.2 (1979).

336. *Id.* § 702.18. See text accompanying notes 207-95 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

337. A class A felony is punishable by mandatory confinement for life without parole. IOWA CODE § 902.1 (1979). Consequently, none of the ameliorative sentencing alternatives (*i.e.*, a deferred sentence, a deferred judgment, or a suspended sentence of probation) are available. *Id.* § 903.7. No fines are authorized. For class B felonies, see note 327 *supra*.

338. See IOWA CODE § 907.3 (1979).

339. See note 311 *supra*.

340. As to the applicability of IOWA CODE § 909.1 (1979) to "forcible felonies," see text accompanying note 128 *supra*.

341. See IOWA CODE § 698.1 (1977) (repealed 1978).

tions is available for Sexual Abuse. An even more restrictive change has occurred with offenses involving unlawful deviate sexual activity. For example, both of these ameliorative sentencing options were available for the pre-revised offenses of non-consensual Sodomy<sup>342</sup> and Carnal Knowledge of an Imbecile,<sup>343</sup> but neither is available under the successor offense of Sexual Abuse.

### C. Incest

Incest<sup>344</sup> remains as the only sexual activity which requires sexual intercourse as an element, unlike related offenses which are satisfied by mere sexual contact<sup>345</sup> rather than requiring penetration. In other words, the general definitional clause "sex act"<sup>346</sup> does not apply to Incest.

A few changes nevertheless were made in this crime. One change has restricted the number of relatives covered, with Incest extending only to sexual intercourse between persons related by consanguinity within the third degree, as opposed to the fourth degree under the former statute.<sup>347</sup> Moreover, the revised crime no longer extends to any relationships by affinity, such as marriage. This restriction of the prohibited parties to "the immediate family or blood relatives"<sup>348</sup> thus eliminates cousins as well as step-parent-stepchild relations. The latter, however, would be punishable under the separate crime of Sexual Abuse,<sup>349</sup> if and only if the stepchild is under fourteen.

Another change is that a mens rea component has been added, with the prosecution now required to prove that the defendant *knew* that the person with whom he was having sexual intercourse was related to him.<sup>350</sup> This scienter element extends only to knowledge of the particular familial relationship, and the defendant will not be excused for not knowing that sexual intercourse between such relatives is illegal. Scienter as to the familial relationship was not an element under the pre-revised statute, either on its face

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342. See *id.* § 705.1. But see *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976).

343. IOWA CODE § 698.3 (1977) (repealed 1978).

344. IOWA CODE § 726.2 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 2607-10; J. YEAGER & R. CARLSON, *supra* note 12, §§ 587-88; R. PERKINS, *supra* note 12, at 383-85. For a discussion of the background of the pre-revised law through the changes proposed in the 1974 bill, see Note, *Protection of the Family*, 60 IOWA L. REV. 560 (1977) [hereinafter *Family Note*].

345. See text accompanying notes 206-18 *supra*.

346. IOWA CODE § 702.17 (1979). See text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

347. See IOWA CODE § 704.1 (1977) (repealed 1978).

348. J. ROEHRICK, *supra* note 81, at 366.

349. See IOWA CODE § 709.1 (1979) and text accompanying notes 232-343 *supra*.

350. *Id.* See also *id.* § 726.2 (1979); UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2608.

or as interpreted.<sup>351</sup> This is a class D felony,<sup>352</sup> but is not a "forcible felony."<sup>353</sup>

#### D. Lascivious Acts With a Child<sup>354</sup>

The only change made in the pre-revised crime of Lascivious Acts With a Child<sup>355</sup> was the lowering of the cutoff age for a protected "child"<sup>356</sup> from sixteen to fourteen. This change corresponds with the lowering of the age of discretion (i.e., legal consent) for Sexual Abuse.<sup>357</sup> Consent of the child, of course, is immaterial.

This crime can be committed in several ways, including the acts of (1) fondling or touching a "child's" pubes or genitals; (2) permitting a "child" to fondle or touch one's pubes or genitals; (3) soliciting a "child" to engage in a "sex act";<sup>358</sup> (4) inflicting pain or discomfort upon a "child"; or (5) permitting a "child" to inflict pain or discomfort upon oneself. These acts must be accompanied by the specific intent<sup>359</sup> of arousing the sexual desires of either the adult defendant or the "child" victim.<sup>360</sup> This mens rea component could be difficult to prove, unless the trial courts are liberal in application of the idea of acts speaking for themselves.

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351. "Incest, as defined in the [pre-revised] statute, appears to be a strict liability offense, not including any element of knowledge or intent which must be proved by the prosecution for conviction." *Family Note, supra* note 344, at 568. This authority states:

It is not clear whether a lack of knowledge by the defendant of the familial relationship is a defense to an incest conviction. The Iowa Supreme Court has dealt with the issue by stating that the state need not affirmatively allege and prove knowledge, and leaving the issue of lack of knowledge as a defense for future decision.

*Id.* at 568 n.80 (citing *State v. Rennick*, 127 Iowa 294, 103 N.W. 159 (1905)). Another commentator states, "[u]nder the prior law, Incest was essentially a section of Strict Liability requiring only intercourse between two persons who could not validly marry. Under the adopted section, it appears that knowledge will be required, and therefore an intent as to intercourse occurring between the prohibited parties." *J. RORHRICK, supra* note 81, at 366.

352. See note 65 *supra*.

353. See note 128 *supra*.

354. IOWA CODE § 709.8 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 913-16; *J. YEAGER & R. CARLSON, supra* note 12, § 216.

355. IOWA CODE § 725.10 (1977) (repealed 1978).

356. See IOWA CODE § 702.5 (1979). See text accompanying notes 145-55 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

357. See *id.* §§ 702.5, 709.1. Cf. *id.* § 709.3(2) (age of consent lowered to 12 for more serious offense of Sexual Abuse in the Second Degree).

358. See *id.* § 702.17 and text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

359. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

360. *Id.* § 709.8. See *State v. Haines*, 259 N.W.2d 806 (Iowa 1977).

### 1. Age of the Offender

This is the only offense in the Iowa Criminal Code which can be committed only by persons eighteen or older.<sup>361</sup> This means that persons that are fourteen, fifteen, sixteen, or seventeen years old can *inter alia* fondle a "child" without committing this class D felony. Presumably this exemption was to immunize consenting teenage lovers "caught in the act." If so, the exemption paints with too broad a brush. After all, this unequivocal language immunizes a complete stranger during a chance, brief "encounter." So viewed, this immunity has to be a *casus omissus* not intended by the legislature. The alternative criminal offense in ordinary circumstances would be the simple misdemeanor<sup>362</sup> offense of Assault.<sup>363</sup> On the other hand, the comparable class D felony<sup>364</sup> offense of Assault While Participating in a Felony<sup>365</sup> could be available in special circumstances where there is evidence that the act of fondling was coterminous with an intent to commit statutory sexual abuse.

### 2. Marital Exception

"Lascivious" acts with an offender's "child" spouse are expressly exempted.<sup>366</sup> While this exemption technically is necessary to protect an adult spouse from being persecuted for having a "child" bride, nevertheless it seemingly goes too far in certain respects. One type of "lascivious" act involved infliction of pain upon a "child" with the intent of arousing the offender's sexual desires. Whereas the marital exception precludes the adult offender from being convicted of this class D felony offense, nevertheless he or she could be convicted of Assault<sup>367</sup> or an aggravated Assault if "serious injury" was either attempted<sup>368</sup> or inflicted.<sup>369</sup>

### 3. Lesser Included Offense

There are no lesser included offenses<sup>370</sup> for Lascivious Acts With a Child. This is because this crime can be committed in several alternative

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361. *But see Iowa Code* § 709.4(5) (1979) which includes as one of five alternative ways of committing Sexual Abuse in the Third Degree a voluntary "sex act" between a 14 or 15-year old person and a defendant who is six or more years older.

362. See note 37 *supra*.

363. *Id.* § 708.2(2). See text accompanying notes 1-197 *supra*.

364. See note 65 *supra*.

365. *Id.* § 708.3. See text accompanying notes 70-106 *supra*.

366. *Id.* § 709.8.

367. *Id.* § 708.2(2). See text accompanying notes 1-198 *supra*.

368. *Id.* § 708.2(1) (Assault With Intent to Inflict Serious Injury). See text accompanying notes 56-69 *supra*.

369. *Id.* § 708.4 (Willful Injury). See text accompanying notes 107-23 *supra*.

370. For a discussion of the standard for Lesser Included Offenses, see text accompanying notes 619-38 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

ways, thus not *requiring* either an assault or a solicitation (both of which otherwise constitute complete lesser crimes).

#### 4. *Interrelationship With Other Crimes*

The proscription in this offense against soliciting a "child" to engage in a "sex act" is an example of a specific solicitation statute. As such, the less-serious general crime of Solicitation<sup>371</sup> is not applicable here.<sup>372</sup> Moreover, if the solicited "sex act" is for compensation, then this offense would take precedence over the less serious crime of Prostitution,<sup>373</sup> an aggravated misdemeanor<sup>374</sup> which includes soliciting for prostitution. Of course, the more serious crime of Sexual Abuse<sup>375</sup> would occur if the solicited "sex act" is completed either by penetration or "sexual contact."

Attempted, but unsuccessful, sexual contact of the offender's pubes or genitals with a "child's" could constitute the crime of Assault While Participating in a Felony<sup>376</sup>—provided that an assault had occurred. While the latter is punishable as a class D felony,<sup>377</sup> the same as Lascivious Acts With a Child, nevertheless it is a "forcible felony"<sup>378</sup> unlike Lascivious Acts With a Child. Consequently, the "felonious assault"<sup>379</sup> offense, with its accompanying unavailability of all ameliorative sentencing alternatives, could be used for obtaining mandatory<sup>380</sup> confinement for unauthorized sexual activity with a thirteen-year old. In contrast, a suspended sentence is available for the lascivious offense, whereas a deferred judgment and a deferred sentence are barred only when the child victim is under twelve.<sup>381</sup>

Mere exposure of the offender's pubes or genitals to a child, however, is not a lascivious act. This misconduct would be punishable under the less severe general crime of Indecent Exposure,<sup>382</sup> and then only if the act of exposure was accompanied by the requisite intent.

Merely taking indecent liberties with children, however, does not con-

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371. IOWA CODE § 705.1 (1979). *See* text accompanying notes 757-830 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

372. For an example of application under the new Criminal Code of the general principal that the specific statute controls the general, *see* State v. Thompson, 253 N.W.2d 608, 609 (Iowa 1977). IOWA CODE § 4.7 (1979).

373. IOWA CODE § 725.1 (1979). *See* text accompanying notes 397-412 *infra*.

374. *See* note 37 *supra*.

375. IOWA CODE §§ 709.1-4 (1979). *See* text accompanying notes 232-343 *supra*.

376. *Id.* § 708.3. *See* text accompanying notes 70-106 *supra*.

377. *See* note 65 *supra*.

378. *See* IOWA CODE § 702.11 (1979) and note 128 *supra*.

379. *See* text accompanying notes 326-345 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

380. *See* text accompanying notes 70-74 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

381. *See* IOWA CODE § 907.3 (1979).

382. *Id.* § 709.9.

stitute Lascivious Acts With a Child when the improper conduct does not fit within the rubric of the statute. In *State v. Baldwin*,<sup>383</sup> 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."<sup>384</sup> The case was charged and prosecuted on the only possible basis of solicitation of a child to engage in a "sex act"—in light of there being no evidence of touching her genitals or of inflicting pain or discomfort upon her. 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" and held that the term "genitalia" (being limited only to the reproductive organs)<sup>385</sup> within the definition of "sex act" does not include a human breast. In such situations, the offense of Assault,<sup>386</sup> a simple misdemeanor,<sup>387</sup> clearly occurs. Whether or not this course of conduct would constitute the much more serious offense of Assault While Participating in a Felony,<sup>388</sup> a class D felony<sup>389</sup> and a "forcible felony,"<sup>390</sup> is an open question.

##### 5. Grading and Sentencing Options

As a class D felony,<sup>391</sup> this crime carries a maximum penalty of an indeterminate term of five years imprisonment and a fine of up to \$5,000. These maxima are the same as those under the pre-revised law.<sup>392</sup> Nevertheless, one major change was made.

Because this crime is not a "forcible felony,"<sup>393</sup> a deferred judgment or a deferred sentence is a sentencing alternative, except in cases in which the child is twelve or under.<sup>394</sup> This means that a deferred judgment is available only when a thirteen year old child is involved since a "lascivious act" with a fourteen year old is not a crime. This limited distinction seems unnecessary. Because of the sensitive nature of the criminal activity, it appears unwise to authorize a deferred judgment under any circumstances. Indeed, a suspended sentence is available under all circumstances and thus is an adequate ameliorative provision. Legislative oversight is the probable explanation for the twelve to thirteen age dichotomy. The provision barring a deferred judgment for lascivious acts with a child of twelve or under is a

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383. 291 N.W.2d 337 (Iowa 1980).

384. *Id.* at 339.

385. *Id.* at 340.

386. IOWA CODE § 708.2(2) (1979).

387. See note 37 *supra*.

388. IOWA CODE § 708.5 (1979).

389. See note 65 *supra*.

390. See notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

391. See note 65 *supra*.

392. See IOWA CODE § 725.10 (1977) (repealed 1978).

393. See notes 180-83 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

394. See IOWA CODE § 907.3(1)(a) (1979).

carryover from the pre-revised sentencing law,<sup>395</sup> whereas the pre-revised statute on Lascivious Acts With a Child encompassed children through the age of fifteen.<sup>396</sup>

### E. Prostitution and Related Offenses

#### 1. Prostitution

Prostitution<sup>397</sup> has been defined in the new Criminal Code as selling or purchasing services as a partner in a "sex act,"<sup>398</sup> or offering (i.e., attempting) to do so. The new definition has resulted in several changes in this law.<sup>399</sup>

The former female-only<sup>400</sup> crime of Prostitution has been extended not only to male customers, but also to male prostitutes and homosexual prostitution.<sup>401</sup> The concept of prostitution has also been expanded with the prohibited activity consisting of participation in a "sex act" which includes "sexual intercourse and certain sodomitic and homosexual activities"<sup>402</sup> (but not masturbation by hand)<sup>403</sup>—in other words, "most of the more active perversions."<sup>404</sup> The applicable terminology of "carnal knowledge" and "lewdness" in the former statutes<sup>405</sup> was much narrower in being limited to sexual intercourse and thus did not include deviate sex. On the other hand, the newly defined crime of Prostitution clearly is limited on its face to pecuniary type prostitution.<sup>406</sup>

This statute also encompasses soliciting done directly by the prostitute herself or himself,<sup>407</sup> but not solicitation done by a third party. The latter situation is included in the more serious separate offense of Pimping,<sup>408</sup> as

395. See *id.* § 789A.1 (1977) (repealed 1978).

396. See *id.* § 725.10 (1977) (repealed 1978).

397. Iowa Code § 725.1 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 2501-03; J. YEAGER & R. CARLSON, *supra* note 12, §§ 561-63; R. PERKINS, *supra* note 12, at 392-96.

398. See Iowa Code § 702.17 (1979) and text accompanying note 246 *supra*.

399. See Iowa Code §§ 724.1-2 (1977) (repealed 1978).

400. See *State v. Gardner*, 174 Iowa 748, 156 N.W. 747 (1916) (men could not be guilty of prostitution, but could be guilty of resorting to a house of ill fame for purposes of lewdness, under the forerunner to the since repealed Iowa Code § 724.1 (1977)).

401. J. YEAGER & R. CARLSON, *supra* note 12, § 563.

402. *State ex rel. Clemens v. Toneca, Inc.*, 265 N.W.2d 909, 913 (Iowa 1978).

403. *Id.*

404. J. YEAGER & R. CARLSON, *supra* note 12, § 563, at 141.

405. See Iowa Code §§ 724.1-2 (1977) (repealed 1978).

406. Cf. *State v. Willis*, 218 N.W.2d 921 (Iowa 1974) (nonpecuniary promiscuity included in common law meaning of prostitution); *State v. Price*, 237 N.W.2d 813 (Iowa 1976) (judicial gloss limiting Iowa's statute to prostitution for pecuniary gain).

407. See *State v. Walton*, 195 N.W.2d 100 (Iowa 1972) (former Iowa Code § 724.2 (1977), applied to solicitations made directly by prostitute and not to those just by third parties).

408. Iowa Code § 725.2 (1979).

discussed below.<sup>409</sup> Of course, any act of solicitation must proceed from the prostitute to an intended patron, rather than from a potential patron (albeit an undercover agent) to the prostitute, in order for the prostitute to be punished.<sup>410</sup> Under the revised Code, however, a solicitation via an offer to purchase a "sex act" made by a patron makes the patron guilty of the offense of Prostitution itself.

Prostitution is an aggravated misdemeanor.<sup>411</sup> This penalty compares favorably to the pre-revised felony. Nevertheless, the penalty level still is ridiculously high for a "victimless crime," especially in light of one grade of Involuntary Manslaughter<sup>412</sup> also being an aggravated misdemeanor. Equating recklessly causing the *death* of a person with a male soliciting a decoy "prostitute" or even a prostitute actually plying her trade is totally beyond reason.

## 2. *Pimping*

The new crime of Pimping<sup>413</sup> attaches, *inter alia*, to third party solicitation of patrons for a prostitute or to a third party knowingly sharing in the earnings of a prostitute. This crime can also be committed by knowingly<sup>414</sup> furnishing a place to be used for prostitution, whether or not for compensation. The breadth of this provision is evident in this comment by Professor Yeager: "A bar owner or bartender who permits prostitutes to solicit customers on the premises furnishes a place to be used for an act of prostitution, since the mere soliciting is such an act."<sup>415</sup>

This provision does not make sense when viewed in the context of the entire Code chapter on Prostitution. Pimping is a "non-forcible"<sup>416</sup> class D felony,<sup>417</sup> whereas Prostitution is only an aggravated misdemeanor.<sup>418</sup> One plausible explanation for treating soliciting by a pimp more harshly than direct soliciting by the prostitute is that the pimp "is not only furthering

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409. See text accompanying notes 413-21 *infra*.

410. *State v. Walker*, 247 N.W.2d 1 (Iowa 1976).

411. See note 63 *supra*.

412. See *Iowa Code* § 707.5(2) (1979) and text accompanying notes 915-36 *infra*.

413. *Iowa Code* § 725.2 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 2504-08; J. YEAGER & R. CARLSON, *supra* note 12, § 564.

414. See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 230 and text accompanying notes 572-601 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

415. J. YEAGER & R. CARLSON, *supra* note 12, § 564.

416. A non-forcible felony is subject to a full range of ameliorative sentencing alternatives (i.e., a deferred judgment, a deferred sentence, or a suspended sentence of probation) in lieu of the prescribed confinement or fine. See *Iowa Code* § 907.3 (1979). Moreover, it appears than whenever neither a deferred judgment nor a deferred sentence is granted (and thus a sentence is imposed) a fine can be the sole sentence instead of confinement or a suspended sentence. See *Iowa Code* § 909.1 (1979) and text accompanying notes 180-83 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

417. See note 65 *supra*.

418. See note 63 *supra*.

the prohibited activity, but is also victimizing the prostitute."<sup>419</sup> However, an unanswered question remains regarding how a cooperative bartender "victimizes the prostitute," so long as he is not getting his cut. A more logical crime to bring the bartender's non-compensated activity within the rubric of the law would be Leasing Premises for Prostitution,<sup>420</sup> which is merely a serious misdemeanor.<sup>421</sup>

### 3. Pandering

The gist of the newly constituted and renamed crime of Pandering<sup>422</sup> is recruiting "prostitutes,"<sup>423</sup> maintaining a "brothel,"<sup>424</sup> or "knowingly"<sup>425</sup> sharing in the income of a brothel.<sup>425.1</sup> As such, it combines several former statutes<sup>426</sup> into one crime with a uniform penalty, a "non-forcible"<sup>427</sup> class D felony.<sup>428</sup> One change has eliminated any age restrictions in defining the crime or in grading the penalty upward when minors are involved. The potential breadth of this crime is evident in the feasible observation by Professor Yeager that Pandering could be applied to "a landlord who rents premises with the knowledge that the tenant is keeping a brothel, particularly when he is collecting rent which would be considered grossly excessive if the premises were being put to any lawful use."<sup>429</sup>

### 4. Leasing Premises for Prostitution

Two changes were made to the statutory forerunner<sup>430</sup> to the crime of Leasing Premises for Prostitution.<sup>431</sup> One involves broadening of the place covered from a "house" under the former statute to "premises," defined as any building, boat, trailer, or other place offering shelter or seclusion. The principal change, however, as explained by Professor Yeager, is that "this section places the duty to act on the landlord as soon as he is aware of the

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419. J. YEAGER & R. CARLSON, *supra* note 12, § 564.

420. IOWA CODE § 725.4 (1979). *See* text accompanying notes 397-412 *supra*.

421. *See* note 40 *supra*.

422. IOWA CODE § 725.3 (1979). There are no Uniform Jury Instructions for this crime. *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 565.

423. *Id.* § 702.15. *See* J. YEAGER & R. CARLSON, *supra* note 12, § 42.

424. *Id.* § 702.4. *See* J. YEAGER & R. CARLSON, *supra* note 12, § 25.

425. *See* UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 230, and text accompanying notes 572-601 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

425.1. This crime "does not apply to one who recruits active prostitutes to work in a particular brothel or elsewhere." J. YEAGER & R. CARLSON, *supra* note 12, § 565.

426. *See* IOWA CODE §§ 724.3, .7, .9-.10 (1977) (repealed 1978).

427. *See* note 416 *supra*.

428. *See* note 65 *supra*.

429. J. YEAGER & R. CARLSON, *supra* note 12, § 565.

430. *See* IOWA CODE § 724.6 (1977) (repealed 1978).

431. IOWA CODE § 725.4 (1979). There are no Uniform Jury Instructions for this crime. *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 566.

use of the premises [for prostitution], and also requires him to be alert to signs that the premises are being used for prostitution."<sup>432</sup> As already noted, this is a serious misdemeanor.<sup>433</sup>

#### F. Detention in a Brothel<sup>434</sup>

This is an obscure offense which, although it is included in the chapter on Sexual Abuse and related offenses, nevertheless actually is an aggravated form of False Imprisonment<sup>435</sup> arising out of involuntary prostitution.<sup>436</sup> This crime can be committed in either of two ways, both equally punishable as a "non-forcible"<sup>437</sup> class C felony.<sup>438</sup> One form includes: (1) using force, intimidation, or false pretense (2) to entice another person (3) who is not a "prostitute"<sup>439</sup> (4) to enter a "brothel"<sup>440</sup> (5) with the intent to cause that person to become an inmate thereof. The other alternative consists of: (1) detaining another person whether a "prostitute" or not, (2) in a "brothel," (3) against his or her will, (4) with the intent that the person engage in prostitution therein. Both modes thus are specific intent crimes, and both apply to detention of males for prostitution in light of the neutral or genderless statutory definition of "prostitution."<sup>441</sup>

#### G. Indecent Exposure

The crime of Indecent Exposure<sup>442</sup> was resurrected in the new Criminal Code, after its predecessor version<sup>443</sup> had been voided for vagueness in 1974.<sup>444</sup> The actus reus of the revised crime can consist, in the alternative, of either (1a) exposure of one's genitals or pubes to another person other than one's spouse or (1b) commission of a "sex act"<sup>445</sup> in the presence or view of a

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432. J. YEAGER & R. CARLSON, *supra* note 12, § 566. See J. ROEHRICK, *supra* note 81, which states: "[I]t appears that the failure to terminate will provide a presumption of allowance or knowing continuation." *Id.* at 352.

433. See note 40 *supra*.

434. IOWA CODE § 709.7 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 215. There are no Uniform Jury Instructions for this offense. See note 12 *supra*.

435. IOWA CODE § 710.7 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 215.

436. See IOWA CODE §§ 702.15, 725.1 (1979).

437. See note 416 *supra*.

438. See note 311 *supra*.

439. See IOWA CODE § 702.15 (1979); J. YEAGER & R. CARLSON, *supra* note 12, § 42.

440. See IOWA CODE § 702.4 (1979); J. YEAGER & R. CARLSON, *supra* note 12, § 25.

441. See text accompanying notes 397-412 *supra*.

442. IOWA CODE § 709.9 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 917-18; J. YEAGER & R. CARLSON, *supra* note 12, § 217.

443. IOWA CODE § 725.1 (1977) (repealed 1978).

444. State v. Kueny, 215 N.W.2d 215 (Iowa 1974).

445. See IOWA CODE § 702.17 (1979) and text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980), and note 246 *supra*.

third person;<sup>446</sup> with the additional dual mens rea elements of both (2) intending to arouse or satisfy the sexual desires of either party and (3) knowing (or having reasonable basis for knowing) that such conduct is offensive to the viewer.<sup>447</sup> Indecent exposure thus is essentially a visual assault crime.

This new statutory version should pass constitutional scrutiny. Its predecessor had made it a crime for any person to "designedly make an open and indecent or obscene exposure of his or her person,"<sup>448</sup> without defining "indecent" or statutorily providing any "descriptions of proscribed ultimate criminal conduct."<sup>449</sup> Voiding the pre-revised statute, the Iowa Supreme Court considered the above quoted statutory language to be "so indefinite and uncertain that persons of ordinary intelligence are given inadequate notice as to what conduct is thereby prohibited."<sup>450</sup> Moreover, the supreme court saw "no plausible basis upon which peace officers, judges or juries may reasonably ascertain, with any degree of certainty, guidelines essential to a determination of the legislatively intended application of the statute here in question."<sup>451</sup> All doubt should be removed in the new statutory version, especially with the statutory definition of "sex act."<sup>452</sup>

### 1. Mens Rea

The scope of the prohibited activity under this section is restricted drastically by the *dual* particularized mens rea components. For example, an entertainer in an establishment with a liquor or beer license who performs acts prohibited under the section on Public Indecent Exposure<sup>453</sup> cannot be punished for Indecent Exposure in the face of the element of being offensive to the viewer. Moreover, a strip-in protest demonstration has already been held under the predecessor statute as not constituting Indecent Exposure because of the intent not being to arouse sexual desires of either party.<sup>454</sup> Likewise, either a drunk urinating in public or a "mooner" certainly should

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446. Note that the marital exception does not apply to this second alternative. See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 918.

447. See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 917 (definition of Indecent Exposure), 918 (elements).

448. *IOWA CODE* § 725.1 (1977) (repealed 1978).

449. *State v. Kuemy*, 215 N.W.2d 215, 218 (Iowa 1974).

450. *Id.* at 219. The court pointed out that its earlier interpretations of section 725.1 had not dealt with "facial constitutional construction," but instead with applicability of section 725.1 to specific conduct. See *State v. Nelson*, 178 N.W.2d 434 (Iowa 1970), *cert. denied*, 401 U.S. 923 (1971) (disrobing at public meeting as a means of social protest); *State v. Mitchell*, 149 Iowa 362, 128 N.W. 378 (1910) (conspiracy to induce virtuous females to meet males with intent to cause them to commit adultery and lewdness and to become prostitutes).

451. *Id.*

452. See *IOWA CODE* § 702.17 (1979) and text accompanying notes 296-313 in Part I of this Article, 29 *DRAKE L. REV.* 289 (1980), and note 246 *supra*.

453. See *id.* § 728.5.

454. *State v. Nelson*, 178 N.W.2d 434 (Iowa 1970).

know that his despicable conduct would be offensive to any viewer, intended or not, but certainly nobody's sexual desires should be aroused.<sup>455</sup> On the other hand, public nudity while not *per se* being criminalized<sup>456</sup> nevertheless under certain circumstances might come within the rubric of Indecent Exposure. Finally, the prosecution will, of course, have to prove intentional exposure as opposed to careless disrobing in the public view, as where a neighbor or passerby sees what appears to be an exhibitionist in front of a window in his or her own residence.<sup>457</sup>

## 2. Relationship to Other Crime

The gravamen of this offense is exposure of one's own genitals or pubes. If the *actus reus* consists instead of fondling or touching the genitals or pubes of another, then, of course, this crime does not occur. Rather, this would constitute the crime of Lascivious Acts With a Child<sup>458</sup> if done so with the requisite sexual desire, intent and with a victim under fourteen. The crime would either be simple Assault<sup>459</sup> or Assault While Participating in a Felony<sup>460</sup> (i.e., attempted Sexual Abuse),<sup>461</sup> depending upon the surrounding circumstances, if either of these two requisites is missing. Of course, if the defendant's pubes or genitals actually touch the victim's pubes or genitals, the extremely more serious crime of Sexual Abuse<sup>462</sup> would be complete even without penetration.

Unlike the offenses of Sexual Abuse and Lascivious Acts With a Child, this crime does not make special provision for children. That is, exposing oneself to a "child"<sup>463</sup> (e.g., a thirteen year old) is not *per se* a crime. In order to make this conduct punishable, it may be necessary to create a doctrine of implied offensiveness similar to implied consent under the statutory sexual abuse (Statutory Rape) provision. Otherwise, what if a "worldly" thirteen year old girl encourages a male flasher and thus is not at all offended by his performance? To avoid a possible *casus omissus*, an amendment making exposure to a minor an express way of committing this crime would be in order. Alternatively, the crime of Lascivious Acts With a Child could be amended to include exposure of one's genitals or pubes to a child.

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455. See generally *Cohen v. California*, 403 U.S. 15 (1971).

456. "Exposure *per se* is not prohibited by § 709.9." J. YEAGER & R. CARLSON, *supra* note 12, § 217.

457. See *State v. Perry*, 224 Minn. 346, 28 N.W.2d 851 (1947).

458. See *Iowa Code* § 709.8 (1979) and text accompanying notes 354-90 *supra*.

459. See *id.* § 708.2(2) and text accompanying notes 1-198 *supra*.

460. See *id.* § 708.3 and text accompanying notes 70-106 *supra*.

461. See *id.* § 709.1 and text accompanying notes 294-307 *supra*.

462. See *id.* §§ 709.1-4 and text accompanying notes 232-343 *supra*.

463. See *id.* § 702.5 and text accompanying notes 144.1-155 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

### 3. Grading

There is only one grade of this offense, which is a serious misdemeanor.<sup>464</sup> Unlike for the sex related offenses of Sexual Abuse and Lascivious Acts with a Child, a deferred judgment, a deferred sentence, and a suspended sentence are available sentencing options in all cases of Indecent Exposure.<sup>465</sup>

### H. Obscenity Offenses<sup>466</sup>

#### 1. Generally

Three new obscenity offenses have been added to the new Criminal Code, joining the two pre-revised offenses which were re-enacted verbatim. The latter two offenses consist of Knowingly Disseminating or Exhibiting Obscene Material to a Minor<sup>467</sup> and Knowingly Admitting a Minor to Premises Where Obscene Material is Exhibited.<sup>468</sup> Like these two offenses, one of the new crimes—Sexual Exploitation of Children<sup>469</sup>—is concerned only with protection of non-adults.<sup>470</sup> On the other hand, the two other new offenses—Sale of Hard Core Pornography<sup>471</sup> and Public Indecent Exposure<sup>472</sup>—relate to adults also. A widely varying statutory standard of objectionable material or conduct is included within the rubric of the “obscenity” chapter, including but not limited to, depiction of a “sex act,”<sup>473</sup> as that term is specially defined in chapter 728. Indeed, no fewer than three different specific definitions of “sex act” are used in these five obscenity offenses collectively. Each of these specific definitions is much broader than the same term as defined in the general definitional clause in section 702.17, using the latter’s underlying penetration or “sexual contact” merely as the definitional foundation.

The basic specific definition in this chapter<sup>474</sup> includes both actual and

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464. See note 40 *supra*.

465. *Id.*

466. There are no Uniform Jury Instructions for any of these five crimes. See J. YEAGER & R. CARLSON, *supra* note 12, §§ 621-40.

467. IOWA CODE § 728.2 (1979). See text accompanying note 481 *infra*.

468. *Id.* § 728.3. See text accompanying notes 499-503 *infra*.

469. *Id.* § 728.12. See text accompanying notes 504-18 *infra*.

470. There are age differences even as to these offenses. For purposes of the two offenses relating to making obscene material available to minors, a “minor” is a person under the age of 18. See *id.* § 728.1(6). Contrastingly, a child is defined in the provision on Sexual Exploitation of a Child as a person under the age of 14. See *id.* §§ 702.5, 728.12 and text accompanying notes 144.1-55 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

471. *Id.* § 728.4. See text accompanying notes 519-27 *infra*.

472. *Id.* § 728.5. See text accompanying notes 582-38 *infra*.

473. *Id.* § 702.17. See text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980), and note 246 *supra*.

474. *Id.* § 728.1(7).

simulated sexual contact similar to that in the general definitional clause in section 702.17, in addition to digital manipulation, bestiality, and oral-anal contact. This basic definition is used in the offenses of Dissemination and Exhibition of Obscene Material to Minors<sup>475</sup> and Admitting Minors to Premises Where Obscene Material Is Exhibited.<sup>476</sup>

A more restrictive definition of "sex act" is contained in the crime of Sale of Hard Core Pornography.<sup>477</sup> Herein, depiction of the requisite "sex act" as defined in section 728.1(7) must involve "sadomasochistic abuse, excretory functions, a child, or bestiality."<sup>478</sup>

The specific term "prohibited sexual act"<sup>479</sup> is extremely broad as the central factor in the crime of Sexual Exploitation of Children.<sup>480</sup> This specific term includes six separate acts in addition to a "sex act" as generally defined in section 702.17.

## 2. *Dissemination and Exhibition of Obscene Material to Minors*<sup>481</sup>

The elements of this serious misdemeanor<sup>482</sup> offense are: (1) knowingly (2) disseminating or exhibiting (3) obscene material (4) to a minor (5) by a person other than the minor's parent or guardian. This provision was re-enacted in the same form as its original passage in 1973.<sup>483</sup>

a. "Obscene." An unusual definition of obscenity is included in the new Criminal Code, as follows:

"Obscene material" is any material *depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse* which the average person, taking the material as a whole and applying contemporary community standards *with respect to what is suitable material for minors*, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.<sup>484</sup>

Although this definition incorporates the *Roth-Miller*<sup>485</sup> definition (the unitalicized portion of the above quote) for first amendment purposes, it also contains two additional limiting features (in the italicized portions). One is that obscenity is to be determined by "what is suitable material for

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475. *Id.* § 728.2. See text accompanying notes 481-98 *infra*.

476. *Id.* § 728.3. See text accompanying notes 499-503 *infra*.

477. *Id.* § 728.4. See text accompanying notes 519-27 *infra*.

478. *Id.* § 728.1(7).

479. *Id.* § 728.1(8).

480. *Id.* § 728.12. See text accompanying notes 504-18 *infra*.

481. *Id.* § 728.2 (1979). See YEAGER & R. CARLSON, *supra* note 12, § 631.

482. See note 4C *supra*.

483. See IOWA CODE § 725.2 (1977) (repealed 1978).

484. IOWA CODE § 728.1(1) (1979) (emphasis added).

485. See *Roth v. United States*, 354 U.S. 476 (1957), *modified sub nom.*, *Miller v. California*, 413 U.S. 15 (1973).

*minors.*<sup>486</sup> The other is that obscene material *per se* is not prohibited; rather only that obscene material relating to "the genitals, sex acts,<sup>487</sup> masturbation, excretory functions or sado-masochistic abuse."<sup>488</sup> This enumeration *appears* all-encompassing, but any activity or depiction beyond this listing would not be proscribed notwithstanding its obscene character under the *Roth-Miller* standard.

b. *Material.* "Material" is statutorily defined narrowly to include printed or written material (e.g., books, magazines, and newspapers), pictorial representations (e.g., photographs, pictures, drawings, and motion pictures), statues, and recordings.<sup>489</sup> So defined, this does not include oral communications and live performances.<sup>490</sup>

c. *Exhibiting.* The act of exhibiting is quite broad under this provision, since it includes exhibiting obscene material "so that it can be observed by a minor on or off the premises where it is displayed."<sup>491</sup> This provision thus places an affirmative duty on a merchant to keep this material "under wraps," especially in terms of a display open to public view. It is not clear whether this provision is meant to include *any person* (other than the minor's parent or guardian) who merely shows ("exhibits") obscene material to minors in private, as opposed to a commercial "exhibition" in a store or pornography shop. This provision is not limited to a commercial setting in light of the broad language of "any person." The gravamen of this offense is exposure of minors to objectionable or harmful material, and the setting of the exhibition, whether private or commercial, should be of no consequence. Nevertheless, parents or guardians are expressly exempted from the reach of this statute, while interestingly, spouses are not.

d. *Dissemination.* The act of disseminating consists of a mere physical

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486. The concept of addressing obscenity standards to material suitable for minors was upheld in *Ginsberg v. New York*, 390 U.S. 629 (1968). However, as made clear in *Pinkus v. United States*, 436 U.S. 293 (1978), children are not to be included as part of the local community in applying "contemporary community standards" under an obscenity statute of general applicability (i.e., to both adults and minors). There is no *Pinkus*-type problem with Iowa Code §§ 728.2-3 (1979), of course, in light of their application being limited to minors.

487. A specific definitional clause defining "sex act" for purposes of the obscenity offenses appears at Iowa Code § 728.1(7) (1979). See also text accompanying note 246 *supra*.

488. See *id.* § 728.1(5) (1979).

489. *Id.* § 728.1(2) (1979). See *Kaplan v. California*, 413 U.S. 115 (1973) (nonpictorial representation of conduct can be obscene under first amendment standards).

490. "The exclusion of oral obscenity would appear to be a practical one, but the failure to include live performances was in all probability an oversight." J. YEAGER & R. CARLSON, *supra* note 12, § 631. The anomaly of this is pointed out by Professor Yeager, in his discussion of Iowa Code § 728.3 (1979), to-wit: "Note that because of the definition of obscene material, it is a violation of this section to sell to a minor a ticket to a theater exhibiting a sexually explicit moving picture, or to admit him to the premises, but it is not a violation to sell him a ticket or to admit him to a carnival show exhibiting the same acts in a live performance." J. YEAGER & R. CARLSON § 632, at 157.

491. Iowa Code § 728.2 (1979).

*transfer* of possession. Thus, no consideration is necessary, nor is it necessary for the transferee to receive *permanent* possession.<sup>492</sup>

e. *Knowledge*. *Scienter* is an element of the crime, with the defendant statutorily (and constitutionally)<sup>493</sup> required to be "aware of the character of the matter"<sup>494</sup> which he is charged with disseminating or exhibiting. Whether actual knowledge of the obscene contents of the materials will need to be proven, or whether such culpable knowledge can merely be inferred, could depend upon the reputation of the particular medium (e.g., magazine), the type of business and experience of the defendant, and the nature of the advertising involving the medium.<sup>495</sup>

f. *Specific Affirmative Defense*. It is an affirmative defense<sup>496</sup> that not only did the defendant reasonably believe that the minor involved was not underaged, but also that the minor either (a) exhibited false proof of his age, or (b) was accompanied by an adult parent or an adult spouse.<sup>497</sup> Thus, a seller of obscene material must only make a good faith attempt to prevent sales (or exhibiting) to minors in order to come within the protection of this defense. However, the burden is upon the seller to establish his good faith attempt based upon the bi-partite test set out above. Strangely, this defense applies only to this offense and not to the related offense of Admitting Minors to Premises Where Obscene Material is Exhibited.<sup>498</sup>

### 3. *Admitting Minors to Premises Where Obscene Material is Exhibited*<sup>499</sup>

The elements of this serious misdemeanor<sup>500</sup> offense are: (1) knowingly; (2a) admitting or (2b) providing a pass for; (3) a minor; (4) to premises where obscene material is exhibited. This provision was re-enacted verbatim from the prior code.<sup>501</sup>

The gist of this offense is the act of admitting minors onto premises where obscene material is exhibited. The concept of admitting is quite broad, including providing a pass for admittance. Thus, ticket sellers at X-

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492. "Disseminate" means to transfer possession" with or without consideration. *Id.* § 728.1(3).

493. See *Smith v. California*, 361 U.S. 147 (1959).

494. *IOWA CODE* § 728.1(4) (1979).

495. *J. YEAGER & R. CARLSON*, *supra* note 12, § 631.

496. This is the only defense denominated as an "affirmative defense" in the entire Criminal Code. This lends some support to the argument that the legislative intent is that all of the other "defenses" are to be considered differently than this one "affirmative defense." That all-important difference can very well be in allocation of the burden of proof (with defendant bearing the burden of proof only as to an "affirmative defense").

497. See *IOWA CODE* § 728.10 (1979). See generally *J. YEAGER & R. CARLSON*, *supra* note 12, § 639.

498. *IOWA CODE* § 728.3 (1979). See text accompanying notes 499-503 *infra*.

499. *Id.* § 728.3. See generally *J. YEAGER & R. CARLSON*, *supra* note 12, §§ 631-32.

500. See note 40 *supra*.

501. See *IOWA CODE* § 728.3 (1977) (repealed 1978).

rated movies are within the provision's proscription. Concomitantly, actual exposure to the obscene material is not a *sine qua non* of this offense.<sup>502</sup>

Unlike the offense of Dissemination and Exhibition of Obscene Material to Minors,<sup>503</sup> there is no exemption for parents or guardians of the minors involved. This means that parents or guardians could be guilty of providing a pass to their minor children or minor wards for entry into a place for or including exhibition of obscene material. Moreover, an operator of a "porn shop" cannot legally admit his minor child or minor ward onto his premises. On the other hand, the term "premises" seemingly should be read as being limited to commercial premises. Clearly, the legislative intent was to include X-rated theaters and porno book shops, and not a private residence. That is, a parent or guardian would not be guilty of this offense merely by having obscene material on the premises. A more difficult question arises when a legitimate business (e.g., a drug store) incidentally sells obscene magazines. Obviously, the manager of a drug store could not be prosecuted for the mere admittance of a minor onto the premises. On the other hand, such a manager could very well have a duty to take certain precautions to see that obscene material is not made available to minors. This could include special packaging as well as tight restrictions on browsing.

#### 4. *Sexual Exploitation of Children*

The new crime of Sexual Exploitation of Children<sup>504</sup> was passed in 1978,<sup>505</sup> as an addition to the new Criminal Code. With its focus upon "children"<sup>506</sup> rather than "minors,"<sup>507</sup> this provision only protects persons under age fourteen.

The gravamen of the offense is commercially photographing a child involved in a "prohibited sexual act" or a simulated "prohibited sexual act." A "prohibited sexual act"<sup>508</sup> is statutorily defined much more broadly than "sexual act"<sup>509</sup> is defined for purposes of either of the two obscenity offenses relating to minors or for Sexual Abuse. Any of the following constitute a "prohibited sexual act": (1) a "sex act" as defined in the general definitional clause applicable to the entire Criminal Code<sup>510</sup> (and thus to Sexual

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502. "It is not necessary that the minor actually receive or observe the obscene material. This offense is complete when he is admitted to any place where obscene material is exhibited." J. YEAGER & R. CARLSON, *supra* note 12, § 632.

503. IOWA CODE § 728.2 (1979). *See* text accompanying notes 481-98 *supra*.

504. *Id.* § 728.12. *See* J. YEAGER & R. CARLSON, *supra* note 12, § 641.

505. 1978 IOWA ACTS 2d Sess. ch. 1188.

506. *See* IOWA CODE § 702.5 (1979). *See* text accompanying notes 144.1-55 in Part I of this Article, 29 DRAKE L. REV. 239 (1980), and notes 219-28 *supra*.

507. *Id.* § 728.1(6).

508. *Id.* § 728.1(8).

509. *Id.* § 728.1(7).

510. *Id.* § 702.17. *See* text accompanying notes 296-313 in Part I of this Article, 29 DRAKE L. REV. 239 (1980), and 246 *supra*.

Abuse)<sup>511</sup> rather than as defined specifically in the two obscenity offenses relating to minors; (2) acts of bestiality involving a child; (3) acts of sadomasochistic abuse involving a child; (4) "lascivious"-type acts<sup>512</sup> of fondling or touching of the pubes or genitals of a child or of another person by a child; or (5) nudity of a child.<sup>513</sup>

An offender can commit this crime either by being involved in the photographing itself, or by being a child's parent or guardian and knowingly permitting or otherwise causing the child to engage in the prohibited acts while knowing or intending that the act or simulated act will be photographed for commercial purposes. The legislative intent to prohibit the reportedly growing business of child models for pornography magazines is apparent in the limiting language in the statute itself, which refers to the sex act or simulated sex act being "photographed, filmed, or otherwise preserved in a negative, slide, book, magazine, or other print or visual medium."<sup>514</sup>

Unlike the offense of Dissemination and Exhibition of Obscene Material to Minors,<sup>515</sup> this offense does not recognize a defense of reasonable mistake as to age of the child. This differentiation is explainable in light of the gravity of the offense of Sexual Exploitation of Children, similar to the essentially strict liability approach of the offense of Sexual Abuse of a Child.<sup>516</sup>

This is a class C felony,<sup>517</sup> but is not a "forcible felony."<sup>518</sup> It is the only obscenity offense which is a felony.

##### 5. *Sale of Hard Core Pornography*<sup>519</sup>

Unlike the two pre-revised offenses relating to merely obscene material which applied only to exhibition or distribution to minors, and the new offense of Sexual Exploitation of Children, the new Code criminalizes the sale of hard core pornography to anyone, including adults. The elements of this simple misdemeanor<sup>520</sup> offense are: (1) knowingly;<sup>521</sup> (2) selling or offering for sale;<sup>522</sup> (3) material depicting a "sex act";<sup>523</sup> (4) which involves either

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511. *Id.* § 709.1. See text accompanying notes 232-343 *supra*.

512. *Id.* § 709.8. See text accompanying notes 354-90 *supra*.

513. Public nudity *per se* is not a crime, however.

514. 1978 Iowa Acts 2d Sess. ch. 1188, § 1.

515. IOWA CODE §§ 728.2, .10 (1979). See text accompanying notes 481-98 *supra*.

516. See text accompanying notes 221-23 *supra*.

517. See note 311 *supra*.

518. See text accompanying note 128 *supra*. Because this offense is not a "forcible felony," it appears that IOWA CODE § 909.1 (1979) (authorizing a fine as an alternative penalty) definitely applies.

519. IOWA CODE § 728.4 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 633.

520. See note 37 *supra*.

521. Regarding knowledge as a state of mind, see text accompanying notes 572-601 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

522. IOWA CODE § 728.1(7) (1979). See text accompanying note 246 *supra*.

"sado-masochistic abuse,"<sup>523</sup> excretory functions, a "child"<sup>524</sup> (i.e., under fourteen), or bestiality; and (5) which also is obscene under the *Roth-Miller* "contemporary community standards" test.<sup>525</sup>

The prohibited activity is sale or offering for sale, and thus mere possession itself will not be illegal—either by the customer or apparently by the distributor who has not at least impliedly offered hard core pornography for sale (e.g., in storage but not on the display for sale counter). Moreover, "[m]aking such material available on a non-remuneration basis does not violate this section, nor does it appear that the rental of this material is prohibited."<sup>526</sup>

Unlike Justice Stewart's imprecise, albeit perceptive, standard of knowing pornography "when he sees it,"<sup>527</sup> this statute contains a detailed tripartite definition. First and foremost, there must be a "sex act," as specifically defined in section 728.1(7) of the Code. Secondly, not all "sex acts" qualify, but rather only those involving either sado-masochistic abuse, excretory functions, a child or bestiality. Finally, there unbelievably *also* must be a finding of obscenity under the *Roth-Miller* standards. This suggests that there could be material depicting a "sex act" involving either sado-masochistic abuse, excretory functions, a child, or bestiality which is not obscene.

#### 6. *Public Indecent Exposure*<sup>528</sup>

The other new crime in chapter 728 of the new Criminal Code is Public Indecent Exposure, which is a serious misdemeanor.<sup>529</sup> It is not tied to any obscenity standard whether for minors or adults. As Professor Yeager points out: "The performance, exhibition or display need not appeal to the prurient interest, be patently offensive, nor must it lack serious literary, scientific, political or artistic value."<sup>530</sup> In fact, he notes that this section was included in chapter 725 on Vice, instead of chapter 728, in the Criminal Code bill as passed by the General Assembly in 1976. The transfer was made in the editing process by the Legislative Service Bureau. The substantive problem with this transfer is that one aspect of this crime involves a "sex act" and chapter 728 contains a specific definitional clause whereas chapter 725 does not. As passed, the legislature used the general definition of "sex act" in section 702.17 of the Code by using the general term "sex act" without providing a special definition. The two definitions differ in that the gen-

523. *Id.* § 728.1(5).

524. *Id.* § 702.5. See text accompanying notes 144.1-55 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

525. See note 489-90 *supra*.

526. J. YEAGER & R. CARLSON, *supra* note 12, § 633.

527. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion).

528. IOWA CODE § 728.5 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 634.

529. See note 40 *supra*.

530. J. YEAGER & R. CARLSON, *supra* note 12, § 634.

eral definition does not include simulated sexual contact in any form, bestiality, digital manipulation, or oral-anal contact. Unfortunately for the practitioner, the Code makes no reference to this transfer in the "scope notes" following each section in the Criminal Code.

The subject of this offense is limited to the owner or operator of a premises with a liquor or beer license. The prohibited activity is allowing or permitting *any* of the following acts by performers or patrons: (1) actual or simulated public performance of any "sex act" upon the premises; (2) exposure of the genitals, buttocks or *female* breast of a waiter/waitress; (3) exposure of the genitals or *female* breast nipple of any entertainer (whether paid or not); (4) allowing any person who publicly exposes his or her genitals, pubic hair or anus to remain on the premises; or (5) displaying of films or pictures depicting any "sex act" or display of pubic hair, anus, or genitals. These very activities can legally occur on premises which do not have a liquor or beer license.

The license-holder and manager thus have a duty to prevent any of these prohibited activities and exhibitions from occurring on the premises—whether by entertainers, waitresses or waiters, or even patrons. Of course, strict liability should not attach, in light of the statutory language "allow or permit." This does mean, however, that the supervisory person must take decisive corrective action to prevent recurrence of any such incidents.

This section does not speak at all to the nude entertainer, etc. Because there is no general public nudity crime in Iowa, any criminal responsibility of an entertainer, etc., would have to come under the crime of Indecent Exposure.<sup>531</sup> However, a prosecution under this offense would be impractical because of the element of specific intent "to arouse or satisfy the sexual desires of either party," as well as the actor knowing that "the act is offensive to the viewer."<sup>532</sup>

One definitional problem with this new statute has surfaced already. This involves what "nudity" is, when "viewed" in the context of small patches of scotch tape over a stripper's nipples. Moreover, the exact contours of what constitutes a nipple present a problem of proof under this provision.<sup>533</sup>

a. *Constitutionality.* The constitutionality of this section has been upheld by the Iowa Supreme Court. In *Three K.C. v. Richter*,<sup>534</sup> the court fol-

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531. Iowa Code § 709.9 (1979).

532. *Id.* (emphasis added).

533. An example of this definitional problem can be found in a recent arrest reported in the Des Moines Tribune, 12-22-78, p. 23. The story read: "Magistrate George Stein Thursday found Diana Neubauer, 24, a Des Moines go-go dancer, innocent of a charge of indecent exposure. Tama Police officer Dennis Purdy filed the charge after watching Neubauer perform at Bill's place in Tama this week. The dancer denied the charge." *Id.*

534. 279 N.W.2d 268 (Iowa 1979).

lowed the lead of the Supreme Court of the United States<sup>535</sup> 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.<sup>536</sup> 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."

b. *Exceptions.* Section 728.5 excepts from its coverage "a theater, concert hall, art center, museum, or similar establishment." The constitutionality of this exceptions clause was upheld in *Three K.C. v. Richter*<sup>537</sup> against contentions of denial of equal protection and void for vagueness.

At first blush, these exceptions appear unnecessary in light of the practical consideration that the requisite specific intent would generally be lacking in a legitimate theatrical performance involving nudity. The practical result of this legislation's stating of the obvious in this exceptions clause may be to legitimatize public nudity, in its barest essentials, in such enterprises as burlesque theaters and nude model encounter establishments.<sup>538</sup> And, of course, any of these exempted businesses can promote acts of public indecent exposure even if they have liquor licenses.

### III. KIDNAPPING AND RELATED OFFENSES

#### A. *Kidnapping*<sup>539</sup>

The pre-revised crime<sup>540</sup> of Kidnapping<sup>541</sup> has been changed in several respects, although still essentially maintaining its common law character of being an aggravated form of False Imprisonment.<sup>542</sup> The actus reus of the revised offense expressly can consist either of confining a person or removing a person "from one place to another" (either within or outside of Iowa),<sup>543</sup> with the attendant circumstance of knowingly<sup>544</sup> doing so without

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535. *California v. LaRue*, 409 U.S. 109 (1972).

536. *Id.* at 118-19.

537. 279 N.W.2d 288 (Iowa 1979).

538. A Des Moines municipal ordinance tracking section 728.5 of the Code has been interpreted by a district associate judge as not applying to live on-stage stripping in a triple-X movie theater. The ruling concludes that it is not public exposure to dance nude in a licensed theater in Des Moines. *City of Des Moines v. Sandee Sedlacek*, Polk County Crim. No. 43-36595 (complaint dismissed 11/13/79).

539. See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 232-38. See also R. PERKINS, *supra* note 12, at 176-81.

540. IOWA CODE §§ 706.1-3 (1977) (repealed 1978).

541. IOWA CODE §§ 710.1-4 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 1001-09.

542. R. PERKINS, *supra* note 12, at 176.

543. "Kidnapping as defined in § 710.1 differs from the common law, and the former statute [repealed Code § 706.1], in that the definition no longer refers to secret confinements or to forcibly carrying another out of the state." J. YEAGER & R. CARLSON, *supra* note 12, § 232.

authority or consent to do so.<sup>545</sup> Without more, the crime merely would be False Imprisonment.<sup>546</sup> The aggravating circumstances which upgrade the crime to Kidnapping consist of the particular accompanying specific intent.<sup>547</sup> Formerly, Kidnapping was not a specific intent<sup>548</sup> crime at all,<sup>549</sup> but now requires proof of any one of six specific intentions accompanying the *actus reus*.<sup>550</sup>

### 1. Confinement

The alternative *actus reus* of unlawful confinement no longer requires that the confinement be secret (unlike under both the former statute<sup>551</sup> and common law).<sup>552</sup> Requiring that the unlawful confinement also be a secret confinement was felt to be too limiting in the modern context.<sup>553</sup> For example, at least two of the types of kidnapping, as re-defined, necessarily involve acting in the open (if not even being well publicized).<sup>554</sup> Moreover, secret confinement is not *required* in three of the other four modes of conducting kidnapping, as re-defined, thus leaving only one such mode—the specific intent to secretly confine—requiring the confinement to be secret.

"Confinement" is not defined in the statutory provisions expressly covering Kidnapping. However, "confinement" is defined in the related, albeit lesser included offense,<sup>555</sup> of False Imprisonment,<sup>556</sup> as that a person is con-

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544. Regarding knowledge as a particularized state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

545. IOWA CODE § 710.1 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1009.

546. IOWA CODE § 710.7 (1979).

547. See note 52 *supra*.

548. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

549. *State v. Wallace*, 259 Iowa 765, 145 N.W.2d 615 (1966) (jury instruction defining kidnapping as "the willful and forcible confining of any other person within the state against such person's will and without lawful authority" is adequate and need not add "with the intent either to cause such person to be secretly confined or imprisoned").

550. That is, the intent to hold the victim for ransom, the intent to use the victim as a shield or hostage, the intent to inflict serious injury on the victim, the intent to subject the victim to sexual abuse, the intent to secretly confine the person, or the intent to interfere with the performance of any governmental function. See IOWA CODE §§ 710.1-4 (1979).

551. IOWA CODE § 706.1 (1977) (repealed 1978).

552. See J. YEAGER & R. CARLSON, *supra* note 12, § 231 at 64:

The common law designated certain states of mind which were aggravating circumstances, the intent to secretly confine or the intent to remove the victim from the state. In present day America, the intent to remove one from the state has lost much of its former significance, and the intent to secretly confine, which still significant, does not adequately cover the field.

553. *Id.*

554. That is, Kidnapping with either the intent to use the victim as a shield or hostage or the intent to interfere with the performance of any governmental action.

555. See text accompanying notes 619-38 in Part I of this Article, 29 DRAKE L. REV. 239

fined when his "freedom to move about is substantially restricted by force, threat or deception."<sup>557</sup> Under the standard interpretational guide of *in pari materia*, this definition should be also used for Kidnapping, in the absence of any legislative intent to the contrary. Indeed, the Bar's Uniform Jury Instructions on Kidnapping include an instruction on "confinement"<sup>558</sup> which is "partially derived from Section 710.7."<sup>559</sup> As amplified in this instruction, the confinement can be "either in the place where the restriction commences or in a place to which he has been removed" and "need not exist for any particular length of time, as long as it is for the purpose of restricting the person's freedom to move about."<sup>560</sup>

The specific intent to *secretly confine* is defined in Uniform Jury Instruction No. 1008 as "something more than to restrict the movement of [the victim]. Such intent means an intent to secrete, conceal, hide, or prevent [the victim's] discovery."<sup>561</sup>

## 2. Other Objectives

In addition to the intent to secretly confine his victim, the kidnapper may have one of five other specific intents. The intent of holding his victim for ransom is a carryover from the pre-revised law.<sup>562</sup> Two other, closely-related situations arise when a person is confined (or removed) with the intent to use the victim as a hostage or—in an act of political terrorism—to seize public personnel with the intent to interfere with a governmental function.<sup>563</sup> The other two aggravating circumstances occur when the kidnapping is done for the purpose either of inflicting "serious injury"<sup>564</sup> or of committing "sexual abuse."<sup>565</sup>

## 3. Grading

Kidnapping is graded into three degrees. Each is classified as a "forcible felony," thus carrying a mandatory term of imprisonment.

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(1980).

556. IOWA CODE § 710.7 (1979).

557. *Id.* See also UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1007.

558. UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1007.

559. *Id.* See explanatory note.

560. *Id.*

561. *Id.* at No. 1008.

562. IOWA CODE § 706.3 (1977) (repealed 1978).

563. "This is apparently set forth so as to have political terrorism or the holding of witnesses and judicial officers constitute kidnapping." J. ROEHRICK, *supra* note 81, at 110.

564. See IOWA CODE § 702.18 (1979) and text accompanying notes 207-95 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

565. See *id.* § 709.1 and text accompanying notes 232-343 *supra*. John Roehrick queries: "'Does sexual abuse also constitute kidnapping,' since there must be confinement without consent?" J. ROEHRICK, *supra* note 81, at 110. See text accompanying notes 597-604 *infra*.

Kidnapping is of the first-degree<sup>566</sup> in any of these three situations: the victim suffered "serious injury,"<sup>567</sup> or was intentionally<sup>568</sup> subjected either to "sexual abuse"<sup>569</sup> or to "torture."<sup>570</sup> Thus, these three situations require a specific result of injury as opposed to the more inchoate situation of unlawful confinement or removal merely with the *intent* to injure. This grading makes sense, as the gravest type of kidnapping is reserved for acts based upon injury to the victim.

The decision to categorize Kidnapping in the First Degree as a class A felony<sup>571</sup> (i.e., punishable by automatic life imprisonment) appears to be out of proportion. The absurdity is most apparent in light of *Murder* in the First Degree<sup>572</sup> also being a class A felony. The ultimate harm caused in *Murder* is so much greater than in a non-homicidal kidnapping. Downgrading the latter to a class B felony<sup>573</sup> (punishable by an indeterminate term of 25 years) as the Criminal Code bill was originally recommended<sup>574</sup> and introduced in 1974,<sup>575</sup> would be preferable.

The absurdity continues when one considers the infliction of either "serious injury," sexual abuse, or torture separately without benefit of the additional aspect of a kidnapping. Infliction of a "serious injury," standing alone,<sup>576</sup> is at best<sup>577</sup> only a class C felony<sup>578</sup> (punishable by an indeterminate term of 10 years). Because the infliction of torture could very well not even result in a "serious injury," it's entirely possible that torture, by itself, would be punishable merely as *Assault with Intent to Inflict Serious Injury*<sup>579</sup> (only an aggravated *misdemeanor*<sup>580</sup> with maximum confinement of

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566. IOWA CODE § 710.2 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1003.

567. See IOWA CODE § 702.18 (1979) and text accompanying notes 207-95 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

568. Regarding intentionally as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

569. See *id.* § 709.1 (1979) and text accompanying notes 232-343 *supra*.

570. "Torture" is the only one of these three terms left undefined in the new Criminal Code. Thus, its ordinary meaning should be given, *viz.* "the intentional infliction of pain [either] mental or physical." Moreover, sometimes "the manner of confinement may amount to torture." TRAINING MANUAL, *supra* note 14, at 54.

571. See note 337 and accompanying text *supra*.

572. IOWA CODE § 707.2 (1979). See text accompanying notes 827-63 *infra*.

573. See note 327 and accompanying text *supra*.

574. See SUBSTANTIVE CRIM. LAW SUBCOMM. OF THE CRIM. CODE REVIEW STUDY COMM., 1002 (Tent. Draft No. 4, 1974) [hereinafter cited as STUDY COMMITTEE REPORT].

575. See S.F. 1150, § 1002 (1974). But see S.F. 85, § 1002 (1976).

576. See IOWA CODE § 708.4 (1979) (Willful Injury).

577. Willful Injury is limited by requiring a specific intent to inflict a "serious injury," thus excluding negligently or even recklessly caused "serious injury." See *id.* and text accompanying notes 107-18 *supra*.

578. See note 311 and accompanying text *supra*.

579. IOWA CODE § 708.2(1) (1979). See text accompanying notes 56-69 *supra*.

580. See note 63 and accompanying text *supra*.

two years). Finally, Sexual Abuse in the First Degree<sup>581</sup> (a class A felony) is limited to sexual assaults resulting in a "serious injury" to a person, with an ordinary sexual assault being merely a class C felony. Yet, an ordinary sexual assault upon a kidnap victim bootstraps this into a class A felony. Mere confinement or removal from one place to another should not be equated with infliction of "serious injury."

The two types of aggravating circumstances which constitute Kidnapping in the Second Degree<sup>582</sup> are being armed with a "dangerous weapon"<sup>583</sup> and intending to hold the victim for ransom.<sup>584</sup> The former is a new concept in Iowa law,<sup>585</sup> and would appear to limit the new, lesser crime of False Imprisonment<sup>586</sup> to unlawful confinements by unarmed offenders. The latter was the only aggravating circumstance under the pre-revised law.<sup>587</sup> Being the product of the time of the post-Lindbergh baby kidnapping hysteria, the old Kidnapping for Ransom offense<sup>588</sup> carried an automatic penalty of life imprisonment. The ridiculousness of that penalty level was evident in the interpretation of "ransom" as including sexual favors (albeit deviate) in *State v. Knutson*.<sup>589</sup>

Kidnapping in the Third Degree<sup>590</sup> is the residual section, which will not encompass very many kidnappings in light of "the broad scope" of First and Second Degree Kidnapping.<sup>591</sup> Nevertheless, it appears that this category would include those kidnappings when the specific intent was one of the following, whether the intent was actually carried out or not: to secretly confine the victim, to use the victim as a hostage or shield, or to interfere with the performance of a governmental function. Additionally, Kidnapping

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581. IOWA CODE § 709.2 (1979). See text accompanying notes 232-343 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

582. *Id.* § 710.3.

583. See *id.* § 702.7 (1979) and text accompanying notes 161-179 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

584. That this type of kidnapping need only be carried out *with the intent to hold the victim for ransom, without requiring payment thereof*, is made clear in UNIFORM JURY INSTRUCTION No. 1005, to wit: "Where one detains another for the purpose of obtaining money from him or another as the price of release, whether the victim is actually released without payment is immaterial." See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1005. It also appears that a *demand* for payment is not even required, although a conviction without such evidence could be difficult to obtain.

585. J. YEAGER & R. CARLSON, *supra* note 12, § 237.

586. See IOWA CODE § 710.7 (1979) and text accompanying notes 656-71 *infra*.

587. IOWA CODE § 706.3 (1977) (repealed 1978).

588. *Id.*

589. 220 N.W.2d 575 (Iowa 1974).

590. IOWA CODE § 710.4 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1006.

591. J. YEAGER & R. CARLSON, *supra* note 12, § 238. Accord, J. ROEHRICK, *supra* note 12, at 113: "This is the least serious form [of Kidnapping] and will be used where there is no injury, ransom or dangerous weapon involved. However, it is hard to conceive when this could be charged, although it is felt it will constitute a lesser included offense."

is in the Third Degree when the unconsummated intent was either to inflict a "serious injury" (when it was not actually inflicted) or to subject a person to sexual abuse (when the sexual abuse was not actually committed).<sup>592</sup> In most of these situations, it is logical to expect that the offender would be armed (with a "dangerous weapon") and the offense *ipso facto* would constitute Kidnapping in the Second Degree. In other words, the Third Degree offenses would involve only unarmed kidnappers.

#### 4. *Felony Murder Rule*<sup>593</sup>

Inclusion of Kidnapping in the classification of a "forcible felony"<sup>594</sup> has the effect of making Kidnapping one of the underlying felonies for application of the felony murder rule to Murder in the First Degree,<sup>595</sup> unlike under pre-revised law.<sup>596</sup> Moreover, this applies to all three degrees of Kidnapping, since they are all classified as "forcible felonies."

#### 5. *Merger*

One fundamental question to be answered by the Iowa Supreme Court,<sup>597</sup> absent any legislative guidance, is whether a defendant can be convicted of both Kidnapping and another offense, e.g., Robbery or Sexual Abuse, committed coincidental with the Kidnapping. The bald statutory language provides that Kidnapping occurs when a person "either confines a person or removes a person from one place to another . . .".<sup>598</sup> Because a victim of a Robbery or of a Sexual Abuse necessarily is confined at least temporarily,<sup>599</sup> it would appear that both Kidnapping and Robbery or Sexual Abuse would lie in these circumstances. At least there is nothing on the face of the statute indicating a legislative intent to prevent this double charging.<sup>600</sup> Iowa's Kidnapping statute is somewhat unique in its inclusion

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592. See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 1002.

593. See generally W. LAFAVE & A. SCOTT, *supra* note 12, § 71; R. PERKINS, *supra* note 12, at 37-45; J. YEAGER & R. CARLSON, *supra* note 12, § 139.

594. See *IOWA CODE* § 702.11 (1979) and text accompanying notes 180-203, in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

595. See *IOWA CODE* § 707.2(2) (1979) and text accompanying notes 827-63 *infra*.

596. See *IOWA CODE* § 690.2 (1977) (repealed 1978) (felony murder rule application to first-degree murder limited to underlying felonies of arson, rape, robbery, mayhem, or burglary). Accordingly, the felony murder rule as to Kidnapping applied only to second-degree murder under the pre-revised law. See J. YEAGER & R. CARLSON, *supra* note 12, § 139.

597. In the only case of this nature under the pre-revised law, the supreme court mentioned but did not decide the issue in *State v. Knutson*, 220 N.W.2d 575 (Iowa 1974). *But see J. YEAGER & R. CARLSON, supra* note 12, § 233. "[T]here is some suggestion in that case that there must be more than merely confining a rape victim at or near the spot where she was accosted and where the rape was attempted or committed."

598. *IOWA CODE* § 710.1 (1979).

599. J. YEAGER, *TRAINING MANUAL*, *supra* note 14, at 54.

600. See J. YEAGER & R. CARLSON, *supra* note 12, § 235 at 65: "Because of the wording of

of confinement as an alternative mode of the offense being committed. The more common Kidnapping statute requires moving the victim from one place to another.<sup>601</sup> Two opposing views exist in other states as to whether Kidnapping and other offenses incidental thereto are both punishable.<sup>602</sup> One view is that detention of the victim, together with any amount of accompanying coerced movement of the victim of a robbery or sexual abuse is necessarily sufficient to constitute the separate crime of Kidnapping. This theory is based upon "the fact of a forcible removal, and not the distance of the forcible removal."<sup>603</sup> The opposing view is that movements merely incidental to the commission of a robbery or sexual abuse "and which did not substantially increase the risk of harm over and above that risk which was necessarily present"<sup>604</sup> in the Robbery or Sexual Abuse did not constitute the separate crime of Kidnapping. These latter jurisdictions require that the victim be moved a substantial distance from the original scene of the criminal confrontation.

In the absence of any pronouncement by the Iowa Supreme Court,<sup>605</sup> this question is open. There clearly are precedents from many jurisdictions supportive of either position.<sup>606</sup>

The better view is that the requisite confinement or removal must be more than merely incidental to effectuate another crime in order for both crimes to be punishable. As pointed out by Professor Yeager: "Unless sections 709.3 and 709.4 [Sexual Abuse in the Second and Third Degrees] are to become surplusage, it will be necessary to require some confinement or movement of the victim beyond that which is a normal incident of sexual abuse, and considering the severity of the penalty imposed by this section, the acts of the kidnapper should be required to add substantially to the heinousness of the sexual abuse, if this section is to apply."<sup>607</sup>

Kidnapping essentially is an inchoate crime designed to effectuate some other purpose including commission of another crime, since one does not wrongfully confine or remove another just for the sake of confining or removing another. For example, a kidnapper uses his incidental act of kidnapping to "secure" his intended sexual abuse victim. Thus, a kidnapper should be punishable both for Kidnapping and Sexual Abuse only when he prolongs the wrongful confinement of a sexual abuse victim well beyond the period of

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subsection 3, the question will arise where the other offense is a homicide, assault or sexual abuse." *But see* TRAINING MANUAL, *supra* note 14, at 54: "However, it is not the intent of the code that all or most felonies against the person also be kidnapping, merely because some secret confinement is involved."

601. *See generally* R. PERKINS, *supra* note 42, at 177-81.

602. *See* Annot., 43 A.L.R.3d 699, 701 (1972).

603. *Id.*

604. *Id.*

605. *See* note 597 *supra*.

606. *See* note 602 *supra*.

607. J. YEAGER & R. CARLSON, *supra* note 12, § 236.

time of the sexual attack. Thus, two counts should not be permissible for a mere 15-20 minute "quick trip" into the country or to a nearby deserted park (i.e., within a few blocks or even miles of the original site of the kidnapping) in order to consummate a sexual abuse. In contrast, a ten-hour period of continued wrongful confinement of a sexual abuse victim should clearly warrant two counts, in light of the significant incremental harm done over and above the sexual abuse. For example, the victim is left anguished over a prolonged period as to whether she will be released unharmed or eventually killed to prevent her identification of the defendant. Situations falling in between cloud the issue, with the preferred resolution to be left to a case-by-case basis. The legal standard should be something akin to Professor Yeager's suggestion, *viz.* the kidnapping, in order to be punishable separately, must have "add[ed] substantially to the heinousness of the sexual abuse"<sup>608</sup> or other target crime. Alternatively, the prosecutor, in his discretion, can always elect to charge either Kidnapping or the consummated target crime itself (e.g., Sexual Abuse).<sup>609</sup> The open issue is whether he can charge both.

Under the prevailing Iowa law as to lesser included offenses<sup>610</sup> and the related principle of double jeopardy,<sup>611</sup> multiple convictions for Kidnapping and another intertwined offense (e.g., Sexual Abuse) are permissible. Thus, an ordinary kidnapping is punishable in the lowest of three degrees if the objective of the kidnapping (e.g., Sexual Abuse) is not achieved. On the other hand, a "successful" kidnapper who actually subjects his victim to sexual abuse is subject both to Kidnapping in the First Degree and to Sexual Abuse (in one of three degrees depending upon varying circumstances surrounding the unlawful "sex act").<sup>612</sup> These multiple counts (and, more importantly, dual convictions) are permissible even though the sexual abuse was the sole factor bootstrapping an ordinary Kidnapping in the Third Degree (a mere class C felony) into Kidnapping in the First Degree (a class A felony). Thus, Sexual Abuse is an integral part of the charge of Kidnapping in the First Degree, since the latter offense (in this situation) consists of (1) a kidnapping and (2) a sexual abuse committed during the duration of the kidnapping. Accordingly, it seems logical that Sexual Abuse is a lesser included offense of the crime of Kidnapping in the First Degree (by commission of sexual abuse upon the kidnapping victim). However, committing a sexual abuse upon a kidnapping victim is not required for Kidnapping in

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608. *Id.*

609. Regarding prosecutorial discretion in charging, see note 1056 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

610. See *State v. Stewart*, 223 N.W.2d 250 (Iowa 1974), *cert. denied*, 423 U.S. 902 (1975), and text accompanying notes 619-723 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

611. See *id.* and text accompanying notes 619-723 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

612. See IOWA CODE §§ 709.1-4 (1979) and text accompanying notes 315-36 *supra*.

the First Degree. That is, two other circumstances can raise an ordinary Kidnapping into Kidnapping in the First Degree. Consequently, Sexual Abuse is not a lesser included offense under the elemental test of *State v. Stewart*,<sup>613</sup> and multiple convictions accordingly would not constitute double jeopardy as applied also under *State v. Stewart*.<sup>614</sup>

#### 6. Lesser Included Offenses

a. *Kidnapping in the Second or Third Degrees.* It appears that while Kidnapping in the Second and Third Degrees may be lesser included offenses of Kidnapping in the First Degree, nevertheless one or the other may not necessarily be so. Thus, lesser included offense instructions on these two degrees need not, indeed can not, be given in *all* cases of Kidnapping in the First Degree. The law requires that a lesser included offense meet the dual legal and factual test. Thus, an instruction on Kidnapping in the Second Degree should not be given, even though an instruction on the lesser included offense of Kidnapping in the Third Degree would be required, where there was no evidence in the record to show either that the defendant was armed with a "dangerous weapon" or that the defendant's purpose was to hold the victim for ransom. On the other hand, if there was sufficient evidence of just one of these circumstances—e.g., being armed with a "dangerous weapon"—then a lesser included offense instruction on Kidnapping in the Second Degree should be given, but only as to being armed with a "dangerous weapon" and not to the alternative basis of holding the victim for ransom.

Kidnapping in the Third Degree, on the other hand, appears to be a lesser included offense to be submitted in every case of kidnapping, whether the principal offense is Kidnapping in the First or Second Degree. Being the residual category, Kidnapping in the Third Degree seems to meet both the legal and factual tests of a lesser included offense, as it would encompass the situations in which the enumerated aggravating circumstances constituting either first or second degree kidnapping are not proven beyond a reasonable doubt.

b. *Child Stealing and Violating a Custodial Order.* Neither Child Stealing<sup>615</sup> nor Violating a Custodial Order<sup>616</sup> can ever be a lesser included offense of Kidnapping (in any of the three degrees). This is because neither offense can meet the legal test, since each of these offenses requires one or more elements that the principal crime of Kidnapping does not.

c. *False Imprisonment.* It appears that False Imprisonment<sup>617</sup> neces-

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613. 223 N.W.2d 250 (Iowa 1974), *cert. denied*, 423 U.S. 902 (1975). See also text accompanying notes 619-723 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

614. *Id.*

615. See IOWA CODE § 710.5 (1979) and text accompanying notes 620-42 *infra*.

616. See *id.* § 710.6 and text accompanying notes 643-55 *infra*.

617. See *id.* § 710.7 and text accompanying notes 656-71 *infra*.

sarily will be a lesser included offense in *all* cases of Kidnapping (irrespective of the degree of the principal crime). This is because False Imprisonment basically is merely an unlawful confinement crime whereas Kidnapping (as an aggravated form of False Imprisonment) is an unlawful confinement (or removal) crime that is accompanied by several types of specific intent. The fact that False Imprisonment requires a confinement whereas the *actus reus* of Kidnapping can be satisfied either by a confinement or a removal should not preclude the legal test of a lesser included offense being met. This is because a removal can not be effected without confining the victim during the time of removal. Consequently, a confinement is, in effect, necessarily included (*i.e.*, required) for the Kidnapping offenses. Of course, if confinement is not read into removal,<sup>618</sup> then False Imprisonment is not a lesser included offense under the present standard.<sup>619</sup> This is because, under such an interpretation, Kidnapping could be committed in either of two ways while False Imprisonment can only be committed in one way. However, it is doubtful that the Supreme Court will take such a narrow view.

### B. *Child Stealing*<sup>620</sup>

The offense of Child Stealing<sup>621</sup> supplements the kidnapping offenses "by prohibiting unprivileged acts which are not defined as kidnapping."<sup>622</sup> The elements of this crime are: (1) forcibly or fraudulently; (2) taking or enticing away; (3) any "child"<sup>623</sup> (*i.e.*, under fourteen); (4) with the specific intent<sup>624</sup> to detain or conceal such child from its lawful custodian; and (5) having knowledge<sup>625</sup> of no authority to do so. So defined, this crime differs from Kidnapping<sup>626</sup> by not including any of the specific intent requirements of Kidnapping, as well as not requiring confinement of the victim.<sup>627</sup> The

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618. Some support for this interpretation is strongly implied at J. YEAGER & R. CARLSON, *supra* note 14, § 241: "[False Imprisonment] differs from kidnapping in two ways, first, a confinement is required, whereas kidnapping requires either a confinement or a removal of the person of the victim . . . ."

619. See text accompanying notes 619-723 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

620. See generally J. YEAGER & R. CARLSON, *supra* note 12, § 239. See also R. PERKINS, *supra* note 12, at 181-82.

621. IOWA CODE § 710.5 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 1013-15.

622. Yeager Note, *supra* note 52, at 527.

623. IOWA CODE § 702.5 (1979).

624. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

625. Regarding knowledge as a particularized state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

626. *Id.* § 710.1.

627. "Child stealing differs from kidnapping in that there is no need of proving anything other than that the child was taken from its parents or guardian with the intent that the child

gist of this crime thus consists of wrongful usurpation of custody of a child.<sup>628</sup> Two minor changes in the revised crime<sup>629</sup> include lowering the age of the victim from sixteen to fourteen and eliminating the pre-revised requirement that the taking be done maliciously.<sup>630</sup>

### 1. Parental Exception

A major change was made in the revised crime with the addition of an exception exculpating parents or other relatives involved in a dispute over the stolen child's custody, but only when the taking was for the sole purpose of assuming custody of the child.<sup>631</sup> If neither of these two components, relative of child or specific intent of assuming custody, is absent, then the defense is not applicable. The burden of disproving this defense is apparently upon the state.<sup>632</sup>

"This section is directed at the outsider, a person having no color of claim, either legal or moral, to the custody of the child, who usurps the position of the rightful custodian," Professor Yeager explains.<sup>633</sup> However, relatives are not exculpated completely as their conduct can constitute the less serious new offense of Violating a Custodial Order,<sup>634</sup> as discussed below.

### 2. Grading

There is only one grade of Child Stealing. This is a class C felony,<sup>635</sup> but is not a "forcible felony."<sup>636</sup> In contrast, roughly similar illegal conduct punishable as Kidnapping in the Third Degree,<sup>637</sup> also a class C felony, is subject to the special penalties of a "forcible felony."

One major change in the penalty ranges has been made, however. Under the new Criminal Code, a sentencing judge imposing a term of imprisonment is limited to the regular class C felony penalty of an indeterminate term of ten years. Contrastingly, under the pre-revised law, a sentencing judge could, in his judicial discretion, either impose the ten-year term or a one-year term.<sup>638</sup> Of course, a sentencing judge can accomplish approxi-

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not be returned." TRAINING MANUAL, *supra* note 14, at 55.

628. J. YEAGER & R. CARLSON, *supra* note 12, § 239.

629. Cf. IOWA CODE § 706.2 (1977) (repealed 1978).

630. Regarding malice as a state of mind, see text accompanying notes 549-65 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

631. IOWA CODE § 710.5 (1979).

632. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1015.

633. J. YEAGER & R. CARLSON, *supra* note 12, § 239, at 66-67.

634. IOWA CODE § 710.6 (1979). See text accompanying notes 643-55 *infra*.

635. See note 311 and accompanying text *supra*.

636. See IOWA CODE § 702.11 (1979) and text accompanying notes 180-203 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

637. See text accompanying notes 539-619 *supra*.

638. See IOWA CODE § 706.2 (1977) (repealed 1978).

mately the same type of alternative "short" term under the new Criminal Code by exercising his right under Code section 902.4 to reconsider the sentence to imprisonment within ninety days (and thus grant "delayed" probation).<sup>639</sup>

Because Child Stealing is not a "forcible felony,"<sup>640</sup> unlike all three degrees of Kidnapping, the full range of ameliorative sentencing alternatives (i.e., a deferred judgment, a deferred sentence, or a suspended sentence) is available in lieu of confinement. Moreover, a fair reading of Code section 909.1 authorizes the sentencing judge to impose a sentence of a fine only, instead of being limited to a sentence of confinement or a suspended sentence, once he has determined not to defer judgment or to defer sentencing.<sup>641</sup> Finally, it should be noted that there are no lesser included offenses of this crime.<sup>642</sup>

### C. Violating a Custodial Order

As noted above, a new offense of Violating a Custodial Order<sup>643</sup> was added to the Criminal Code to deal more leniently with what heretofore had been punishable as child stealing committed by relatives embroiled in child custody disputes,<sup>644</sup> instead of treating them under the more serious offense of Child Stealing.<sup>645</sup> The elements of the most serious of the three modes of committing this general intent offense,<sup>646</sup> as amended in 1978,<sup>647</sup> are: (1) any relative; (2) taking a child (i.e., under fourteen); (3) and removing him from Iowa; (4) and concealing the child's whereabouts; (5) without consent of the child's lawful custodian; and (6) in violation of a court order fixing custody of the child in another. This is a class D felony,<sup>648</sup> but of course, not a "for-

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639. See *State v. Wrage*, 279 N.W.2d 4 (Iowa 1979).

640. See *Iowa Code* § 702.11 (1979) and text accompanying notes 184-86 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

641. See text accompanying notes 75-102 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

642. For an extensive discussion of the standard for determining lesser included offenses, see text accompanying notes 619-723 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

643. *Iowa Code* § 710.6 (1979). The Uniform Jury Instructions for this crime—Nos. 1016 and 1017—are outdated because of the 1978 legislative amendments. See note 12 *supra*. See generally J. YEAGER & R. CARLSON, *supra* note 12, § 240.

644. "The exception [in the Child Stealing section] was included because the [drafting] Committee felt that the penalty which should be assessed for child stealing in the ordinary case would be entirely inappropriate if applied to a parent or other relative who is involved in a dispute over the child's custody. In these custody disputes, the person so acting is usually concerned with the well-being of the child, and his identity is known. Yeager Note, *supra* note 52, at 527-28.

645. *Iowa Code* § 710.5 (1979), as discussed in text accompanying notes 620-42 *supra*.

646. Regarding general intent as a state of mind, see text accompanying notes 471-79 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

647. 1978 Iowa Acts 2d Sess. ch. 1029, § 49.

648. See *Iowa Code* § 702 (1979) and text accompanying notes 144.1-55 in Part I of this

cible felony."<sup>649</sup> Less serious penalties apply to a parent of a child living apart from the other parent who either (1) takes and conceals that child from within the State in violation of a custodial order and without the other parent's consent or (2) conceals that child in violation of a court order granting visitation rights and without the other parent's consent. Both of these offenses are serious misdemeanors.<sup>650</sup>

These provisions certainly are not consistent. The most serious offense covers "any relative," whereas the other two misdemeanor offenses are limited to "a parent." Thus, it appears that wrongful concealment of another's child *within* the State by a relative of the child other than one of its parents is not criminalized. No logical reason for this *casus omissus* is apparent. On the other hand, a parent is included under all three offenses, with the key determining factor being whether the child is kept in Iowa or is removed therefrom. At first blush, the significant differential in the penalty schedules for the parent's wrongful act in these three roughly similar instances seems illogical. The gravamen of each of the offenses is the wrongful usurpation of *de facto* custody, with the mere removal of the child from Iowa seemingly not warranting the penalty jump from a serious misdemeanor to a class D felony. This approach is especially suspect in light of the evolution of the related crime of Kidnapping<sup>651</sup> from its early origins (when removal from the territory was an essential element).<sup>652</sup> No other crime in Iowa requires removal of the victim from the State as an element of the offense or even considers this factor in grading a multiple-classification offense for sentencing purposes. The harsh reality of current extradition practices appears to be the only logical explanation for making the removal-from-Iowa situation a class D felony. A more sound approach would be to realistically extend the practice of extradition procedures to certain misdemeanors, including this type of activity.

Another apparent inconsistency is that the class D felony expressly applies to a custodial order, whether permanent or temporary in nature. In contrast, one of the serious misdemeanor offenses refers to "a custodial order," without any qualifying language.<sup>653</sup> This suggests that the latter offense can only be committed in violation of a permanent custodial order. Otherwise, the phrase "permanently or temporarily" in the class D provision is superfluous. If this interpretation is correct, then another *casus omissus* arises as there would be no provision covering a parent who violates a temporary custodial order as long as the child is not removed from Iowa.

In the final analysis, the whole offense seems superfluous, except for its

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Article, 29 DRAKE L. REV. 239 (1980).

649. *See id.* § 702.11 (1979).

650. *See* note 40 and accompanying text *supra*.

651. *See* IOWA CODE §§ 710.1-4 (1979) and text accompanying notes 539-619 *supra*.

652. *See* R. PERKINS, *supra* note 12, at 176.

653. *See* J. YEAGER & R. CARLSON, *supra* note 12, § 240.

one positive contribution of providing an alternative, less-severe punishment for parents other than that existing under Child Stealing.<sup>654</sup> These familial child-custody disputes have been, or will continue to be, punishable under contempt of court<sup>655</sup> for violation of a court's orders granting custody and visitation rights (whether permanent or temporary in nature).

#### D. False Imprisonment

The new crime of False Imprisonment<sup>656</sup> consists of these elements: (1) intentionally;<sup>657</sup> (2) confining another person; (3) against his will; (4) having no reasonable belief of a right or authority to do so. The gravamen of this offense is the illegal confinement. A person is to be considered confined, by terms of the statute, when his "freedom to move about is substantially restricted by force, threat, or deception."<sup>658</sup>

##### 1. Substantiality

The explicit statutory requirement that the restriction upon a person's movement be *substantial* indicates a legislative intent that False Imprisonment be given a stricter interpretation under the Iowa Criminal Code than under the common law.<sup>659</sup> That is "a *serious interference* with another's personal liberty"<sup>660</sup> appears necessary for a violation of Code section 710.7, as compared with a violation of the common law crime being predicated merely upon "any *unlawful restraint* of a person's liberty."<sup>661</sup>

So interpreted, False Imprisonment would require more than a temporary, albeit intentional, blocking of another's path. Actual, prolonged restraint should be necessary, as, for example, wrongfully locking someone in a room for an appreciable time. Another example would be either to force a person into one's vehicle or to effectively restrain a passenger from alighting (either through force or through making it impractical to alight from a speeding vehicle), in either instance in order to shower unwanted affections on the other. Of course, such an encounter would constitute at least Kidnap-

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654. See IOWA CODE § 710.5 (1979) and text accompanying notes 620-42 *supra*.

655. See J. YEAGER & R. CARLSON, *supra* note 12, § 240.

656. IOWA CODE § 710.7 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 1010-12; J. YEAGER & R. CARLSON, *supra* note 12, § 241; J. MILLER, *supra* note 30, at 315-16; R. PERKINS, *supra* note 12, at 171-76.

657. Regarding intentionally as a state of mind, see text accompanying notes 528-42 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

658. IOWA CODE § 710.7 (1979).

659. See generally J. MILLER, *supra* note 30, at 315-16; R. PERKINS, *supra* note 12, at 171-76.

660. See note 52 *supra*.

661. J. MILLER, *supra* note 30, at 315. But cf. TRAINING MANUAL, *supra* note 14, at 55: "This offense consists of merely restraining another's freedom to move about, without authority or color of authority."

ping in the Third Degree<sup>662</sup> if the requisite specific intent of committing sexual abuse could be proved.

## 2. Mental State

This is not a specific intent<sup>663</sup> crime. All that a prosecutor has to prove is that the defendant intentionally<sup>664</sup> (as opposed to recklessly or negligently)<sup>665</sup> wrongfully confined another person. The particular purpose for doing so is not material. This lack of a specific intent element is what principally differentiates this offense from the much more serious kidnapping offenses.

## 3. Reasonable Belief

An essential element of False Imprisonment is that the offender had no reasonable belief that he had a right or any authority to restrain the other person.<sup>666</sup> This reasonable belief of authority is defined in the Uniform Jury Instructions as "whether the defendant, under the facts and circumstances existing at that time, had reasonable grounds to believe that he did have the authority or right to confine (the victim)."<sup>667</sup>

## 4. Grading

The single grade of this offense is a serious misdemeanor.<sup>668</sup> The necessity of this offense at all, especially in light of it being a serious misdemeanor, is questionable. Arguably more serious conduct is punishable under other offenses merely as a simple misdemeanor.<sup>669</sup> For example, Assault<sup>670</sup> includes a battery of such a nature as to not qualify under the more serious aggravated assaults.<sup>671</sup> A broken nose is punishable as a simple misdemeanor, whereas mere wrongful confinement without any violence or even threatened violence can be punished as a serious misdemeanor under this offense. The corresponding tort of false imprisonment is a sufficient deterrent to petty wrongful acts of this nature, and the aggravated assaults and kidnapping offenses cover any aggravated instances of False Imprisonment.

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662. See IOWA CODE § 710.4 (1979) and text accompanying notes 590-92 *supra*.

663. Regarding specific intent as a state of mind, see text accompanying notes 485-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

664. Regarding intentionally as a state of mind, see text accompanying notes 528-42 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

665. Regarding recklessness and negligence as states of mind, see text accompanying notes 471-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

666. IOWA CODE § 710.7 (1979).

667. UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1012.

668. See note 40 *supra*.

669. See note 37 *supra*.

670. See IOWA CODE § 708.2(1) (1979) and text accompanying notes 1-198 *supra*.

671. See text accompanying notes 1-55 *supra*.

This leaves no significant purpose for the criminal offense of False Imprisonment.

#### IV. WEAPONS AND WEAPONS-RELATED OFFENSES

##### A. *Introduction*

###### 1. *Gravamen of the Offenses*

The new Criminal Code contains multitudinous weapons, weapons-related, and weapons-aggravation offenses<sup>672</sup> covering a broad spectrum of proscribed conduct constituting the gravamen of the offense(s). The acti rei of these divers offenses range from mere representation of being armed with a firearm<sup>673</sup> to discharging a firearm.<sup>674</sup> Incredibly, the most minor actus reus—that of mere representation of being armed with a firearm—shares in carrying the most onerous penalty.<sup>675</sup>

###### 2. *Types of Weapons*

No fewer than seven different terms are used in the various weapons and weapons-related offenses. This definitional proliferation is incredulous in light of the so-called "uniform" approach in the new Criminal Code. Of course, the broadest term is "dangerous weapon,"<sup>676</sup> which fortunately is included in the general definitional chapter (as is the more restrictive term "offensive weapon").<sup>677</sup> Surprisingly, two other related weapons terms—*i.e.*, "deadly weapon"<sup>678</sup> and "firearm"<sup>679</sup>—are not statutorily defined, although both had well-defined meanings under the pre-revised law which control in the absence of any statutory modifications in the new Criminal Code. Three other statutorily-undefined phrases are likewise used in various weapons offenses, *viz.*, "pistol or revolver," "spring gun," and "any weapon."

###### 3. *Unloaded Weapons*

The majority of the weapons and weapons-related offenses can be com-

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672. See text accompanying notes 711-23 *infra*, as to step-up penalty schedules because of the involvement of weapons.

673. IOWA CODE § 902.7 (1979) (mandatory minimum five-year sentence for certain involvement of firearms in commission of "forcible felonies"). See text accompanying notes 692-710 *infra*.

674. IOWA CODE § 708.6(1) (1979). See text accompanying notes 797-803 *infra*.

675. See note 673 *supra*.

676. See IOWA CODE § 702.7 (1979) and text accompanying notes 128-354 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

677. See IOWA CODE § 724.1 (1979).

678. See text accompanying notes 128-34 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

679. See text accompanying notes 128-354 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

mitted even though the particular weapon used was unloaded. Additionally, the weapon involved in the five non-weapons offenses with step-up penalties<sup>680</sup> because of possession or use of weapons during their commission need not be loaded. The Iowa Supreme Court has held that under the new Criminal Code,<sup>681</sup> like under the pre-revised law,<sup>682</sup> the prosecution "is not required to establish that a pistol was loaded at the time of the offense to prove its character as a dangerous weapon in a prosecution for robbery in the first degree."<sup>683</sup> Thus, it was held proper for the trial court to instruct the jury that a pistol is a "dangerous weapon" notwithstanding the lack of any prosecutorial evidence that the pistol was loaded at the time of its use in the robbery.

The particular weapon involved in the following crimes need not be loaded: Assault (by pointing a "firearm" toward another),<sup>684</sup> Going Armed with Intent,<sup>685</sup> Possession of Offensive Weapons,<sup>686</sup> Possession of Firearms or Offensive Weapons by a Felon,<sup>687</sup> and two of three types of Carrying Weapons.<sup>688</sup> Contrastingly, one type of Carrying Weapons—*viz.*, going armed with "any loaded firearm of any kind" within a city's limits—expressly requires that the weapon be loaded.<sup>689</sup> Additionally, the Code contemplates that two other weapons offenses—*viz.*, Terrorism (by discharging a "dangerous weapon")<sup>690</sup> and Setting a Spring Gun<sup>691</sup>—involve loaded weapons.

#### 4. Firearms During Forcible Felonies

The change in weapons law with the greatest impact was the addition of a provision<sup>692</sup> setting a mandatory<sup>693</sup> minimum sentence of five years for

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680. See text accompanying notes 711-23 *infra*.

681. *State v. Nichols*, 276 N.W.2d 416 (Iowa 1979).

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

683. 276 N.W.2d at 417.

684. *Iowa Code* § 708.1(3) (1979).

685. *Id.* § 708.8.

686. *Id.* § 724.3.

687. *Id.* § 724.26.

688. *Id.* § 724.4 (carrying dangerous weapon concealed on or about person and transporting pistol or revolver in a vehicle).

689. *Id.* (carrying any loaded firearm within a city's limits).

690. *Id.* § 708.6(1).

691. *Id.* § 708.9.

692. *Iowa Code* § 902.7 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 220-22; *J. YEAGER & R. CARLSON*, *supra* note 12, § 1628.

693. See *State v. Powers*, 278 N.W.2d 26, 28 (Iowa 1979), in which it is stated in *obiter dictum*: "Here, the obvious legislative purpose of section 902.7 is to deter the use of firearms by imposition of mandatory minimum penalties," and text accompanying notes 70-102 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980). But cf. *J. YEAGER & R. CARLSON*, *supra* note 12, § 1628 (concerning section 902.7 of the Code) and § 1772 (concerning section 909.1 of the Code).

possession,<sup>694</sup> representation of possession,<sup>695</sup> display,<sup>696</sup> or use<sup>697</sup> of a "firearm"<sup>698</sup> during commission of any "forcible felony."<sup>699</sup> Read *in pari materia* with the statutory ban on probation for "forcible felonies," the "firearms" provision means that anyone convicted of a "forcible felony" involving a "firearm" must serve a minimum of five years imprisonment (i.e., no probation and no parole eligibility for at least five years subject, however, to reductions via both good time and honor time). This provision does not create a separate crime, nor does it increase the *maximum* penalty on the underlying felony conviction. Moreover, its application is limited to involvement of firearms during crimes constituting "forcible felonies."

a. *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."<sup>700</sup> The supreme court made it clear in *State v. Matlock*<sup>701</sup> 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

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694. Being in possession of or being armed with a firearm means that the defendant "had a firearm on his person at the time of the offense." *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 220.

695. The representation must be that the defendant (or an accomplice) is "in the immediate possession and control of a firearm" which means to state, or act as if, a firearm were in the defendant's possession. It is not necessary that there actually was a firearm, or that it was shown or displayed. However, there must be such action or statements, by the defendant, as would lead one to reasonably believe the defendant did have a firearm in his possession and control. The belief must be reasonable and may not be founded merely on speculation or conjecture.

*UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 222. See *State v. Matlock*, 289 N.W.2d 625, 629 (Iowa 1980) (trial court's findings of fact in bench trial for Robbery that defendant "put his hands inside his shirt, and said he wanted money" determined upon appeal to be inadequate on this record to justify invocation of section 902.7 by sentencing judge, with case apparently turning on the fact that the fact finder had not made the requisite finding of fact that defendant had represented that he was in possession of a firearm).

696. The displaying of the firearm must be "in a threatening manner" which means to "show or make the existence of a firearm apparent in such a manner as to intimidate the victim." *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 221.

697. An extremely broad spectrum of activity is encompassed in this provision—from mere representation of possession to actual use of a firearm. How these two situations can be equated for purposes of a uniform penalty is not readily clear to this author. This divergence certainly points up the unreasonableness of this being a *mandatory* sentencing provision.

698. See text accompanying notes 346-50 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

699. See Iowa Code § 702.11 (1979) and text accompanying notes 180-83 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

700. *State v. Matlock*, 289 N.W.2d 625, 629, (Iowa 1980).

701. 289 N.W.2d 625 (Iowa 1980).

of being part of the findings and conclusions of the trier of fact.

The Iowa Rules of Criminal Procedure have been amended, effective July 1, 1980, to require a special pleading in the indictment or trial information whenever the state plans to seek invocation of section 902.7.<sup>702</sup> 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.<sup>703</sup> 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.

b. *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*.<sup>704</sup> "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,"<sup>705</sup> the supreme court concluded.

c. *Complicity.* As discussed extensively and critically above,<sup>706</sup> section 902.7 was interpreted in *State v. Sanders*<sup>707</sup> as applying to a mere aider and abettor (here, in a Robbery) who did not personally have the firearm. 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."<sup>708</sup>

d. *Constitutionality.* Section 902.7 has already withstood several constitutional challenges. One of these unsuccessful contentions went to the substantive content of the provision itself on the due process ground of void for vagueness.<sup>709</sup> The other focus of attack has been upon the *mandatory* feature of the sentence to be imposed under section 902.7, with unsuccessful federal constitutional challenges being based upon grounds of equal protection, due process, cruel and unusual punishment, and separation of powers.<sup>710</sup>

##### 5. Step-Up Penalty Schedules

Possession or use of weapons, even without causing any physical injury, is the basis for higher degrees of five crimes. This includes the following four

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702. IOWA R. CRIM. P. 6(6) (1979) (amended 1980).

703. IOWA R. CRIM. P. 21(2) (1979) (amended 1980).

704. 293 N.W.2d 5 (Iowa 1980).

705. *Id.* at 8.

706. See text accompanying notes 398-405 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

707. 280 N.W.2d 375 (Iowa 1979).

708. *Id.* at 377.

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

710. *State v. Holmes*, 276 N.W.2d 823 (Iowa 1979).

serious felonies which are thereby raised from class C felonies<sup>711</sup> to class B felonies:<sup>712</sup> Burglary,<sup>713</sup> Kidnapping,<sup>714</sup> Robbery,<sup>715</sup> and Sexual Abuse.<sup>716</sup> Accordingly, the corresponding penalty schedule in the form of an indeterminate term of imprisonment is increased from ten years to twenty-five years. More importantly, "armed" burglary becomes a "forcible felony"<sup>717</sup> and thus not subject to the ameliorative sentencing options of a deferred judgment, a deferred sentence, or a suspended sentence.<sup>718</sup> Similarly, a fine-only sentence is not authorized for Burglary in the First Degree although it apparently is for Burglary in the Second Degree.<sup>719</sup> On the other hand, the other three aforementioned offenses are "forcible felonies" irrespective of the degree. The fifth offense with weapons causing a step-up penalty schedule—Interference with Official Acts<sup>720</sup>—involves increasing the basic penalty of a simple misdemeanor<sup>721</sup> to an aggravated misdemeanor.<sup>722</sup> Incredibly, however, pointing a firearm at another is treated merely as one of the alternative modes of committing simple Assault,<sup>723</sup> a simple misdemeanor.

### B. Possession of Offensive Weapons

There were no significant changes made in the crime of Possession of Offensive Weapons,<sup>724</sup> which makes unlawful knowing possession of offensive weapons by anyone except for certain classes of persons. The scope of the devices or instrumentalities included in the definition of "offensive weapon"<sup>725</sup> was broadened, basically being patterned after federal law.<sup>726</sup> There also were additions made to the list of persons authorized to possess offensive weapons because of being required or permitted to do so by the duties or lawful activities of such persons.<sup>727</sup> One other change is the elimination of the exception for "innocent" possession by a person who finds an

711. See note 311 *supra*.

712. See note 327 *supra*.

713. IOWA CODE § 713.2 (1979) (in possession "of a dangerous weapon").

714. *Id.* § 710.3 ("armed with a dangerous weapon").

715. *Id.* § 711.2 ("armed with a dangerous weapon").

716. *Id.* § 709.3(1) ("displays in a threatening manner a deadly weapon").

717. See note 128 *supra*.

718. See IOWA CODE § 907.3 (1979).

719. See *id.* §§ 713.2, .3, 909.1. See also text accompanying notes 957-1037 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

720. IOWA CODE § 719.1 (1979).

721. See note 37 *supra*.

722. See note 63 *supra*.

723. IOWA CODE § 708.1(3) (1979). See text accompanying notes 797-803 *infra*.

724. *Id.* § 724.3 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 2401-04; J. YEAGER & R. CARLSON, *supra* note 12, §§ 512-16.

725. IOWA CODE § 724.1 (1979); see UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2403; J. YEAGER & R. CARLSON, *supra* note 12, § 512.

726. 18 U.S.C.A. § 922 (1976); 26 U.S.C.A. § 5847 (1980).

727. IOWA CODE § 724.2 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 513.

offensive weapon. As Professor Yeager cautions, a person finding what appears to be an offensive weapon should "leave it where it is and notify the appropriate police agency."<sup>728</sup>

Mere possession<sup>729</sup> *per se* is not a crime under this statute, however, since the offender must "knowingly possess an offensive weapon."<sup>730</sup> This means, according to Professor Yeager, that the offender must have knowledge both of his possession of the weapon and of the offensive weapon quality, and furthermore that "proof that one knowingly possesses one of these permits an inference that he knows that it is an offensive weapon."<sup>731</sup>

The simple grade of this offense is a class D felony.<sup>732</sup> It, of course, is not a "forcible felony."<sup>733</sup>

### C. Possession of Firearm or Offensive Weapon by Felon

This new crime,<sup>734</sup> which is patterned after federal law,<sup>735</sup> is comprised of: (1) the act of either possession;<sup>736</sup> receiving, transporting, or causing to be transported, (2) a "firearm"<sup>737</sup> or an "offensive weapon";<sup>738</sup> (3) by a person previously convicted of a felony (in any state or federal court). It is reasonable to assume that this statute, like the comparable pre-revised Carrying Concealed Weapons statute,<sup>739</sup> will be interpreted as requiring an additional element of knowledge<sup>740</sup> (that a weapon was being possessed, etc.). Moreover, whenever applicable, the state will have to prove beyond a reasonable doubt that the offender had not at the time either been pardoned or had his

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728. J. YEAGER & R. CARLSON, *supra* note 12, § 516.

729. Possession is defined in the Uniform Jury Instructions as "the having or keeping of a [weapon] by the defendant. It must be a conscious possession and control of the [weapon]; and, he must exercise dominion and control over it or have the actual care and management of it." UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2404.

730. IOWA CODE § 724.3 (1979).

731. J. YEAGER & R. CARLSON, *supra* note 12, § 515 at 129-30. *But cf.* UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2402 which limits knowledge to the element of having possession.

732. See note 65 *supra*.

733. See note 128 *supra*.

734. IOWA CODE § 724.26 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 2410-12; J. YEAGER & R. CARLSON, *supra* note 12, §§ 538-40.

735. 18 U.S.C. §§ 922-25 (1976).

736. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2404 ("Possession").

737. See text accompanying notes 347-51 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

738. See IOWA CODE § 724.1 (1979); UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2403; J. YEAGER & R. CARLSON, *supra* note 12, § 512.

739. See IOWA CODE § 695.2 (1977) (repealed 1978).

740. See *State v. Krana*, 246 N.W.2d 293 (Iowa 1976); *State v. Williams*, 184 Iowa 1070, 169 N.W. 371 (1919), and text accompanying notes 587-91 in Part I of this Article, 29 DRAKE L. REV. 239 (1980). See also UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2411. *But see J. ROEHRICK*, *supra* note 81, at 345 (appears to be no requirement that there be knowledge or intent on behalf of accused).

rights restored (by the President or Governor) as well as that he had not been expressly authorized (by the President or Governor) to handle such weapons.<sup>741</sup>

What constitutes a "felony" is spelled out in the Code, *viz.* "any offense punishable in the jurisdiction where it occurred by imprisonment for a term exceeding one year."<sup>742</sup> The legislature was wise in clearly setting out what it meant by a convicted felon. However, the wisdom of its specific definition can be questioned. As Professor Yeager has noted,<sup>743</sup> a due process problem (*i.e.*, of notice) can arise when this section is applied to a person whose conduct constituted a misdemeanor under the prevailing law at the time but which nevertheless carried a penalty of a term of potential imprisonment exceeding one year. The apparent rationale for this definition is a legislative decision that uniform criteria should be applied to persons convicted of a crime serious enough to warrant potential imprisonment in excess of one year, notwithstanding the felony-misdemeanor classification of the crime. Strangely, the legislature in this same Code raised the minimal level of felony criminal conduct to the five-year punishment level.<sup>744</sup> Concomitantly, it created a new classification of an aggravated misdemeanor, which is punishable by a determinate maximum term of two years imprisonment.<sup>745</sup> Read *in pari materia* with the aforementioned definition of a felony, this raises the question of whether an aggravated misdemeanor constitutionally can provide the underlying *felony* conviction for this offense of Possession of Firearm by Felon.

Two constitutional challenges concerning section 724.26 have already been resolved in favor of the statute. In *State v. Rupp*,<sup>746</sup> 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. A similar statute has been upheld in Colorado<sup>747</sup> against a constitutional attack on including non-Colorado convictions as the underlying or predicate felony conviction. The unsuccessful argument was that by permitting federal convictions as well as convictions in other states (in addition, of course, to Colorado) this amounted to legislative delegation to another jurisdiction the power to define Colorado crimes. The court emphasized that the existence of a prior felony conviction is merely a fact to be

741. See IOWA CODE § 724.27 (1979); UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2411. See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 538-40.

742. IOWA CODE § 724.25 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2412; J. YEAGER & R. CARLSON, *supra* note 12, § 538.

743. J. YEAGER & R. CARLSON, *supra* note 12, § 538.

744. See IOWA CODE § 902.9(4) (1979) (class D felony).

745. *Id.* § 903.1(1) (aggravated misdemeanor).

746. 282 N.W.2d 125 (Iowa 1979).

747. *People v. Tenorio*, 590 P.2d 952 (Colo. 1979).

proved at trial.<sup>748</sup>

The United States Supreme Court has held<sup>749</sup> that a felon charged under the comparable federal statute cannot contest the validity of the predicate felony conviction. The six-three majority held that "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm,"<sup>750</sup> after determining that the Congressional intent was to "focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons."<sup>751</sup> This decision and underlying rationale is unreasonable, especially in light of the asserted invalidity of the prior felony conviction being violation of the sixth amendment right to counsel. The same legislative-intent justification should apply to recidivist statutes, yet a prior counselless felony conviction in violation of *Gideon v. Wainwright*<sup>752</sup> cannot—indeed, should not—be used.<sup>753</sup>

#### D. Carrying Weapons

The former single-facet crime of Carrying Concealed Weapons<sup>754</sup> was reconstituted into three types of related conduct comprising the new crime of Carrying Weapons.<sup>755</sup> The three alternative means of committing this offense are: (1)(a) going armed, (b) with a "dangerous weapon,"<sup>756</sup> (c) concealed on or about one's person;<sup>757</sup> or (2)(a) going armed, (b) with a pistol, revolver, or any kind of loaded "firearm,"<sup>758</sup> (c) within a city's limits;<sup>759</sup> or (3)(a) knowingly carrying or transporting, (b) a pistol or revolver, (c) in a vehicle.<sup>760</sup> Of course, these weapons can be carried lawfully, even in the above-mentioned circumstances, provided that one or more of the eight statutory exceptions exists.<sup>761</sup> The state has the burden of negating the application of the exceptions.<sup>762</sup>

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748. *Id.* at 955.

749. *Lewis v. United States*, 100 S. Ct. 915 (1980).

750. *Id.* at 921.

751. *Id.* at 922.

752. 372 U.S. 335 (1963).

753. *United States v. Tucker*, 404 U.S. 443 (1972).

754. See *Iowa Code* 695.2 (1977) (repealed 1978).

755. *Iowa Code* § 724.4 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 2405-09; *J. YEAGER & R. CARLSON*, *supra* note 12, §§ 517-22.

756. *Iowa Code* § 702.7 (1979). See text accompanying notes 161-79 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

757. *Iowa Code* § 724.4 (1979); *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 2407.

758. See text accompanying notes 347-51 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

759. *Iowa Code* § 724.4 (1979); *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 2409.

760. *Iowa Code* § 724.4 (1979); *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 2408.

761. *Iowa Code* § 724.4 (1979). See *J. YEAGER & R. CARLSON*, *supra* note 12, §§ 518-22.

762. See *State v. Baych*, 169 N.W.2d 578 (Iowa 1969); *State v. Burns*, 181 Iowa 1098, 165 N.W. 346 (1917); *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 2407. Note, however, that

The first alternative is basically a restatement of the former offense prohibiting the carrying of a *concealed* dangerous weapon anywhere in Iowa. Presumably, former caselaw dealing with the issue of concealment remains viable, with the term "concealed" essentially meaning "not in plain view."<sup>763</sup> Moreover, the revised statutory language should not change the pre-revised interpretation requiring proof of conscious or intentional carrying of what was known to be a dangerous weapon,<sup>764</sup> although this remains merely a general intent crime.<sup>765</sup>

The concept underlying the second alternative is new to Iowa law. Concealment is not an element of this offense, since it is a violation to go armed in any manner with the specified weapons. Note that this crime can only be committed within any city's corporate limits. The philosophy being that "no one should go armed in areas of relatively dense population,"<sup>766</sup> with the city limits chosen as an effective way for anyone to identify restricted areas. This crime is committed if the individual is armed with a "pistol or revolver" whether or not such weapon is loaded. However, if the charge is based upon carrying a "firearm," other than a pistol or revolver, the prosecution must establish that such weapon was loaded. The reason for this distinction is unclear.

The final alternative represents an expansion of prior law by not being limited to the operator of the vehicle.<sup>767</sup> The weapon need not be loaded. Finally, the single grade of this offense is an aggravated misdemeanor.<sup>768</sup>

#### E. Going Armed With Intent

The only change made in the crime of Going Armed with Intent<sup>769</sup> was to substitute the general terminology of "any dangerous weapon"<sup>770</sup> for the pre-revised lengthy listing of specific weapons. The practical effect could be

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unlike in instruction No. 2407 (carrying a dangerous weapon concealed upon person), no mention is made in Uniform Jury Instructions Nos. 2408 (carrying a firearm in a vehicle) and 2409 (carrying a weapon within the city limits) of negating these exceptions as an element of the State's case. This, of course, is an oversight that requires revision of these two instructions.

763. J. YEAGER & R. CARLSON, *supra* note 12, § 517.

764. *Id.* See State v. Watts, 223 N.W.2d 234 (Iowa 1974); State v. Williams, 184 Iowa 1070, 169 N.W. 371 (1918).

765. State v. Davidson, 217 N.W.2d 630 (Iowa 1974); State v. Baych, 169 N.W.2d 578 (Iowa 1969). *But cf.* State v. Juergens, 240 N.W.2d 647 (Iowa 1976) (defendant's purpose or motive in carrying a knife which was not included in the statutory listing of *per se* dangerous weapons is material element of offense).

766. J. YEAGER & R. CARLSON, *supra* note 12, § 517.

767. *Id.*

768. See note 63 *supra*.

769. IOWA CODE § 708.8 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 819-21; J. YEAGER & R. CARLSON, *supra* note 12, § 187.

770. See IOWA CODE § 702.7 (1979) and text accompanying notes 161-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

to include more weapons within the province of this offense.<sup>771</sup>

Although this crime is included in the Code chapter on Assaults, an assault is not an element of this crime. Going Armed with Intent is essentially an inchoate attempted murder provision,<sup>772</sup> applicable in a situation where there is not a sufficient overt act for an Attempted Murder charge.<sup>773</sup> Indeed, the crime of Going Armed with Intent even "is complete without any attempt having been made to use the weapon."<sup>774</sup>

Specifically, this crime consists of: (1) going armed;<sup>775</sup> (2) with a "dangerous weapon";<sup>776</sup> (3) with the intent to use it, without justification, against another person. This is a specific intent<sup>777</sup> crime, thus differentiating it from the crime of Carrying Weapons,<sup>778</sup> although the prosecution does not have to prove the *particular* person against whom the defendant intended to use the dangerous weapon.<sup>779</sup>

The single grade of this offense is a class D felony.<sup>780</sup> However, it is not a "forcible felony."<sup>781</sup> This is because an assault is not a necessary element and thus Going Armed with Intent would not come within the interpretation of a "felonious assault"<sup>782</sup> in *State v. Powers*.<sup>783</sup>

#### F. Setting Spring Guns and Mantraps

A new crime of Setting Spring Guns and Mantraps<sup>784</sup> appears in section

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771. However, this expanded definition still is not broad enough to encompass a starting pistol. See *State v. Lawr*, 263 N.W.2d 747 (Iowa 1978).

772. See *TRAINING MANUAL, supra* note 14, at 49.

773. See *IOWA CODE* § 707.11 (1979) and text accompanying notes 872-93 *infra*.

774. See *TRAINING MANUAL, supra* note 14, at 49.

775. "Going armed" encompasses conscious and deliberate keeping of a dangerous weapon on or about the person, and available for immediate use. See *UNIFORM JURY INSTRUCTIONS, supra* note 12, at No. 821. The distance that an armed individual has gone from his home is relevant to the element of intent in appropriate cases. This is a matter for the jury, rather than a question of sufficiency of evidence (for a motion for judgement of acquittal). *State v. Buchanan*, 207 N.W.2d 784 (Iowa 1973).

776. Under the *UNIFORM JURY INSTRUCTIONS, supra* note 12, at No. 820, the jury is to decide if the particular weapon used by the defendant was a "dangerous weapon," as that term is defined in section 702.7 of the code and in *UNIFORM JURY INSTRUCTIONS, supra* note 12, at No. 218. See text accompanying notes 161-79 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

777. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

778. *IOWA CODE* 724.4 (1979). See text accompanying notes 754-68 *supra*.

779. See *State v. Buchanan*, 207 N.W.2d 784 (Iowa 1973).

780. See note 65 *supra*.

781. See note 128 *supra*.

782. See text accompanying notes 326-45 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

783. 278 N.W.2d 26 (Iowa 1979).

784. *IOWA CODE* § 708.9 (1979). There are no Uniform Jury Instructions for this crime. See generally J. YEAGER & R. CARLSON, *supra* note 12, § 188; *TRAINING MANUAL, supra* note 14, at 49.

708.9 of the Code, *partly* in response<sup>785</sup> to the well-publicized and highly controversial civil liability case of *Katko v. Briney*.<sup>786</sup> The elements of this essentially inchoate-type offense are: (1) setting either a spring gun or mantrap; (2) which is intended to be sprung by a person; and (3) which can cause such person "serious injury."<sup>787</sup> This is a specific intent crime.<sup>788</sup>

The single grade of this offense is an aggravated misdemeanor,<sup>789</sup> irrespective of whether or not the spring gun or mantrap ever is set off. Unlike several other offenses, this offense thus does not include a built-in higher penalty schedule for firing of the devices or for any resultant personal injury. This singular approach has the desirable effect of avoiding double punishment for any personal injury caused by a spring gun or a mantrap. Of course, any resultant harm caused to a person would be punishable as a separate substantive offense (either as a homicide offense or an aggravated type of assault offense, depending upon the degree of injury and the particular surrounding circumstances).

#### G. Assault

One mode of committing the simple misdemeanor<sup>790</sup> crime of Assault<sup>791</sup> is by either intentionally<sup>792</sup> pointing a "firearm"<sup>793</sup> toward another person or displaying in a threatening manner<sup>794</sup> any "dangerous weapon"<sup>795</sup> toward another person. There is no requirement that the victim not be aware that it is unloaded.<sup>796</sup>

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785. Professor Yeager, the draftsman of the IOWA CRIMINAL CODE, reports that this provision was already included in early drafts of the proposed revised code prior to the decision in *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971). See J. YEAGER & R. CARLSON, *supra* note 12, § 188.

786. 183 N.W.2d 657 (Iowa 1971).

787. See IOWA CODE § 702.18 (1979) and text accompanying notes 207-11 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

788. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

789. See note 63 *supra*.

790. See note 37 *supra*.

791. IOWA CODE § 708.1(3) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 804; J. YEAGER & R. CARLSON, *supra* note 12, § 175.

792. "Intentionally" is defined as "consciously and not accidentally or inadvertently." UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 804. Regarding intentionally as a state of mind, see text accompanying notes 528-42 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

793. See text accompanying notes 347-51 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

794. This phrase means "to show or make the existence of a dangerous weapon apparent in such a manner as to intimidate another." UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 804.

795. See IOWA CODE § 702.7 (1979) and text accompanying notes 161-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

796. See *State v. Shepard*, 10 Iowa 126 (1859).

### H. Terrorism

The discharging of certain weapons under certain limited circumstances constitutes one of the two types of Terrorism,<sup>797</sup> which is included in the chapter on Assault in the new Criminal Code. The elements of this new crime are: (1) discharging a "dangerous weapon";<sup>798</sup> (2) at or into any occupied building or vehicle; and (3) placing the occupants thereof in reasonable apprehension<sup>799</sup> of "serious injury."<sup>800</sup> Proof of the occupants being placed in *actual* danger appears unnecessary in light of the fact that the crime only requires that the dangerous weapon be discharged *at* an occupied building or vehicle.

This offense is a class D felony.<sup>801</sup> Moreover, this particular type of Terrorism has been interpreted<sup>802</sup> to be a "felonious assault" and thus a "forcible felony."<sup>803</sup>

### I. Miscellaneous Weapons Distribution Offenses

Six minor offenses<sup>804</sup> relating to permits and unlawful transfers of diverse types of weapons also appear in Chapter 724. Unfortunately, the remainder of this chapter is comprised of an elaborate scheme for the *administrative* function of issuing and recording permits for weapons.<sup>805</sup> The administrative procedure for issuing weapons permits was not included in the fourth tentative draft of S.F. 85. It was noted in the accompanying commentary: "The suggestion is that such matters ought to be taken out of the criminal code and placed back in that part of the code which deals with the duties of the sheriff as such." The message did not get through, however.

Purchasing a pistol or revolver without a valid permit (or selling a pistol

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797. IOWA CODE § 708.6(1) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 812-14; J. YEAGER & R. CARLSON, *supra* note 12, § 181.

798. See IOWA CODE § 702.7 (1979) and text accompanying notes 161-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

799. The phrase "reasonable apprehension of serious injury" means "whether, under the facts and circumstances existing at the time, a reasonable person in the position of the victim would be placed in fear or apprehension of serious injury." UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 814.

800. See IOWA CODE § 702.18 (1979) and text accompanying notes 207-11 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

801. See note 65 *supra*.

802. State v. Young, 293 N.W.2d 5 (Iowa 1980).

803. See note 128 *supra*.

804. There are no Uniform Jury Instructions for any of these six offenses. See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 524-40.

805. Although the permit provisions were included within the pre-revised Criminal Code itself (see IOWA CODE §§ 695.4-29 (1977) (repealed 1978)), they were omitted in early legislative drafts. As explained in the commentary to the Fourth Tentative Draft of S.F. 85: "The procedure for issuing permits to carry dangerous weapons are [sic] not included in the draft. The suggestion is that such matters ought to be taken out of the criminal code and placed back in that part of the code which deals with the duties of the sheriff as such." *Id.* at 109.

or revolver to a person without a valid permit)<sup>806</sup> constitutes the only new offense in this grouping. This new criminalization is wise, as a measure to aid in regulating the proliferation of handguns, although surprisingly it is graded merely as a simple misdemeanor.<sup>807</sup> Note that this offense cuts both ways, by criminalizing the actions of both the seller and the purchaser. Thus, a legitimate handgun dealer has the duty of ascertaining that a customer has what appears to be a valid permit for the purchase of a handgun. Of course, the seller should not be held strictly liable for fraudulently-obtained permits. However, a seller arguably has a duty of making reasonable inquiry when presented with a permit with alterations on its face as well as a requirement to determine that the prospective purchaser and the permit holder are the same person. Moreover, a seller certainly would be remiss in selling a handgun to a person who falsely alleges to have a valid permit but fails to have it in his possession at the time.<sup>808</sup>

Three pre-revised offenses<sup>809</sup> were changed, although not substantially. Two others<sup>810</sup> were re-enacted verbatim.

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806. *Iowa Code* § 724.16 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 534.

807. *See note 37 supra.*

808. *Iowa Code* § 724.16 (1979) reads in pertinent part: "[A]ny person who transfers ownership of a pistol or revolver to a person who *does not have in his or her possession* a valid annual permit to acquire pistols or revolvers is guilty . . ." (emphasis added).

809. The revised crime of Failure to Report Sale or Other Transfer of Firearms, a simple misdemeanor, is "somewhat more limited" than prior law by being limited to pistols and revolvers. *Iowa Code* § 724.15 (1979). *Cf. Iowa Code* § 695.21 (1977) (repealed 1978). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 534.

The revised crime of Giving False Information When Purchasing Firearms, an aggravated misdemeanor, has been expanded by specifying that it can be committed either through the giving of: (1) a false name; (2) false identification; or (3) other false information. *Iowa Code* § 724.21 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 534. The pre-revised crime was limited to giving of a false or fictitious name. *See Iowa Code* § 695.23 (1977) (repealed 1978).

The revised crime of Making Firearms Available to Minors, a simple misdemeanor, is somewhat more extensive than prior law by applying to firearms generally (instead of merely to pistols and revolvers) and by "further delineat[ing] the prohibited conduct." J. ROEHRICK, *supra* note 81, at 341. *See Iowa Code* § 724.22 (1979). *Cf. Iowa Code* § 695.26 (1977) (repealed 1978). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 535. Moreover, exceptions were added for minors to have firearms legitimately provided for recreational uses as well as for national guard duties. *See id.*

810. These two unchanged offenses are Failure of Armed Persons to Carry a Permit, a simple misdemeanor (*see Iowa Code* § 724.5 (1979); J. YEAGER & R. CARLSON, *supra* note 12, § 523) and Making a False Statement in Application for Permit, an aggravated misdemeanor (*see Iowa Code* § 724.10 (1979); J. YEAGER & R. CARLSON, *supra* note 12, § 529).

## V. HOMICIDE OFFENSES

## A. Murder Offenses

## 1. Overview

No substantive change was made in what constitutes murder under the Criminal Code, the definition continuing to be the killing of another person "with malice aforethought either express or implied."<sup>811</sup> Doubtlessly, there remains "one crime called murder in Iowa,"<sup>812</sup> now defined in section 707.1, and "the degrees of the offense are but gradations of the crime devised to permit punishment to be varied according to circumstances of greater or less enormity characterizing the act."<sup>813</sup> The major change has been to expand the scope of first degree murder<sup>814</sup> at the expense of the residual offense of second-degree murder.<sup>815</sup> It appears that second-degree murder has also been cut back by the reach of the involuntary manslaughter provision.<sup>816</sup>

Malice aforethought<sup>817</sup> remains the specific state of mind necessary to make an unlawful killing, murder, instead of merely manslaughter. It is defined in the Uniform Jury Instructions as being:

A fixed purpose or design to do some physical harm to another which exists prior to the act committed. It need not exist for any particular length of time and requires only such deliberation as would make a person appreciate and understand the nature of the act and its consequences, as distinguished from an act done in the heat of passion.<sup>818</sup>

Malice aforethought may be inferred from the intentional use of a deadly weapon upon the victim.<sup>819</sup> Indeed, willful use of a deadly weapon or other instrument likely to cause death when accompanied by an opportunity to deliberate before it is used has been held to constitute evidence of malice, deliberation, premeditation and intent to kill.<sup>820</sup> These mens rea components must be inferred by the fact finder from the totality of circumstances

811. IOWA CODE § 707.1 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 703; J. YEAGER & R. CARLSON, *supra* note 12, §§ 132, 136.

812. State v. Nowlin, 244 N.W.2d 596, 604 (Iowa 1976) (pre-revised Code). Feticide offenses, which are minor offenses, are not covered in this Article. For an extensive discussion of those offenses see J. YEAGER & R. CARLSON, *supra* note 12, at Nos. 722-27.

813. State v. Nowlin, 244 N.W.2d at 604.

814. IOWA CODE § 707.2 (1979).

815. *Id.* § 707.3.

816. *Id.* § 707.5(1). For a discussion of the application of the lesser included offenses doctrine to homicide see text accompanying notes 647-723 in Part I of this Article, 29 DRAKE LAW REVIEW 239 (1980).

817. See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 135-36.

818. UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 702.

819. UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 704; J. YEAGER & R. CARLSON, *supra* note 12, § 136.

820. See, e.g., State v. Smith, 242 N.W.2d 320 (Iowa 1976); State v. Lass, 228 N.W.2d 758 (Iowa 1975); State v. Hall, 214 N.W.2d 205 (Iowa 1974).

rather than being presumed from the mere use of a deadly weapon.<sup>821</sup> In *State v. Lass*,<sup>822</sup> the supreme court held that to instruct that an Assault with a Deadly Weapon implies malice and that a presumption of malice aforethought is warranted if death ensues does not place the burden of proving absence of malice upon the defendant. Similarly, it noted therein that an instruction that the presumption of malice "may be overcome by contrary evidence"<sup>823</sup> does not shift the burden of proof to the defendant, because this was only a *prima facie* fact presumption which was rebuttable.<sup>824</sup>

Motive for a killing, of course, is not an essential element in a prosecution for murder. Consequently, the supreme court has rejected outright a claim that the senselessness of the particular multiple murders detracted from the state's required showing of deliberation and premeditation, noting that murder is always senseless.<sup>825</sup> Nevertheless, the court has stated that the absence of a motive "may be considered in determining whether an assailant acted with malice aforethought."<sup>826</sup>

## 2. First Degree Murder

The Criminal Code retains the traditional language of "willfully, deliberately, and with premeditation"<sup>827</sup> as aggravating elements making a killing done with malice aforethought first-degree murder. It did eliminate, however, the archaic phraseology making a killing first-degree murder if "perpetrated by means of poison, or lying in wait."<sup>828</sup> Of course, this deletion is inconsequential since such a killing falls within the traditional elements retained in the Criminal Code as a willful, deliberate and premeditated killing with malice aforethought.

Three other types of murder are considered to be in the first degree under the new Criminal Code. These include two entirely new concepts—killings during an escape or attempted escape<sup>829</sup> from lawful custody and most (but not all) killings by prisoners.<sup>830</sup> Additionally, the third type, the felony murder rule,<sup>831</sup> underwent considerable revision. Each of these three circumstances merely substitutes for premeditation, but not for malice aforethought. The fact that the word "kills" is used in each of the four subsections in the revised Code does not portend a change in Iowa law that has

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821. *State v. Lass*, 228 N.W.2d 758, 766 (Iowa 1975).

822. 228 N.W.2d 758 (Iowa 1975).

823. *Id.* at 767 (quoting *State v. Anstine*, 91 Idaho 169, \_\_\_, 418 P.2d 210, 214 (1966)).

824. *State v. Lass*, 228 N.W.2d 758, 767 (Iowa 1975).

825. *State v. Fryer*, 226 N.W.2d 36 (Iowa 1975).

826. *State v. Smith*, 242 N.W.2d 320, 326 (Iowa 1976).

827. *Iowa Code* § 707.2(1) (1979).

828. *See Iowa Code* § 690.2 (1977). (repealed 1978).

829. *Iowa Code* § 707.2(3) (1979). *See* text accompanying notes 854-56 *infra*.

830. *Id.* § 707.2(4). *See* text accompanying notes 857-62 *infra*.

831. *Id.* § 707.2(2). *See* text accompanying notes 847-53 *infra*.

required malice aforethought as an element of murder (whether of the first or second degree) even under the felony murder rule.<sup>832</sup> This is because the first main section in the first degree murder statute refers to "murder,"<sup>833</sup> which term has been previously defined as killing another person with malice aforethought.<sup>834</sup>

a. *Premeditation.* A so-called "straight" first-degree murder occurs when the killing is done "with malice aforethought, willfully, deliberately, premeditatedly and with a specific intent to kill."<sup>835</sup> "Willfully" means "intentional or by fixed design or purpose and not accidental,"<sup>836</sup> or a killing "done intentionally and without legal justification."<sup>837</sup> To "deliberate" is "to weigh in one's mind, to consider, to contemplate, or to reflect."<sup>838</sup> To "premeditate" is "to think or ponder upon a matter before acting."<sup>839</sup> Absent a specific intent to kill, a "straight" murder would be only of the second degree<sup>840</sup> (at least when the murder is not also committed during a forcible felony, escape or attempted escape or by a prisoner).<sup>841</sup>

Deliberation and premeditation may not be presumed, but instead are subject merely to a permissive inference to be drawn or rejected by the fact finder.<sup>842</sup> Nevertheless, neither needs to exist "for any particular length of time before the act."<sup>843</sup> For example, in finding deliberation and premeditation a jury may consider the fact that the defendant selected a deadly weapon with an opportunity to deliberate (even for a short time) as to where he will use it thereafter in a deadly manner.<sup>844</sup>

Deliberation and premeditation can be shown by circumstantial evidence through, for example: "(1) evidence of planning activity of the defendant which was directed toward the killing; (2) evidence of motive which might be inferred from prior relationships between defendant and the victim; and (3) evidence regarding the nature of the killing."<sup>845</sup> All three of these are not necessary, however, in making a requisite showing of premeditation.<sup>846</sup>

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832. *State v. Galloway*, 275 N.W.2d 736, 738 (Iowa 1979).

833. *Iowa Code* § 707.2 (1979).

834. *Id.* § 707.1.

835. *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 708.

836. *Id.* at No. 702.

837. *J. YEAGER & R. CARLSON*, *supra* note 12, § 138.

838. *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 702.

839. *Id.*

840. *State v. Smith*, 242 N.W.2d 320, 326 (Iowa 1976).

841. *Iowa Code* §§ 707.2(2), (3), (4) (1979).

842. *State v. Fryer*, 226 N.W.2d 36, 41 (Iowa 1975).

843. *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 705; *see State v. Fryer*, 226 N.W.2d 36, 41 (Iowa 1975).

844. *See, e.g., State v. Frazer*, 267 N.W.2d 34, 39 (Iowa 1978); *State v. Smith*, 240 N.W.2d 693, 695 (Iowa 1976); *State v. Lass*, 228 N.W.2d 758, 766 (Iowa 1975).

845. *State v. Harrington*, 284 N.W.2d 244, 247-48 (Iowa 1979).

846. *Id.*

b. *Felony Murder Rule.* Killing another person during participation in a "forcible felony" constitutes Murder in the First Degree.<sup>847</sup> This substitution of the phrase "forcible felony"<sup>848</sup> for the five enumerated crimes under the pre-revised law has changed the felony murder rule in several respects, all of which are discussed extensively in individual sections of this Article.<sup>849</sup>

The felony murder doctrine "must be based on a causally related felony and acts causing death."<sup>850</sup> 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.<sup>851</sup> A causal relationship was found in *State v. Taylor*<sup>852</sup> 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 operator "in order to effect his escape and avoid later identification."<sup>853</sup> The operator's purse also was taken, which presumably was the basis of the felony murder application, since rifling a cash register in the absence of anyone else would constitute mere Theft, the court's unfortunate reference to defendant's robbing the place notwithstanding.

c. *Escape.* One of the two new types of first-degree murder provided for in the new Criminal Code is a killing during an escape or attempted escape from lawful custody.<sup>854</sup> The elements are: (1) killing any person (2) with malice aforethought<sup>855</sup> (3) while either escaping or attempting to escape<sup>856</sup> (4) from lawful custody.

d. *Killings by Inmates.*<sup>857</sup> The other completely new type of first degree murder can only be committed by an inmate who is at the time imprisoned<sup>858</sup> in a state, county, or city correctional facility. The victim must be

847. IOWA CODE § 707.2(2) (1979).

848. *Id.* § 702.11. See text accompanying notes 180-203 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

849. See text accompanying notes 197-203, 539-670, 884-86, 992-96, 1321-22 in Part I of this Article, 29 DRAKE L. REV. 239 (1980); notes 107-18, 223-343, 539-670 *supra*.

850. *State v. Taylor*, 287 N.W.2d 576, 577 (Iowa 1980).

851. *Id.* at 578.

852. 287 N.W.2d 576 (Iowa 1980).

853. *Id.* at 577.

854. IOWA CODE § 707.2(3) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 710-11; J. YEAGER & R. CARLSON, *supra* note 12, § 140.

855. See text accompanying notes 817-26 *supra*. But see J. YEAGER & R. CARLSON, *supra* note 12, § 140, as to possible problems in implying malice when the particular grade of the underlying escape or attempted escape is merely a misdemeanor.

856. Regarding what constitutes an escape, see IOWA CODE § 719.4 (1979). See also UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 711.

857. IOWA CODE § 707.2(4) (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 712; J. YEAGER & R. CARLSON, *supra* note 12, § 141.

858. Because of the express, restrictive statutory language, "[t]he person intentionally kills . . . while such person is imprisoned. . . ." IOWA CODE § 707.2(4) (1979), it is clear that offenders free on bail, probation, or parole are not covered. Whether inmates who intentionally kill while on work release or under custodial hospitalization or while being transported from

either a peace officer, correctional officer, public employee, or hostage—but not another inmate (except when the latter is killed while being held hostage).

Only *intentional*<sup>859</sup> killings are included under the express terms of the statute itself.<sup>860</sup> Thus, the malice aforethought component will be satisfied by actual proof of the man-endangering state of mind of an intent to kill, but without requiring deliberation and premeditation.

Of course, an unintentional killing of a prison guard by an inmate could still constitute Murder in the First Degree if done under either of the other two above-mentioned circumstances (other than premeditation). Otherwise, such a killing would constitute either second degree murder<sup>861</sup> if done with malice aforethought or if not then Involuntary Manslaughter.<sup>862</sup> Murder in the First Degree is a class A felony.<sup>863</sup>

### 3. Second Degree Murder

a. *Generally.* The pre-revised Code concept of second-degree murder<sup>864</sup> being statutorily defined as a residual provision was retained in the new Criminal Code. Therefore, Murder in the Second Degree<sup>865</sup> is all other murder which is not Murder in the First Degree. This includes deaths caused either intentionally or unintentionally, with malice aforethought being based upon: (a) intent to inflict serious bodily injury (but the victim nevertheless died); or (b) a depraved heart (*i.e.*, intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others); or (d) intentional "felony murders" involving felonies other than forcible felonies or escape (or attempted escape). The supreme court has stated that the absence of a specific intent to kill reduces an unlawful killing with malice aforethought from first degree murder to second degree murder.<sup>866</sup>

b. *Felony Murder Rule.* The scope of the application of the felony

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one place of confinement to another are covered is not clear. *See J. YEAGER & R. CARLSON, supra* note 12, § 141. Certainly these latter circumstances all fit within the obvious legislative intent to discourage killings by prisoners under any circumstances. It would be unreasonable to apply this provision to prisoner X who is either in his cell or at least somewhere within the penitentiary or jail at the time of the killing but not to his cellmate Y who was temporarily hospitalized in a private facility, but still in custody. A better statutory approach would have been to specify that the offender "is in custody" rather than "is imprisoned" at the time of the killing.

859. Regarding intentionally as a state of mind, see text accompanying notes 70-102 in Part I of this Article, 29 DRAKE L. Rev. 239 (1980).

860. Iowa Code § 707.2(4) (1979).

861. *See id.* § 707.3 (1979) and text accompanying notes 915-36 *infra*.

862. *See id.* § 707.5 (1979) and text accompanying notes 915-36 *infra*.

863. *See note 337 supra.*

864. *See Iowa Code § 690.3 (1977) (repealed 1978).*

865. Iowa Code § 707.3 (1979). *See UNIFORM JURY INSTRUCTIONS, supra* note 12, at Nos. 703, 713; *J. YEAGER & R. CARLSON, supra* note 12, § 143.

866. *State v. Reese*, 259 N.W.2d 771, 778 (Iowa 1977).

murder rule to second-degree murder has been sharply curtailed in the new Criminal Code in two respects. First, as already discussed above,<sup>867</sup> the scope of the first-degree felony murder rule has been broadened considerably. Secondly, the new Code created a separate crime of Involuntary Manslaughter<sup>868</sup> based upon *unintentionally* causing deaths during the commission of public offenses other than "forcible felonies" and escape (or attempted escape). Thus, accidental second-degree felony murder<sup>869</sup> is no longer recognized in Iowa, in contravention of common law. This crime is a class B felony,<sup>870</sup> and more importantly, it is a "forcible felony."<sup>871</sup>

#### 4. Attempted Murder

The separate crime of Attempted Murder<sup>872</sup> consists of these elements: (1) without justification, (2) doing an act expected to set in motion a force or chain of events which will cause or result in the death of another person, (3) with the intent to cause such death.<sup>873</sup> In essence, the state has to prove the concurrence of the requisite overt act and a specific intent to kill,<sup>874</sup> and additionally has to negate justification for the intended homicide.<sup>875</sup>

a. *Overt Act.* The overt act requirement embodied in this provision (*viz.* "does any act by which he or she expects to set in motion a force or chain of events which will cause or result in the death of such other person")<sup>876</sup> is quite different than the prevailing common law standard followed by the Iowa Supreme Court:

The overt act must reach far enough towards the accomplishment, toward the desired result, to amount to the commencement of the consummation, not merely preparatory. It need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt . . .<sup>877</sup>

The unfortunate reference in this new Code provision to setting in mo-

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867. See text accompanying notes 847-49 *supra*.

868. See IOWA CODE § 707.5(1) (1979) and text accompanying notes 915-36 *infra*.

869. See *State v. Kelley*, 195 N.W.2d 702 (Iowa 1972).

870. See note 327 *supra*.

871. See note 128 *supra*.

872. IOWA CODE § 707.11 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 728-30; J. YEAGER & R. CARLSON, *supra* note 12, §§ 161-63.

873. IOWA CODE § 707.11 (1979).

874. *State v. Barney*, 244 N.W.2d 316 (Iowa 1976).

875. J. YEAGER & R. CARLSON, *supra* note 12, § 161.

876. IOWA CODE § 707.11 (1979).

877. *State v. Roby*, 194 Iowa 1032, 1042, 188 N.W. 709, 714 (1922).

tion a chain of events designed to cause or result in death could have the effect of criminalizing mere preparatory conduct as opposed to minimally requiring some preperating act. Such an approach would fly in the face of accepted common law principles as well as common sense. Indeed, the very essence of such less severe offenses as Going Armed With Intent,<sup>878</sup> Administering Harmful Substances,<sup>879</sup> and Setting Spring Guns and Man-traps<sup>880</sup> appears to be criminalizing dangerous conduct which nevertheless does not constitute Attempted Murder.<sup>881</sup> Professor Yeager's interpretation seems correct in determining that mere preparation is insufficient since what is required is that the act "do whatever is necessary, in the light of the facts as he perceives them, to bring about the death of another—pull the trigger, strike out with the knife, put poison into food which the other is expected to ingest, or the like."<sup>882</sup> Thus, either merely purchasing or arming oneself with a firearm, knife, or poison would not be sufficient to satisfy the overt act requirement for the serious offense of Attempted Murder.

b. *Impossibility as Defense.* A specific provision is included in the Attempted Murder section<sup>883</sup> which seemingly makes it clear that impossibility is not a defense to this charge. However, the proviso is included in the statute that the actor's expectations must not have been unreasonable in the light of the facts known to the actor. The emphasis is thus placed on the expectations accompanying the overt act with a requirement, however, that those expectations be reasonable. As Professor Yeager recognizes, "[i]f it is unreasonable to expect that the acts will cause the death of another, there is some doubt that death was intended."<sup>884</sup> The upshot of this requisite reasonableness seemingly is to detract from the requisite specific intent to kill.

c. *Grading.* Attempted Murder, a class C felony,<sup>885</sup> has been interpreted as being a "forcible felony,"<sup>886</sup> and thus the ameliorative sentencing options of a deferred judgment, a deferred sentence, and a suspended sentence are not available.<sup>887</sup> In *State v. Powers*,<sup>888</sup> the supreme court held that the term "felonious assault"<sup>889</sup> in the definitional clause on "forcible felony"<sup>890</sup> includes "any assault the commission of which constitutes a fel-

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878. IOWA CODE § 708.8. See text accompanying notes 769-83 *supra*.

879. *Id.* § 708.5.

880. *Id.* § 708.9.

881. See J. YEAGER & R. CARLSON, *supra* note 12, § 180 (Administering Harmful Substances).

882. *Id.* § 162.

883. IOWA CODE § 707.11 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 163.

884. J. YEAGER & R. CARLSON, *supra* note 12, § 163.

885. See note 311 *supra*.

886. See note 128 *supra*.

887. See IOWA CODE § 907.3 (1979).

888. 278 N.W.2d 26 (Iowa 1979).

889. See text accompanying notes 326-45 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

890. See IOWA CODE § 702.11 (1979) and text accompanying notes 296-313 in Part I of this

ony,"<sup>891</sup> and that Attempted Murder is a felony which necessarily includes an assault.<sup>892</sup> The court thus rejected defendant's claim that the term "felonious assault" was limited to "those felonies listed in the assault chapter"<sup>893</sup> (while Attempted Murder is included in the homicide chapter).

### B. Manslaughter Offenses

#### 1. Overview

The generic definition of Manslaughter as an unlawful killing of another person without malice aforethought has remained unchanged from pre-revised law<sup>894</sup> (including the common law derivation). Unlike the pre-revised law, however, the new Criminal Code contains its own statutory definitions of this crime instead of merely incorporating the common law by reference.<sup>895</sup> Nevertheless, the statutory definitions essentially follow the common law, as discussed below.

Unlike the singular crime of Manslaughter under the pre-revised law, the revised crime is split into Voluntary<sup>896</sup> and Involuntary Manslaughter.<sup>897</sup> The key difference is that the former is an intentional killing whereas the latter is an unintentional killing. Additionally, Involuntary Manslaughter is further divided into two grades—the more serious being of the unlawful act type and the less serious being based upon something akin to criminal negligence.<sup>898</sup>

#### 2. Voluntary Manslaughter

The elements of Voluntary Manslaughter<sup>899</sup> in essence are: (1) intentionally<sup>900</sup> and (2) without justification; (3) causing the death of another person;<sup>901</sup> (4) solely by reason of passion (5) resulting from serious provocation;

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Article, 29 DRAKE L. REV. 239 (1980).

891. 278 N.W.2d at 28.

892. *Id.*

893. *Id.*

894. See Iowa Code § 690.10 (1977) (repealed 1978).

895. See State v. Shimon, 182 N.W.2d 113, 114-15 (Iowa 1970).

896. Iowa Code § 707.4 (1979).

897. *Id.* § 707.5.

898. *Id.*

899. Iowa Code § 707.4 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 715-17; J. YEAGER & R. CARLSON, *supra* note 12, §§ 144-46.

900. Regarding intentionally as a state of mind, see text accompanying notes 528-601 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

901. "The '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." State v. Marti, 290 N.W.2d 570, 579 (Iowa 1980) (citations omitted).

and (6) without a reasonable cooling-off period. Absent such circumstances of passion, this intentional killing would, of course, constitute murder.<sup>902</sup> The passion must be "sudden, violent, and irresistible" in nature,<sup>903</sup> and must result from a "serious provocation" (that is, "conduct that would excite, in a reasonable person" such a passion).<sup>904</sup> Nevertheless, as spelled out in the Uniform Jury Instructions:

Regardless of how sudden, violent and irresistible the passion may be, if there is an interval of time during which a reasonable person would, under the circumstances, have time to reflect and bring his passion under control, or, in other words, there is a sufficient time for a person of ordinary reason and temperament to regain his control and suppress the impulse to kill, then the act of the defendant was not committed solely by reason of passion caused by a "serious provocation."<sup>905</sup>

This offense is a class C felony.<sup>906</sup> It appears to be a "forcible felony."<sup>907</sup>

By statute,<sup>908</sup> this offense is made a lesser included offense<sup>909</sup> in a prosecution for murder in the first<sup>910</sup> or second degree.<sup>911</sup> Of course, this statutory provision merely satisfies the legal test for a lesser included offense and the evidence in the record of the case still must be examined to determine if the factual test is met.<sup>912</sup> Moreover, Involuntary Manslaughter<sup>913</sup> is made a lesser included offense of Voluntary Manslaughter under the same circumstances of requiring an independent factual basis.<sup>914</sup>

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902. IOWA CODE § 707.4 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 145.

903. IOWA CODE § 707.4 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 717; J. YEAGER & R. CARLSON, *supra* note 12, § 145.

904. UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 717. See J. YEAGER & R. CARLSON, *supra* note 12, § 146. *Accord* State v. Inger, 292 N.W.2d 119 (Iowa 1980). "Section 707.4 requires that both a subjective standard and objective standard be met before a defendant can be convicted of voluntary manslaughter. The subjective requirement . . . is that the defendant must act solely as a result of sudden, violent, and irresistible passion." 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." *Id.* at 122.

905. UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 717. *Accord* State v. Inger, 292 N.W.2d 119 (Iowa 1980). "[A]s 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." *Id.* at 122.

906. See note 311 *supra*.

907. See note 128 *supra*.

908. IOWA CODE § 707.5 (1979).

909. See text accompany notes 619-723 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

910. IOWA CODE § 707.2 (1979).

911. *Id.* § 707.3.

912. State v. Inger, 292 N.W.2d 119, 122 (Iowa 1980).

913. IOWA CODE § 707.5 (1979).

914. State v. Inger, 292 N.W.2d 119, 124 (Iowa 1980) (not error in prosecution for Voluntary Manslaughter to refuse to submit lesser included offense instruction on Involuntary Manslaughter in absence of factual basis for the latter).

### 3. *Involuntary Manslaughter*

There are two grades of Involuntary Manslaughter.<sup>915</sup> Both types, however, involve unintentional,<sup>916</sup> but unjustifiable, killings.

The more serious grade, a class D felony,<sup>917</sup> 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 Code,<sup>918</sup> include: (1) unintentionally and (2) without justification (3) causing the death of a human being<sup>919</sup> (4) during the commission of a public offense other than a "forcible felony" or escape (or attempted escape). However, the supreme court in *State v. Conner*<sup>920</sup> interpreted the legislative intent in this provision to also require a showing of recklessness<sup>921</sup> on the part of the offender.

The less serious grade, an aggravated misdemeanor,<sup>922</sup> is based strictly upon recklessness as the state of mind of the offense. The elements, as set out in the 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."<sup>923</sup> The latter phrase, which was left undefined in the Criminal Code, has been interpreted by the supreme court in *State v. Conner*<sup>924</sup> to mean 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."<sup>925</sup>

Aiding and abetting another to commit suicide has been interpreted<sup>926</sup> 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*,<sup>927</sup> 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. "[P]reparing and providing a weapon for one who is unable

915. Iowa Code § 707.5(1) (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 718-19; J. YEAGER & R. CARLSON, *supra* note 12, § 147.

916. Regarding intentionally as a state of mind, see text accompanying notes 528-65 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

917. See note 65 *supra*.

918. Iowa Code § 707.5(1) (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 719.

919. See note 901 *supra*.

920. 292 N.W.2d 682, 684 (Iowa 1980).

921. Regarding recklessness as a state of mind, see text accompanying notes 594-601 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

922. See note 63 *supra*.

923. Iowa Code § 707.5(2) (1979).

924. 292 N.W.2d 682, 684 (Iowa 1980).

925. *Id.*

926. *State v. Marti*, 290 N.W.2d 570 (Iowa 1980).

927. 290 N.W.2d 570 (Iowa 1980).

to do so and is known to be intoxicated and probably suicidal are acts 'likely to cause death or serious injury' <sup>928</sup> within the provision on involuntary manslaughter, the supreme court concluded. On the other hand, *State v. Conner*<sup>929</sup> 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.

The requisite act for this grade of Involuntary Manslaughter (which is based upon recklessness) was defined in *State v. Inger*<sup>930</sup> as being "an act that is *not* a public offense as defined in section 707.5(1)"<sup>931</sup> the latter being the unlawful act grade of Involuntary Manslaughter. 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 meaningful of section 707.5(1)." <sup>932</sup> Because the factual basis was not met for submitting a lesser included offense instruction,<sup>933</sup> the trial court thus correctly refused to instruct on Involuntary Manslaughter in this prosecution for second-degree murder. 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<sup>934</sup> or second degree<sup>935</sup> or for Voluntary Manslaughter.<sup>936</sup>

## VI. GOVERNMENTAL PROCESS OFFENSES

### A. Offenses Against the Government

Six offenses, including three new crimes and three other expanded crimes, are included in the chapter 718 offenses of the Code directed against governmental agencies and employees.<sup>936.1</sup> The principal change, however, is the elimination of Treason<sup>937</sup> as a crime cognizable under Iowa law. As Professor Yeager explains, Treason is an offense of concern only to the United States and "[i]n the modern context, treason against the state of Iowa is not a viable concept."<sup>938</sup> Professor Schantz adds that "the venerable offense of

928. *Id.* at 583.

929. 292 N.W.2d 682, 684 (Iowa 1980).

930. 292 N.W.2d 119 (Iowa 1980).

931. *Id.* at 124.

932. *Id.*

933. See text accompanying notes 619-723 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

934. IOWA CODE § 707.2 (1979).

935. *Id.* § 707.3.

936. *Id.* § 707.4.

936.1. There are no Uniform Jury Instructions, *supra* note 12, for any of these offenses.

937. See IOWA CODE § 689.1 (1977) (repealed 1978).

938. J. YEAGER & R. CARLSON, *supra* note 12, § 401.

treason [was] replaced by a narrower prohibition against insurrection."<sup>939</sup>

### 1. *Insurrection*

The revised crime of Insurrection,<sup>940</sup> which combines into one offense the two former crimes of Inciting Insurrection<sup>941</sup> and Inciting Hostilities,<sup>942</sup> has been broadened to include interference with or disruption of any subdivision of government (rather than being limited to State government itself, as under previous law). Another change requires a minimum of three persons acting in concert to commit this offense, the rationale being that this is "the point at which activity of this type begins to pose a special threat because of the number of persons involved."<sup>943</sup> The most drastic change, however, is in the focus of the conduct underlying this offense. Previously, the gravamen of the offense was incitement (via writing, speaking, etc.), whereas the new focus is placed upon physical violence or disruption.<sup>944</sup> The requirement of the actual use of "physical violence against persons or property"<sup>945</sup> means that mere passive conduct (e.g., a sit-in demonstration) will not be punishable under this crime, notwithstanding the conduct's disruptive effect.<sup>946</sup> This also means that a disruptive activity accompanied by a threat of physical violence will not suffice. Other less serious offenses (e.g., Willful Disturbance<sup>947</sup> and Harassment of Public Officers and Employees)<sup>948</sup> encompass this type of activity.

The mens rea of the revised crime is stated in the alternative: specifically, with the purpose of disrupting the state government of any subdivision thereof or of preventing a governmental body or officer thereof from performing a lawful function. Thus, it follows that this is a specific intent crime.<sup>949</sup>

There is only one grade of this crime. It is a class C felony,<sup>950</sup> but is not

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939. Schantz, *Objectives of Criminal Code Revision: Guidelines to Evaluation*, 60 IOWA L. REV. 430 (1975).

940. IOWA CODE § 718.1 (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 402.

941. See IOWA CODE § 689.4 (1977) (repealed 1978).

942. See *id.* § 689.8.

943. J. YEAGER & R. CARLSON, *supra* note 12, § 402, at 105-06.

944. "Insurrection differs from riot and unlawful assembly in that it consists of violence directed against the government and its functions, whereas riot and unlawful assembly threaten individuals or property." *Id.* at 106.

945. IOWA CODE § 718.1 (1979).

946. See J. YEAGER & R. CARLSON, *supra* note 12, § 402.

947. See IOWA CODE § 718.3 (1979) and text accompanying notes 959-68 *infra*.

948. See *id.* § 718.4 and text accompanying notes 960-64 *infra*.

949. For an extensive discussion of specific intent as a state of mind, see text and accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

950. A class C felony is punishable by either an indeterminate term of imprisonment of ten years or a maximum fine of \$5000 or both. IOWA CODE § 907.3 (1979).

a "forcible felony."<sup>951</sup> In contrast, the related pre-revised offense of Treason<sup>952</sup> was punishable by life imprisonment without parole or probation.

## 2. *Impersonating a Public Official*

The offense of Impersonating a Public Official<sup>953</sup> represents an expansion of the prior law<sup>954</sup> (which was basically limited to law enforcement and judicial officers) to include any elected or appointed official of any governmental subdivision. According to Professor Yeager, this crime does not encompass "innocent mistakes" and the statutory language "implies knowledge<sup>955</sup> of the falsity or at least the lack of any reasonable belief that one has the authority which he assumes to exercise."<sup>956</sup> The gravamen of this offense is the act of impersonation or mere pretense, and thus another person need not be defrauded, nor need there even be such a purpose.<sup>957</sup> This crime is an aggravated misdemeanor.<sup>958</sup>

## 3. *Willful Disturbance*

The new crime of Willful Disturbance<sup>959</sup> was created to deal with intentional disturbances of governmental deliberative bodies. The elements are: (1) willfully;<sup>960</sup> (2) disturbing; (3) any governmental deliberative body; (4) with the purpose<sup>961</sup> of either (a) disrupting the function of such body by tumultuous behavior or (b) coercing by force or attempted force any official conduct or proceeding.

The gravamen of this offense, a serious misdemeanor,<sup>962</sup> is disturbing a government agency, whereas the separate and less serious offense of Harassment of Public Officers and Employees,<sup>963</sup> also a simple misdemeanor, covers disruptive conduct directed toward the personnel of such an agency. Whether or not a single act which violates both of these sections can sup-

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951. See note 128 *supra*.

952. See IOWA CODE § 689.1 (1977) (repealed 1978).

953. IOWA CODE § 718.2 (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 403.

954. See IOWA CODE § 740.5 (1977) (repealed 1978).

955. For an extensive discussion of knowledge as a particularized state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

956. J. YEAGER & R. CARLSON, *supra* note 12, § 403.

957. *Id.*

958. See note 63 *supra*.

959. IOWA CODE § 718.3 (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 404.

960. Regarding willfully as a state of mind, see text accompanying notes 543-48 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

961. Regarding purposely as a state of mind, see text accompanying notes 569-71 in Part I of this Article, 29 Drake L. Rev. 239 (1980).

962. See note 40 *supra*.

963. See IOWA CODE § 718.4 (1979) and text accompanying notes 936-39 *supra*.

port two separate convictions is an open question. Unlike the more serious crime of Insurrection,<sup>964</sup> Willful Disturbance does not require multiple defendants or physical violence.

The phrase "tumultous behavior," which has been criticized by Professor Schantz,<sup>965</sup> is not defined in the Code. Professor Yeager suggests the use of its ordinary meaning, namely "a noisy uproar, with violence or under-tones of violence, be adopted."<sup>966</sup>

#### 4. *Harrassment of Public Officers and Employees*

A new crime<sup>967</sup> of Harrassment of Public Officers and Employees<sup>968</sup> encompasses any act willfully<sup>969</sup> done, or attempted, with the purpose<sup>970</sup> of preventing public personnel from performing their duties. Success is not required, nor is violence.<sup>971</sup>

The victims of this offense can only be public personnel, and then only when they are on duty or attempting to be on duty. The general crime of Harrassment in Code section 708.7, on the other hand, provides that *any person* can be the victim. However, the scope of prohibited activity under this general offense is much narrower, being limited to the statutory enumeration. Both harrassment offenses are simple misdemeanors.<sup>972</sup>

#### 5. *Falsifying Public Documents*

The crime of Falsifying Public Documents<sup>973</sup> consists of a consolidation of four pre-revised statutes,<sup>974</sup> with two significant changes. One change is that the gravity of the level of mens rea has been lowered considerably, with the elimination of fraudulent intent, leaving this a general intent crime.<sup>975</sup>

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964. See IOWA CODE § 718.1 (1979) and text accompanying notes 940-52 *supra*.

965. Schantz, *supra* note 939, at 435.

966. J. YEAGER & R. CARLSON, *supra* note 12, § 404.

967. "This section is not presently known within the Iowa statutory law. It appears to have been adopted to prevent interference with non-judicial personnel, as well as peace officers." J. ROHRICK, *supra* note 81, at 244.

968. IOWA CODE § 718.4 (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 405.

969. Regarding willfully as a state of mind, see text accompanying notes 543-48 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

970. Regarding purposely as a state of mind, see text accompanying notes 569-71 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

971. J. YEAGER & R. CARLSON, *supra* note 12, § 405.

972. See note 37 *supra*.

973. IOWA CODE § 718.5 (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 406.

974. See IOWA CODE §§ 718.3, .18, 738.21, 740.12 (1977) (repealed 1978).

975. Regarding general intent as a state of mind, see text accompanying notes 471-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

The prosecution need now only prove that a public document<sup>976</sup> was falsified by a person "having no right or authority to do so." The other change is that the mere act of possessing a seal or counterfeit seal of any governmental body is made a crime, whereas the criminal act under the applicable pre-revised statute<sup>977</sup> consisted of the consummated offense of counterfeiting. This offense is a "non-forcible" class D felony.<sup>978</sup>

#### 6. False Reports

The substantive nature of the general<sup>979</sup> intent crime of False Reports to Law Enforcement Authorities<sup>980</sup> was not changed from that of the applicable pre-revised statutes.<sup>981</sup> The newly-consolidated crime encompasses making false reports to a fire department or a law enforcement authority as well as falsely reporting a crime. This crime, a simple misdemeanor,<sup>982</sup> overlaps with two other more serious crimes—Making False Bomb Reports<sup>983</sup> and Malicious Prosecution<sup>984</sup>—as well as with Harrassment,<sup>985</sup> also a simple misdemeanor.

#### B. Offenses Relating to Interference with the Judicial Process

Six offenses "concerned with the protection of the judicial process"<sup>986</sup> are included in chapter 720 of the Code.<sup>987</sup> Only one of these, Malicious Prosecution,<sup>988</sup> is entirely new. Four of the five other offenses were revised and consolidated into this chapter. Only the crime of Compounding a Felony<sup>989</sup> was included unchanged as to substantive content, being modified only by providing for a simple penalty schedule. Two other comparatively minor offenses—Tampering with Witnesses or Jurors<sup>990</sup> and False Represen-

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976. Some public documents will also be financial instruments, *see Iowa Code* § 715.1, and the false making or alteration of them should be prosecuted as a violation of *Iowa Code* § 715.6. *J. YEAGER & R. CARLSON, supra* note 12, § 406. The penalty (class D felony) is the same for both offenses, however.

977. *See Iowa Code* § 718.18 (1977) (repealed 1978).

978. *See note 65 supra.*

979. Regarding general intent as a state of mind, *see* text accompanying notes 471-79 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

980. *IOWA CODE* § 718.6 (1979).

981. *See Iowa Code* §§ 714.31, .42 (1977) (repealed 1978).

982. *See note 37 supra.*

983. *IOWA CODE* § 712.7 (1979) (class D felony). *See* text accompanying notes 980-85 *supra.*

984. *Id.* § 720.6 (serious misdemeanor). *See* text accompanying notes 992-98 *infra.*

985. *Id.* § 708.7(4). *See* text accompanying notes 967-72 *supra.*

986. *J. YEAGER & R. CARLSON, supra* note 12, § 441.

987. The related offense of Contempt was not transferred into the Criminal Code. *See Iowa Code* ch. 6 (1979).

988. *IOWA CODE* § 720.6 (1979). *See* text accompanying notes 992-98 *infra.*

989. *IOWA CODE* § 720.1 (1979).

990. *IOWA CODE* § 720.4 (1979). *See generally J. YEAGER & R. CARLSON, supra* note 12, §

tations or Records or Process<sup>991</sup>—were not substantially changed, and are not further discussed in this Article.

### 1. *Malicious Prosecution*

A new crime of Malicious Prosecution,<sup>992</sup> a serious misdemeanor,<sup>993</sup> was added to the new Code. The elements include: (1) causing or attempting to cause another to be prosecuted; (2) while having no reasonable cause for believing that person committed the offense.<sup>994</sup> Presumably, the state would also have to prove that the prosecution thereof was undertaken maliciously,<sup>995</sup> in light of the crime being titled "Malicious Prosecution" in the section heading. The problem, however, is that the word "maliciously" is not used in the text of the section itself. Otherwise, this would be a general intent crime.<sup>996</sup>

One thing that is clear about this new crime is that the attempt need not be successful in order to be prosecutable. However, as Professor Yeager points out, "a mere false accusation of crime, unless made under circumstances which can reasonably be expected to lead to prosecution, will not be sufficient."<sup>997</sup> Of course, filing a criminal complaint unequivocally demonstrates the intent to have another prosecuted, but such act "is not a requirement" to fulfill a Malicious Prosecution charge.<sup>998</sup>

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445. There are no Uniform Jury Instructions for this crime. This is an aggravated misdemeanor, which is punishable by either a determinate term of confinement not to exceed two years or a maximum fine of \$5000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine.

991. IOWA CODE § 720.5 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 446. There are no Uniform Jury Instructions for this crime. As a simple misdemeanor, this offense is punishable by either a determinate jail term not exceeding thirty days or a maximum fine of \$100, but not both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine.

992. IOWA CODE § 720.6 (1979). There are no Uniform Jury Instructions for this crime. *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 447.

993. *See note 40 supra.*

994. John Roehrick would add a third element, *viz.*, "That the prosecution was done maliciously." Regarding this, he queries: "As to the element of malice, the question arises whether it will be implied, by reason of the lack of reasonable belief, or will have to be strictly proven." J. ROEHRICK, *supra* note 81, at 270.

995. Regarding malice as a state of mind, see text accompanying notes 549-65 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

996. Regarding general intent as a state of mind, see text accompanying notes 471-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

997. J. YEAGER & R. CARLSON, *supra* note 12, § 447.

998. *Id.*

## 2. *Perjury*

The crime of Perjury<sup>999</sup> was enlarged substantially in the new Code. Unlike the pre-revised offense<sup>1000</sup> which was limited to *false statements* of material facts made under oath in an official proceeding requiring sworn statements, the new offense also includes the making of *false denials* under similar circumstances as well as the making of *contradictory statements*. The addition of both of these new modes of committing Perjury will strengthen the sanctity of the judicial process by serving notice that a witness can get into serious trouble for other kinds of falsification other than merely making false affirmative statements, it will not be necessary for the prosecution to prove which of the two (or more) contradictory statements were untrue. Rather, as Professor Yeager points out, the prosecution need only prove that "one of the statements must necessarily be false, and that the person making the statements knew that he was falsely testifying when the false statements was made."<sup>1001</sup> Specifically, the elements of a false statement type of Perjury are: (1) while under oath or affirmation; (2) knowingly;<sup>1002</sup> (3) making a false statement of fact; (4) such fact was material. The elements of false-denial Perjury are: (1) while under oath or affirmation; (2) falsely denying knowledge of a fact; (3) such fact was material.

The elements of the contradictory statement type of Perjury are: (1) while under oath or affirmation; (2) making contradictory statements; (3) knowing<sup>1003</sup> that one or the other was false; (4) both statements made during the three-year statute of limitations period.

a. *Oath.* "Material"<sup>1004</sup> false testimony must have been given under oath (or affirmation) in order for it to be punishable as Perjury. The form of the oath is immaterial, as long as it signifies a binding of conscience to tell the truth.<sup>1005</sup> A Perjury defendant's "sworn" false statements must have been made pursuant to an oath required (or authorized)<sup>1006</sup> by law. Therefore, a false affidavit given pursuant to a "gratuitous oath" cannot be the basis for a Perjury prosecution.<sup>1007</sup>

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999. IOWA CODE § 720.2 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 2006-09; J. YEAGER & R. CARLSON, *supra* note 12, § 443; R. PERKINS, *supra* note 12, at 453-66.

1000. See IOWA CODE § 721.1 (1977) (repealed 1978).

1001. J. YEAGER & R. CARLSON, *supra* note 12, § 443.

1002. Regarding knowledge as a particularized state of mind, see text accompanying notes 572-601 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

1003. See note 1002 *supra*.

1004. See text accompanying notes 1009-16 *infra*.

1005. *State v. Hulsman*, 147 Iowa 572, 126 N.W. 700 (1910) (immaterial to omit traditional words "so help you God" in oath).

1006. IOWA CODE § 720.2 (1979). The question of whether "the defendant was required to be under oath or affirmation" is a question of law to be determined by the court. *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 2002.

1007. See, e.g., *Mendez v. Commonwealth*, \_\_\_ Va. \_\_\_, 255 S.E.2d 533 (in which the defendant falsely executed an affidavit which was not required by law but which was imposed

b. *Materiality.* The false testimony must have been "material" in order to be punishable under the perjury statute.<sup>1008</sup> The legal test for determining materiality under Iowa caselaw is stated in the disjunctive, *viz.* an otherwise perjurious statement is material if it directly or circumstantially either: (1) supports or attacks a witness' credibility; or (2) has a legitimate tendency to prove or disprove some relevant fact irrespective of the main fact at trial; or (3) is capable of influencing the court or tribunal on any proper matter of inquiry.<sup>1009</sup> It is sufficient that the perjured testimony was material to any collateral inquiry during the official proceeding and thus it need not be material to the principal issue at hand.<sup>1010</sup> Moreover, a perjurer need not have known that his false testimony was material, but instead only that the testimony was false.<sup>1011</sup>

"Materiality" is a question of law to be decided by the trial court.<sup>1012</sup> This, of course, means that materiality is not included as an element in jury instructions. Rather, the procedural context in determining sufficiency of the prosecution's showing of materiality occurs upon defendant's motion for judgment of acquittal. Nevertheless, opinion evidence is admissible on the issue of materiality.<sup>1013</sup>

The materiality of known false testimony must be affirmatively proved by the prosecution, rather than presuming materiality from the mere fact that false testimony has been shown to have been given under oath. Nevertheless, it appears that the required materiality of the false statement may be demonstrated by its effect. In *State v. Fisher*,<sup>1014</sup> it was noted that a false statement during a sentencing hearing "resulted in permitting defendant to withdraw a guilty plea and to have a jury trial which, at that point, he had waived."<sup>1015</sup>

c. *Facts.* A change in terminology in the statutory definition of Perjury could have the effect of significantly curtailing the scope of the Perjury statute. Whereas the pre-revised law referred in broad terms to false statements concerning any material "matter,"<sup>1016</sup> the new Criminal Code covers only

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upon defendant by the prosecution as a condition precedent to defendant obtaining a polygraph examination that he had requested, his conviction for perjury was reversed because of the "gratuitous oath".

1008. Iowa Code § 720.2 (1979). See *State v. Fisher*, 282 N.W.2d 684 (Iowa 1979); *State v. Gartin*, 271 N.W.2d 902, 913-14 (Iowa 1978); *State v. Deets*, 195 N.W.2d 118, 122 (Iowa 1972).

1009. See *State v. Gartin*, 271 N.W.2d 902, 913-14 (Iowa 1978); *State v. Deets*, 195 N.W.2d 118, 122 (Iowa 1972).

1010. *State v. Shupe*, 16 Iowa 36 (1864).

1011. *State v. Sargood*, 80 Vt. 415, 68 A. 49 (1907).

1012. *State v. Gartin*, 271 N.W.2d 902 (Iowa 1978); *State v. Deets*, 195 N.W.2d 118, 122 (Iowa 1972).

1013. *State v. Thompson*, 254 Iowa 331, 117 N.W.2d 514 (1962).

1014. 282 N.W.2d 684 (Iowa 1979).

1015. *Id.* at 687.

1016. Iowa Code § 721.1 (1977) (repealed 1978).

false statements of material "facts."<sup>1017</sup> In *State v. Deets*,<sup>1018</sup> "[a] false statement of opinion or belief" was deemed "sufficient to support a charge of perjury" under the pre-revised law.<sup>1019</sup> Now, Perjury will be limited to a false statement of "fact."

d. *Mens Rea*. Perjury clearly is not a strict liability<sup>1020</sup> crime. Indeed, the false testimony must be given intentionally<sup>1021</sup> with knowledge<sup>1022</sup> of its falsity, rather than "in the honest belief that it is true, or by mistake or inadvertence."<sup>1023</sup>

A "good" motive does not vitiate the general mental responsibility or capacity for a willful or intentional act of perjury. As a New York court has pointed out: that the ultimate object to be attained by the perjury may be beneficial or indifferent in no way absolves or qualifies the criminality of the act. One may not commit a crime because he hopes or expects that good will come of it.<sup>1024</sup>

e. *Specific Result*. The gist of the crime of Perjury is the intentional giving of false testimony, without any requirement of a specific result. Thus, it is still Perjury although the false testimony was not believed and thus could have had no influence.<sup>1025</sup> Likewise, it is immaterial to the question of criminal responsibility for Perjury that the case in which the perjured testimony was given was subsequently reversed on appeal.<sup>1026</sup>

f. *Quantitative Evidence Rule*. Iowa follows the quantitative evidence rule in requiring that the falsity of the allegedly perjurious statement be established upon more than the word of one state's witness. This does not mean, however, that at least two witnesses must testify that defendant's statements were false.<sup>1027</sup> Rather, this rule is satisfied either by two such witnesses or by only one witness whose testimony as to falsity is buttressed by

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1017. Iowa Code § 720.2 (1979).

1018. 195 N.W.2d 118 (Iowa 1972).

1019. *Id.* at 122.

1020. Regarding strict liability as a substitute for mens rea, see note 471 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1021. Regarding knowledge as a state of mind, see text accompanying notes 528-42 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1022. Regarding knowledge as a particularized state of mind, see text accompanying notes 572-601 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1023. See *People ex rel. Hegeman v. Corrigan*, 195 N.Y. 1, 87 N.E. 792 (1909). Accord, *State v. Lazarus*, 181 Iowa 625, 164 N.W. 1037 (1917): "A man cannot be said to have falsely and corruptly sworn to a fact, if he in good faith believed the fact . . . to be true. . . . If a man is honestly mistaken as to the existence of a fact which he affirms to exist, under oath, he cannot be convicted of perjury upon a mere showing that the fact was other than was stated by him under oath."

1024. *People ex rel. Hegeman v. Corrigan*, 195 N.Y. 1, 87 N.E. 792 (1909).

1025. See also *State v. Fisher*, 282 N.W.2d 684 (Iowa 1979), discussed in text accompanying notes 1014-15 *supra*.

1026. *State v. Pilcher*, 242 N.W.2d 367 (Iowa 1976).

1027. *State v. Gartin*, 271 N.W.2d 902 (Iowa 1978).

other corroborative evidence.<sup>1028</sup>

g. *Grading.* All three forms of Perjury are punishable equally. The only grade of this offense is a class D felony.<sup>1029</sup> It, of course, is not a "forcible felony."<sup>1030</sup>

h. *Defense of Retraction.* Another new feature in the Perjury statute is the retraction defense. Retraction of the false statement excuses the maker thereof from Perjury if the retraction is made "in the course of the proceedings where it was made before the false statement has substantially affected the proceedings."<sup>1030.1</sup>

Presumably, this is an affirmative defense in which counsel for the defense must assume the burden of proving an effective retraction. Because the opportunity for retracting or recanting is unusual in criminal law, this defense "will no doubt be strictly construed," in Professor Yeager's estimation.<sup>1031</sup>

i. *Attorney-Client Privilege.* That a perjurious attorney cannot excuse his false testimony under oath on the basis of the attorney-client privilege was made clear in *State v. Gartin*.<sup>1032</sup> In *Gartin*, the supreme court deemed it Perjury for the attorney-defendant to testify falsely that he had no knowledge concerning the matters under investigation even though it was true that any such knowledge had been gained through the attorney-client privilege. The proper approach, stated the court, would have been to claim the attorney-client privilege for refusing to testify at all.

### 3. *Suborning Perjury*

Suborning Perjury<sup>1033</sup> is an independent crime, separate from the target crime of Perjury. The thrust of this specific intent<sup>1034</sup> crime is to persuade someone else to commit Perjury.<sup>1035</sup> There are two alternative means of committing this crime: inducing either the making of false statements or the concealing of material facts. The elements of the false statement alternative are: (1) either procuring another person or offering an inducement to another person; (2) to make a statement under oath; (3) in an official proceeding; (4) with the intent that such person make a false statement. The ele-

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1028. *State v. Raymond*, 20 Iowa 582 (1866).

1029. *See note 65 supra*.

1030. *Iowa Code* § 720.2 (1979).

1030.1. *See J. ROEHMICK, supra note 81, at 265. See also UNIFORM JURY INSTRUCTIONS, supra note 12, at No. 2002: "Whether the defense of retraction is a question of fact for the jury or a question of law for the court, is an open question." Id.*

1031. *J. YEAGER & R. CARLSON, supra note 12, § 443.*

1032. 271 N.W.2d 902 (Iowa 1978).

1033. *Iowa Code* § 720.3 (1979). *See UNIFORM JURY INSTRUCTIONS, supra note 12, at Nos. 2006-09; J. YEAGER & R. CARLSON, supra note 12, § 444; R. PERKINS, supra note 12, at 446-67.*

1034. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

1035. *See UNIFORM JURY INSTRUCTIONS, supra note 12, at No. 2009.*

ments of the concealing material facts alternative are: (1) either procuring another person or offering an inducement to another person; (2) who is reasonably believed will be called to testify under oath; (3) to conceal material facts known to such other person. So defined, this revised crime combines the two separate pre-revision crimes of Suborning Perjury<sup>1036</sup> and Attempting to Suborn,<sup>1037</sup> thus rendering the substantive consummated and attempted offenses equally punishable. The revised crime is also broader than the pre-revised offenses in two respects. Because "the act which is solicited must be one which would be perjury,"<sup>1038</sup> the scope of this offense has been expanded with the expansion of what constitutes perjury.<sup>1039</sup> Moreover, the revised definition of Suborning Perjury, unlike its predecessor, includes the act of procuring another "to conceal material facts known to such person."<sup>1040</sup>

For Suborning Perjury it is unnecessary for the person being procured to have been subpoenaed to testify. It is necessary, however, that the procurer-defendant believe that the solicited testimony is false and that he intend that the false or concealed testimony be given with guilty knowledge of the solicited person.<sup>1041</sup> However, it appears that under this statute it is no defense that the "procured" witness knew his statements were true although the procurer-defendant believed they were false.<sup>1042</sup>

Like the consummated target offense of Perjury,<sup>1043</sup> this inchoate offense is punishable as a class D felony. Suborning Perjury, of course, is not a "forcible felony,"<sup>1044</sup> as is Perjury. Although this is a specific solicitation statute, nevertheless there are no different penal consequences, since it also is a class D felony under the general solicitation statute<sup>1045</sup> to solicit the commission of any felony.

#### 4. Compounding a Felony

The elements of the unchanged crime of Compounding a Felony<sup>1046</sup> are: (1) with knowledge of another's commission of a felony; (2) receiving any consideration; (3) upon a promise to either (a) conceal such crime or (b) not to prosecute or (c) not to give evidence of such crime. The gist of this gen-

1036. See IOWA CODE § 721.2 (1977) (repealed 1978).

1037. See *id.* § 721.3.

1038. J. YEAGER & R. CARLSON, *supra* note 12, § 444.

1039. See text accompanying notes 999-1032 *supra*.

1040. IOWA CODE § 720.3 (1979).

1041. *Boren v. United States*, 144 F. 801 (9th Cir. 1906).

1042. See R. PERKINS, *supra* note 12, at 467.

1043. See IOWA CODE § 720.2 (1979) and text accompanying notes 999-1032 *supra*.

1044. See note 65 *supra*.

1045. See IOWA CODE § 705.1 (1979) and text accompanying notes 757-830 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1046. IOWA CODE § 720.1 (1979). See J. YEAGER & R. CARLSON, *supra* note 12, § 442. R. PERKINS, *supra* note 12, at 518-22, 651-54.

eral intent<sup>1047</sup> crime is the promise or agreement. Thus, Compounding a Felony does not occur if, for example, a thief returns stolen property or gives some other thing of value to either the theft victim or a third party, merely hoping that this will *discourage* prosecution—as long as there is no agreement.<sup>1048</sup> On the other hand, the closely analogous situation of compromising a crime<sup>1049</sup> is legal. That is, the victim of a crime or of some other wrongful act may legally accept compensation or restitution for his injury or damage—even directly from the criminal himself. Compounding the crime occurs only when this compensation or restitution is in exchange for, or conditioned upon, an agreement or understanding that the other person will not be prosecuted.<sup>1050</sup> This crime is complete upon the making of the agreement and thus the subsequent violation of the criminal bargain is no defense.<sup>1051</sup> Similarly, it is no defense that the other party has been tried and acquitted.<sup>1052</sup>

Absent consideration, a mere promise not to report a defendant to the authorities is not a crime.<sup>1053</sup> "Consideration" may consist of money or anything of value or even some nonpecuniary advantage accruing to the person forbearing from prosecuting<sup>1054</sup> (e.g., a store owner agrees not to prosecute on the consideration of his goods being returned by a thief). The Iowa Supreme Court has held that it is immaterial that a theft victim merely received return of his rightful property, as long as such return was premised upon an agreement not to prosecute.<sup>1055</sup>

Because the *actus reus* of this crime consists of receiving any consideration, it follows that a thief who approaches his theft victim about an "arrangement" can not be guilty of this offense. That is, "[o]nly the party who receives the consideration is criminally liable; the former criminal is not guilty of compounding by virtue of his act in giving the consideration."<sup>1056</sup> Other offenses cover the latter's wrongful conduct.<sup>1057</sup>

a. *Misprison of Felony Distinguished.* Compounding a Felony is dis-

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1047. Regarding general intent as a state of mind, see text accompanying notes 471-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1048. *Austin v. Feron*, 289 Ill. App. 528, 7 N.E.2d 476 (1937).

1049. See W. LAFAVE & A. SCOTT, *supra* note 12, § 66.

1050. See R. PERKINS, *supra* note 12, at 521.

1051. See *Campbell v. State*, 42 Tex. Crim. 27, 57 S.W. 288 (1900).

1052. See generally *People v. Buckland*, 13 Wend. 593 (N.Y. 1835).

1053. "[A]bsent consideration, a mere promise not to report the offender, no matter how serious the offense, is not punishable." MODEL PENAL CODE § 208.32A, Comment (Tent. Draft No. 9, 1959). See *Commonwealth v. Pease*, 16 Mass. 91 (1819); W. LAFAVE & A. SCOTT, *supra* note 12, § 66.

1054. See *Commonwealth v. Pease*, 16 Mass. 91 (1819); W. LAFAVE & A. SCOTT, *supra* note 12, § 66.

1055. *State v. Ruthven*, 58 Iowa 121, 12 N.W. 235 (1882).

1056. *Aikman v. Wheeling*, 120 W. Va. 46, 195 S.E. 667 (1938); W. LAFAVE & A. SCOTT, *supra* note 12, § 66.

1057. See J. YEAGER & R. CARLSON, *supra* note 12, § 442.

tinguished from the early-English common law crime of Misprison of Felony<sup>1058</sup> (which is not recognized as a crime in Iowa) by the former's requirement of an agreement. The gravamen of the latter crime is mere non-disclosure of a known felony committed by another person.<sup>1059</sup>

b. *Extortion Distinguished.* Compounding a Felony bears striking resemblance to the more severe offense of Extortion.<sup>1060</sup> The latter can be committed by threatening to accuse another of a public offense, with the intent of obtaining anything of value for oneself or for another person. The focal point in Extortion is the threat, thus requiring an active role by the defendant. Contrastingly, one who compounds a Felony is nevertheless guilty merely by passively accepting unsolicited consideration by the original criminal. In such a circumstance, the receiving party could never be guilty of Extortion, absent the threat. On the other hand, when the party compounding the Felony was the party who initiated the "arrangement," then he can be guilty of Extortion if the requisite threat can be proved. Whether thinly-veiled threats will suffice for Extortion remains to be seen. In resolving this matter, it is important to keep in mind that the requisite threat for Extortion need not be tied to threats of violence (but rather only to a threat "to accuse another of a public offense"). Considerable discretion appears to be reposed in prosecutors in selecting the appropriate charge in the individual circumstances.<sup>1061</sup>

c. *Grading.* The only grade of this crime is an aggravated misdemeanor.<sup>1062</sup> This single grade is better than the two-grade scheme under the pre-revised law (with the more serious grade relating to compounding a felony punishable by life imprisonment). The proper focus, used under the revised law, is upon the compounding-actor's conduct in being a party to an unlawful agreement and in wrongfully receiving a benefit thereunder irrespective of the no-prosecution benefit received by the other party.

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1058. See W. LAFAVE & A. SCOTT, *supra* note 12, § 66; R. PERKINS, *supra* note 12, at 512-17.

1059. W. LAFAVE & A. SCOTT, *supra* note 12, § 66.

1060. See IOWA CODE § 711.4 (1979).

1061. "The fact that there was evidence tending to show more than was required by the statute and also an attempt to violate another statute did not invalidate the prosecution of the charge here involved." *State v. Stanton*, 214 N.W.2d 125, 126 (Iowa 1974). *Accord United States v. Ruggiero*, 472 F.2d 599, 606 (1973), *cert. denied*, 412 U.S. 939 (1973) ("where criminal statutes overlap the government is entitled to choose among them provided it does not discriminate against any class of defendants"); *People v. Fowler*, 516 P.2d 428, 429 (Colo. 1973). "[A] single transaction that violates two criminal statutes may generally be prosecuted under either . . . . No constitutional proscription has been demonstrated which would prohibit the exercise of prosecutorial discretion in such a situation . . . ." *Id.* See *United States v. Batchelder*, 99 S. Ct. 2198 (1979) (defendant may be sentenced under section with harsher penalty where defendant's conduct falls within two sections of same criminal statute).

1062. See note 63 *supra*.

### C. Offenses Relating to Official Misconduct

#### 1. Generally

Eight offenses, many of which include consolidation of several pre-revised statutes, comprise the offenses relating to Official Misconduct.<sup>1063</sup> Five offenses remain unchanged. Four of these relate to prohibited political activities involving public personnel or public property,<sup>1064</sup> and the other offense prohibits public personnel from having an interest in public contracts.<sup>1065</sup>

#### 2. Felonious Misconduct in Office

The revised offense of Felonious Misconduct in Office,<sup>1066</sup> the intent of which is "to protect the integrity of public records and documents,"<sup>1067</sup> consists of a consolidation of several prior statutes.<sup>1068</sup> The one new prohibition appears in section 721.1(2) of the Code, with the elements being: (1) a public officer or employee; (2) falsifying a public record or making what purports to be a public document; (3) with knowledge<sup>1069</sup> of its falsity.

The mens rea component of this general intent crime<sup>1070</sup> requires only proof of an intent to make a false entry—instead of a fraudulent intent—since, as Professor Yeager points out, "there is no legitimate reason for any person to knowingly falsify one of these instruments or documents."<sup>1071</sup> Willful or intentional falsification is necessary, instead of mere mistakes and discrepancies arising from oversight, forgetfulness, or incompetence.<sup>1072</sup> On the other hand, one's motive for the falsification is

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1063. Iowa Code ch. 721 (1979). There are no Uniform Jury Instructions for any of these eight offenses, *see note 12 supra*.

1064. These four offenses involve Iowa Code §§ 721.3 (Solicitation for Political Purposes); 721.4 (Using Public Motor Vehicles for Political Purposes); 721.5 (Participation in Political Activities During Working Hours by State Employees); and 721.6 (Labeling Publicly Owned Motor Vehicles) (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 464. There are no Uniform Jury Instructions for any of these crimes, all of which remain in the Criminal Code as unrepealed sections of the 1977 IOWA CODE. These are all general intent crimes. *See text accompanying notes 471-79 in Part I of this Article*, 29 DRAKE L. REV. 239 (1980).

1065. Iowa Code § 721.11 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 466. This is a general intent crime. *See text accompanying notes 471-79 in Part I of this Article*, 29 DRAKE L. REV. 239 (1980).

1066. Iowa Code § 721.1 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 464.

1067. J. YEAGER & R. CARLSON, *supra* note 12, § 462.

1068. *See* Iowa Code §§ 740.9 (False Entries in Relation to Fees); 740.12 (False Entries, Returns, Certificates or Receipts); 738.21 (Forgery of Papers or Ballots) (1977) (repealed 1978).

1069. Regarding knowledge as a particularized state of mind, *see text accompanying notes 572-93 in Part I of this Article*, 29 DRAKE L. REV. 239 (1980).

1070. Regarding general intent as a state of mind, *see text accompanying notes 471-79 in Part I of this Article*, 29 DRAKE L. REV. 239 (1980).

1071. J. YEAGER & R. CARLSON, *supra* note 12, § 462.

1072. *State v. Hamlin*, 134 Iowa 493, 110 N.W. 162 (1907).

irrelevant.<sup>1073</sup>

The statute apparently covers all public records or documents actually kept in an official capacity during the course of public employment, whether or not the particular records or documents in question were required by law to be kept.<sup>1074</sup> Caselaw interpreting the predecessor statute is supportive of this proposition,<sup>1075</sup> and the revised criminal provision<sup>1076</sup> still contains no limiting language (e.g., "when such is required . . . by law") such as that used in the related offense of Nonfelonious Misconduct in Office.<sup>1077</sup>

The single grade of this offense is a class D felony.<sup>1078</sup> Again, the offense is not classified as a "forcible felony."<sup>1079</sup>

### 3. *Non-Felonious Conduct in Office*

The related, multi-faceted offense of Non-Felonious Conduct in Office<sup>1080</sup> consists of a consolidation, with only minor changes, of several former statutes<sup>1081</sup> concerning "fiscal mismanagement."<sup>1082</sup> However, neither an injury to government nor an intent to profit is required.<sup>1083</sup> Moreover, because of the statutory requirement that these acts be done "knowingly,"<sup>1084</sup> this crime "deals only with intentional misconduct, and is not intended to reach negligent malfeasance or misfeasance."<sup>1085</sup> Nevertheless, the obvious purpose is to instill fiscal responsibility in the public sector.

The elements of one type of misconduct covered in this statute are: (1) a public officer, employee, or person acting under color of such office or employment; (2) who knowingly; (3) makes a contract; (4) which contemplates an expenditure known to be in excess of that authorized by law.<sup>1086</sup> Thus,

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1073. *Id.*

1074. *Id.*

1075. *Id.*

1076. IOWA CODE § 721.1(2) (1979) reads, in its entirety: "Falsifies *any* public record, or issues *any* document falsely purporting to be a public document" (emphasis added).

1077. *Id.* § 721.2(2).

1078. See note 65 *supra*.

1079. See note 128 *supra*.

1080. IOWA CODE § 721.1 (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 463.

1081. See IOWA CODE §§ 741.1 (accepting or giving bonuses or gifts relating to doing business with a public agency); 740.4 (exercising public office without authority); 740.1 (extortion by public employee); 740.7 (failure to pay over fees); 740.11 (failure to take official oath); 740.19 (misappropriating fees or fines); 740.3 (oppression in official capacity); 740.20 (private use of public property); 740.13 (solicitation for public purposes); 740.10 (taking more than lawful fee); 740.15 (using public motor vehicles for political purposes) (1977) (repealed 1978).

1082. J. YEAGER & R. CARLSON, *supra* note 12, § 463.

1083. *Id.*

1084. See text accompanying notes 471-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1085. *Id.*

1086. IOWA CODE § 721.2(1) (1979).

this is a general intent crime. In the absence of definitive caselaw, this provision recently was the subject of a comprehensive attorney general's opinion<sup>1087</sup> regarding the criminal responsibility of county and city fiscal officers. Noting that Code section 721.2(1) "extends to every budgetary transaction involving the expenditure of tax dollars,"<sup>1088</sup> the opinion states that each expenditure of public money must, in the first instance, be authorized by law; i.e., "each expenditure requires an appropriation which, in turn, requires a formal act (e.g., a resolution) by the county or city governing body."<sup>1089</sup> Accordingly, the opinion continues, "the mere existence of an unencumbered balance of cash or investments does not constitute authorization by law for its expenditure. Before the county or city may use such moneys, the governing body must appropriate same through budget amendments."<sup>1090</sup>

The knowledge requirement under the statute was interpreted in that opinion as being limited to "actual, positive knowledge of the facts," although it was conceded that the requisite mens rea "may also include knowledge resulting from deliberate ignorance of the facts."<sup>1091</sup> The latter would include an employee who does not possess positive knowledge only because he consciously avoided it, for example, members of a city council who approve claims for expenditures while "deliberately ignoring" readily available information indicating the absence of necessary appropriations. The opinion noted: "Although we recognize the growing trend toward imputing actual knowledge from deliberate ignorance of the facts, we decline by this opinion to extend this view to section 721.2(1) and properly leave such conclusions to our judiciary."<sup>1092</sup> The opinion concluded:

If the county or city fiscal officer knowingly issues a purchase order or other form of contract with actual knowledge that insufficient appropriations exist, section 721.2(1) is violated even though the fiscal officer did not negotiate the expenditure. Similarly, if the local governing body knowingly approves claims with actual knowledge of insufficient moneys, section 721.2(1) is violated even though the governing body did not negotiate the contract. Obviously, if an additional appropriation to meet the excess is made according to statutory procedures before approval of the claims, no liability is created. And if the fiscal officer or governing body acts in honest mistake of the facts (e.g., inaccurate accounting, overestimates, etc.), the requisite knowledge is absent and the offense is not committed.<sup>1093</sup>

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1087. [1979] REP. ATT'Y GEN. IA. 79-9-15.

1088. *Id.*

1089. *Id.*

1090. *Id.*

1091. *Id.*

1092. *Id.* citing with approval the "highly critical examination" of the concept of deliberate ignorance at Comment, 63 IOWA L. REV. 466 (1977).

1093. [1979] REP. ATT'Y GEN. IA. 79-9-15.

One *apparent* change is made in the part of the revised offense dealing with demanding or coercing employees to make contributions to any person, organization, or fund.<sup>1094</sup> The pre-revised statute was expressly limited to political contributions, whereas the revised statutory section omits the applicable limiting language.<sup>1095</sup> As Professor Yeager points out, this revised section "is directed at the practice of forcing public employees to contribute to political campaigns as a condition of employment,"<sup>1096</sup> nevertheless it appears that the total thrust of this revision will provide broader protection for public employees who otherwise could be pressured to contribute to charitable causes, such as the United Way Campaign, especially when there is an office "goal." The single grade of this offense is a serious misdemeanor.<sup>1097</sup>

#### 4. *Misuse of Public Records and Files*

A new general intent<sup>1098</sup> Misuse of Public Records and Files<sup>1099</sup> was added to the new Code as a general provision to prevent release, for personal profit, of certain public records or related accumulations of information by public officers and employees.<sup>1100</sup> This provision, unfortunately, relates only to release for personal gain and does not even attempt to set a general privacy policy on "the availability of public records for general or limited inspection."<sup>1101</sup> The single grade of this offense is a serious misdemeanor.<sup>1102</sup>

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1094. IOWA CODE § 721.2(7) (1979).

1095. "The only change in this subsection is that the misconduct is no longer limited to political contributions, but applies to any contribution." J. ROEHRICK, *supra* note 12, at 279.

1096. J. YEAGER & R. CARLSON, *supra* note 12, § 463.

1097. It is punishable by either a determinate jail term not exceeding one year or a maximum fine of \$1000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine.

1098. Regarding general intent as a state of mind, see text accompanying notes 471-79 in Part I of this Article, 29 DRAKE L. REV. 289 (1980).

1099. IOWA CODE § 721.10 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 465.

1100. J. ROEHRICK, *supra* note 12, states:

This section establishes a general section concerning the confidentiality of records, particularly where there is no fee or right to such information. If this were only limited to excess fees, then it is felt that Section 721.1(3) would be applicable to cover the situation. However, since this section relates to information, files, dossiers, etc., more was contemplated than mere excess of fee.

*Id.* at 284-85.

1101. J. YEAGER & R. CARLSON, *supra* note 12, § 465.

1102. *See* note 40 *supra*.

D. *Obstructing Justice Offenses*1. *Generally*

Eight offenses relating to various aspects of obstructing justice comprise chapter 719 of the Code. The most significant change in these offenses was made by a 1978 amendment making Out of State Flight to Avoid Prosecution<sup>1103</sup> punishable conduct under the Escape section.<sup>1104</sup> Some significant changes were made in six of the eight offenses, with only minor changes made in the dual offenses relating to furnishing intoxicants or controlled substances to inmates.<sup>1105</sup>

2. *Interference with Official Acts*

The crime of Interference with Official Acts<sup>1106</sup> represents an expansion of the pre-revised crime of Resisting Execution of Process.<sup>1107</sup> This revised crime consists of either knowingly resisting or obstructing a known peace officer in performance of his duty, or knowingly restricting or obstructing anyone in the execution either of process or of a court order. An added element requires knowledge<sup>1108</sup> by the defendant that the person being obstructed or resisted<sup>1109</sup> is a peace officer in performance of his duties, but knowledge of the scope of authority of the person restricted or obstructed is not required. Nor must the State prove that the defendant's intent was to obstruct the officer.

There are two grades of this offense, although it is not divided into degrees. The basic offense, without more, is merely a simple misdemeanor.<sup>1110</sup> Any one of the following aggravating circumstances changes this minor offense into an aggravated misdemeanor:<sup>1111</sup> (1) purposeful infliction of "serious injury,"<sup>1112</sup> (2) attempted infliction of "serious injury,"<sup>1113</sup> (3) displaying

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1103. 1978 Iowa Acts 2d Sess. ch. 1185, amending Iowa Code § 719.4(4) (Supp. 1978).

1104. Iowa Code § 719.4 (1979).

1105. See Iowa Code §§ 719.7, .8 (1979) (Furnishing Intoxicant to Inmates and Furnishing Controlled Substance to Inmates, respectively); UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 1916-17 (controlled substance); J. YEAGER & R. CARLSON, *supra* note 12, § 32. Neither of these two minor offenses is discussed further in this Article.

1106. Iowa Code § 719.1 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 1901-03; J. YEAGER & R. CARLSON, *supra* note 12, § 422.

1107. See Iowa Code § 742.1 (1977) (repealed 1978).

1108. Regarding knowledge as a particularized state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1109. See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 1903 (definitions of "resist" and "obstruct").

1110. See note 37 *supra*.

1111. See note 63 *supra*.

1112. See Iowa Code § 708.4 (1979) (Willful Injury) and text accompanying notes 107-18 *supra*.

1113. See Iowa Code § 708.2(1) (1979) (Assault with Intent to Inflict a Serious Injury).

of a "dangerous weapon,"<sup>1114</sup> and (4) being armed with a "firearm,"<sup>1115</sup> each of which can constitute a separate crime.<sup>1116</sup>

### 3. Refusing to Assist an Officer

In its revised form, the crime of Refusing to Assist an Officer<sup>1117</sup> includes three related pre-revised offenses,<sup>1118</sup> with several changes having been made. One change is that the assistance that can be summoned by an officer under the revised statute is limited to making an arrest or preventing any criminal act. A person refusing to assist in execution of process, upon being summoned by a police officer, is no longer subject to a criminal penalty. Another change is effected by the addition of a factor of reasonableness in order for an offender's conduct to be punishable. That is, an offender now must act both unreasonably and without lawful cause in refusing to assist an officer. No statutory standard is included as to what is an "unreasonable" refusal.<sup>1119</sup>

No element of scienter is required on the face of this statute which defines a general intent crime.<sup>1120</sup> That is, there is no express requirement that the defendant *know*<sup>1121</sup> that the person making the request or order for assistance is indeed a police officer or magistrate.<sup>1122</sup> This lack of knowledge, however, could arguably constitute a reasonable basis for the defendant refusing or neglecting to render the assistance. However, the legislative intent may very well have been to exclude a scienter component from this crime, as discerned by reading this provision *in pari materia* with the related provision on Interference With Official Acts<sup>1123</sup> (a scienter type offense). Finally, there is only one grade of this offense, which is a simple misdemeanor.<sup>1124</sup>

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1114. See IOWA CODE § 708.1(3) (1979) (Assault) and text accompanying notes 10-55 *supra*.

1115. See IOWA CODE § 724.4 (1979) (Carrying Weapons).

1116. See notes 112-15 *supra*.

1117. IOWA CODE § 719.2 (1979). There are no Uniform Jury Instructions for this crime. See generally J. YEAGER & R. CARLSON, *supra* note 12, § 423.

1118. See IOWA CODE §§ 742.3, .5, 743.6 (1977) (repealed 1978).

1119. J. YEAGER & R. CARLSON, *supra* note 12, § 423.

1120. Regarding general intent as a crime, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1121. Regarding knowledge as a particularized state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1122. See Williams v. State, 253 Ark. 973, 490 S.W.2d 117 (1973), in which the Arkansas Supreme Court stated, in *dictum*, the proposition that "every citizen is bound to assist a *known* public officer in making an arrest, when called upon to do so." *Id.* at \_\_\_, 490 S.W.2d at 119 (emphasis added) (citing 4 Wharton's Criminal Law & Procedure 223 (Anderson ed.)). The Arkansas statute being interpreted also did not include an express scienter element, but scienter was not at issue in the case.

1123. IOWA CODE § 719.1 (1979). See text accompanying notes 86-91 *supra*.

1124. See note 37 *supra*.

#### 4. *Obstructing Prosecution or Defense*

The pre-revised crime of Interference with Administration of Justice<sup>1125</sup> was made more restrictive in its application in the new crime of Obstructing Prosecution or Defense,<sup>1126</sup> as evidenced by making this crime a specific intent offense.<sup>1127</sup> The revised offense basically involves tampering with physical evidence and with witnesses during the pre-trial or investigatory stage.<sup>1128</sup> Such prohibited acts include: (1) knowingly tampering with admissible physical evidence; or (2) knowingly making available or furnishing false information with the intent that it be used in another's trial; or (3) knowingly inducing a material witness either to fail to appear when subpoenaed or to leave the state, or to conceal oneself.<sup>1129</sup> Such acts must be done "with intent to prevent the apprehension or obstruct the prosecution or defense of any person."<sup>1130</sup> There is only one grade of this offense. It is an aggravated misdemeanor.<sup>1131</sup>

#### 5. *Escape*

The revised crime of Escape<sup>1132</sup> differs, *inter alia*, from its predecessor<sup>1133</sup> by not equally punishing the acts of escape and attempted escape.<sup>1134</sup> This is accomplished by providing separate paragraphs for: (1) the consummated offense of an *intentional*<sup>1135</sup> escape either from any "detention facility"<sup>1136</sup> or from the custody of any public personnel to whom the defendant has been entrusted;<sup>1137</sup> and (2) the essentially inchoate activity of being

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1125. See Iowa Code § 723.1 (1977) (repealed 1978).

1126. Iowa Code § 719.3 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 1904-05; J. YEAGER & R. CARLSON, *supra* note 12, § 424.

1127. Regarding specific intent as a state of mind, see text accompanying notes 510-10.1 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1128. See Iowa Code §§ 720.2-4 (1979) (interference with judicial process offenses of Perjury, Suborning Perjury, and Tampering With Witnesses or Jurors).

1129. The more serious crime of Suborning Perjury, a class D felony, is committed if the inducement or attempted inducement is to a witness to testify falsely at trial or at some other official proceeding. See Iowa Code § 720.3 (1979) and text accompanying note 65 *supra*.

1130. Iowa Code § 719.3 (1979).

1131. See note 63 *supra*.

1132. Iowa Code § 719.4 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 1906-10; J. YEAGER & R. CARLSON, *supra* note 12, §§ 425-28.

1133. See Iowa Code §§ 745.1, .3, .8 (1977) (repealed 1978).

1134. *Id.* § 745.18. There is no counterpart in the new Criminal Code, thus requiring an *actual* escape except for the alternative mode of being absent without leave.

1135. Proof of intent was not an essential element of Escape under the pre-revised code. See *State v. Wharff*, 257 Iowa 871, 134 N.W.2d 922 (1965). "The manner of effecting the escape is immaterial. It can be accomplished by stealth, guile, or violence." J. YEAGER & R. CARLSON, *supra* note 12, § 426.

1136. This consolidates into one crime the two separate pre-revised crimes of prison break and breaking jail. See Iowa Code §§ 745.1, .8 (1977) (repealed 1978).

1137. Iowa Code § 719.4(2) (1979). Escape under either of these two alternative code sec-

knowingly and voluntarily absent from any place where a prisoner is required to be.<sup>1138</sup> This absent-without-leave provision would appear to encompass, attempted escapees who did not succeed in breaking out and thus did not escape *from* the detention facility, or did not succeed in breaking away from a custodial officer.

In *State v. Davis*,<sup>1139</sup> the Iowa Supreme Court recently reversed an escape (by prison break)<sup>1140</sup> conviction of a prison inmate, basing its reversal on the pre-revised escape law. In this case, the defendant inmate had failed to return to his jail cell at the designated time of day. The inmate had been given *initial* permission by prison authorities to leave his cell but had remained in the penitentiary library (drinking alcohol), and did not even attempt to leave the prison grounds. Since the gravamen of the pre-revised offense was *unauthorized* departure,<sup>1141</sup> the court reversed the conviction. In so doing, the court noted in dictum that the new revised crime of Escape (through its absent without leave provision) would impose criminal culpability upon an inmate who failed to make a timely return to his jail cell, even though he had initial permission to leave and had made no attempt to leave the institution itself.<sup>1142</sup> Distinguishing *State v. Eads*,<sup>1143</sup> the court noted that the defendant Eads was convicted under the pre-revised crime of Breaking Jail<sup>1144</sup> because of his failure to return to the county jail following work release. The crucial point was that the *Eads* decision turned on the issue that a county jail prisoner on work release remained "in the legal custody of the Sheriff."<sup>1145</sup> No such comparable language was contained in the statute interpreted in *Davis*. The court in *Davis* noted therein that "[t]he new Iowa Criminal Code, not applicable here, plainly describes the offense the State would have us find in [the pre-revised] section 745.1."<sup>1146</sup>

The substantive scope of the revised offense was restricted by not retaining violation of parole<sup>1147</sup> as conduct constituting Escape. Violation of parole, under the new Criminal Code, is not a separate criminal offense. Instead, the parolee will only be subject to serving out the remainder, or some indefinite part thereof, of his sentence.

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tions is a class D felony if the defendant was convicted of or charged with any class of felony on the underlying offense, but only a serious misdemeanor when the underlying offense was any class of misdemeanor.

1138. Iowa Code § 719.4(3) (1979). This activity is punishable uniformly as a serious misdemeanor, irrespective of whether the underlying conviction was for a felony or a misdemeanor.

1139. 271 N.W.2d 693 (Iowa 1978).

1140. See Iowa Code § 745.1 (1977) (repealed 1978).

1141. 271 N.W.2d at 696 (citing *State v. Horstman*, 218 N.W.2d 604, 605 (Iowa 1974)).

1142. *Id.*

1143. 234 N.W.2d 108 (Iowa 1975).

1144. See Iowa Code § 745.8 (1977) (repealed 1978).

1145. See Iowa Code § 356.26 (1979).

1146. 271 N.W.2d at 696.

1147. See Iowa Code § 745.3 (1977) (repealed 1978).

A legislative amendment in 1978<sup>1148</sup> restored the pre-revised requirement<sup>1149</sup> that a sentence for Escape *shall* run consecutively with the original sentence, that is, to commence after the expiration of the term of the original sentence. The revised Criminal Code as passed in 1976 had omitted this requirement, and had thus left the matter to the judicial discretion of the sentencing judge.<sup>1150</sup> Of course, inclusion of the mandatory term "shall" removes discretion from the sentencing court, leaving only consecutive sentences in Escape cases.

a. *Flight to Avoid Prosecution.* An addition was made by a 1978 amendment to the crime of Escape to include Flight to Avoid Prosecution.<sup>1151</sup> This is a separate crime which is new to Iowa law. The elements of this offense are: (1) fleeing from Iowa; (2) to avoid prosecution; (3) for a felony or an aggravated misdemeanor. This is patterned after the federal crime of Flight to Avoid Prosecution or Giving Testimony,<sup>1152</sup> which is considerably broader in its scope. The idea behind the new Iowa crime was to be able to invoke (for extradition purposes) the federal statute which is limited, by express terms, to interstate flight to avoid state prosecutions for a *felony*. This purpose is accomplished by making the state crime of Flight to Avoid Prosecution a class D felony. A collateral effect, however, is to impose additional penalties upon an offender who flees to avoid prosecution but nevertheless is apprehended, returned, and convicted of both the underlying offense and the "flight" offense. The apparent anomaly in this crime is that a person who flees Iowa to avoid prosecution on only an aggravated misdemeanor charge commits a class D felony by the collateral act of fleeing.

It appears clear that under the Iowa statute, unlike its federal counterpart, this crime is not triggered until formal commencement of prosecution.<sup>1153</sup> This is because the word "prosecution" is used in section 719.4(4) of the Code without further definition. Thus, the general definitional clause in section 801.4(12) of the Code governs the definition of "prosecution", defined therein as "the commencement, including the filing of a complaint, and continuance of a criminal proceeding, and pursuit of that proceeding to final judgment . . .".<sup>1154</sup> Strictly interpreted, this means that a person who commits a felony or an aggravated misdemeanor will not violate this section if he flees *before* commencement of the prosecution against him.

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1148. 1978 Iowa Acts 2d Sess. ch. 1091, § 4.

1149. See Iowa Code § 745.1 (1977) (repealed 1978).

1150. See *State v. Buck*, 275 N.W.2d 194 (Iowa 1979).

1151. 1978 Iowa Acts 2d Sess. ch. 1185, amending Iowa Code § 719.4 (Supp. 1978). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 429.

1152. 18 U.S.C. § 1073 (1970).

1153. See *Lupino v. United States*, 268 F.2d 799 (8th Cir. 1959), *cert. denied*, 361 U.S. 834 (1959); *United States v. Bando*, 244 F.2d 833 (2d Cir. 1957), *cert. denied*, 355 U.S. 844 (1957); *contra*, *United States v. Rappaport*, 156 F. Supp. 159 (N.D. Ill. 1957).

1154. Iowa Code § 801.4(12) (1979).

This is a specific intent<sup>1155</sup> crime, requiring proof that the defendant left the state with the intent "to avoid prosecution for a public offense . . .".<sup>1156</sup> Judicial interpretations of the federal statute have established that "the dominant purpose" of the interstate flight need not be to avoid prosecution,<sup>1157</sup> but that mere absence from the originating state is not sufficient proof of an intent to flee to avoid prosecution.<sup>1158</sup>

b. *Felony Murder Rule.* One major change in the Code is that Escape has been made an underlying felony for purposes of the application of the felony murder rule to Murder in the First Degree.<sup>1159</sup> Under the prior law, unpremeditated murders during an escape or attempted escape were punishable under the felony murder rule<sup>1160</sup> only as second-degree murder.<sup>1161</sup>

c. *Grading.* There are four grades, including two classifications of penalty schedules, of this offense, although they are not divided into degrees. It is a class D felony<sup>1162</sup> for either (1) a person convicted of (or charged with) any felony to intentionally escape from any detention facility, or (2) a person to flee from Iowa to avoid prosecution on a felony or an aggravated misdemeanor. Only a serious misdemeanor penalty<sup>1163</sup> applies for either (1) a person convicted of (or charged with) any class of misdemeanor to intentionally escape from any detention facility, or (2) a prisoner to knowingly and voluntarily absent himself from any place he is required to be.

## 6. Assisting a Prisoner to Escape

This revised offense has apparently undergone some changes from the prior law. The revised offense<sup>1164</sup> focuses upon the actor's conduct, consisting either of introducing or knowingly<sup>1165</sup> causing to be introduced into the possession of any prisoner certain instruments or devices for facilitating escape. The crime is completed upon the mere rendering of assistance coupled with the intent<sup>1166</sup> "to facilitate the escape of any prisoner,"<sup>1167</sup> thus not

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1155. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1156. 1978 Iowa Acts 2d Seas. ch. 1185.

1157. *Hett v. United States*, 353 F.2d 761 (9th Cir. 1965), cert. denied, 384 U.S. 905 (1966).

1158. *Barrow v. Owen*, 89 F.2d 476 (5th Cir. 1937).

1159. See Iowa Code § 707.2(3) (1979) and text accompanying notes 1008-15 *supra*.

1160. Iowa Code § 690.2 (1977) (repealed 1978) contained an all-inclusive listing of five underlying felonies (other than Escape) for purposes of felony murder in the first degree.

1161. Iowa Code § 690.3 (1977) (repealed 1978) defined second-degree murder as all murder which was not first-degree murder, thus including felony murder during an Escape.

1162. See note 65 *supra*.

1163. See note 40 *supra*.

1164. Iowa Code § 719.6 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 1913-15; J. YEAGER & R. CARLSON, *supra* note 12, § 431.

1165. Regarding knowledge as a particularized state of mind, see text accompanying notes 480-509 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1166. Regarding specific intent as a state of mind, see text accompanying notes 480-509 in

requiring that any prisoner actually attempt to escape. In contrast, the language of the pre-revised statute<sup>1168</sup> appears to have required at least an attempted escape. Moreover, unlike the pre-revised law,<sup>1169</sup> the revised offense does not include an attempt.<sup>1170</sup>

The revised offense appears to be more restrictive in the type of assistance which is criminalized. This assistance is statutorily limited to introduction of "any weapon, explosive or incendiary substance, rope, ladder, or any [escape-facilitating] instrument or device"<sup>1171</sup> into any detention or correctional facility. This compares with the former statutory language of a person aiding or assisting "by any means whatever" a prisoner in any place of confinement in an attempt to escape therefrom.<sup>1172</sup> The import of this statutory change is that the revised crime is more restrictive in its scope of included conduct. That is, this section "applies only to the listed acts which will be done before the escape is attempted and which, by themselves, would not be more than mere preparation for the attempt, although any of them would be an overt act satisfying the requirements of the conspiracy section, section 706.1."<sup>1173</sup> Other types of assistance to "escaping" prisoner would be left to be punishable under traditional aiding or abetting,<sup>1174</sup> or conspiracy,<sup>1175</sup> provisions.

It is interesting to note that the offense of Assisting a Prisoner to Escape can be punishable more severely than the underlying offense of Escape itself. Permitting a class A felon to escape from custody is a class C felony,<sup>1176</sup> whereas an escaping class A felon is subject only to a class D felony penalty.<sup>1177</sup> The same class D felony penalty schedule for Escape and for Assisting an Escape, however, are in effect for other felonies. Nevertheless, the unlawful act of assisting an escape by misdemeanants of *any class* is also punishable as a class D felony, while escapes by misdemeanants of any class are punishable merely as serious misdemeanors. Legislative clarification in this area would be of great assistance.

## 7. Permitting a Prisoner to Escape

The only substantive change in the offense of Permitting a Prisoner to

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Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1167. IOWA CODE 719.6 (1979).

1168. See IOWA CODE §§ 745.12-18 (1977) (repealed 1978).

1169. See *id.* § 745.18.

1170. See J. ROEHRICK, *supra* note 12, at 257.

1171. IOWA CODE § 719.6 (1979).

1172. See IOWA CODE § 745.18 (1977) (repealed 1978).

1173. J. YEAGER & R. CARLSON, *supra* note 12, § 431.

1174. See IOWA CODE § 703.1 (1979) and text accompanying notes 398-421 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1175. See IOWA CODE § 706.1 (1979).

1176. See note 311 *supra*.

1177. See note 65 *supra*.

Escape<sup>1178</sup> is that, unlike its predecessor statute,<sup>1179</sup> the revised crime expressly applies not only to a jailor or other public personnel permitting, aiding, or abetting a prisoner to escape, but also to such conduct related to an *attempted* escape. The revised statute makes it clear, through the language of "voluntarily<sup>1180</sup> permits, aids, or abets,"<sup>1181</sup> that an intentional act (as opposed to negligence) is necessary to incur criminal culpability. The change in terminology from "suffering" escape to the revised language of "permits, aids or abets" should be of no consequence, however.<sup>1182</sup> The literal "reach" of this statute, especially as to *permitting an escape*, is recognized by Professor Yeager as follows:

When the person who permits the escape is also the person who has custody of the prisoner, and therefore has an affirmative duty to retain such custody, any failure to take the necessary steps to prevent an escape is permitting the escape. There seems to be no reason why the same cannot be said of any officer or employee who is aware of the escape attempt and who is in a position to prevent or impede it, but fails to do so.<sup>1183</sup>

The same questionable two-level grading scheme applies for this offense as for the related offense of *Assisting a Prisoner to Escape*.<sup>1184</sup>

## VII. MISCELLANEOUS OFFENSES

### A. Animal Offenses<sup>1185</sup>

#### 1. Generally

Only minor changes were made in the three offenses which, taken together, provide limited protection to domestic animals from "some acts of wanton selfish cruelty."<sup>1186</sup> The aggravated misdemeanor<sup>1187</sup> crime of *Injury to Animals*<sup>1188</sup> is limited to *maliciously* causing aggravated injury to domestic animals belonging to another. Contrastingly, the related simple misdemeanor<sup>1189</sup> offense of *Cruelty to Animals*<sup>1190</sup> is broader in scope because it

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1178. IOWA CODE § 719.5 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, Nos. 1911-12; J. YEAGER & R. CARLSON, *supra* note 12, § 430.

1179. See IOWA CODE §§ 745.9-11 (1977) (repealed 1978).

1180. Regarding voluntarily as a state of mind, see text accompanying notes 566-68 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1181. IOWA CODE § 719.5 (1979) (emphasis added).

1182. J. YEAGER & R. CARLSON, *supra* note 12, § 430.

1183. *Id.* § 430.

1184. See text accompanying notes 1178-82 *supra*.

1185. IOWA CODE §§ 717.1-3 (1979). There are no Uniform Jury Instructions, *supra* note 12, for any of these offenses. See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 391-94.

1186. J. YEAGER & R. CARLSON, *supra* note 12, § 391.

1187. See text accompanying note 63 *supra*.

1188. Compare IOWA CODE § 717.1 (1979) with IOWA CODE § 717.1 (1977) (repealed 1978). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 392.

1189. See text accompanying note 37 *supra*.

encompasses *intentional or negligent* mistreatment of domestic animals belonging either to another or to defendant himself. The final related crime, Exhibitions and Fights,<sup>1191</sup> is limited in its application to punish promoters for staging exhibitions where animals fight or are tormented. This section also applies to those persons furnishing a place for such exhibitions.<sup>1192</sup> Also, this section is the only one of the three offenses extending its protection to wild, non-domesticated creatures.<sup>1193</sup> It is a serious misdemeanor.<sup>1194</sup>

There is no substantive change in these offenses, with the principal change being the inclusion of a single broad definition, "a nonhuman vertebrate,"<sup>1195</sup> to define the term "animal." This single definition replaces the extensive listing of specific animals under the former statutes. Nevertheless, all "animals" are not included in the protections of these three related offenses. Section 717.1 covers malicious injury only to animals belonging to another. Section 717.2 is limited to cruelty to only certain types of animals (i.e., "any domestic animal, or fowl, or any dog or cat"). Section 717.3, while being the only provision to include *all* animals (including wild animals), has the most limited coverage (i.e., commercially using "animals," for exhibitions and fights).

## 2. *Injury to Animals*

The elements of this offense are: (1) maliciously; (2) killing, maiming, or disfiguring; (3) any "animal"; (4) of another; (5) having no right to do so. Alternatively, this offense can be committed either by maliciously administering poison to another's animal or by exposing another's animal to poison with the intent that it be taken. The latter of the three circumstances is the only one not requiring actual harm to the animal.

The fundamental purpose of this section is, as it always has been, to protect animal owners from financial or other loss. (Legislative solicitude for animals themselves is embodied in section 717.2, as discussed below). Thus, no protection whatsoever is given under section 717.1 to unowned animals or to animals owned by the perpetrator of the injury. Moreover, the terms "disfigure" and "malice" have been interpreted broadly to facilitate protection of animal owners, as discussed below.<sup>1196</sup>

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1190. Compare Iowa Code § 717.2 (1979) with Iowa Code § 717.1 (1977) (repealed 1978). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 393.

1191. Compare Iowa Code § 717.3 (1979) with Iowa Code § 726.7 (1977) (repealed 1978). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 394.

1192. J. YEAGER & R. CARLSON, *supra* note 12, states that "[s]pectators, and even participants, do not violate this section unless they have taken a more active part in arranging, promoting, or staging the exhibition. For example, bird handlers at cockfights are not included." *Id.* § 394.

1193. *Id.* § 393.

1194. See text accompanying note 40 *supra*.

1195. Iowa Code § 702.3 (1979).

1196. See text accompanying notes 1198-1204 *infra*.

The revised provision updates this section of the Code beyond Nineteenth Century notions. It recognizes that owners of unusual and exotic "non-human vertebrates" can suffer just as much from the killing, maiming and disfiguring of their animals as can dog-breeders and cattlefeeders. The original "Injuries to Beasts" provision was codified in 1851. It was drawn to protect farmers from livestock marauders, and it remained substantially unchanged until the 1979 revision. Practically, of course, livestock owners will remain the single most important group protected by section 717.1. Even so, the new section 717.1 extends protection to owners of animals of all sorts—from zoo and circus animals to pet canaries and pet sharks—the sole exclusion being non-vertebrates.

a. *"Disfigure."* There may be some confusion as to the meanings of "disfigure"<sup>1197</sup> and "maliciously."<sup>1198</sup> According to Professor Yeager, "[t]he word 'disfigure,' taken in its context, means some permanent disfigurement, and not something temporary, as may result from clipping the animal's hair in a strange fashion, even though a temporary disfigurement may be annoying to the owner . . ."<sup>1199</sup> The legislative and interpretive history of the pre-revised law does not support this conclusion, however. The words "maliciously kill, maim or disfigure" were adopted wholesale from the previous enactment, which, in turn, took the phrase from past codifications beginning in 1851. The courts are likely, therefore, to attach especially heavy precedential value to past interpretations of these words. Caselaw supports the conclusion that "maims" means permanent injuries and "disfigure" means non-permanent injuries. Specifically, the Iowa Supreme Court has stated: "[t]o maim as applied to domestic animals, implies some permanent injury; but to disfigure is a lower grade of the same offense, and the disfiguring need not be of a permanent character to make the offense complete."<sup>1200</sup> The example of "disfiguring" given in that case was shaving a horse's mane or tail.

"Disfiguring" as "non-permanent injury" is consistent with the conclusion that section 717.1 is designed to protect animal owners, not animals. A painless shaving gives a dog no grief, but it could cause great injury to an owner, particularly if the animal is kept for show purposes.

b. *Maliciously.*<sup>1200</sup> Early judicial interpretations of "maliciously" support both of these conclusions. For example, the Iowa Supreme Court has written that:

[m]alice toward the *owner* of the animal is the ingredient of this offense; and although the injury may be but very *slight*, yet if it is of such a

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1197. Regarding disfigurement to a human being, see text accompanying notes 232-38 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1198. J. YEAGER & R. CARLSON, *supra* note 12, § 392.

1199. State v. Harris, 11 Iowa 414, 415 (1861).

1200. Regarding malice as a state of mind, see text accompanying notes 549-65 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

character as to lessen the value of the animal *to the owner*, and shows the malicious intention of the person committing the act, we think, under the statute the offense is complete.<sup>1201</sup>

Similarly, it has said that "[m]ere wantonness, or an intent simply to injure the animal without malice against the person . . . is not sufficient . . . But although the owner may be unknown, if the act is done maliciously, for the purpose and with the intent of injuring such person, it is sufficient."<sup>1202</sup>

Malice must be directed toward the animal owner, and it will even be inferred if the act is wanton and the owner suffers injury.<sup>1203</sup> Since the value of the animal to the owner might be lessened by temporary disfigurement, as well as by permanent maiming, such permanence or lack thereof should be irrelevant. Furthermore, if "disfigure" and "maim" are to be equated, as Professor Yeager implies, there would have been no reason for the General Assembly to have used two distinct words.

Admittedly, the problem of when there is injury and when there is not remains. *State v. Harris*<sup>1204</sup> suggests a broad test, *i.e.*, an animal owner might be injured emotionally, as well as financially. The problem will arise only rarely, that being when the animal is maimed or disfigured but the owner suffers no financial loss. Logic and convenience might prescribe a market value test, but justice counsels otherwise. An old man, fondly attached to a worthless old mongrel, is entitled to the same protection under the criminal law as the farmer who owns cattle of great value.

c. *Relationship to Criminal Mischief.* Another important issue raised by section 717.1 is its relation to section 716.1—criminal mischief. Criminal mischief is defined therein as "damage, defacing, alteration, or destruction of tangible property," and section 702.14 defines "property" as "anything of value, whether publicly or privately owned. The term includes both tangible and intangible property, labor and services. The term includes all that is included in the terms 'real property' and 'personal property.' "

Professor Yeager<sup>1205</sup> asserts that sections 716.1 and 717.1 are mutually exclusive, that section 716.1 encompasses inanimate property and section 717.1 animate. There seems to be little foundation for this assertion, as the statutory language is clear—section 716.1 says "tangible property." The distinction made is between tangible and intangible (and animals certainly are tangible), not between animate and inanimate. Had the General Assembly intended the latter distinction, it seems clear that they would have made it, since legislative awareness of such distinctions is evidenced by distinctions between animate and inanimate things being expressly made in the offense

1201. *Id.*

1202. *State v. Linde*, 54 Iowa 139, 142, 6 N.W. 168, 172 (1880).

1203. *State v. Williamson*, 68 Iowa 351, 352, 27 N.W. 259, 261 (1886).

1204. 11 Iowa 414 (1861).

1205. J. YEAGER & R. CARLSON, *supra* note 12, § 392.

of Trespass.<sup>1206</sup> Further, chapters 714-716 of the 1979 Code include exhaustive provisions on malicious mischief to various types of property. In all likelihood, the General Assembly intended to consolidate all previously enumerated offenses into one—criminal mischief. It follows that all previously-enumerated property is now encompassed by the term “tangible property.” This conclusion is buttressed by an examination of the pre-revised offense of Malicious Injury.<sup>1207</sup> It forbade anyone to “willfully and maliciously destroy, injure, or secrete any goods, chattels or valuable papers of another . . . .” The term “chattels” was broadly interpreted in a similar forerunner statute as being used “in its broadest sense” and as such “undoubtedly cover[ing] every kind of personal property.”<sup>1208</sup> Finally, in the 1895 case *State v. Phipps*,<sup>1209</sup> the defendant’s conviction for malicious mischief to animals was upheld even though the Code specifically prohibited injuries to animals in another section, similar to the overlapping in the present Code.

All of this indicates that malicious injury to animals is probably subject to prosecution under both provisions, which has some important ramifications. First, anything prosecuted under section 717.1 will be punishable as an aggravated misdemeanor. Under chapter 716, the value of the animal’s treatment, in the case of injury, or replacement value, in the case of killing, will determine the degree of the offense. First and second degree criminal mischief are felonies.

Second, section 716.1 may encompass a broader range of animals than section 717.1, as the former includes “public property,” and the latter only animals “of another.” While municipal zoo animals may be covered by section 717.1, almost certainly they would be covered under section 716.1. It is even conceivable that wild animals could fall within the protection of section 716.1 if they are considered the ultimate property of the sovereign state.

Finally, section 716.1 does not require a showing of malice to the owner. The mischief need only be done “intentionally by one who has no right to so act.”

d. *Without a Right To Do So.* An essential element of section 716.1 is that the perpetrator injured another’s animal while “having no right to do so.” This should include all traditional defenses to criminal behavior (e.g., self defense, defense of others, and defense of property), as well as express statutory exceptions permitting destruction of animals in limited circumstances.<sup>1210</sup> This same limitation applies to any prosecutions for Malicious Mischief.<sup>1211</sup>

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1206. See Iowa Code § 716.7(2)(a), (d) (1979).

1207. See Iowa Code § 714.1 (1977) (repealed 1978).

1208. *State v. Phipps*, 95 Iowa 491, 493, 64 N.W. 411, 414 (1895).

1209. *Id.*

1210. See, e.g., Iowa Code §§ 162.19, 163.10, 188.50, 351.26, .27, .37, .39 (1979).

1211. See text accompanying notes 1200-04 *supra*.

### 3. *Cruelty to Animals*

Section 717.2 protects a select group of animals from enumerated acts of human cruelty. It is clearly designed to protect animals and not animal-owners, but it is more narrowly drawn than previous provisions,<sup>1212</sup> which protected "any animal" and "any creature." Why this change was made is not entirely clear. It is particularly mysterious in light of the expanded coverage of section 717.1 and the new protection provided by section 717.3. Perhaps the legislators felt a blanket provision was too difficult to enforce. In any case, precisely what is included within "any domestic animal, or fowl" must await a judicial determination. Older cases, interpreting "domestic animal" for purposes of section 717.1 and its forerunners, have accepted hogs,<sup>1213</sup> oxen,<sup>1214</sup> and horses.<sup>1215</sup>

Section 717.2 leaves other questions unanswered. The first prohibited act—failing to supply sufficient food and water—clearly applies only to those who have confined or impounded an animal. So, apparently, there is no affirmative duty to give food and water to an animal over which one does not have custody.

The language of the provision (stated in the disjunctive, the repeated "who") indicates that the other prohibited acts apply without regard to who has confined the animal, or even if the animal is confined. Most of the enumerated transgressions are self-explanatory. Deprivation of necessary sustenance differs from failure to supply food and water only in that the former requires an active deprivation, not merely a failure to act, while the latter imposes an affirmative duty which may be violated by omission. Commenting on similar language, the Iowa Supreme Court has said in dicta:

[o]nly those owning or having the care or control [of animals] . . . are required to provide [them] 'with proper food, drink, shelter or protection from weather,' and it was not intended to impose on others who may learn of an animal's lack of proper care the duty to supply these at the peril of being punished by the criminal laws of the state.<sup>1216</sup>

It is not clear whether "sustenance" includes shelter. The previous Code used the words "unnecessarily fail to provide the same with proper food, drink, shelter, or protection from the weather. . . ."<sup>1217</sup> The express alteration, coupled with the commonly understood meaning of "sustenance," may indicate an intent to exclude shelter.

It is also not clear whether the phrase "unjustified pain, distress or suffering" applies only to "kill any such animal" or also to the other enumerated

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1212. See Iowa Code §§ 717.2, .3 (1977) (repealed 1978).

1213. State v. Enslow, 10 Iowa 115 (1859).

1214. State v. Harris, 11 Iowa 414 (1861).

1215. State v. Lightfoot, 107 Iowa 344, 78 N.W. 41 (1899).

1216. Pieper v. Krutzfeldt, 155 Iowa 716, 721, 136 N.W. 904, 906 (1912).

1217. Iowa Code § 717.3 (1977) (repealed 1978).

ated acts of cruelty. Nor is it clear when "pain, distress or suffering" is "unjustified." The best and most logical explanation is that "torture, torment, deprive of necessary sustenance, mutilate, overdrive, overload, drive where overloaded, beat, or kill" is meant to be an exhaustive list of acts of cruelty, which acts are defined as causing "unjustified pain, distress, or suffering." What is justified and what is not will depend largely on judicial sympathy for individual members of the animal kingdom.

#### 4. *Exhibitions and Fights*

Section 717.3 is new, and like section 717.2, it refers to "any animal." However, it does not limit protection to animals "of another." Thus, wild animals are given only this limited protection in chapter 717.

Although section 717.3 only applies to promoters and to persons who keep places where prohibited exhibitions and fights are held, section 725.11 prohibits related conduct. That provision makes it a serious misdemeanor to have any connection with money paid as admission to any animal fights or baiting spectacles. The scope of section 725.11 may be broad enough to cover everyone remotely connected with such an affair, possibly including even the spectators.<sup>1218</sup>

### B. *Bribery and Corruption Offenses*<sup>1219</sup>

#### 1. *Generally*

Five bribery offenses,<sup>1220</sup> three voting offenses,<sup>1221</sup> and the crime of Misconduct by Election Official<sup>1222</sup> comprise the bribery and corruption offenses in chapter 722 of the Iowa Code. Seven of these offenses remain unchanged from their pre-revised form. Only two bribery offenses relating to public employment or public service have been changed, but not until the 1980 legislative session.

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1218. See note 1192 *supra*.

1219. There are no Uniform Jury Instructions for any of these offenses. See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 481-90.

1220. These offenses, all of which essentially are specific intent crimes, are IOWA CODE §§ 722.1 (Bribery); 722.2 (Accepting a Bribe); 722.3 (Bribery in Sports); 722.4 (Bribery of an Elector); 722.6 (Bribery of Election Officials) (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 482-86.

1221. These offenses, none of which includes a particularized state of mind, are IOWA CODE §§ 722.5 (Improper Voting); 722.8 (Duress to Prevent Voting); 722.9 (Duress to Procure Voting) (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 487, 489-90.

1222. IOWA CODE § 722.7 (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 488. This is a particularized state of mind crime, with the prosecution required to prove that defendant "knowingly" did any of the prohibited acts. For a detailed discussion of knowledge as a requisite mental state of criminal activity, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

## 2. *Bribery and Accepting Bribes*

The general crime of Bribery<sup>1223</sup> in the new Iowa Criminal Code consists of a consolidation of several pre-revised Code sections into one, with a uniform penalty applying to "all attempts to bribe persons who are serving in a public capacity."<sup>1224</sup> The statutory uniformity was mandated in 1975 by the Iowa Supreme Court in *State v. Books*.<sup>1225</sup> Like prior law,<sup>1226</sup> Bribery also encompasses the attempt to bribe, and makes the attempt equally punishable with the consummated offense. Conversely, the related offense of Accepting a Bribe<sup>1227</sup> focuses upon the public official or employee who solicits or receives a bribe.

With the substantive nature of these two offenses unchanged in the new Iowa Criminal Code as it went into effect in 1978, and as it was amended in 1980, Iowa continues to have "very likely the strictest bribery statutes in existence."<sup>1228</sup> This is because of the broad statutory language prohibiting the offering or giving of "anything of value or any benefit"<sup>1229</sup> to public officers or employees with the understanding that their official actions would be influenced thereby, and conversely the soliciting or accepting of same by public officers or employees.<sup>1230</sup>

The General Assembly rejected a bill in 1980<sup>1231</sup> which would amend these two bribery statutes to permit the giving, receiving, and even soliciting of gifts up to fifty dollar value "in any one occurrence"<sup>1232</sup> to any person serving in a public capacity even when done so with the intent to influence that person's official actions. An amendment that passed<sup>1233</sup> maintained the prohibition against *any* gratuity but added the requirement that any gift, in order to be illegal under these bribery statutes, must have been "given pursuant to an agreement, arrangement, or understanding that the gift would influence the person serving in a public capacity."<sup>1234</sup>

The elements of the revised crime of Bribery<sup>1235</sup> are: (1) offering, promising, or giving; (2) anything of value or any benefit; (3) to any person engaged in a public capacity; (4) pursuant to an agreement or arrangement or understanding; (5) that the thing of value or benefit will influence the per-

1223. *Iowa Code* § 722.1 (1979).

1224. J. YEAGER & R. CARLSON, *supra* note 12, § 482, at 120.

1225. *State v. Books*, 225 N.W.2d 322, 323-24 (Iowa 1975).

1226. See *Iowa Code* §§ 739.1, .4, .6, .11 (1977) (repealed 1978).

1227. *Iowa Code* § 722.2 (1979).

1228. J. YEAGER & R. CARLSON, *supra* note 12, § 481. The insignificant amendments in 1980 apparently would not change Professor Yeager's opinion (stated in 1979).

1229. *Iowa Code* § 722.1 (1979).

1230. *Id.*

1231. H.F. 720 (1980).

1232. *Id.*

1233. H.F. 687 §§ 63 & 64 (1980).

1234. *Id.*

1235. *Iowa Code* § 722.1 (1979), as amended by H.F. 687, § 63(m) 68th G.A. (1980).

son's exercise of his public duties. Similarly, those of the related revised crime of Accepting a Bribe<sup>1236</sup> are: (1) a person engaged in a public capacity; (2) knowingly; (3) accepting or receiving or soliciting; (4) any promise or anything of value or any benefit; (5) pursuant to an understanding or arrangement; (6) that the promise, thing of value, or benefit will influence his exercise of public duties.

a. *Any Gratuity.* The phrase "anything of value or any benefit" was construed in a 1977 attorney general opinion<sup>1237</sup> to preclude public officials from being offered or accepting *any* gratuity, "no matter how slight or insignificant,"<sup>1238</sup> including a single cup of coffee or a free ride in an automobile. Of course, such a gratuity must have been received with knowledge that it was given with the *intent* to influence his official actions, although not necessarily in a particular transaction. After the 1980 amendment, it is necessary to show an agreement, arrangement, or understanding that the gift is for the purpose of influencing such official actions.

This restrictive reading of a gratuity was reaffirmed, or at least not rejected, in a letter released by the Iowa Attorney General in 1979.<sup>1239</sup> Nevertheless, an exception for general business or advertising gifts was essentially created in a subsequent official attorney general's opinion.<sup>1240</sup> That opinion suggested that businesses could give away small items "with their names and logos prominently displayed for advertising purposes" such as "pencils, letter openers, calendars, and the like" to "past customers, friends, other businesses as well as to government officials, employees, and agencies," without running afoul of the bribery statutes.<sup>1241</sup> This was because of practical difficulties of proof as to the requirement of intent to influence official actions in these limited circumstances: "the value of the gift is very small, is given to a large group of people and not exclusively to public officials, and has obvious advertising benefits."<sup>1242</sup>

b. *Intent.* The intent of the donor to influence the donee's official actions is the gravamen of these two bribery offenses. As a result, the prosecution need not prove that the donee's official actions were, in fact, influenced. However, the donee apparently must know that the donor's purpose in giving the gift was to influence the donee's official actions. This is because the Accepting a Bribe statute refers to the public official or employee "knowingly [accepting] or [receiving] any promise or anything of value or any benefit given pursuant to an understanding or arrangement that the promise or

1236. Iowa Code § 722.2 (1979), as amended by H.F. 687, § 64, 68th G.A. (1980).

1237. [1977] REP. ATT'Y GEN. IA. 77-12-13.

1238. *Id.*

1239. Letter, Miller to Pelton and Johnson, March 21, 1979.

1240. [1979] REP. ATT'Y GEN. IA. 79-4-27.

1241. *Id.*

1242. *Id.*

thing of value or benefit will influence . . . .<sup>1243</sup>

The placement of the adverb "knowingly"<sup>1244</sup> limits its scope to the acts of accepting or receiving. This means that one must have been personally aware that he had received a gift.

### 3. *Gift Law Limitations*

The overlapping of these bribery offenses in chapter 722 with the unrepealed pre-revised gift-limitation<sup>1245</sup> law in section 68B.5 of the Iowa Code has continued. In the 1980 amendments, section 68B.5 had not been considered to be preempted by these bribery offenses under the pre-revised law.<sup>1246</sup>

The amended gift law permits gifts<sup>1247</sup> up to fifty dollars in value "in any one occurrence" to any person serving in a public capacity. An *unlimited number* of gifts can be offered, given, received, and even solicited, however, so long as the fifty dollars per occurrence limitation is not exceeded.

The fifty dollars limitation applies to gifts involved "in any one occurrence." This means that the value of all gifts involved in the same "occurrence" must be totalled, and not that *each* gift can equal up to fifty dollars when there are multiple gifts.<sup>1248</sup>

What constitutes an "occurrence" is not set out in the statute. In its broadest sense, this could mean each separate *contact* which conceivably could occur daily if not hourly. Thus, a legislative lobbyist who has ten different meetings with a legislator on the same day to discuss the same legislative matter conceivably could legally "shower" that individual legislator with up to five hundred dollars worth of gifts during that one day.

A more restrictive interpretation of the term "occurrence" is desirable to prevent emasculation of the apparent legislative intent to legitimatize the giving and receiving of small gifts. Indeed, probably the most commonly expressed concern by legislators had been their having to pay for their own meals and drinks even at meetings where they had spoken *pro bono*. It is submitted that an "occurrence" should be read in light of a function or a project, instead of every single face-to-face contact. Under this interpretation, a lobbyist could only confer one fifty dollar bevy of gifts upon an individual legislator while lobbying on the same legislative matter. Accordingly, there could be one fifty dollar gift all at once or numerous small gifts which do not exceed a cumulative total of fifty dollars. This approach would permit the fifty dollar limit for each occasion that a legislator spoke before the

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1243. Iowa Code § 722.2 (1979), as amended by H.F. 687, § 64, 68th G.A. (1980).

1244. Regarding knowledge as a state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1245. H.F. 687, §§ 6-8, 68th G.A. (1980).

1246. [1977] REP. ATT'Y GEN. IA. 77-12-13.

1247. The term "Gifts" is defined in Iowa Code § 68B.2 (1979) (amended 1980). See H.F. 687, § 6, 68th G.A. (1980).

1248. [1980] REP. ATT'Y GEN. IA. 80-6-20.

same organization, provided, of course, that each speech was bona-fide.

An attorney general's opinion,<sup>1249</sup> issued June 25, 1980, concluded that "a determination of whether two or more gifts constitute 'one occurrence' is to be made by reference to the totality of the circumstances surrounding the gifts in question."<sup>1250</sup> Setting out some factors intended to be suggestive of the nature of the inquiry thought appropriate in individual cases to be decided on their own merits, the opinion states:

If the gifts involved are related to one another, they are likely part of the same occurrence. In making a determination as to the relatedness of more than one gift, it is our opinion that one would look to such factors as the nature and similarity of the gifts, the setting in which the gifts are given, the nature of the relationship between the donor and the donee, and the time lapse between the gifts in question. If the gifts in question are of a similar nature or are related to one another, if the gifts were made in the same or a similar setting, if the relationship between the donor and the donee rather than in the personal relations between the parties, and if there was a relatively brief period of time separating the gifts in question it is our opinion that such gifts would likely be found to constitute one occurrence.<sup>1251</sup>

Section 68B.5, until the 1980 amendments, had applied only to state officers and state employees, but now, like the bribery offenses, it applies to public officials at all levels of government. Section 68B.5 continues to overlap with sections 722.1 and 722.2 in prohibiting essentially the same conduct, with two major exceptions. The exceptions being a value in excess of fifty dollars,<sup>1252</sup> only if given "in any one occurrence," and that section 68B.5 does not require an intent to influence the donee's official actions.<sup>1253</sup> Accordingly, the prohibited gifts crime should be a lesser included offense of the crime of Accepting a Bribe.

a. *Grading.* There is a single grade for each of these complementary bribery offenses in chapter 722. Bribery is a class D felony, whereas Accepting a Bribe is a class C felony. Of course, neither offense is a "forcible felony."<sup>1254</sup> On the other hand, the less culpable section 68B.5 crime, Excessive Gifts to Public Employees, is more realistically only a serious misdemeanor.<sup>1255</sup> This same penalty schedule applies to the new offense<sup>1256</sup> for failure to report receipt of gifts valued in excess of fifteen dollars in any occurrence by public officials and employees.

1249. *Id.*

1250. *Id.*

1251. *Id.*

1252. See note 1232 *supra*.

1253. See notes 1245-46 *supra*.

1254. See note 128 *supra*.

1255. See note 40 *supra*.

1256. IOWA CODE § 68B (1979) (new section unnumbered, as amended by H.F. 687, § 7, 68th G.A. (1980)).

### C. Civil Rights Offenses<sup>1257</sup>

No changes were made in the new Criminal Code regarding the two crimes<sup>1258</sup> included in the unrepealed pre-revised code chapter on Infringement of Civil Rights.<sup>1259</sup> Unfortunately, section 729.4 of the Code, relating to unfair employment practices, should not have been retained. This section conflicts with the modern non-penal approach to violations of civil rights as exemplified in the Iowa Civil Rights Act.<sup>1260</sup> Moreover, section 729.4 does not include sex or physical handicaps in its coverage, unlike the civil rights act.<sup>1261</sup> Each of these crimes has its own specific penalty provisions incorporated therein, in contrast to the general scheme of placing the individual crimes into a small range of classification of offenses.<sup>1262</sup>

### D. Offenses Against the Family

Six offenses criminally defining "acts which attack the stability and welfare of the family"<sup>1263</sup> comprise Code chapter 726 on "Protection of the Family." Only the offense of Wanton Neglect of a Resident of a Health Care Facility<sup>1264</sup> is entirely new. However, all five of the carryover pre-revised offenses were changed somewhat. One of these "family protection" offenses—Incest<sup>1265</sup>—is treated in this Article in another grouping of offenses relating to Sexual Abuse and sexual morality.<sup>1266</sup>

#### 1. Bigamy

The major change made in the crime of Bigamy<sup>1267</sup> was the elimination of "subsequent bigamous cohabitation"<sup>1268</sup> as an alternative mode of committing the offense, thus criminalizing only those bigamous marriages made

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1257. There are no Uniform Jury Instructions for any of these three rather obscure offenses.

1258. These two offenses relate to the implementation of Iowa constitutional prohibitions located in IOWA CONST. art. I, § 4. See IOWA CODE §§ 729.1 (religious tests for public office or public employment); 729.4 (discriminatory employment practices) (1979).

1259. IOWA CODE §§ 729.1-.4 (1979).

1260. IOWA CODE §§ 601A.1-.17 (1979).

1261. *Id.*

1262. See generally IOWA CODE §§ 902.1, .9, 903.1 (1979).

1263. J. YEAGER & R. CARLSON, *supra* note 12, § 581.

1264. See IOWA CODE § 726.7 (1979) and text accompanying notes 1282-84 *infra*.

1265. IOWA CODE § 726.2 (1979).

1266. See IX (H) *supra*.

1267. Compare IOWA CODE § 726.1 (1979) with IOWA CODE §§ 703.1-.3 (1977) (repealed 1978). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 2601-06; J. YEAGER & R. CARLSON, *supra* note 12, §§ 582-86; R. PERKINS, *supra* note 12, at 380-82. For a discussion of the background of the pre-revised law through the proposed changes in the 1974 bill, see *Family Note*, *supra* note 344, at 561-67.

1268. J. YEAGER & R. CARLSON, *supra* note 12, § 583 at 144. See *Family Note*, *supra* note 344, at 563-64.

in Iowa. So restricted, this revised offense can only be committed by either (1) marrying another person, while already having a living spouse, or (2) marrying a person, knowing that person already has a living spouse. As defined, this revised offense applies equally to both parties in a bigamous marriage, as compared to the separate, less serious pre-revised offense of Knowingly Marrying Spouse of Another<sup>1269</sup> in addition to Bigamy<sup>1270</sup> itself.

The statute is unclear on its face as to the mental state required when the *actus reus* consists of marrying another while already having a spouse. The fact that the defendant *knew* he was married at the time is not a statutory requisite. Contrastingly, knowledge<sup>1271</sup> is expressly provided for when the *actus reus* consists of marrying another whom the defendant *knows* has another living spouse. Reading these two provisions (which are in the same section), *in pari materia*, the legislative intent to exclude knowledge as an element in the former situation seems clear.<sup>1272</sup> The knowledge element is not mentioned in the Uniform Jury Instructions which set out the elements of Bigamy based upon the defendant having a living spouse.<sup>1273</sup>

A person should know whether he is married or not,<sup>1274</sup> and a new defense based upon a mistaken but reasonable belief that his prior marriage was dissolved has been added to the new Criminal Code, as discussed below.<sup>1275</sup> There is no sound policy reason for extending the mens rea requirement beyond that,<sup>1276</sup> and thus encumber the prosecution with having to refute spurious claims, such as amnesia.

Three defenses to a bigamy prosecution are provided for in the new Criminal Code. Two of these, a three-year absence of the spouse<sup>1277</sup> and a reasonable belief of the spouse's death,<sup>1278</sup> were retained unchanged from the prior law. However, a third defense relating to a prior divorce<sup>1279</sup> has

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1269. IOWA CODE § 703.3 (1977) (repealed 1978).

1270. *Id.* § 703.1.

1271. Regarding knowledge as a state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1272. *But see* J. YEAGER & R. CARLSON, *supra* note 12, § 582: "The seriousness of the offense does not suggest that it was or is intended as an absolute liability crime." *Id.* at 144.

1273. UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2602.

1274. J. YEAGER & R. CARLSON, *supra* note 12, states that "it usually will be a permissible inference that one is aware of his own marital state, particularly since the statutory exceptions include the more frequently occurring situations in which one can reasonably be confused on this point." *Id.* § 582.

1275. See text accompanying notes 1279-80 *infra*.

1276. *But see* J. YEAGER & R. CARLSON, *supra* note 12, § 582.

1277. IOWA CODE § 726.1(3) (1979). *See* J. YEAGER & R. CARLSON, *supra* note 12, § 586.

1278. IOWA CODE § 726.1(2). *See* J. YEAGER & R. CARLSON, *supra* note 12, § 585.

1279. IOWA CODE § 726.1(1). *See* J. YEAGER & R. CARLSON, *supra* note 12, § 584. *See also* Family Note, *supra* note 344, stating:

This [then proposed] provision contrasts sharply with [the then current] section 703.2 of the Code which enumerates only the defense of a lawful prior divorce, and has been construed to disallow a defense of mistake of fact or mistake of law as to the belief in the validity of a prior divorce. . . . It is apparent from the drafter's records

been expanded considerably, by recognizing a defendant's mistaken but reasonable belief that there was a valid dissolution of the prior marriage. A "reasonable belief," by terms of the statute, must be based upon "reasonably convincing evidence" of a valid termination of the prior marriage. A reasonable belief is defined in the Uniform Jury Instructions as "that which a reasonable person would believe, based upon the facts and circumstances known to such person at that time,"<sup>1280</sup> without requiring seeking out proof beyond a reasonable doubt of the truth. Finally, this offense is a serious misdemeanor.<sup>1281</sup>

## 2. *Abandonment of a Dependent Person*

Several aspects of the pre-revised crime of Exposing and Abandoning a Child<sup>1282</sup> have been changed in the expanded crime of Abandonment of a Dependent Person.<sup>1283</sup> One major change involves a significant broadening of the scope of protected persons. The new crime is defined in terms of a "dependent person"<sup>1284</sup> instead of the limitation to children under the pre-revised law. Thus, the offense of abandonment applies to mentally or physically infirm persons irrespective of their age.<sup>1285</sup> The operative fact is that the defendant have legal custody of the dependent person.<sup>1286</sup> Moreover, the applicable maximum age of a child has been raised from six to fourteen years.<sup>1287</sup>

This revised crime can be committed, in the alternative, either: (1) by

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that they added the defense of reasonable belief based on reasonably convincing evidence to protect a person who had made a good faith effort to find out whether a prior divorce was valid.

*Id.* at 565.

1280. *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 2606.

1281. As a serious misdemeanor, this offense is punishable by either a determinate jail term not exceeding one year or a maximum fine of \$1000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence, in lieu of the above-mentioned confinement or fine. *See notes 40, 37, 63, 65, 128, 311, 327, 337, 416 supra.*

1282. *IOWA CODE* § 731.7 (1977) (repealed 1978).

1283. *IOWA CODE* § 726.3 (1979). *See UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 2611-14; *J. YEAGER & R. CARLSON*, *supra* note 12, § 589; *Family Note*, *supra* note 344, at 573-76.

1284. A dependent person is defined as any person "who by reason of mental or physical disability is not able to care for himself or herself . . ." *IOWA CODE* § 726.3 (1979).

1285. *J. YEAGER & R. CARLSON*, *supra* note 12, § 589.

1286. The term "custody" is not defined in the Code. A good working definition has been suggested by Professor Yeager as "the legal duty of caring for and keeping the abandoned one." As he explains, "[t]his can be a temporary duty, informally assumed, such as that of a nurse or babysitter, as well as a more permanent duty, formally imposed, as by the appointment of a guardian." *J. YEAGER & R. CARLSON*, *supra* note 12, § 583 at 144.

1287. The change is in line with the uniform definition of "child" generally applicable throughout the Criminal Code. *See IOWA CODE* § 702.5 (1979). *But see* text accompanying notes 220-28 *supra*.

knowingly<sup>1288</sup> or recklessly<sup>1289</sup> exposing a dependent person to a hazard or danger against which such person could not reasonably be expected to protect himself; or (2) by abandoning a dependent person, knowing or having reason to believe such person will be exposed to such a hazard or danger.<sup>1290</sup> Contrastingly, the sole actus reus under the pre-revised statute consisted of exposing a child with the intent solely to abandon it. Thus, this revised crime no longer is a specific intent<sup>1291</sup> crime, under either of the alternative modes of commission. The act of exposure to a known danger, which appears to be an expansion of the prior law, can be done either knowingly or recklessly; thus "mere neglect of duty" is excluded as a predicate for this offense.<sup>1292</sup> The related less severe offense of Wanton Neglect of a Minor<sup>1293</sup> can occur through acts of abandonment or through mere neglect of duty.<sup>1294</sup> The alternative actus reus of abandonment apparently requires an element of permanency in light of the interpretation in *State v. Wilson*,<sup>1295</sup> given the word "abandon" in the related offense of Wanton Neglect of a Minor, as discussed in detail below.<sup>1296</sup> This is a class C felony,<sup>1297</sup> but is not a "forcible felony."<sup>1298</sup>

### 3. Nonsupport

The pre-revised offense of Desertion<sup>1299</sup> has been renamed Nonsupport,<sup>1300</sup> with several modifications. The new elements are: (1) failure or refusal to provide support for a child<sup>1301</sup> or ward under the age of eighteen; (2)

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1288. Regarding knowledge as a state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1289. Regarding recklessness as a state of mind, see text accompanying notes 594-601 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1290. IOWA CODE § 726.3 (1979).

1291. Regarding specific intent as a state of mind, see text accompanying notes 705-23 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1292. J. YEAGER & R. CARLSON, *supra* note 12, § 589. See also J. ROEHRICK, *supra* note 81, at 367.

1293. See IOWA CODE § 726.6 (1979) and text accompanying notes 1312-27 *infra*.

1294. J. YEAGER & R. CARLSON, *supra* note 12, § 592.

1295. 287 N.W.2d 587 (Iowa 1980).

1296. See text accompanying notes 1312-27 *infra*.

1297. It is punishable by either an indeterminate term of imprisonment of ten years or a maximum fine of \$5000 or both.

1298. Because it is not a "forcible felony," a full range of ameliorative sentencing alternatives (i.e., a deferred judgment, a deferred sentence, and a suspended sentence of probation) is also available, in lieu of the above-mentioned imprisonment or fine. See note 128 *supra*.

1299. See IOWA CODE § 731.1 (1977) (repealed 1978).

1300. IOWA CODE § 726.5 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 2615-18; J. YEAGER & R. CARLSON, *supra* note 12, § 591; Family Note, *supra* note 344, at 576-80.

1301. Child in this section is limited to son or daughter, unlike under the general definitional clause in IOWA CODE § 702.5 (1979) which defines a "child" as *any* person under fourteen years of age.

by a parent or guardian; (3) able to provide support.<sup>1302</sup> This is a general intent crime.<sup>1303</sup>

Two changes have been made in the definition of the victim of this offense. The major change is the omission of a wife altogether. The other change lengthens the support requirements of parents or guardians by raising the age of the child or ward to be supported from sixteen to eighteen years.

The revised offense did not retain the requirement of *wilfull*<sup>1304</sup> failure or refusal to provide support. Nevertheless, there may be no operative effect of this omission, in light of the new parental requirement regarding ability to provide support but failing or refusing to do so.

The new Criminal Code changes the concept of the level of support significantly, with the omission of the pre-revised requirement that the child be left destitute. Support, under the new definition, means either "the minimal requirements of food, clothing, or shelter"<sup>1305</sup> in general, or any specific support level fixed by court order in particular, such as part of a dissolution of marriage decree. No statutory definition of "minimal" support is given. The standard used in the Uniform Jury Instructions is that the jury should determine what is "minimal" support "from the facts and circumstances of the present situation of the defendant's [unsupported child or ward]."<sup>1306</sup> This standard is not overly informative; it appears worthless as a legal guideline. Reference to "the basic necessities of life" would be preferable.<sup>1307</sup>

A new special defense was added to statutorily exempt a parent or guardian from criminal responsibility for nonsupport of their runaway children who left home without consent of their parents or guardians.<sup>1308</sup> Thus, the "true nature" of the parent's duty is merely to *offer* the requisite support.<sup>1309</sup> Also, this is a class D felony,<sup>1310</sup> but is not a "forcible felony."<sup>1311</sup>

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1302. Iowa Code § 726.5 (1979).

1303. Regarding general intent as a state of mind, see text accompanying notes 471-79 in Part I of this Article, 29 DRAKE L. REV. 239 (1979).

1304. Regarding wilfullness as a state of mind, see text accompanying notes 543-48 in Part I of this Article, 29 DRAKE L. REV. 239 (1979).

1305. UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2617.

1306. *Id.*

1307. J. YEAGER & R. CARLSON, *supra* note 12, § 591.

1308. See Iowa Code § 726.5 (1979); UNIFORM JURY INSTRUCTIONS, *supra* note 12, at No. 2618; J. YEAGER & R. CARLSON, *supra* note 12, § 591.

1309. J. YEAGER & R. CARLSON, *supra* note 12, § 591.

1310. It is punishable by either an indeterminate term of imprisonment of five years or a maximum fine of \$1,000 or both.

1311. Because it is not a "forcible felony," a full range of ameliorative sentencing alternatives (*i.e.*, a deferred judgment, a deferred sentence, and a suspended sentence of probation) is also available, in lieu of the above-mentioned imprisonment or fine. See note 128 *supra*.

#### 4. Wanton Neglect of a Minor

The revised crime of Wanton Neglect of a Minor<sup>1312</sup> is much more specific than the pre-revised statute<sup>1313</sup> as to what activities are encompassed. Specifically, a parent or other person having custody of a minor (i.e., someone under eighteen) commits this crime either: (1) by knowingly<sup>1314</sup> acting in a manner likely to be injurious to the minor's physical, mental, or moral welfare; or (2) by abandoning such minor to fend for himself, knowing<sup>1315</sup> he is unable to do so.<sup>1316</sup> A specific defense is provided under the first alternative recognizing faith healing, but only to the extent that the particular religious method of healing is permitted under Iowa law. Under the second alternative, the *actus reus* of abandoning the minor, together with the requisite *scienter*, are sufficient to incur criminal culpability, without the necessity of any attendant circumstances (such as exposure of the minor to a hazard or danger as required for the more severe crime of Abandonment of a Dependent Person).<sup>1317</sup>

A charge of abandonment under subsection two of section 726.6 has been held to require an element of permanency, however. That is, leaving a minor unattended through a temporary absence will not support a conviction. Reversing a conviction in *State v. Wilson*,<sup>1318</sup> the Iowa 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."<sup>1319</sup> 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 nearby to use a public telephone for social purposes.<sup>1320</sup>

The term "abandons" is not defined in the Criminal Code, either in section 726.6 or in the general definitions section. Because there are no Uniform Jury Instructions for this crime, there is no guidance from the bar committee either. A jury instruction on abandonment apparently can follow the statutory definition of abandonment in section 232.2(1) of the new Juvenile Code which was passed two years later in 1978, especially in light of the court's reference to section 232.2(1) with apparent approval, read together

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1312. IOWA CODE § 726.6 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 2619-20; J. YEAGER & R. CARLSON, *supra* note 12, § 592; *Family Note*, *supra* note 344, at 580-84.

1313. See IOWA CODE § 731A.1 (1977) (repealed 1978); J. YEAGER & R. CARLSON, *supra* note 12, § 592.

1314. Regarding knowledge as a state of mind, see text accompanying notes 572-93 *supra*.

1315. *Id.*

1316. IOWA CODE § 726.6 (1979).

1317. See *id.* § 726.3 and text accompanying notes 1282-96 *supra*.

1318. 287 N.W.2d 587 (Iowa 1980).

1319. *Id.* at 589.

1320. *Id.* at 588.

with the court's previous interpretation of "abandons."<sup>1321</sup> The definition set out in section 232.2(1) reads:

"Abandonment of a child" means the permanent relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship. Proof of abandonment must include both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time.

It certainly seems reasonable to use the same definition of "abandonment" for both the related Criminal and Juvenile Codes. Moreover, the section 232.2(1) definition is followed in the Code chapter on termination of parental rights.<sup>1322</sup>

Although the court intimated no opinion in *State v. Wilson*, it's apparent that the defendant could have been convicted under the previous statute.<sup>1323</sup> The gravamen of the previous offense was wanton *neglect*, without mention of the more restrictive abandonment. "Neglect" was statutorily defined as "willful neglect of such a nature, arising under such circumstances as a parent of ordinary intelligence actuated by normal and natural concern for the welfare of the child would not permit or be a party to."<sup>1324</sup>

This crime, instead of the more serious crime of Abandonment of a Dependent Person, apparently would be committed when a young child is "abandoned under circumstances which make it unlikely that he will come to any harm before he is picked up . . ."<sup>1325</sup> As to the nebulous standard of leaving a minor to fend for himself, Professor Yeager feels that this probably means "more than mere survival, and will be held to mean survival under conditions which will not be injurious to the child's physical, mental, or moral welfare."<sup>1326</sup> The single grade of this offense is a serious misdemeanor.<sup>1327</sup>

##### 5. Wanton Neglect of a Resident of a Health Care Facility

A related crime was added to the new Criminal Code to extend protec-

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1321. *E.g.*, Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 515 (Iowa 1976).

1322. See Iowa Code § 600A.2(16) (1979).

1323. See Iowa Code §§ 731A.1-2 (1977) (repealed 1978) (element of abandonment not included).

1324. See *id.* § 731A.2.

1325. J. YEAGER & R. CARLSON, *supra* note 12, § 592.

1326. *Id.*

1327. As a serious misdemeanor, this offense is punishable by either a determinate jail term not exceeding one year or a maximum fine of \$1000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine. See note 40 *supra*.

tion against wanton neglect to residents of health care facilities.<sup>1328</sup> The elements of this crime are: (1) knowingly;<sup>1329</sup> (2) acting in a manner likely to be injurious to the physical, mental, or moral welfare; (3) of a resident of a health care facility.<sup>1330</sup> The subjects of this crime should only be personnel of a health care facility,<sup>1331</sup> with legal obligations towards their residents being imposed similar to the parent-child obligation under section 726.6 of the Code. The single grade of this offense is a serious misdemeanor.<sup>1332</sup>

#### E. Health, Safety, and Welfare Offenses<sup>1333</sup>

Ten offenses relating to health, safety or welfare are collected in section 727 of the Code, with no substantial changes being made in four of these.<sup>1334</sup> All ten offenses were included in scattered portions of the pre-revised code. None of these offenses represents conduct that is central to the criminal justice system. In light of this, whether they should be included in the new Criminal Code at all is questionable,<sup>1335</sup> especially since several other regulatory type offenses were not included.<sup>1336</sup>

Expansion of the conduct constituting the crime has occurred in five of these offenses. The simple misdemeanor offense<sup>1337</sup> of Exposure to Radia-

1328. IOWA CODE § 726.7 (1979). See UNIFORM JURY INSTRUCTIONS, *supra* note 12, at Nos. 2621-22; J. YEAGER & R. CARLSON, *supra* note 12, § 593.

1329. Regarding knowledge as a state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 DRAKE L. REV. 239 (1980).

1330. IOWA CODE § 726.7 (1979).

1331. J. YEAGER & R. CARLSON, *supra* note 12, § 593.

1332. As a serious misdemeanor, this offense is punishable by either a determinate jail term not exceeding one year or a maximum fine of \$1000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine. See note 40 *supra*.

1333. There are no Uniform Jury Instructions, *supra* note 12, relating to this group of offenses. See generally J. YEAGER & R. CARLSON, *supra* note 12, §§ 601-12.

1334. The four unchanged crimes, all simple misdemeanors, involve IOWA CODE §§ 727.3 (leaving abandoned or unattended refrigerators with lockable doors accessible to children); 727.7 (failure to include in telephone directories a warning about falsely claiming an emergency); 727.6 (falsely claiming an emergency in order to obtain use of a telephone line); 727.9 (transacting business without a license) (1979). An eleventh related offense, Maintaining Pay Toilets in Public Rooms, also a simple misdemeanor, has been transferred outside the Criminal Code to § 135.21, after originally appearing as § 727.11. For a discussion of the various sentencing options for simple misdemeanors, see text accompanying note 37 *supra*.

1335. Schantz, *supra* note 939, at 444, which states:

In sum, the [then proposed] Code's relocation or elimination of the "regulatory" statutes located in our [pre-revised] criminal Code seems rather thorough. However, one might well take exception to nearly all of [the chapter on] "Health, Safety and Welfare." Regulation of fireworks, x-rays and abandoned refrigerators, if needed at all, surely belongs outside the criminal code.

*Id.*

1336. See text accompanying notes 1346-57 *infra*.

1337. For a discussion of the various sentencing options, see text accompanying note 40 *supra*.

tion,<sup>1338</sup> previously limited<sup>1339</sup> to "the use of x-rays in the retail shoe trade,"<sup>1340</sup> was broadened to criminalize "the intentional exposure of persons to x-rays for any purpose other than medical diagnosis and treatment."<sup>1341</sup> The serious misdemeanor<sup>1342</sup> offense of Wiretaps and Eavesdropping,<sup>1343</sup> formerly limited to wire taps on telephone and telegraph lines,<sup>1344</sup> was broadened to prohibit "any electronic or mechanical interception of conversations or communications."<sup>1345</sup> The simple misdemeanor<sup>1346</sup> offense of Distributing Dangerous Substances<sup>1347</sup> was expanded from mere inclusion of pharmaceuticals to general terminology, specifically "corrosive, caustic, poisonous or other injurious substance,"<sup>1348</sup> which should provide "the maximum desirable coverage."<sup>1349</sup> The revised simple misdemeanor<sup>1350</sup> offense of Obstructing Emergency Phone Calls<sup>1351</sup> now applies to persons using any telephone or telegraph line, after previously being limited to failure to relinquish party lines or public pay telephones.<sup>1352</sup>

Contrastingly, two of these revised offenses are more limited in scope. The serious misdemeanor<sup>1353</sup> offense of Exhibiting Deformed or Abnormal Persons<sup>1354</sup> was changed from an absolute prohibition<sup>1355</sup> to a qualified prohibition resting upon the consent of the exhibited person. As Professor Yeager explains, the purpose of this law is to protect such persons from exploitation while not "depriving these unfortunates of what may be their only

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1338. IOWA CODE § 727.4 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 605.

1339. *See* IOWA CODE § 732.24 (1977) (repealed 1978).

1340. J. YEAGER & R. CARLSON, *supra* note 12, § 605.

1341. *Id.*

1342. For a discussion of the various sentencing options, see text accompanying note 40 *supra*.

1343. IOWA CODE § 727.8 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 609.

1344. *See* IOWA CODE § 716.8 (1977) (repealed 1978).

1345. J. YEAGER & R. CARLSON, *supra* note 12, § 609.

1346. For a discussion of the various sentencing options, see text accompanying note 40 *supra*.

1347. IOWA CODE § 727.1 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 602.

1348. IOWA CODE § 727.1 (1979).

1349. J. YEAGER & R. CARLSON, *supra* note 12, § 602.

1350. For a discussion of the various sentencing options, see text accompanying note 40 *supra*.

1351. IOWA CODE § 727.5 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 606.

1352. *See* IOWA CODE § 714.38 (1977) (repealed 1978).

1353. For a discussion of the various sentencing options, see text accompanying note 40 *supra*.

1354. IOWA CODE § 727.10 (1979). *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 611.

1355. *See* IOWA CODE § 725.12 (1977) (repealed 1978).

opportunity to earn a living."<sup>1356</sup> It certainly is difficult to argue with such logic, especially since only consenting, paying customers will see the exhibits.

The other "criminalization" cutback occurred with the Fireworks offense,<sup>1357</sup> a serious misdemeanor.<sup>1358</sup> The revised crime is limited to sale, offering for sale, exposing for sale, or using fireworks.<sup>1359</sup> This crime no longer prohibits possession, or criminalizes a non-sale transfer of fireworks.<sup>1360</sup> The wisdom of such changes can be questioned, since the overall effectiveness of regulation of fireworks can be reduced.

#### F. Labor Related Offenses<sup>1361</sup>

Several labor related offenses are included in each of three chapters of the Code dealing with blacklisting employees,<sup>1362</sup> labor union membership,<sup>1363</sup> and labor boycotts and strikes.<sup>1364</sup> These unrepealed pre-revised chapters dealing with rather obscure and petty crimes were unfortunately left in the new Criminal Code. Each of these crimes has its own specific penalty provisions incorporated therein, in contrast to the general scheme of placing the individual crimes into a small range of classification of offenses.<sup>1365</sup>

#### G. Public Disorder Offenses

##### 1. Generally

Four misdemeanor crimes constitute the offenses relating to public disorder, appearing in chapter 723 of the new Criminal Code. Two of these, Riot and Unlawful Assembly, require multiple offenders (three or more) in order for the disruptive activity to be criminal. These offenses relate to disruption of the public peace and quiet, as opposed to attempted disruption of governmental bodies.<sup>1366</sup>

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1356. J. YEAGER & R. CARLSON, *supra* note 12, § 611, at 151-52.

1357. IOWA CODE § 727.2 (1979). See generally J. YEAGER & R. CARLSON, *supra* note 12, § 603.

1358. For a discussion of the various sentencing options, see text accompanying note 40 *supra*.

1359. See IOWA CODE §§ 732.17-19 (1977) (repealed 1978).

1360. *Id.*

1361. There are no Uniform Jury Instructions for any of these offenses.

1362. IOWA CODE ch. 730 (1979).

1363. *Id.* ch. 731.

1364. *Id.* ch. 732.

1365. See generally *id.* §§ 902.1, .9, 903.1 (1979).

1366. See *id.* § 718.1 (1979) (Insurrection, which includes attempted disruption of governmental bodies) and text accompanying notes 940-52 *supra*.

## 2. Riot

The most serious of these offenses is Riot,<sup>1367</sup> an aggravated misdemeanor.<sup>1368</sup>

a. *Actus Reus.* An individual's actus reus in this crime consists of willingly joining in or remaining a part of a riot, knowing or having reasonable grounds to believe that a riot is occurring. A riot (*i.e.*, the corpus delicti of the offense) is statutorily defined as an assembly of three or more persons in a violent manner to the disturbance of others, with one or more of these persons using unlawful force or violence against another person or causing property damage.<sup>1369</sup>

b. *Intent.* Of course, "mere presence at the scene of a riot is not punishable."<sup>1370</sup> This is because a person must willingly and knowingly<sup>1371</sup> have joined in or remained a part of a riot. The requisite showing of intent requires evidence that defendant "conduct[ed] himself in a violent manner."<sup>1372</sup> So interpreted, this statute does not extend to punishment of innocent bystanders and accordingly is not unconstitutionally overbroad.<sup>1373</sup>

c. *Remaining a Part Of.* The initial purpose for an assembly is irrelevant. If a lawful assembly becomes riotous and an individual intentionally remains a part of the riot, then he is liable to criminal sanction. Of course, a defendant must know<sup>1374</sup> or have reasonable grounds to believe that a riot is occurring.<sup>1375</sup> Moreover, he must conduct himself in a violent manner, thus preventing an innocent bystander from being criminally punished, as noted above.<sup>1376</sup>

d. *Multiple Offender Requirement and Joint Liability.* While retaining the numerical requirement of three or more offenders, the crime of Riot, as redefined,<sup>1377</sup> makes it clear that now only one of these "rioters" needs to

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1367. *Id.* § 723.1 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 2301-03; J. YEAGER & R. CARLSON, *supra* note 12, § 502; R. PERKINS, *supra* note 12, at 405-08.

1368. An aggravated misdemeanor is punishable by either a determinate term of confinement not to exceed two years or a maximum fine of \$5000 or both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine. See note 63 *supra*.

1369. *IOWA CODE* § 723.1 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at Nos. 2301-02.

1370. *Williams v. Osmundson*, 281 N.W.2d 622, 624 (Iowa 1979).

1371. Regarding knowledge as a state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

1372. *Id.*

1373. *Id.*

1374. Regarding knowledge as a state of mind, see text accompanying notes 572-93 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).

1375. *IOWA CODE* § 723.1 (1979). See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 2302; *Williams v. Osmundson*, 281 N.W.2d 622 (Iowa 1979).

1376. See text accompanying notes 1372-73 *supra*.

1377. See *IOWA CODE* § 743.2 (1977) (repealed 1978).

"actually use unlawful force or violence"<sup>1378</sup> in order for all of them to be convicted. Once the prosecution has proved a riot, any one of the participants can be convicted even though the offender did not actually participate in the personal injury or property damage. All that need be proven is "community of purpose"<sup>1379</sup> with proof that a particular defendant was a participant in the riot itself.<sup>1380</sup> So restricted, this provision has been held to be not unconstitutionally overbroad.<sup>1381</sup>

e. *Public Place.* That "riotous activity is punishable only if it occurs in public" was determined in *Williams v. Osmundson*,<sup>1382</sup> notwithstanding the lack of any such restriction in section 723.1 itself. This interpretation is in line with the purpose of preserving public order, rather than of regulating "private relationships."<sup>1383</sup>

f. *Constitutionality.* The constitutionality of section 723.1 has been upheld<sup>1384</sup> on the following grounds: (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; (2) the statute does not create an unlawful presumption because "mere presence" at the scene of a riot is not punished; (3) the statute is not void for vagueness since it furnishes reasonable notice as to its proscribed activity (violent group activity occurring in public).

### 3. *Unlawful Assembly*

The only significant change made in the simple misdemeanor<sup>1385</sup> crime of Unlawful Assembly<sup>1386</sup> was to broaden the scope of the offense to include persons who remain part of an unlawful assembly although knowing, or reasonably believing, that an unlawful assembly exists.<sup>1387</sup> An individual's actus reus in this crime consists of knowingly and willingly joining in or remaining a part of an unlawful assembly. An "unlawful assembly" is an assembly of

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1378. J. YEAGER & R. CARLSON, *supra* note 12, § 502.

1379. "It is the community of purpose, rather than the community of activity, which is essential to establish the riot." *Id.* at 125.

1380. See *UNIFORM JURY INSTRUCTIONS*, *supra* note 12, at No. 2302, which states: "The fact that only the defendant is on trial is immaterial. It is not necessary that any other person alleged to be involved be tried at the same time."

1381. *Williams v. Osmundson*, 281 N.W.2d 622 (Iowa 1979).

1382. *Id.*

1383. *Id.* at 627.

1384. *Williams v. Osmundson*, 281 N.W.2d 622 (Iowa 1979).

1385. A simple misdemeanor is punishable by either a determinate jail term not exceeding thirty days or a maximum fine of \$100, but not both. Other sentencing alternatives include a deferred judgment, a deferred sentence, and a suspended sentence of probation, in lieu of the above-mentioned confinement or fine. See note 37 *supra*.

1386. IOWA CODE § 723.2 (1979). There are no Uniform Jury Instructions, *supra* note 12, for this crime. See generally J. YEAGER & R. CARLSON, *supra* note 12, § 503; R. PERKINS, *supra* note 12, at 403-05.

1387. See IOWA CODE § 743.1 (1977) (repealed 1978).

three or more persons assembled together in a violent manner and with intent to commit a public offense.<sup>1388</sup>

Generally a prelude to a Riot, this essentially inchoate offense can be charged when the requisite personal violence or property damage for a Riot has not occurred or when the criminal intent is to commit a public offense not involving personal violence or property damage.<sup>1389</sup> However, a rowdy gathering of three or more persons is not *ipso facto* an unlawful assembly. "It becomes one [an unlawful assembly] when there is a community of purpose to commit a public offense."<sup>1390</sup>

#### 4. Failure to Disperse

Several changes were made to the pre-revised crimes now consolidated in the new crime of Failure to Disperse,<sup>1391</sup> a simple misdemeanor.<sup>1392</sup> One change is that the scope of the new crime has been broadened to cover persons in the immediate vicinity of a riot or unlawful assembly, rather than being restricted to active participants therein. Another change is the drastic reduction in the number of necessary participants in the underlying activity. That is, although the criminal responsibility for Failure to Disperse is an individual matter, nevertheless there must still be at least three persons involved in the underlying criminal activity (e.g., Riot or Unlawful Assembly) before triggering the right of a peace officer to give an order to disperse (of a nature being criminally punishable for violation thereof). The final change limits the classification of public officials authorized to order dispersals, for purposes of this crime, to peace officers. Formerly, such orders could be made by judges, magistrates, and certain other public officials.

Specifically, the elements of the revised crime of Failure to Disperse are: (1) refusal to obey a peace officer's order to disperse; (2) by either a participant in a Riot or an Unlawful Assembly or by any person in the vicinity of a Riot or an Unlawful Assembly; (3) who is within hearing distance of such order.<sup>1393</sup> Thus, this statute is broad in its reach, extending to *all persons in the immediate vicinity* of a Riot or an Unlawful Assembly rather than being restricted, as it could be, to active participants therein.

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1388. IOWA CODE § 723.2 (1979).

1389. J. YEAGER & R. CARLSON, *supra* note 12, § 503 at 125.

1390. *Id.*

1391. IOWA CODE § 723.3 (1979). There are no Uniform Jury Instructions, *supra* note 12, for this crime. See generally, J. YEAGER & R. CARLSON, *supra* note 12, § 504.

1392. See note 18 *supra*.

1393. Regarding "the subjective requirement that any person who is within hearing distance must disperse," one commentator ponders: "Will this be a presumption or an element requiring strict proof, before a person can be convicted under this section?" J. ROEHRICK, *supra* note 12, at 306.

##### 5. *Disorderly Conduct*

The newly-styled offense of Disorderly Conduct<sup>1394</sup> can be committed in any of seven ways. This offense, a simple misdemeanor,<sup>1395</sup> represents a consolidation of several pre-revised crimes,<sup>1396</sup> both with and without change, as well as two new types of punishable activity. This offense fills the void created when only one or two persons engage in disruptive conduct which otherwise would constitute Riot or Unlawful Assembly (except for the three or more persons requirement).

Two of these alternatives, "public" fighting<sup>1397</sup> and disturbing a meeting or other lawful assembly,<sup>1398</sup> were incorporated into the new Criminal Code without change. Three others incorporate some changes. These include Disorderly Conduct: (1) by making unlawful noise near a hospital or house and causing unreasonable distress to occupants thereof;<sup>1399</sup> (2) by making knowingly false reports of catastrophes;<sup>1400</sup> and (3) by knowingly and publicly desecrating the United States flag.<sup>1401</sup>

One of the two new types of Disorderly Conduct involves directing abusive epithets or any threatening gesture at another, knowing (or reasonably believing) that a violent reaction is likely to be provoked.<sup>1402</sup> This crime has been described as "an incitement to disorderly conduct."<sup>1403</sup> The other new crime consists of unauthorized obstruction of a public way, with the intent to prevent or hinder its use.<sup>1404</sup>

Unlike Riot and Unlawful Assembly, the crime of Disorderly Conduct does not have any minimal numerical requirements regarding participants therein. Indeed, six of the seven types of Disorderly Conduct can be committed by a sole actor.

Only unlawful fighting in a public place or in or near any lawful assembly "requires" more than one participant. Strictly speaking, this type of conduct can also be punishable as participation in a Riot (a much more serious

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1394. IOWA CODE § 723.4 (1979). There are no Uniform Jury Instructions, *supra* note 12, for this crime. *See generally* J. YEAGER & R. CARLSON, *supra* note 12, § 505.

1395. *See note 1385 supra.*

1396. *See IOWA CODE §§ 714.42, 727.1, 744.1, 2 (1977) (repealed 1978).*

1397. IOWA CODE § 723.4(1) (1979).

1398. *Id.* § 723.4(4).

1399. *Id.* § 723.4(2).

1400. *Id.* § 723.4(5). *Cf. IOWA CODE § 712.7 (1979) (false reports concerning, *inter alia*, placement of incendiary devices).* "This is a broader concept than was previously the law. It now allows an epidemic or other catastrophe to qualify as a means of committing the offense." J. ROEHRICK, *supra* note 12, at 310.

1401. IOWA CODE § 723.4(6) (1979).

1402. IOWA CODE § 723.4(3) (1979). "This section is an incitement to disorderly conduct, for which there was nothing comparable under the [pre-revised] statutes of Iowa." J. ROEHRICK, *supra* note 12, at 309.

1403. J. ROEHRICK, *supra* note 12, at 309.

1404. IOWA CODE § 723.4(7) (1979). This section is closely related to IOWA CODE ch. 657 (1979) (nuisance law). *See* J. YEAGER & R. CARLSON, *supra* note 12, § 505.

offense),<sup>1405</sup> when three or more persons are involved and their group violence is directed at others. The choice of the particular charging statute (i.e., Riot or Disorderly Conduct) in this situation is strictly a matter of prosecutorial discretion.<sup>1406</sup>

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1405. Riot is an aggravated misdemeanor punishable by a jail term of up to two years or a fine of up to \$5,000, or both. Disorderly Conduct is merely a simple misdemeanor punishable by a jail term of up to thirty days or a fine of up to \$100 but not both.

1406. For a discussion of prosecutorial discretion in charging, see notes 1055-56 in Part I of this Article, 29 *DRAKE L. REV.* 239 (1980).