1974

Three Prosecutors Look at the New Pennsylvania Crimes Code

Martin H. Belsky, University of Akron School of Law
Joseph Dougherty
Steven H. Goldblatt
Three Prosecutors Look at the New Pennsylvania Crimes Code

Martin H. Belsky*
Joseph Dougherty**
Steven H. Goldblatt***

On December 6, 1972, a new Crimes Code was approved, to be effective June 6, 1973. The new Crimes Code is the first real legislative attempt since 1860 to codify the criminal laws of the Commonwealth of Pennsylvania. However, because of political realities, it is not a complete codification, but rather an attempt to restructure only those provisions found in the former Penal Code.

In the comments of the Joint State Government Commission, the drafters of the new Crimes Code sought to convince the legislature and the public that few substantive changes had been made. In fact, by the elimination of common law offenses, the grading of offenses, the

* B.A., Temple University (1965); J.D., Columbia University (1968); Diploma in Criminology, Cambridge University (1969); Member of the Philadelphia, Pennsylvania and Federal Bars; Instructor in Law, Temple University School of Law; Assistant District Attorney, Chief of Adult Prosecution, District Attorney's Office of Philadelphia.

** B.S., LaSalle College (1958); J.D., Temple University (1968); Member of the Pennsylvania Bar; Adjutant Professor, Rutgers University; Assistant District Attorney, Chief of Indictment Division, District Attorney's Office of Philadelphia.

*** B.A., Franklin & Marshall College (1967); J.D., Georgetown University (1970); Assistant District Attorney, Chief of Motions Division, District Attorney's Office of Philadelphia.

2. Id. § 101.
4. Crimes found in other volumes, such as narcotics, drugs, traffic and cigarette tax offenses were left unaffected. In addition, provisions concerning the death penalty, homosexuality, wiretapping, and abortion were left unaffected.
5. After enactment of the new Crimes Code, these comments were revised and published as PENNSYLVANIA BAR ASSOCIATION, COMMENTS RELATING TO THE PROVISIONS OF THE CRIMES CODE [hereinafter referred to as PBA COMMENTS].
6. For example, the PBA COMMENTS, supra note 5, at 6, states that CONSOL. PA. STAT. ANN. tit. 18, § 308 (1973), merely "delineates the defense" of intoxication or drugged condition already established in Pennsylvania common law. In fact, by stating that "evidence of intoxication or drugged condition . . . may be offered . . . whenever relevant to negative an element of the offense," the provisions encourage challenges to prosecution for any offense which involves an "element," proof of culpability such as intent or knowledge.
7. CONSOL. PA. STAT. ANN. tit. 18, § 107(b) (1973).
8. See id. §§ 106, 1101-05.
mandating of jury instructions,\textsuperscript{9} and the establishment of new defenses,\textsuperscript{10} the Crimes Code did in fact make changes in the substantive criminal law and, in addition, to the entire administration of criminal justice.

This article will seek to explore some of the practical problems, from making a lawful arrest, through preparation of indictments, to trial, that have resulted from the new Crimes Code.\textsuperscript{11}

I. Arrest

A. The Misdemeanor-Felony Distinction and the Grading of Offenses

Rule 102 of the Pennsylvania Rules of Criminal Procedure precludes an arrest without a warrant for a misdemeanor or a summary offense under the Vehicle Code, not committed in the presence of the arresting police officer, and requires the victim to swear out a complaint in those cases.\textsuperscript{12} With the creation of graded offenses by the new Crimes Code, this rule can lead to serious legal problems for police officers seeking to apprehend offenders.\textsuperscript{13}

\textsuperscript{9} See, e.g., id., §§ 302(b), 3106.
\textsuperscript{10} See, e.g., id., §§ 109-11, 501-06.
\textsuperscript{11} One problem, of course, is communicating the meaning of the new Crimes Code provisions to counsel, judges, prosecutors and police. In Philadelphia, the District Attorney's Office worked closely with the Philadelphia Police Department in preparing training programs, pamphlets and material for patrolmen, detectives and supervisory staff. In addition the office has prepared a book, seeking to clarify the legalistic language of the Crimes Code and to provide commentary to and explanation of the provisions. See S. Oler/Hite & M. Belsky, ANALYSIS AND COMMENTARY TO THE PENNSYLVANIA CRIMES CODE (1978). Copies of this analysis have been given to all judges and District Attorneys of the Commonwealth as well as to many police departments, justices of the peace and attorneys.

\textsuperscript{12} Pa. R. Crim. P. 102 provides:

Criminal Proceedings may be instituted by:

1. A written complaint in any case.
2. An arrest without a warrant upon probable cause when the offense is a felony.
3. An arrest without a warrant when the offense is a felony or misdemeanor committed in the presence of the arresting person.
4. An arrest without a warrant when the offense is a summary offense under The Vehicle Code committed in the presence of a police officer, provided the police officer is in uniform.
5. An arrest without a warrant when the offense is a summary offense which involves a breach of the peace, endangers property or the safety of any person present, provided the police officer displays a badge or other sign of authority or is in uniform.
6. A citation when the offense is a summary offense under The Vehicle Code, provided the police officer is in uniform.
7. A citation when the offense is any other summary offense, provided the police officer displays a badge or other sign of authority or is in uniform.

\textsuperscript{13} An analogous problem occurred prior to the enactment of the Crimes Code because of rule 102. Evidence essential for prosecutions for drunken driving or involuntary manslaughter was often suppressed because of an arrest deemed illegal under rule 102. An officer coming upon the scene of an accident can often tell to a substantial degree of certainty that one of the drivers involved is intoxicated. Rule 102 prevents the subsequent
One typical illustration is the grading of “stealing offenses” from robbery to four degrees of theft. Under the Crimes Code a theft may be elevated to robbery, a first degree felony, if an offender inflicts or threatens serious bodily injury or commits or threatens to commit a felony of the first or second degree (such as arson) in the course of committing the theft. All other thefts are misdemeanors, unless the amount involved exceeds $2,000, or the property stolen is a firearm or automobile, or the defendant is accused of being a receiver of stolen property and is shown to be in the business of buying or selling stolen property, in which case the theft is a felony of the third degree.

If a victim of a purse snatch calls for the police, complains of the off-
fense, and points to an individual running away, a literal reading of rule 102 might seem to require detailed questioning by the officer of an obviously shaken victim in order to determine the amount of loss, the nature of the property taken, and the nature of the harm or threat, if any, in order to determine if the offense is a felony justifying a warrantless arrest. Such a requirement could obviously delay apprehension of the suspect and could easily result in the offender's escape. Moreover, the likelihood of immediate, detailed, and clear responses from a shaken victim are minimal. Finally, if the responses do not match the requirements for robbery or felonious theft, literal readings of the rule might completely preclude any immediate attempts to apprehend the offender and would thereby result in the failure to ever apprehend him.\textsuperscript{20}

At the time of the victim's report at or near the scene of the crime—the only time that the offender is likely to be apprehended—the police officer is unreasonably asked to make a complicated legal judgment to determine what grade or degree of theft was involved.

If the officer fails to make an arrest of an offender who is subsequently charged with a felony, he could be charged with incompetency or worse. If the officer proceeds to arrest an offender who is subsequently charged with a misdemeanor, the effect might be felt in the courtroom when physical evidence acquired during a search incident to an unlawful arrest is suppressed.

No interest of society is served by dismissing charges against one who, by mere chance, is a misdemeanor, not a felon. The fourth amendment requires no such ironic result.\textsuperscript{21}

The obvious answer to the problem raised by this example,\textsuperscript{22} is to


\textsuperscript{22} Numerous other illustrations could be detailed. For example, if one is suspected of stealing an auto, a felony under CONSOL. PA. STAT. ANN. tit. 18, § 3903 (1973), he may be charged with the misdemeanor of unauthorized use of an automobile under id. § 3928. If one is suspected of disorderly activity, he may be charged with the summary or misdemeanor offense of disorderly conduct under id. § 5503 or the third degree felony of riot under id. § 5501; if one is suspected of giving a false statement, he may be charged with the misdemeanor of false swearing or unsworn falsification, id. §§ 4105-04, or the felony of perjury under id. § 4902. In these cases, like the theft example in the text, evidence obtained with probable cause might be suppressed under rule 102.
alter the rule concerning warrantless arrests. Either the legislature or the Pennsylvania Supreme Court Criminal Rules Committee must adopt the appropriate revisions.

B. The Retail Theft Provision and the Arrest of Shoplifters

Under the 1939 Penal Code, a shoplifter was charged with a summary offense, released on copy or citation, and given a hearing within days. Recidivistic offenders could be charged with the summary offense of shoplifting again or with the felony of larceny. Often the felony would be reduced by the justice of the peace or magistrate to the summary offense of shoplifting. In any event, convictions were few, fines low, and imprisonment doubtful.

In response to the requests of the Pennsylvania Retailer's Association, the new Crimes Code creates a new offense of "retail theft" in

---

21. See, e.g., N.Y. CRIM. PLO. LAW § 140.10(1)(b) (1971), which provides:
A police officer may arrest a person for . . . a crime when he has reasonable cause to believe that such a person has committed such crime whether in his presence or otherwise.
Id. (emphasis added).
22. Currently, the General Assembly of Pennsylvania is considering House Bill No. 1082 which would add a new section 113 "Arrest Without Warrant" to chapter 1 of the Crimes Code. The important provisions of that proposed section are:
(a) General Note—A law enforcement officer shall have the same right of arrest without a warrant for a graded offense as exists or may hereafter exist in the case of the commission of a felony.
(b) Conviction of misdemeanor on summary offense—an arrest without a warrant for a graded offense shall not be invalidated solely by reason of the fact that defendant was convicted of a misdemeanor or summary offense.
23. The District Attorney's Office of Philadelphia has proposed one possible rule change—to simply include within rule 102 a provision that "Criminal proceedings may be instituted by . . . an arrest without a warrant upon probable cause when the offense is a felony or a misdemeanor."
27. See Pa. R. Crim. P. 102 providing for citation for summary offenses.
(1) takes possession of any merchandise offered for sale by any store or other retail mercantile establishment with the intention of converting it to his own use without paying to the owner the value thereof; or
(2) alters, transfers or removes any label, price tag or marking upon any merchandise offered for sale by any store or other retail mercantile establishment; or
(3) transfers any merchandise offered for sale by any store or other retail mercantile establishment from the container in or on which the same shall be displayed to any other container with intent to deprive the owner of all or some part of the value thereof.
place of the earlier crime of shoplifting. In addition to introducing welcome reforms in the proof of the crime and the apprehension of offenders, the provision grades retail theft offenses independently of the general theft statute.

Retail theft of merchandise of $100 or more is a first degree misdemeanor; retail theft of merchandise of less than $100 is a summary offense the first time, a second degree misdemeanor the second time and a first degree misdemeanor the third and subsequent time.

The new provision, however, creates difficult administrative problems that could lead to unreasonable delays in arrest and unintended leniency in prosecution. By punishing recidivists as misdemeanants "upon conviction of a second offense" or "upon conviction of a third or any subsequent offense," the provision indicates that increased penalties should be given upon multiple convictions. Unanswered are the problems of recidivists, convicted of shoplifting under the 1939 Penal Code or arrested and not yet convicted of retail theft under the Crimes Code. It has been argued that one starts "anew" under the Crimes Code. Thus, a three or four time convicted shoplifter could only be charged with the summary retail theft provision for any new arrest after June 6, 1973. Similarly, it can be argued that one arrested for the summary offense of retail theft can be charged, upon subsequent arrest, with the misdemeanor of retail theft only if he has been convicted of this first charge. Until then, no prior "offense" has legally been committed.

32. See PBA COMENTS, supra note 5, at X.
33. CONSOL. PA. STAT. ANN. tit. 18, § 3929(c) (1971), creates a prima facie presumption that intentional concealment of unpurchased properties indicated an intention to convert the property to one's own use without paying the purchase price.
34. Id. § 3929(d), allows a police officer or merchant to detain for a reasonable time on probable cause a suspected offender in or outside the premises in order to secure identification, recover stolen merchandise and institute criminal proceedings.
35. Id. § 3929(b)(4). A first degree misdemeanor has a maximum penalty of five years and/or $10,000. Id. §§ 1101(3), 1104(1).
36. Id. § 3929(b)(1). A summary offense has a maximum penalty of ninety days and/or $500. Id. §§ 1101(6), 1105.
37. Id. § 3929(b)(2). A second degree misdemeanor has a maximum penalty of two years and/or $5,000. Id. §§ 1101(4), 1104(2).
38. Id. § 3929(b)(3). A first degree misdemeanor has a maximum penalty of five years and/or $10,000. Id. §§ 1101(3), 1104(1).
39. Id. § 3929(b)(2).
40. Id. § 3929(b)(3).
41. While first listing of a retail theft summary could be in days, the hearing and conviction could be much later, possibly due to the failure of an offender to appear at his hearing. In addition, even conviction before a justice of the peace or magistrate may not be considered a final conviction, allowing application of the recidivist provisions, since an offender has the right to appeal for a hearing de novo to a common pleas court judge. See Minor Judicial Court Appeals Act, Pa. Stat. Ann. tit. 42, §§ 3001-07 (1968).
For a police officer, the difficulties are obvious. He must make a detailed record check to determine prior convictions or release the defendant on citation. If he does not take the necessary time to make the check, or if the records are inaccurate, a defendant could be tried within days, receive a minor penalty, and be released. Reproduction, upon learning that an individual is a convicted recidivist, is forever precluded. If a prior record is found but is limited to shoplifting convictions under the old Penal Code, or arrests under the new Crimes Code, the officer could be forced to release the defendant on a copy of the citation and leave the penalty to the hearing judge. If a police officer avoids such dilemmas and charges all such offenders with a misdemeanor, only to later find out it was a summary offense, he has created additional and burdensome paperwork for himself, his department, and the courts. In addition, he has not only forced taxpayers' dollars to be spent for these procedures, but also for the time of a prosecutor and defense counsel, if the offender is indigent.

Similarly, by providing for punishment as a first degree misdemeanor, whether a first, second, third or subsequent offense, whenever the value of the merchandise taken is $100, the provision indicates a desire to increase punishment for the serious and professional shoplifter. However, by failing to provide any provision for accumulation, as found in the general theft section, it leaves a gaping loophole in enforcement. For example, if an offender visited several stores in a shopping center but took only $99 worth of wares from each, he could not be charged with a first degree misdemeanor because of the value of the goods taken; he could not be charged as a misdemeanor solely because of the multiple thefts on the same day and in the same arrest. He could only be charged with a number of summary offenses, receiving the minimum, rather than the maximum, penalties.

Some of the problems can be resolved by new police and prosecution procedures. Retail establishments can keep their own records as to repeated offenders. Accurate and speedy record checking devices must

---

44. Id., § 3929(c), relating to the general theft provisions, states that “... amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.”

799
be maintained. Use of prosecution under the general theft statute should be considered for recidivistic offenders not fitting into the strict requirements of the retail theft provision and for commercial thefts involving property of considerable value.

C. Use of Force in Making an Arrest and Aggravated Assault and Battery

One common and justified complaint of many police officers is that society asks them to make sophisticated legal judgments as to the legality of an arrest. For example, what is or is not probable cause has been the subject of extensive litigation; when a warrant is or is not required can be the basis of considerable controversy. The Crimes Code seeks to lessen this burden but it only goes half-way and this results in possible confusion.

In establishing justifications for the use of force, the Crimes Code is very specific in stating that a citizen does not have the right to resist an arrest, whether lawful or unlawful. The obvious purpose of this is to preclude needless violence where a citizen believes he is being unlawfully arrested or even harassed. His remedy is nonviolent action against the police officer, either through internal police disciplinary proceedings, or to the courts through criminal prosecution, or civil litigation.

Unfortunately, while providing that resistance to an unlawful arrest is not justifiable, the Crimes Code nevertheless excuses that resistance.

45. Id. § 3921(a), provides that one "... is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof."

46. There is no provision prohibiting prosecution under the general theft provisions in addition to or in lieu of prosecution under the retail theft provision.

47. Depending on the nature and value of the merchandise, the penalty could be felony of the third degree, or a misdemeanor of the first, second or third degree. It would never be a summary offense. See CONSOL. PA. STAT. ANN. tit. 18, § 3503 (1979). See also note 18 supra.

48. Chapter five, id. §§ 501-10, describes the various justification defenses available.

49. Id. § 505(b)(1)(l), specifically provides: The use of force is not justifiable to resist an arrest which the actor knows is being made by a police officer, although the arrest is unlawful . . . .

50. In Philadelphia, for example, such a complaint could be made to the Police Internal Security Division and result in an administrative hearing before the Police Board of Inquiry.

51. The District Attorney's Office of Philadelphia has established a separate division to investigate brutality and other complaints against the police. Prosecutions for assault and battery, (CONSOL. PA. STAT. ANN. tit. 18, §§ 2701-02 (1973)) harassment (id. § 2709) or official oppression (id. § 5301) can result.

52. Complaints, seeking money damages, can be filed in state courts, for assault, battery, or invasion of privacy, and in federal courts for the violation of an individual's civil rights.
Pennsylvania Crimes Code

It is a misdemeanor of the second degree 53 to resist an arrest—but only if that arrest is lawful. 54 It is a misdemeanor of the first degree 55—to attempt or cause bodily injury to a police officer making or attempting to make an arrest—but only if that arrest is lawful. 56 It is a felony of the second degree 57 to attempt or cause serious bodily injury to police officers making or attempting to make an arrest—but again only if that arrest is lawful. 58

Moreover, even if a lawful arrest is made, these provisions only punish an offender where bodily injury is involved. Thus, under the definition of bodily injury, 59 minor scruffling or even fighting by a defendant seeking to resist an arrest is not punishable. 60

If the purpose of the provision eliminating a right to resist is to deter, it has failed. Failure to follow the requirement is without effect if one was right about the legality of the arrest. Failure to follow the requirement is also without effect even if one is wrong and no bodily injury results.

II. INDICTMENTS

A. Delays in Indictments

Prior to enactment of the new Crimes Code, delays in indictment could easily lead to the termination of prosecutions because of the statute of limitations. 61 This led to difficult problems of administration

53. A misdemeanor of the second degree is punishable with a maximum penalty of two years and/or $2,500. CONSOL. PA. STAT. ANN. tit. 18, §§ 1101(4), 1104(2) (1975).
54. Id. § 5104, provides that one is guilty of a misdemeanor of the second degree “... if, with the intent of preventing a public servant from effecting a lawful arrest ... the person creates a substantial risk of bodily injury ... .” Id. (emphasis added).
55. A misdemeanor of the first degree is punishable with a maximum penalty of five years and/or $10,000. Id. §§ 1101(3), 1104(1).
56. Id. § 2702(a)(9), provides one is guilty if he “... attempts to cause or intentionally or knowingly causes bodily injury to a police officer making or attempting to make a lawful arrest.” Id. (emphasis added).
57. A felony of the second degree is punishable with a maximum penalty of ten years and/or $25,000. Id. §§ 1101(1), 1103(1).
58. Id. § 2702(a)(2), provides one is guilty if he “... attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to a police officer making or attempting to make a lawful arrest ... .” Id. (emphasis added).
59. Id. § 2301, defines “bodily injury” as “impairment of physical condition or substantial pain.”

Similarly “serious bodily injury” is “bodily injury which creates a substantial risk of death on which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” Id.
60. See PBA COMMENTS, supra note 5, at 29, describing CONSOL. PA. STAT. ANN. tit. 18, § 104 (1973), as changing “existing law somewhat by not extending to minor scruffling which occasionally takes place during an arrest.”
61. PA. STAT. ANN. tit. 19, § 211 (1964), provided that indictments for treason, arson,
and procedure and sometimes to the dismissal of prosecutions without any real fault on the part of the Commonwealth. For example, under the constitutional and statutory provisions establishing the municipal court,\textsuperscript{62} no indictment was possible for any offense punishable by five years or less until after sentencing in the municipal court. Rules provided that pre-trial motions to suppress evidence would be heard at trial.\textsuperscript{64} If a difficult motion was presented, requiring the preparation of briefs and an opinion, trial could be delayed for months. If the decision of the motion was adverse to the Commonwealth, it could appeal first to the common pleas court\textsuperscript{65} and then to the superior or supreme court. Such procedures, fully permissible and justifiable, could lead to months and even years of delay. As most of the offenses involved in these cases had a two year statute of limitations, the inability to indict could result in the dismissal of the prosecution.

The new Crimes Code provisions fortunately resolve these problems. While providing basically the same periods as the 1939 Penal Code,\textsuperscript{66} the new time limitations provision provides that the limitations only apply to the “commencement” of prosecution. A prosecution is commenced either “when an indictment is found or when an arrest or summons is issued.”\textsuperscript{67} Because a warrant or summons must be issued before\textsuperscript{68} or almost immediately after\textsuperscript{69} arrest, incidental delays caused by municipal court procedures will no longer jeopardize prosecutions.

\section*{B. Defective Indictments Or Indictment Procedures}

Recent cases in the Pennsylvania appellate courts have held that defects in indictments or in indictment procedures would not toll the statute of limitations. In a series of cases,\textsuperscript{70} the Pennsylvania Supreme Court held that the Pennsylvania Rules of Criminal Procedure\textsuperscript{71} re-

\begin{footnotesize}
\begin{itemize}
\item[64.] Pa. R. CRIM. P. 6005(b).
\item[66.] CONSOL. PA. STAT. ANN. tit. 18, §§ 108(a), (b) (1973).
\item[67.] Id. § 108(c).
\item[68.] Pa. R. CRIM. P. 102, 107.
\item[69.] Id. 118.
\item[71.] Pa. R. CRIM. P. 203.
\end{itemize}
\end{footnotesize}
quire that a defendant must be given a reasonable opportunity to challenge the grand jury and to challenge individual grand jurors for cause. In order to effectuate that right the accused or his counsel had to be notified as to which grand jury his case would be presented. Failure to satisfy these requirements led to the quashing of the indictments. Many defendants waited until the statutory time limitation had passed to quash their indictments based on these cases and they were successful, even to prosecutions pre-dating these decisions. When prosecutors sought to re-indict, the courts held that they were barred because the statute of limitations had passed.

Such problems could not occur under the new Crimes Code. In its time limitation provision, the Crimes Code makes it explicit that the statutory limitation period does not run “during any time when a prosecution against the accused for the same conduct is pending in this Commonwealth.”

C. New Procedures

In order to implement the new Crimes Code, new indictments had to be prepared relating a criminal incident to the new relevant Crimes Code offenses. The District Attorney’s Office of Philadelphia has prepared a model set of indictments, one hundred and seventy-seven in all, involving one hundred and sixty-four indictable offenses. In order to avoid legal problems as to complex or graded offenses, clarity was obtained by making use of different counts in a single bill of indictment and by scrupulously abiding by the exact language of the statute.

Because of the need for standardization and speed, these new indictments are printed out by a computer, in accordance with the results of the preliminary hearing, municipal court trial, or district attorney’s review. Because of the efficiency of these procedures, prosecutions based on the new indictments have proceeded without serious challenge in the courts.

77. See PA. R. CRIM. P. 219(b), providing for separate counts in an indictment.
78. Within three days after defendants are held for action of the grand jury all of the bills of indictment are forwarded to the indictment division from the court computer section. Typists insert the appropriate information pertaining to the particular case in the bills of indictment. The bills are then placed in the trial file to await the expiration of the ten day delay from preliminary hearing to grand jury as required by the PA. R. CRIM. P. 203(c).
III. Trial

The Crimes Code is not simply a recodification of substantive crimes replacing and “modernizing” the Penal Code of 1939. The new Crimes Code contains significant provisions, three of which are discussed below, which will change the conduct and course of all criminal trials in the state. It is these provisions perhaps which will have the most significant impact on the administration of criminal justice in Pennsylvania.

A. Former Jeopardy

In Benton v. Maryland, the United States Supreme Court held that the double jeopardy clause of the fifth amendment applies to the states through the fourteenth amendment. Since Benton, the scope of double jeopardy (and the related principle of collateral estoppel) has been expanded by both federal and state courts in recognition of the potential harm in allowing the government to bring interminable prosecutions arising from the same criminal incident. The entire issue of when and how double jeopardy should apply has now been handled in statutory form in the Crimes Code. For the first time in Pennsylvania, the legislature has mandated the circumstances when a second prosecution is barred by a former prosecution for the same offense, for a dif-

80. Prior to Benton, principles of double jeopardy were controlled in Pennsylvania by its own constitutional provision, Pa. Const. art. I, § 10, which provided that no person may be twice placed in jeopardy of life or limb for the same offense. This provision was interpreted by the courts as only applicable to capital offenses. See Commonwealth v. Baker, 413 Pa. 106, 199-12 196 A.2d 382, 385-87 (1964). In non-capital cases double jeopardy principles were inapplicable. However, the common law principles of autrefois convict or autrefois acquit were available. These principles prevent a prosecution for an offense if the defendant had already been convicted or acquitted of a lesser offense arising out of the same alleged criminal incident. See Pa. Stat. Ann. tit. 19, § 464 (1970).
When a prosecution is for a violation of the same provision of the statutes and is
different offense arising out of the same criminal episode, or by a former prosecution in a different jurisdiction. The effect of this legislation

based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside.

(2) The former prosecution was terminated, after the indictment had been found, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty accepted by the court. In the latter two cases failure to enter judgment must be a reason other than a motion of the defendant.

(4) The former prosecution was improperly terminated after the first witness was sworn but before a verdict, or after a plea of guilty was accepted by the court.

84. Id. § 110, which states:

Although a prosecution is for a violation of a different provision of the statute than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(i) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is for:

(i) any offense of which the defendant could have been convicted on the first prosecution;

(ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and was within the jurisdiction of a single court unless the court ordered a separate trial of the charge of such offense; or

(ii) the same conduct, unless:

(A) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil; or

(B) the second offense was not consummated when the former trial began.

(2) The former prosecution was terminated, after the indictment was found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.

(3) The former prosecution was improperly terminated, as improper termination is defined in section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

85. Id. § 111, which states:

When conduct constitutes an offense within the concurrent jurisdiction of this Commonwealth and of the United States or another state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this Commonwealth under the following circumstances:

(i) The first prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is based on the same conduct unless:
is perhaps most significant in that it requires the state to consolidate and try all known charges arising from the same incident or transaction at one trial unless a court orders separate trials of the crimes. This requirement places a heavy burden on police and prosecutors to carefully process cases at the arrest and pre-trial stages in order to insure that all charges arising from a criminal incident are consolidated prior to trial. While it can be stated that such cases can be reasonably expected and handled by the state, a completely different situation exists where a criminal incident is prosecutable in more than one jurisdiction. A second prosecution arising from the same incident may only be instituted if it requires proof of a fact which was not required in the first prosecution and if the laws defining the offenses in the first and second prosecution are designed to prevent substantially different evils. In this regard there is little a prosecutor can do to control the actions of another state, county, or federal authority which initiates prosecution before he can act.

(i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil; or

(ii) the second offense was not consummated when the former trial began.

The former prosecution was terminated, after the indictment was found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.


87. This is especially troublesome in the City of Philadelphia where the municipal court has jurisdiction over all cases where the maximum penalty for any individual crime is five years or less. In all other cases jurisdiction lies in the common pleas court. Often a case arising from the same criminal transaction may be pending in both courts and unless detected and consolidated, the first trial will bar the second.

88. Regardless of whether the “other” jurisdiction is the United States, or another state or county, there are often conflicting concerns of the two prosecutorial authorities which prevent them from working together for the same goal. A serious state offense may be considered trivial by the United States Attorney (or vice versa) and the latter may negotiate a guilty plea for little or no punishment thereby preventing the state from prosecuting its case unless it can establish the narrow exceptions described in Consol. Pa. Stat. Ann. tit. 18, § 111 (1973). In a similar vein, defense counsels will be able to “jurisdiction shop” and proceed with the case in the forum most favorable to his client.

89. See id.

90. See note 88 supra.
However, by requiring the litigation of all criminal charges arising from one episode to one trial, there will be significant financial savings to the state. In addition, citizens charged with crimes will have their fates decided once and not be subjected to interminable litigation.

B. *De Minimis Infractions*

The Crimes Code confers upon judges the power to dismiss prosecutions if the judge finds that the criminal conduct charged was:

1. within customary license;
2. not actually causing the harm sought to be prevented by the law defining the crime or causing harm too trivial to warrant conviction; or
3. is extenuated to such a degree that it cannot be regarded as forbidden by the General Assembly.91

Exercise of the power to dismiss prosecution pursuant to this section requires that the judge file a written statement of his reasons for this action.92

This section confers powers upon the courts which they have carefully denied themselves.93 Traditionally, a court or a jury has been restricted to determining whether the state has proven that a crime has been committed; the existence of mitigating circumstances has been a matter for sentencing. Section 312 gives the judiciary power to dismiss any prosecution at any stage or for any crime. The purpose of the section was to “remove petty infractions from the category of criminal conduct.”94 This section, however, will be a potential weapon for judicial abuse due to the sweeping language of the section. This situation could have been avoided by limiting the permissive range of crimes for which dismissal by a court under this section would be allowed, as well as by establishing strict appellate scrutiny of any decision to dismiss prosecution.

---

91. CONSOL. PA. STAT. ANN. tit. 18, § 312 (1973).
92. Id., § 312(b). The purpose of this written statement is not stated nor are appellate review standards, if any, described.
93. A trial judge cannot sustain a demurrer or grant a motion in arrest of judgment unless he finds that the evidence and the reasonable inferences therefrom, when viewed in a light most favorable to the prosecution does not establish that the crime has been committed by this defendant. See, e.g., Commonwealth v. Ponton, 490 Pa. 40, 299 A.2d 694 (1972).
94. PBA COMMENTS, supra note 5, at 7. Most petty infractions are screened by the District Attorney's Office in Philadelphia through its Legal Counseling Program which screens cases in the police station prior to arraignment. Those arrests which are without sufficient cause or where evidence was obtained improperly are rejected for prosecution as are most "de minimis" infractions.
C. Justification as a Defense

Chapter 5 of the Crimes Code mandates those circumstances when individuals will be justified in the use of conduct upon another person which would otherwise be criminal. Thus the Crimes Code defines by statute concepts of self defense and other instances of “justified” use of force. These concepts have traditionally been the subject of judicial and not legislative mandate. Unfortunately, the drafters of the Crimes Code have, in their attempt to clarify and consolidate justification defenses, placed the entire area of law in a state of confusion which will plague trial courts for some time. This confusion is in part the result of omission because the Crimes Code is silent as to the burden of proof required when chapter 5 defenses are raised. Case law prior to the enactment of the Crimes Code made it quite clear that justification defenses were affirmative defenses which the defendant had the burden of raising and proving by a preponderance of the evidence. The Crimes Code, however, when it defines defenses other than in chapter 5, on occasion places the burden of proof specifically on the defendant, thereby creating the inference that the legislature by its silence did not intend to shift the burden to the defense for justification defenses. If appellate courts ultimately so construe this chapter,

96. Id. § 503, is the general justification section and it provides:
(a) General rule.—Conduct which the actor believes to be necessary to prevent a harm or evil to himself or to another is justifiable if:
(1) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
(2) neither this title nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
(3) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
(b) Choice of evils.—When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.
The remaining sections deal with self-defense (id. § 505); justification in property crimes (id. § 510); use of force in law enforcement (id. § 508) and other situations where otherwise criminal conduct is sanctioned (id. §§ 504-10).
99. Entrapment is a defense provided in chapter 3 of the Crimes Code. CONSOL. PA. STAT. ANN. tit. 18, § 313 (1973). It has a specific subsection providing that the defendant must prove this defense by a preponderance of the evidence. Id. § 313(b). See also the defense of mistake as to age, id. § 310, which is also an affirmative defense.
100. This inference is strongly supported by the fact that the Model Penal Code in its justification chapter from which the Crimes Code justification chapter is derived, clearly makes these defenses affirmative. MODEL PENAL CODE § 301(1). This language was not adopted by the legislature.
it will represent a radical departure from existing law and many convictions will be vacated in those cases where lower courts followed the established concept that the defense has the burden of proving justifica-

The second complication of the justification defenses is that they are so carefully detailed judges will be required to read them verbatim to juries in order to avoid any deviation from the stated law which might constitute reversible error. Unfortunately, it is highly doubtful that a juror, upon hearing the legislative definition of self-defense, will be able to understand it and apply it to the facts in the case he is hearing.102

In the final analysis, it may be concluded that chapter 5 of the Crimes Code was counter-productive to the goal of modernizing and streamlining the criminal justice system. This can be alleviated in part by providing amendments clearly stating the required burden of proof for chapter 5 and other defenses.103

D. Sex Offenses

Forcible sex offenses are often the most difficult as well as the most serious crimes to prosecute. There rarely are independent witnesses to these offenses and trials are charged with emotional trauma to the vic-

The Crimes Code made these crimes even more difficult to prosecute by providing that the jury be instructed in all sex offense trials "to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."104 This jury instruction made a conviction for a sexual offense almost impossible in the absence of corroborative evidence104 because it forced the judge to tell the jury that there

101. Even worse, appellate courts might adopt a case-by-case approach to this question and provide different rules for different chapter 4 sections. This would leave trial judges in a very tenuous position for many years.

102. Consol. Pa. Stat. Ann. tit. 18, § 505(a) (1973), which states: "Use of force justifiable for protection of the person,... The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

103. Id. § 3106.

104. There rarely is corroborative evidence strong enough to overcome this jury instruction. Where there is no corroborative evidence regarding the forcible nature of the crime, a defendant remains protected by his presumption of innocence and the prosecutor has the burden of proving his guilt beyond a reasonable doubt. He is also protected by the right to cross-examine his accuser. Only when the victim's testimony is so credible as to overcome these obstacles is he convicted.
is virtually a presumption of reasonable doubt regarding the veracity of the victim's testimony. The drafters of the Crimes Code stated that this provision "does not change existing law." However, they cited no authority for this proposition.106

This section came under attack from various groups and was repealed by the legislature because of public pressure. Repeal of this section was essential to prosecution of sex offenses because the legislature had established a virtually impossible burden of proof for conviction.109

IV. CONCLUSION

The difficulty with the new Crimes Code, as illustrated by the problems enumerated in this article, is the adoption of substantive and procedural rules promulgated initially in 1953 in some cases107 and adopted in 1962.108 The legal and constitutional questions and issues of 1974 are quite different than those apparent to the drafters of the Model Penal Code in the 1950's. For example, with no exclusionary rule in the states until 1961,109 the distinction between misdemeanors and felonies could not have the same meaning or effect on police conduct as is now possible.110 Similarly, with increased use by prosecutors of screening and rehabilitative disposition in the 1960's and 1970's,111 the formal enactment of power of dismissal of petty yet valid cases by the court may be an overresponse and an interference with prosecutorial discretion.112

Thus, when the drafters of the new Crimes Code reviewed the Model Penal Code, they were philosophically limited because of their reference to the sometimes dated concepts and wording found in the Model Penal Code. Even then, the institution of sweeping changes in the old penal laws by eliminating offenses and restructing others113 was po-

105. To date this writer has discovered no precedent in Pennsylvania requiring this instruction. This section therefore departs from existing law and may serve to protect the guilty rather than the innocent. See PBA COMMENTS, supra note 5, at 16.
110. See text at notes 12-25 supra.
111. See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS A NATIONAL STRATEGY TO REDUCE CRIME 143-49 (1973); PA. R. CRIM. P. 175-85.
112. See text at notes 91-95 supra.
113. Thus, abortion and consensual homosexuality are maintained as crimes. See PBA COMMENTS, supra note 5, at ii. In addition, article 6, "Miscellaneous Offenses," maintains
Pennsylvania Crimes Code

...aturally impossible. Finally, the adoption of a new Crimes Code without concurrent adoption of legislation as to sentencing and sentencing alternatives, which was proposed simultaneously, leaves practitioners and judges with not even "half a loaf."

The new Crimes Code, with its inherent legal problems and delays, was effective at the same time as new procedural rules requiring prompt trials. Prosecutors, defense counsel and the court must not only learn, apply, and test new definitions, new crimes and new penalties, but must also respond to new requirements as to timing of cases, delays of cases, and exceptions to rules. The fear is chaos. The probability is, at the least, confusion.
