

## A Commentary

# The Code is Broken

by Darren Gelber

Some of the salutary purposes of the Legislature in promulgating the current criminal code, known as Title 2C, were to “match the degree of the defendant’s offense with his actual culpability” while, at the same time, ensuring that the criminal code would be a “systemic code,” making “it possible, now and in the future, to look at any particular provision in terms of its consistency with the whole system.”<sup>1</sup> As the criminal code approaches its 40th anniversary, it appears, at least insofar as these goals are concerned, that Title 2C has lost its way.

What was once envisioned as a clearly defined and organized structure—defining criminal offenses and grading them according to their severity—has emerged as a mishmash of disjointed, and sometimes counterintuitive, provisions enacted by the Legislature to address the headline of the day without appropriate consideration for the systemic effects upon the code as a whole. Political pressures and the need to be perceived as ‘tough on crime’ no doubt have led to a criminal code that today is a far cry from what it was envisioned to be.

Below, some specific examples of the incongruity present in today’s Title 2C will be identified, with a view toward establishing that it is time again to start from scratch by retiring Title 2C (after thanking it for its 40 years of service), and developing a new criminal code with a rededicated goal to make sure the penal system is logical, consistent and attentive to prevailing societal expectations.

A glaring example of how disjointed the criminal code has become can be seen by reviewing the current state of our gun laws. New Jersey has always tightly regulated the use and possession of firearms, and the criminal provisions relating to firearms are grouped under Chapter 39 of Title 2C, while licensing provisions pertaining to firearms fall under Chapter 58. Simply stated, it is unlawful for a person to possess a handgun outside of his or her home or place of business, unless the person has first obtained a permit to carry a concealed handgun (which is very

difficult to obtain), or the handgun is being transported to or from the person’s home or place of business under certain defined procedures<sup>2</sup>

As originally enacted, Title 2C made possession of an unloaded firearm a crime of the fourth degree, and possession of a loaded firearm a crime of the third degree.<sup>3</sup> When these offenses were designated as third- and fourth-degree crimes, prosecutors retained wide discretion to determine how individual cases should be handled. For example, first-time offenders were eligible for pre-trial intervention (PTI), a diversionary program that would allow them to avoid a criminal conviction upon completion of a probationary program.<sup>4</sup> For those defendants not suitable for PTI, third- and fourth-degree offenses could be resolved through guilty pleas and probationary sentences.<sup>5</sup> Harsher offenses and stiffer sanctions were available to handle cases in which a defendant used a firearm to commit a crime, threatened someone or possessed a machine gun or assault firearm.<sup>6</sup>

By and large, the state’s gun laws were rational and appropriate, escalating in seriousness depending upon the gravity of the offense, the type of weapon involved, and whether it was possessed passively or used offensively. But during the 2007 legislative session, lawmakers enacted a bill “intended to address the growing problem of gang-related gun violence,” upgrading to a second-degree offense the simple possession of a firearm.<sup>8</sup>

Although the bill was labeled by the Legislature as “establish[ing] as crime of the second degree unlawful possession of *certain* handguns” (emphasis supplied), it actually established as a second-degree offense the possession of all handguns.<sup>9</sup> In one fell swoop, defendants formerly eligible for PTI now became presumptively ineligible for PTI, and faced the virtually certain prospect of a state prison sentence upon conviction of the newly created second-degree offense of simple possession of a firearm.

While the Legislature may have envisioned that it was addressing the problem of gang violence, it enacted a statute that applies to truck drivers who carry loaded firearms for per-

sonal protection while traveling interstate; victims of prior crimes who live in high-crime areas who improvidently decide to carry a handgun for safety; and even those who transport a handgun to a firing range for target practice, but fail to follow the required procedures set by statute for the appropriate transportation of firearms.

To compound this legislative problem, in the same session the Legislature expanded the reach of what is known as the Graves Act,<sup>10</sup> requiring prison sentences and periods of parole ineligibility, to now include the simple possession of a handgun.<sup>11</sup> The attorney general, seizing upon the new legislative onslaught against gun possession, promulgated guidelines that make it virtually impossible for an otherwise eligible defendant to escape criminal prosecution through the benevolence of a PTI diversion.

In light of the Legislature's recent policy decision to significantly upgrade the seriousness of firearm offenses, it is expected that prosecutors will consent to a defendant's admission to PTI only in rare cases involving extraordinary and compelling circumstances that fall outside the heartland of the legislative policy to deter unauthorized gun possession.<sup>12</sup>

As a result of these 2007 amendments, the hypothetical interstate truck driver carrying a loaded handgun in his or her cab for protection now commits a second-degree, Graves Act offense, making him or her presumptively ineligible for PTI, and virtually requiring a state prison sentence upon conviction. This truck driver now faces the same punishment as if he or she had committed the violent crimes of robbery<sup>13</sup> or arson.<sup>14</sup>

A careful review of countless other provisions of Title 2C yields similar oddities. A person who drinks too much and drives his or her car recklessly, causing an accident that results in a death, com-

mits the second-degree offense of death by auto, punishable by the same range of sanctions as the offense of forcible rape.<sup>15</sup> Should a person who does not intend to cause harm, but wrongly drives intoxicated, be punished in the same way as someone who forcibly rapes a victim? Should the crime of stalking in violation of an existing restraining order, with all of its attendant fear-producing impact upon the victim, be labeled in the same category as theft of property valued at between \$500 and \$75,000?<sup>16</sup> For that matter, should the criminal code treat theft of property valued at \$501 in the same way it treats theft of property valued at \$75,000?<sup>17</sup>

Another example in support of this thesis is the apparent incongruity between two provisions of Chapter 14 of Title 2C, the chapter that defines sex offenses. N.J.S.A. 2C:14-2c(1) establishes the offense of sexual assault for offenders who commit an "act of sexual penetration"<sup>18</sup> upon another person by using physical force or coercion. So long as the victim does *not* suffer "severe personal injury,"<sup>19</sup> the offense is classified as one of the second degree, punishable by up to 10 years in prison.<sup>20</sup> This offense thus encompasses cases where the actor uses brute force, such as holding down a struggling victim. It does not require a degree in psychology to comprehend that such an offense is likely to have a devastating impact upon a victim, who stands to suffer a lifetime of anguish as a result of actively experiencing and surviving such a personal and violent intrusion.

But while an actor who overcomes the victim's active resistance and uses force to commit rape is guilty of a second-degree offense, an actor who rapes a victim who is unconscious, and thus presumably unable to experience the terror of the act itself, commits aggravated sexual assault, a crime of the first degree, punishable by up to 20 years in prison.<sup>21</sup> Clearly, an offender who takes advantage of a victim who is in a state of unconsciousness com-

mits a reprehensible act and is deserving of significant punishment, but should that punishment be more severe than that which awaits the offender who used physical force to overcome a victim's active resistance?

Any experienced criminal defense attorney who has represented clients facing both the second- and first-degree sex crimes described has likely been at a loss to comprehend the disparity in the severity of these two offenses, as have prosecutors handling the cases, and the judges presiding over them. It would seem appropriate and intuitive that the more serious offense would be the one in which the victim suffers consciously through the act, even while resisting. Yet, under the code the opposite is true.

This was not always the case. Both crimes were classified as second-degree offenses until 1997, when the Legislature upgraded offenses involving helpless and unconscious victims to first-degree crimes as part of a package of laws designed to combat the perceived increased prevalence of "date rape drugs."<sup>22</sup> While certainly an important issue deserving of legislative attention, the end result has left askew the grading of offenses within Chapter 14. Prosecutors, defense attorneys, judges, defendants, and even victims, are now left with a system of offenses that does not appropriately categorize the severity of conduct, detracting from the ultimate goal of a comprehensive criminal code.

There is a further structural breakdown of the integrity of Title 2C in the manner in which the Legislature has amended the assault statutes.

New Jersey has always upgraded to aggravated assault an act of simple assault upon certain categories of individuals. Upon the enactment of Title 2C, the Legislature limited the class of victims upon whom a simple assault would be considered an aggravated assault to law enforcement officers in uniform and exhibiting evidence of authority while

acting in the performance of duties, firemen and emergency first aid and medical workers.<sup>23</sup> In so doing, the Legislature, wisely, limited these categories of protected victims, eliminating from among them newsmen<sup>24</sup> and process servers,<sup>25</sup> expressing the view that enhanced punishments for committing an act of simple assault upon these classes of individuals was “inappropriate” and “unnecessary.”<sup>26</sup>

Despite the early intent to limit the classes of individuals against whom a simple assault would be considered as an aggravated assault, since the enactment of Title 2C, in response to isolated incidents, the Legislature has amended the statute to broaden the protected class on many occasions. For example, in 1983 school board employees were added to the list,<sup>27</sup> and in 2006 the definition of school board employees was broadened to include private school employees.<sup>28</sup> In 1995, Division of Youth and Family Services workers were added to the list,<sup>29</sup> and in 1997 judges were included.<sup>30</sup>

As it now stands, it is also aggravated assault to commit simple assault against a motor bus operator or supervisor, any employee of a “rail passenger service,” corrections officers, juvenile detention officers, probation officers, any member of a sheriff’s office, utility company employees and independent contractors employed by utility companies, and cable television employees and independent contractors employed by cable television companies.<sup>31</sup>

This hodge-podge of a list signals the Legislature’s assessment of those classes of individuals upon whom it is particularly egregious to commit an act of simple assault. But why are cable television workers entitled to this protection, and not satellite television installers? How about census workers or door-to-door salesmen? The lack of a clear delineation between what constitutes a protected class and what does not breeds uncertainty, ambiguity, and inconsistency.

It is also now aggravated assault to

commit an act of simple assault in the presence of a child under 16 years of age at a school- or community-sponsored youth sports event.<sup>32</sup> It would seem by implication that the Legislature sees no reason for enhanced punishment for a simple assault committed in the presence of a child under 16 years of age at a drama club play, or at a math league competition or spelling bee.

The process by which the Legislature has amended the assault statutes has resulted in a statutory scheme that seems to make little sense. Crimes committed intentionally or purposefully should be treated more seriously than crimes committed as a result of recklessness. Crimes against the person should be treated more seriously than crimes against property. Crimes should be graded based upon the nature of the harm they cause.

These are not new or novel concepts; indeed, they formed the basis of our criminal code when it was first enacted. Unfortunately, as is the case in New Jersey, when a legislature acts in response to a narrow issue by enacting a broadly worded-statute, even a criminal code like New Jersey’s, organized with the best of intentions, can stray from these goals.

Each new law must be assessed not only in terms of whether it accomplishes its intended goal, but also, and perhaps more importantly, how it affects the overall structure and organization of the criminal code as a whole. If the goal is to ensure a uniform, cohesive and rational criminal code, the Legislature would do well to allow all proposed amendments to be filtered through an independent body, as unaffected by partisan politics as any such body could be, whose sole function would be to assess the impact of proposed code revisions upon the structure of the criminal code as a whole.

For the reasons cited above, it is doubtful that any such process can save the current criminal code. Instead, the Legislature would serve the criminal justice system well by enacting a new crim-

inal code firmly rooted in the principles described above, and establishing a procedure to ensure that as time passes, and new laws are promulgated, the mistakes of Title 2C are not repeated. ♪

## Endnotes

1. Final Report of the New Jersey Criminal Law Revision Commission, The New Jersey Penal Code, Vol. I: Report and Penal Code, at xii, xiv (Oct. 1971).
2. N.J.S.A. 2C:39-5b (criminalizing possession of a handgun); 2C:39-6e (exception permitting possession of firearm in home or place of business, or transporting firearm to or from home or place of business subject to defined procedures); 2C:39-6g (defining procedures for transporting firearm to or from home or place of business); 2C:58-4 (procedures to obtain permit to carry a handgun).
3. Final Report of the New Jersey Criminal Law Revision Commission, The New Jersey Penal Code, Vol. II: Commentary, at 309 (Oct. 1971).
4. R. 3:28 (describing PTI program).
5. N.J.S.A. 2C:44-1e (authorizing probation as available sentence for conviction of third- or fourth-degree offense).
6. See, e.g., N.J.S.A. 2C:39-4; 2C:39-4.1.
7. Senate Law and Public Safety and Veterans Affairs Committee Statement to Senate Committee Substitute for Senate No. 2431 (Dec. 17, 2007).
8. P.L. 2007, c.284.
9. The bill excepted from second-degree status only air guns, spring guns and the like. Possession of all traditional handguns, meaning those firing a bullet, became classified as second-degree offenses.
10. P.L. 2007, c.341.
11. Attorney General Directive to Ensure Uniform Enforcement of the Graves Act at 8 (Oct. 23, 2008).
12. N.J.S.A. 2C:15-1 (defining robbery as a second-degree offense in most

- instances).
13. N.J.S.A. 2C:17-1 (defining aggravated arson is a crime of the second degree).
  14. Compare N.J.S.A. 2C:11-5 with N.J.S.A. 2C:14-2c(1) (defining death by auto and sexual assault, and classifying both as second-degree offenses).
  15. Compare N.J.S.A. 2C:12-10c with N.J.S.A. 2C:20-2b(2)(a) (classifying stalking in violation of an existing restraining order and theft of property valued between \$500 and \$75,000 as third-degree offenses).
  16. N.J.S.A. 3C:20-2b(2)(a).
  17. "Sexual penetration" is defined to include vaginal or anal intercourse, cunnilingus, fellatio or the insertion of the hand, finger or any object into the anus or vagina. See N.J.S.A. 2C:14-1c.
  18. "Severe personal injury" means severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain. N.J.S.A. 2C:14-1f.
  19. N.J.S.A. 2C:43-6a(2)(establishing a range of punishments for second-degree offenses).
  20. See N.J.S.A. 2C:14-2(a)(7).
  21. Assembly Judiciary Committee Statement to Assembly Committee Substitute For Assembly, No. 2725 (June 12, 1997) (available at [www.njleg.state.nj.us/9697/Bills/A2500/2725\\_S1.PDF](http://www.njleg.state.nj.us/9697/Bills/A2500/2725_S1.PDF)).
  22. Final Report of the New Jersey Criminal Law Revision Commission, The New Jersey Penal Code, Vol. I: Report and Penal Code, at 55 (Oct. 1971).
  23. N.J.S.A. 2A:199-1 (repealed).
  24. N.J.S.A. 2A:99-1 (repealed).
  25. Final Report of the New Jersey Criminal Law Revision Commission, The New Jersey Penal Code, Vol. II: Commentary, at 178 (Oct. 1971).
  26. L. 1983, ch. 101.
  27. L. 2006, ch. 78.
  28. L. 1995, ch. 181.
  29. L. 1997, ch. 42.
  30. N.J.S.A. 2C:12-1b(5)(g) to b(5)(i).
  31. N.J.S.A. 2C:12-1f.

**Darren Gelber** is a shareholder with the law firm of Wilentz, Goldman & Spitzer P.A., where he serves as co-chair of the criminal law/civil rights practice group. He is a certified criminal trial attorney, and current vice-president of the Association of Criminal Defense Lawyers of New Jersey. The opinions expressed in this article are those of the author, and do not represent the official opinion of the New Jersey State Bar Association.