MAINE

CRIMINAL LAW REVISION COMMISSION

INTRODUCTION

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TO ACCOMPANY

PROPOSED MAINE CRIMINAL CODE

AUGUSTA, MAINE
JANUARY, 1975

INTRODUCTION

During the past two decades every state in the union, save one, as well as the federal government, has been rewriting its criminal laws. More than half of the states have already enacted new penal codes, while the others are at various stages of drafting or adopting.

This proposed Maine Criminal Code represents the first time in the history of our state that the criminal laws of Maine have been rewritten in a systematic fashion. Previous efforts failed for lack of adequate state funding.

Recognition should therefore be given to the Maine Law Enforcement Planning and Assistance Agency whose grant, under the Safe Streets Act, together with legislative funds made this revision possible.

Beginning with its organizational meeting April 7, 1972, the Commission had 45 working sessions with Chief Counsel Sanford J. Fox.

In its work the Commission was not guided by some Northern Star-like philosophy. Rather, it sought on a case by case basis to find practical approaches to meeting the needs of today.

With the divergent views and backgrounds represented on the Commission it would be idle to pretend that there was unanimity on all of the difficult issues decided by the Commission. There was not. But there was give and take and accommodation to the views of other members until it would be fair to say that the members felt that the revision as a whole represented a reasonable balance between compassion for the offender and a concern for the interests of society.

In the process of making these hard choices it was necessary to make arbitrary selections and decisions. The Commission might be hard put to say exactly why the line had to be drawn where we drew it. It represented our best collective judgment at the time. Therefore it must follow that there is no magic in where we drew the line. But the warning must be given that an effort towards wholesale upgrading or downgrading of penalties would, in our judgment, make for a code which would be unduly harsh or permissive.

In seeking to make the state's criminal laws "as rational and just as law can be" the Commission has relied, at times, on the deliberations in other states where the penal laws revision has preceded the Maine effort, using as models for some provisions of the Code the law of this or that state. At the same time, the Commission has left intact those parts of the existing Maine law where the rules have served the State's interests well over the years.

One of the central accomplishments of the new Codes, including the Maine Code, is the articulation of vitally important rules of law that have traditionally been left unexpressed by legislative enactments and only incompletely developed by the process of judicial decisions. The first three chapters of the Code represent examples of this. Thus in chapter 1 there are rules for determining what the authority of the State of Maine is regarding criminal conduct that is partly accomplished within the state and partly in another state, a body of rules whose importance has increased significantly as interstate travel has become so commonplace. Similarly, in chapter 3 the Code provides

a means of answering such important but hitherto bypassed questions as when does a mistake excuse what would otherwise be punishable conduct? What is the effect of the victim's consent to crime? When can one person justly be held accountable for the criminal behavior of another? Issues of no lesser importance are set forth in the third chapter where the Commission presents its recommendations on settling such problems as when may a law enforcement officer shoot in order to make an arrest? What force may legally be used to defend one's property? What authority to use force is to be granted as a matter of self-defense? What circumstances justify use of force by a bus driver or a train conductor?

The general principles in these early chapters apply to all of the crimes defined in the Code, and precisely because they are general principles, they are made to apply to crimes defined in all other parts of the Maine statutes as well.

The same general scope is provided for Part III of the Code in which the sentencing laws are found. It would be both impractical and confusing to have one set of rules for sentencing govern the crimes defined in the Code, and another distinctively different set apply to crimes defined elsewhere in the statutes. In addition to being of general applicability, the sentencing system provided for in the Code follows the approach of the Model Penal Code and all the other revisions by changing the structure by which the legislature determines the penalties it authorizes for each offense. At the present time, the criminal statutes of Maine each have sentencing provisions; that is, one offense may be punishable by 30 days imprisonment, another by 11 months, another by 3 years, etc. There are, in fact, more than 60 such distinctive sentencing provisions in the statutes. In view of the fact that a major function of this particular part of penal legislation is to express a scale of seriousness and a sense that the penalty must preserve some element of proportionality between the gravity of the harm that is done and the severity of the penalty that is extracted for doing it, it seems clear that the function has been lost over the years. The law, as a whole, at present represents not a considered legislative judgment on this issue, but a process of ad hoc enactment that has made such a judgment an impossibility.

In order to permit the legislature to address the issue of seriousness, and to provide a structure whereby future legislatures may enact new criminal statutes which express their own understanding of what is more and what is less serious, the Code sets up a classification system. All criminal statutes are allocated to one of five sentencing classes, each of which has its own penalty limits. Thus the legislative judgment can rationally be exercised to declare that any particular offense is more serious than the offenses in one class, but less serious than the offenses in another. A choice from among five classes represents what the Commission considers to be the limits of rational choice.

The two most serious criminal homicides are outside of this classification scheme and are provided their own distinctive penalties. The classifications do not rely on the traditional terms "felony" and "misdemeanor" since they function largely as perjoratives and add nothing to the effort to decide on the relative seriousness of prohibited behavior.

Another change proposed in the sentencing system is the requirement that persons sentenced to imprisonment be confined for a definite period, rather than for the indeterminate term now characteristic of the law. Release will no longer depend on parole board decisions but on the willingness of the prisoner to earn the "good time" deductions authorized by law. Educational, vocational and other programs may still be offered prisoners, but the realization that there is no known program that can act as a "cure" for criminality makes it irrational to rely on program participation as some sign of rehabilitation.

The bulk of the Code is concerned not with the general principles of the sentencing system, but with the definition of offenses. The major impact of these provisions is in the direction of simplifying the law. One way this is accomplished is by having the definitions uniformly use only a handful of terms to describe the culpable mental state that is an essential element of the crimes. These terms are, moreover, carefully defined in the Code, so that the definition of crime will no longer turn on deciphering the meaning of such traditional terms as "maliciously," "fraudulently," "corruptly" etc. On the whole, this Code relies much more on providing definitions of key terms than does traditional law, thus permitting a more straightforward description of the elements of particular crimes. Many of the crimes, especially the more serious ones such as the homicides, thefts and the sex offenses, are substantively quite similar to the present law.

The Code also contains many crimes that are new to Maine law, such as are provided in the forgery, bribery and perjury chapters. The effort here has been to maintain the integrity of such things as writings, official statements and government processes on a wider scale than traditional law has reached. These chapters also exemplify a central theme that has run through the work to define offenses. That is the need to distinguish behavior that is merely undesirable from behavior that is sufficiently threatening to require the specialized effort of the criminal law to prevent it. Thus it is clear that outright bribery is properly a subject for the criminal law, while careless mistakes of public officials are not. There is a broad range of official wrongdoing in between that calls for difficult judgments as to whether penal or other methods of control are called for. The same problem is presented regarding the law of theft where it is clear that only **some** instances of dealing with the property of another should be penalized.

In making these judgments the Commission has been keenly aware that the penal law can become, and in some respects already is, badly over-extended. When the law reaches such a state it tends to squander precious and limited social assets such as law enforcement and court resources. Thus to the extent that laws which prohibit fornication, social gambling, and the like are in fact enforced, other laws dealing with more serious offenses necessarily cannot be. When the laws are not enforced, the whole system is undermined since it becomes quite clear that not everything in the law is to be taken seriously. Thus one of the tasks involved in defining crime has been to identify these cases and to restrict the law to instances where enforcement is to be encouraged and the prohibitions to be taken as representative of community judgments that are widely and strongly held. In the course of making

decisions of this sort the Commission has recommended dropping from the penal law those prohibitions that do not meet these criteria, including the prohibition against possession of marijuana for one's personal use.

I would like to express our appreciation to our Chief Counsel, Professor Sanford J. Fox, for his careful work and thoughtful presentations to the Commission. As Chairman, I thank the members of the Commission and the Consultants for their faithful attendance and participation which meant taking time away from a busy law practice, family activities or a crowded court docket, and often meant traveling long distances to attend meetings. I hope that the results will have been worth the effort.

Now, I would urge the Bench, the Bar, interested civic groups and all concerned citizens to subject the proposed Code to scrutiny, and discussion. Please direct specific comments to the Commission Secretary, State Law Library, Augusta.

Jon A. Lund, Chairman
Criminal Law Revision Commission

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CHAPTER 147

AN ACT to Create a Commission to Prepare a Revision of the Criminal Laws.

Sec. 1. Commission; duties. A special commission shall be constituted and appointed to supervise the preparation, in final legislative draft form, of a proposed Criminal Code for the State of Maine, such proposed code to be presented to the regular session of the 107th Maine Legislature. Such proposed Criminal Code shall include and consist of a complete revision, redraft and rearrangement of all sections of the Revised Statutes pertaining to the criminal law. Such proposed Criminal Code may, without limitation, incorporate such necessary repealers, amendments and modifications of existing laws as, in the judgment of such commission, are necessary and appropriate to accomplish such purposes. Such proposed code may include such new or modified provisions as, in the judgment of the commission, will best serve the interests of the people of the State, and the commission shall give due consideration to the criminal laws of other states, and the requirements for enforcement thereof. Such commission shall employ a chief counsel, and, subject to his recommendations, such additional counsel as may be required, to perform the necessary research and drafting of such code, the chief counsel to meet the requirements as set forth. Such commission shall hold such public hearings as may be deemed necessary to acquaint the public. It is the purpose and intent hereof to provide such commission with sufficient authority and funds to enable it to present to the Maine Legislature a fully modern, integrated and consistent criminal code.

Sec. 2. Membership. The membership of the commission shall consist of not less than 11 nor more than 14 persons. The Governor shall appoint the members of the commission as follows: Four members shall be members of the bar, 2 of whom shall have been active in the trial of criminal cases. Two members shall be from the field of mental health and corrections, one of whom shall be the Warden of the Maine State Prison. At least 4 shall be qualified by reason of common sense and broad experience in everyday affairs, as

representative of the public, which may include persons within the foregoing categories. The Governor shall designate 4 consultants to the commission, who shall be active or retired members of the judiciary, at least one of whom shall be a member of the Supreme Judicial Court and one member shall be from the Superior Court. The Attorney General shall be a member of the commission ex officio. Members shall serve for a term of 2 years and may be reappointed by the Governor. In the event of the death or resignation of any member, the vacancy for his unexpired term shall be filled by the Governor. Eight members of the commission shall constitute a quorum.

Sec. 3. Meetings. The said commission shall be appointed promptly upon enactment hereof, and the Governor shall notify all members of the time and place of the first meeting. At that time the commission shall organize, elect a chairman, vice-chairman and secretary-treasurer, adopt rules as to the administration of the commission and its affairs. The commission shall maintain minutes of its meetings and such financial records as may be required by the State Auditor and shall report periodically its progress to the Governor.

Sec. 4. Chief counsel. The commission shall contract a chief counsel who need not be a resident of this State, who shall have the responsibility for legal research and drafting required in connection with the preparation of the proposed Criminal Code, under the direction and supervision of the commission. No person shall be employed as chief counsel who shall not, by virtue of prior training, experience, ability and reputation, have clearly demonstrated the ability to perform the tasks to be assigned to him by the commission.

Sec. 5. Reimbursement of expenses. The members of the commission shall serve without compensation, but may be reimbursed for their reasonable expenses in attending meetings, procuring supplies, correspondence and other related and necessary expenditures.

Sec. 6. Federal funds. The commission shall be authorized on behalf of the State to accept federal funds and may seek the advice and assistance of the Law Enforcement Planning and Assistance Agency in carrying out its duties.

Sec. 7. Appropriation. There is appropriated from the Unappropriated Surplus of the General Fund the sum of $10,000 for the fiscal year ending June 30, 1973 to carry out the purposes of this Act.

Effective September 23, 1971

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ONE HUNDRED AND SEVENTH LEGISLATURE

Legislative Document No. 314

S. P. 113 In Senate, January 28, 1975

The Committee on Judiciary suggested by Committee on Reference of Bills.

HARRY N. STARBRANCH, Secretary

Presented by Senator Collins of Knox.

Cosponsor: Senator Clifford of Androscoggin.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SEVENTY-FIVE

AN ACT Creating the Maine Criminal Code.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. **17-A MRSA**, is enacted to read:

TITLE 17-A
MAINE CRIMINAL CODE

PART 1
GENERAL PRINCIPLES

CHAPTER 1
PRELIMINARY

§ 1. Title; effective date; severability

1. Title 17-A of the Revised Statutes Annotated shall be known and may be cited as the Maine Criminal Code.

2. This code shall become effective March 1, 1976, and it shall apply only to crimes committed subsequent to its effective date. Prosecution for crimes committed prior to the effective date shall be governed by the prior law which is continued in effect for that purpose as if this code were not in force; provided, however, that in any such prosecution the court may, with the consent of the defendant, impose sentence under the provisions of the code. For purposes of this section, a crime was committed subsequent to the effective date if all of the elements of the crime occurred on or after that date; a crime was not committed subsequent to the effective date if any element thereof occurred prior to that date.

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

Comment*

This section performs a number of important functions. Subsection 1 serves to provide a convenient and formal way of referring to this body of law.

Subsection 2 sets the period of transition between enactment of the code and the date it becomes the law of the State of Maine, a necessary hiatus to permit familiarization with the Code's provisions.

In order to emphasize that there is no intention that the Code have a retroactive effect, subsection 2 provides that only if all of the elements of a crime defined in the Code take place after the effective date, will the code apply. In all other cases, the prior law will be legally available for the prosecution of crimes committed before the effective date. Persons thus convicted under the prior law are offered, however, the option of being sentenced under the sentencing provisions of the Code.

Subsection 3 is a severability provision which expresses the legislative intent that the Code be given effect in the event that any particular part of it is held to be invalid.

There is no statutory counterpart to this section in the present Maine law.

§ 2. Definitions

As used in this code, unless a different meaning is plainly required, the following words and variants thereof have the following meanings.

1. "Act" or "action" means a voluntary bodily movement.

2. "Acted" includes, where appropriate, possessed or omitted to act.

3. "Actor" includes, where appropriate, a person who possesses something or who omits to act.

4. "Benefit" means any gain or advantage to the actor, and includes any gain or advantage to a person other than the actor which is desired or consented to by the actor.

5. "Bodily injury" means physical pain, physical illness or any impairment of physical condition.

6. "Criminal negligence" has the meaning set forth in section 10.

7. "Culpable" has the meaning set forth in section 10.

8. "Deadly force" means physical force which a person uses with the intent of causing, or which he knows to create a substantial risk of causing, death or serious bodily injury. Intentionally or recklessly discharging a firearm in

the direction of another person or at a moving vehicle constitutes deadly force.

9. "Deadly weapon" or "dangerous weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is capable of producing death or serious bodily injury.

10. "Dwelling place" means any building, structure, vehicle, boat or other place adapted for overnight accommodation of persons, or sections of any place similarly adapted. It is immaterial whether a person is actually present.

11. "Element of the crime" has the meaning set forth in section 5.

12. "Financial institution" means a bank, insurance company, credit union, safety deposit company, savings and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

13. "Government" means the United States, any state or any county, municipality or other political unit within territory belonging to the United States, or any department, agency or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government or formed pursuant to interstate compact or international treaty.

14. "He" means, where appropriate, "she," or an organization.

15. "Intentionally" has the meaning set forth in section 10.

16. "Knowingly" has the meaning set forth in section 10.

17. "Law enforcement officer" means any person who by virtue of his public employment is vested by law with a duty to maintain public order, to prosecute offenders, or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes.

18. "Nondeadly force" means any physical force which is not deadly force.

19. "Organization" means a corporation, partnership or unincorporated association.

20. "Person" means a human being or an organization.

21. "Public servant" means any official officer or employee of any branch of government and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function. A person is considered a public servant upon his election, appointment or other designation as such, although he may not yet officially occupy that position.

22. "Recklessly" has the meaning set forth in section 10.

23. "Serious bodily injury" means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or extended impairment of the function of any bodily member or organ.

Comment*

This section contains definitions of terms which occur frequently in the code. Other terms are defined in particular chapters if they are used only in that chapter. See, for example, section 701 of chapter 29 which defines the terms used in forgery crimes. States of mind are defined in section 10 of chapter 1 since it is in that chapter that the code sets forth what role these mental elements play in the definition of crimes generally. But since terms such as "intentionally," "knowingly," and "recklessly" appear so frequently, a cross-reference is provided here for the convenience of users of the code.

§ 3. All crimes defined by statute: Civil actions

1. No conduct constitutes a crime unless it is prohibited

A. By this code; or

B. By any statute or private act outside this code, including any rule or regulation authorized by and lawfully adopted under a statute, provided that it is expressly classified according to section 4, or the penalty applicable thereto, for a first or subsequent violation, includes a term of incarceration.

2. This code does not bar, suspend, or otherwise affect any right or liability for damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in such civil action constitutes an offense defined in this code.

Comment*

Subsection 1 of this section declares an end to the largely unused power of courts to find conduct to be criminal even if it is not specifically made a crime by some statute. This power was necessary at a time when legislation was rudimentary and statutory crimes constituted merely a basic framework of penal law. Since the need to fill the gaps in such a system has long since been abandoned by the courts, it is appropriate for the code to abolish common law crimes and provide the public with the security of knowing that all conduct subject to criminal penalties can be found in the written law.

While this code does not undertake to redefine every criminal offense now in the Maine statutes — there are approximately 900 such crimes outside of the core collection of the most serious crimes in Title 17 — subsection 1, paragraph B does provide that there can be crimes outside the code. Any offense to which the Legislature has attached the possibility of imprisonment continues to be a criminal offense. Conduct which is less serious and cannot result in any imprisonment is, according to section 4, a civil violation.

Subsection 2 is designed to prevent any unintended effects on the civil side of the legal system.

§ 4. Classification of crimes; civil violations

1. Except for criminal homicide in the first or 2nd degrees, all crimes whether defined by this code or by any other statute of the State of Maine, are classified for purposes of sentencing by this section.

2. Crimes are classified as Class A, Class B, Class C, Class D and Class E crimes. In this code each crime is specifically assigned to a class. In statutes defining crimes which are outside this code, the class depends upon the imprisonment penalty that is provided as follows. If the maximum period authorized by the statute defining the crime:

A. Exceeds 10 years, the crime is a Class A crime;

B. Exceeds 5 years, but does not exceed 10 years, the crime is a Class B crime;

C. Exceeds 3 years, but does not exceed 5 years, the crime is a Class C crime;

D. Exceeds one year, but does not exceed 3 years, the crime is a Class D crime;

E. Does not exceed one year, the crime is a Class E crime.

3. If the statute outside the code prohibits defined conduct but does not provide an imprisonment penalty it is a civil violation and is hereby expressly declared not to be a criminal offense. Civil violations are enforceable by the Attorney General, his representative, or any other appropriate public official in a civil action to collect the amount of what may be designated a fine, penalty or other sanction, or to secure the forfeiture that may be decreed by the statute.

4. Notwithstanding subsections 2 and 3, the sentencing class applied upon conviction of an offense defined outside this code punishable by fine without imprisonment and which expressly provides that it may be committed by an organization, is determined by the maximum amount of the fine provided, as follows. If the maximum fine:

A. Exceeds $5,000, the crime is a Class B crime;

B. Exceeds $1,000, but does not exceed $5,000, the crime is a Class C crime;

C. Exceeds $500, but does not exceed $1,000, the crime is a Class D crime; and

D. Does not exceed $500, the crime is a Class E crime.

Comment*

One of the major changes made in this code is that crimes are grouped into classes for sentencing purposes, as a substitute for the present scheme whereby each provision of the law not only defines the conduct that is criminal, but provides a specific penalty as well. Under the code, penalties are provided for each class, not for each crime. This section serves several purposes in bringing about the change.

Subsection 1 notifies the reader of the code that there are these sentencing classes. Subsection 2 is, in effect, a conversion table which allocates to a particular sentencing class, every crime that is defined by a law outside of the code. This is necessary in order to have one, rather than two, sentencing systems. It should be noted that this section does **not** declare what the penalty is for each sentencing class; it merely assigns crimes outside the code to a sentencing class on the basis of the penalty now provided for those crimes.

Subsection 3 defines a civil violation as prohibited conduct which calls for some penalty other than imprisonment. It accomplishes the moving out of the criminal law those things which are of minimal seriousness. The monetary cost of engaging in the conduct can then be assessed in the more simple and flexible molds of civil procedure. Subsection 4 is a necessary exception to this decriminalization of "fine only" offenses. It serves to continue as a criminal violation any conduct which a statute declares may be committed by an organization and which would, therefore, carry only a fine as a penalty. Since fines are the only penalties which could have been provided in such cases, the assumption otherwise valid that where there is no imprisonment the conduct is not serious, does not hold.

§ 5. Pleading and proof

1. No person may be convicted of a crime unless each element of the crime is proved beyond a reasonable doubt. "Element of the crime" means: The forbidden conduct; the attendant circumstances specified in the definition of the crime; the intention, knowledge, recklessness or negligence as may be required; and any required result. The existence of jurisdiction must also be proved beyond a reasonable doubt. Venue may be proved by a preponderance of the evidence. The court shall decide both jurisdiction and venue.

2. The State is not required to negate any facts expressly designated as a "defense," or any exception, exclusion, or authorization which is set out in the statute defining the crime, either:

A. By allegation in the indictment or information; or

B. By proof at trial, unless the existence of the defense, exception, exclusion or authorization is in issue as a result of evidence admitted at the trial which is sufficient to raise a reasonable doubt on the issue, in which case the State must disprove its existence beyond a reasonable doubt.

3. Where the statute explicitly designates a matter as an "affirmative defense," the matter so designated must be proved by the defendant by a preponderance of the evidence.

4. The existence of a reasonable doubt as to any intention, knowledge, or recklessness required as an element of a crime may be established by any relevant evidence, including evidence of an abnormal condition of mind or intoxication. As used in this section, "intoxication" means a disturbance of mental capacities resulting from the introduction of alcohol, drugs, or similar substances into the body. Intoxication is otherwise no defense.

Comment*

This section states several basic rules concerning the prosecution of criminal cases. Subsection 1 includes a statement of the rule compelled by the federal constitution that the conduct constituting the crime must be proved beyond a reasonable doubt. **In re Winship,** 397 U.S. 358 (1970). It is also the law of Maine that jurisdiction must be similarly proved. **State v. Baldwin,** 305 A.2d 555 (Me. 1973). Since venue is far less crucial than either the elements or jurisdiction, a lesser degree of proof is permitted. Since both jurisdiction and venue are tried without a jury, the disconformity of the burdens of proof should cause little difficulty.

The rule in subsection 2, paragraph A is similarly the present law. **State v. Rowe,** 238 A.2d 217 (Me. 1968). If there is evidence of an exception, however, subsection 2, paragraph B requires the State to disprove it, contrary to the rule in **Rowe** that the defendant must sustain the burden that he comes within the exception. Subsection 2 also serves to place the burden on the State as to anything, such as the material in chapter 5 relating to justification, which the code designates as a "defense." Subsection 3 notifies the reader of the code that there are, on the other hand, issues which the defendant is required to prove, designated "affirmative defenses."

Subsection 4 states that where the State must prove a culpable mental state as an element of the crime, any evidence which raises a reasonable doubt on whether the defendant had that mental state is admissible.

§ 6. Application to crimes outside the code

The provisions of chapters 1, 3, 5, 7, 47, 49, 51 and 53 are applicable to crimes defined outside this code, unless the context of the statute defining the crime clearly requires otherwise.

Comment*

In order to achieve uniformity in the enforcement of the criminal law this section provides that rules of general applicability and the sentencing system apply to all criminal offenses, no matter what part of the statutes defines the offenses.

§ 7. Territorial applicability

1. Except as otherwise provided in this section, a person may be convicted under the laws of this State for any crime committed by his own conduct or by the conduct of another for which he is legally accountable only if:

A. Either the conduct which is an element of the crime or the result which is such an element occurs within this State; or

B. Conduct occurring outside this State constitutes an attempt to commit a crime under the laws of this State and the intent is that the crime take place within this State;

C. Conduct occurring outside this State would constitute a criminal conspiracy under the laws of this State, an overt act in furtherance of the conspiracy occurs within this State, and the object of the conspiracy is that a crime take place within this State;

D. Conduct occurring within this State would constitute complicity in the commission of, or an attempt, solicitation or conspiracy to commit an offense in another jurisdiction which is also a crime under the law of this State;

E. The crime consists of the omission to perform a duty imposed on a person by the law of this State, regardless of where that person is when the omission occurs; or

F. The crime is based on a statute of this State which expressly prohibits conduct outside the State, when the actor knows or should know that his conduct affects an interest of the State protected by that statute; or

G. Jurisdiction is otherwise provided by law.

2. Subsection 1, paragraph A does not apply if:

A. Causing a particular result or danger of causing that result is an element and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense; or

B. Causing a particular result is an element of the crime and the result is caused by conduct occurring outside the State which would not constitute an offense if the result had occurred there.

3. When the crime is homicide, a person may be convicted under the laws of this State if either the death of the victim or the bodily impact causing death occurred within the State. If the body of a homicide victim is found within this State, it is presumed that such death or impact occurred within the State. When the crime is theft, a person may be convicted under the laws of this State if he obtained property of another, as defined in chapter 15, section 352, outside of this State and brought the property into the State.

Comment*

This section sets out the rules for deciding whether the courts of Maine may try a crime where some of the offense took place, or was intended to take place, within another jurisdiction. Subsection 1, paragraph A provides the rule that will cover most cases. The remainder of this subsection deals with situations where the interest of Maine in preventing harm within the State warrants prosecution. Subsection 1, paragraph F, for example, provides jurisdiction for protecting the Maine environment from pollution originating from outside. Subsection 2 sets out a limited exception for cases where the conduct outside the State was legal where it took place. Subsection 3 states rules that are presently the law of Maine. See MRSA Title 15, § 2; **Younie v. State**, 281, A.2d 446 (Me. 1971).

§ 8. Statute of limitations

1. It is a defense that prosecution was commenced after the expiration of the applicable period of limitations provided in this section; provided, however, that a prosecution for criminal homicide in the first or 2nd degree may be commenced at any time.

2. Prosecutions for crimes other than criminal homicide in the first or 2nd degree are subject to the following periods of limitations:

A. A prosecution for a Class A, Class B or Class C crime must be commenced within 6 years after it is committed;

B. A prosecution for a Class D or Class E crime must be commenced within 3 years after it is committed.

3. The periods of limitations shall not run:

A. During any time when the accused is absent from the State, but in no event shall this provision extend the period of limitation otherwise applicable by more than 5 years; or

B. During any time when a prosecution against the accused for the same crime based on the same conduct is pending in this State.

4. If a timely complaint or indictment is dismissed for any error, defect, insufficiency or irregularity, a new prosecution for the same crime based on the same conduct may be commenced within 6 months after the dismissal, or during the next session of the grand jury, whichever occurs later, even though the period of limitations has expired at the time of such dismissal or will expire within such period of time.

5. If the period of limitation has expired, a prosecution may nevertheless be commenced for:

A. Any crime based upon breach of fiduciary obligation, within one year after discovery of the crime by an aggrieved party or by a person who has a legal duty to represent an aggrieved party, and who is himself not a party to the crime, whichever occurs first; or

B. Any crime based upon official misconduct by a public servant, at any time when such person is in public office or employment or within 2 years thereafter.

C. This subsection shall in no event extend the limitation period otherwise applicable by more than 5 years.

6. For purposes of this section:

A. A crime is committed when every element thereof has occurred, or if the crime consists of a continuing course of conduct, at the time when the course of conduct or the defendant's complicity therein is terminated; and

B. A prosecution is commenced when a complaint is made or an indictment is returned, whichever first occurs.

7. The defense established by this section shall not bar a conviction of a crime included in the crime charged, notwithstanding that the period of limitation has expired for the included crime, if as to the crime charged the period of limitation has not expired or there is no such period, and there is evidence which would sustain a conviction for the crime charged.

Comment*

There are current Maine statutes imposing limitations on prosecutions similar to those contained in this section. See MRSA Title 15, § 452; Title 17, § 3803. Almost all crimes are presently subject to a six year rule. Subsection 2, paragraph B provides a shorter period for the less serious crimes, while subsection 1 contains a rule that the most serious criminal homicides may be prosecuted at any time. Subsection 5 is similar to the New Hampshire Criminal Code, 1973 & 625:8 III. Subsection 6 sets out guidelines for determining when the applicable period runs. Subsection 7 clarifies the result when the jury returns a verdict of guilt of a lesser offense where the statute has already run on that offense.

§ 9. Plea negotiations

1. A. Person charged with a crime may plead guilty or nolo contendere to that crime, or to any lesser included crime, and the plea may specify the sentence to the same extent as it may be fixed by the court upon conviction after a plea of not guilty. Any such plea must have been accepted by the State and must be approved by the court in open court before it shall become effective. If so accepted and approved, the defendant cannot be sentenced to a punishment more severe than that specified in the plea. If such plea is not accepted by the State and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. If such plea is deemed withdrawn, it may not be received in evidence in any criminal or civil action, or proceeding of any nature.

2. In determining whether to accept such a plea, the State may consider charging a different crime from the one originally charged, and may do so in the interests of justice. If it accepts a plea to such a different crime, the change shall be brought to the attention of the court when it considers approving the plea submitted to it.

3. No plea, or other part of the negotiations leading to the submission of a plea to the court, shall be a matter of public record unless and until such plea is approved by the court.

4. Proceedings under this section shall comply with the requirements of Rule 11, Maine Rules of Criminal Procedure.

Comment*

The purpose of this section is to make the process of plea bargaining more visible. It also provides that a guilty plea may be tentatively made by an accused person, subject to his learning whether the sentence he would receive is more severe than he anticipates. If these conditions of the plea are not acceptable either to the prosecution or the court, the plea may be withdrawn and the case would go to trial. This section is based on chapter 265, section 2 (d) of the Proposed Criminal Code of Massachusetts.

§ 10. Definitions of culpable states of mind

1. "Intentionally."

A. A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

B. A person acts intentionally with respect to attendant circumstances when he is aware of the existence of such circumstances or believes that they exist.

2. "Knowingly."

A. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

B. A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist.

3. "Recklessly."

A. A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.

B. A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.

C. A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation.

4. "Criminal negligence.

A. A person acts with criminal negligence with respect to a result of his conduct when he fails to be aware of a substantial and unjustifiable risk that his conduct will cause such a result.

B. A person acts with criminal negligence with respect to attendant circumstances when he fails to be aware of a substantial and unjustifiable risk that such circumstances exist.

C. A risk is substantial and unjustifiable within the meaning of this subsection if the person's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable and prudent person would observe in the same situation.

5. "Culpable." A person acts culpably when he acts with the intention, knowledge, recklessness or criminal negligence as is required.

Comment*

The code uses only four terms to identify the state of mind, or fault (in the case of criminal negligence) which is an essential element of the crimes that are defined. This section defines those terms so that they have a uniform meaning throughout the law. A number of the terms defined in this section are already frequently used in Title 17; "intentionally" or a varia-

tion of it appears, for example, in at least 60 different sections. Title 17 now also uses, however, terms such as "maliciously", "corruptly", "fraudulently", "wantonly" and "wilfully" which are not repeated in this section or the code.

§ 11. Requirement of culpable mental states; liability without culpability

1. A person is not guilty of a crime unless he acted intentionally, knowingly, recklessly, or negligently, as the law defining the crime specifies, with respect to each element of the crime, except as provided in subsection 5. When the state of mind required to establish an element of a crime is specified as "wilfully," "corruptly," "maliciously," or by some other term importing a state of mind, that element is satisfied if, with respect thereto, the person acted intentionally or knowingly.

2. When the definition of a crime specifies the state of mind sufficient for the commission of that crime, but without distinguishing among the elements thereof, the specified state of mind shall apply to all the elements of the crime, unless a contrary purpose plainly appears.

3. When the law provides that negligence is sufficient to establish an element of a crime, that element is also established if, with respect thereto, a person acted intentionally, knowingly or recklessly. When the law provides that recklessness is sufficient to establish an element of a crime, that element is also established if, with respect thereto, a person acted intentionally or knowingly. When the law provides that acting knowingly is sufficient to establish an element of the crime, that element is also established if, with respect thereto, a person acted intentionally.

4. Unless otherwise expressly provided, a culpable mental state need not be proved with respect to:

A. Any fact which is solely a basis for sentencing classification; or

B. Any element of the crime as to which it is expressly stated that it must "in fact" exist.

5. If the statute defining the crime does not expressly prescribe a culpable mental state with respect to some or all of the elements of the crime, a culpable mental state is nevertheless required, pursuant to subsections 1, 2 and 3, unless:

A. The statute expressly provides that a person may be guilty of a crime without culpability as to those elements; or

B. A legislative intent to impose liability without culpability as to those elements otherwise appears.

Comment*

This section provides general rules for determining when a particular mental state is a required element of a crime. Subsection 1 contains the general rule that one of the designated mental states is always a part of the crime; the exception referred to in subsection 5 is designed to permit the Legislature to dispense with this element by manifesting a clear intention to produce that result.

§ 12. De minimis infractions

1. The court may dismiss a prosecution if, upon notice to the prosecutor and opportunity to be heard, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds the defendant's conduct:

A. Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the crime; or

B. Did not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction; or

C. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime.

2. The court shall not dismiss a prosecution under this section without filing a written statement of its reasons.

Comment*

This section, patterned on the Model Penal Code § 2.12 and the Hawaii Penal Code 1973 § 236, introduces a desirable degree of flexibility in the administration of the law. It gives the courts a visible degree of responsibility in the decision that technical and minor violations of the law need not always be fully prosecuted. The requirement that written reasons be provided serves to insure that the discretion granted by this section is exercised within the scope of the policy expressed in subsection 1.

§ 13. Lesser offenses

The court is not required to instruct the jury concerning a lesser offense unless, on the basis of the evidence, there is a rational basis for the jury finding the defendant guilty of such lesser offense.

Comment*

This code does not undertake to define what is a lesser offense, or when a verdict of guilt as to a lesser offense may be returned by the jury. See **State v. Barnett**, 158, Me. 117; Rule 31(c), Maine Rules of Criminal Procedure. This section does provide a rule, similar to that mentioned in **State v. Ellis**, 325 A.2d 772 (Me. 1974), relating to when the court must instruct the jury on lesser offenses.

§ 14. Separate trials

A defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses were known to the appropriate prosecuting officer at the time of the commencement of the first trial and were within the jurisdiction of a single court, unless the court ordered such separate trials.

Comment*

This section is based on the Model Penal Code § 1.07(2). It is designed to require that all known offenses arising from one set of circumstances be

prosecuted together. The court's power to order them tried separately, however, is explicitly preserved.

CHAPTER 3

CRIMINAL LIABILITY

§ 51. Basis for liability

1. A person commits a crime only if he engages in voluntary conduct, including a voluntary act, or the voluntary omission to perform an act of which he is physically capable.

2. A person who omits to perform an act does not commit a crime unless he has a legal duty to perform the act.

3. Possession is voluntary conduct only if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Comment*

This section states the common law requirements which relate to the need for voluntary action as the basis for criminal liability. See LaFave and Scott, Criminal Law 174-191 (1972). It serves the important function of excluding from liability any conduct that cannot be denominated voluntary. The section is based on the New Hampshire Criminal Code 1973, § 626.1.

§ 52. Ignorance and mistake

1. Ignorance or mistake as to a matter of fact or law is a defense only if:

A. The ignorance or mistake raises a reasonable doubt concerning the kind of culpability required for the commission of the crime; or

B. The law provides that the state of mind established by such ignorance or mistake constitutes a defense.

2. Although ignorance or mistake would otherwise afford a defense to the crime charged, the defense is not available if the defendant would be guilty of another crime had the situation been as he supposed.

3. A mistaken belief that facts exist which would constitute an affirmative defense is not an affirmative defense, except as otherwise expressly provided.

4. A belief that conduct does not legally constitute a crime is an affirmative defense to a prosecution for that crime based upon such conduct if:

A. The statute violated is not known to the defendant and has not been published or otherwise reasonably made available prior to the conduct alleged; or

B. The defendant acts in reasonable reliance upon an official statement, afterward determined to be invalid or erroneous, contained in:

(1) a statute, ordinance or other enactment;

(2) a final judicial decision, opinion or judgment;

(3) an administrative order or grant of permission; or

(4) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the statute defining the crime. This subsection does not impose any duty to make any such official interpretation.

Comment*

This section is taken from the proposed Massachusetts Criminal Code, chapter 263, section 19. There does not appear to be statutory or judicial law in Maine governing this subject.

Subsection 1, paragraph A merely states a rule of evidence to the effect evidence of mistake or ignorance is like any other evidence which may be used to negate the knowledge, intent or other state of mind necessary for the offense. As a defense, the burden will be on the prosecution to disprove it beyond a reasonable doubt, once the defendant puts in such evidence as raises the issue.

Subsection 1, paragraph B makes clear that no inconsistency is intended between this section and any other provision of law which accords legal significance to a mistaken state of mind.

Subsection 2 insures that if the defendant thought he was committing a different offense, then he does not have the "innocent" mind contemplated by this section, and therefore has no defense. Subsection 3 is to the same effect.

Subsection 4 relates to mistakes about law and provides for the defendant to prove by a preponderance of the evidence that he relied on one of the authoritative sources listed in the subsection.

§ 53. Immaturity

1. No criminal proceeding shall be commenced against any person who has not attained his 18th birthday at the time of such proceeding except as the result of a finding of probable cause authorized by Title 15, section 2611, subsection 3, or in regard to the offenses over which juvenile courts have no jurisdiction, as provided in Title 15, section 2552.

2. When it appears that the defendant's age, at the time the crime charged was committed, may have been such that the court lacks jurisdiction by reason of subsection 1, the court shall hold a hearing on the matter and the burden shall be on the State to establish by a preponderance of the evidence that the court does not lack jurisdiction on such grounds.

Comment*

This section is patterned on the proposed Massachusetts Criminal Code, chapter 263, section 24.

Title 15, section 2551 gives the District Court, sitting as a juvenile court, exclusive original jurisdiction over the offenses committed by persons under

the age of 18. Section 2552 of Title 15 carves out exceptions to this jurisdiction for misdemeanors contained in: Title 29 (motor vehicles); Title 38, chapter 1, subchapter VI (watercraft registration and safety); Title 12, chapter 304 (snowmobiles), provided that some of these offenses are designated as remaining within the exclusive, original jurisdiction of the juvenile courts.

Section 2611 in Title 15 gives the juvenile court power to find probable cause against a person under the age of 18 and bind him over to the Grand Jury.

This section preserves the jurisdiction of juvenile courts as otherwise provided and insures that criminal prosecutions are authorized under the law relating to juveniles.

§ 54. Duress

1. **It is a defense that when a defendant engages in conduct which would otherwise constitute a crime, he is compelled to do so by threat of imminent death or serious bodily injury to himself or another person or because he was compelled to do so by force.**

2. **For purposes of this section, conpulsion exists only if the force, threat or circumstances are such as would have prevented a reasonable person in the defendant's situation from resisting the pressure.**

3. **The defense set forth in this section is not available:**

A. To a person who intentionally or knowingly committed the homicide for which he is being tried; or

B. To a person who recklessly placed himself in a situation in which it was reasonably probable that he would be subjected to duress; or

C. To a person who with criminal negligence placed himself in a situation in which it was reasonably probable that he would be subjected to duress, whenever criminal negligence suffices to establish culpability for the offense charged.

Comment*

This section is taken from section 3C7 of Senate 1, 93d Congress, First Session. There does not appear to be either statute or judicial decision in Maine on this subject.

The common law recognized a defense of duress similar to the one set out in this section. It is designed to absolve persons who produce criminal harm without any fault on their part, and who exhibit no particular weaknesses which might be responsible for the harm. This latter point is included in subsection 2 largely on deterrent consideration.

§ 55. Consent

1. **It is a defense that when a defendant engages in conduct which would otherwise constitute a crime against the person or property of another, that**

such other consented to the conduct and that an element of the crime is negated as a result of such consent.

2. When conduct is a crime because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense only if:

A. Neither the injury inflicted nor the injury threatened was such as to endanger life or to cause serious bodily injury; or

B. The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport; or

C. The conduct and the injury are reasonably foreseeable hazards of an occupation or profession or of medical or scientific experimentation conducted by recognized methods and the persons subjected to such conduct or injury have been made aware of the risks involved prior to giving consent.

3. Consent is not a defense within the meaning of this section if:

A. It is given by a person who is declared by a statute or by a judicial decision to be legally incompetent to authorize the conduct charged to constitute the crime, and such incompetence is manifest or known to the actor;

B. It is given by a person who by reason of intoxication, mental illness or defect, or youth, is manifestly unable or known by the defendant to be unable, to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the crime; or

C. It is induced by force, duress or deception.

Comment*

This section is taken from Senate 1, 93d Congress, First Session, and the Proposed Massachusetts Criminal Code, chapter 263, section 42.

There is no general statute covering consent as a defense to crime, and no opinion of the Supreme Judicial Court in a criminal case. Two civil cases, however, have dealt with the matter of consent as a defense to civil recovery, and both have held that there is no such defense. See **Grotton v. Glidden,** 84 Me. 589 (1892) (assault and battery) and **Lembo v. Donnell,** 117 Me. 143 (1918) (abortion patient against physician).

Subsection 1 confirms that there are some offenses where lack of consent is a necessary element, as in forcible rape, and that consent is, therefore, a defense.

Subsection 2 deals with consent as it relates to physical injury. It limits the scope of the defense otherwise available to those instances where life is not seriously threatened. This subsection also recognizes instances where it would be widely agreed that the criminal law has no role to play, even though someone may be hurt.

Subsection 3 imposes limits on when the consent defense can be available.

§ 56. Causation

Unless otherwise provided, when causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient.

Comment*

This section is taken from the proposed Massachusetts Code, chapter 263, section 20. There is neither criminal case law nor statute dealing with the matter of causation.

This section restates the common law rule that "but for" causation generally suffices for criminal liability. As noted in the comment to the proposed Federal Criminal Code, "While this section may not be useful in all cases where causation must be explained, it is intended to be an aid to uniformity and clarification whenever it does apply. 'But for' is a minimal requirement for guilt; and resolving that question permits focusing on the more important issue of culpability as to the result caused." Final Report of the National Commission on Reform of Federal Criminal Laws at p. 32. Stricter requirements of causation may be applied when called for, as in section 3 of chapter 22 where death must be a "natural and probable" result.

§ 57. Criminal liability for conduct of another; accomplices

1. A person may be guilty of a crime if it is committed by the conduct of another person for which he is legally accountable as provided in this section.

2. A person is legally accountable for the conduct of another person when:

A. Acting with the intention, knowledge, recklessness or criminal negligence that is sufficient for the commission of the crime, he causes an innocent person, or a person not criminally responsible, to engage in such conduct; or

B. He is made accountable for the conduct of such other person by the law defining the crime; or

C. He is an accomplice of such other person in the commission of the crime, as provided in subsection 3.

3. A person is an accomplice of another person in the commission of a crime if:

A. With the intent of promoting or facilitating the commission of the crime, he solicits such other person to commit the crime, or aids or agrees to aid or attempts to aid such other person in planning or committing the crime. A person is an accomplice under this subsection to any crime the commission of which was a reasonably foreseeable consequence of his conduct; or

B. His conduct is expressly declared by law to establish his complicity.

4. A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable.

5. Unless otherwise expressly provided, a person is not an accomplice in a crime committed by another person if:

A. He is the victim of that crime; or

B. The crime is so defined that it cannot be committed without his cooperation; or

C. He terminates his complicity prior to the commission of the crime by

(1) informing his accomplice that he has abandoned the criminal activity and

(2) leaving the scene of the prospective crime, if he is present thereat.

6. An accomplice may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has an immunity to prosecution or conviction, or has been acquitted.

Comment*

This section is taken from the New Hampshire Criminal Code, section 626.8. It is based on the Model Penal Code, section 2.06. Other jurisdictions have also followed the Model Penal Code pattern, see e.g., Pennsylvania Crimes Code, section 306; Revised Washington Criminal Code, section 9A.08.060.

The basic statute is in Title 15, section 341. The rules are different for felonies from what they are regarding misdemeanors. Persons actually or constructively present at the place of the crime and are either aiding, abetting, assisting or advising in its commission are principals and are equally guilty with the perpetrator of the felony, State v. Berube, 158 Me. 433 (1962); State v. Burbank, 156 Me. 269 (1960), although they are considered principals in the second degree. Berube, supra. See State v. Dupuis, 188 A.2d 688 (Me. 1963).

In the commission of a misdemeanor, however, all who knowingly participate in the commission of the offense are deemed principals, State v. Vicniere, 128 A.2d 851 (Me. 1957). Presence is not a necessary element.

§ 58. Mental abnormality

1. An accused is not criminally responsible if, at the time of the criminal conduct, as a result of mental disease or defect, he either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.

2. As used in this section "mental disease or defect" means any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs the processes and capacity of a person to control his actions.

3. The defendant shall have the burden of proving, by a preponderance of the evidence, that he lacks criminal responsibility as described in subsection 1.

Comment*

This section is based on the opinion of the Court of Appeals for the District of Columbia Circuit in **United States v. Brawner,** 471 F.2d 969 (D.C. Cir. 1972).

The present rule concerning insanity in criminal cases is in section 102 of Title 15, MRSA. The burden of proof is on the defendant. **State v. Collins,** 297 A.2d 620 (Me. 1972).

This section proposes abandoning the so-called Durham rule in favor of the test recently adopted by the court which originated the Durham rule.

Although abolition of the insanity defense had been discussed by the Commission, there seem to be two good reasons for not going in this direction. One is that it is likely an unconstitutional rule, in that the rule of an insanity defense seems to be so integral a part of the criminal process that a person may not be convicted without invoking its benefits. At least two courts have indicated that the constitution forbids doing away with the defense. **Sinclair v. State,** 132 So. 581, 583 (Miss. 1931) (concurring opinion of Ethridge, J.); **State v. Strasburg,** 110 P. 1020 (Wash. 1910).

In addition, even if the defense were abolished, it would still be necessary to admit psychological evidence that is relevant to the culpable state of mind which must be proved as one of the elements of the crime. There would thus be little change on the matter of whether expert testimony would be involved in the determination of guilt or innocence. An evaluation of the complications such as system imports is highly negative. See Louisell and Hazard, **Insanity as a Defense: The Bifurcated Trial,** 49 Calif. L. Rev. 805 (1961).

§ 59. Procedure upon plea of not guilty coupled with plea of not guilty by reason of insanity

1. When the defendant enters a plea of not guilty together with a plea of not guilty by reason of insanity, he shall also elect whether the trial shall be in 2 stages as provided for in this section, or a unitary trial in which both the issues of guilt and of insanity are submitted simultaneously to the jury. At the defendant's election, the jury shall be informed that the 2 pleas have been made and that the trial will be in 2 stages.

2. If a two-stage trial is elected by the defendant, there shall be a separation of the issue of guilt from the issue of insanity in the following manner.

A. The issue of guilt shall be tried first and the issue of insanity tried only if the jury returns a verdict of guilty. If the jury returns a verdict of not guilty, the proceedings shall terminate.

B. Evidence of mental disease or defect, as defined in section 58, shall not be admissible in the guilt or innocence phase of the trial, but shall only be admissible in the 2nd phase following a verdict of guilty.

3. The issue of insanity shall be tried before the same jury as tried the issue of guilt. The defendant may, however, elect to have the issue of insanity tried by the court without a jury.

4. If the jury in the first phase returns a guilty verdict, the trial shall proceed to the 2nd phase. The defendant and the State may rely upon evidence admitted during the first phase or they may recall witnesses. Any evidence relevant to the defendant's responsibility, or lack thereof, under section 58, is admissible. The order of proof shall reflect that the defendant has the burden of establishing his lack of responsibility. The jury shall return a verdict that the defendant is responsible, or not guilty by reason of mental disease or defect excluding responsibility. If the defendant is found responsible, the court shall sentence him according to law.

5. This section shall not apply to cases tried before the court without a jury.

Comment*

This section is patterned on the Wisconsin Criminal Procedure Code, section 971.175. The present Maine practice is to try the issues of guilty and insanity simultaneously.

The Code represents a third choice in addition to leaving trial of the insanity issue as it presently is, and abolishing the defense of insanity. The approach of this section is to simplify the problem of trying the guilt issue by excluding evidence of insanity until after the defendant has been found tentatively guilty. What authority there is on the constitutionality of doing this is in conflict. Wisconsin has upheld a similar provision against constitutional attack. **State v. Hebard,** 50 Wis. 2d 408 (1970); **State v. Anderson,** 51 Wis. 2d 557 (1970); **Gibson v. State,** 55 Wis. 2d 110 (1971). Arizona, on the other hand, struck down a two-trial statute which, however, did not include an election by the defendant. **State v. Shaw,** 106 Ariz. 103 (1970). In some respects, the issue appears to be whether there is a due process right to a diminished responsibility defense. The last answer to this from the Supreme Court was negative. **Fisher v. United States,** 328 U.S. 463 (1946).

The advantages to the defendant of the procedures under this section are that he may have the opportunity to make an insanity defense without thereby making the implied admission to the jury that he committed the act charged against him. As subsection 2, paragraph B is phrased, the defendant is not precluded, in the guilt phase, from entering evidence of accident, intoxication, or anything else that might raise a reasonable doubt concerning the **mens rea** element of the crime, save evidence of mental disease or defect; and, of course, the jury will continue to be instructed that it must find the **mens rea** beyond a reasonable doubt in order to find guilt. In this regard, strong disagreement is expressed by the Code with the state-

ment in **Shaw** that: "If an individual is insane he would not be able to intend an act, nor would he be able to premeditate or have malice aforethought." 106 Ariz. at 109. The reaction of the Supreme Court of Wisconsin to this seems persuasive. In speaking of this quote from **Shaw,** the Wisconsin court noted:

> Applied to the case now before us, this would have us state as a matter of law that the defendant, if found insane . . . did not and could not intend to kill the five persons he did kill. He aimed the gun at least five times, each time at the head of one of the five. He pulled the trigger at least five times. He did not miss. The bullets hit their mark and five persons lay dead. The Arizona conclusion is that their deaths cannot be found to have been intentionally caused. We do not share the conclusion, much less its certainty. For, as we see it, a court finding of legal insanity is not a finding of inability to intend; it is rather a finding that under the applicable standard or test, the defendant is excused from criminal responsibility for his acts. 50 Wis. at 419-30.

This view is in conformity with the opinion of Judge Bazelon in **Brawner** where he identifies the jury's function in these cases as the determination of whether the defendant "cannot justly be held responsible for his act." 471 F.2d at 1032. Judge Bazelon would have the jury instructed in those terms. The majority in **Brawner** discusses and rejects this alternative at p. 986.

It is proposed that this section be tied in with the existing provisions of Title 15, sections 103 and 104, and that the issue of competence to stand trial continue to be governed by section 101 of Title 15, as revised in 1973.

§ 60. Criminal liability of an organization

1. An organization is guilty of a crime when:

A. It omits to discharge a specific duty of affirmative performance imposed on it by law, and the omission is prohibited by this code or by a statute defining a criminal offense outside of this code; or

B. The conduct or result specified in the definition of the crime is engaged in or caused by an agent of the organization while acting within the scope of his office or employment.

2. It is no defense to the criminal liability of an organization that the individual upon whose conduct the liability of the organization is based has not been prosecuted or convicted, has been convicted of a different offense, or is immune from prosecution.

Comment*

This section provides rules for determining when an artificial entity may be found guilty of a crime. Subsection 1 deals with failures to act and requires that a duty be imposed by law and that failure to perform the duty be made a crime. Subsection 2 concerns affirmative action and holds the organization criminally liable for criminal conduct by its agents acting on its behalf.

§ 61. Individual liability for conduct on behalf of organization

1. An individual is criminally liable for any conduct he performs in the name of an organization or in its behalf to the same extent as if it were performed in his own name or behalf. Such an individual shall be sentenced as if the conduct had been performed in his own name or behalf.

2. If a criminal statute imposes a duty to act on an organization, any agent of the organization having primary responsibility for the discharge of the duty is criminally liable if he recklessly omits to perform the required act, and he shall be sentenced as if the duty were imposed by law directly upon him.

Comment*

This section deals with the criminal liability of a person acting on behalf of an organization. Such a person is held accountable to the same extent as if he had been acting purely on his own.

§ 62. Military orders

1. It is a defense if the defendant engaged in the conduct charged to constitute a crime in obedience to an order of his superior in the armed services which he did not know to be unlawful.

2. If the defendant was reckless in failing to know the unlawful nature of such an order, the defense is unavailable in a prosecution for a crime for which recklessness suffices to establish liability.

Comment*

The purpose of this section is to make clear that conduct in obedience to a lawful military order is not criminal. The most likely context in which this section might be important is in regard to actions by the National Guard.

CHAPTER 5

JUSTIFICATION

§ 101. General rules

1. Conduct which is justifiable under this chapter constitutes a defense to any crime; provided, however, that if a person is justified in using force against another, but he recklessly injures or creates a risk of injury to 3rd persons, the justification afforded by this chapter is unavailable in a prosecution for such recklessness.

2. The fact that conduct may be justifiable under this chapter does not abolish or impair any remedy for such conduct which is available in any civil action.

3. For purposes of this chapter, use by a law enforcement officer or a corrections officer of chemical mace or any similar substance composed of a mixture of gas and chemicals which has or is designed to have a disabling effect upon human beings is use of nondeadly force.

Comment*

This section combines provisions of the New Hampshire Criminal Code, section 627:1 and the Proposed Massachusetts Criminal Code, chapter 263, section 32 (b).

There are no statutes on this subject, and the rule concerning burden of proof on justification has only recently been settled in regard to self-defense. In **State v. Millett,** 273 A.2d 504, 507-08 (Me. 1971) the Supreme Judicial Court noted:

> The majority rule, embraced by many courts, declines to shift the burdent of proof to defendant, but requires only that he assume **the burden of going forward with evidence** (court's emphasis) of such nature and quality as to raise the issue of self-defense and justify a reasonable doubt of guilt if upon the whole evidence the factfinder entertains such a doubt.

This section generalizes the rule of **Millett** to all cases where there is a claim of justification for the criminal conduct. The rule of the majority of the courts, accepted by **Millett,** has also become the rule of the recodifications, so that the burden of going forward with evidence of justification is usually placed on the defendant by the new codes.

The proviso in subsection one is designed to make sure that where a person is justified, for example, in firing a weapon at another, he does not consciously disregard an undue risk that bystanders might get hurt.

The purpose of subsection two is to have the rules of civil liability free from unintended amendment by the provisions of this chapter. It may be, of course, that the rules of justification in this chapter turn out to be similar or identical with the rules that civilly exculpate. But it is not the function of the criminal code to determine whether that is a useful result.

The general rule in subsection 3 permits use of mace and similar substances by law enforcement officers as an alternative to the use of force more likely to have a permanent disabling effect.

§ 102. Public duty

1. Any conduct, other than the use of physical force under circumstances specifically dealt with in other sections of this chapter, is justifiable when it is authorized by law, including laws defining functions of public servants or the assistance to be rendered public servants in the performance of their duties; laws governing the execution of legal process or of military duty; and the judgments or orders of courts or other public tribunals.

2. The justification afforded by this section to public servants is not precluded:

A. By the fact that the law, order or process was defective provided it appeared valid on its face and the defect was not knowingly caused or procured by such public servant; or,

B. As to persons assisting public servants, by the fact that the public servant to whom assistance was rendered exceeded his legal authority or

that there was a defect of jurisdiction in the legal process or decree of the court or tribunal, provided the actor believed the public servant to be engaged in the performance of his duties or that the legal process or court decree was competent.

Comment*

This section is taken from the New Hampshire Criminal Code, § 627:2.

There is no general rule at present making explicit the assumption that when a public servant acts within the scope of his duty, he incurs no criminal liability for so doing. There are indications in the cases, however, that this is the assumption. See e.g., **State v. Phinney,** 42 Me. 284 (1856), noting "the protection which the law throws around its ministers when on the rightful discharge of their official duty;" **cf. State v. Robinson,** 145 Me. 77 (1950), declaring an illegal arrest to be an assault and battery.

It does not appear to be settled in Maine whether a defect in the authority under which a public servant acts will affect the justification of his conduct, when he is unaware of the defect.

A primary purpose of the first subsection is to insure that a distinction is made between acts of public servants which involve the use of physical force, and those which do not. The former are the subject of detailed rules in other sections of this chapter, while the latter are governed by the general rule of this section.

Subsection 2 is designed to permit public servants to act upon authority which appears to them to be **bona fide.** It is written so as to make irrelevant any personal knowledge of a defect which a public servant may have in any particular instance, in order to permit the public's business to be carried on on the basis of documents on their face official and lawful. To permit litigation of the officer's state of mind under such circumstance would inject an undesirable degree of uncertainty.

§ 103. **Competing harms**

1. **Conduct which the actor believes to be necessary to avoid imminent physical harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the crime charged. The desirability and urgency of such conduct may not rest upon considerations pertaining to the morality and advisability of such statute.**

2. **When the actor was reckless or criminally negligent in bringing about the circumstances requiring a choice of harms or in appraising the necessity of his conduct, the justification provided in subsection 1 does not apply in a prosecution for any crime for which recklessness or criminal negligence, as the case may be, suffices to establish criminal liability.**

Comment*

This section is taken from the New Hampshire Criminal Code, § 627:3.

The problems covered by this section do not seem to be the subject of statutory or case law.

The purpose of this section is to provide a general guidance for the resolution of infrequently occurring, but troublesome circumstances, such as where a truck driver who discovers a defect in his brakes on a downhill road, decides to bring his vehicle to a stop near a crowd of people at the foot of the road, rather than turn off the road and risk some personal injury to himself.

The second sentence of the first subsection is designed to prevent this section from being a basis for justifying acts of civil disobedience.

Subsection 2 is designed to preserve the possibility of criminal liability based on recklessness or negligence when intentional conduct might be justified.

§ 104. Use of force in defense of premises

A person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using nondeadly force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate the commission of a criminal trespass by such other in or upon such premises, but he may use deadly force under such circumstances only in defense of a person as prescribed in section 108 or when he reasonably believes it necessary to prevent an attempt by the trespasser to commit arson.

Comment*

This section is taken from the New Hampshire Criminal Code, § 627:7.

State v. Benson, 155 Me. 115, 119 (1959) states "When one goes upon the land of another without invitation or license he is there unlawfully as a trespasser and the owner may take reasonable measures to remove him. This follows the view of 4 AmJur § 38, p. 147. Trespassers, however, do have the right of self-defense when there is no request by the land owner to leave. However, if the trespasser uses actual force in gaining entrance, a request to leave is not necessary, neither is a request necessary when it would be useless, it would be dangerous, or substantial harm could be done before the request was made." It does not distinguish or explain "substantial harm" in terms of individuals, property or premises. See also **Stearns v. Sampson,** 59 Me. 566 (1871), permitting a landlord to use force to eject a tenant upon termination of the tenancy; **State v. Brown,** 302 A. 2d 322 (Me. 1973), reiterating the right to use force against a trespasser.

The rule of this section follows generally the statements made in the **Benson** and **Stearns** cases. It is specifically provided, however, that the use of deadly force is governed by the section in this chapter on that subject. Additionally, the owner is justified in using deadly force to prevent his premises from being burned or blown up.

§ 105. Use of force in property offenses

A person is justified in using a reasonable degree of nondeadly force upon another when and to the extent that he reasonably believes it necessary to prevent what is or reasonably appears to be an unlawful taking of his prop-

erty, or criminal mischief, or to retake his property immediately following its taking; but he may use deadly force under such circumstances only in defense of a person as prescribed in section 108.

Comment*

This section is taken from the New Hampshire Criminal Code, § 627:8. There is no settled law on this subject. The only case mentioning the subject matter of this section appears to be **State v. Gilman,** 69 Me. 163 (1879) which states: "The law is well settled that an assault with intent to kill cannot be justified for the defense of property."

This section permits property owners to use reasonable and non-deadly force to prevent theft or destruction of their property. The use of deadly force, however, is to be governed by the section on that subject.

§ 106. Physical force by persons with special responsibilities

1. A parent, foster parent, guardian or other similar person responsible for the long term general care and welfare of a person under the age of 17 is justified in using a reasonable degree of force against such person when and to the extent that he reasonably believes it necessary to prevent or punish such person's misconduct. A person to whom such parent, foster parent, guardian or other responsible person has expressly delegated permission to so prevent or punish misconduct is similarly justified in using a reasonable degree of force.

2. A teacher or person otherwise entrusted with the care or supervision of a person under the age of 17 for special and limited purposes is justified in using a reasonable degree of force against any such person who creates a disturbance when and to the extent that he reasonably believes it necessary to control the disturbing behavior or to remove such person from the scene of such disturbance.

3. A person responsible for the general care and supervision of a mentally incompetent person is justified in using a reasonable degree of force against such person who creates a disturbance when and to the extent that he reasonably believes it necessary to control the disturbing behavior or to remove such person from the scene of such disturbance.

4. The justification extended in subsections 1, 2 and 3 does not apply to the purposeful or reckless use of force that creates a substantial risk of death, serious bodily injury, or extraordinary pain, mental distress or humiliation.

5. Whenever a person is required by law to enforce rules and regulations, or to maintain decorum or safety, in a vessel, aircraft, vehicle, train or other carrier, or in a place where others are assembled, may use nondeadly force when and to the extent that he reasonably believes it necessary for such purposes, but he may use deadly force only when he reasonably believes it necessary to prevent death or serious bodily injury.

6. A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious bodily injury upon himself may use a degree of force on such person as he reasonably believes to be necessary to thwart such a result.

7. A licensed physician, or a person acting under his direction, may use force for the purpose of administering a recognized form of treatment which he reasonably believes will tend to safeguard the physical or mental health of the patient, provided such treatment is administered:

A. With consent of the patient or, if the patient is a minor or incompetent person, with the consent of the person entrusted with his care and supervision; or

B. In an emergency relating to health when the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person concerned for the welfare of the patient would consent.

8. A person identified in this section for purposes of specifying the rule of justification herein provided, is not precluded from using force declared to be justifiable by another section of this chapter.

Comment*

This section is patterned on the New Hampshire Criminal Code, § 627:6.

Several statutes deal with the subject matter of this section. Under Title 19, section 218 a parent is guilty of a crime if he "cruelly treats" his child, or uses "extreme punishment." In Title 15, section 2716 the superintendent of a state school is given the same powers as a parent.

It appears that teachers may inflict corporal punishment and incur liability only for the use of excessive force. See **Patterson v. Nutter,** 78 Me. 509 (1886).

In regard to public conveyances, Title 35, section 1171 gives to the conductor a power to eject "in a reasonable manner and at a reasonable place anyone acting in a drunk or disorderly manner." This authority may be exercised against a person who refuses to pay his fare. **State v. Gould,** 53 Me. 279 (1865).

Physicians have an immunity from civil liability when they administer, with due care, emergency medical treatment. Title 32, section 3291.

Ths section deals with several different roles under circumstances where the use of force is not uncommon.

Subsection 1 permits parents to use force against their children which they reasonably believe is necessary for punishment or to prevent misbehavior. This would appear to be the same rule as is implied in the statutory prohibition against **extreme** punishment.

Teachers, however, are not granted authority to use force in order to punish by subsection 2 which thereby changes present law. It is necessary for a teacher to have order so that he may teach, and subsection 2 gives him authority to maintain order when a child is creating a disturbance or when he refuses to leave the classroom or other school area.

Persons in charge of institutions, such as mental hospitals, are given a broader scope of authority by virtue of their 24 hour responsibility for their patients.

Subsection 4 serves to place a legislative limit on what may be deemed reasonable under the first three subsections. That is, the purpose of the subsection is to prohibit death, serious bodily injury, or substantial amounts of either pain, mental suffering or humiliation. Subsection 5 seeks to give authority that is commensurate with responsibility. Subsections 6 and 7 articulate rules which conform with general expectations of what the law permits under the named circumstances.

§ 107. Physical force in law enforcement

1. A law enforcement officer is justified in using a reasonable degree of nondeadly force upon another person:

A. When and to the extent that he reasonably believes it necessary to effect an arrest or to prevent the escape from custody of an arrested person, unless he knows that the arrest or detention is illegal; or

B. To defend himself or a 3rd person from what he reasonably believes to be the imminent use of nondeadly force encountered while attempting to effect such an arrest or while seeking to prevent such an escape.

2. A law enforcement officer is justified in using deadly force only when he reasonably believes such force is necessary:

A. To defend himself or a 3rd person from what he reasonably believes is the imminent use of deadly force; or

B. To effect an arrest or prevent the escape from arrest of a person whom he reasonably believes

(1) has committed a crime involving the use or threatened use of deadly force, or is using a deadly weapon in attempting to escape, or otherwise indicates that he is likely seriously to endanger human life or to inflict serious bodily injury unless apprehended without delay; and

(2) he had made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest and has reasonable grounds to believe that the person is aware of these facts.

3. A private person who has been directed by a law enforcement officer to assist him in effecting an arrest or preventing an escape from custody is justified in using;

A. A reasonable degree of nondeadly force when and to the extent that he reasonably believes such to be necessary to carry out the officer's direction, unless he believes the arrest is illegal; or

B. Deadly force only when he reasonably believes such to be necessary to defend himself or a 3rd person from what he reasonably believes to be the imminent use of deadly force, or when the law enforcement officer directs him to use deadly force and he believes such officer himself is authorized to use deadly force under the circumstances.

4. A private person acting on his own is justified in using nondeadly force upon another when and to the extent that he reasonably believes it necessary

to arrest or prevent the escape from arrest of such other whom he reasonably believes to have committed a crime; but he is justified in using deadly force for such purpose only when he reasonably believes it necessary to defend himself or a 3rd person from what he reasonably believes to be the imminent use of deadly force.

5. A corrections officer or law enforcement officer in a facility where persons are confined, pursuant to an order of a court or as a result of an arrest, is justified in using deadly force against such persons under the circumstances described in subsection 2 of this section. He is justified in using a reasonable degree of nondeadly force when and to the extent they reasonably believe it necessary to prevent any other escape from such a facility.

6. A reasonable belief that another has committed a crime means such belief in facts or circumstances which, if true, would in law constitute an offense by such person. If the facts and circumstances reasonably believed would not constitute an offense, an erroneous though reasonable belief that the law is otherwise does not make justifiable the use of force to make an arrest or prevent an escape.

7. Use of force that is not justifiable under this section in effecting an arrest does not render illegal an arrest that is otherwise legal and the use of such unjustifiable force does not render inadmissible anything seized incident to a legal arrest.

8. Nothing in this section constitutes justification for conduct by a law enforcement officer amounting to an offense against innocent persons whom he is not seeking to arrest or retain in custody.

Comment*

This section is a modified version of section 572 of the New Hampshire Report of the Commission to Recommend Codification of the Criminal Laws.

There is relatively little Maine law on this subject. Title 15, section 704 provides that in making an arrest, if the law enforcement officer "acts wantonly or oppressively, or detains a person without warrant longer than is necessary to procure it, he shall be liable to such person for the damages suffered thereby." This creates a civil liability to the person detained. **State v. Boynton,** 143 Me. 313 (1948); **Bale v. Ryder,** 290 A2d 359 (Me. 1972), and does not constitute any defense for the person arrested.

Section 558 of Title 34 provides a justification for "suppressing an insurrection among the convicts of the State Prison, and . . . preventing their escape or rescue therefrom, or from any other legal custody or confinement" even if the convict is wounded or killed. Section 595 of the same title is to the same effect in providing a justification for wounding or killing any convict who refuses and resists obedience to a lawful command.

This section deals first with the justification provided to law enforcement officers. It is divided into justification for nondeadly force and for the use of deadly force. In regard to the former, subsection 1 provides a rule that

the officer may use the force necessary to carry out his duty to arrest and prevent escapes, and may similarly use the nondeadly force that is required to prevent persons from interfering with the performance of these duties.

In regard to the use of deadly force, the officer is justified in using it to defend himself or another from a third person's use of such force. In addition, he is granted the right to use deadly force in making arrests under circumstances where the person to be arrested poses a threat to human life. Subsection 2, paragraph B also includes provisions designed to insure that, even under these circumstances, deadly force is a last resort.

Subsection 3 is concerned with the force a private person may use when he is assisting a law enforcement officer. It does not purport to define the citizen's duty to respond to a request for such assistance, nor does it define when an officer is authorized to request the assistance. Subsection 4 is similarly limited in that it does not set out the circumstances which might give rise to a citizen's arrest; it merely says that when he does arrest, he may use reasonable force. Use of deadly force for these purposes, however, is limited to self-defense circumstances.

Justification for use of force in a correctional facility is the same as applies when a law enforcement officer seeks to prevent the escape of an arrested person, and subsection 5 makes an explicit incorporation of those rules.

Subsection 6 serves to restate, in the law enforcement context, the generally applicable rule that mistakes about law do not change one's legal rights. It is to be expected, in any event, that law enforcement officers will have more than a passing knowledge of the law defining offenses.

Subsection 7 provides assurance that there is no "windfall" to an arrested or searched person merely by virtue of his otherwise legal arrest being accomplished by excessive force.

The final subsection states that if a law enforcement officer recklessly shoots a bystander when he is, with justification, shooting at an escaping criminal, he may be guilty of recklessly wounding or killing the bystander.

§ 108. Physical force in defense of a person

1. A person is justified in using a reasonable degree of nondeadly force upon another person in order to defend himself or a 3rd person from what he reasonably believes to be the imminent use of unlawful, nondeadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose. However, such force is not justifiable if:

A. With a purpose to cause physical harm to another person, he provoked the use of unlawful, nondeadly force by such other person; or

B. He was the initial aggressor, unless after such aggression he withdraws from the encounter and effectively communicates to such other per-

son his intent to do so, but the latter notwithstanding continues the use or threat of unlawful, nondeadly force; or

C. The force involved was the product of a combat by agreement not authorized by law.

2. A person is justified in using deadly force upon another person when he reasonably believes that such other person is about to use unlawful, deadly force against the actor or a 3rd person, or is likely to use any unlawful force against a person present in dwelling while committing or attempting to commit a burglary of such dwelling, or is committing or about to commit kidnapping or a forcible sex offense. However, a person is not justified in using deadly force on another to defend himself or a 3rd person from deadly force by the other:

A. If, with a purpose to cause physical harm to another, he provoked the use of unlawful deadly force by such other; or

B. If he knows that he can, with complete safety

(1) retreat from the encounter, except that he is not required to retreat if he is in his dwelling and was not the initial aggressor, provided that if he is a law enforcement officer or a private person assisting him at his direction and was acting pursuant to section 107, he need not retreat; or

(2) surrender property to a person asserting a claim of right thereto; or

(3) comply with a demand that he abstain from performing an act which he is not obliged to perform; nor is the use of deadly force justifiable when, with the purpose of causing death or serious bodily harm, the actor has provoked the use of force against himself in the same encounter.

Comment*

This section is patterned on the New Hampshire Criminal Code 1973, § 627:4. It undertakes to clarify and articulate the law relating to self-defense and to the circumstances in which force may be used against another even in the absence of some aggression against the actor.

Subsection 1 provides the general rule that force may be used for self-defense or in defense of a third person. Subsection 1, paragraphs A-C declare exceptions to the rule under circumstances where the defense ought not to be recognized. The criteria for use of deadly force are set out in subsection 2; they permit such force as a matter of self-defense, when there is a risk of physical harm from a burglar, and in order to prevent kidnapping or a forcible sex offense. Subsection 2, paragraph B creates exceptions to this as a manifestation of a policy that human life is to be preserved where possible.

PART 2

SUBSTANTIVE OFFENSES

CHAPTER 7

OFFENSES OF GENERAL APPLICABILITY

§ 151. Conspiracy

1. A person is guilty of conspiracy if, with the intent that conduct be performed which, in fact, would constitute a crime or crimes, he agrees with one or more others to engage in or cause the performance of such conduct.

2. If a person knows that one with whom he agrees has agreed or will agree with a 3rd person to effect the same objective, he shall be deemed to have agreed with the 3rd person, whether or not he knows the identity of the 3rd person.

3. A person who conspires to commit more than one crime is guilty of only one conspiracy if the crimes are the object of the same agreement or continuous conspiratorial relationship.

4. No person may be convicted of conspiracy to commit a crime unless it is alleged and proved that he, or one with whom he conspired, took a substantial step toward commission of the crime. A substantial step is any conduct which, under the circumstances in which it occurs, is strongly corroborative of the firmness of the actor's intent to complete commission of the crime; provided that speech alone may not constitute a substantial step.

5. Accomplice liability for crimes committed in furtherance of the conspiracy is to be determined by the provisions of chapter 3, section 57.

6. For the purpose of determining the period of limitations under chapter 1, section 8.

A. A conspiracy shall be deemed to continue until the criminal conduct which is its object is performed, or the agreement that it be performed is frustrated or is abandoned by the defendant and by those with whom he conspired. For purposes of this subsection, the object of the conspiracy includes escape from the scene of the crime, distribution of the fruits of the crime, and measures, other than silence, for concealing the commission of the crime or the identity of its perpetrators.

B. If a person abandons the agreement, the conspiracy terminates as to him only when:

(1) he informs a law enforcement officer of the existence of the conspiracy and of his participation therein; or

(2) he advises those with whom he conspired of his abandonment. The defendant shall prove his conduct under subparagraph 2 by a preponderance of the evidence.

7. It is no defense to prosecution under this section that the person with whom the defendant is alleged to have conspired has been acquitted, has not

been prosecuted or convicted, has been convicted of a different offense, or is immune from or otherwise not subject to prosecution.

8. It is a defense to prosecution under this section that, had the objective of the conspiracy been achieved, the defendant would have been immune from liability under the law defining the offense, or as an accomplice under chapter 3, section 57.

9. Conspiracy is an offense classified as one grade less serious than the classification of the most serious crime which is its object, except that conspiracy to commit criminal homicide in the first or 2nd degree is a Class A crime. If the most serious crime is a Class E crime, the conspiracy is a Class E crime.

Comment*

The draft changes Maine law under Title 17, sections 951 and 952 in some respects, and provides rules in some circumstances which are not covered by the law.

The phrase "in fact" is designed to settle a problem which has arisen about the conspiracy offense, namely, does it make any difference that the defendant does not know that what he agrees to is a crime? The answer provided here, and in the other codes, is No.

Subsection 2 provides a rule for still another fuzzy aspect of conspiracy at common law, and under such statutes as are in force in Maine. This relates to the scope of the conspiracy and the matter of who is a conspirator with whom. The problem arises in many contexts, but the narcotics situation is a ready illustration. The street pusher who buys from his supplier, knowing that the latter is involved in an agreement with a third party source, becomes a conspirator with such a third party, even if he does not know who he is.

Subsection 3, too, is a commonly found provision designed to settle the question of how many offenses are committed when the agreement among the conspirators relates to more than one crime. The rule that only one conspiracy results in such circumstances does not, of course, prevent multiple criminal liability if the criminal objects of the agreement are achieved.

Subsection 4 changes the common law rule that has prevailed in Maine to the effect that no overt act is required for the conspiracy to constitute an offense. **State v. Chick,** 263 A.2d 71 (Me. 1970). The overt act requirement that has long prevailed in federal law, and has been carried forward in the proposed Federal Criminal Code, is provided for in a modified form by subsection 4. The modification is in the direction of requiring more than has traditionally been needed to satisfy the federal overt act requirement. The draftsmen of the Federal Code recognize this difficulty, for in the comment to the conspiracy statute it is noted that: "the act need not constitute a 'substantial step' as is required in the case of attempt . . . An alternative to the text would be to adopt the substantial step requirement on the theory that otherwise the act may be innocent in itself and not particularly corroborative of the existence of a conspiracy." The appraisal of the proposed Federal Code by the American Civil Liberties Union includes:

An overt act is required to prove the firmness of the intent. Unfortunately, this act can be virtually negligible, indicative of absolutely nothing. It therefore offers no reliable indication of the danger to the community, for the act can be very far indeed from actually trying to achieve the unlawful objective.

It would be more appropriate to insist that the overt act represent a substantial step toward consummation. The Comment recognizes this shortcoming of the proposed provision and raises the possibility of such a requirement.

Testimony of the American Civil Liberties Union before the Senate Report of the National Commission on Reform of Federal Criminal Laws, March 21, 1972 at p. 57.

Section 57 of chapter 3 of the proposed criminal code includes rules for determining when one person may be held criminally liable for the criminal conduct of another. Subsection 5 says that a conspirator is to be held responsible for the crimes of his co-conspirator pursuant to such rules.

Subsection 6 combines provisions from the Massachusetts and Federal codes in determining how to compute the running of the statute of limitations in regard to conspiracy offenses.

Subsection 7 proposes to change the present law in Maine, as it appears in **State v. Breau,** 222 A.2d 774 (Me. 1966). In that case, A, B, and C were jointly tried for conspiracy. The confessions of A and B were introduced in order to establish the conspiracy. But since A and B had not been advised of their constitutional rights prior to giving the confessions, they were granted a directed acquittal. The conviction of C was reversed on appeal by the Supreme Judicial Court on the grounds that it was not possible to convict only one conspirator, the court remarking that "he could not conspire with himself." Subsection 7 would convict him despite this. Since he had done everything prohibited by the penal law, there is every reason to hold him accountable.

Subsection 8 deals with a somewhat converse situation. Here the defendant who satisfies all the elements of the offense is, nonetheless, not to be held liable. The under-age person in a statutory rape case, for example, may technically become a conspirator by agreeing to the prohibited relations, but as the victim to be protected, she would not be criminally liable, and this subsection insures that this protection extends to the conspiratorial relationship as well.

§ 152. Attempt

1. **A person is guilty of criminal attempt if, acting with the kind of culpability required for the commission of the crime, and with the intent to complete the commission of the crime, he engages in conduct which, in fact, constitutes a substantial step toward its commission. A substantial step is any conduct which goes beyond mere preparation and is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime.**

2. It is no defense to a prosecution under this section that it was impossible to commit the crime which the defendant attempted, provided that it would have been committed had the factual and legal attendant circumstances specified in the definition of the crime been as the defendant believed them to be.

3. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under chapter 3, section 57 were the crime committed by the other person, even if the other person is not guilty of committing or attempting the crime.

4. Criminal attempt is an offense classified as one grade less serious than the classification of the offense attempted, except that an attempt to commit a Class E crime is a Class E crime, and an atttempt to commit criminal homicide in the first or 2nd degree is a Class A crime.

Comment*

There are two statutes of general applicability which deal with the subject of attempts, Title 17, sections 251 and 252.

In addition to these two statutes, there are other penal laws which include an attempt among their definitional elements, for example, Title 17, sections 1405, 1405-A, relating to escapes from confinement and attempts to escape.

Although section 251 specifically mentions the doing of some act towards the commission of the crime, other attempt statutes such as section 1405, do not. It has been held by the Supreme Judicial Court, however, that where an attempt is included within the law, some action beyond preparation is nonetheless required to be proved to make out an attempt. **Logan v. State,** 263 A.2d 266 (Me. 1970).

This section makes very little change in current Maine law. The first subsection spells out a bit more clearly the nature of the mental element which must accompany the conduct, and specifies the significance which that conduct must have in the total circumstances.

Subsection 2 deals with a problem that has arisen regarding attempts (but apparently not in Maine) when, for one reason or another, it would have been impossible for the defendant to consummate the crime, **e.g.,** giving his victim harmless sugar, supposing it to be arsenic. Since, in such cases, it is merely good luck that frustrates the offense, the criminal liability of the actor is not affected.

Subsection 3 fills a gap in the law which appears when the actor's conduct would bring about complicity liability were the offense to be committed by his accomplice, but because the offense is not consummated, the actor cannot be held as an accomplice to anything. Here, too, the actor satisfies all of the elements of the attempt offense, but for reasons unrelated to him, no attempt or consummation is brought about by the other person.

§ 153. Solicitation

1. A person is guilty of solicitation if he commands or attempts to induce another person to commit a particular Class A or Class B crime, whether as principal or accomplice, with the intent to cause the imminent commission of the crime, and under circumstances which the actor knows make it very likely that the crime will take place.

2. It is a defense to prosecution under this section that, if the criminal object were achieved, the defendant would not be guilty of a crime under the law defining the crime or as an accomplice under chapter 3, section 57.

3. It is no defense to a prosecution under this section that the person solicited could not be guilty of the crime because of lack of responsibility or culpability, or other incapacity or defense.

4. Solicitation is an offense classified as one grade less serious than the classification of the crime solicited, except that solicitation to commit criminal homicide in the first or 2nd degree is a Class A crime.

Comment*

There is no Maine statute making this sort of conduct criminally punishable. Solicitation of a felony has been recognized as a common law offense in Maine, however, since 1875. See **State v. Beckwith,** 135 Me. 423, 198 A. 739 (1938), citing **State v. Ames,** 64 Me. 386 (1875), a case involving soliciting a witness not to appear at a trial to which he had been summoned. According to the **Beckwith** opinion, the offense of solicitation can be committed even if the crime solicited does not take place.

Several changes in the common law offense are proposed in this section. Following the federal pattern of requiring some element beyond mere verbal expression for there to be criminal liability, subsection 1 includes a requirement of knowledge that the crime solicited will very likely take place.

Similar to the preservation of policies of immunity provided for in sections one and two of this chapter, subsection 2 of this section is to the same effect. Subsection 3 is also similar to the first two sections in its denial of any benefit to the defendant by virtue of the immunity from guilt which may be enjoyed by the person he solicits.

§ 154. General provisions regarding chapter 7

1. It shall not be a crime to conspire to commit, or to attempt, or solicit, any crime set forth in this chapter.

2. There is an affirmative defense of renunciation in the following circumstances.

A. In a prosecution for attempt under section 152, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere aban-

donment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

B. In a prosecution for solicitation under section 153, or for conspiracy under section 151, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited or of the crime contemplated by the conspiracy, as the case may be.

C. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by: A belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation, or which makes more difficult the consummation of the crime; or a decision to postpone the criminal conduct until another time or to substitute another victim or another but similar objective.

Comment*

This section follows the Massachusetts Criminal Code, chapter 263, section 49, which, in turn, is based upon the New York Penal Law, section 34.45 and the Federal Criminal Code.

Subsection 1 states a principle of common law which has not, however, apparently been expressed in a Maine court opinion or statute. The remainder of this section has no counterpart in existing law.

The major purpose of this section is to prove a limited defense to persons whose conduct, while criminal, has not yet brought about substantive harm, provided that they take effective steps to prevent that harm.

CHAPTER 9

OFFENSES AGAINST THE PERSON

§ 201. Criminal homicide in the first degree

1. A person is guilty of criminal homicide in the first degree if he commits criminal homicide in the 2nd degree as defined in section 202 and, at the time of his actions, one or more of the circumstances enumerated in subsection 2 was in fact present.

2. The circumstances referred to in subsection 1 are:

A. The criminal homicide was committed by a person under sentence for murder or aggravated murder;

B. The person had previously been convicted of a crime involving the use of serious violence to any person;

C. The person knowingly created a great risk of death to many persons;

D. The criminal homicide was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from lawful custody;

E. The criminal homicide was committed for pecuniary benefit;

F. The person knowingly inflicted great physical suffering on the victim.

3. An indictment for criminal homicide in the first degree must allege one or more of the circumstances enumerated in subsection 2.

4. The sentence for criminal homicide in the first degree shall be as authorized in chapter 51.

Comment*

This section seeks to isolate the most serious forms of criminal homicide in order that special penalty provisions may be made applicable. The basic definition is composed of two factors: the proof of a violation of section 202 of this chapter (criminal homicide in the second degree) plus one of the circumstances enumerated in subsection 2. Taken together with sections 202 and 203 of this chapter, this section covers the present law of murder, as it has developed under Title 17, section 2651.

§ 202. Criminal homicide in the 2nd degree

1. A person is guilty of criminal homicide in the 2nd degree if he causes the death of another intending to cause such death, or knowing that death will almost certainly result from his conduct.

2. The sentence for criminal homicide in the 2nd degree shall be as authorized in chapter 51.

Comment*

This section states a form of criminal homicide that is the classic case of murder under Title 17, section 2651. That is, the present law would find the "malice" necessary for murder when the death had been caused intentionally or knowingly. See e.g., State v. Wilbur, 278 A.2d 139 (Me. 1970); State v. Duguay, 158 A.2d 61 (Me. 1962). Criminal homicide in the second degree, like the crime defined in section 201, is subject to special sentencing provisions, referred to in subsection 2.

§ 203. Criminal homicide in the 3rd degree

1. A person is guilty of criminal homicide in the 3rd degree if, acting alone or with one or more other persons in the commission of, or an attempt to commit, or immediate flight after committing, or attempting to commit any Class A crime, or escape he or another participant causes the death of a person and such death is a natural and probable consequence of such commission, attempt or flight.

2. It is an affirmative defense to prosecution under this section that the defendant:

A. Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel or aid the commission thereof; and

B. Was not armed with a firearm, destructive device, dangerous weapon, or other weapon which under circumstances indicated a readiness to inflict serious bodily injury; and

C. Reasonably believed that no other participant was armed with such a firearm, device or weapon; and

D. Reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

3. Criminal homicide in the 3rd degree is a Class A crime.

Comment*

This section is also concerned with defining an offense which is included within the present definition of murder under Title 17, section 2651. It is patterned on section 1601 (c) of the proposed Federal Criminal Code. Subsection 1 serves to restate the common law felony murder rule which appears to be in force in Maine, see **State v. Priest**, 117 Me. 223, 231 (1918) and which functions primarily as a means of imposing homicide liability on participants in a felony who do not, themselves, commit the homicide. Subsection 2 limits this vicarious liability in cases where the participant can prove that he is free from fault in regard to the homicide, although he remains, of course, still accountable for the crime which he participated in.

§ 204. Criminal homicide in the 4th degree

1. A person is guilty of criminal homicide in the 4th degree if he:

A. Recklessly causes the death of another human being; or

B. Causes the death of another human being under circumstances which would be criminal homicide in the first or 2nd degree except that he causes the death under the influence of extreme emotional disturbance or extreme mental retardation. The defendant shall prove by a preponderance of the evidence the presence and influence of such extreme emotional disturbance or mental retardation. Evidence of extreme emotional disturbance or mental retardation may not be introduced by the defendant unless the defendant at the time of entering his plea of not guilty or within 10 days thereafter or at such later time as the court may for cause permit, files written notice of his intention to introduce such evidence. In any event, the court shall allow the prosecution a reasonable time after said notice to prepare for trial, or a reasonable continuance during trial.

2. Criminal homicide in the 4th degree is a Class B crime, provided that it is a defense which reduces it to a Class C crime if it occurs as the result of the reckless operation of a motor vehicle.

Comment*

Manslaughter is presently defined in Title 17, section 2551. Criminal homicide in the fourth degree restates some of the present law that has developed under section 2551, and changes it in some respects. It is not clear under the common law rules, embodied in section 2551, whether there must be any conscious awareness of the risk of death posed by the behavior of the defendant. See, for example, **State v. Ela**, 136 Me. 303 (1939). By making reference to the requirement that the act be done recklessly, defined in section 10 of chapter 1, the code imposes the need to prove a conscious disregard of an unjustifiable risk.

In subsection 1, paragraph B this section deals with the form of manslaughter that is generally characterized as a killing "in the heat of passion." Under present law, however, the mitigation from murder to manslaughter under the circumstances producing the passion is not legally available unless it can be said to be "reasonable" or "adequate" provocation. See **State v. Park**, 159 Me. 328, 332 (1963). This section of the code changes that, and follows section 630:2 of the New Hampshire Criminal Code 1973 by not requiring that there be an inquiry into reasonableness. Once a jury has found that the killing was under the influence of the mental factors described, there is sufficient warrant for them to find a lesser degree of criminal homicide. This subsection also provides, however, that the State be given a fair opportunity to rebut the accused's mitigating evidence.

§ 205. Criminal homicide in the 5th degree

1. A person is guilty of criminal homicide in the 5th degree if, with criminal negligence, he causes the death of another.

2. Criminal homicide in the 5th degree is a Class D crime.

Comment*

At the present time a homicide committed with "gross or culpable" negligence is manslaughter, **State v. Ela**, 136 Me. 303 (1939), or a violation of Title 29, section 1315 if death was caused by a motor vehicle. The term "negligence" is defined in section 10 of chapter 1. A provision such as this is commonly found in recodifications and is based on the Model Penal Code, section 210.4.

§ 206. Criminal homicide in the 6th degree

1. A person is guilty of causing or aiding suicide if he intentionally aids or solicits another to commit suicide, and the other commits or attempts suicide.

2. Criminal homicide in the 6th degree is a Class D crime.

Comment*

There is no counterpart to this section in the present law. It is included in the code in order to deter conduct aimed at causing another to take his life. The participation of the victim in bringing about his own death does not make the forbidden conduct free from fault. The requirement that there be a successful or unsuccessful suicide attempt adds a safeguard designed to corroborate the defendant's intention.

§ 207. Assault

1. A person is guilty of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another.

2. Assault is a Class D crime.

Comment*

Title 17, section 201 presently divides criminal assaults into simple assaults and those that are of a "high and aggravated nature." This section

of the code, and the next following section, continue this division. They differ from the present law, however, in not including conduct that does not result in some physical contact or harm to the victim. The provisions of the code dealing with Attempt and Criminal Threatening cover such circumstances. The two assault sections are distinguishable on the basis of the seriousness of the harm caused or the risks to life that are posed by the defendant's conduct.

§ 208. Aggravated assault

1. A person is guilty of aggravated assault if he intentionally, knowingly, or recklessly causes:

A. Serious bodily injury to another; or

B. Bodily injury to another by means of a deadly weapon; or

C. Bodily injury to another under circumstances manifesting extreme indifference to the value of human life.

2. Aggravated assault is a Class B crime.

Comment*

See comments to section 207.

§ 209. Criminal threatening

1. A person is guilty of criminal threatening if he intentionally or knowingly places another person in fear of imminent bodily injury.

2. Criminal threatening is a Class D crime.

Comment*

This section follows the proposed Massachusetts Criminal Code, chapter 265, section 11 and the proposed Federal Criminal Code, section 1616.

It essentially provides a penalty for committing a common law assault, except that it is more narrow than the common law. The requirement that there be fear of bodily injury leaves uncovered the situations where there is created by the defendant a fear of something less than that, namely simple physical contact which would cause no injury at all. Where the defendant's conduct goes so far as to ripen into an attempt, he would be guilty of an offense even if only offensive, but not injurious, contact were attempted. Short of an attempt, it is the policy of this section to leave threats of contact within the realm of abrasive social relations which, while regrettable, ought not to invoke the machinery of the criminal law.

§ 210. Endangering human life

1. A person is guilty of endangering human life if he knowingly violates any federal, state or local statute or regulation whose primary purpose is to protect persons employed by him or consumers of his products, from bodily injury.

2. The penalty for violation of this section shall be in addition to, and not in place of, any penalty otherwise authorized by law for violation of the statute or regulation.

3. As used in this section "bodily injury" includes, but is not limited to, the physical harm caused by prolonged exposure to, or use of, any substance.

4. It is no defense to a prosecution under this section that compliance with the statute or regulation would have caused economic hardship in any degree.

5. Endangering human life is a Class B crime.

Comment*

This section is the first cousin to the law of robbery which is similarly concerned with preventing and punishing conduct posing threats of bodily harm in order to achieve some economic gain. The potential for widespread injuries is, however, far greater in the circumstances described by this statute. It has no counterpart in current law.

§ 211. Terrorizing

1. A person is guilty of terrorizing if he communicates to any person a a threat to commit or cause to be committed a crime of violence dangerous to human life, against the person threatened or another, and the natural and probable consequence of such a threat, whether or not such consequence in fact occurs, is:

A. To place the person to whom the threat is communicated in reasonable fear that the crime will be committed; or

B. To cause evacuation of a building, place of assembly or facility of public transport.

2. Terrorizing is a Class C crime.

Comment*

This section deals with the circumstances included in Title 17, sections 503 (false bomb threats) and 3701 (threatening).

Three opinions of the Supreme Judicial Court shed light on the meaning of section 3701: **State v. Sondergaard**, 316 A.2d 367 (Me. 1974); **State v. Lizotte**, 256 A2d 439 (Me. 1969); and **State v. Cashman**, 217 A.2d 28 (Me. 1966).

Sondergaard held that to be consistent with First - Fourteenth Amendment protections, section 3701 cannot be used to punish a threat made to destroy property or to injure a person unless there are circumstances alleged which indicate a reasonable likelihood of fear or alarm as a result of the threat. Thus, a threat made that a third person will be killed cannot, without more, amount to a criminal offense. **Lizotte** held that it need not be shown that the person threatened (there a police officer) was or would have been placed in fear as a result of the threat; it is sufficient if an ordinary person would have so reacted. **Cashman** adds that the threat need

not necessarily promise harm at the hands of the defendant, but may be a threat that some unnamed person will harm the victim.

Subsection 1, paragraph A is consistent with current law, but does not reach threats to property. No actual fear need be shown under this subsection. If there is fear of imminent harm, section 209 of chapter 9, Criminal Threatening would be applicable.

Subsection 1, paragraph B goes beyond the reach of section 503 of Title 17 in that this subsection is not restricted to reports that are false. A true description of the actor's intent to blow up a building, loosen the supports on a structure, etc., would be covered by subsection 1, paragraph B, although apparently not under present statutes.

§ 212. Reckless conduct

1. A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person.

2. Reckless conduct is a Class D crime.

Comment*

This section is a modification of chapter 265, section 10 of the Proposed Criminal Code of Massachusetts.

The only statute which appears to deal with the conduct described in this section is Title 29, section 1314 which provides: "No person shall drive any vehicle upon any way or in any other place in such a manner as to endanger any person or property."

This section of the code relates to the person who drops a brick from the roof into a crowded street, as well as to the reckless motor vehicle driver. If luck so dictates and someone is hurt or killed, there would be either an assault under sections 207 or 208 of this chapter, or manslaughter under section 204.

CHAPTER 11

SEX OFFENSES

§ 251. Definitions and general provisions

1. In this chapter the following definitions apply.

A. "Spouse" means a person legally married to the actor, but does not include a legally married person living apart from the actor under a judicial decree of separation.

B. "Sexual intercourse" means any penetration of the female sex organ by the male sex organ. Emission is not required.

C. "Sexual act" means any act of sexual gratification between 2 persons involving direct physical contact between the sex organs of one and the mouth or anus of the other.

D. "Sexual contact" means any touching of the genitals directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire.

2. No person may be prosecuted for violating this chapter unless the alleged offense was reported to or discovered by a law enforcement officer within 3 months after its occurrence; or within one month after a parent, guardian, or other competent person interested in the victim and who is not a party to the offense learns of it, if the alleged victim was younger than 16 years of age, incompetent, or unable to make complaint.

Comment*

This section is patterned on the proposed Criminal Code of Massachusetts, chapter 265, section 20, and Senate 1, 93d Congress, First Session, section 2-7A1, the proposed Federal Code.

There are no separate definitions in the Maine Statutes analogous to those contained in subsection 1. The definitions set forth here, however, serve to define the substantive law, and they can, therefore, be compared to existing provisions of law.

At common law, a man could not legally rape his wife. Although that issue appears not to have been raised in any reported case, it is expected that the common law rule would be applied in Maine. There does not appear to be any decision, as well, on the issue of common law marriage and whether persons related in that way would be included in the rule negating rape of a spouse.

If the husband were involved in the rape as an aider and abettor, the common law rule would not preclude his criminal liability for the rape. See **State v. Flaherty,** 128 Me. 141, (1929).

The definition of "sexual act" relates to the present law of the crime against nature under Title 17, section 1001. This offense includes cunnilingus, **State v. Townsend,** 145 Me. 384 (1950), and fellatio, **State v. Cyr,** 135 Me. 513 (1938), and it has been declared that "[t]he crime against nature involving mankind is not complete without some penetration, however slight, of a natural orifice of the body. The penetration need not be to any particular distance, and the fact of penetration may be proved by circumstantial evidence as by the position of the parties and the like." **State v. Pratt,** 151 Me. 236, 238 (1955).

The definition of "sexual intercourse" in subsection 1, paragraph B is the same as the present law. **State v. Croteau,** 158 Me. 360 (1962).

The definition of "sexual contact" in subsection 1, paragraph D relates to the offense of indecent liberties defined in Title 17, section 1951. This statute forbids the taking of "any indecent liberty or liberties," or indulging "in any indecent or immoral practice or practices with the sexual parts or organs," when the prescribed age relationships are present. The cases establish that this offense may be committed by sexual intercourse, **State v. Lindsey,** 254 A.2d 601 (Me. 1969), but not by touching of sexual parts through the clothing, see **State v. Rand,** 156 Me. 81 (1960).

Maine law does not require corroboration of the victim's testimony, **State v. Wheeler,** 150 Me. 332 (1955), although where the testimony is "inherently improbable and incredible," a conviction cannot stand. **Id.** There is also no rule that requires the complaint of the victim to be made within any particular period of time. See **State v. Mulkern,** 85 Me. 106 (1892).

The definition of "spouse" is designed to continue the common law restriction and to expand it to cases where the same relationship exists except for solemnization.

The definition of "sexual act" in subsection 1, paragraph C is broader coverage than the present law requiring some penetration, and serves to permit a conviction upon contact in the case of sodomy, fellatio, and cunnilingus.

Sexual contact is similarly more extensive than the present law relating to indecent liberties. Since this definition, like the present offense, is designed to protect young children, the definition will permit conviction where the touching is through the clothing; this may well be as traumatic for the child as instances where the clothing is breached.

The provisions of subsection 2 are also new to the law in enacting safeguards against false conviction.

§ 252. Rape

1. A person is guilty of rape if he engages in sexual intercourse:

A. With any person who has not attained his 14th birthday; or

B. With any person, not his spouse, and he compels such person to submit:

(1) by force and against the person's will; or

(2) by threat that death, serious bodily injury, or kidnapping will be imminently inflicted on the person or on any other human being.

2. It is an affirmative defense that the defendant and the victim were living together as man and wife at the time of the crime.

3. Rape is a Class A crime. It is, however, a defense which reduces the crime to a Class B crime that the victim was a voluntary social companion of the defendant at the time of the crime and had, on that occasion, permitted the defendant sexual contact.

Comment*

Portions of this section are taken from section 2-7E of Senate 1, 93d Congress, 1st session and the Proposed Massachusetts Criminal Code, chapter 265, section 16.

Title 17, section 3151 now provides: "Whoever ravishes and carnally knows any female who has attained her 14th birthday, by force and against her will, or unlawfully and carnally knows and abuses a female child who

has not attained her 14th birthday, shall be punished by imprisonment for any term of years." As used in this State, carnal knowledge has the same meaning as sexual intercourse. **State v. Croteau,** 158 Me. 360 (1962). When submission is under the compulsion of fear, the offense is made out on the basis of constructive force. **State v. Mower,** 298 A.2d 759 (Me. 1973).

There is no Maine law on the issue of whether a threat to kidnap the victim will support a rape conviction, or whether a threat directed against a third party will similarly suffice.

This section makes very little change in Maine law. The nature of the threats that will suffice for the offense, in subsection 1, paragraph B, subparagraph (2), go beyond the common law, and the definition of spouse from section 251 which is applied here also expands the class of relationships which preclude rape liability. But otherwise the offense is similar to present law.

The grading provisions are taken from the proposed Federal Code, and are similar in the Massachusetts proposal.

There are other circumstances in which sexual intercourse takes place as a result of some gross imposition on the female, but the impositions are less frightening and dangerous than those set forth in subsection 1, paragraph B. The next section deals with these other impositions.

§ 253. Gross sexual misconduct

A person is guilty of gross sexual misconduct

1. If he engages in a sexual act with another person, not his spouse, and

A. He compels such other person to submit:

(1) by force and against the will of such other person; or

(2) by threat that death, serious bodily injury, or kidnapping will be imminently inflicted on such other person or on any other human being; or

B. The other person has not attained his 14th birhday; or

2. If he engages in sexual intercourse or a sexual act with another person, not his spouse, and

A. He has substantially impaired the other person's power to appraise or control his sex acts by administering or employing drugs, intoxicants, or other similar means; or

B. He compels or induces the other to engage in such sexual act by any threat; or

C. The other person suffers from mental illness or defect that is reasonably apparent or known to the actor, and which in fact renders the other substantially incapable of appraising the nature of the contact involved; or

D. The other person is unconscious or otherwise physically incapable of resisting and has not consented to such sexual act; or

E. The other person is in official custody as a probationer or a parolee, or is detained in a hospital, prison or other institution, and the actor has supervisory or disciplinary authority over such other person.

3. It is a defense to a prosecution under subsection 2, paragraph A that the other person voluntarily consumed or allowed administration of the substance with knowledge of its nature.

4. Violation of subsection 1 is a Class A crime. It is, however, a defense to prosecution under subsection 1, paragraph A which reduces the crime to a Class B crime that the other person was a voluntary social companion of the defendant at the time of the offense and had, on that occasion, permitted him sexual contact. It is an affirmative defense to a prosecution under subsection 1, paragraph A that the defendant and the victim were living together as man and wife at the time of the crime.

5. Violation of subsection 2, paragraphs A, C or E is a Class B crime. Violation of subsection 2, paragraphs B or D is a Class C crime.

Comment*

This section picks up portions of the proposed Massachusetts Criminal Code chapter 265, section 19 and section 2-7E2 of Senate 1, 93d Congress, First Session.

Title 17, section 1001, Crime Against Nature penalizes the conduct defined in subsection 1 as a "sexual act" regardless of the consensual or imposition circumstances under which the act takes place.

The Maine cases have also indicated that the offense of rape would be made out when the woman "exhibits no will in the matter as where she is drugged or **non compos mentis.**" **State v. Dipietrantonio**, 152 Me. 41, 46 (1956).

There does not appear to be any Maine law covering the other circumstances set out in subsection 2.

This section relates to two separate problems. The first, in subsection 1, creates a new offense of forcing or threatening a person into partnership in a sexual act, as defined in section 251. It also includes engaging in such conduct with a person under the age of 14. The offense is treated as being equally serious as using the same means of imposition to commit sexual intercourse with an immature or unwilling female, and is a direct counterpart of the rape offense.

Subsection 2 deals with both sexual acts and sexual intercourse, and defines an offense when the circumstances are not of the same quality of imposition.

It should be noted that unless there are circumstances of gross or lesser imposition, as defined in this section, conduct defined as a sexual act is not defined as criminal, except as to 14, 15, 16 and 17 year old children dealt with in the next section.

§ 254. Sexual abuse of minors

1. A person is guilty of sexual abuse of a minor if, having attained his 18th birthday he engages in sexual intercourse or a sexual act with another person who has attained his 14th birthday but has not attained his 18th birthday; provided the actor is at least 3 years older than such other.

2. It is a defense to a prosecution under this section that the actor reasonably believed the other person to have attained his 18th birthday.

3. Sexual abuse of minors is a Class C crime.

Comment*

Title 17, section 3152 presently provides:

> "Whoever, having attained his 18th birthday, has carnal knowledge of the body of any female child who has attained her 14th birthday but has not attained her 16th birthday shall be punished by a fine of not more than $500 or by imprisonment for not more than 2 years. This section shall not apply to cases of rape as defined in section 3151."

This section of the code includes a sexual act as well as sexual intercourse within the prohibition and changes the upper age limit of the victim from 15 to 17. The victim of the offense may, under the code, be male as well as female. The defense provided in subsection 2 is new.

§ 255. Unlawful sexual contact

1. A person is guilty of unlawful sexual contact if he intentionally subjects another person, not his spouse, to any sexual contact, and

A. The other person has not expressly or impliedly acquiesced in such sexual contact; or

B. The other person is unconscious or otherwise physically incapable of resisting, and has not consented to the sexual contact; or

C. The other person has not attained his 14th birthday and the actor is at least 3 years older; or

D. The other person suffers from a mental disease or defect that is reasonably apparent or known to the actor which in fact renders the other person substantially incapable of appraising the nature of the contact involved; or

E. The other person is in official custody as a probationer or parolee or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary authority over such other person.

2. Unlawful sexual contact is a Class D crime, except that a violation of subsection 1, paragraph C is a Class C crime.

Comment*

This section is based on section 2-7E3 of Senate 1, 93d Congress, First Session, and the proposed Massachusetts Criminal Code, chapter 265, sec-

tion 18. Title 17, section 1951 defines an indecent liberties offense similar to this section of the code. This offense may be committed upon proof of sexual intercourse by persons within the stated age limits. **State v. Lindsey**, 254 A. 2d 601 (Me. 1969). It may not be committed, however, by a touching of the child through his clothing. **State v. Rand,** 156 Me. 81 (1960).

Subsection 1, paragraph C creates a limited privilege from liability under this section for young persons whose ages are in close proximity.

The remainder of the section is designed to afford protection against particularly annoying sorts of impositions which, in most cases, would also constitute an assault.

The definition of unlawful sexual contact changes the law in the **Rand** case, **supra**, by having the offense occur even when the touching is through the clothing.

CHAPTER 13

KIDNAPPING AND CRIMINAL RESTRAINT

§ 301. Kidnapping

1. A person is guilty of kidnapping if either:

A. He knowingly restrains another person with the intent to

(1) hold him for ransom or reward;

(2) use him as a shield or hostage;

(3) inflict bodily injury upon him or subject him to conduct defined as criminal in chapter 11;

(4) terrorize him or a 3rd person;

(5) facilitate the commission of another crime by any person or flight thereafter; or

(6) interfere with the performance of any governmental or political function; or

B. He knowingly restrains another person:

(1) under circumstances which, in fact, expose such other person to risk of serious bodily injury; or

(2) by secreting and holding him in a place where he is not likely to be found.

2. "Restrain" means to restrict substantially the movements of another person without his consent or other lawful authority by:

A. Removing him from his residence, place of business, or from a school; or

B. Moving him a substantial distance from the vicinity where he is found; or

C. Confining him for a substantial period either in the place where the restriction commences or in a place to which he has been moved.

3. Kidnapping is a Class A crime. It is however, a defense which reduces the crime to a Class B crime, if the defendant voluntarily released the victim alive and not suffering from serious bodily injury, in a safe place prior to trial.

Comment*

Kidnapping is now defined in a number of statutes, **i.e.** Title 17, sections 1, 2, 2051 and 2051-A.

There does not appear to be any reported case law interpreting these statutes. On the matter of penalty, however, it has been held to be a violation of due process for information to be given the sentencing judge concerning the conduct of the kidnapper toward his victim, in the absence of defendant's lawyer. **Haller v. Robbins**, 409 F.2d 857 (CA 1, 1969).

The elements of the offense defined by this section are two: (1) restraint, and (2) one of the specified intentions or the circumstances described in subsection 1, paragraph B. "Restraint" is defined in subsection 2 as requiring a number of components: (1) restriction of physical movement; (2) without consent or authority; (3) accomplished by one of the three specified means. These latter three means of restriction are important in seeing what sort of things the offense is aimed at. Any removal from the home, school or place of work, if accompanied by one of the specified intentions, will suffice to constitute kidnapping. But in order to avoid having kidnapping include what is essentially only robbery when the robber forces the victim into a nearby hallway in order to take his wallet and watch, the second means is limited to cases where the victim is moved "a substantial distance." The third designated means is designed to preclude kidnapping liability when the burglar puts the householder in the closet while he fills his sack with the silver.

Subsection 3 is an inducement for the kidnapper to minimize the personal harm to his victim.

§ 302. **Criminal restraint**

1. **A person is guilty of criminal restraint if:**

A. He knowingly restrains another person; or

B. Being the parent of a child under the age of 16, he intentionally or knowingly takes, retains, or entices such child from the custody of his other parent, guardian or other lawful custodian, and removes such child from the State, knowing that he has no legal right to do so; or

C. Knowing he has no legal right to do so, he intentionally or knowingly takes, retains or entices:

(1) a child under the age of 14; or

(2) an incompetent person; or

(3) a child who has attained his 14th birthday but has not attained his 16th birthday, provided that the actor is at least 18 years of age, from the custody of his parent, guardian or other lawful custodian, with the intent to hold the person permanently or for a prolonged period.

2. "Restrain" has the same meaning as in section 301.

3. Criminal restraint is a Class D crime.

Comment*

This section is similar to the Proposed Criminal Code of Massachusetts, chapter 265, section 15. It deals with unlawful restrictions on freedom of movement that are less serious than those defined as kidnapping. Subsection 1, paragraph B relates to custody disputes between separated parents and provides a penalty when the custody is interfered with by taking the child from the State. The present law in section 2051 of Title 17 provides a blanket exception from liability for kidnapping in the case of a parent taking his minor child.

CHAPTER 15

THEFT

§ 351. Consolidation

Conduct denominated theft in this chapter constitutes a single crime embracing the separate crimes such as those heretofore known as larceny, larceny by trick, larceny by bailee, embezzlement, false pretenses, extortion, blackmail, and receiving stolen property. An accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the information or indictment, subject only to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief if the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

Comment*

This is a commonly found section in the new codes. Versions of it are in the Proposed Massachusetts Criminal Code, chapter 266, section 17 (d), and the New Hampshire Criminal Code, section 637:1. The source of such provisions is the Model Penal Code, section 223.1 (1).

There does not seem to be any judicial decision dealing with appeals based on the claim that one sort of theft, of which there was a conviction, is in fact another sort, e.g., whether certain conduct was larceny by trick or false pretenses. Rule 52 (a) of the Maine Rules of Criminal Procedure provides that: "Any . . . variance which does not affect substantial rights shall be disregarded."

The purpose of this section is to insure that there is no possibility of a miscarriage of justice by virtue of a person being charged with wrong offenses. The technical distinctions among common law offenses which create such possibilities will be dropped from the restatement of theft law in this code to the maximum extent possible. But it is well to provide that

any further distinctions which may be lurking in the code's terms shall not give rise to unwanted procedural results.

§ 352. Definitions

As used in this chapter, unless a different meaning is plainly required by the context:

1. "Property" means anything of value, including but not limited to:

A. Real estate and things growing thereon, affixed to or found thereon;

B. Tangible and intangible personal property;

C. Captured or domestic animals, birds or fishes;

D. Written instruments, including credit cards, or other writings representing or embodying rights concerning real or personal property, labor, services or otherwise containing anything of value to the owner;

E. Commodities of a public utility nature such as telecommunications, gas, electricity, steam or water; and

F. Trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

2. "Obtain" means, in relation to property, to bring about, in or out of this State, a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph or other reproduction.

3. "Intent to deprive" means to have the conscious object:

A. To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or the use and benefit thereof, would be lost; or

B. To restore the property only upon payment of a reward or other compensation; or

C. To dispose of the property under circumstances that make it unlikely that the owner will recover it.

4. "Property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in the possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

5. The meaning of "value" shall be determined according to the following.

A. Except as otherwise provided in this subsection, value means the market value of the property or services at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property or services within a reasonable time after the crime.

B. The value of a written instrument which does not have a readily ascertainable market value shall, in the case of an instrument such as a check, draft or promissory note be deemed the amount due or collectible thereon, and shall, in the case of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

C. The value of a trade secret which does not have a readily ascertainable market value shall be deemed any reasonable value representing the damage to the owner suffered by reason of losing an advantage over those who do not know of or use the trade secret.

D. If the value of property or services cannot be ascertained beyond a reasonable doubt pursuant to the standards set forth above, the trier of fact may find the value to be not less than a certain amount, and if no such minimum value can be thus ascertained, the value shall be deemed to be an amount less than $500.

E. Amounts of value 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 class or grade of the crime.

F. The defendant's culpability as to value is not an essential requisite of liability, unless otherwise expressly provided.

Comment*

This section sets forth the basic definitions which will be used in the substantive definitions of theft offenses in the rest of this chapter.

The definition of "property" is designed to expand present law to include anything which is of value. Most of the definitions are taken up with examples of this, so as to insure that things which have been questionably included in larceny, or excluded entirely, are covered.

Subsection 2's definition of "obtain" serves to do away with any distinction between common law larceny, which is generally held to be an offense against possession, and false pretense offenses, which usually relate to offenses against title. This definition also continues the rule that a person committing larceny out of the State may be prosecuted in Maine, provided he brings the stolen goods with him, was recently reaffirmed in **Younie v. State**, 281 A.2d 446 (Me. 1971).

Under common law, the circumstances described in subsection 3 would satisfy the requirement of **mens rea**, as explained in **State v. Gordon**, 321 A.2d 352 (Me. 1974).

As was true in subsection 1, the aim of the definition of "property of another" is to expand the law. The general rule provided is that any property interest which the defendant is not privileged to infringe may be the subject of larceny. An exception is made, however, for cases where that other interest is a security interest in the property, since action inconsistent with a security agreement should be treated as something different from ordinary theft.

The detailed definition of "value" in subsection 5 will assist in determining the class of offense.

§ 353. Theft by unauthorized taking or transfer

1. A person is guilty of theft if he obtains or exercises unauthorized control over the property of another with intent to deprive him thereof.

2. As used in this section, "exercises unauthorized control" includes but is not necessarily limited to conduct heretofore defined or known as common law larceny by trespassory taking, larceny by conversion, larceny by bailee and embezzlement.

Comment*

This section preserves the common law theft offenses, but does so by invoking the more precise definitions of terms set out in subsection 2. Like the New Hampshire Code, upon which this is based, the basic structure is taken from the Model Penal Code. The Model Penal Code, however, uses the term "takes" where this section says 'obtains'. This choice has been made in order to invoke the broad definition of 'obtains' set forth in section 352, free of common law technicalities that the use of the common law 'takes' might imply. Except for these words, the same formula as the Model Penal Code is used. The function of this formulation is best explained in the Model Penal Code, Tentative Draft 2, p. 62 (1954).

"We have chosen 'taking or exercise of unlawful control' as the test, thus dispensing with the mechanical common law standards of physical seizure and movement. 'Taking' unauthorized control becomes the touchstone in the ordinary case of theft by a stranger; 'exercise' of unauthorized control is the requirement in the typical embezzlement situation where the actor already has lawful control. The test has the virtue of simplicity, which is important especially for use in jury trials. It has sufficient flexibility for application to the tremendous diversity of situations to be covered in a modern economy. The test also appears to discriminate between attempt and accomplishment at a psychologically significant point. It seems likely, for example, that the critical psychological 'threshold' for a would-be auto thief is probably the point at which he enters the car and addresses himself to the controls, rather than the moment when he releases the clutch or steps on the gas to put the car in motion. Before he 'takes the wheel' he will be more easily frightened off or he may voluntarily desist. The psychological difference between starting the engine and starting the car is probably very small."

§ 354. Theft by deception

1. A person is guilty of theft if he obtains or exercises control over property of another as a result of deception and with an intention to deprive him thereof.

2. For purposes of this section, deception occurs when a person intentionally:

A. Creates or reinforces an impression which is false and which that person does not believe to be true, including false impressions as to law, value, knowledge, opinion, intention or other state of mind. Provided, however, that an intention not to perform a promise, or knowledge that a promise will not be performed, shall not be inferred from the fact alone that the promise was not performed;

B. Fails to correct an impression which is false which he previously had created or reinforced, and which he does not believe to be true, or which he knows to be influencing another whose property is involved and to whom he stands in a fiduciary or confidential relationship;

C. Prevents another from acquiring information which is relevant to the disposition of the property involved; or

D. Fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

3. It is no defense to a prosecution under this section that the deception related to a matter that was of no pecuniary significance, or that the person deceived acted unreasonably in relying on the deception.

Comment*

Chapter 59 of Title 17, Fraud and False Pretenses, contains 38 separate sections which relate, in part, to the provisions of this draft section. Some of these sections of chapter 59 define crimes which closely parallel the conduct encompassed by this draft, for example, section 1601. Under this statute, an unconditional promise made without an intention to perform the promise, is a false pretense. **State v. Austin,** 159 Me. 71 (1963).

Several Maine cases report the rule that a false statement of opinion cannot serve as the basis for a conviction under this statute. See **e.g., State v. Deschambault,** 159 Me. 216 (1963), relying on **State v. Paul,** 69 Me. 215 (1879). But if there is a misrepresentation that is within the statute, it is only necessary that the victim have relied on it, **Ellis v. State,** 276 A.2d 438 (Me. 1971), and it makes no difference that he may have been inordinately gullible in doing so. **State v. Mills,** 17 Me. 211 (1840).

This section does not purport to substitute for all of the offenses in Chapter 59. By dealing comprehensively with obtaining property, as broadly defined in section 351 of this chapter, it does, however, obviate the need for specialized statutes, such as the present provisions relating to telephone service.

The format is followed in this section which describes the underlying conduct as obtaining or exercising control over property of another. The requirement of an intention permanently to deprive is also included.

The means for obtaining the property is defined by the four paragraphs of subsection 2. These undertake to describe the sort of cheating which goes beyond the limits of what is to be tolerated in a commercial society. Paragraph A of subsection 2 rests on the premise that when the actor misstates his own state of mind, e.g., that he has an opinion which he does not, in fact, have, there is as much overreaching which ought to be dealt with by the criminal law as where he misrepresents the quantity of goods he holds out for sale. The Maine law concerning false promises is continued, but with the safeguard that a failure to perform the promise cannot, by itself, sustain a conviction.

Subsection 3 also continues the Maine rejection of **caveat emptor** in these circumstances. That subsection also is designed to clarify that if the victim parts with his property on the basis of one of the designated falsities, it makes no difference that the falsity related to, for example, the ability of a product to restore youthful vigor, rather than to any falsity of direct pecuniary significance. In these respects, subsection 3 differs from the New Hampshire Code and the Model Penal Code provision on which it is based.

§ 355. Theft by extortion

1. **A person is guilty of theft if he obtains or exercises control over the property of another as a result of extortion and with the intention to deprive him thereof.**

2. **As used in this section, extortion occurs when a person threatens to:**

A. Cause physical harm in the future to the person threatened or to any other person or to property at any time; or

B. Do any other act which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person's health, safety, business, calling, career, financial condition, reputation or personal relationships.

Comment*

Title 17, section 3702 presently punishes threats made with the intent to extract money or other advantage. If the threat proscribed by the statute is made, the offense is complete, without regard to the effect the threat might have had on the mind of the victim. **State v. Burns,** 24 Me. 71 (1844). Similarly, there is no requirement under Maine law that the defendant actually obtain the property which his threat is designed to procure for him. **Id.** In this respect, Maine statutes follow the traditional pattern of American extortion or blackmail statutes. See LaFave and Scott, Criminal Law 705 (1972).

As part of a consolidated law of theft, this section deals with an offense which requires that the defendant obtain property. It is, of course, also possible for a person to be guilty of an attempt to commit this offense

under circumstances satisfying the requirements of the law of attempts and where the property is, in fact, not passed to the defendant. As a consummated offense, this section follows the basic pattern of the other theft offenses by requiring that the defendant obtain or exercise control over the property of another with the intent to deprive.

Since it is required that he obtain or control the property **by** extortion, there is a causal relation introduced between the defendant's threats and the victim's parting with his property. In this respect Maine law, which makes the victim's state of mind irrelevant, is changed. If, however, the defendant threatens the victim with imminent bodily injury, the conduct would be punishable as Criminal Threatening under section 209 of chapter 9.

§ 356. Theft of lost, mislaid or mistakenly delivered property.

A person is guilty of theft if he obtains or exercises control over the property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property, and he both:

1. Fails to take reasonable measures to return the same to the owner; and

2. Has the intention to deprive the owner of such property when he first obtains or exercises control over it, or at any time prior to taking reasonable measures to return the same to the owner.

Comment*

This section is a slight modification of the New Hampshire Criminal Code, section 637:6, which is, in turn, patterned on the Model Penal Code, section 223.5.

There is one statute which specifically relates to the subject matter of this draft section. Title 17, section 2105 provides:

> Whoever falsely personates or represents another and thereby receives anything intended to be delivered to the party personated, with intent to convert the same to his own use, is guilty of larceny and shall be punished accordingly.

The prohibition against "stealing" in section 2101 of Title 17 would cover the cases of lost or mislaid property, since the common law of larceny imposed criminal liability under certain circumstances in these cases. The only statement on the subject which seems to appear in the reported Maine cases is from **State v. Furlong,** 19 Me. 225, 228 (1841) which cites English authorities for the proposition: "If a man lose goods, and another find them, and not knowing the owner, convert them to his use, this is not larceny. Even although he deny the finding of them, or secrete them. But it is otherwise if he know the owner". What is omitted from this brief statement is that, in order for there to be common law larceny when the finder knows the owner or has ready means for identifying him, the intention to steal the property must exist at the time the property is found. If, at the time of finding, the actor intends to return the goods to the owner,

but later forms the intent to steal them, there is no common law larceny. See LaFave and Scott, Criminal Law 628 (1972). The general rule in larceny cases, concerning the need for intent and taking to occur at the same time, has been several times affirmed in Maine. See e.g., **State v. Coombs,** 55 Me. 477 (1868). To property delivered by mistake, the rule is briefly stated in LaFave and Scott at p. 629: "It is well settled that the recipient of the mistaken delivery who appropriates the property commits a trespass in the taking, and so is guilty of larceny if, realizing the mistake at the moment he takes delivery, he then forms an intent to steal the property."

This section uses the format of the theft chapter obtaining or exercising control over property with the intention to deprive — to continue the common law on the subject, with one major exception. Under this section, the offense may be committed even if the intention to deprive does not coincide with the obtaining of the property. Since there appears to be no sound reason for exculpating a person who starts off as a good samaritan, but later becomes a thief, subsection 2 permits the offense to be defined so as to include the later-formed intent.

§ 357. Theft of services

1. A person is guilty of theft if he obtains services which he knows are available only for compensation by deception, threat, force or any other means designed to avoid the due payment therefor. As used in this section, "deception" has the same meaning as in section 354, and "threat" is deemed to occur under the circumstances described in section 355, subsection 2.

2. A person is guilty of theft if, having control over the disposition of services of another, to which he knows he is not entitled, he diverts such services to his own benefit, or to the benefit of some other person who he knows is not entitled thereto.

3. As used in this section, "services" includes, but is not necessarily limited to, labor, professional service, public utility and transportation service, restaurant, hotel, motel, tourist cabin, rooming house and like accommodations, the supplying of equipment, tools, vehicles or trailers for temporary use, telephone, telegraph or computor service, gas, electricity, water or steam, admission to entertainment, exhibitions, sporting events or other events for which a charge is made.

4. Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels, restaurants and garages, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception.

Comment*

The first three subsections of this section are patterned on the New Hampshire Criminal Code, section 582:8. The last subsection is taken from the Pennsylvania Crimes Code of 1970, section 3926 (a) (3).

A few specialized statutes, dealing with destruction, as well as theft, are concerned with the theft of services. Title 17, section 2352, for example,

deals with taping the pipes of a water company, while section 2353 relates to interference with gas or electric meters. Section 1602 punishes unlawful obtaining of long-distance telephone service. Section 1617 deals with tampering with fare boxes on a public vehicle. Not all of the relevant statutes are in Title 17, however. In Title 30, for example, there is section 2701 which punishes obtaining food, lodging or other accommodations with intent to defraud. Section 2702 of Title 30 identifies prima facie proof in the latter sorts of cases.

The aim of this section is to provide comprehensive protection to "services." At common law, these things could not be the subject of theft.

Subsection one sets out the means by which services can be unlawfully obtained. The definitions of deception and threat are incorporated from the sections of this chapter which deal with obtaining tangible property by such means.

Subsection two brings within the coverage of this section a common form of misuse of services, i.e., the diversion of services to an unauthorized use.

The presumption defined in subsection four is valuable where direct evidence of deception may be difficult to obtain, but where the burden should properly be on the person who obtained the service and then takes off without making payment. The policy is similar to that contained in Title 30, section 2702.

§ 358. Theft by misapplication of property

1. A person is guilty of theft if he obtains property from anyone or personal services from an employee upon agreement, or subject to a known legal obligation, to make a specified payment or other disposition to a 3rd person or to a fund administered by himself, whether from that property or its proceeds or from his own property to be reserved in an equivalent or agreed amount, if he intentionally or recklessly fails to make the required payment or disposition and deals with the property obtained or withheld as his own.

2. Liability under subsection 1 is not affected by the fact that it may be impossible to identify particular property is belonging to the victim at the time of the failure to make the required payment or disposition.

3. An officer or employee of the government or of a financial institution is presumed:

A. To know of any legal obligation relevant to his liability under this section; and

B. To have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of his accounts.

Comment*

This section is taken from the New Hampshire Criminal Code, section 582:10. Similar provisions are in many other codes. See e.g., Pennsylvania Crimes Code of 1970, section 3927.

There are specialized statutes on this subject relating to the duty of tax collectors to pay over the proceeds collected to the appropriate treasurer, subject to a civil forfeiture for failure to comply with the statutory duty. See e.g. Title 36, section 759. In addition, Title 17, section 2107 includes provisions for punishment of "a public officer, collector of taxes, or an agent, clerk or servant of a public officer or tax collector [who] embezzles or fraudulently converts to his own use, or loans or permits any person to have or use for his own benefit without authority of law, any money in his possession or under his control by virtue of his office or employment by such officer." This statute has been held to create the offense of larceny without a trespass. **State v. Rowe,** 238 A.2d 217 (1968).

The aim of this section is to reach cases where the wrongdoing does not necessarily proceed against the identifiable property of someone other than the accused. The thrust of the definition is a culpable failure to carry out a legal duty. In this sense, it lies close to the border between criminality and mere civil failure to perform a contractual obligation. The subsection dealing with private conduct relates to cases such as where an employer withholds a certain amount from the wages of his employees, upon his undertaking to pay an amount equal to the withholding into a certain fund. Since, if the employee had received his full wages, and then returned a portion to the employer for transit to the fund, there would be a clear case of embezzlement when the employer treats the returned money as his own, this statute provides for the same result in the case where the amount in question does not change hands.

The duty laid on officers and employees of government and financial institutions is commensurate with public expectations of fiduciary conduct. The presumptions in subsection 3 are in recognition of the awareness such persons usually have of the rules governing their handling of property placed in their control.

§ 359. Receiving stolen property

1. A person is guilty of theft, if he receives, retains or disposes of the property of another knowing that it has been stolen, or believing that it has probably been stolen, with the intention to deprive the owner thereof.

2. As used in this section, "receives" means acquiring possession, control or title, or lending on the security of the property.

Comment*

This section is based on the New Hampshire Criminal Code, section 637:7. Similar provisions are common. See e.g. Proposed Alaska Criminal Code, section 11.21.150.

The basic statute now dealing with receiving is Title 17, section 3551.

The Supreme Judicial Court has recently determined that in order for a person to be convicted under this statute, he must be found to have himself believed that the goods in question were stolen, it is not sufficient for the jury merely to find that a reasonable man would have had this belief.

State v. Beale, 299 A.2d 921 (1973). It is also the rule in Maine that a person may be guilty of this offense regardless of whether the goods were stolen outside of the State. **State v. Stimpson**, 45 Me. 608 (1858).

This section retains the core of the traditional "receiving" crime. It is expanded, however, via the definition of "receives" in subsection 2 which would include the lender as a receiver.

§ 360. Unauthorized use of property

1. A person is guilty of theft if:

A. Knowing that he does not have the consent of the owner, he takes, operates or exercises control over a vehicle, or, knowing that a vehicle has been so wrongfully obtained, he rides in such vehicle;

B. Having custody of a vehicle pursuant to an agreement between himself and the owner thereof whereby the actor or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, he intentionally uses or operates the same, without the consent of the owner, for his own purposes in a manner constituting a gross deviation from the agreed purpose; or

C. Having custody of property pursuant to a rental or lease agreement with the owner thereof whereby such property is to be returned to the owner at a specified time and place, he intentionally fails to comply with the agreed terms concerning return of such property without the consent of the owner, for so lengthy a period beyond the specified time for return as to render his retention or possession or other failure to return a gross deviation from the agreement.

2. As used in this section, "vehicle" means any automobile, airplance, motorcycle, motorboat, snowmobile, any other motor-propelled means of transportation, or any boat or vessel propelled by sail, oar or paddle. "Property" has the meaning set forth in section 2 and includes vehicles.

3. It is a defense to a prosecution under this section that the actor reasonably believed that the owner would have consented to his conduct had he known of it.

Comment*

This section is based on the New Hampshire Criminal Code, section 582:9, and the Crimes Code of Pennsylvania, section 3928.

There are several statutes relating to this subject. The most recently enacted is Title 17, section 2109-A, concerned with conversion of rented property. In addition, Title 29, section 900 deals specifically with using a motor vehicle without authority.

This section combines coverage of the common "joyriding" problem with circumstances of criminal misuse of bailed or rented property.

Subsection 1, paragraph A extends the joyriding definition to the driver and those of his passengers who know that the vehicle has been taken without consent.

Subsection 1, paragraph B is designed to reach the garage mechanic who uses a vehicle left for repair as his own personal means of transportation. The use must, however, be more than minor, and must constitute a "gross deviation" from the basic reason for the vehicle having been left to him. It is necessary to have some limit of this sort on the criminal liability created by this section, and the "gross deviation" limit serves to create a jury question on the issue so that all of the circumstances can be taken into account.

Subsection 1, paragraph C is a similar prohibition against misuse of rented or leased property — commonly an automobile, but may be any sort of machinery or equipment. Here, too, the "gross deviation" requirement is interposed.

The defense created by subsection 3 is taken from the Pennsylvania Code and is included as a further limit on the scope of the liability defined in this section. The purpose of the defense is to exclude honest mistakes from the coverage.

§ 361. Claim of right; presumptions

1. It is an affirmative defense to prosecution under this chapter that the defendant acted in good faith under a claim of right to property or services involved, including, in cases of theft of a trade secret, that the defendant rightfully knew the trade secret or that it was available to him from a source other than the owner of the trade secret.

2. Proof that the defendant was in exclusive possession of property that had recently been taken under circumstances constituting a violation of this chapter or of chapter 27 shall give rise to a presumption that the defendant is guilty of the theft or robbery of the property, as the case may be.

3. Proof that the defendant intentionally concealed unpurchased property stored, offered or exposed for sale while he was still on the premises of the place where it was stored, offered or exposed, or in a parking lot or public or private way immediately adjacent thereto shall give rise to a presumption that the defendant obtained the property with the intent to deprive the owner thereof.

Comment*

This section contains rules of general applicability to theft. The first is designed to prevent criminal liability where the property was taken in good faith or, in the case of a claimed trade secret, the information was lawfully available to the accused. Subsection 2 contains a rule that is already law in Maine. See **State v. Saba**, 139 Me. 152 (1942). Subsection 3 is an elaborated version of present law contained in Title 17, section 3501.

§ 362. Classification of theft offenses

1. All violations of this chapter shall be classified, for sentencing purposes, according to this section. The facts set forth in this section upon which the classification depends shall be proved by the State beyond a reasonable doubt.

2. Theft is a Class B crime if:

A. The value of the property or services exceeds $5,000;

B. The property stolen is a firearm or an explosive device; or

C. The actor is armed with a deadly weapon at the time of the offense.

3. Theft is a Class C crime if:

A. The value of the property or services is more than $1,000 but not more than $5,000; or

B. The actor has been twice before convicted of the theft of property or services; or

C. The theft is a violation under section 355, subsection 2, paragraphs A or B.

4. Theft is a Class D crime if:

A. It is a volation of section 360, regardless of the value involved; or

B. The value of the property or services exceeds $500 but does not exceed $1,000.

5. Theft is a Class E crime if the value of the property or services does not exceed $500.

Comment*

The substance of the grading criteria is taken from the New Hampshire Criminal Code, section 637:11.

The major provisions of the current law pertaining to theft each contains its own separate penalty choice. Larceny, for example, is punishable by five years imprisonment if the value of the property stolen exceeds $500, and by 11 months or $1,000 if it does not. Title 17, section 2101. Cheating by false pretense, on the other hand, under section 1601 is punishable by seven years and a fine of $500, regardless of the value of the property obtained. Embezzlement does not have a separate penalty and although it partakes of fraud, is punishable as larceny, not as cheating. Title 17, section 2107. If, on the other hand, a guest in one's house steals something from his host during the night, he may be punished by 15 years in prison, under Title 17, section 2103. If the theft in a dwelling house occurs during the day, this same statute reduces the penalty to 6 years. The same penalties are applicable to a larceny committed after breaking and entering an "office, bank, shop, store, warehouse, barn stable, house trailer, mobile home, inhabitable camp trailer, vessel, railroad car of any kind, courthouse, jail, meetinghouse, college, academy or other building for public use or in which valuable things are kept."

This section governs the sentencing of any offender convicted under the theft provisions of this entire chapter. Accordingly, a maqor element in identifying the seriousness of the offense, is the value of the property taken, with a five-fold classification being made in that respect. In addition, this

section makes relevant for sentencing other factors which bear on the seriousness of the offense, such as the theft of a firearm or explosives, or the fact that the thief may have been armed at the time of the offense, both of which class the offense as a B crime. Persistent thieves are dealt with in subsection 3, paragraph B, which authorizes a C penalty, regardless of the amount that might be involved. Of course, if on the theft for which he is presently convicted, the persistent thief can be brought within subsection 2, he may be sentenced for a class B crime.

CHAPTER 17

BURGLARY AND CRIMINAL TRESPASS

§ 401. Burglary

1. **A person is guilty of burglary if he enters or surreptitiously remains in a dwelling place, or other building, structure or place of business, knowing that he is not licensed or privileged to do so, with the intent to commit a crime therein.**

2. **Burglary is classified as:**

A. A Class A crime if the defendant was armed with a firearm, or knew that an accomplice was so armed; and

B. A Class B crime if the defendant intentionally or recklessly inflicted or attempted to inflict bodily injury on anyone during the commission of the burglary, or an attempt to commit such burglary, or in immediate flight after such commission or attempt or if the defendant was armed with a deadly weapon other than a firearm, or knew that an accomplice was so armed; or if the violation was against a dwelling place;

C. All other burglary is a Class C crime.

3. **A person may be convicted both of burglary and of the crime which he committed or attempted to commit after entering or remaining in the dwelling place, but sentencing for both crimes shall be governed by chapter 47, section 1155.**

Comment*

The seven sections of chapter 31, Title 17 presently contain the statutes dealing with burglary. This section preserves the essential elements of the offense, save the common law requirement included in the current law, that there be a "breaking." The crime loses nothing in seriousness if the burglar enters a door inadvertently left open, rather than through a door he breaks open.

The sentencing provisions of subsection 2 reflect that an armed or dangerous burglar presents one of the most serious threats to public order.

§ 402. Criminal trespass

1. **A person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so:**

A. He enters in any secured premises; or

B. He remains in any place in defiance of a lawful order to leave which was personally communicated to him by the owner or other authorized person.

2. As used in this section, "secured premises" means any dwelling place, structure that is locked or barred, and a place from which persons may lawfully be excluded and which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders, or which is fenced or otherwise enclosed in a manner designed to exclude intruders.

3. Criminal trespass is a Class D crime if the violation of this section was by entering a dwelling place, as defined in section 2. All other criminal trespass is a Class E crime.

Comment*

Chapter 172 of Title 17 contains 10 separate sections dealing with Trespass. Nine of these define criminal offenses while the tenth (section 3857) provides for a four-year statute of limitations.

The offenses defined by chapter 127 differ from each other mainly in their descriptions of the types of property which are protected. Section 3151, for example, relates to state property; section 3853 extends to commercial or residential property; wildlife preserves are the subject of section 3859.

Section 3856, on the other hand, appears designed to prevent theft of real property (earth, sand, stone) or of things growing on real estate (grass, corn, fruit, hay or other vegetables). Also different from the others is section 3858 which proscribes interfering with a nest or colony of wild bees.

This section is designed to provide general coverage for all criminal trespass. Three separate sorts of conduct are forbidden. Subsection 1, paragraph A deals with entries to places which the owner has taken some trouble to keep free from intruders by bringing it within the definition of secured premises provided in subsection 2. It is **not** an offense merely to make an unauthorized entry into a place which does not meet the requirements of that definition. Subsection 1, paragraph B is not restricted to secured premises, but creates an offense when the intruder refuses to comply with a lawful request to leave.

§ 403. Possession of burglar's tools

1. A person is guilty of possession of burglar's tools if he possesses or makes any tool, implement, instrument or other article which is adapted, designed or commonly used for advancing or facilitating crimes involving unlawful entry into property or crimes involving forcible breaking of safes or other containers or depositories of property, including but not limited to a master key designed to fit more than one lock, with intent to use such tool, implement, instrument or other article to commit any such criminal offense.

2. Possession of burglar's tools is a Class E crime.

Comment*

This section is a modification of chapter 266, section 12 of the Proposed Criminal Code of Massachusetts. Title 17, section 1813 now provides for forfeiture of "all burglars' tools or implements prepared or designed for burglary." There is no criminal penalty attached to the possession of these tools.

This section is designed to be complementary to the law dealing with attempts. It reaches those who possess with the intent to use the thing in order to commit a crime.

§ 404. Trespass by motor vehicle

1. A person is guilty of trespass by motor vehicle if, knowing that he has no right to do so, he intentionally or knowingly permits a motor vehicle belonging to him or subject to his control to enter or remain in or on:

A. The residential property of another; or

B. The nonresidential property of another for a continuous period in excess of 24 hours.

2. Upon proof that the defendant was the registered owner of the vehicle, it shall be presumed that he was the person who permitted the vehicle to enter or remain on the property.

3. Trespass by motor vehicle is a Class E crime.

Comment*

Sections 3853 and 2251 of Title 17 include prohibitions similar to that contained in this section. Current law and the Code are designed to deal with a number of problems. One is the matter of abandoning motor vehicles on the property of other persons. A lesser problem is parking of cars on such property. The draft requires that the person operating the vehicle know that he has no right to put it where he does. The presumption in subsection 2 is based on the realistic expectation that registered owners drive their cars, and that if, in a given instance, someone else was at the wheel, the owner is the one best suited to indicate this to be so.

CHAPTER 19

FALSIFICATION IN OFFICIAL MATTERS

§ 451. Perjury

1. A person is guilty of perjury if he makes:

A. In any official proceeding, a false statement under oath or affirmation, or swears or affirms the truth of a material statement previously made, and he does not believe the statement to be true; or

B. Inconsistent material statements, in the same official proceeding, under oath or affirmation, both within the period of limitations, one of which statements is false and not believed by him to be true.

2. Whether a statement is material is a question of law to be determined by the court. In a prosecution under subsection 1, paragraph B, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the defendant to be true.

3. It is an affirmative defense to prosecution under this section: That the defendant retracted the falsification in the course of the official proceeding in which it was made, and before it became manifest that the falsification was or would have been exposed; or, that proof of falsity rested solely upon contradiction by testimony of a single witness.

4. It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not mentally competent to make the statement or was disqualified from doing so. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

5. As used in this section:

A. "Official proceeding" means any proceeding before a legislative, judicial, administrative or other governmental body or official authorized by law to take evidence under oath or affirmation including a notary or other person taking evidence in connection with any such proceeding;

B. "Material" means capable of affecting the course or outcome of the proceeding.

6. Perjury is a Class C crime.

Comment*

This section is taken from the Proposed Criminal Code of Massachusetts, chapter 268, section 1. Similar provisions are in the other recodifications, e.g., N. H. Criminal Code, section 641:1, which are based on the Model Penal Code, Article 241.

There are three current statutes on the subject of perjury: Title 17, sections 3001, 3002 and 3003.

Under section 3001, a number of judicial opinions have provided amplification of the statutory terms. Thus, "material matter" has been declared to be "any statement which is relevant to the matter under investigation." **State v. True,** 135 Me. 96, 99 (1937).

The falsity of the statement made which is alleged to be perjured must be proved by two witnesses, or by one witness and some corroborating circumstances. **State v. Rogers,** 149 Me. 32 (1953). But two witnesses, who heard the same utterance will satisfy this rule. **State v. True, supra.**

If the witness makes several false statements in the course of a single judicial proceeding, he commits only one perjury. **State v. Shannon,** 136 Me. 127 (1939).

This section makes little change in the present law. It continues the requirement that the alleged perjury relate to a material matter, that the

statement can be made on oath or affirmation, and that a conviction for perjury may not rest on only the testimony of a single witness that the statement in issue is false.

The retraction provided for in subsection 3 does not appear in current Maine law. It is included as an inducement to witnesses to come forward with the truth, even after they have once given a false account. But if the truth were to appear or be about to appear, without the retraction then there is no need for the inducement.

Subsection 4 similarly appears not to be part of the present law. Its provisions are designed to assure that criminal liability is not affected by matters that are essentially irrelevant, e.g., whether the proper form of words was followed in the oath or whether the oathtaker raised his hand, etc.

The definition of official proceeding in subsection 5, paragraph A brings the perjury prohibition in at every official proceeding in which an oath is taken.

§ 452. False swearing

1. A person is guilty of false swearing if:

A. He makes a false statement under oath or affirmation or swears or affirms the truth of such a statement previously made and he does not believe the statement to be true, provided

(1) the falsification occurs in an official proceeding as defined in section 451, subsection 5, paragraph A, or is made with the intention to mislead a public servant performing his official duties; or

(2) the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths; or

B. He makes inconsistent statements under oath or affirmation, both within the period of limitations, one of which is false and not believed by him to be true. In a prosecution under this subsection, it need not be alleged or proved which of the statements is false, but only that one or the other was false and not believed by the defandant to be true.

2. It is an affirmative defense to prosecution under this section that, when made in an official proceeding, the defendant retracted the falsification in the course of such proceeding before it became manifest that the falsification was or would have been exposed; or that proof of falsity rested solely upon contradiction by testimony of a single witness.

3. It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not mentally competent to make the statement or was disqualified from doing so. A document purporting to be made upon oaths or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

4. False swearing is a Class D crime.

Comment*

The same provisions as are found in this section are in the New Hampshire Criminal Code, section 641:2, and the Proposed Criminal Code of Massachusetts, chapter 268, section 2. There does not appear to be any Maine statute or case law which penalizes the conduct described in this section.

This section is similar to section 451 of this chapter, except that there is no requirement that the statement be a material one, and there is found in this present section a prohibition against falsely swearing to a statement for the purpose of misleading a public servant in the performance of his official functions. Violation of this section entails a lesser degree of crime.

§ 453. Unsworn falsification

A person is guilty of unsworn falsification if:

A. He makes a written false statement which he does not believe to be true, on or pursuant to, a form conspicuously bearing notification authorized by statute or regulation to the effect that false statements made therein are punishable; or

B. With the intent to deceive a public servant in the performance of his official duties, he

(1) makes any written false statement which he does not believe to be true, provided, however, that this subsection does not apply in the case of a written false statement made to a law enforcement officer by a person then in official custody and suspected of having committed a crime; or

(2) knowingly creates, or attempts to create, a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading; or

(3) submits or invites reliance on any sample, specimen, map, boundary mark or other object which he knows to be false.

2. Unsworn falsification is a Class D crime.

Comment*

This section adopts the provisions of the Proposed Criminal Code of Massachusetts, chapter 268, section 3. There does not appaer to be any statute or case law in Maine penalizing the conduct described in this section

This section continues the pattern of the first two sections of this chapter by providing a lesser penalty for falsity that is neither sworn nor in any official proceeding. The deception of a public servant is penalized here in narrow circumstances. There need not be any oath or affirmation when these circumstances occur. The provisions concerning available and unavailable defenses contained in the first two sections are continued here as well.

§ 454. Tampering with witness or informant

1. A person is guilty of tampering with witness or informant if, believing that an official proceeding as defined in section 451, subsection 5, paragraph A, or an official criminal investigation, is pending or will be instituted:

A. He attempts to induce or otherwise cause a witness or informant

(1) to testify or inform falsely; or

(2) to withhold, beyond the scope of any privilege which the witness or informant may have, any testimony, information or evidence; or

(3) to absent himself from any proceeding or investigation to which he has been summoned by legal process; or

B. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in subsection 1, paragraph A, subparagraph (1); or

C. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in subsection 1, paragraph A, subparagraphs (2) or (3).

2. Violation of subsection 1, paragraph A, subparagraph (1) or paragraph B is a Class C crime. Violation of subsection 1, paragraph A, subparagraphs (2) or (3), or subsection 1, paragraph C is a Class D crime.

Comment*

This section is patterned on the Proposed Massachusetts Criminal Code, chapter 268, section 5. Title 17, section 3002 provides:

> Whoever willfully and corruptly endeavors to incite or procure another to commit perjury, although it is not committed shall be punished by imprisonment for not more than 5 years.

There does not appear to be statutory law covering the remainder of the draft section.

The aim of this section is to provide a comprehensive prohibition against improper interference with sources of official information. The section also prohibits the witness or informant from seeking to obstruct justice in this manner.

§ 455. Falsifying physical evidence

1. A person is guilty of falsifying physical evidence if, believing that an official proceeding as defined in section 451, subsection 5, paragraph A, or an official criminal investigation, is pending or will be instituted, he:

A. Alters, destroys, conceals or removes any thing relevant to such proceeding or investigation with intent to impair its verity, authenticity or availability in such proceeding or investigation; or

B. Presents or uses any thing which he knows to be false with intent to deceive a public servant who is or may be engaged in such proceeding or investigation.

2. **Falsifying physical evidence is a Class D crime.**

Comment*

This section is taken from the Proposed Criminal Code for Massachusetts, chapter 268, section 6. There does not appear to be any statute on this subject in the present law.

This section is a complementary provision to section 454 of this chapter which prohibits subornation of perjury and other improper interferences with witnesses. The present section is directed toward the same end of supporting the integrity of official proceedings by prohibiting improper use or alteration of physical evidence.

§ 456. Tampering with public records or information

1. **A person is guilty of tampering with public records or information if he:**

A. Knowingly makes a false entry in, or false alteration of any record, document or thing belonging to, or received or kept by the government, or required by law to be kept by others for the information of the government; or

B. Presents or uses any record, document or thing knowing it to be false, and with intent that it be taken as a genuine part of information or records referred to in subsection 1, paragraph A; or

C. Intentionally destroys, conceals, removes or otherwise impairs the verity or availability of any such record, document or thing, knowing that he lacks authority to do so.

2. **Tampering with public records or information is a Class D crime.**

Comment*

This section is taken from the Proposed Criminal Code of Massachusetts, chapter 268, section 7. There does not appear to be a statute in the present Maine law.

This section shares with others in this chapter the aim of promoting the integrity of governmental functions. It is drafted, however, so as not to include inadvertent mishandling of material.

§ 457. Impersonating a public servant

1. **A person is guilty of impersonating a public servant if he falsely pretends to be a public servant and engages in any conduct in that capacity with the intent to deceive anyone.**

2. **It is no defense to a prosecution under this section that the office the person pretended to hold did not in fact exist.**

3. **Impersonating a public servant is a Class E crime.**

Comment*

This section is derived from the Hawaii Penal Code, section 1016. Chapter 53 of Title 17 contains two statutes on the subject, sections 1451 and 1452.

This section is a generalized form of present prohibitions. It includes the requirement of some act with an intent to deceive in order to insure that only serious misconduct be covered.

CHAPTER 21

OFFENSES AGAINST PUBLIC ORDER

§ 501. Disorderly conduct

A person is guilty of disorderly conduct if:

1. In a public place, he intentionally or recklessly causes annoyance to others by intentionally:

A. Making loud and unreasonable noises; or

B. Activating a device, or exposing a substance, which releases noxious and offensive odors; or

2. In a public or private place, he knowingly accosts, insults, taunts or challenges any person with offensive, derisive or annoying words, or by gestures or other physical conduct, which would in fact have a direct tendency to cause a violent response by an ordinary person in the situation of the person so accosted, insulted, taunted or challenged;

3. In a private place, he makes loud and unreasonable noise which can be heard as unreasonable noise in a public place or in another private place, after having been ordered by a law enforcement officer to cease such noise.

4. A person violating this section in the presence of a law enforcement officer may be arrested without a warrant.

5. As used in this section:

A. "Public place" means a place to which the public at large or a substantial group has access, including but not limited to

(1) public ways as defined in section 505;

(2) schools, government-owned custodial facilities, and

(3) the lobbies, hallways, lavatories, toilets and basement portions of apartment houses, hotels, public buildings and transportation terminals;

B. "Private place" means any place that is not a public place.

6. Disorderly conduct is a Class E crime.

Comment*

Disorderly conduct is now defined in section 3953 of Title 17 in very general terms. This section of the code is aimed at spelling out the more precise characteristics of conduct which is sufficiently offensive to legitimate interests of the public so that it should be reached by the criminal law. The definitions of this section also form the basis for more serious offenses prohibited by subsequent sections of this chapter.

§ 502. Failure to disperse

1. When 6 or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, a law enforcement officer may order the participants and others in the immediate vicinity to disperse.

2. A person is guilty of failure to disperse if he knowingly fails to comply with an order made pursuant to subsection 1.

3. Failure to disperse is a Class D crime if the person is a participant in the course of disorderly conduct; otherwise it is a Class E crime.

Comment*

Section 3355 of Title 17 now prohibits failure to disperse in terms that make the duty to disperse depend on how many people there are and whether they are armed. This section of the code has the duty depend on a lesser number (12 or 30 required under present law) but requires that there be disorderly conduct likely to cause public harm.

§ 503. Riot

1. A person is guilty of riot if, together with 5 or more other persons, he engages in disorderly conduct;

A. With intent imminently to commit or facilitate the commission of a crime involving physical injury or property damage against persons who are not participants; or

B. When he or any other participant to his knowledge uses or intends to use a firearm or other dangerous weapon in the course of the disorderly conduct.

2. Riot is a Class B crime.

Comment*

Riot is the most serious offense defined in this chapter. It involves disorderly conduct by a group which is likely to produce personal injury or property damage, or which is engaged in by persons who are armed. It is similar to the offense now defined in section 3352 of Title 17 in more general terms.

§ 504. Unlawful assembly

A person is guilty of unlawful assembly if:

1. He assembles with 5 or more other persons with intent to engage in conduct constituting a riot; or being present at an assembly that either has or develops a purpose to engage in conduct constituting a riot, he remains there with intent to advance that purpose; and

2. He knowingly fails to comply with an order to disperse given by a law enforcement officer to the assembly.

3. Unlawful assembly is a Class C crime.

Comment*

Like section 502 of this chapter, this section is designed to permit law enforcement officers to head off a riot by requiring the dispersal of persons about to engage in serious misconduct that threatens the personal safety of others. It is more serious than section 502 in that it is closer to the conduct defined as riot in section 503. Section 3352 of Title 17 defines a similar offense, but in more general terms.

§ 505. Obstructing public ways

1. A person is guilty of obstructing public ways if he unreasonably obstructs the free passage of foot or vehicular traffic on any public way, and refuses to cease or remove the obstruction upon a lawful order to do so given him by a law enforcement officer.

2. As used in this section, "public way" means any public highway or sidewalk, private way laid out under authority of statute, way dedicated to public use, way upon which the public has a right of access or has access as invitees or licensees, or way under the control of park commissioners or a body having like powers.

3. Obstructing public ways is a Class D crime.

Comment*

Under section 3961 of Title 17 it is an offense to place obstructions on a traveled road "and leave them there." This section of the code is a more general prohibition which requires that the person making the obstruction refuse to remove it upon being told to do so by a law enforcement officer.

§ 506. Harassment

1. A person is guilty of harassment if by means of telephone he:

A. Makes any comment, request, suggestion or proposal which is, in fact, offensively coarse or obscene, without consent of the person called; or

B. Makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at the called number; or

C. Makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

D. Makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

E. Knowingly permits any telephone under his control to be used for any purpose prohibited by this section.

2. The crime defined in this section may be prosecuted and punished in the county in which the defendant was located when he used the telephone, or in the county in which the telephone called or made to ring by the defendant was located.

3. Harassment is a Class D crime.

Comment*

This section is similar to the 1967 enactment against annoying telephone calls in section 3704 of Title 17.

§ 507. Desecration and defacement

1. A person is guilty of desecration and defacement if he intentionally desecrates any public monument or structure, any place of worship or burial, or any private structure not owned by him.

2. As used in this section, "desecrate" means marring, defacing, damaging or otherwise physically mistreating, in a way that will outrage the sensibilities of an ordinary person likely to observe or discover the actions.

3. Desecration is a Class E crime.

Comment*

Section 1252 of Title 17 prohibits desecration of a monument or place of burial, while section 3965 is a similar provision relating to state buildings. This section of the code broadens the coverage of these statutes and protects against mistreatment that would outrage ordinary persons.

§ 508. Abuse of corpse

1. A person is guilty of abuse of corpse if he intentionally and unlawfully disinters, digs up, removes, conceals, mutilates or destroys a human corpse, or any part or the ashes thereof.

2. It is a defense to prosecution under this section that the actor was a physician, scientist or student who had in his possession, or used human bodies or parts thereof lawfully obtained, for anatomical, physiological or other scientific investigation or instruction.

3. Abuse of corpse is a Class D crime.

Comment*

This section continues the prohibition in section 1251 of Title 17 as well as the exemption from liability described in subsection 2.

§ 509. False public alarm or report

1. A person is guilty of false public alarm or report if:

A. He knowingly gives or causes to be given false information to any law enforcement officer with the intent of inducing such officer to believe

that a crime has been committed or that another has committed a crime, knowing the information to be false; or

B. He knowingly gives false information to any law enforcement officer or member of a fire fighting agency, including a volunteer fire department, concerning a fire, explosive or other similar substance which is capable of endangering the safety of persons, knowing that such information is false, or knowing that he has no information relating to the fire, explosive or other similar substance.

2. False public alarm is a Class D. crime.

Comment*

The purpose of this section is to prevent the unnecessary use of public security resources. Like section 503 of Title 17, subsection 1, paragraph B prohibits false bomb reports; subsection 1, paragraph A is designed to discourage crime investigations that have no basis.

§ 510. Cruelty to animals

1. A person is guilty of cruelty to animals if, intentionally or recklessly:

A. He kills or injures any animal belonging to another person without legal privilege or the consent of the owner. The owner or occupant of property is privileged to use reasonable force to eject a trespassing animal;

B. He overworks, tortures, abandons, gives poison to, cruelly beats or mutilates any animal, or exposes a poison with the intent that it be taken by an animal;

C. He deprives any animal which he owns or possesses of necessary sustenance, shelter or humanely clean conditions;

D. He owns, possesses, keeps, or trains any animal with the intent that it shall be engaged in an exhibition of fighting, or if he has a pecuniary interest in or acts as a judge at any such exhibition of fighting animals; or

E. He keeps or leaves sheep on an uninhabited or barren island lying off the coast of Maine during the month of December, January, February or March without providing sufficient food and proper shelter.

2. As used in subsection 1, paragraph B, "mulilates" includes, but is not limited to, cutting the bone, muscles or tendons of the tail of a horse for the purpose of docking or setting up the tail, cropping or cutting off the ear of a dog in whole or in part. As used in subsection 1, "animal" means birds, fowl, fish and any other living sentient creature that is not a human being.

3. It is an affirmative defense to prosecution under this section that:

A. The defendant's conduct conformed to accepted veterinary practice or was a part of scientific research governed by accepted standards; or

B. The defendant's conduct was designed to control or eliminate rodents, ants or other common pests on his own property.

4. Cruelty to animals is a Class D crime.

Comment*

Chapter 43 of Title 17 contains many provisions on the subject of cruelty to animals. This section of the code collects the most important of these; the administrative and enforcement provisions will remain in Title 17.

§ 511. Violation of privacy

1. A person is guilty of violation of privacy if, except in the execution of a public duty or as authorized by law, he intentionally:

A. Commits a civil trespass on property with the intent to overhear or observe any person in a private place; or

B. Installs or uses in a private place without the consent of the person or persons enttled to privacy therein, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place; or

C. Installs or uses outside a private place without the consent of the person or persons entitled to privacy therein, any device for hearing, recording, amplifying or broadcasting sounds originating in that place which would not ordinarily be audible or comprehensible outside that place.

2. As used in this section "private place" means a place where one may reasonably expect to be safe from surveillance but does not include a place to which the public or a substantial group has access.

3. Violation of privacy is a Class D crime.

Comment*

There is no counterpart to this section in the present law. It is designed to prevent seeing or hearing of things that are justifiably expected to be kept private.

§ 512. Failure to report treatment of a gunshot wound

1. A person is guilty of failure to report treatment of a gunshot wound if, being a licensed physician, he treats a human being for a wound apparently caused by the discharge of a firearm and knowingly fails to report the same to a law enforcement officer within 24 hours.

2. Failure to report treatment of a gunshot wound is a Class E crime.

Comment*

This section continues the prohibition now found in section 3957 of Title 17.

§ 513. Maintaining an unprotected well

1. A person is guilty of maintaining an unprotected well if, being the owner or occupier of land on which there is a well, he knowingly fails to enclose the well with a substantial fence or other substantial enclosing barrier or to protect it by a substantial covering which is securely fastened.

2. Maintaining an unprotected well is a Class E crime.

Comment*

This section continues the prohibition now found in chapter 129 of Title 17.

§ 514. Abandoning an airtight container

1. A person is guilty of abandoning an airtight container if:

A. He abandons or discards in any public place, or in a private place that is accessible to minors, any chest, closet, piece of furniture, refrigerator, icebox or other article having a compartment capacity of 1½ cubic feet or more and having a door or lid which when closed cannot be opened easily from the inside; or

B. Being the owner, lessee, manager or other person in control of a public place or of a place that is accessible to minors on which there has been abandoned or discarded a container described in subsection 1, paragraph A, he knowingly or recklessly fails to remove such container from that place, or to remove the door, lid or other cover of the container.

2. Abandoning an airtight container is a Class E crime.

Comment*

This section continues the prohibition now found in section 3951 of Title 17.

§ 515. Unlawful prize fighting

1. A person is guilty of unlawful prize fighting if:

A. He knowingly engages in, encourages or does any act to further a premeditated fight without weapons between 2 or more persons, or a fight commonly called a ring fight or prize fight; or

B. He knowingly sends or publishes a challenge or acceptance of a challenge for such, or carries or delivers such a challenge for acceptance, or trains or assists any person in training or preparing for such fight, or acts as umpire or judge for such fight.

2. This section shall not apply to any boxing contest or exhibition:

A. Conducted by license and permit of the Maine State Boxing Commission; or

B. Under the auspices of a nonprofit organization at which no admission charge is made.

3. Unlawful prize fighting is a Class E crime.

Comment*

This section continues the rules now found in section 551 of Title 17 and adds an exemption for nonprofit organizations under subsection 2, paragraph B.

§ 516. Champerty

1. A person is guilty of champerty if, with the intent to collect by a civil action a claim, account, note or other demand due, or to become due to another person, he gives or promises anything of value to such person.

2. This section does not apply to agreements between attorney and client to bring, prosecute or defend a civil action on a contingent fee basis.

3. Champerty is a Class E crime.

Comment*

This section is a simplified version of Title 17, section 801.

CHAPTER 23

OFFENSES AGAINST THE FAMILY

§ 551. Bigamy

1. A person is guilty of bigamy if, having a spouse, he intentionally marries or purports to marry, knowing that he is legally ineligible to do so.

2. Bigamy is a Class E crime.

Comment*

This section is a combination of the New Hampshire Criminal Code, section 639:1 and the Hawaii Penal Code, section 900. The present bigamy statute is Title 17, section 351. It has been held that the State must plead that the defendant was not within the statutory exception, and that the factors of seven year absence and not known to be living, constitute a single exception. State v. Damon, 97 Me. 323 (1903). That is, it is no defense to raise a reasonable doubt concerning how long the other spouse has been missing unless a doubt is also raised about whether the defendant knew the spouse to be alive; the defendant prevails only if there is a reasonable doubt as to both.

This section seeks to simplify the law of bigamy and to change the substantive rules concerning when a person who has previously been married, is permitted to marry again without violating the penal law.

The basic requirement of this crime is that the defendant knew that he was legally ineligible to marry. The inclusion of the requirement that he also have a spouse is designed to keep the statute from being a broad "illegal marrying" prohibition that would extend to young persons who married before they were legally eligible to do so.

Under this statute it makes no difference how long a spouse may have been missing and believed to be dead. If the defendant honestly believes that the spouse is not alive, he is free to marry without violating penal law.

The scope of this offense could be broadened by providing that it is an affirmative defense which the defendant must establish that he thought he was eligible to marry; further expansion would be brought about by

requiring that he has been **reasonable** in arriving at this belief. These alternatives have not been adopted on the ground that an absence of good faith is the essence of the offense and should, therefore, be proved by the State.

§ 552. Nonsupport of dependents

1. **A person is guilty of nonsupport of dependents if he knowingly fails to provide support which he is able to provide and which he knows he is legally obliged to provide to a spouse, child or other person declared by law to be his dependent.**

2. **As used in this section, "support" includes but is not limited to food, shelter, clothing and other necessary care.**

3. **Nonsupport of dependents is a Class E crime.**

Comment*

This section is a modification of the Hawaii Penal Code, section 903. The basic statute on this subject is Title 19, section 481, as amended in 1969. The fundamental change brought about by the 1969 revision was to drop any reference to failure to support a wife, and to leave the statute solely in terms of failure to support children under the age of 18. It also appears that the 1969 statute continues the rule which had developed under the earlier version, to the effect that only legitimate children are within its provisions. **State v. McCurdy,** 116 Me. 359 (1917).

This section provides a comprehensive prohibition relating to all circumstances in which one person is a dependent of another and there is a culpable failure to provide the support called for by the relationship. This section does not, however, undertake to define who is a dependent of whom; other statutes do this. Title 19, section 301 presently obliges a man to support his wife and minor children; section 219 of the same Title requires adult children to support their dependent parents.

§ 553. Abandonment of child

1. **A person is guilty of abandonment of a child if, being a parent, guardan or other person legally charged with the long-term care and custody of a child under the age of 14, or a person to whom such care and custody has been expressly delegated, he leaves the child in any place with the intent to abandon him.**

2. **Abandonment of a child is a Class D crime.**

Comment*

Ths section is patterned on the Hawaii Penal Code, section 902. It is similar to Title 19, section 487 of the present law in Maine.

Ths section raises the age of present law from 6 to 14, but otherwise leaves the elements of the offense basically as they are now. The Hawaii age limit has been proposed, in preference to the present age of 6, on the ground that the deterrent force of the law is still required for the older children who are still largely incapable of making major decisions for themselves and are still not ready to be wholly responsible for themselves.

§ 554. Endangering the welfare of a child

1. A person is guilty of endangering the welfare of a child if, except as provided in subsection 2, he knowingly permits a child under the age of 16 to enter or remain in a house of prostitution; or he knowingly sells, furnishes, gives away or offers to sell, furnish or give away to such a child, any intoxicating liquor, cigarettes, tobacco, air rifles, firearms or ammunition; or he otherwise knowingly endangers the child's health, safety or mental welfare by volating a duty of care of protection.

2. It is an affirmative defense to prosecution under this section that:

A. The defendant was the parent, foster parent, guardian or other similar person responsible for the long-term general care and welfare of a child under the age of 16 who furnished such child a reasonable amount of intoxicating liquor in the actor's home and presence; or

B. Any person acting pursuant to authority expressly or impliedly granted in Title 12.

3. Endangering the welfare of a child is a Class D crime.

Comment*

This section is patterned on the New Hampshire Criminal Code, section 639:3, but it also includes many provisions of present Maine law; chapter 35 of Title 17 is made up of 11 sections relating to protection of children. In addition, section 859 punishes contributing to delinquency.

This section is designed to substitute for section 859 of the present statutes and to insure that the prohibitions specifically mentioned in chapter 35 of Title 17 are continued, with the following exceptions. The section relating to narcotic drugs is not included since that will be covered in the drug law revisions, and the section on begging or exhibiting is not included as being unnecessary.

§ 555. Endangering welfare of an incompetent person

1. A person is guilty of endangering the welfare of an incompetent person if he knowingly endangers the health, safety or mental welfare of a person who is unable to care for himself because of advanced age, physical or mental disease, disorder or defect.

2. As used in this section "endangers" includes a failure to act only when the defendant had a legal duty to protect the health, safety or mental welfare of the incompetent person.

3. Endangering the welfare of an incompetent person is a Class D crime.

Comment*

This section is a modified version of the Hawaii Penal Code, section 905. There does not appear to be any statutory provision on this subject.

This section is a counterpart to the code's provision relating to endangering the welfare of children. In many penal codes these are treated together

in one section, e.g., New Hampshire Penal Code, section 639:9. It would, however, be awkward to attempt to consolidate the two sections as they are presently written.

This section relates to all persons in regard to positive acts of endangering, not merely those who are guardians of incompetent persons. Omissions are punishable, however, only when they are on the part of those who have an affirmative legal duty to act.

§ 556. Incest

1. A person is guilty of incest if, being at least 18 years of age, he has sexual intercourse with another person who is at least 18 years of age and as to whom he knows marriage is prohibited by Title 19, section 31.

2. Incest is a Class D crime.

Comment*

This section is similar to the Proposed Criminal Code of Massachusetts, chapter 272, section 7. Title 17, section 1851 now provides:

> When persons within the degrees of consanguinity or affinity, in which marriages are declared incestuous and void, intermarry or commit fornication or adultery with each other, they shall be punished by imprisonment for not less than one year nor more than 10 years.

This section provides for the crime of incest only when the participants are at least 18 years old. Sexual intercourse with a child under the age of 14 will be rape under section 252 of chapter 11, which intercourse with a child between 14 and 18 is punishable as sexual abuse of minors under section 254 of chapter 11.

CHAPTER 25

BRIBERY AND CORRUPT PRACTICES

§ 601. Scope of chapter

Nothing in this chapter shall be construed to prohibit the giving or receiving of campaign contributions made for the purpose of defraying the costs of a political campaign. No person shall be convicted of an offense solely on the evidence that a campaign contribution was made, and that an appointment or nomination was subsequently made by the person to whose campaign or political party the contribution was made.

Comment*

The purpose of this section is to insure that legitimate campaign contributions do not become the subject of criminal prosecutions merely because the contributor received an appointment or nomination by the person who benefiitted from the contribution. It is taken from the New Hampshire Criminal Code, section 640:1.

§ 602. Bribery in official and political matters

1. A person is guilty of bribery in official and political matters if:

A. He promises, offers, or gives any pecuniary benefit to another with the intention of influencing the other's action, decision, opinion, recommendation, vote, nomination or other exercise of discretion as a public servant, party official or voter; or

B. Being a public servant, party official, candidate for electoral office or voter, he solicits, accepts or agrees to accept any pecuniary benefit from another knowing or believing the other's purpose to be as described in subsection 1, paragraph A, or fails to report to a law enforcement officer that he has been offered or promised a pecuniary benefit in violation of subsection 1, paragraph A.

2. As used in this section and other sections of this chapter, the following definitions apply.

A. A person is a "candidate for electoral office" upon his public announcement of his candidacy.

B. "Party official" means any person holding any post in a political party whether by election, appointment or otherwise.

C. "Pecuniary benefit" means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally.

3. Bribing in official and political matters is a Class C crime.

Comment*

Bribery by public officers is now prohibited by sections 601, 603, 605, 606 of Title 17. This section goes beyond present law by including bribery of candidates as well as those already elected or appointed to public office. In addition, the definition of "public servant" in section 2 of chapter 1 serves to expand present law by including consultants among those who may not be bribed.

§ 603. Improper influence

1. A person is guilty of improper influence if he:

A. Threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion, recommendation, nomination, vote or other exercise of discretion;

B. Privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the intention of influencing that discretion on the basis of considerations other than those authorized by law; or

C. Being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of paragraphs A or B.

2. "Harm" means any disadvantage or injury, pecuniary or otherwise, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official or voter is interested.

3. Improper influence is a Class D crime.

Comment*

This section is designed to protect the integrity of the government function by forbidding threats whose aim is to influence the exercise of official discretion and by prohibiting appeals to discretion outside the established channels of communication. The rule in subsection 1, paragraph B is limited, however, to judicial and administrative proceedings because legislative and executive officers are traditionally subject to such a variety of special pleas for the exercise of their discretion that there are no prevailing norms, short of penalties for threat or outright bribery, that prohibit communications to them for favor. In the absence of a widely held view that there is something wrong about appealing to legislative and executive personnel, the law ought not to create the condemnation on its own.

§ 604. Improper compensation for past action

1. A person is guilty of improper compensation for past action if:

A. Being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty; or

B. He promises, offers or gives any pecuniary benefit, acceptance of which would be a violation of paragraph A.

2. Improper compensation for past action is a Class D crime.

Comment*

This section seeks to fill a gap in the law dealing with official integrity which is occasioned by giving or receiving what, in essence, is a bribe after the official action has taken place. The rationale for reaching unofficial compensation under these circumstances is described by the comments to the Model Penal Code, section 240:3:

> Soliciting or accepting pay for past official favor should be discouraged because it undermines the integrity of administration. Compensation for past action implies a promise of similar compensation for future favor. Apart from this implied bribery for the future, when some "clients" of a public servant undertake to pay him for favors, others who deal with the same public servant are put under pressure to make similar contributions or risk subtle disfavor.

§ 605. Improper gifts to public servants

1. A person is guilty of improper gifts to public servants if:

A. Being a public servant he solicits, accepts or agrees to accept any pecuniary benefit from a person who he knows is or is likely to become

subject to or interested in any matter or action pending before or contemplated by himself or the governmental body with which he is affiliated; or

B. He knowingly gives, offers, or promises any pecuniary benefit prohibited by paragraph A.

2. Improper gifts to public servants is a Class E crime.

Comment*

This section supplements the bribery provisions which prohibit giving things to public servants with the wrong motive, by prohibiting such transactions when the thing given comes from the "wrong" source. It seems to be a warranted assumption that gifts from persons who have an interest in an official matter before the public servant would be so often made with the hope and intent of influencing him that it is appropriate to prohibit all such gifts generally. This prohibition also serves to contribute significantly to the appearance, as well as the substance, of public integrity.

§ 606. Improper compensation for services

1. A person is guilty of improper compensation for services if:

A. Being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for advice or other assistance in preparing or promoting a bill, contract, claim or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise; or

B. He gives, offers or promises any pecuniary benefit, knowing that it is prohibited by paragraph A.

2. Improper compensation for services is a Class E crime.

Comment*

Like other parts of this chapter, this section seeks to prevent a particular evasion of the bribery laws, namely, where the public servant purports to be acting privately but where the work he does is so intimately related to his official role that he is serving two masters when the public interest requires that it only be served.

§ 607. Purchase of public office

1. A person is guilty of purchase of public office if:

A. He solicits, accepts or agrees to accept, for himself, another person, or a political party, money or any other pecuniary benefit as compensation for his endorsement, nomination, appointment, approval or disapproval of any person for a position as a public servant or for the advancement of any public servant; or

B. He knowingly gives, offers or promises any pecuniary benefit prohibited by paragraph A.

2. Purchase of public office is a Class D crime.

Comment*

This section reaches one of the most pernicious invasions of the integrity of the public's business. Few public interests exceed that of having the most qualified persons fill public office. When the selection for public office is based not on quality but on a **quid pro quo**, the stage is set for inefficiency of performance, a breakdown of morale among civil servants, and even corrupt practices.

§ 608. Official oppression

1. A person is guilty of official oppression if, being a public servant and acting with the intention to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office, or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

2. Official oppression is a Class E crime.

Comment*

This section is designed to prevent the abusive use of official power. It does not attach criminal penalties to all unauthorized actions or inactions, however; only those that are done with the specified intention come within the prohibition.

§ 609. Misuse of information

1. A person is guilty of misuse of information if, being a public servant and knowing that official action is contemplated, or acting in reliance on information which he has acquired by virtue of his office or from another public servant, he:

A. Acqiures or divests himself of a pecuniary interest in any property, transaction or enterprise which may be affected by such official action or information; or

B. Speculates or wagers on the basis of such official action or information; or

C. Knowingly aids another to do any of the things described in paragraphs A and B.

2. Misuse of information is a Class E crime.

Comment*

The aim of this section is to prevent public servants from taking advantage of their positions in order to gain personal profits. This in turn should contribute significantly to the lessening of conflicts of interest when official discretion is to be exercised and should also help to maintain the image of government processes as being strictly in the interests of the public.

CHAPTER 27

ROBBERY

§ 651. Aggravated robbery

1. A person is guilty of aggravated robbery if, in the course of committing robbery, as defined in section 652:

A. He intentionally inflicts or attempts to inflict bodily injury or uses physical force on another; or

B. He is armed with a dangerous weapon.

2. Aggravated robbery is a Class A crime.

Comment*

This section and the one following, Robbery, follow the Maine statutes (Title 17, sections 3401, 3401-A and 3402) and the common law conception of robbery as an aggravated form of theft. This section seeks to identify the most serious forms of aggravation in subsection 1. In subsection 1, paragraph A the measure is the amount of force that is used or attempted in the theft, while in subsection 1, paragraph B any force or theft will constitute the aggravating circumstances, provided the actor was armed.

The next following section, Robbery, is graded as a less serious crime and identifies as the aggravating circumstances of the theft, less destructive use of force.

§ 652. Robbery

1. A person is guilty of robbery if he commits theft and at the time of his actions:

A. He threatens to use force against any person present with the intent

(1) to prevent or overcome resistance to the taking of the property, or to the retention of the property immediately after the taking; or

(2) to compel the person in control of the property to give it up or to engage in other conduct which aids in the taking or carrying away of the property; or

B. He recklessly inflicts bodily injury on another.

2. Robbery is a Class B crime.

Comment*

See comments to section 651.

CHAPTER 29

FORGERY AND RELATED OFFENSES

§ 701. Definitions

As used in sections 702 and 703:

1. A person "falsely alters" a written instrument when, without the authority of anyone entitled to grant it, he changes a written instrument, wheth-

er it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that such instrument in its thus altered form appears or purports to be in all respects an authentic creation of, or fully authorized by, its ostensible author, maker or drawer;

2. A person "falsely completes" a written instrument when, by adding, inserting or changing matter, he transforms an incomplete written instrument into a complete one, without the authority of anyone entitled to grant it, so that such complete instrument appears or purports to be in all respects an authentic creation of, or fully authorized by, its ostensible author, maker or drawer;

3. A person "falsely makes" a written instrument when he makes or draws a complete written instrument in its entirety, or an incomplete written instrument, which purports to be an authentic creation of its ostensible author, maker or drawer, but which is not such, either because the ostensible maker or drawer is fictitious or because, if real, he did not authorize the making or drawing thereof;

4. "Written instrument" includes any token, coin, stamp, seal, badge, trademark, credit card, other evidence or symbol of value, right, privilege or identification, and any paper, document, or other written instrument containing written or printed matter or its equivalent;

5. "Complete written instrument" means a written instrument which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof; and

6. "Incomplete written instrument" means a written instrument which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

Comment*

The definition of written instrument is derived from the Hawaii Penal Code, section 850(1); the others are from the Proposed Criminal Code of Massachusetts, chapter 266, sections 1(b), 1(c), and 26(c).

The Maine statutes do not now contain formal definitions such as those contained in this section. There are, however, fragments of analogous definitions to be gleaned from various sources. Title 17, section 1502, for example, punishes any person who, with intent to defraud, "erases or obliterates" a writing or who "alters" any writing "in a material matter." Judicial opinions may also supply some of the definitions used in the present law. See, for example, **State v. Talbot,** 160 Me. 103, 106-107 (1964) where reference is made to dictionary means of "alter" and "forge." Definitions of the things which may be the subject of the crime of forgery are contained in the various statutes dealing with that crime. Title 17, section 1501, for example, speaks of "any public record or proceeding filed or entered in any court" and "any charter, deed, will, testament, bond, writing obligatory, power of attorney, letter of credit," etc. Forgery is also defined outside of Title 17. See, for example, Title 6, section 203 which punishes

forgery of certain aeronautics certifications; Title 32, section 4403 creates the offense of forgery of permits to cut Christmas trees.

The definitions in this section are designed to permit comprehensive treatment of forgery in the ensuing two sections. By setting forth the definitions separately, undue complexity is avoided in the sections which define and grade the forgery offenses. The definitions provided here do not appear to be in conflict with the present law, except that "falsely completes" provides the basis for defining forgery in a way that would conflict with dictum in **Abbott v. Rose**, 62 Me. 194, 201 (1873) to the effect that fraudulently filling in the blanks in an incomplete instrument would not be forgery.

§ 702. Aggravated forgery

1. A person is guilty of aggravated forgery if, with intent to defraud or deceive another person or government, he falsely makes, completes or alters a written instrument, or knowingly utters or possesses such an instrument, and the instrument is:

A. Part of an issue of money, stamps, securities or other valuable instruments issued by a government or governmental instrumentality;

B. Part of an issue of stocks, bonds or other instruments representing interests in or claims against an organization or its property;

C. A will, codicil or other instrument providing for the disposition of property after death;

D. A public record or an instrument filed or required or authorized by law to be filed in or with a public office or public employee; or

E. A check whose face value exceeds $5,000.

2. Aggravated forgery is a Class B crime.

Comment*

This section is patterned on the Proposed Criminal Code of Massachusetts, chapter 266, sections 26(a) and 27(b) and (d). The basic forgery statutes are in Title 17, sections 1501 through 1507.

Two forms of forgery are provided, this section and the one following. They are distinguished largely by the nature of the thing forged. Subsection 1, paragraph E serves to authorize a higher penalty for forging of a large check.

§ 703. Forgery

1. A person is guilty of forgery if, with the intent to defraud or deceive another person or government, he:

A. Falsely makes, completes or alters a written instrument, or knowingly utters or possesses such an instrument; or

B. Causes another, by deception, to sign or execute a written instrument, or utters such an instrument.

2. Forgery is a Class D crime.

Comment*

This section is derived from the Proposed Criminal Code of Massachusetts, chapter 266, section 28, and the Hawaii Penal Code, section 856.

The basic statutes are cited in the Comment to section 702. It has been held that fraudulently obtaining the signature of a person to a document is a forgery of that document. **State v. Shurtliff,** 18 Me. 368 (1841).

This section punishes all forgery that is not described in section 702. In addition, there is provision for the case of obtaining a signature by fraud, as is the present law under **Shurtliff.**

§ 704. Possession of forgery devices

1. A person is guilty of possession of forgery devices if:

A. He makes or possesses with knowledge of its character, any plate, die or other device, apparatus, equipment or article specifically designed or adapted for use in committing aggravated forgery or forgery; or

B. He makes or possesses any device, apparatus, equipment, or article capable of or adaptable to use in committing an aggravated forgery or forgery, with the intent to use it himself, or to aid or permit another to use it for purposes of committing aggravated forgery or forgery.

2. Possession of forgery devices is a Class E crime.

Comment*

This section is a modification of the Hawaii Penal Code, section 854.

Title 17, section 1508 presently provides punishment for conduct of this sort.

The two parts of subsection one differ from each other on the matter of whether the thing possessed is or is not specifically designed to commit forgery, e.g., plates to counterfeit stamps. If it is, then it need only be proved that the actor knew of this. Subsection 1, paragraph B, on the other hand, relates to things usable to commit forgery, but are not specifically designed to that end, e.g., a printing press. In these latter cases, the prosecution must prove that there was an intent, accompanying the possession, to put the thing to use in a forgery.

§ 705. Criminal simulation

1. A person is guilty of criminal simulation if:

A. With intent to defraud, he makes or alters any property so that it appears to have an age, rarity, quality, composition, source or authorship which it does not in fact possess; or with knowledge of its true character and with intent to defraud, he transfers or possesses property so simulated; or

B. In return for a pecuniary benefit;

(1) he authors, prepares, writes, sells, transfers or possesses with intent to sell or transfer, an essay, term paper or other manuscript knowing that it will be, or believing that it probably will be, submitted by another person in satisfaction of a course, credit or degree requirement at a university or other degree, diploma or certificate-granting educational institution; or

(2) he takes an examination for another person in satisfaction of a course, credit or degree requirement at a university or other degree, diploma or certificate-granting educational institution;

C. He knowingly makes, gives or exhibits a false pedigree in writing of any animal; or

D. With intent to defraud and to prevent identification, he alters, removes or obscures the manufacturer's serial number or any other distinguishing identification number, mark or symbol upon any automobile, motorboat, aircraft or any other vehicle or upon any machine, firearm or other object.

2. Criminal simulation is a Class E crime.

Comment*

This section is a modification of the Proposed Massachusetts Criminal Code, chapter 266, section 33. There does not appear to be any present Maine statute dealing specifically with this subject. Title 29, section 2185 prohibits transacting in a motor vehicle whose identification symbols have been tampered with, but does not prohibit merely the tampering. This section is designed to prevent specific kinds of fraud that are perpetrated by passing off something as what it is not.

§ 706. Suppressing recordable instrument

1. A person is guilty of suppressing a recordable instrument if, with intent to defraud anyone, he falsifies, destroys, removes or conceals any will, deed, mortgage, security instrument or other writing for which the law provides public recording, whether or not it is in fact recorded.

2. Suppressing a recordable instrument is a Class E crime.

Comment*

This section is taken from the New Hampshire Criminal Code, section 638:2.

Title 18, section 10 prohibits suppressing a will. In addition, Title 1, section 452 punishes the removal or destruction of records, documents or instruments from their official repositories in the State Capitol, or in the hands of certain state officials.

This section provides a general prohibition against conduct which aims at falsifying public records. So long as there is the intent to defraud, it is

criminal under this section that certain unauthorized conduct takes place in regard to things which are, or could be, part of a public record.

§ 707. Falsifying private records

1. A person is guilty of falsifying private records if, with intent to defraud any person, he:

A. Makes a false entry in the records of an organization, or

B. Alters, erases, obliterates, deletes, removes or destroys a true entry in the records of an organization; or

C. Omits to make a true entry in the records of an organization in violation of a duty to do so which he knows to be imposed on him by statute; or

D. Prevents the making of a true entry or causes the omission thereof in the records of an organization.

2. Falsifying private records is a Class E crime.

Comment*

This section is a modified version of the Hawaii Penal Code, section 872. There does not now appear to be a statute dealing with the subject of this section. It is designed to prevent frauds by prohibiting the manipulation of private records in a way that is likely to produce a fraudulent transaction. The requirement that the state prove the intention to defraud serves to prevent the section from reaching simple, or even neglignt or reckless, mistakes.

§ 708. Negotiating a worthless instrument

1. A person is guilty of negotiating a worthless instrument if he intentionally issues or negotiates a negotiable instrument knowing that it will not be honored by the maker or drawee.

2. It shall be presumed that the person issuing or negotiating the instrument knew that it would not be honored upon proof that:

A. The drawer had no account with the drawee at the time the instrument was negotiated; or

B. Payment was refused by the drawee for lack of funds upon presentation within a reasonable time after negotiation or issue, as determined according to Title 11, section 3-503, and the drawer failed to make good within 5 days after actual receipt of a notice of dishonor, as defined in Title 11, section 3-508.

3. As used in this section, the following definitions apply:

A. "Issue" has the meaning provided in Title 11, section 3-102, subsection (1), paragraph (a);

B. "Negotiable instrument" has the meaning provided in Title 11, section 3-104;

C. "Negotiation" and its varients have the meaning provided in Title 11, section 3-202.

4. Negotiating a worthless instrument is a Class D crime.

Comment*

This section is patterned on the Hawii Penal Code, 1973, section 857. Title 17 contains two sections on this subject, sections 1605 and 1606.

This section of the code punishes passing bad checks or other worthless negotiable paper. The definitions are taken from the UCC provisions in Title 11. It is not necessary that any property be obtained in return.

CHAPTER 31

OFFENSES AGAINST PUBLIC ADMINISTRATION

§ 751. Obstructing government administration

1. A person is guilty of obstructing government administration if he uses force, violence, intimidation or engages in any criminal act with the intent to interfere with a public servant performing or purporting to perform an official function.

2. This section shall not apply to:

A. Refusal by a person to submit to an arrest;

B. Escape by a person from official custody, as defined in section 755.

3. Obstructing government administration is a Class D crime.

Comment*

This section is based on the New Hampshire Criminal Code, section 642:1. Chapter 95 of Title 17 contains six sections on obstructiong justice.

This section is a generalized form of the statutes now in Title 17. The limitations in subsection 2 are designed to insure that in the subjects mentioned, criminality is determined by the statutes specifically dealing with those particular issues.

§ 752. Assault on an officer

1. A person is guilty of assault on an officer, if:

A. He has been taken into custody by a law enforcement officer and he commits an assault on such officer; or

B. Being in custody in a penal institution or other facility pursuant to an arrest or pursuant to a court order, he commits an assault on a member of the staff of the institution or facility.

2. As used in this section "assault" means the crime defined in chapter 9, section 207. For purposes of subsection 1, a law enforcement officer takes another person into custody when he exercises physical control over that person's freedom of movement, or is in a position imminently to exercise such control and declares his intention to do so.

Comment*

In Title 17, section 2952 punishment is provided for an assault on an officer. This section of the code defines the offense more narrowly, and

creates a special crime only when the actor is in the custody of the officer. Subsection 2 includes two important rules: one that the question of whether this particular crime has been committed does not depend on whether there was some defect in the legality of the arrest. The policy here is to discourage people in custody from a violent response to what they see as an illegal arrest. The second rule is that if, in making the arrest, the officer uses more force than the law allows him, the victim of that excessive force commits no crime if he defends himself from it.

§ 753. Hindering apprehension or prosecution

1. A person is guilty of hindering apprehension or prosecution if, with the intent to hinder, prevent or delay the discovery, apprehension, prosecution, conviction or punishment of another person for the commission of a crime, he:

A. Harbors or conceals the other person; or

B. Provides or aids in providing a dangerous weapon, transportation, disguise or other means of avoiding discovery or apprehension; or

C. Conceals, alters or destroys any physical evidence that might aid in the discovery, apprehension or conviction of such person; or

D. Warns such person of impending discovery or apprehension, except that this subsection does not apply to a warning given in connection with an effort to bring another into compliance with the law; or

E. Obstructs by force, intimidation or deception anyone from performing an act which might aid in the discovery, apprehension, prosecution or conviction of such person; or

F. Aids such person to safeguard the proceeds of or to profit from such crime.

2. Hindering apprehension is a Class B crime if the defendant knew that the charge made or liable to be made against the other person was criminal homicide in the first or 2nd degree, or a Class A crime. Otherwise, it is one grade less than the charge made or in fact liable to be made against the other person; provided that if such charge is a Class E crime, hindering apprehension is a Class E crime.

Comment*

This section is taken from the Proposed Criminal Code of Massachusetts, chapter 268, section 11. Title 15, section 342 provides a general definition of an accessory after the fact. In addition, section 903 of Title 17 contains a similar offense.

This section of the code spells out what is described in general terms in present law as "harbors, conceals, maintains or assists." In addition, this section prohibits obstructing others who are in pursuit of the principal offender. Subsection 1, paragraph F also reaches the person who aids the criminal by hiding the loot, converting it into currency, or otherwise assists

in making the original enterprise profitable. This subsection goes beyond the common law, and the present Maine statute, which required that the assistance be rendered directly to the offender.

§ 754. Compounding

1. A person is guilty of compounding if he intentionally solicits, accepts or agrees to accept, any pecuniary benefit as consideration for refaining from initiating or participating as informant or witness in a criminal prosecution.

2. Licensed or certified persons or institutions rendering treatment or services in connection with problems associated with the abuse of drugs pursuant to Title 32, sections 2595, 3292, 3817 and 4185-A and Title 22, section 1823 shall be exempt from the necessity of disclosure under this section of "possession" or "use" violations of chapter 45, known to such licensed or certified person or institution to have been committed by the person receiving treatment or services for problems associated with the abuse of drugs.

3. Compounding is a Class E crime.

Comment*

This section is a modification of the Hawaii Penal Code, section 1013. Two sections of Title 17 are relevant. Section 901 defines a crime similar to the one in this section of the code. Section 902 punishes failure to disclose knowledge of a crime — the common law's misprision of a felony.

This section does not include the misprision offense in section 902 of Title 17. It otherwise follows the present elements of section 901, except that an affirmative defense is provided for the person who takes what he honestly believes is due him as a result of the criminal conduct.

§ 755. Escape

1. A person is guilty of escape if, without official permission, he intentionally leaves official custody, or intentionally fails to return to official custody following temporary leave granted for a specific purpose or a limited period.

2. In the case of escape from arrest, it is a defense that the arresting officer acted unlawfully in making the arrest. In all other cases, it is no defense that grounds existed for release from custody that could have been raised in a legal proceeding.

3. As used in this section, "official custody" means arrest, custody in, or on the way to or from a jail, police station, house of correction, or any institution or facility under the control of the Bureau of Corrections, or under contract with the bureau for the housing of persons sentenced to imprisonment, the custody of any official of the bureau, or any custody pursuant to court order. It does not include custody of persons under 18 years of age unless such person has been administratively transferred to custody in the men's or women's correctional center, or the custody is as a result of a finding of probable cause made under the authority of Title 15, section 2611, subsection 3 or is in regard to offenses over which juvenile courts have no

jurisdiction, as provided in Title 15, section 2552. A person on a parole or probation status is not, for that reason alone, in "official custody" for purposes of this section.

4. Escape is a Class B crime if it is committed by force against a person, threat of force, or while the defendant is armed with a dangerous weapon. Otherwise it is a Class C crime.

Comment*

This section is an adaptation of the Proposed Criminal Code of Massachusetts, chapter 268, section 13. There are presently a number of statutes dealing with escape in Titles 14, 34 and 17.

The aim of this section is to consolidate the diverse statutes now dealing with escape from penal custody. Like present law, the penalty is higher if the offense is committed with a substantial risk to life. Subsection 2 reflects a policy of discouraging "self-help" when the prisoner deems his custody to be illegal. The definition in subsection 3 includes an exemption for children within juvenile court jurisdiction in the belief that escalation of the penalties they face ought not to be automatically required. It is, of course, open for administrative sanctions to be imposed in the case of such runaways.

§ 756. Aiding escape

1. A person is guilty of aiding escape if, with the intent to aid any person to violate section 755:

A. He conveys or attempts to convey to such person, any contraband;

B. He furnishes plans, information or other assistance to such person; or

C. Being a person whose official duties include maintaining persons in official custody, as defined in section 755, subsection 3, he permits such violation, or an attempt at such violation.

2. As used in this section, and in section 757, "contraband" means a dangerous weapon, any tool or other thing that may be used to facilitate a violation of section 755, or any other thing which a person confined in official custody is prohibited by statute or regulation from making or possessing.

3. Aiding escape is a Class C crime, unless the contraband involved in a violation of subsection 1, paragraph A includes a dangerous weapon, in which case it is a Class B crime.

4. A person may not be indicted or charged in an information with both a violation of this section and as an accomplice to a violation of section 755.

Comment*

This section is a modification of the Proposed Criminal Code of Massachusetts, chapter 268, section 14. Several Maine statutes in Title 17 and 34 punish aiding escapes.

This section seeks to consolidate existing law by comprehensively prohibiting the designated sorts of aid given in order to permit another to violate the escape prohibition in section 755.

§ 757. Trafficking in prison contraband

1. A person is guilty of trafficking in prison contraband if:

A. He intentionally conveys contraband to any person in official custody; or

B. Being a person in official custody, he intentionally makes, obtains or possesses contraband.

2. As used in this section "official custody" has the same meaning as in section 755, provided that solely for purposes of subsection 1, paragraph A, it does include the custody of all persons under the age of 18.

3. Trafficking in prison contraband is a Class C crime.

Comment*

This section is aimed at preventing the furnishing of materials that can be used in escapes and disorders within penal institutions. The expanded definition of "official custody" is to permit the prohibition to relate to assisting escapes and disorders in juvenile institutions.

CHAPTER 33

ARSON AND OTHER PROPERTY DESTRUCTION

§ 801. Aggravated arson

1. A person is guilty of aggravated arson if he intentionally starts, causes or maintains a fire or explosion that damages any structure which is the property of himself or of another, in conscious disregard of a substantial risk that at the time of such conduct a person may be in such structure.

2. It is no defense to a prosecution under this section that no person was present in the structure.

3. In a prosecution under this section, the requirements of specificity in the charge and proof at the trial otherwise required by law do not include a requirement to allege or prove the ownership of the property.

4. As used in this section "structure" includes but is not limited to a building, tent, lean-to and a vessel or vehicle adapted for overnight accommodation.

5. Aggravated arson is a Class A crime if the fire or explosion causes death or serious bodily injury to any person actually present in the structure. Otherwise it is a Class B crime.

Comment*

This section is based on section 2-8B1 of S.1, 93d Congress First Session, and the Proposed Criminal Code of Massachusetts, chapter 266, section 3.

There are eight sections in Title 17 covering arson, (161-167). In Title 25, section 2435 states:

> Whoever with intent to injure another causes a fire to be kindled on his own or another's land, whereby the property of any other person is injured or destroyed, shall be punished by a fine of not less than $20 nor more than $1,000 or by imprisonment for not less than 3 months nor more than 3 years.

Section 3752 in Title 17 contains a statute to deal with tramps who build fires on the land of another without consent. Further, section 1401 of Title 12 covers restrictions on out-of-door fires; and section 1402 of Title 24 with limitations of fire insurance recovery.

This section, and the three next following all deal with damaging property by fire or explosion. They are graded as to sentencing class on the basis of the nature of the risk which is presented to life and property by the particular conduct. The basic elements are similar to present law.

§ 802. Arson

1. A person is guilty of arson if he starts, causes, or maintains a fire or explosion;

A. On the property of another with the intent to damage or destroy such property; or

B. On his own property or the property of another

(1) with the intent to enable any person to collect insurance proceeds for the loss caused by the fire or explosion; or

(2) in conscious disregard of a substantial risk that his conduct will endanger any person or damage or destroy the property of another.

2. In a prosecution under subsection 1, paragraph B, the requirements of specificity in the charge and proof at the trial otherwise required by law do not include a requirement to allege or prove the ownership of the property. In a prosecution under subsection 1, paragraph A, it is a defense that the actor believed he had the permission of the property owner to engage in the conduct alleged.

3. Arson is a Class B crime.

Comment*

This section is taken from the Proposed Criminal Code of Massachusetts, chapter 266, section 4 and section 2-8B2 of Senate 1, 93d Congress, First Session.

This section is graded on the basis of dangers created solely in order to collect on insurance or in reckless disregard to the dangers posed to other persons or their property. See also Comment to section 801.

§ 803. Causing a catastrophe

1. A person is guilty of causing a catastrophe if he recklessly causes a catastrophe by explosion, fire, flood, avalanche, collapse of a structure, release of poison, radioactive material, bacteria, virus or other such force or substance that is dangerous to human life and difficult to confine.

2. As used in this section, "catastrophe" means death or serious bodily injury to 10 or more people or substantial damage to 5 or more structures, as defined in section 801.

3. Causing a catastrophe is a Class A crime.

Comment*

This section is patterned on section 14.070 of the Proposed Criminal Code for the State of Missouri, 1973.

This section is graded as a Class A crime on the basis of the risk that is consciously created by fire, explosion, etc., and which in fact results in mass death or destruction. If the conduct is done intentionally, it would be murder, or perhaps aggravated murder. See also Comment to section 801.

§ 804. Failure to control or report a dangerous fire

1. A person is guilty of failure to control or report a dangerous fire if:

A. He starts, causes or maintains a fire or explosion, and knowing that its spread would endanger human life or the property of another, he fails to take reasonable measures to put out or control the fire or to give a prompt fire alarm;

B. Knowing that a fire is endangering a substantial amount of property of another, as to which he has an official, contractual, or other legal duty, he fails to take reasonable measures to put out or control the fire or to give prompt fire alarm; or

C. Knowing that a fire is endangering human life, he fails to take reasonable measures to save life by notifying the persons endangered or by taking reasonable measures to put out or control the fire or by giving a prompt fire alarm.

2. Failure to control or report a dangerous fire is a Class D crime.

Comment*

This section is patterned on section 2-8B4 of Senate 1, 93d Congress, First Session. There does not seem to be any Maine statute on this subject

This section imposes affirmative duties on persons who are in a position of responsibility in regard to the harm that might be caused by a fire or explosion. Subsection 1, paragraph A places such a duty on the person who starts a fire, even if it had been started accidentally without fault on his part. Subsection 1, paragraph B relates to persons such as bailees of large amounts of property or hotel managers with whom people entrust their property. The final portion of subsection 1 is broader than the first

two in that all persons who know there to be a fire dangerous to others are obligated to do something to help save those lives.

§ 805. Aggravated criminal mischief

1. A person is guilty of aggravated criminal mischief if he intentionally or knowingly:

A. Damages or destroys property of another in an amount exceeding $1,000 in value, having no reasonable ground to believe that he has a right to do so; or

B. Damages or destroys property in an amount exceeding $1,000 in value, to enable any person to collect insurance proceeds for the loss caused; or

C. Damages, destroys or tampers with the property of a law enforcement agency, fire department or supplier of gas, electric, steam, water, transportation, sanitation or communication services to the public, having no reasonable ground to believe that he has a right to do so, and thereby causes a substantial interruption or impairment of service rendered to the public; or

D. Damages, destroys or tampers with property of another and thereby recklessly endangers human life.

2. Aggravated criminal mischief is a Class C crime.

Comment*

This section is patterned on the Proposed Criminal Code of Massachusetts, chapter 266, section 6.

There are presently six statutes in Title 17 dealing with the subject of this section: sections 2351-2355 and 2404.

This section of the Code and the next following deal with damage or destruction of property, and set out a grading scheme which depends partly on the value of the property involved, partly on whether human life is endangered, and partly on whether a great inconvenience to the public at large is caused by the acts of the accused.

§ 806. Criminal mischief

1. A person is guilty of criminal mischief if, intentionally or knowingly, he:

A. Damages or destroys the property of another, having no reasonable ground to believe that he has a right to do so; or knowingly damages or destroys property with the intent to enable any person to collect insurance proceeds for the loss caused; or

B. Damages, destroys or tampers with property of a law enforcement agency, fire department, or supplier of gas, electric, steam, water, transportation, sanitation or communication services to the public, having no reasonable ground to believe that he has a right to do so, and by such conduct recklessly creates a risk of interruption or impairment of services rendered to the public.

2. Criminal mischief is a Class D crime.

Comment*

This section is a modified version of section 2-8B6 of Senate 1, 93d Congress, First Session.

This section differs from section 805 on the basis of the absence of consideration to the value of damage caused, and on the absence of a requirement that there be in fact an interruption of the public service which the accused tampered with. See also comment to section 805.

CHAPTER 35

PROSTITUTION AND PUBLIC INDECENCY

§ 851. Definitions

As used in this chapter:

1. "Prostitution" means engaging in, or agreeing to engage in, or offering to engage in sexual intercourse or a sexual act, as defined in chapter 11, section 251, in return for a pecuniary benefit to be received by the person engaging in prostitution or a 3rd person;

2. "Promotes prostitution" means:

A. Causing or aiding another to commit or engage in prostitution, other than as a patron; or

B. In a public place, soliciting patrons for prostitution; or

C. Providing persons for purposes of prostitution; or

D. Leasing or otherwise permitting a place controlled by the defendant, alone or in association with others, to be regularly used for prostitution; or

E. Owning, controlling, managing, supervising or otherwise operating, in association with others, a house of prostitution or a prostitution business; or

F. Transporting a person into or within the State with the intent that such other person engage in prostitution; or

G. Accepting or receiving, or agreeing to accept or receive, a pecuniary benefit pursuant to an agreement or understanding with any person, other than with a patron, whereby he participates or he is to participate in the proceeds of prostitution.

Comment*

These definitions are adaptations of provisions found in the Hawaii Penal Code 1973, section 1201; the Proposed Criminal Code of Massachusetts, chapter 272, section 4; and the Proposed Criminal Code for the State of Missouri, section 12.010.

Section 3052 of Title 17 provides: "The term 'prostitution' shall be construed to include the offering or receiving of the body for sexual intercourse

for hire and shall be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire." Other definitions are contained in subsections 1 through 6 of section 3051 of Title 17.

This section sets forth definitions that are required for the offenses described in this chapter. The definitions in subsection 2 are particularly important since "promoting prostitution" is the basic element of the crimes set forth in sections 852 and 853.

§ 852. Aggravated promotion of prostitution

1. A person is guilty of aggravated promotion of prostitution if he knowingly:

A. Promotes prostitution by compelling a person to enter into, engage in, or remain in prostitution; or

B. Promotes prostitution of a person less than 18 years old.

2. As used in this section "compelling" includes but is not limited to:

A. The use of a drug or intoxicating substance to render a person incapable of controlling his conduct or appreciating its nature; and

B. Withholding or threatening to withhold a narcotic drug or alcoholic liquor from a drug or alcohol-dependent person. A "drug or alcohol-dependent person" is one who is using narcotic drugs or alcoholic liquor and who is in a state of psychic or physical dependence on both, arising from the use of the drug or alcohol on a continuing basis.

3. Aggravated promotion of prostitution is a Class C crime.

Comment*

This section is patterned on the Proposed Criminal Code for the State of Missouri, section 12.050. It defines an offense encompassed now by Title 17, section 3055-3059.

This is the first of the two sections which will deal with prostitution. Neither one defines prostitution itself as an offense. This present draft seeks to identify the most serious forms of promoting prostitution, leaving the next section to define an offense which is all other means of promoting prostitution.

§ 853. Promotion of prostitution

1. A person is guilty of promotion of prostitution if he knowingly promotes prostitution.

2. Promoting prostitution is a Class D crime.

Comment*

See comment to section 852.

§ 854. Public indecency

1. A person is guilty of public indecency if:

A. In a public place

(1) he engages in sexual intercourse or a sexual act, as defined in chapter 11, section 251; or

(2) he knowingly exposes his genitals to a person under the age of 12, or under circumstances which, in fact, are likely to cause affront or alarm; or

B. In a private place, he exposes his genitals with the intention that he be seen from a public place or from another private place.

2. For purposes of this section "public place" includes, but is not limited to, motor vehicles which are on a public way.

3. Public indecency is a Class E crime.

Comment*

This section is similar to the present prohibition against procuring in Title 17, section 3051, subsection 4 and the crime of indecent exposure defined in Title 17, section 1901. In addition it prohibits public sexual activity where there is no victim save the general affrontery.

CHAPTER 37

FRAUD

§ 901. Deceptive business practices

1. A person is guilty of deceptive business practices if, in the course of engaging in a business, occupation or profession, he intentionally:

A. Uses or possesses with the intent to use, a false weight or measure, or any other device which is adjusted or calibrated to falsely determine or measure any quality or quantity;

B. Sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service;

C. Takes more than the represented quantity of any commodity or service when as buyer he furnished the weight or measure;

D. Sells, offers or exposes for sale any commodity which is adulterated or mislabelled;

E. Sells, offers or exposes for sale a motor vehicle on which the speedometer or odometer has in fact been turned back, adjusted or replaced so as to understate its actual mileage, without disclosing the understatement;

F. Sells, offers or exposes for sale a motor vehicle on which the manufacturer's serial number has in fact been altered, removed or obscured;

G. Makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial number of persons, in connection with the promotion of his business, occupation or profession or to increase the consumption of specified property or service;

H. Offers property or service, in any manner including advertising or other means of communication, as part of a scheme or plan with the intent not to sell or provide the advertised property or services

(1) at all;

(2) at the price or of the quality offered;

(3) in a quantity sufficient to meet the reasonably expected public demand unless the advertisement or communication states the approximate quantity available; or

I. Conducts, sponsors, organizes or promotes a publicly exhibited sports contest with the knowledge that he or another person has tampered with any person, animal or thing that is part of the contest, with the intent to prevent the contest from being conducted in accordance with the rules and usages purporting to govern it, or with the knowledge that any sports official or sports participant has accepted or agreed to accept any benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best efforts or that he will perform his duties improperly.

2. It is a defense to a prosecution under subsection 1, paragraphs G and H, that a television or radio broadcasting station, or a publisher or printer of a newspaper, magazine or other form of printed material, which broadcasts, publishes or prints a false, misleading advertisement did so without knowledge of the advertiser's intent.

3. As used in this section:

A. "Adulterated" means varying from the standard of composition or quality prescribed for the substance by statute or by lawfully promulgated administrative regulation, or if none, as set by established commercial usage;

B. "Mislabeled" means having a label varying from the standard of truth and disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage.

4. Deceptive business practices is a Class D crime.

Comment*

This section is patterned on the Proposed Criminal Code of Massachusetts, chapter 266, section 3. It is designed to prohibit unfairness in business relations that goes beyond the bounds of accepted sharpness, especially in circumstances where one of the parties to the transaction relies on the honesty of the other. Thus, in subsection 1, paragraph A, the buyer makes his purchase in reliance on the accuracy of the scale; in subsection 1, paragraph D he assumes the label to be truthful, etc. This section also includes prohibitions similar to those in present law, such as the sale of a motor vehicle with an altered serial number described in subsection 1, paragraph F

and Title 29, section 2185 or chicanery with the odometer prohibited by subsection 1, paragraph E and Title 17, section 1609-A.

Subsection 1, paragraphs G and H define an offense relating to false advertising which, together with the defense provided in subsection 2, is similar to that contained in section 1620 of Title 17.

The penalty provided for the sale of adulterated commodities in subsection 1, paragraph D is now found in chapter 111 of Title 17.

§ 902. Defrauding a creditor

1. A person is guilty of defrauding a creditor if:

A. He destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest, as defined in Title 11, section 1-201, subsection (37), with the intent to hinder enforcement of that interest; or

B. Knowing that proceedings have been or are about to be instituted for the appointment of an administrator, he

(1) destroys, removes, conceals, encumbers, transfers or otherwise deals with any property with a purpose to defeat or obstruct the claim of any creditor; or

(2) presents in writing to any creditor or to an assignee for the benefit of creditors, any false statement relating to the debtor's estate, knowing that a material part of such statement is false.

2. As used in this section "assignee for benefit of creditors" means a receiver, trustee in bankruptcy or any other person entitled to administer property for the benefit of creditors.

3. Defrauding a creditor is a Class D crime.

Comment*

Subsection 1 of this section is patterned on the New Hampshire Criminal Code, section 638:9 while subsection 2 is derived from the Proposed Criminal Code of Massachusetts, chapter 266, section 37(b). The section as a whole is designed to prevent a form of cheating which is not, in substance, significantly different from theft. It complements the chapter on theft which excludes that offense when a debtor takes what another has only a security interest in. Similar offenses are in Title 17, sections 1613 and 1614.

§ 903. Misuse of entrusted property

1. A person is guilty of misuse of entrusted property if he deals with property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is a violation of his duty and which involves a substantial risk of loss to the owner or to a person for whose benefit the property was entrusted.

2. As used in this section "fiduciary" includes any person carrying on fiduciary functions on behalf of an organization which is a fiduciary.

3. Misuse of entrusted property is a Class D crime.

Comment*

This section, based on the New Hampshire Criminal Code, section 638:11, reaches wrongful property which would not be theft because it does not involve a permanent deprivation of property. It is designed to prevent the violation of known fiduciary duties which creates a serious risk or loss of the property.

§ 904. Private bribery

1. A person is guilty of private bribery if:

A. He offers, gives or agrees to give any benefit to

(1) an employee or agent with the intention to influence his conduct adversely to the interest of the employer or principal of the agent or employee;

(2) a hiring agent or an official or employee in charge of employment upon agreement or understanding that a particular person, including the actor, shall be hired, retained in employment or discharged or suspended from employment;

(3) a fiduciary with the intent to influence him to act contrary to his fiduciary duty;

(4) a sports participant with the intent to influence him not to give his best efforts in a sports contest;

(5) a sports official with the intent to influence him to perform his duties improperly;

(6) a person in a position of trust and confidence in his relationship to a 3rd person, with the intention that the trust or confidence will be used to influence the 3rd person to become a customer of the actor, or as compensation for the past use of such influence; or

B. He knowingly solicits, accepts or agrees to accept any benefit, the giving of which would be criminal under subsection 1, paragraph A.

2. Private bribery is a Class D crime.

Comment*

This section is adapted from the Proposed Criminal Code of Massachusetts, chapter 266, sections 34 and 35. Its aim is to protect the integrity of employer-employee relations, and similar relationships, from dishonest abuse in the form of bribery to act against the interests of the employer or beneficiary of a fiduciary duty.

§ 905. Misuse of credit identification

1. A person is guilty of misuse of credit identification if, in order to obtain property or services, he intentionally or knowingly:

A. Presents or uses a credit card which is stolen, forged or cancelled; or

B. Presents a credit or billing number which he is not authorized to use.

2. It is an affirmative defense to prosecution under this section that the defendant believed in good faith that he had a right to present or use the card or number.

3. Misuse of credit identification is a Class D crime.

Comment*

Several sections of Title 17 presently prohibit conduct similar to that described in this section. See, for example, section 1621 (obtaining telephone service by use of a false billing manner); sections 1624-1634 (fraudulent use of credit cards). This section of the Code is designed to consolidate such coverage and provide a general prohibition against obtaining credit fraudulently. No property need change hands for this offense to be committed.

§ 906. Use of slugs

1. A person is guilty of use of slugs if:

A. With intent to defraud, he inserts or deposits a slug in a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle; or

B. He makes, possesses or disposes of a slug with intent to enable a person to insert or deposit it in a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle.

2. As used in this section, "slug" means an object or article which, by virtue of its size, shape or other quality, is capable of being inserted or deposited as an improper substitute for a genuine coin, bill, pass, key or token in a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle which is designed automatically to offer, provide, assist in providing or permit the acquisition of some property or services in return for the insertion or deposit of a genuine coin, bill, pass, key or token.

3. Use of slugs is a Class D crime.

Comment*

This section is designed to prevent cheating under circumstances where goods or services are mechanically delivered. It broadens and generalizes the offense of use or possession of mutilated coins to obtain transportation on a public vehicle.

CHAPTER 39
UNLAWFUL GAMBLING

§ 951. Inapplicability of chapter

Any person licensed by the Chief of the State Police as provided in Title 17, chapter 14, shall be exempt from the application of the provisions of this chapter insofar as his conduct is within the scope of such license.

Comment*

This section is designed to leave intact the policy regarding games of chance enacted by the Legislature in 1973. The provisions of that chapter allow for a limited type of gambling to be controlled primarily through licensing.

§ 952. Definitions

As used in this chapter, the following definitions apply:

1. "Advance gambling activity." A person "advances gambling activity" if, acting other than as a player or a member of the player's family residing with a player in cases in which the gambling takes place in their residence, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes, but is not limited to, bookmaking, conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. A person also advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue, or makes no effort to prevent its occurrence or continuation.

2. "Bookmaking" means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

3. "Contest of chance" means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

4. "Gambling." A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance.

5. "Gambling device" means any device, machine, paraphernalia or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. However, lottery tickets and other items used in the playing phases of lottery schemes are not gambling devices within this definition.

6. "Lottery" means an unlawful gambling scheme in which:

A. The players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones; and

B. The winning chances are to be determined by a drawing or by some other method based on an element of chance; and

C. The holders of the winning chances are to receive something of value.

7. "Mutuel" means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme.

8. "Player" means a person who engages in social gambling solely as a contestant or bettor on equal terms with the other participants therein without receiving or becoming entitled to receive something of value or any profit therefrom other than his personal gambling winnings. "Social gambling" is gambling, or a contest of chance, in which the only participants are players and from which no person or organization receives or becomes entitled to receive something of value or any profit whatsoever, directly or indirectly, other than as a player, from any source, fee, remuneration connected with said gambling, or such activity as arrangements or facilitation of the game, or permitting the use of premises, or selling or supplying for profit refreshments, food, drink service or entertainment to participants, players or spectators. A person who engages in "bookmaking" as defined in subsection 2 is not a "player."

9. "Profit from gambling activity." A person "profits from gambling activity" if, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

10. "Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property, or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

11. "Unlawful" means not expressly authorized by statute.

Comment*

Most of the definitions in this section are taken from the Hawaii Penal Code 1973, section 1220. Since this section proposes definitions for a new means of defining criminal gambling, there are no comparable sections in the present law.

The definitions provided here make it possible to define the substantive offenses in the chapter more succinctly. A major policy embodied in these

definitions, and the offenses which follow, is that it will not be criminal to be a participant in social gambling. The definition of "player" is designed to facilitate this narrow exception to the gambling prohibitions. The definitions also permit offenses to be defined so as to make large scale professional gambling activity a more serious offense than is illegal gambling at a lower level.

§ 953. Aggravated unlawful gambling

1. A person is guilty of aggravated unlawful gambling if he intentionally or knowingly advances or profits from unlawful gambling activity by:

A. Engaging in bookmaking to the extent that he receives or accepts in any 24-hour period more than 5 bets totaling more than $500; or

B. Receiving in connection with a lottery or mutuel scheme or enterprise, money or written records from a person other than a player whose chances or plays are represented by such money or records; or

C. Receiving in connection with a lottery, mutuel or other gambling scheme or enterprise, more than $500 in any 24-hour period play in the scheme or enterprise.

2. Aggravated gambling is a Class B crime.

Comment*

This section is taken from the Hawaii Penal Code, section 1221. The basic gambling crimes of Title 17 are in sections 1801-1803 and 1805. In addition, chapter 81 of Title 17 prohibits various forms of lotteries.

This section defines a gambling offense that is characterized by its professional and profit-making features. The definitions of "advancing gambling activity" and "profiting from gambling activity" set forth in section 952 are key elements of the offense.

§ 954. Unlawful gambling

1. A person is guilty of unlawful gambling if he intentionally or knowingly advances or profits from gambling activity.

2. Unlawful gambling is a Class D crime.

Comment*

This section is taken from the Hawaii Penal Code, section 122. It defines an offense which is made up of intentionally or knowingly doing any of the things included in the definitions in subsections 1 and 9 of section 952.

§ 955. Possession of gambling records

1. A person is guilty of possession of gambling records if, other than as a player, he knowingly possesses any writing, paper, instrument or article, which is being used or is intended by him to be used in the operation of unlawful gambling activity as defined in this chapter.

2. Possession of gambling records is a Class D crime.

Comment*

This is a restricted version of a possession offense defined in the Hawaii Penal Code, sections 1223 and 1224.

Title 17, section 2301 punishes the possession of lottery material with the intent to sell or dispose of it. The possession of betting slips is not a violation of Title 17, section 1811 which prohibits possession of specified gambling devices. **State v. Ferris.** 284 A.2d 288 (Me. 1971).

This section is designed to be part of the effort to control illegal gambling by defining an offense against persons who knowingly participate in the gambling by keeping its records.

§ 956. Possession of gambling devices

1. **A person is guilty of possession of gambling devices if he manufactures, sells, transports, places, possesses or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of any gambling device, knowing it is to be used in the advancement of unlawful gambling activity, as defined in this chapter.**

2. Possession of gambling devices is a Class D crime.

Comment*

This section is taken from the Hawaii Penal Code, section 1225. Title 17, section 1811 punishes possession of certain gambling material, such as slot machines, but it does not prohibit possession of betting slips. **State v. Ferris,** 285 A.2d 288 (Me. 1971).

This section is similar to section 955 in that it is designed to reach activity that is necessarily supportive to illegal gambling. The requirement that the actor know that the thing he possesses will be put into illegal use serves to confine the impact of the prohibition.

§ 957. Out-of-state gambling

In any prosecution under this chapter it is not a defense that the gambling activity, including the drawing of a lottery, which is involved in the illegal conduct takes place outside this State and is not in violation of the laws of the jurisdiction in which the lottery or other activity takes place.

Comment*

This section is a modification of the Hawaii Penal Code, section 1228. There is no similar provision in the present law. The aim of this section is to insure that the legality of out-of-state gambling activity does not prevent the operation of the prohibitions in this chapter.

§ 958. Injunctions; recovery of payments

1. **When it appears to the Attorney General that any person has formed or published a lottery, or taken any measures for that purpose, or is engaged in selling or otherwise distributing tickets, certificates, shares or interests therein, whether such lottery originated in this State or not, he shall im-**

mediately make complaint in the name of the State to the Superior Court for an injunction to restrain such person from further proceedings therein. If satisfied that there is sufficient ground therefor, such court shall forthwith issue such injunction and thereupon it shall order notice to be served on the adverse party to appear and answer to said complaint. Such court, after a full hearing, may dissolve, modify or make perpetual such injunction, make all orders and decrees necessary to restrain and suppress such unlawful proceedings and, if the adverse party neglects to appear, or the final decree of the court is against him, judgment shall be rendered against him for all costs, fees and expenses incurred in the case and for such compensation to the Attorney General for his expenses, as the court deems reasonable.

2. Payments, compensations and securities of every description, made directly or indirectly in whole or in part, for any such lottery or ticket, certificate, share or interest therein, are received without consideration and against law and equity, and may be recovered.

Comment*

This section repeats the rules presently in Title 17, sections 2302 and 2303.

CHAPTER 41

CRIMINAL USE OF EXPLOSIVES AND RELATED CRIMES

§ 1001. Criminal use of explosives

1. A person is guilty of criminal use of explosives if he intentionally or knowingly:

A. Without right, throws or places explosives into, against or upon any real or personal property;

B. Makes, imports, transports, sends, stores, sells or offers to sell any explosives without a proper permit under the regulations, or in violation of the regulations;

C. Sells or supplies explosives to, or buys, procures or receives explosives for, a person prohibited by the regulations from receiving explosives; or

D. Possesses explosives with the intent to do any of the acts prohibited in this section.

2. As used in this section:

A. "Explosives" means gunpowders, powders used for blasting all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, and any chemical compounds, mechanical mixtures or other ingredients in such proportions, quantities or packing that ignition by fire, by friction, by concussion, by percussion or by detonation of the compound or material or any part thereof may cause an explosion; and

B. "Regulations" means the rules, regulations, ordinances and bylaws issued by lawful authority pursuant to Title 25, section 2441.

3. Criminal use of explosives is a Class C crime.

Comment*

This section is a modified version of the Proposed Criminal Code of Massachusetts, chapter 269, section 13. It includes the prohibitions now in sections 501 and 502 of Title 17 and provides a penalty for violation of the regulations concerning explosives authorized by section 2441 of Title 25.

§ 1002. Criminal use of disabling chemicals

1. A person is guilty of criminal use of disabling chemicals if he intentionally sprays or otherwise uses upon any other person chemical mace or any similar substance composed of a mixture of gas and chemicals which has or is designed to have a disabling effect upon human beings.

2. Criminal use of disabling chemicals is a Class D crime.

Comment*

This section is designed to control the use of a harmful device which is capable of causing severe injuries. It is taken from section 14, chapter 269 of the Proposed Criminal Code of Massachusetts. In section 101 of chapter 5 of this Code provision is made to permit law enforcement use of this material as an alternative to more dangerous means of control such as firearms.

§ 1003. Criminal use of noxious substance

1. A person is guilty of criminal use of noxious substance if he intentionally deposits on the premises or in the vehicle or vessel of another, without his consent, any stink bomb or other device or substance which releases or is designed to release noxious offensive odors.

2. Criminal use of noxious substance is a Class E crime.

Comment*

This section is complementary to section 501 of chapter 21 of this Code which prohibits the use of stink bombs in public. In this section the conduct is defined as being directed against "another" rather than the public at large.

CHAPTER 43

WEAPONS

§ 1051. Possession of machine gun

1. A person is guilty of possession of a machine gun if, without authority to do so, he knowingly possesses a machine gun.

2. As used in this chapter, "machine gun" means a weapon of any description, by whatever name known, loaded or unloaded, which is capable of discharging a number of projectiles in rapid succession by one manual or mechanical action on the trigger or firing mechanism.

3. Possession of a machine gun is a Class D crime.

Comment*

The first four sections of this chapter continue the provisions of chapter 82 of Title 17 which was enacted in 1969.

§ 1052. Right to possess, carry or transport machine gun

Any law enforcement officer of the State of Maine, any law enforcement officer of another state or a territory of the United States, members of the Armed Forces, Maine National Guard and Maine State Guard may possess a machine gun if the possession or carrying of such weapon is in the discharge of his official duties and has been authorized by his appointing authority.

Machine guns manufactured, acquired, transferred or possessed in accordance with the National Firearms Act, as amended, shall be exempt from this chapter.

Comment*

See comment to section 1051.

§ 1053. Confiscation and seizure of machine gun

Any machine gun possessed in violation of section 1051 is declared to be contraband and is subject to forfeiture to the State. Any law enforcement officer shall have the power to seize the same with due process.

When a machine gun is seized as provided, the officer seizing the same shall immediately file with the judge before whom such warrant is returnable, a libel against the machine gun, setting forth the seizure and describing the machine gun and the place of seizure in a sufficient manner to reasonably identify it, that it was possessed in violation of law and pray for a decree of forfeiture thereof. Such judge shall fix a time for the hearing of such libel and shall issue his monition and notice of same to all persons interested, citing them to appear at the time and place appointed to show cause why such machine gun should not be declared forfeited, by causing true and attested copies of said libel and monition to be posted in 2 public and conspicuous places in the town and place where such machine gun was seized, 10 days at least before said libel is returnable. In addition, a true and attested copy of the libel and monition shall be served upon the person from whom said machine gun was seized and upon the owner thereof, if their whereabouts can be readily ascertained 10 days at least before said libel is returnable. In lieu of forfeiture proceedings, title to such seized machine gun may be transferred in writing to the State of Maine by the owner thereof. If title to and ownership in the machine gun is transferred to the State, a receipt for the machine gun shall be given to the former owner by the law enforcement officer who seized the machine gun.

Comment*

See comment to section 1051.

§ 1054. Forfeiture of machine gun

If no claimant for a machine gun seized under the authority of section 1053 appears, the judge shall, on proof of notice, declare the same to be for-

feited to the State. If any person appears and claims such machine gun, as having a right to the possession thereof at the time when the same was seized, he shall file with the judge a claim in writing stating specifically the right so claimed, the foundation thereof, the item so claimed, any exemption claimed, the time and place of the seizure and the name of the law enforcement officer who seized the machine gun, and in it declare that it was not possessed in violation of this chapter, and state his business and place of residence and sign and make oath to the same before said judge. If any person so makes claim, he shall be admitted as a party to the process, and the libel, and may hear any pertinent evidence offered by the libelant or claimant. If the judge is, upon hearing, satisfied that said machine gun was not possessed in violation of this chapter, and that claimant is entitled to the custody thereof, he shall give an order in writing, directed to the law enforcement officer having seized the same, commanding him to deliver to the claimant the machine gun to which he is so found to be entitled, within 48 hours after demand. If the judge finds the claimant not entitled to possess the machine gun, he shall render judgment against him for the libelant for costs, to be taxed as in civil cases before such judge, and issue execution thereon, and shall declare such machine gun forfeited to the State. The claimants may appear and shall recognize with sureties as on appeals in civil actions from a judge. The judge may order that the machine gun remain in the custody of the seizing law enforcement officer, pending the disposition of the appeal. All machine guns declared forfeited to the State, or title to which have been transferred to the State in lieu of forfeiture proceedings shall be turned over to the Chief of the Maine State Police. If said machine gun is found to be of a historic, artistic, scientific or educational value, the State Police may retain the machine gun for an indefinite period of time. Any other machine gun declared forfeited and in possession of the State Police shall be destroyed by a means most convenient to the Chief of the State Police.

Comment*

See comment to section 1051.

§ 1055. Trafficking in dangerous knives

1. A person is guilty of trafficking in dangerous knives, if providing he has no right to do so, he knowingly manufactures or causes to be manufactured, or knowingly possesses, displays, offers, sells, lends, gives away or purchases any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife, or any knife having a blade which opens or falls or is ejected into position by the force of gravity, or by an outward, downward or centrifugal thrust or movement.

2. Trafficking in dangerous knives is a Class D crime.

Comment*

This section continues the crime now punishable in Title 17, section 3952.

CHAPTER 45
DRUGS

§ 1101. Definitions

As used in this Title, the following words shall, unless the context clearly requires otherwise, have the following meanings.

1. "Tetrahydrocannabinol (THC)," any substance, including hashish or marijuana, of which the concentration therein of delta-9 or delta-8 tetrahydrocannabinol exceeds 10%.

2. "Hypodermic apparatus," hypodermic syringe, hypodermic needle or any instrument designed or adapted for the administration of any drug by injection.

3. "Isomer," the optical isomer, except wherever appropriate, the optical, position or geometric isomer.

4. "Manufacture," to produce, prepare, propagate, compound, convert or process, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis.

5. "Marihuana" means all parts, including the seeds, of any plant of the genus cannabis, including but not limited to the species sativa L., whether growing or not and means also the resin extracted from any part of the plant; but does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any preparation, compound or derivative of the stalks, fiber, oil or cake, or the sterilized seed of the plant that is incapable of germination.

6. "Narcotic drug," any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical syntheses:

A. Opium and any opiate, and any salt, compound, derivative or preparation of opium or opiate;

B. Any salt, compound, isomer, ester, ether, derivative or preparation thereof which is chemically equivalent or identical to or with any of the substances referred to in paragraph A, but not including the isoquinoline alkaloids of opium; or

C. Opium poppy and poppy straw.

7. "Opiate."

A. Any substance having an analgesic and addiction forming or addiction sustaining property or liability similar to morphine or capable of conversion into a drug having such analgesic and addiction forming or addiction sustaining property or liability.

B. This term does not include, unless specifically designated or listed in Schedule W, X, Y or Z, the dextrorotatory isomer or 3-methoxy-n-methyl-

morphinan and its salts, dextromethorphan, but does not include its racemic and levorotatory forms.

8. "Opium poppy," the plant of the species Papaver somniferum L., except its seeds.

9. "Poppy straw," all parts, except the seeds, of the opium poppy, after mowing.

10. "Prescription drug," any drug upon which the manufacturer or distributor is obliged to place, in order to comply with federal law and regulations, the following legend: "Caution, federal law prohibits dispensing without prescription."

11. "Scheduled drug," any drug named or described in section 1102, schedule W, X. Y or Z.

12. "Schedule W drug," any drug named, listed or described in section 1102, schedule W.

13. "Schedule X drug," any drug named, listed or described in section 1102, schedule X.

14. "Schedule Y drug," any drug named, listed or described in section 1102, schedule Y.

15. "Schedule Z drug," any drug named, listed or described in section 1102, schedule Z.

16. "State laboratory," a laboratory of any state agency which is capable of performing any or all of the analyses that may be required to establish that a substance is a scheduled or a counterfeit drug, including, but not limited to, the laboratory of the State Department of Health and Welfare and any such laboratory that may be established within the Department of Public Safety.

17. "Traffick:"

A. To make, create, manufacture;

B. To grow or cultivate, except with respect to marihuana;

C. To sell, barter, trade, exchange or otherwise furnish for consideration; or

D. To possess with the intent to do any act mentioned in paragraph C, except that possession of marihuana with such intent shall be deemed furnishing.

18. "Furnish:"

A. To furnish, give, dispense, administer, prescribe, deliver or otherwise transfer to another;

B. To possess with the intent to do any act mentioned in paragraph A.

Comment*

This section contains both the definitions of the drugs whose use is controlled by this chapter and definitions of the prohibited acts which constitute the crimes. On the basis of these definitions, and the grouping of drugs into schedules accomplished by section 1102, the crimes can be defined in a straightforward way.

The aim of the code provisions regarding drugs is to collect in this chapter all of the criminal provisions concerning drugs. The revision of Title 22, included as a separate section of this Act, reflects this. The criminal provisions have been deleted and the remaining parts of the drug laws in Title 22 have been rewritten so as to grant affirmative permission for the use of drugs where called for, by pharmacists, for example. There are also provisions for civil violations where the need for control does not necessarily call for criminal penalties.

§ 1102. Schedules W, X, Y and Z

For the purposes of defining crimes under this chapter and of determining the penalties therefor, there are hereby establishd the following schedules, designated W, X, Y and Z.

1. Schedule W:

A. Unless listed or described in another schedule, any amphetamine, or its salts, isomers, or salts of isomers, including but not limited to methamphetamine, or its salts, isomers, or salts of isomers;

B. Unless listed or described in another schedule, or unless made a nonprescription drug by federal law, barbituric acid or any derivative of barbituric acid, or any salt of barbituric acid or of a derivative of barbituric acid, including but not limited to amobarbital, butabarbital, pentobarbital, secobarbital, thiopental, and methohexital;

C. Methaqualone or its salts;

D. Methprylon;

E. Flurazepam;

F. Glutethimide;

G. Unless listed or described in another schedule, any of the following hallucinogenic drugs, or their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation

(1) 3,4-methylenedioxy amphetamine

(2) 5-methoxy-3, 4-methylenedioxy amphetamine

(3) 3, 4, 5-trimethoxy amphetamine

(4) 4-methyl-2, 5, -dimethoxyamphetamine

(5) Diethyltryptamine

(6) Dimethyltryptamine

(7) Dipropyltryptamine

(8) Lysergic acid diethylamide

(9) 2,-3 methylenedioxy amphetamine.

H. Lysergic acid;

I. Lysergic acid amide;

J. Cocaine, coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances, except decocainized coca leaves or extractions whereof which do not contain cocaine or ecgonine.

2. ScheduleX:

A. Unless listed or described in another schedule, all narcotic drugs, including but not limited to heroin (diacetylmorphine), methadone, pethidine, morphine and opium;

B. Unless listed or described in another schedule, any of the following drugs having depressant effect on the central nervous system

(1) Chlorhexadol

(2) Sulfondiethylmethane

(3) Sulfonethylmethane

(4) Sulfonmethane

C. Phenmetrazine and its salts;

D. Nalorphine;

E. Methylphenidate;

F. Chlordiazepoxide or its salts;

G. Diazepam;

H. Carbromal;

I. Chloral hydrate;

J. Unless listed in another schedule, any of the following hallucinogenic drugs, or their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation

(1) Bufotenine

(2) Ibogaine

(3) Mescaline, including but not limited to peyote

(4) N-methyl-3-piperidyl benzilate

(5) N-ethyl-3-piperidyl benzilate

(6) Psilocybin

(7) Psilocyn

(8) Tetrahydrocannabinols

(9) Phencyclidine;

K. Unless listed in another schedule, any material, compound, mixture or preparation containing limited quantities of any of the following narcotic drugs or any salts thereof

(1) not more than 300 milligrams of dehydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium

(2) not more than 300 milligrams of dehydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage units, with one or more active nonnarcotic ingredients in recognized therapeutic amounts

(3) not more than 1.8 grams of dehydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts

(4) not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit with one or more active nonnarcotic ingredients in recognized therapeutic amounts

(5) not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

3. Schedule Y:

A. Barbital;

B. Chloral betaine;

C. Ethchlorvynol;

D. Ethinamate;

E. Methohexital;

F. Methylphenobarbital;

G. Paraldehyde;

H. Petrichloral;

I. Phenobarbital;

J. Codeine (methylmorphine);

K. Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredient in sufficient proportion to confer upon

the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone

(1) not more than 2.5 milligrams of diphenoxylate with not less than 25 micrograms of atropin sulfate per dosage unit;

L. Meprobamate;

M. Ergot.

4. Schedule Z:

A. All prescription drugs other than those included in schedules W, X or Y;

B. Marihuana;

C. All nonprescription drugs other than those included in schedules W, X or Y as the Board of Pharmacy shall duly designate;

5. Notwithstanding anything in this section, no drug or substance which is legally sold in the State of Maine without any federal or state requirement as to prescription and which is unaltered as to its form shall be included in schedule W, X, Y or Z.

Comment*

The criminal penalties in this chapter depend on the type of drug that is involved in the misconduct. By grouping the dangerous drugs into 4 classifications, in schedules W, X, Y and Z, the penalties can be scaled according to the seriousness of the abuse that is involved. The definition of schedule Z drugs, in subsection 4, permits the Board of Pharmacy to designate new drugs for inclusion in the schedule as the evidence concerning abuse of drugs comes before them.

§ 1103. Unlawful trafficking in scheduled drugs

1. A person is guilty of unlawful trafficking in a scheduled drug if he intentionally or knowingly traffics in what he knows or believes to be any scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such trafficking is either:

A. Expressly authorized by Title 22; or

B. Expressly made a civil violation by Title 22.

2. Violation of this section is:

A. A Class B crime if the drug is a schedule W drug;

B. A Class C crime if the drug is a schedule X drug; or

C. A Class D crime if the drug is a schedule Y or schedule Z drug.

Comment*

This section is the basic drug abuse crime. It is built on the definition of Traffick in subsection 17 of section 1101 and the list of drugs in the

schedules provided in section 1102. This section does not penalize possession with intent to give away. That conduct comes under the definition of "furnishing," penalized in section 1106. Trafficking under this section includes the more serious possession with intent to sell. Possession without the requirement of any particular intent is criminal under section 1107; but that section does not relate to schedule Z drugs.

§ 1104. Trafficking in or furnishing counterfeit drugs

1. A person is guilty of trafficking in or furnishing counterfeit drugs if he intentionally or knowingly trafficks in or furnishes a substance which he represents to be a scheduled drug but which, in fact, is not a scheduled drug, but is capable, in fact, of causing death or serious bodily injury when taken or administered in the customary or intended manner.

2. Trafficking in or furnishing counterfeit drugs is a Class C crime.

Comment*

This section deals with the trafficking or furnishing of a dangerous substance with the pretence that it is a scheduled drug. In most instances this will take the form of a sale under the misrepresentation that the substance sold is a narcotic drug, but which turns out to be a form of poison.

§ 1105. Aggravated trafficking or furnishing scheduled drugs

1. A person is guilty of aggravated trafficking or furnishing scheduled drugs if he trafficks with or furnishes to a child under 16 a scheduled drug in violation of section 1103 or 1104.

2. Aggravated trafficking or furnishing is a crime one class more serious than such trafficking or furnishing would otherwise be.

Comment*

This section provides a more serious penalty for trafficking or furnishing drugs to children. It reaches all scheduled drugs.

§ 1106. Unlawfully furnishing scheduled drugs

1. A person is guilty of unlawfully furnishing scheduled drugs if he intentionally or knowingly furnishes what he knows or believes to be a scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such furnishing is either:

A. Expressly authorized by Title 22; or

B. Expressly made a civil violation by Title 22.

2. Violation of this section is:

A. A Class C crime if the drug is a schedule W drug; or

B. A Class D crime if the drug is a schedule X, Y or Z drug.

Comment*

This section is designed to deal with the case where the actor furnishes what he thinks is one particular scheduled drug which turns out to be

another scheduled drug. This section is necessary in order to distinguish, for penalty purposes, the person who knows that he is passing a highly dangerous substance from the one who does so inadvertently, although still in knowing violation of the law.

§ 1107. **Unlawful possession of schedule W, X and Y drugs**

1. **A person is guilty of unlawful possession of a scheduled drug if he intentionally or knowingly possesses a useable amount of what he knows or believes to be a scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such possession is either:**

A. Expressly authorized by Title 22; or

B. Expressly made a civil violation by Title 22.

2. **Violation of this section is:**

A. A Class C crime if the drug is a schedule W drug; or

B. A Class D crime if the drug is a schedule X or Y drug.

Comment*

This section reaches possession that is not authorized by Title 22 or made a civil violation by that title. It is not necessary that the possession be accompanied by any particular intention; it is necessary, however, that the possession be of a useable amount. This sort of possession, which includes possession to use a drug one's self, does not include possession of schedule Z drugs, the group which includes marihuana. These drugs may, however, be seized under section 1114.

The case against making a criminal out of an adult who does nothing more than have for his own use a substance which is less harmful than either alcohol or tobacco has been made many times. It is especially important that a complete revision of the criminal laws, as this Code represents, seek to distinguish conduct that is truly anti-social and the proper subject for criminal penalties from that which may be looked upon as undesirable, but nonetheless not a fit object for the moral condemnation which a criminal conviction should represent or for the severely handicapping effects most often experienced by ex-convicts. Throughout the revision of the criminal laws, the Commission has been at pains to reserve its definitions of crime for conduct that is truly intolerable in present society; its judgment that possession of marihuana for one's own use does not fall within this class has gained increasing support in many places, as indicated recently by the National Council on Crime and Delinquency's Criminal Justice Newsletter (vol. 5, no. 23, Dec. 16, 1974):

"Pressure Mounts to Decriminalize Marijuana

"The thin cracks in the wall against decriminalization and relaxation of penalties against use of marijuana appear likely in the next few months to become large gaping holes.

"And where legislators are failing to act, law enforcement officers, choking from an ever-growing number of marijuana arrests, are taking matters in their own hands and are refusing to enforce or are downgrading enforcement of the marijuana laws on the books.

"The big breach may come on the federal level, where Sen. Jacob K. Javits (R-NY) and Rep. Edward J. Koch (D-NY) are expected to introduce federal decriminalization legislation in the next session of Congress.

"And the Justice Department, where officials have become alarmed over the increase in the number of persons arrested for possessing small amounts of the drugs, are contemplating whether to recommend stiff civil fines to take the place of criminal penalties for marijuana users.

"In 1965 the number of persons arrested on marijuana charges was 18,815. It was up to 188,682 in 1970 and reached 420,700 in 1973. About 13 million persons smoke marijuana occasionally and 2.5 million smoke it regularly. Dr. Robert L. DuPont, head of the White House Special Action Office for Drug Abuse Prevention has urged an end to criminal penalties.

"**Oregon Leads.** The model for decriminalization is Oregon which abolished criminal penalties for marijuana use in October, 1973, substituting civil fines up to $100. In Denver, a city council ordinance passed last spring treats possession of up to a half ounce as a non-criminal violation.

"The 'parking ticket model' was introduced two years ago in Ann Arbor and Ypsilanti, MI, and after being rescinded a short time in Ann Arbor has been restored.

"New York City district attorneys have circumvented stiff penalty law by permitting persons accused of simple possession of up to two pounds to plead guilty to a single misdemeanor count.

"Commisioner Cleveland B. Fuessenich of the Connecticut State Police has told his men to go easy on marijuana arrests. Many other administrators have done the same and the evidence is that police officers are agreeing more and more with this approach on the ground it will free them for more important cases and because of the difficulty of enforcing the narcotics prohibitions.

"There are exceptions. In Washington, D. C., U. S. Attorney Earl J. Silbert had to rescind his order that his office no longer prosecute such cases because of pressure from police and Attorney General William B. Saxbe.

"It is interesting to note that the State Police in Connecticut have been told to cut down on traffic citations and no longer automatically hand out summonses for every accident, even single car ones.

"Keith Stroup, director of the National Organization for the Reform of Marijuana Laws, says that Colorado, California, Hawaii, Minnesota, New Jersey, Vermont and Massachusetts will probably decriminalize marijuana next year."

§ 1108. Acquiring drugs by deception

1. A person is guilty of acquiring drugs by deception if he violates chapter 15, section 354, knowing or believing that the subject of the theft is a scheduled drug, and it is, in fact, a scheduled drug.

2. For purposes of this section, information communicated to a physician in an effort to violate this section, including a violation by procuring the administration of a scheduled drug by deception, shall not be deemed a privileged communication.

3. Acquiring drugs by deception is a Class D crime.

Comment*

The purpose of this section is to single out a form of theft when it relates to dangerous drugs. Often the deception would be in the form of inducing a physician to prescribe the forbidden drug, and subsection 2 is designed to facilitate enforcement in such cases.

§ 1109. Stealing drugs

1. A person is guilty of stealing drugs if he violates chapter 15, sections 353, 355 or 356, knowing or believing that the subject of the theft is a scheduled drug, and it is, in fact, a scheduled drug, and the theft is from a person authorized to possess or traffick in such drug.

2. Stealing drugs is a Class D crime.

Comment*

This section prohibits outright stealing, theft by deception and the theft which arises when property is delivered by mistake. This conduct is described in the provisions of the Code referred to in subsection 1.

§ 1110. Trafficking in hypodermic apparatuses

1. A person is guilty of trafficking in hypodermic apparatuses if he intentionally or knowingly trafficks in a hypodermic apparatus, unless the conduct which constitutes such trafficking is either:

A. Expressly authorized by Title 22; or

B. Expressly made a civil violation by Title 22.

2. Trafficking in hypodermic apparatuses is a Class C crime.

Comment*

This section prohibits trafficking in material that is often associated with drug abuse and the illegal commercial activity that supports it.

§ 1111. Possession of hypodermic apparatuses

1. A person is guilty of possession of hypodermic apparatuses if he intentionally or knowingly furnishes or possesses a hypodermic apparatus, unless the conduct which constitutes such possession is either:

A. Expresly authorized by Title 22; or

B. Expressly made a civil violation by Title 22.

Comment*

This section deals with giving away, or possession one's self, hypodermic apparatuses under circumstances that are not covered by Title 22.

§ 1112. Analysis of scheduled drugs

1. A state laboratory which receives a drug or substance from a law enforcement officer or agency for analysis under this chapter shall, if it is capable of so doing, analyze the same as requested, and shall issue a certificate stating the results of such analysis. Such certificate, when duly signed and sworn to by a qualified chemist, or by a laboratory technician whose testimony as an expert has been received in any court of the State of Maine, of the United States, or of any state, shall be admissible in evidence in any court of the State of Maine, and shall be prima facie evidence that the composition and quality of the drug or substance is as stated therein, unless within 10 days written notice to the prosecution, the defendant requests that a qualified witness testify as to such composition and quality.

2. Transfers of drugs and substances to and from a state laboratory for purposes of analysis under this chapter may be by certified or registered mail, and when so made shall be deemed to comply with all the requirements regarding the continuity of custody of physical evidence.

3. Nothing contained in this section shall be deemed to prevent analyses of drugs from being performed by laboratories of the United States, of another state, or of private persons or corporations.

Comment*

The purpose of this section is to set out important rules of evidence which are often involved in litigation concerning enforcement of the drug laws. Subsection 1 permits hearsay to be used to establish the identity of the drug, unless the defendant objects, in which case a witness must testify in court on the issue. Subsection 2 is designed to facilitate handling of the drug without creating difficult problems of proving that the drug seized during an arrest, or otherwise, is the same drug that is produced in court. Subsection 3 serves to insure that nothing is lost in terms of flexibility in obtaining a chemical analysis by virtue of the rules in subsections 1 and 2.

§ 1113. Arrest without warrant by police officer for drug crimes; inspection

1. A law enforcement officer shall have the authority to arrest without a warrant any person who he has probable cause to believe has committed or is committing any crime under this chapter.

2. The powers of arrest conferred upon law enforcement officers by this section are not exclusive, but are in addition to all other powers provided by law.

3. State law enforcement officers, members of the Board of Commissioners of the Profession of Pharmacy and pharmacy inspectors shall have the right to inspect the records of any pharmacy which relate to any scheduled drug or any substance designated as a "potent medical substance" under Title 22, section 2201.

Comment*

This section facilitates enforcement of the requirements of this chapter. It repeats, however, the requirement that there be probable cause before any arrest may take place. Subsection 3 is now part of Title 22, section 2215.

§ 1114. Schedule Z drugs; contraband subject to seizure

All scheduled Z drugs, the unauthorized possession of which constitutes a civil violation under Title 22, are hereby declared contraband, and may be seized and confiscated by the State.

Comment*

This section recognizes that although the possession of schedule Z drugs ought not to lead automatically to the possessor's criminal liability — in the absence of an intent to give or sell the substance — it is still sound policy to take these substances out of circulation when that can be done.

§ 1115. Notice of conviction

On the conviction of any person of the violation of any provision of this chapter, or on his being found liable for a civil violation under Title 22, a copy of the judgment or sentence and of the opinion of the court or judge, if any opinion be filed, shall be sent by the clerk of court or by the judge to the board or officer, if any, by whom the person has been licensed or registered to practice his profession or to carry on his business. The court may, in its discretion, suspend or revoke the license or registration of the person to practice his profession or to carry on his business. On the application of any person whose license or registration has been suspended or revoked and upon proper showing and for good cause, said board or officer may reinstate such license or registration.

Comment*

This section repeats the provisions of Title 22, section 2377 and includes persons who have committed any of the civil violations contained in the revised Title 22.

PART III

CHAPTER 47

GENERAL SENTENCING PROVISIONS

§ 1151. Purposes

The general purposes of the provisions of this part are:

1. To prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety;

2. To minimize correctional experiences which serve to promote further criminality;

3. To give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;

4. To eliminate inequalities in sentences that are unrelated to legitimate criminological goals;

5. To encourage differentiation among offenders with a view to a just individualization of sentences;

6. To promote the development of correctional programs which elicit the cooperation of convicted persons; and

7. To permit sentences which do not diminish the gravity of offenses.

Comment*

The purpose of this section is to set forth the principles on which the entire Part III is based. The enumerated principles cannot all be accomplished in any particular case and it is inevitable that balances must be struck in each instance which sacrifice one or the other of the goals set out here. It is useful, however, to provide an overall view of what the goals of sentencing are.

§ 1152. Authorized sentences

1. Every natural person and organization convicted of a crime shall be sentenced in accordance with the provisions of this Part.

2. Every natural person convicted of a crime shall be sentenced to one of the following:

A. A suspended period of imprisonment with probation as authorized by chapter 49;

B. Unconditional discharge as authorized by chapter 49:

C. To a period of imprisonment as authorized by chapter 51; or

D. To pay a fine as authorized by chapter 53. Subject to the limitations of chapter 53, section 1302, such a fine may be imposed in addition to probation or a sentence authorized by chapter 51.

3. Every organization convicted of a crime shall be sentenced to one of the following:

A. Probation or unconditional discharge as authorized by chapter 49;

B. The sanction authorized by section 1153. Such sanction may be imposed in addition to probation or a fine; or

C. A fine authorized by chapter 53. Such fine may be imposed in addition to probation or the sanctions authorized by section 1153.

4. The provisions of this chapter shall not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office or impose any other civil penalty. An appropriate order exercising such authority may be included as part of the judgment of conviction.

Comment*

This section serves to introduce the remainder of the Part. It lists the types of sentences that are authorized by law for the commission of crime.

§ 1153. Sanctions for organizations

1. If an organization is convicted of a crime, the court may, in addition to or in lieu of imposing other authorized penalties, sentence it to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media, or otherwise as the court may direct. Failure to do so may be punishable as contempt of court.

2. If a director, trustee or managerial agent of an organization is convicted of a Class A or Class B crime committed in its behalf, the court may include in the sentence an order disqualifying him from holding office in the same or other organizations for a period not exceeding 5 years, if it finds the scope or nature of his illegal actions makes it dangerous or inadvisable for such office to be entrusted to him.

3. Prior to the imposition of sentence, the court may direct the Attorney General, a district attorney, or any other attorney specially designated by the court, to institute supplementary proceedings in the case in which the organization was convicted of the crime to determine, collect and distribute damages to persons in the class which the statute was designed to protect who suffered injuries by reason of the crime, if the court finds that the multiplicity of small claims or other circumstances make restitution by individual suit impractical. Such supplementary proceedings shall be pursuant to rules adopted by the Supreme Judicial Court for this purpose. The court in which proceedings authorized by this subsection are commenced may order the State to make available to the attorney appointed to institute such proceedings all documents and investigative reports as are in its possession or control and grand jury minutes as are relevant to the proceedings.

Comment*

This section is founded primarily on deterrent considerations and the expectation that penalties which have a direct economic impact can be of major influence in the conduct of corporate affairs. The requirements of subsection 1 can serve to prevent crime in another way as well, since they can alert potential victims as to the danger of doing business with the convicted organization. Subsection 2 gives the court the flexibility to diminish the chances of any particular organization agent engaging in similar crim-

inal behavior in the future. Subsection 3 is a procedural device for accomplishing the sort of restitution which is often required in criminal cases.

§ 1154. Sentences in excess of one year deemed tentative

1. When a person has been sentenced to imprisonment for a term in excess of one year and such imprisonment has not been suspended, the sentence shall be deemed tentative, to the extent provided in this section.

2. If, as a result of the department's evaluation of such person's progress toward a noncriminal way of life, the department is satisfied that the sentence of the court may have been based upon a misapprehension as to the history, character or physical or mental condition of the offender, or as to the amount of time that would be necessary to provide for protection of the public from such offender, the department may file in the sentencing court a petition to resentence the offender. The petition shall set forth the information as to the offender that is deemed to warrant his resentence and shall include a recommendation as to the sentence that should be imposed.

3. The court may, in its discretion, dismiss a petition filed under subsection 2 without a hearing if it deems the information set forth insufficient to warrant reconsideration of the sentence. If the court finds the petition warrants such reconsideration, it shall cause a copy of the petition to be served on the offender, the district attorney, the Attorney General and the victim of the crime or, in the case of a criminal homicide, on the victim's next of kin, all of whom shall have the right to be heard on the issue.

4. If the court grants a petition filed under subsection 2, it shall resentence the offender and may impose any sentence not exceeding the original sentence that was imposed. The period of his being in the custody of the Department of Mental Health and Corrections prior to resentence shall be applied in satisfaction of the revised sentence.

5. For all purposes other than this section, a sentence of imprisonment has the same finality when it is imposed that it would have if this section were not in force. Nothing in this section shall alter the remedies provided by law for appealing a sentence, or for vacating or correcting an illegal sentence. As used in this section, "court" means the judge who imposed the original sentence, unless he is disabled or otherwise unavailable, in which case it means any judge exercising similar jurisdiction.

Comment*

This section is drawn from the Massachusetts Criminal Code, chapter 264, section 5.

Rule 35 of the Maine Rules of Criminal Procedure, for the Superior and District Courts, provides authority in the sentencing court to revise a sentence at any time prior to commencement of its execution. There is no authority for revision by the sentencing court.

The design of this section is to supplement the provisions of Rule 35. The present rule is an important recognition that "second thoughts" or supplementary information may arise which call for a change in the sen-

tence originally imposed. But it not infrequently occurs that upon his arrival at a correctional facility, or shortly thereafter, there comes to light information about the offender or the offense which, if it had been known by the sentencing judge, would have caused him to reconsider the sentence under his Rule 35 powers. This section provides a means for conveying that information to him in appropriate cases.

The court is given authority to dismiss the petition without any notice or hearing. This is provided in view of the court already having given full consideration to the case and the need to avoid burdening the court with hearings that may be merely a repetition of the original sentencing proceedings. If the court does propose to reconsider the sentence, however, the district attorney must be notified and given the opportunity to be heard.

§ 1155. Multiple sentences

1. Other provisions of this section notwithstanding, when a person subject to an undischarged term of imprisonment is convicted of a violation of chapter 31, section 755, or of a crime against the person of a member of the staff of the institution in which he was imprisoned, or of an attempt to commit either of such crimes, the sentence shall run consecutively to the undischarged term of imprisonment.

2. When multiple sentences of imprisonment are imposed on a person at the same time, or when such a sentence is imposed on a person who is already subject to an undischarged term of imprisonment, the sentences shall run concurrently, or, subject to the provisions of this section, consecutively, as determined by the court. When multiple fines are imposed on a person or an organization, the court may, subject to the provisions of this section, sentence the person or organization to pay the cumulated amount or the highest single fine. Sentences shall run concurrently and fines shall not be cumulated unless otherwise specified by the court pursuant to subsections 3 and 4.

3. Unless the court sets forth in detail for the record the findings described in subsection 4, it shall not either:

A. Impose consecutive imprisonment terms or cumulative fines which exceed the maximum term or the highest fine authorized for the most serious crime involved; or

B. Impose consecutive imprisonment terms or cumulative fines at all.

4. The findings referred to in subsection 3 are the reasons why, having regard to the nature and circumstances of the crime, and the history and character of the defendant, the court is of the opinion that there are exceptional features to the case which require the sentence imposed.

5. A defendant may not be sentenced to consecutive terms or cumulative fines for more than one crime when:

A. One crime is an included crime of the other;

B. One crime consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other;

C. The crimes differ only in that one is defined to prohibit a designated kind of conduct generally, and the other to prohibit a specific instance of such conduct; or

D. In separate trials, inconsistent findings of fact are required to establish the commission of the crimes.

Comment*

Title 15, section 1702 now provides the rule that unless the court decides otherwise, sentences are to be served concurrently. The purpose of this section of the Code is to provide guidelines for the exercise of that discretion. The basic rule, set out in subsection 2, is that sentences are normally to run concurrently and that if they are to run consecutively, the maximum is not normally to exceed the maximum severity for any particular crime for which the sentence is being imposed. Subsections 3 and 4 serve to permit the court to rule otherwise, both in terms of whether sentences are to run consecutively and what the maximum of the whole may be, provided it makes the findings set out in subsection 4. Subsections 1 and 5 are exceptions to this scheme; the former requires that a person who commits the crime of escape must serve his sentence for that consecutively to the one from which he escaped, while the latter limits the authority to impose consecutively terms where the crimes are essentially only one course of conduct.

§ 1156. Consideration of other crimes

1. If the convicted person consents, the court may, in its discretion, take into account in determining sentence, any other crimes committed by such person for which he has not been convicted; provided that if there is such consent, the prosecuting attorney shall be notified and afforded an opportunity to be heard. If, following any such hearing, or waiver thereof by the prosecuting attorney, the court takes into account such other crimes as are disclosed by the convicted person, the record shall so state and the sentence imposed shall bar the prosecution or conviction in this State of the person so sentenced. If the court does not take such other crimes into account, the convicted person's disclosure of them, in whole or in part, and any evidence derived directly or indirectly from such disclosure, shall not be admissible against him in any court. Before taking into account any such disclosed crimes, the court must be satisfied that the convicted person engaged in the conduct constituting such crimes.

2. Sentences imposed under this section are subject to the provisions of section 1155. Upon the imposition of sentence under this section, the clerk of the court imposing sentence shall notify in writing the clerk of the court in which there are pending any of the crimes taken into account, and the clerk of the court in which they are pending shall cause the record of such pending cases to show that they were the subject of proceedings under this section. The record of the case in which sentence is imposed shall reflect all action taken under this section.

3. Before imposing sentence, the court shall inform the convicted person of the provisions of this section.

Comment*

The purpose of this section is to permit both the court system and the convicted person to clear the record of any existing or potential charges against the person to be sentenced. Safeguards are provided in terms of hearings on the issue of taking other crimes into account and in terms of not using disclosures concerning them against the person owning up to other misdeeds.

CHAPTER 49

PROBATION AND UNCONDITIONAL DISCHARGE

§ 1201. Eligibility for probation and unconditional discharge

1. A person who has been convicted of any crime, except aggravated murder or murder, may be sentenced to a suspended term of imprisonment with probation or to an unconditional discharge, unless the court finds that:

A. There is undue risk that during the period of probation the convicted person would commit another crime;

B. The convicted person is in need of correctional treatment that can be provided most effectively by commitment to the Department of Mental Health and Corrections; or

C. Such a sentence would diminish the gravity of the crime for which he was convicted.

2. A convicted person who is eligible for sentence under this chapter, as provided in subsection 1, shall be sentenced to probation if he is in need of the supervision, guidance, assistance or direction that probation can provide. If there is no such need, and no proper purpose would be served by imposing any condition or supervision on his release, he shall be sentenced to an unconditional discharge. A sentence of unconditional discharge is for all purposes a final judgment of conviction.

Comment*

Parts of this section are taken from the Proposed Massachusetts Criminal Code, chapter 264, section 20(b) and the Proposed Federal Criminal Code, section 3101(2). There is no statute of general applicability similar to this in the present law. Murder, treated separately in this section, is now subject to a mandatory life imprisonment sentence under Title 17, section 2651.

This section serves to set up a system of priorities to govern the sentencing decision. Consistent with the provisions of chapter 51, section 1251, persons convicted of aggravated murder or murder are excluded from consideration for probation or unconditional discharge. Subsection one of this section similarly excludes from this chapter those persons who would present a threat of further crime if sentenced to probation or unconditional discharge; who are in need of programs available to the Department of Mental Health and Corrections; or whose offense is too serious for sentence under this chapter.

Among those eligible, subsection 2 says that probation should be used if it appears that the convicted person would be helped thereby. Absent such a need, an unconditional discharge is warranted.

§ 1202. Period of probation; modification and discharge

1. A person convicted of a Class A or Class B crime may be placed on probation for a period not to exceed 3 years; for a Class C crime, for a period not to exceed 2 years; and for a Class D crime or Class E crime, for a period not to exceed one year.

2. During the period of probation specified in the sentence made pursuant to subsection 1, and upon application of a person on probation, his probation officer, or upon its own motion, the court may, after a hearing upon notice to the probation officer and the person on probation, modify the requirements imposed, add further requirements authorized by section 1204, or relieve the person on probation of any requirement that, in its opinion, imposes an unreasonable burden on him.

3. On application of the probation officer, or of the person on probation, or on its own motion, the court may terminate a period of probation and discharge the convicted person at any time earlier than that provided in the sentence made pursuant to subsection 1, if warranted by the conduct of such person. Such termination and discharge shall serve to relieve the person on probation of any obligations imposed by the sentence of probation.

Comment*

This section is based on the Proposed Massachusetts Criminal Code, chapter 264, section 22, and the Proposed Federal Criminal Code, section 3102. Title 34, section 1632 of the present law places a two year limit on all orders of probation, regardless of the offenses for which the conviction was had. Section 1634 of Title 34 provides that probation may be earlier discharged.

The only significant change proposed by this section in the present Maine law relates to the periods of probation. Subsection 1, consistent with the policy of grading offenses, provides for differing maximum periods of probation, depending on the class of crime for which there was a conviction. The Massachusetts and Federal drafts propose to have six and five year maximum periods respectively for the most serious offenses. These periods have been rejected in this Code on the view that if probation is to be a successful experience at all, it will be clear that such is the case in a shorter period of time.

The flexibility for modifying the conditions of probation, and for an early release of persons from the constraints of those conditions, now in present law, are continued in this draft.

§ 1203. Split sentences

1. Subject to the limitations in subsection 2, the court may require that a person placed on probation be imprisoned in a designated institution for any portion of the probation.

2. If, pursuant to subsection 1, the court requires the person placed on probation to be imprisoned in the State Prison for the initial period of the probation, it shall fix such period of imprisonment not to exceed 90 days.

Comment*

The purpose of this section is to give the sentencing court the flexibility to order that the period of probation not begin until the convicted person has had a brief experience of imprisonment. In some cases the court may decide that such an experience is what is needed to bring home to the offender the consequences of law violation.

§ 1204. Conditions of probation

1. If the court imposes a sentence of probation, it shall attach such conditions, as authorized by this section, as it deems to be reasonable and appropriate to assist the convicted person to lead a law-abiding life.

2. As a condition of probation, the court in its sentence may require the convicted person:

A. To support his dependents and to meet his family responsibilities;

B. To devote himself to an approved employment or occupation;

C. To undergo, as an out-patient, available medical or psychiatric treatment, or to enter and remain, as a voluntary patient, in a specified institution when required for that purpose. Failure to comply with this condition shall be considered only as a violation of probation and shall not, in itself, authorize involuntary treatment or hospitalization;

D. To pursue a prescribed secular course of study or vocational training;

E. To refrain from criminal conduct or from frequenting unlawful places or consorting with specified persons;

F. To refrain from possessing any firearms or other dangerous weapon;

G. To make restitution, in whole or in part, according to the resources of the convicted person, to the victim or victims of his crime, or to the county where the offense is prosecuted where the identity of the victim or victims cannot be ascertained. As used in this subsection, "restitution" includes the money equivalent of property taken from the victim, or property destroyed or otherwise broken or harmed, and out-of-pocket losses attributable to the crime, such as medical expenses or loss of earnings;

H. To remain within the jurisdiction of the court unless permission to leave temporarily is granted in writing by the probation officer, and to notify the court or the probation officer of any change in his address or his employment;

I. To refrain from drug abuse and excessive use of alcohol;

J. To report as directed to the court or the probation officer, to answer all reasonable inquiries by the probation officer and to permit the officer to visit him at reasonable times at his home or elsewhere;

K. To pay a fine as authorized by chapter 53; or

L. To satisfy any other conditions reasonably related to the rehabilitation of the convicted person or the public safety or security.

3. The convicted person shall be given a written statement setting forth the particular conditions on which he is released on probation, and he shall then be given an opportunity to address the court on these conditions if he so requests at the time.

Comment*

Similar provisions are in the Massachusetts Criminal Code, chapter 264, section 21 and the Federal Criminal Code, section 3103. Both are derived from the Model Penal Code, section 301.1. Title 34, section 1632 presently provides that . . . "The court shall determine the conditions of the probation and shall give the probationer a written statement containing the conditions of his probation." There is no statute which spells out what these conditions are or might be in any individual case.

This section of the Code provides legislative guidelines for the setting of probation conditions. It does not interfere with the discretion of the sentencing court in setting conditions which it deems proper in individual cases. The provision for restitution in subsection 2, paragraph G can, in appropriate cases, be a useful means for compensating the victim of the crime.

§ 1205. Preliminary hearing or violation of conditions of probation

1. If a probation officer has probable cause to believe that a person under his supervision has violated a condition of his probation, he may issue a summons to such person to appear before the district supervisor or such other official as may be designated by the Director of Probation and Parole for a preliminary hearing to determine whether such probable cause in fact exists. If the alleged violation constitutes the commission of a new crime, the probation officer may communicate the basis for his belief that there is probable cause that the person under supervision has committed a crime to any law enforcement officer who may, in his discretion, thereupon arrest such person. The probation officer shall forthwith provide the arrested person with a written notice of a preliminary hearing before the district supervisor to determine whether there is probable cause to believe that he has committed the new crime.

2. The preliminary hearing shall be held within 48 hours if a person under supervision has been arrested, and as soon as practicable if he has not. It shall be held as near to the place where the violation is alleged to have taken place as is reasonable under the circumstances. The summons and written notice provided for in subsection 1 shall name the place and time of the preliminary hearing, state the conduct alleged to constitute the violation, and inform the person of his rights under this section. In no case shall there be a waiver of the right to a preliminary hearing.

3. At the preliminary hearing the person alleged to have violated a condition of his probation has the right to confront and cross-examine persons

who have information to give against him, to present evidence on his own behalf, and to remain silent. If the district supervisor determines on the basis of the evidence before him that there is not probable cause to believe that a condition of probation has been violated, he shall terminate the proceedings and order the person on probation forthwith released from any detention he may then be in. In such case, no further proceedings to revoke the probation, based on the conduct alleged to have been the violation may be brought. If he determines that there is such probable cause, he shall prepare a written statement summarizing the evidence that was brought before him, and particularly describing that which supports the belief that there is probable cause. The person on probation shall be provided a copy of this statement. At the outset of the preliminary hearing, the district supervisor shall inform the person of his rights under this section and of the provisions of section 1206. Such person may waive, at the preliminary hearing, his right to confront and cross-examine witnesses against him, his right to present evidence in his own behalf, and his right to remain silent. No other rights may then be waived.

Comment*

This section sets out the procedures to be followed in the preliminary hearing on probation revocation which is required by **Gagnon v. Scarpelli,** 411 U. S. 778 (1973). It provides for a finding of probable cause by someone other than the probationer's probation officer, notice of the allegations of probation violation, and a hearing before a neutral official.

§ 1206. Court hearing on probation revocation

1. If, as a result of proceedings held under section 1205, there is a determination of probable cause, the Director of Probation and Parole may apply to any court for a summons ordering the person to appear before the court for a hearing on the alleged violation. The application for summons shall include a copy of the written statement prepared pursuant to section 1205, subsection 3. The person on probation shall be furnished a copy of the application by the Director of Probation and Parole.

2. Upon the receipt of the application provided for in subsection 1, the court may, in its discretion:

A. Issue the summons and order a hearing on the allegations or deny the application and order the person on probation released forthwith if he has been arrested on the allegations;

B. If it is not the court which imposed the probation sentence, transfer the proceedings to such court which shall then proceed pursuant to this section; or

C. If a hearing is ordered, the person on probation shall be notified, and the court, including the court to which the proceedings may have been transferred, may issue a warrant for his arrest and order him committed, with or without bail, pending the hearing.

3. If a hearing is held, the person on probation shall be afforded the opportunity to confront and cross-examine witnesses against him, to present

evidence on his own behalf, and to be represented by counsel. If he cannot afford counsel, the court shall appoint counsel for him.

4. When the alleged violation constitutes a crime:

A. If the court hearing the violation is a District Court, it may

(1) accept a plea of guilty or nolo contendere to such crime, provided all the requirements for accepting such pleas are complied with;

(2) if it has jurisdiction to try such crime, revoke probation if it finds by a preponderance of the evidence that the person on probation committed the crime, or it may order him tried for such crime; or

(3) order the allegation of such new crime to be brought before the Superior Court, if it does not have jurisdiction to try such crime.

B. If the court hearing the violation is a Superior Court, it may

(1) accept a plea of guilty or nolo contendere to crime, provided all the requirements for accepting such pleas are complied with;

(2) revoke probation if it finds by a preponderance of the evidence that the person on probation committed the crime; or

(3) order the person tried for such crime.

5. If the alleged violation does not constitute a crime and the court finds that the person has inexcusably failed to comply with a requirement imposed as a condition of probation, it may revoke probation. In such case, the court shall impose the sentence of imprisonment that was suspended when probation was granted.

6. If the person on probation is convicted of a new crime during the period of probation, the court may sentence him for such crime, revoke probation and impose the sentence of imprisonment that was suspended when probation was granted, subject to chapter 47, section 1155.

Comment*

This section sets out the procedures to be followed in a court hearing on probation violation following the preliminary hearing required under section 1205. Rights to notice, opportunity to be heard, and counsel are provided. The options available to the court, if it finds the violation to have been committed, depend on whether the violation is a new crime. Subsection 4 permits the court to order trial for the new crime or to revoke probation. If the person is convicted of the new crime, the probation may then be revoked, although the sentencing will be governed by the provisions of section 1155 of chapter 47 concerning multiple convictions.

CHAPTER 51

SENTENCES OF IMPRISONMENT

§ 1251. Imprisonment for criminal homicide in the first or 2nd degree

1. A person who has been convicted of a crime may be sentenced to imprisonment pursuant to this chapter.

2. In the case of a person convicted of criminal homicide in the 2nd degree, the court shall commit him to the custody of the department for purposes of an evaluation of such person as is relevant to sentence. No later than 120 days from such commitment, the department shall return the convicted person to the court, along with the report of its evaluation and a recommended sentence.

3. Upon receipt of the report and recommendations provided for in subsection 2, the court shall sentence him to the State Prison for any term of years that is not less than 20.

4. A person convicted of criminal homicide in the first degree shall be sentenced to life imprisonment.

Comment*

This section reflects a number of basic policy decisions. In subsection 1 is the decision that the Code defines offenses which are serious enough to merit the possibility of some imprisonment. That is, there is no conduct defined in the Code and, by virtue of the provisions of section 4 of chapter 1 no conduct defined outside of the Code which is criminal but which does not have an imprisonment penalty. Crime and the possibility of prison are linked.

In subsections 2 and 3 provision is made for sentencing a person convicted of criminal homicide in the second degree. Such a person must be sentenced to the State Prison for not less than 20 years. By virtue of the "good time" deductions authorized by section 1253 of this chapter, a twenty-year sentence means a period of imprisonment of about thirteen and a half years or twelve years, depending on what the behavior of the inmate is and whether he can earn special deductions for assuming unusual responsibilities.

In subsection 3 the court is required to sentence a person convicted of criminal homicide in the first degree to life imprisonment. Such a person may also "earn" the deductions of section 1253, but they may not be applied to reduce his sentence until after he has served 15 years, and then the reduction can take place only with the permission of the court. See subsection 2 of section 1253.

§ 1252. Imprisonment for crimes other than criminal homicide in the first or 2nd degree

1. In the case of a person convicted of a crime other than criminal homicide in the first or 2nd degree, the court may sentence to imprisonment for a definite term as provided for in this section. The sentence of the court shall specify the place of imprisonment, provided that no person shall be sentenced to imprisonment in the Men's Correctional Center located at South Windham, Maine, if his sentence exceeds 5 years or he is, at the time of sentence, more than 26 years old.

2. The court shall set the term of imprisonment as follows:

A. In the case of a Class A crime, the court shall set a definite period not to exceed 20 years;

B. In the case of a Class B crime, the court shall set a definite period not to exceed 10 years;

C. In the case of a Class C crime, the court shall set a definite period not to exceed 5 years;

D. In the case of a Class D crime, the court shall set a definite period not to exceed one year; or

E. In the case of a Class E crime, the court shall set a definite period not to exceed 6 months.

3. The court may add to the sentence of imprisonment a restitution order as is provided for in chapter 49, section 1204, subsection 2, paragraph G. In such cases, it shall be the responsibility of the department to determine whether the order has been complied with and consideration shall be given in the department's administrative decisions concerning the imprisoned person as to whether the order has been complied with.

4. If the State pleads and proves that a Class B, C, D or E crime was committed with the use of a dangerous weapon then the sentencing class for such crime is one class higher than it would otherwise be. In the case of a Class A crime committed with the use of a dangerous weapon, such use should be given serious consideration by the court in exercising its sentencing discretion.

Comment*

The sentencing structure for all crimes other than the two most serious criminal homicides is different from present law in many respects. There are no more indeterminate sentences whereby the release of a prisoner depends on the discretion of corrections officials. This section sets a maximum period of imprisonment for each class of crime and requires that the court pick a precise period within that maximum. This period is then the time spent incarcerated, less the deductions authorized in section 1253. There is the possibility of an exception to this process based on the provisions of section 1154 of chapter 47 which permits the Corrections Bureau to request the court to reduce the sentence in any case where it exceeds one year.

Subsection 4 permits the court to impose a sentence one class higher than that authorized for the crime of which the person was convicted in any case in which it is proved that the crime was committed with the use of a dangerous weapon.

§ 1253. Calculation of period of imprisonment

1. The sentence of any person committed to the Department of Mental Health and Corrections shall commence to run on the date on which such person is received into the custody of the department.

2. When a person sentenced to imprisonment has been committed for pre-sentence evaluation pursuant to section 1251, subsection 2, or has previously been detained to await trial, in any state or county institution, or local

lock-up, for the conduct for which such sentence is imposed, such period of evaluation and detention shall be deducted from the time he is required to be imprisoned under such sentence. The department shall have the same authority regarding such local lock-ups as is provided regarding county jails by Title 34, section 3. The attorney representing the State shall furnish the court, at the time of sentence, a statement showing the length of such detention, and the statement shall be attached to the official records of the commitment.

3. Each person sentenced to imprisonment for more than 6 months whose record of conduct shows that he has observed all the rules and requirements of the institution in which he has been imprisoned shall be entitled to a deduction of 10 days a month from his sentence, commencing, in the case of all convicted persons, on the first day of his delivery into the custody of the department.

4. An additional 2 days a month may be deducted in the case of those who are assigned duties outside the institution or who are assigned to work within the institution which is deemed to be of sufficient importance and responsibility to warrant such deduction.

Comment*

This section provides for the good time deductions in all cases where the sentence exceeds six months. In addition, subsection 4 authorizes an additional two days a month for special assignments made at the discretion of the corrections authorities.

§ 1254. Release from imprisonment

1. An imprisoned person shall be unconditionally released and discharged upon the expiration of his sentence, minus the deductions authorized under section 1253.

2. A person sentenced to life imprisonment may, after having served 15 years, and annually thereafter, and a person sentenced to a term of years in excess of 20 years, may, after having served 12 years, and annually thereafter, petition the Superior Court of the county in which he is imprisoned for a reduction of his sentence to a term of years. Upon notice to the Attorney General and the victim or the next of kin of the victim, the court shall hold a hearing on the petition and may, in its discretion, reduce the sentence from life imprisonment to a term of years that is not less than 30, and reduce any other sentence to a term that is not less than 20. If the sentence is so reduced the imprisoned person shall be unconditionally released and discharged upon the expiration of the term specified in such sentence, minus such deductions authorized under section 1253 as he shall have accumulated.

3. All persons in the custody of the Bureau of Corrections serving a criminal sentence on the effective date of this code shall be released and discharged according to the law as it was in force on the date they were sentenced and such law shall continue in force for this purpose as if this code were not enacted; provided, however, that any such person may elect to

be released and discharged according to section 1253 and of this section. Upon such election he shall be released and discharged as if section 1253 and this section were in force on the date he was sentenced.

Comment*

Subsection 1 contains the general rule that requires release upon the expiration of the sentence and not at the discretion of the Parole Board. An exception is made to this rule in subsection 3 in order to avoid having this rule create an **ex post facto** effect. In subsection 2 are procedures whereby persons sentenced for criminal homicide in the first or second degrees and those sentenced for consecutive terms which exceed 20 years, may petition the court to reduce their sentences. If they are successful, the deductions they will have earned will be applied to determine their release and discharge, a bit of mathematics it is assumed the court will do in determining whether and how much to reduce any given sentence.

CHAPTER 53

FINES

§ 1301. Amounts authorized

1. A natural person who has been convicted of a Class C, Class D or Class E crime may be sentenced to pay a fine, subject to section 1302, which shall not exceed:

A. $1,000 for a Class C crime;

B. $500 for a Class D crime;

C. $250 for a Class E crime; and

D. Regardless of the classification of the crime, any higher amount which does not exceed twice the pecuniary gain derived from the crime by the defendant.

2. As used in this section, "pecuniary gain" means the amount of money or the value of property at the time of the commission of the crime derived by the defendant from the commission of the crime, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed. When the court imposes a fine based on the amount of gain, the court shall make a finding as to the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding, the court may conduct, in connection with its imposition of sentence, a hearing on this issue.

3. If the defendant convicted of a crime is an organization, the maximum allowable fine which such a defendant may be sentenced to pay shall be:

A. $50,000 for a class A crime;

B. $20,000 for a Class B crime;

C. $10,000 for a Class C crime;

D. $5,000 for a Class D crime or a Class E crime; and

E. Any higher amount which does not exceed twice the pecuniary gain derived from the crime by the convicted organization.

Comment*

Article I, section 9 of the Maine Constitution prohibits the imposition of "excessive fines." There is little clear guidance to what this means, however, since the only reported case interpreting this prohibition declared: "In determining the question whether . . . or not a fine imposed is excessive, regard must be had to the purpose of the enactment, and to the importance and magnitude of the public interest sought by it to be protected." **State v. Lubee**, 93 Me. 418, 421 (1899). There is no general statutory provision governing the amount of fines authorized by law. Each criminal offense defined in the statutes carries its own fine penalty. Chapter 303 of Title 15 deals with the subject of fines, but is restricted mostly to the recovery of fines and their payment to the appropriate government official.

This section follows the general policy of having the criminal code grade offenses by imposing differing penalties on offenses of differing seriousness. The limits provided are maxima, so that a sentence may include a fine anywhere below the specified limit. Criteria for imposing fines are in section 1302.

§ 1302. **Criteria for imposing fines**

No convicted person shall be sentenced to pay a fine unless the court determines that he is or will be able to pay the fine. In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the offender and the nature of the burden that its payment will impose. No person shall be imprisoned solely for the reason that he will not be able to pay a fine.

Comment*

There are no criteria in the present law for imposing fines, although it is likely that the consideration that goes into deciding on a sentence to pay a fine utilizes some of the criteria set forth here.

The provisions governing fines must be viewed in the context of the code policy of having every crime punishable by imprisonment. There are no crimes punishable only by a fine. It is, of course, possible that the circumstances of any particular case will lead the court to withhold the commitment alternative and to invoke only the fine that is authorized.

The purpose of the last sentence is to minimize the number of times that there are defaults in the payment of fines. The provision requires that if a person is found to be unable to pay a fine that might be required, he shall not, for that reason alone, be committed. Where an unconditional discharge is not in order, the court can place the offender on probation.

§ 1303. Time and method of payment of fines

1. If a convicted person is sentenced to pay a fine, the court may grant permission for the payment to be made within a specified period of time or in specified installments. If no such permission is embodied in the sentence, the fine shall be payable forthwith to the clerk.

2. If a convicted person sentenced to pay a fine is also placed on probation, the court may make the payment of the fine a condition of probation. In such cases, the court may order that the fine be paid to the probation officer.

Comment*

This section provides explicit authority for tailoring the method of paying a fine to the circumstances of the convicted person. Although the fine would ordinarily be paid immediately to the clerk, it is possible for it to be paid in installments over a period of time specified in the sentence, or that it be paid as part of the conditions of probation.

§ 1304. Default in payment of fines

1. When a convicted person sentenced to pay a fine defaults in the payment thereof or of any installment, the court, upon the motion of the official to whom the money is payable, as provided in section 1303, or upon its own motion, may require him to show cause why he should not be sentenced to be imprisoned for nonpayment and may issue a summons or a warrant of arrest for his appearance. Unless such person shows that his default was not attributable to a wilful refusal to obey the order of the court or to a failure on his part to make a good faith effort to obtain the funds required for the payment, the court shall find that his default was unexcused and may order him imprisoned until the fine or a specified part thereof is paid. The term of imprisonment for such unexcused nonpayment of the fine shall be specified in the court's order and shall not exceed one day for each $5 of the fine or 6 months, whichever is the shorter. When a fine is imposed on an organization, it is the duty of the person or persons authorized to make disbursements from the assets of the organization to pay it from such assets and failure so to do may be punishable under this section. A person imprisoned for nonpayment of a fine shall be given credit towards its payment for each day that he is in the custody of the department, at the rate specified in the court's order. He shall also be given credit for each day that he has been detained as a result of an arrest warrant issued pursuant to this section.

2. If it appears that the default in the payment of a fine is excusable, the court may make an order allowing the offender additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or the unpaid portion thereof in whole or in part.

3. Upon any default in the payment of a fine or any installment thereof, execution may be levied, and such other measures may be taken for the collection of the fine or the unpaid balance thereof as are authorized for the collection of an unpaid civil judgment entered against a person. The levy of

execution for the collection of a fine shall not discharge a person imprisoned for nonpayment of the fine until such time as the amount of the fine has been collected.

Comment*

Title 15, § 1904 now provides:

> Except when otherwise provided, any convict sentenced to pay a fine or costs or both and committed or confined for default thereof and for no other cause shall be given a credit of $5 on such fine or costs or both for each day during which he shall be confined and shall be discharged at such time as the said credits or such credits as have been given and money paid in addition thereto shall equal the amount of fine or costs or both, but no convict shall serve more than 11 months to discharge his liability under any single fine or costs or both, and in all cases no further action shall be taken to enforce payment of said fine or costs or both.

The validity of this part of the Maine laws is seriously in doubt by virtue of the decisions of the Supreme Court of the United States in **Tate v. Short,** 401 U.S. 395 (1971) and **Williams v. Illinois,** 399 U.S. 235 (1970). In these cases the Court ruled that an indigent person could not be imprisoned solely because he could not raise the funds necessary to pay a fine, and that the period of incarceration for nonpayment could not exceed that which was otherwise authorized by the Legislature for commission of the offense.

This section of the Code authorizes a commitment under two sets of circumstances. One is where the failure to pay the fine is found to be without excuse. The second is where, although the court finds that the default is excusable, the convicted person would escape punishment altogether unless he were ordered to the custody of the Department. This latter situation may arise where the person may not be able to raise or earn the money needed to meet his obligations under the original fine sentence. This is, to be sure, an instance of committing a poor person where a wealthy one would remain free; but it does not violate the rule in the **Tate** case since there, the statute violated provided for only a fine, so that imprisonment was altogether impossible for a nonindigent defendant. In this regard, Justice Brennan wrote for the Court:

> Since Texas has legislated a 'fines only' policy for traffic sentences, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State . . . We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.

The last situation referred to by Justice Brennan is provided for in this section; it has not, as yet, been ruled on by the Court.

§ 1305. Revocation of fines

1. A convicted person who has been sentenced to pay a fine and has not inexcusably defaulted in payment thereof, may at any time petition the court which sentenced him for a revocation of any unpaid portion thereof. If the court finds that the circumstances which warranted the imposition of the fine have changed, or that it would otherwise be unjust to require payment, the court may revoke the unpaid portion thereof in whole or in part, or modify the time and method of payment.

2. If, in any judicial proceeding following conviction, a court issues a final judgment invalidating the conviction, such judgment may include an order that any or all of a fine which the convicted person paid pursuant to the sentence for such conviction be returned to him.

Comment*

The purpose of this section is to provide a flexibility to adjust fines as changing circumstances might require. In addition, subsection 2 permits an "undoing" of the fine in any case in which the conviction itself is upset.

Sec. 2. 15 MRSA §§ 2, 102, 341, 342, 451, 452, 751, 1701-A, 1741 to 1743 and 1842 are repealed.

Sec. 3. 15 MRSA, § 1702, 2nd ¶, as amended by PL 1965, c. 356, § 55, is repealed.

Sec. 4. 15 MRSA, § 1904, as amended by PL 1965, c. 425, § 10, is repealed.

Sec. 5. 17 MRSA, cc. 1, 3, 5, 8, 9, 11, 15, 19, 21, 23, 25, 27, 31, 33, 35, 37, 39 and 41 are repealed.

Sec. 6. 17 MRSA, §§ 1053-1055, 1058, 1091, 1092, 1094, 1131, 1133 and 1134 are repealed.

Sec. 7. 17 MRSA, cc. 45, 51, 53, 55 and 57 are repealed.

Sec. 8. 17 MRSA, §§ 1601, 1602, 1603-A, 1604-1608, 1609, 1612-1617 and 1619-1634 are repealed.

Sec. 9. 17 MRSA, cc. 61, 63 and 65 are repealed.

Sec. 10. 17 MRSA, § 1951 is repealed.

Sec. 11. 17 MRSA, cc. 71, 73 ,75 and 77 are repealed.

Sec. 12. 17 MRSA, § 2301 is repealed.

Sec. 13. 17 MRSA, c. 82 is repealed.

Sec. 14. 17 MRSA, §§ 2351-2355, 2403, 2441, 2442, 2491-2493-A, 2494-2496, 2498, 2501-2505, 2507 and 2508 are repealed.

Sec. 15. **17 MRSA, cc. 85, 87, 89, 95, 97 and 99** are repealed.

Sec. 16. **17 MRSA, §§ 3101-3103** are repealed.

Sec. 17. **17 MRSA, c. 103** is repealed .

Sec. 18. **17 MRSA, §§ 3281, 3282 and 3301** are repealed.

Sec. 19. **17 MRSA, cc. 107, 109, 111, 112, 113, 115 and 119** are repealed.

Sec. 20. **17 MRSA, §§ 3701-3703** are repealed.

Sec. 21. **17 MRSA, cc. 123 and 125** are repealed.

Sec. 22. **17 MRSA, §§ 3851-3853 and 3854-3858** are repealed.

Sec. 23. **17 MRSA, c. 129** is repealed.

Sec. 24. **17 MRSA, §§ 3951-3955, 3957-3961, 3963 and 3965** are repealed.

Sec. 25. **17 MRSA, c. 132** is repealed.

Sec. 26. **17 MRSA, § 3104, 2nd sentence,** as last amended by PL 1973, c. 785, § 1, is repealed.

Sec. 27. **22 MRSA, § 2201** is amended to read:

§ 2201. Regulations

The Board of Commissioners of the Profession of Pharmacy, hereinafter in this subchapter called the "board," may from time to time, after notice and hearing, by regulations, designate as potent medicinal substances any compounds of barbituric acid, amphetamines or any other central nervous system stimulants or depressants, psychic energizers or any other drugs having a tendency to depress or stimulate which are likely to be injurious to health if improperly used ~~and it shall be unlawful for any person, firm or corporation to sell, furnish or give away or to offer to sell, furnish or give away any such potent medicinal substances so designed, except as prescribed in section 2210~~.

Comment*

The portion to be repealed reads: "and it shall be unlawful for any person, firm or corporation to sell, furnish or give away or to offer to sell, furnish or give away any such potent medicinal substance so designated, except as prescribed in section 2210." The declaration of illegality is unnecessary since all criminal conduct is defined in chapter 45 of the code and it would not be appropriate to make the described conduct into a civil violation. Section 2210 is also revised to grant permission for dealing in these substances in affirmative terms.

Sec. 28. **22 MRSA, § 2205** is repealed.

Comment*

The prohibition against manufacture of cocaine and the other substances described in this section is now in section 1103 of chapter 45 of the Criminal Code.

Sec. 29. 22 MRSA, §§ 2207, 2210, as amended, 2210-A, as enacted by PL 1971, c. 621, § 2, are repealed.

Comment*

These sections are incorporated into a new section 2207-A.

Sec. 30. 22 MRSA, § 2207-A is enacted to read:

§ 2207-A. Permissive use of drugs

1. Physicians, dentists, veterinarians, drug jobbers, drug wholesalers, drug manufacturers and pharmacists and pharmacies registered under Title 32, section 2901, are authorized to deal professionally with dangerous substances.

2. As used in this section, "to deal professionally" means:

A. In the case of a physician, dentist, in good faith and to his own patients as part of professional treatment, to prescribe, administer or deliver, or to possess for such purpose;

B. In the case of a veterinarian, in good faith and for an animal under his professional treatment, to prescribe, administer or deliver, or to possess for such purpose;

C. In the case of a drug jobber, drug wholesaler or drug manufacturer, in good faith to possess, sell, furnish, give away or offer to sell, furnish or give away to pharmacists, pharmacies, physicians, dentists, veterinarians, hospitals and to each other;

D. In the case of pharmacies and pharmacists registered under Title 32, section 2901,

(1) To sell at retail upon the written order or prescription of a physician, dentist or veterinarian and in good faith to each other and to possess for such purpose; and

(2) To sell at retail in good faith and for the purpose which it is intended, any compound, mixture or preparation containing a dangerous substance which,

(a) Also contains a sufficient quantity of another drug or drugs to cause it to produce an action other than its hypnotic, somnifacent, stimulating or depressant action; or

(b) Is intended for use as a spray or gargle or for external application and contains some other drug or drugs rendering it unfit for internal administration.

3. As used in this section, "dangerous substance" means:

A. Opium, morphine, heroin, codeine or any salt or compound of the same, or any preparation containing any of the said substances or their salts or compounds, or alpha or beta eucaine or their salts or compounds or any synthetic substitute for them, or any preparation containing alpha or beta eucaine or their salts or compounds;

B. Any drug bearing on its container the legend "Caution — federal law prohibits dispensing without prescription," or any veronal or barbital, or any other salts, derivatives or compounds of barbituric acid, or any registered, trademarked or copyrighted preparation registered in the United States Patent Office containing the substances in this paragraph, or any drug designated by the board as a "potent medicinal substance;" and

C. Any amphetamines or derivatives or compounds thereof.

Comment*

This section sets forth the permissive use of the substances named which is now contained in Title 22, section 2207, the subsection 3, paragraph A, drugs, section 2210, the subsection 3, paragraph B, drugs, except for the amphetamines, and section 2210-A, the amphetamines.

Sec. 31. **22 MRSA, § 2212**, as last amended by PL 1971, c. 282, § 12, is repealed and the following enacted in place thereof:

§ 2212. Using drugs not in prescription

If a pharmacist shall knowingly use any drugs or ingredients in preparing or compounding a written or oral prescription of any physician different from those named in the prescription, such use shall constitute a civil violation for which a forfeiture of not more than $1,000 nor less than $50 may be adjudged.

Comment*

No substantive change is made in this revision. It now is set forth as a civil violation which automatically takes the conduct out of the criminal penalties in chapter 45 of the Criminal Code.

Sec. 32. **22 MRSA, § 2212-A**, as last amended by PL 1971, c. 282, § 2, is repealed and the following enacted in place thereof:

§ 2212-A. Refill prescriptions

If a pharmacist or person employed by a pharmacist refills from a copy of the original, any prescription for depressant, stimulant or oral contraceptive drugs, such refilling shall constitute a civil violation for which a forfeiture of not more than $1,000 nor less than $50 may be adjudged.

Comment*

No substantive change is made in this revision. It now is set forth as a civil violation which automatically takes it out of the criminal penalties in chapter 45 of the Criminal Code.

Sec. 33. **22 MRSA, § 2212-B**, as last repealed and replaced by PL 1971, c. 487, § 2, is repealed.

Sec. 34. **22 MRSA, § 2212-C**, as last amended by PL 1971, c. 621, § 3, is repealed.

Sec. 35. **22 MRSA, § 2212-E**, as enacted by PL 1971, c. 621, § 4, is repealed.

Comment*

The 3 previous repealed sections provide criminal penalties for dealing in named hallucinogenic drugs. This is now covered by chapter 45 of the Criminal Code. The named sections also grant permission to the laboratory of the Department of Health and Welfare to do what is otherwise forbidden. This permission is not necessary since the Criminal Code, chapter 5, section 102 makes justifiable any conduct performed as a public duty.

Sec. 36. 22 MRSA, §§ 2214 and 2215, as amended, are repealed.

Comment*

These sections contain the criminal penalties for violation of Title 22, chapter 551, subchapter II. Since the criminal penalties are all in chapter 45 of the Criminal Code, these sections are no longer necessary. Section 2215 also contains a provision imposing up to 2 years imprisonment for being in public under the influence of one of the drugs mentioned in the subchapter. It is recommended that this be repealed and not reenacted.

Sec. 37. 22 MRSA, § 2362, as last amended by PL 1971, c. 621, § 6, is repealed.

Comment*

This is the general penalty for having narcotic drugs. It is not necessary in view of the prohibition on possession of narcotics in chapter 45, section 1107 of the Criminal Code.

Sec. 38. 22 MRSA, § 2362-A, as last amended by PL 1971, c. 544, § 77-A, is repealed.

Sec. 39. 22 MRSA, § 2362-B, as enacted by PL 1971, c. 296, is repealed.

Sec. 40. 22 MRSA, § 2362-C, as enacted by PL 1971, c. 621, § 7, is repealed.

Sec. 41. 22 MRSA, § 2362-D is enacted to read:

§ 2362-D. Hypodermic syringes; prescriptions

1. Hypodermic apparatus may be possessed by a physician, dentist, podiatrist, funeral director, nurse, veterinarian, a manufacturer or dealer in embalming supplies, wholesale druggist, manufacturing pharmacist, pharmacist, manufacturer of surgical instruments, an employee of an incorporated hospital acting under official direction, a carrier or messenger engaged in the transportation of hypodermic apparatus as an agent of any of the above, employees of scientific research laboratories, employees of educational institutions, employees of an agency or organization duly authorized by the Maine Board of Commissioners of the Profession of Pharmacy or a person who has received a written prescription issued under subsection 2.

2. A physician, dentist, podiatrist or osteopathic physician may issue to a patient under his immediate charge a written prescription to purchase a hypodermic apparatus. The Maine Board of Commissioners of the Profession

of Pharmacy shall, by regulation, prescribe the form of prescription that the physician shall use and the records and information that shall be kept by the physician and by the pharmacist filling such prescription.

3. As used in this section, "hypodermic apparatus" has the meaning set forth in Title 17-A, chapter 45, section 1101, except that it does not include a syringe, needle or instrument for use on farm animals and poultry.

Comment*

The repealed sections 2362-A and 2362-B deletes the criminal penalties since these are covered by sections 1110 and 1111 of the Criminal Code and the new section 2362-D combines the permission now contained in the repealed sections. Section 2362-C provides criminal penalties for violations of the chapter on narcotic drugs. It is no longer necessary in view of the penalties provided in chapter 45 of the Criminal Code.

Sec. 42. 22 MRSA, § 2364, the first ¶ is repealed and the following enacted in place thereof:

Subject to the limitations in subsection 3, the following is expressly authorized:

Sec. 43. 22 MRSA, § 2364, sub-§§ 2 and 3 are repealed and the following enacted in place thereof:

2. Liniments, etc. Prescribing, administering, dispensing or selling at retail of liniments, ointments and other preparations that are susceptible of external use only and that contain narcotic drugs in such combinations as prevent their being readily extracted from such liniments, ointments or preparations, except that this authorization shall not apply to any liniments, ointments and other preparations that contain coca leaves in any quantity or combinations.

3. The authorization contained in this section shall apply to the following:

A. Prescribing, administering, dispensing or selling to any one person, or for the use of any one person or animal, any preparation or preparations included within this section, when the actor knows or can by reasonable diligence ascertain that such prescribing, administering, dispensing or selling will provide the person to whom or for whose use, or the owner of the animal for the use of which, such preparation is prescribed, administered, dispensed or sold, within any 48 consecutive hours, with more than 4 grains of opium, or more than ⅓ grain of morphine, or of any of its salts, or more than 4 grains of codeine or any of its salts, or will provide such person or the owner of such animal, within 48 consecutive hours, with more than one preparation authorized by this section: and

B. A medicinal preparation or liniment, ointment or other preparation susceptible of external use only, prescribed, administered, dispensed or sold which does not contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than that possessed by the narcotic drug alone; and any preparation which is prescribed, administered, dispensed or sold not in good faith as a medicine and for the purpose of evading the law.

4. The board may by regulation provide for further authorization to such extent as it determines to be consistent with the public welfare, pharmaceutical preparations found by the board after due notice and opportunity for hearing:

A. Either to possess no addiction-forming or addiction-sustaining liability sufficient to warrant imposition of all of the requirements of law; and

B. Does not permit recovery of a narcotic drug having such an addiction-forming or addiction-sustaining liability, with such relative technical simplicity and degree of yield as to create a risk of improper use.

In exercising the authority granted in paragraph A, the board by regulation and without special findings may grant authorizations relating to such pharmaceutical preparations as determined to be exempt under the federal narcotic law and regulations. If the board shall subsequently determine that any such pharmaceutical preparation does possess a degree of addiction liability that, in its opinion, results in abusive use, it shall by regulation publish the determination in the state papers. The determination shall be final and the authorization shall cease to apply to the particular pharmaceutical preparation.

Sec. 44. 22 MRSA, § 2366 is repealed and the following enacted in place thereof:

§ 2366. Persons and corporations exempted

The following are authorized to possess and have control of narcotic drugs: Common carriers or warehousemen while engaged in lawfully transporting or storing such drugs, any employee of the same acting within the scope of his employment, temporary incidental possession by employees or agents of persons lawfully entitled to possession and persons whose possession is for the purpose of aiding public officers in performing their official duties.

Comment*

The permission has been restated in conforming terminology.

Sec. 45. 22 MRSA, § 2368 is repealed and the following enacted in place thereof:

§ 2368. Licenses for manufacturers and wholesalers

Any person having a license from the Bureau of Health is authorized to manufacture or supply narcotic drugs within the scope of his license.

Comment*

The revision puts the permission to licensees in affirmative language.

Sec. 46. 22 MRSA, § 2370, sub-§ 5 is repealed and the following enacted in place thereof:

5. Use. A person in charge of a hospital or of a laboratory, or in the employ of this State or of any other state, or of any political subdivision thereof, or a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, or a physician or surgeon duly

licensed in some state, territory or the District of Columbia to practice his profession, or a retired commissioned medical officer of the United States Army, Navy or Public Health Service employed upon such ship or aircraft, who obtains narcotic drugs under this section or otherwise, is authorized to administer, dispense or otherwise use such drugs within the State, only within the scope of his employment or official duty, and then only for scientific or medicinal purposes.

Comment*

The revision following the indicated omissions puts permission in affirmative language.

Sec. 47. 22 **MRSA**, § 2375, as last amended by PL 1971, c. 282, § 12, is repealed.

Comment*

This is covered by chapter 45, section 1108 of the Criminal Code.

Sec. 48. 22 **MRSA**, § 2380 is repealed and the following enacted in place thereof:

§ 2380. **Violation of provisions**

Any conduct in violation of this chapter is a civil violation for which a forfeiture of not more than $1,000 nor less than $50 may be adjudged.

Comment*

The revision takes out all the criminal penalties since these are now in chapter 45 of the Criminal Code. What remains are technical violations, not keeping the proper form of record, for example, for which a civil violation is appropriate.

Sec. 49. 22 **MRSA**, § 2381, as enacted by PL 1969, c. 443, § 7, is repealed.

Comment*

Since so much of the chapter concerning cannabis should be repealed, the special title should be repealed as well.

Sec. 50. 22 **MRSA**, § 2382, as last amended by PL 1971, c. 544, § 77-C, is repealed.

Comment*

All of these terms are defined in chapter 45, section 1101 of the Criminal Code and there is no special need for their being defined here again.

Sec. 51. 22 **MRSA**, § 2383, as last amended by PL 1973, c. 546, is repealed and the following enacted in place thereof:

§ 2383. **Possession**

Possession of a usable amount of marijuana is a civil violation for which a forfeiture of not more than $100 may be adjudged.

Comment*

The revision permits confiscation of the drug under chapter 45, section 1114 of the Criminal Code.

The provisions of subsections 1 and 3 are in chapter 45 of the Criminal Code. The "being present" prohibition in subsection 2 is not adopted as a matter of policy against criminalizing persons who contribute nothing to antisocial conduct except their physical presence.

Sec. 52. 22 MRSA, § 2384, as last repealed and replaced by PL 1973, c. 510, is repealed.

Sec. 53. 22 MRSA, §§ 2385 and 2386, as last amended by PL 1971, c. 472, § 4, are repealed.

Comment*

These sections are all covered in chapter 45 of the Criminal Code.

Sec. 54. 22 MRSA, § 2388, as enacted by PL 1973, c. 788, § 88, is repealed.

Comment*

This is covered by chapter 45, sections 1104 and 1106 of the Criminal Code.

Sec. 55. 34 MRSA, § 133 is repealed.

Sec. 56. 34 MRSA, § 527, 4th ¶, as last repealed and replaced by PL 1973, c. 381, is repealed.

Sec. 57. 34 MRSA, § 594 is repealed.

Sec. 58. 34 MRSA, § 705, first 2 sentences, as amended by PL 1965, c. 210, are repealed as follows:

~~Each convict, whose record of conduct shows that he has faithfully observed all the rules and requirements of the State Prison, shall be entitled to a deduction of 7 days a month from the minimum term of his sentence, commencing on the first day of his arrival at the State Prison. An additional 2 days a month may be deducted from the sentence of those convicts who are assigned duties outside the prison walls or security system, or those convicts within the prison walls who are assigned to work deemed by the Warden of the State Prison to be of sufficient importance and responsibility to warrant such deduction~~

Sec. 59. 34 MRSA, § 710, as last amended by PL 1973, c. 647 is repealed.

Sec. 60. 34 MRSA, § 753 is repealed.

Sec. 61. 34 MRSA, § 753-A, as enacted by PL 1971, c. 539, § 23, is repealed.

Sec. 62. 34 MRSA, § 754 is repealed.

Sec. 63. 34 MRSA, § 755, as last amended by PL 1973, c. 75, is repealed.

Sec. 64. **34 MRSA, § 756,** as last amended by PL 1973, c. 582, § 7, is repealed.

Sec. 65. **34 MRSA § 802,** as last amended by PL 1971, c. 544, § 118-B, is repealed.

Sec. 66. **34 MRSA, § 807,** as last amended by PL 1973, c. 567, § 20, is repealed.

Sec. 67. **34 MRSA, § 853,** as last amended by PL 1973, c. 788, § 171, is repealed.

Sec. 68. **34 MRSA, § 859,** as last amended by P & SL 1973, c. 221, § 7, is repealed.

Sec. 69. **34 MRSA, § 865,** as enacted by PL 1967, c. 391, § 25, is repealed.

Sec. 70. **34 MRSA, §§ 1631 - 1634,** as amended, are repealed.

Sec. 71. **34 MRSA, §§ 1671 - 1679,** as amended, are repealed.

STATEMENT OF FACT

By direction of the 105th Legislature (1971 P. & S. L., Ch. 147) a Criminal Law Revision Commission was created "to supervise the preparation of a proposed criminal code for the State of Maine" for presentation to the 107th Legislature. The proposed Code should be a "complete revision, redraft and rearrangement of all sections of the Revised Statutes pertaining to the criminal law," together with "necessary repealers, amendments and modifications of existing laws." The commission was empowered to propose such "new or modified provisions as, in its judgment, would best serve the interests of the people of the State." This legislative document is the commission's proposed Criminal Code.

Additional statements of fact identified as "Comment*" are interspersed throughout the text to amplify the meaning of individual sections.