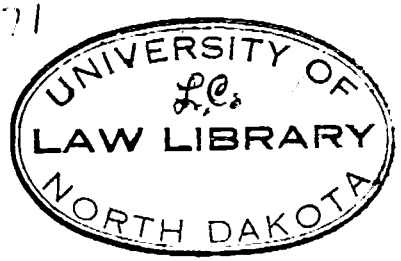
FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

(Established by Congress in Public Law 89-801)

PROPOSED NEW FEDERAL CRIMINAL CODE

(Title 18, United States Code)



THE NATIONAL COMMISSION ON REFORM
OF FEDERAL CRIMINAL LAWS
1111 TWENTIETH STREET NW.
WASHINGTON, D.C. 20036

JANUARY 7, 1971.

To the President and Congress:

I hereby transmit to you the Final Report of the National Commission on Reform of Federal Criminal Laws pursuant to Section 8 of Public Law 89-801, as amended by Public Law 91-39.

The Commission submits this proposed revision of Title 18, United States Code as a work basis upon which the Congress may undertake the necessary reform of the substantive federal criminal laws. The scope and organization of the proposed Code, its general approach to the problem of federal jurisdiction, and the basic outlines of its sentencing system, hold promise as a logical framework for a twentieth century penal code. Individually we have reservations, sometimes strong, on the resolution of particular issues. Nevertheless, we are, as a Commission, satisfied that the provisions embodied in the text, together with their noted alternatives, fairly expose the relevant policy issues and should facilitate the necessary legislative choices by the Congress.

It is to be hoped that this work of reform, so necessary to the fair and effective administration of justice, may merit the due consideration of the Congress and that it will contribute to the resolution, on a constructive basis, of these difficult issues.

By Direction of the Commission,
Edmund G. Brown
EDMUND G. BROWN,
Chairman

cc: The President
The President of the Senate
The Speaker of the House of
Representatives

FINAL REPORT

OF THE

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

A PROPOSED NEW FEDERAL CRIMINAL CODE

(Title 18, United States Code)

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FOREWORD

The Final Report of the National Commission on Reform of the Federal Criminal Laws comprises a proposed Federal Criminal Code to replace most of Title 18 of the United States Code. Comments accompanying the sections of the proposed Code provide brief explanations of the statutory texts and possible alternatives. More elaborate explanations will be found in published Working Papers. Earlier drafts of many provisions are set forth in the Study Draft of a new Federal Criminal Code, published in June, 1970. Interim Reports of the Commission were filed on November 4, 1968 and March 17, 1969. The Interim Report of March 17, 1969 recommended a standard immunity provision to replace the scores of divergent immunity provisions in existing law; a standard provision along the lines recommended by the Commission was enacted in Title II of the Organized Crime Control Act of 1970 (18 U.S.C. §§ 6001–6005).

The Commission's statutory mandate was very broad, including a review not only of substantive criminal law and the sentencing system but also of procedure and all other aspects of "the federal system of criminal justice". However, the Commission determined at the very beginning of its work that it would be inadvisable to spread the available resources so widely. Taking into account that Congress, the Judicial Conference, other Commissions, and privately financed projects were engaged in the studies of many issues of criminal law other than a substantive penal code, the Commission selected that field as its central concern.

The Final Report is the result of nearly three years of deliberation by the Commission, its Advisory Committee, consultants and staff. The Advisory Committee, headed by retired Justice and former Attorney General, Tom C. Clark, consisted of fifteen persons with a broad range of experience, including three United States Attorneys, a former state attorney general who has since become a member of the President's cabinet as Secretary of Health, Education and Welfare, a judge of a state supreme court, a former Judge Advocate General of the Army, and well-known professors of criminology and constitutional and criminal law.[1] The drafting process was as follows: The Commission's staff and consultants, working with law enforcement agencies, prepared preliminary drafts and supporting memoranda. These drew upon the reports of other bodies, such as the President's Commission on Law Enforcement and Administration of Justice, the National Commission on Causes and Prevention of Violence, the National Advisory Commission on Civil Disorders, the American Bar Association Project on Standards for Criminal Justice, the American Law Institute, the National Council on Crime and Delinquency and numerous state penal law revision commissions. Preliminary drafts

[1] A listing of Commission and Advisory Committee members and summaries of their professional backgrounds may be found in Appendices A and B at the end of this volume. A listing of the staff and consultants may be found at pages vii and viii of this volume.

were reviewed by the Advisory Committee and the Commission in periodic discussion meetings.

At the conclusion of this first phase of intensive study, the Commission published the Study Draft of June 1970 in order to secure the benefit of public criticism before the Commission made its decisions.[2] This procedure, affording a pre-Report view of proposals under consideration, was unique in Commission practice; and suggestions and criticisms addressed to the Study Draft aided greatly in the preparation of the Final Report. Many departments and agencies of the government counseled with the Commission staff and submitted memoranda. The Commission has had the benefit of informal exchanges with committees of the U.S. Judicial Conference. A number of prosecutors and private practitioners have written to the Commission and their comments have been taken into account in revising the Study Draft provisions.

The Commission considered asking Congress for an extension of its life beyond the scheduled termination date of January 7, 1971, so as to permit a longer interval between circulation of the Study Draft in June 1970 and the issuance of this Report six months later. The decision not to seek an extension was based on the recognition that Congress bore the ultimate responsibility with respect to both fundamentals and matters of detail argued in many of the comments being received. Further debate within the Commission would not have contributed measurably to solutions, but would have postponed the legislative process without significant gain. Comments on the Study Draft which continue to be addressed to the Commission, as well as comments on the Final Report, can be forwarded to the Judiciary Committees of Congress and the Department of Justice.

Among the basic features of the proposed Code are the following:

(1) Unlike existing Title 18, the Code is comprehensive. It brings together all federal felonies, many of which are presently found outside Title 18; it codifies common defenses, which presently are left to conflicting common law decisions by the courts; it establishes standard principles of criminal liability and standard meanings for terms employed in the definitions of offenses and defenses.

(2) The sentencing system is overhauled. The chaotic variety of existing offenses and penalties is replaced by a limited number of classes of crime: three classes of felony and two of misdemeanors, with a standard range of penalties for each class. Statutory guidelines are formulated for the exercise of discretion within the range of sentencing authority.

(3) For the first time, the question of what is criminal is clearly differentiated from the question of what criminal behavior falls within federal jurisdiction. Thus, robbery, fraud and other offenses are defined in familiar ways, with a separate statement for each offense of the circumstances in which the federal government's law enforcement apparatus can be brought into play, *e.g.*, if the mails or means of interstate commerce are involved.

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[2] Approximately 5,000 copies of the Study Draft and Working Papers were circulated by the Commission. Copies were furnished to all federal agencies, members of Congress, staff of pertinent Congressional committees, federal judges, state attorneys general, chief justices, metropolitan district attorneys and numerous law schools, law professors, bar and professional associations, research bodies and private attorneys. Comments received in response to this circulation are being deposited as reference material with the National Archives, Washington, D.C.

For the first time, there is explicit Congressional guidance for the exercise of restraint in bringing local transactions into federal courts merely because technical federal jurisdiction exists. See § 207.

(4) The proposed Code is an integrated system, *i.e.*, the parts are closely interrelated. This means that the definition of each offense in Part B must be considered in relation to defenses and definitions of terms that appear in Part A—General Provisions, and in relation to the sentencing system in Part C. The length of authorized prison terms, *e.g.*, § 3201, must be considered in relation to restraints on imposing sentences within the "upper range" of the sentencing authority (§ 3202) and to the structure of the parole system (Ch. 34). A characteristic feature of the integration achieved in this Code is the system relating the prosecution for more serious federal offenses to the commission of certain lesser offenses. For example, offenses like impersonating a federal official, obstructing justice, or violating federal civil rights may be given a relatively low classification for the ordinary violator because, as a result of the "piggy-back jurisdiction" (§ 201(b)), the offender may be prosecuted federally for any serious felony associated with that underlying offense, *e.g.*, murder, fraud, kidnapping. The integral quality of the Code does not mean, however, that particular provisions of the principal text cannot be modified to reflect policy judgments different from those proposed. Thus, even on questions of fundamental policy such as capital punishment, the basic design of the Code can assimilate either abolition or retention, whichever is Congress' ultimate judgment. Accordingly, rejection of a particular Code provision does not require rejection of the whole.

A few further observations on the nature of the Commission's task may be useful. The Commission was directed by Congress to "improve" and "reform," not merely to recodify existing law. Among the duties placed upon the Commission by statute was an explicit obligation to propose "changes in the penalty structure [to] better serve the ends of justice." [3] The Commission has not embarked on change lightly. Reforms, improvements, and changes cannot be accomplished without willingness to modify old practices and old language. Whatever temporary inconvenience may be entailed during a period of changeover from the old to an improved new Code will be more than compensated by the reduced difficulty which future judges, lawyers, law enforcement agents and investigators, and legislators and their assistants will experience in comprehending and working with a modernized, comprehensive and systematic federal criminal code.

Members of the Commission have been keenly aware of the importance of taking into account divergent individual viewpoints if reform is to be achieved. Various measures were taken to make possible the consensus on the Report. It is made clear in the letter transmitting this Report that no Commissioner is committed to every feature of the proposed Code. In addition at a number of points the draft statute sets worth, within brackets, alternative formulations that had substantial support within the Commission. Other alternatives with support, sometimes substantial, within the Commission are discussed in

[3] P.L. 89-301 § 3 (89th Cong.), reproduced in Appendix A at the end of this volume.

comment. Another class of alternatives was posed by extensive penal legislation enacted by Congress so late in 1970 as to preclude adequate deliberation by the Commission and its Advisory Committee on the differences between the newly enacted laws and proposals in this Report.[4] Unless otherwise indicated, therefore, such differences are not to be regarded as disapproval by the Commission of a position varying from the Report. Some reexamination of these most recent laws will no doubt be undertaken in this general penal law reform.[5]

The Commission has enjoyed bipartisan support during the present and preceding administrations. It has been encouraged not only by the readiness of Congress and the Executive to meet its modest budget in a time of financial stringency, but also by the favorable terms in which two Presidents have referred to the enterprise in the course of the Commission's work.[6] Such endorsements obviously do not represent a commitment to the Commission's Final Report or any particular feature of it. They do testify to the possibility of pursuing in a nonpartisan spirit the effort to improve the administration of criminal justice.

NOTE ON AVAILABILITY OF DOCUMENTS

Volumes I and II of the Working Papers were published in August, 1970. These volumes and the Study Draft of June 1970 are available for purchase, in sets only. (Study Draft and 2 volumes of Working Papers), from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 for $8.25. A third Volume of Working Papers is in the course of publication and will be for sale by the Superintendent of Documents in March 1971. It will contain additional memoranda by the Commission's staff and consultants as well as guidelines, prepared by the staff of the Commission, for the drafting of a bill which would incorporate the Code provisions. These guidelines deal with transitional provisions, amendments of the procedural provisions in Part II of Title 18, and amendments and deletions in other Titles of the United States Code which would be needed or may merit consideration in conforming them to the Code provisions.

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[4] E.g., Title IX, Organized Crime Control Act of 1970 (P.L. 91-452); The Omnibus Crime Control Act of 1970, (awaiting Presidential signature at this writing).

[5] See S. Rep. 91-617 (91st Cong., 2nd Sess.) p. 89.

[6] See President Johnson's Special Message on the Challenge of Crime to Our Society, 1968 U.S. Code Cong. and Admin. News 216, 224; President Nixon's Special Message on Organized Crime, 1969. U.S. Code Cong. and Admin. News 527, 530; Representative Celler's Statement in Working Papers of The National Commission on Reform of Federal Criminal Laws, Volumes I and II, pages ix.

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PART A. GENERAL PROVISIONS

389-620—71——2

Chapter 17. Offenses Against Property

TITLE 18
UNITED STATES CODE

Part A. General Provisions

Chapter 1. Preliminary Provisions

§ 101. Title; Effective Date; Application.

(1) Title and Citation. Title 18 of the United States Code shall be entitled "Crime and Corrections" and may be cited as "18 U.S.C. § ——" or as "Federal Criminal Code § ——."

(2) Effective Date and Application. This Code shall become effective one year after the date of enactment. Unless otherwise provided this Code shall apply to prosecutions under any Act of Congress except the Uniform Code of Military Justice, District of Columbia Code and Canal Zone Code.

Comment

Existing Title 18 is entitled "Crimes and Criminal Procedure." The new title, "Crime and Corrections," makes it possible to retain the Code in its present place in the alphabetical sequence of the titles of the United States Code, but adds the explicit reference to "corrections" as an appropriate indication of the scope and direction of the Code. The alternative designation, "Federal Criminal Code," reflects common usage and, as an alternative citation, indicates the integrated and systematic treatment of the criminal laws provided by the proposed Code. See Working Papers, pp. 1–3.

It may be noted that the comprehensive revision of the New York Penal Law was enacted some two years before it became effective. This device provided sufficient time not only for making desired amendments to the original bill proposed by its law reform commission, contributing to its speedy enactment, but also to educate those who were to work under it.

Although it was originally contemplated that this section would contain transitional provisions, *e.g.*, application of the Code to those serving sentences under present law, those provisions have been deleted on the view that they would constitute a perpetual anachronism if included in the Code itself. They would appear, however, in the Act enacting the Code, and, according to practice, be visible in the Reviser's Notes to the Code for so long as they are needed.

Since the general and sentencing provisions are intended to apply in all federal prosecutions, it has been thought desirable to be explicit as to the exceptions. If provisions of this Code are to apply to prosecutions under the excepted Codes, that judgment can be made in the amending or enacting of those Codes. The same would be true of the

criminal laws of a place within the jurisdiction of the United States which are not enacted by the Congress, *e.g.*, Virgin Islands.

§ 102. General Purposes.

The general purposes of this Code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which federal protection is appropriate. To this end, the provisions of this Code are intended, and shall be construed, to achieve the following objectives:

(a) to insure the public safety through (i) vindication of public norms by the imposition of merited punishment; (ii) the deterrent influence of the penalties hereinafter provided; (iii) the rehabilitation of those convicted of violations of this Code; and (iv) such confinement as may be necessary to prevent likely recurrence of serious criminal behavior;

(b) by definition and grading of offenses, to define the limits and systematize the exercise of discretion in punishment and to give fair warning of what is prohibited and of the consequences of violation;

(c) to prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders;

(d) to safeguard conduct that is without guilt from condemnation as criminal and to condemn conduct that is with guilt as criminal;

(e) to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses;

(f) to define the scope of federal interest in law enforcement against specific offenses and to systematize the exercise of federal criminal jurisdiction.

Comment

This section sets forth the basic federal focus, as well as a list of objectives of the Code, with the direction that the Code be construed to achieve these objectives. The section is largely derived from the modern New York and Illinois provisions, but modifications in paragraphs (a) and (d) make explicit the elements of "vindication of public norms" and "merited punishment." This recognizes that the criminal law serves, among other functions, as an expression of society's disapprobation of marked departures from social norms, but eschews organized vengeance as a goal of the system. The stated ob-

jectives are reflected in various Code provisions which set standards for the exercise of discretion. For example, paragraph (a) is reflected in the standards affecting the court's decision whether to impose a sentence of probation or imprisonment (§ 3101), and paragraph (f) in the provisions which authorize restraint by federal law enforcement officials in the exercise of concurrent jurisdiction (§ 207).

Many modern code revisions explicitly abolish the rule of strict construction of criminal laws, a doctrine which usually is not followed by modern courts but which can complicate the drafting of criminal laws by suggesting the necessity of literally covering all conceivable applications of the law, what Europeans call the "casuistic" approach to legislation. Such an approach to drafting sacrifices intelligibility and opens up unintended gaps in the law. Instead of an explicit repeal of "strict construction," this section integrates the intended rule of construction with the statement of purposes, in the introductory paragraph of this section.

See Working Papers, pp. 3–4.

§ 103. Proof and Presumptions.

(1) Proof Beyond Reasonable Doubt. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. An accused is assumed to be innocent until convicted. The fact that he has been arrested, confined or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. "Element of an offense" means: (a) the forbidden conduct; (b) the attendant circumstances specified in the definition and grading of the offense; (c) the required culpability; (d) any required result; and (e) the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue. The existence of federal jurisdiction is not an element of the offense; but it shall be proved by the prosecution beyond a reasonable doubt.

(2) Defenses. Subsection (1) does not require negating a defense (a) by allegation in the indictment, information, or other charge or (b) by proof unless the issue is in the case as a result of evidence sufficient to raise a reasonable doubt on the issue. Unless it is otherwise provided or the context plainly requires otherwise, when a statute outside this Code defining an offense, or a related statute, or a rule or regulation thereunder, contains a provision constituting an exception from criminal liability for conduct which would otherwise be included within the prohibition of the offense, that the defendant came within such exception is a defense.

(3) Affirmative Defenses. Subsection (1) does not apply to any

defense which a statute explicitly designates as an "affirmative defense." Defenses so designated must be proved by the defendant by a preponderance of evidence.

(4) Presumptions. When a statute establishes a presumption, it has the following consequences:

(a) when there is sufficient evidence of the facts which gave rise to the presumption, the presumed fact is deemed sufficiently proved to warrant submission of the issue to a jury unless the court is satisfied that the evidence as a whole clearly negates the presumed fact;

(b) in submitting the issue of the existence of the presumed fact to a jury, the court shall charge that, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the facts giving rise to the presumption as strong evidence of the fact presumed.

(5) Prima Facie Case. When a statute declares that given facts constitute a prima facie case, proof of such facts warrants submission of a case to the jury with the usual instructions on burden of proof and without additional instructions attributing any special probative force to the facts proved.

Comment

The purpose of this section is to establish in one place the meaning of concepts relating to the burden of proof and to the consequences of proving certain facts. Existing federal law, which lacks such a provision, deals with these matters in an inconsistent and confusing manner.

Although subsection (1) gives statutory recognition to the well-established requirement of proof of the elements of an offense beyond a reasonable doubt, it does not attempt to define what a reasonable doubt is. An accused is said to be "assumed" to be innocent rather than "presumed," because "presumption" has a special meaning under subsection (4). That a person is accused of a crime does not make it more likely than not that he is innocent.

Elements of an offense are those factors which the definition of the offense denominates as relevant to criminality. Jurisdiction is not an element of an offense (except where it is expressly included in the definition of the forbidden conduct and attendant circumstances), because jurisdiction goes only to the power of a government to prosecute. Whether or not it is proper for the *federal* government to prosecute is a separate question from whether or not the defendant has done something criminal.

Although the statute requires proof of jurisdiction beyond a reasonable doubt, an alternative would be to require only proof by a preponderance of the evidence. A further possibility is to make lack of

federal jurisdiction a matter of defense. Since the policy heretofore underlying federal criminal legislation has been to make jurisdiction an element of the offense, except where it is plenary, there has been no test of the constitutionality of these possibilities for downgrading the issue of federal jurisdiction. It may well be that, absent any need for the government to prove that a defendant *knew* of the federal interest (see §§ 204, 302(3)(c)), the differences between continuing the government's reasonable doubt burden in the first instance and other approaches is in practical effect so slight as not to warrant the risk of unconstitutionality.

Subsection (2) provides an easy method for designating those facts which the prosecution need prove beyond a reasonable doubt only after the issue has been raised. This permits a narrowing of issues at trial; it is not necessary that the prosecution, in every case, prove facts which are rarely contested by a defendant, *e.g.*, that the defendant is sane. This method also permits simple clarification of the prosecution's burden with respect to exemptions, exclusions, and the like, many of which are treated ambiguously in existing statutes. The second sentence of subsection (2) codifies the judge-made rule regarding exceptions which is in force in several of the federal circuits. See Working Papers, p. 16. Since an attempt has been made in drafting the Code to label such exceptions as defenses, its usefulness will lie in determining the obligations of the prosecution in cases brought under statutes outside Title 18, including those where such statutes are incorporated in the Code by reference, *e.g.*, under § 1772.

A defendant must prove an affirmative defense by a preponderance of the evidence; the prosecution has no burden. *Leland* v. *Oregon*, 343 U.S. 790 (1952), implies that such an allocation of the burden of proof is to be measured under the broad due process standard of whether it is reasonable. The affirmative defense is sparingly used in the Code, usually in situations in which the facts are peculiarly within the defendant's grasp and where even the existence of the affirmative defense does not justify a defendant's acts in a moral sense. For example, for the offense of attempt there is an affirmative defense that the defendant renounced and did not commit the crime. See § 1005(3). The defendant is the one who should know whether he abandoned his attempt; but even abandonment does not justify his having taken a substantial step toward commission of the crime, although it will excuse him from criminal liability. Any special procedures which may be desired, such as requiring notice to the prosecution, are an appropriate subject for consideration by the Congress and Advisory Committee on the Federal Rules of Criminal Procedure.

"Presumption," which is presently given a variety of meanings, is confined here to situations in which Congress finds, on the basis of sufficient experience, that an element of an offense can be found by proof only of facts from which the element would not otherwise be readily inferred. There are no irrebutable presumptions in the Code. If a judge is satisfied that, given all the circumstances in a particular case, including any evidence the defendant may have presented, the presumed fact is clearly negated, he should not even submit the issue to the jury.

A substantial body of opinion in the Commission prefers the follow-

ing alternative formulation for the last clause of subsection (4)(a): "the court shall submit the issue to a jury unless the evidence as a whole clearly precludes a finding of the presumed fact beyond a reasonable doubt." In support of this alternative, which was recommended by the Commission's consultant, it is argued that there is no basis for a judge to exercise any discretion as to submitting the case to a jury, once the legislature has expressed a judgment that adequate proof has been introduced to support conviction. The contrary argument in favor of subsection (4)(a) as written is that presumptions are of varying degrees of force and persuasiveness, so that it should be left to the judge to assay the aggregate persuasiveness of a case which depends in part on a presumption.

A "prima facie case" is distinguished, in subsection (5), from a presumption by the absence of special jury instructions. The "prima facie case" designation is used in those few situations in which guidelines are considered desirable to promote uniformity in court decisions as to sufficiency of the prosecution's case, and to provide a warning to prospective offenders which is more explicit than is the definition of the offense. See, *e.g.*, bribery (§ 1361).

See Working Papers, pp. 11–32, 932, 935–38, 943–44.

§ 104. Authorization and Certification by Attorney General.

Whenever authorization or certification by the Attorney General is required in this Code as a condition for prosecution, such responsibility may be delegated only to the Deputy Attorney General or to an Assistant Attorney General. Although prosecution cannot proceed absent authorization or certification, no other questions relating to the exercise of the responsibility are litigable.

Comment

This section relates to the requirement in a few places in the Code, that particular prosecutions be affirmatively authorized by the Attorney General. This device, carried forward from existing law, pinpoints responsibility for the exercise of federal jurisdiction. See, *e.g.*, § 1310 (flight to avoid state prosecution).

§ 109. General Definitions.

Unless it is otherwise provided or a different meaning plainly is required:

(a) "aircraft" includes spacecraft;

(b) "bodily injury" means any impairment of physical condition, including physical pain;

(c) "this Code" means the Federal Criminal Code;

(d) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court estab-

lished under 28 U.S.C. § 132, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court and the Court of Military Appeals;

(e) "crime" means a misdemeanor or a felony and does not include an infraction; but "criminal" and "criminally", when used as an adjective or adverb, refer to any offense;

(f) "dangerous weapon" means any switch blade or gravity knife, machete, scimitar, stiletto, sword, or dagger; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles or sand club; any slungshot; and any projector of, or bomb or any object containing or capable of producing and emitting, any noxious liquid, gas or substance;

(g) "destructive device" means any explosive, incendiary or poison gas bomb, grenade, mine, rocket, missile or similar device;

(h) "element of an offense" has the meaning prescribed in section 103(*l*);

(i) "explosive" 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 mixture, 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.

(j) "felony" means an offense for which a term of imprisonment of more than one year is authorized by a federal statute, or would be if federal jurisdiction existed;

(k) "firearm" means any weapon which will expel, or is readily capable of expelling, a projectile by the action of an explosive and includes any such weapon, loaded or unloaded, commonly referred to as a pistol, revolver, rifle, gun, machine gun, shotgun, bazooka or cannon;

(*l*) "force" means physical action;

(m) "government" means (i) the government of any nation or any political unit within any nation, (ii) any agency, subdivision or department of the foregoing, including the executive, legislative and judicial branches, (iii) any corporation or other association organized by a government for the execution of a government program and subject to control by a government or (iv) any corporation or agency established

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pursuant to interstate compact or international treaty between or among governments for the execution of an intergovernmental program;

(n) "government agency" includes any department, independent establishment, commission, administration, authority, board or bureau of a government or any corporation in which a government has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense;

(o) "harm" means loss, disadvantage, or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any other person in whose welfare he is interested;

(p) "human being" means a person who has been born and is alive;

(q) "included offense" means an offense (i) which is established by proof of the same or less than all the facts required to establish commission of the offense charged, (ii) which consists of criminal facilitation of or an attempt or solicitation to commit the offense charged or (iii) which differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission;

(r) "includes" should be read as if the phrase "but is not limited to" were also set forth;

(s) "infraction" means an offense for which a sentence of imprisonment is not authorized;

(t) "intentionally" and variants thereof designate the standard prescribed in section 302(1);

(u) "judge" includes justice of the Supreme Court;

(v) "knowingly" and variants thereof designate the standard prescribed in section 302(1);

(w) "law enforcement officer" means a public servant authorized by law or by a government agency or branch to conduct or engage in investigations or prosecutions for violations of law;

(x) "local" means of or pertaining to any political unit within any state;

(y) "magistrate" includes commissioner;

(z) "misdemeanor" means an offense for which a term of imprisonment of one year or less is authorized by a federal statute, or would be if federal jurisdiction existed;

(aa) "negligently" and variants thereof designate the standard prescribed in section 302(1);

(ab) "offense" means conduct for which a term of imprisonment or a fine is authorized by a federal statute, or would be if federal jurisdiction existed;

(ac) "official action" means a decision, opinion, recommendation, vote or other exercise of discretion;

(ad) "official proceeding" means a proceeding heard or which may be heard before any government agency or branch or public servant authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or a deposition in connection with any such proceeding;

(ae) "person" means a human being and a corporation or organization as defined in section 409;

(af) "public servant" means an officer or employee of a government or a person authorized to act for or on behalf of a government or serving a government as an adviser or consultant. The term includes Members of Congress, members of the state legislatures, Resident Commissioners, judges and jurors;

(ag) "reasonably believes" designates a belief which is not recklessly held by the actor;

(ah) "recklessly" and variants thereof designate the standard prescribed in section 302(1);

(ai) "section" means a section of this Code; "subsection" or "paragraph" refers to a subsection or paragraph of the section or subsection, as the case may be, in which the term is used;

(aj) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ;

(ak) "state" includes Puerto Rico, the Canal Zone, the District of Columbia, American Samoa, Guam, the Virgin Islands, Johnston Island, Midway Island, Wake Island, and Kingman's Reef and any other territory or possession of the United States;

(al) "think of value" means a gain or advantage, or anything regarded, or which might reasonably be regarded, by the beneficiary as a gain or advantage, including a gain or advantage to any other person. "Thing of pecuniary value" means a thing of value in the form of money, tangible or intangible property, commercial interests or anything else the primary significance of which is economic gain;

(am) "United States", in a territorial sense, includes all

states and all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone;

(an) "United States," when not used in a territorial sense, means government, as defined in paragraph (m), of the United States.

Comment

Words and phrases that are commonly used throughout the Code, for which statutory definition is necessary or desirable, are defined in this section. When a word is used in only one section or chapter, it is defined, if at all, in that section or chapter. Words used only a few times are cross-referenced.

The noteworthy feature of these definitions is that, in general, the words are not limited to federal contexts, *e.g.*, a public servant is one who works for *any* government. Limitations to the federal context are made where the federal jurisdictional base is set forth, or by use of the term "federal" before the word. The approach of this Code is to distinguish the definition of harmful conduct from the designation of which government has the power to prosecute for such conduct. Separately stating the federal aspect of a word also clearly differentiates when culpability is or is not required. For example, in § 1361 (bribery), the person must know he is buying action of a public servant (culpability is required under § 302(3)(a) as to this fact); but he need not know that the public servant worked for the federal government (culpability is not required under § 302(3)(c) as to a jurisdictional fact).

Also to be noted is that, although the definition of "offense" embraces state offenses, the conduct must be such as would also constitute a federal offense if federal jurisdiction were present. The line between felonies and misdemeanors is drawn according to the manner in which comparable federal conduct would be punished.

Comment concerning definitions in this section, and references to more detailed comment in the Working Papers, will be found in the comment to the section in which the term or phrase has its principal use.

Chapter 2. Federal Penal Jurisdiction

§ 201. Common Jurisdictional Bases.

Federal jurisdiction to penalize an offense under this Code exists under the circumstances which are set forth as the jurisdictional base or bases for that offense.

Bases commonly used in this Code are as follows:

(a) the offense is committed within the special maritime and territorial jurisdiction of the United States as defined in section 210;

(b) the offense is committed in the course of committing or in immediate flight from the commission of any other offense defined in this Code over which federal jurisdiction exists;

(c) the victim is a federal public servant engaged in the performance of his official duties or is the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice President-elect, or any individual who is acting as President under the Constitution and laws of the United States, a candidate for President or Vice President, or any member or member-designate of the President's cabinet, or a member of Congress, or a federal judge, or a head of a foreign nation or a foreign minister, ambassador or other public minister;

(d) the property which is the subject of the offense is owned by or in the custody or control of the United States or is being manufactured, constructed or stored for the United States;

(e) the United States mails or a facility in interstate or foreign commerce is used in the commission or consummation of the offense;

(f) the offense is against a transportation, communication, or power facility of interstate or foreign commerce or against a United States mail facility;

(g) the offense affects interstate or foreign commerce;

(h) movement of any person across a state or United States boundary occurs in the commission or consummation of the offense;

(i) the property which is the subject of the offense is moving in interstate or foreign commerce or constitutes or is part of an interstate or foreign shipment;

(j) the property which is the subject of the offense is moved across a state or United States boundary in the commission or consummation of the offense;

(k) the property which is the subject of the offense is owned by or in the custody of a national credit institution;

(*l*) the offense is committed under circumstances amounting to piracy, as prescribed in section 212.

When no base is specified for an offense, federal jurisdiction exists if the offense is committed anywhere within the United States, or within the special maritime and territorial jurisdiction of the United States.

Comment

Existing federal criminal laws differ from state criminal laws most markedly in the approach to jurisdiction: while a state punishes all criminal conduct within its borders, federal jurisdiction rests upon several different bases, *e.g.*, protection of the federal government, special maritime and territorial jurisdiction. Because the extension of federal jurisdiction has been a process of accrual, spreading over many years, many sections of existing Title 18 outlaw conduct only under one jurisdictional formulation. For example, 18 U.S.C. § 1111 deals with homicide within the special maritime and territorial jurisdiction, and 18 U.S.C. § 1751 deals with assassination of various important federal officials. As a result multiple provisions deal with the same basic misconduct; the repetition is required only because there is more than one basis for federal jurisdiction over such misconduct.

A new approach is proposed in this Code. Most crimes are defined without regard to where the conduct occurs, or whether the United States has the power to prosecute, in a manner similar to that in which offenses are defined in state codes. Federal jurisdiction over the misconduct is then set forth separately. Because jurisdiction has no bearing on a person's culpability, the prosecution is not required to prove culpability as to jurisdiction. See § 204. Many crimes have more than one jurisdictional base; that is, if any one of a number of circumstances occurs, the federal government has the power to prosecute. For example, two jurisdictional bases for murder (§ 1601) are that the homicide took place in the special maritime or territorial jurisdiction and that the victim was a federal public servant engaged in the performance of his official duties or was the President, or another specified high-level official. The definition of the harmful conduct—murder—is the same regardless of the base. This approach permits consolidation of the many sections of existing Title 18 which are now separate only because they involve different federal interests. It also resolves difficulties in the areas of conspiracy and accomplice liability because the harmful conduct is the focus of the definition of the offense, rather than the basis for federal jurisdiction over it.

No attempt has been made to increase or decrease the reach of federal jurisdiction across the board. However, federal jurisdiction has grown haphazardly over the years, and inconsistency has resulted. By taking a uniform approach—that similar crimes should have similar juris-

dictional bases unless there is a good reason to the contrary—federal jurisdiction is changed to some extent. A special precatory provision, § 207, provides guidelines for the exercise of jurisdiction.

The first commonly used jurisdictional base listed is special maritime and territorial jurisdiction. A consequence of defining offenses in terms of the basic misbehavior—and an objective of this revision—is that a comprehensive criminal code will exist for federal enclaves, promoting uniformity among them and reducing the need to assimilate the laws of the surrounding jurisdiction on a wholesale basis. This base thus applies to virtually every offense defined in the Code.

Paragraph (b) is a "piggyback" base, providing that the commission of a federal offense defined in this Code is the basis for federal jurisdiction over another Code offense for which paragraph (b) is listed as a base. "In the course of committing," a phrase used in the base, requires more than a mere temporal connection between the two offenses. The principle is found in existing law in 18 U.S.C. § 2113(d) and (e), where the language is similar to that used here (note that the title of that section is "Bank robbery and incidental crimes") and in a number of existing offenses where the penalty is substantially increased "if bodily [or personal] injury results" and "if death results" (18 U.S.C. § 241 (conspiracy against rights of citizens), 18 U.S.C. § 242 (deprivation of rights under color of law), 18 U.S.C. § 245 (federally protected activities), 18 U.S.C. § 34 (when death results from destruction of aircraft or aircraft facilities, or of motor vehicles or motor vehicle facilities), new 18 U.S.C. § 844(d), (f) and (i) (transportation and use of explosives in criminal damaging of property)).

Incorporation of the homicide and assault offenses, through use of paragraph (b), offers a significant drafting advantage in making applicable the carefully drawn culpability requirements and grading differentials when death or injury results. For example, under existing law, the civil rights deprivation which ordinarily is subject to a one-year penalty is subject to life imprisonment when death results without regard to whether death was intended (murder § 1601), recklessly caused (manslaughter, § 1602), or negligently caused (negligent homicide, § 1603). Moreover, paragraph (b) is used in the Code to provide aggravated penalties when the underlying offense embraces kidnapping and arson, in addition to death- and injury-producing conduct.

Analysis of federal provisions older than those cited above has indicated the desirability of other applications of the "piggyback" principle, particularly with respect to those offenses where the federal interest is primary (Chapters 11–15). Impersonating federal officials, for example, is presently a three-year felony (18 U.S.C. § 912), treatment too severe for mere impersonation of a marshal in order to serve legal process, but not severe enough for a kidnapping or major fraud which might be committed by impersonating a federal official. Under the Code the undifferentiated offense of impersonation, like the civil rights offense, can be graded as a misdemeanor, (§ 1381), relying on the "piggyback" base for aggravating the penalty when the impersonation is a means of committing a more serious offense. In addition, note such Code offenses as physical obstruction of government function

(§ 1301), hindering law enforcement (§ 1303), tampering with witnesses and informants (§§ 1321, 1322), and retaliation (§ 1367), where the definition and grading depend upon the "piggyback" base incorporated in other offenses.

In the Study Draft the possibility was suggested of making virtually every federal offense subject to being "piggybacked" upon any other federal offense, with explicit exceptions for Code firearms and fugitive felon offenses as underlying offenses. In the proposed Code the offenses which can be "piggybacked" have been limited to Chapter 16 and 17 offenses (offenses against persons and property), and the underlying offenses have been limited to offenses defined in the Code, except that reckless endangerment is "piggybacked" on all federal crimes defined outside the Code as well (see § 1613). If the incorporation of paragraph (b) is further curtailed, particular note should be taken of the existing provisions and Code sections referred to above. It should be further noted that § 207 contains a guideline for exercise of federal jurisdiction based on paragraph (b) that the offense being "piggybacked" be closely related to the underlying offense and that there be a substantial federal interest in the underlying offense.

Title 18 U.S.C. § 1114 prohibits assaulting or murdering federal officials there described—investigators and law enforcement officers for the most part—while engaged in their official duties.

Under paragraph (c) all federal public servants would be covered while engaged in their official duties, rather than merely specified officials. This extension of federal jurisdiction permits federal back-up of local law enforcement efforts in protecting federal employees and will be subject to the policy as to discretionary restraint on its use expressed in § 207. A more substantial change in existing jurisdiction would be deletion even of the requirement that the federal official be engaged in the performance of his official duties, and its incorporation in § 207 as a guideline for discriminating exercise of federal jurisdiction. This treatment would avoid the occasional problems attending litigation of the issue. Proof problems, however, are minimized in any event by the Code's provision that culpability not be required as to facts establishing jurisdiction.

The second part of paragraph (c) is taken from 18 U.S.C. § 1751 which deals with assassination, kidnapping and assault of certain high-level officials. Paragraph (c) embodies a legislative determination that certain officials should always be federally protected. Protection is extended to members of the President's cabinet, members of Congress and federal judges as well as candidates for President and Vice President.

Protection of foreign diplomatic personnel, required of the federal government by the law of nations, is now found in 18 U.S.C. § 112 and is continued in paragraph (c). In light of the growing problem of protection of foreign diplomatic and consular personnel in the United States, the Congress should give appropriate consideration to the expansion of this base to include members of foreign missions to international organizations, consular officers, and members of the families of diplomatic and consular officers who are part of the household of such officers.

Paragraph (d) is a base for property crimes against the United States, consolidating notions of ownership, custody, control, and "in preparation for," now dealt with in separate statutes. Title 18 U.S.C. § 2112, for example, limits robbery to property belonging to the United States, while § 2114 deals with the mail. Present coverage of federal burglary is spotty, including banks (§ 2113), post offices (§ 2115), certain vehicles (§ 2116) and certain common carrier facilities (§ 2117). Paragraph (d) would apply federal law to any burglary of any federal building, whether or not in a federal enclave, and also any burglary, whether or not of a federal building, where the target property was federal.

Paragraph (e) substantially restates the present jurisdiction over fraud (18 U.S.C. §§ 1341 (mail) and 1343 (wire, radio or television in interstate or foreign commerce)), obscenity (18 U.S.C. §§ 1461 (mail) and 1462 (use of common carrier to transport)), and organized crime (18 U.S.C. § 1952—use of any facility in interstate or foreign commerce, including the mail), among others. The phrase "in the commission" includes planning or attempting the crime. Title 18 U.S.C. § 1461 prohibits use of the mails to *incite* arson, murder or assassination. If this jurisdiction is appropriate, jurisdiction might well extend also to situations in which the mail is *used* to carry out those offenses. *Cf.* 18 U.S.C. § 876 (mailing a kidnap threat or demand for ransom). Alternatively this base could be limited to specific offenses where the use of the mails or facilities of commerce are preferred means of carrying out the offense and to those offenses most likely to be engaged in by organized criminals. There may be need for another more limited base for extortion or threat crimes. Title 18 U.S.C. § 875 limits federal jurisdiction to situations in which a facility of commerce was used to transmit the communication containing the threat, but does not cover other uses of those facilities to carry out the crime, *e.g.*, telephoning an accomplice.

Paragraph (f) is necessary to lay the basis for federal intervention to protect vital, quasi-public national facilities even if they are "privately" owned. For the scope of existing law, see 18 U.S.C. §§ 31–35 (dangerous tampering with airplanes and interstate motor transport), 18 U.S.C. §§ 2271 *et seq.* (destruction of vessels); 18 U.S.C. § 832 (transportation of explosives and other dangerous substances), and 18 U.S.C. § 2117 (burglary of interstate or foreign vehicles or pipelines).

Paragraph (g), the broadest base listed, presently appears in 18 U.S.C. § 1951 (robbery or extortion), 18 U.S.C. § 231 (teaching use of firearms, explosives or incendiaries: obstructing firemen or law enforcement officers in civil disorders affecting commerce), 18 U.S.C. § 245(b)(3) (injuries during a riot to a person engaged in a business affecting commerce) and 18 U.S.C. § 844(i) (damaging by explosives any property used in any activity affecting commerce). This base requires proof that the particular conduct affected commerce and should not be confused with the situation in which Congress finds that certain conduct necessarily affects commerce, so that the federal government has jurisdiction over all such conduct within the country. In the latter situation, no base is stated and no proof of a particular effect on commerce, or other jurisdiction is necessary. See 18 U.S.C.

§§ 891 *et seq.* (extortionate credit transactions). For a proposal limiting exercise of jurisdiction under this base to cases certified by the Attorney General, see § 1740(3).

Examples of present law which use the base set forth in paragraph (h) are 18 U.S.C. § 1201 (kidnap victim transported), 18 U.S.C. § 2421 (prostitute transported), and 18 U.S.C. § 1952 (racketeer travels). The growth of the concept can be seen from these sections. In the earlier statutes, the "victim" had to be moved, whereas, in the latter statute, that the offender travelled is enough. It is difficult to see a rational policy line in this distinction. If interstate transportation of a kidnap victim suffices for federal intervention, interstate movement of the kidnapper to commit the offense should also suffice. The Code approach of using travel as a jurisdictional base permits prosecution of the racketeer under an offense graded according to the nature of the crime, rather than arbitrarily at 5 years or $10,000, as under 18 U.S.C. § 1952.

Paragraph (i) will be a base for theft. It should be compared with paragraph (f), which protects the facilities of commerce. Paragraph (i) describes what the character of the property must be, *e.g.*, part of an interstate shipment, at the time the offense is committed in order to make an offense *against* it a federal offense, *e.g.*, theft, arson. Paragraph (j) describes what must be done with the property in the course of commission or consummation of the offense, *e.g.*, moved across state lines, if federal jurisdiction is to exist. This base, too, will be used in theft, particularly with respect to disposition of stolen property. See, *e.g.*, 18 U.S.C. § 2312 (transporting stolen motor vehicles or aircraft).

Paragraph (k) is similar to paragraph (d) (protection of federal property), and is used in 18 U.S.C. §§ 1006 and 2113, which protect bank property from robbery, theft, embezzlement, misapplication and burglary. However, since existing federal law does not extend to protecting bank property from arson and other forms of criminal destruction, this base is not used for all the crimes for which paragraph (d) is used and therefore it must be stated separately.

Property of nonfederal agencies other than national credit institutions is also protected by existing law, but only against depredations by its employees, *e.g.*, funds of agencies supported by OEO (42 U.S.C. § 2703). Also, the *operations* of such agencies, as well as those of national credit institutions, are protected from certain conduct, such as bribery of their employees (18 U.S.C. § 215). Specialized bases to cover these situations appear with the crimes themselves.

Incorporating the notion of piracy as a jurisdictional base (paragraph (*l*)) constitutes an approach which is more realistic and workable than is the attempt to define unique crimes of piracy, as in present law. Except for jurisdictional facts, crimes constituting piracy consist of conduct which is murder, robbery, kidnapping, etc. Section 212 defines the circumstances which must exist, *e.g.*, ship to ship, to make the offense piracy and thus subject to federal prosecution.

See Working Papers pp. 33–103 for a general survey of federal jurisdiction. See also pp. 424, 440, 712, 722–77, 832, 838–40, 846–47, 864–66, 876, 886–87, 901–02, 909–11, 950, 955–57, 1050.

§ 202. Jurisdiction Over Included Offenses.

If federal jurisdiction of a charged offense exists, federal jurisdiction to convict of an included offense defined in a federal statute likewise exists.

Comment

This section contemplates a situation in which the offense charged has a jurisdictional base which an included offense does not have. An included offense, as defined in § 109, is one, for example, which is established by proof of the same or less than all the facts required to establish the offense charged. That jurisdiction should exist for the charged offense and not for the included offense should be viewed as an accident of legislative drafting rather than the result of different policies. Such occasions should not arise under the proposed Code, where an attempt has been made to anticipate the problem. For example, offenses included in murder, such as assault and aggravated assault, are expressly given the same jurisdictional bases as murder. But there may be situations in which a minor offense outside the Code constitutes the included offense.

§ 203. Prospective Federal Jurisdiction.

(1) Inchoate Offenses. Federal jurisdiction exists with respect to attempt, solicitation or conspiracy when a circumstance giving rise to federal jurisdiction over such inchoate offense has occurred or would occur if the principal offense were committed.

(2) Completed Offenses. Federal jurisdiction over a completed offense exists, although no circumstance otherwise giving rise to federal jurisdiction has yet occurred, if the actor took a substantial step in connection with such offense designed or likely to establish federal jurisdiction.

Comment

Subsection (1) establishes the rules for jurisdiction over the offenses of attempt, solicitation and conspiracy.

There are two situations in which there is federal jurisdiction over inchoate crimes. One is where a circumstance which gives rise to federal jurisdiction over the completed offense has already occurred (even though unintended—culpability is not required as to a fact which gives rise to jurisdiction—see § 204), *e.g.*, a racketeer has moved across a state border. Another is where there would be federal jurisdiction over the offense if it were completed or committed as intended. That is, if a thief intends to steal certain diamonds which are, in fact, part of an interstate shipment, an attempt to steal them is a federal crime. Note that he need not intend that the federal government have jurisdicion, but must intend only to engage in conduct which would give rise to a jurisdictional circumstance. *See, e.g., United States* v. *Kellerman*, 431 F. 2d 319 (2d Cir. 1970).

Subsection (2) applies the Code approach to jurisdictional circumstances to situations in which the substantive criminal conduct has been completed but the jurisdictional circumstances has not. In such situations the crime is complete. No change of substance in present law is effected, as attempts are now generally included in the section prohibiting the completed crime, and are subject to the same penalty. Subsection (2) provides that there is federal jurisdiction over the completed offense if the jurisdictional circumstances would occur because of conduct engaged in or intended to be engaged in. For example, if a person has committed a fraud and has deposited in his bank a check (the proceeds of the fraud) on an out-of-state bank, he has committed the completed federal crime of theft by deception even though federal agents seize the check before it is cleared through the mails. The conduct which has occurred (depositing the check) would cause the existence of the jurisdictional circumstance (movement of the check through the mail).

§ 204. Culpability Not Required As to Jurisdiction.

Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for federal jurisdiction.

Comment

This section is also set forth at § 302(3)(c), *infra*, with the other provisions dealing with culpability and is repeated here for emphasis. Since jurisdiction is only a question of which sovereign has the power to punish certain harmful conduct, it follows that, in general, the degree of an offender's culpability does not depend upon whether he does or does not know when he commits the offense which sovereign will be able to prosecute him. This view is supported by such cases as *United States* v. *Licausi*, 413 F. 2d 1118 (5th Cir. 1969) (defendant need not know deposits of the bank robbed were insured by FDIC); *McEwen* v. *United States*, 390 F. 2d 47 (9th Cir.), *cert. denied*, 392 U.S. 940 (1968) (defendant need not know person assaulted was federal officer); and *United States* v. *Allegrucci*, 258 F. 2d 70 (3d Cir. 1958) (receiver of stolen goods need not know they were stolen from interstate commerce.)

§ 205. Multiple Jurisdictional Bases.

The existence of federal jurisdiction may be alleged as resting on more than one base but proof of any one base is sufficient. The existence of multiple jurisdictional bases for an offense does not increase the number of offenses committed.

Comment

This section clearly differentiates between multiple criminality and multiple bases for federal prosecution. Under existing federal law, which defines many crimes in terms of the jurisdictional base, *e.g.*,

using the mails to further a scheme to defraud, the fact that there are multiple bases, *e.g.*, multiple mailings even to the same person, means that there are multiple crimes. This Code defines crimes in terms of the harmful conduct involved, *e.g.*, theft by deception. That there were two mailings and three interstate telephone calls in the course of one theft does not multiply the harmful conduct. Note that "multiple jurisdictional bases" includes both the occurrence of different kinds of bases and repeated occurrences of the same kind of base.

§ 206. Federal Jurisdiction Not Pre-emptive.

The existence of federal jurisdiction over an offense shall not, in itself, prevent any state or local government from exercising jurisdiction to enforce its own laws applicable to the conduct in question.

Comment

While there are few areas in which the enactment of criminal laws by Congress results in federal occupation of the field, out of an abundance of caution Congress in recent years has added provisions to a number of its criminal enactments making it explicit that such a result is not intended. This section sets forth that proposition in a provision of general applicability. *But see* § 708, barring prosecution by a state or local government after the federal government has prosecuted the offense.

§ 207. Discretionary Restraint in Exercise of Concurrent Jurisdiction.

Notwithstanding the existence of concurrent jurisdiction, federal law enforcement agencies are authorized to decline or discontinue federal enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial Federal interest in further prosecution or that the offense primarily affects state, local or foreign interests. A substantial federal interest exists in the following circumstances, among others:

(a) the offense is serious and state or local law enforcement is impeded by interstate aspects of the case; (b) federal enforcement is believed to be necessary to vindicate federally-protected civil rights; (c) if federal jurisdiction exists under section 201(b), the offense is closely related to the underlying offense, as to which there is a substantial federal interest; (d) an offense apparently limited in its impact is believed to be associated with organized criminal activities extending beyond state lines; (e) state or local law enforcement has been so corrupted as to undermine its effectiveness substantially.

Where federal law enforcement efforts are discontinued in deference to state, local or foreign prosecution, federal agencies are directed to cooperate with state, local or foreign agencies, by providing them with evidence already gathered or otherwise, to the extent that this is practicable without prejudice to federal law enforcement. The Attorney General is authorized to promulgate additional guidelines for the exercise of discretion in employing federal criminal jurisdiction. The presence or absence of a federal interest and any other question relating to the exercise of the discretion referred to in this section are for the prosecuting authorities alone and are not litigable.

Comment

This section affords Congress the opportunity to recognize explicitly and to have its say as to a principle basic to federal law enforcement: that establishment of federal jurisdiction by Congress does not mean that it must be exercised to its fullest extent. Although a policy statement similar to this section may be found in existing provisions dealing with violators of federal laws who are under 21 (18 U.S.C. § 5001—the United States Attorney may defer to local authorities, if they will take the offender and "it will be to the best interest of the United States and of the juvenile offender"), it is not customary for the Congress to provide precatory guidelines for the exercise of federal jurisdiction.

In some instances arbitrary limitations have been incorporated in the definition of the offense, *e.g.*, transporting across state lines stolen property valued at $5,000 or more (18 U.S.C. § 2314). In other instances, where such lines are virtually impossible to draft, the exercise of federal jurisdiction is curbed—or, at least, responsibility is pinpointed—by requiring authorization by the Attorney General himself before a federal prosecution can proceed, *e.g.*, fugitives from state prosecution (18 U.S.C. § 1073), civil rights violations (18 U.S.C. § 245).

Absent such statutory limitations, federal jurisdiction is sometimes exercised to an extent not anticipated when legal jurisdiction was established. For example, when bank robbery jurisdiction was extended to all banks insuring deposits with the FDIC, it was intended to permit federal aid in cases where gangs moved from state-to-state robbing small-town banks; today bank robbery is regarded as primarily a federal crime, regardless of whether there are interstate aspects. While this section does not compel reassessment of pragmatic judgments such as the foregoing as to the primacy of the federal law enforcement effort in a particular area, it does invite reconsideration in terms of stated congressional policies, permits deletion of arbitrary lines, such as the $5,000 minimum for the stolen property offense, and provides a basis of inquiry in appropriation hearings as to the rationality of the allocation of federal law enforcement appropriations.

See Working Papers, pp. 33, 51–62, 803–04, 909–11.

§ 208. Extraterritorial Jurisdiction.

Except as otherwise expressly provided by statute or treaty, extraterritorial jurisdiction over an offense exists when:

(a) one of the following is a victim or intended victim of a crime of violence: the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice President-elect, or any individual who is acting as President under the Constitution and laws of the United States, a candidate for President or Vice President or any member or member-designate of the President's cabinet, or a member of Congress, or a federal judge;

(b) the offense is treason, or is espionage or sabotage by a national of the United States;

(c) the offense consists of a forgery or counterfeiting, or an uttering of forged copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents issued by the United States; or perjury or a false statement in an official proceeding of the United States; or a false statement in a matter within the jurisdiction of the government of the United States; or other fraud against the United States, or theft of property in which the United States has an interest, or, if committed by a national or resident of the United States, any other obstruction of or interference with a United States government function;

(d) the accused participates outside the United States in a federal offense committed in whole or in part within the United States, or the offense constitutes an attempt, solicitation, or conspiracy to commit a federal offense within the United States;

(e) the offense is a federal offense involving entry of persons or property into the United States;

(f) the offense is committed by a federal public servant who is outside the territory of the United States because of his official duties or by a member of his household residing abroad or by a person accompanying the military forces of the United States;

(g) such jurisdiction is provided by treaty; or

(h) the offense is committed by or against a national of the United States outside the jurisdiction of any nation.

Comment

Although the issue of the extraterritorial applicability of the federal criminal law is one which does not arise frequently, the problems it generates when it does are serious. There has never been a clear and simple statement of the circumstances under which the federal government will prosecute for crimes committed abroad. Moreover, there are gaps which only legislation can cover.

Paragraphs (a), (b) and (c) of this section deal with protection of the federal government and its instrumentalities. Paragraph (c) is consistent in its breadth with the probable construction of *United States* v. *Bowman*, 260 U.S. 94 (1922). Paragraph (d) covers conduct outside the United States involved in commission or intended commission of crimes within the United States. Paragraph (e) makes federal sanctions available against foreign breach of our laws on the movement of persons and property over the borders.

Paragraph (f) is a response to two Supreme Court cases holding that civilians accompanying the armed forces and former soldiers are not triable by court-martial. When the crime involves only Americans, the host nation may be reluctant to take action against the perpetrator. Also, status of forces agreements often limit the jurisdiction of a host nation over United States personnel. This paragraph also closes a gap in jurisdiction with regard to diplomatic personnel, who have immunity in the host country and yet cannot be prosecuted in the United States for acts abroad. Paragraph (f) covers those people abroad for whom the federal government is responsible, as well as members of their households who are abroad to be with them. Federal "public servant," under § 109, includes members of the armed forces. The notion of who "accompanies" American military forces abroad is well established in military law.

Paragraph (g) incorporates all jurisdiction as provided by treaty. Paragraph (h) covers crimes by or against nationals outside the jurisdiction of any nation, *e.g.*, in Antarctica or on the moon, subject, as provided in the opening clause of the section, to the provisions of other statutes or treaties.

See Working Papers, pp. 33, 69–76, 424, 506.

§ 209. Assimilated Offenses.

(1) When Assimilated. A person is guilty of a federal offense if he engages in conduct within an enclave which, if engaged in within the jurisdiction of the state or local government in which the enclave is located, would be punishable as an offense under the state or local law then in force, except that this section does not apply when federal law penalizes or immunizes the conduct. Conduct is immunized within the meaning of this subsection if, having regard to federal legislation as to the conduct constituting the type of offense and the failure of Congress to penalize the specific conduct in question, it may be inferred that Congress did not intend to extend penal sanctions to such conduct.

(2) Grading. If the maximum confinement authorized by the state or local law exceeds 30 days, the assimilated offense is a Class A misdemeanor; if such confinement is 30 days or less, a Class B misdemeanor; if there is no such confinement, an infraction. Notwithstanding the classification here provided, the term of imprisonment or fine imposed shall not exceed the maximum authorized by the state or local law, and the offense shall not be deemed a crime if the state or local law provides that it is not a crime.

(3) "Enclave" Defined. In this section "enclave" means a place in the special maritime and territorial jurisdiction of the United States.

Comment

This section would replace 18 U.S.C. § 13. The major change it would effect would be to limit the grading for assimilated crimes to Class A misdemeanors. The policy expressed, which is similar to that of § 3006 (no crime outside of Title 18 is more than a Class A misdemeanor), is that serious federal consequences should occur only in response to conduct which is outlawed following legislative consideration by those committees in Congress with expertise in penal legislation. The limitation is justified in the context of this Code, which attempts to define all serious crimes, including those whose principal incidence is limited to federal enclaves. With a more comprehensive federal law applicable to enclaves, it is prudent to minimize the consequences of the wholesale purchase of not only the grossly disparate existing state laws and penalties, but also those which may be enacted by state legislatures in the future. *See, e.g.*, the capital crime of grave desecration (Georgia).

The burden thus shifts to the proponent of any specific felony not included in the Code to add it rather than to rely on assimilation. Offenses which are assimilated become federal offenses and, since they are prosecuted in federal courts, are governed by federal rules of procedure.

There are state offenses, sometimes heavily penalized, which are not now defined in federal law and which are not included in the proposed Code. Two, bigamy and incest, define unlawful relationships. A third, abortion, is highly controversial, and the law is in great flux. The principal federal concern is that federal enclaves do not become havens for such conduct when outlawed by the surrounding state. The misdemeanor penalty should provide sufficient deterrence for this purpose.

See Working Papers, pp. 33, 77–103, 867–69, 872, 987–88.

§ 210. Special Maritime and Territorial Jurisdiction. Defined.

"Special maritime and territorial jurisdiction of the United States" means:

(a) the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the

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jurisdiction of any particular state, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any state or local government thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state;

(b) any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line;

(c) any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof; or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building;

(d) any unorganized territory or possession of the United States;

(e) any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States;

(f) any aircraft or spacecraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the law of the United States, or any state or local government thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, or while such spacecraft is in flight; and

(g) any aircraft within the special aircraft jurisdiction of the United States as defined in 49 U.S.C. § 1301(32);

Comment

This definition is taken primarily from 18 U.S.C. § 7. Paragraph (d) applies Code offenses to federal territories where there are no local laws, thus achieving the same result as 48 U.S.C. § 644a, which provides that a crime committed on such place shall be deemed to have been committed on board a United States ship. Paragraph (g) brings the jurisdiction of 49 U.S.C. § 1472(i), (j) and (k) into the Code. It reflects the latest revision implementing the Convention on Offenses and Certain Other Acts Committed on Board Aircraft enacted as P.L. 91–449 on October 14, 1970.

§ 211. Special Limited Jurisdiction.

(1) Indian Country. Federal jurisdiction over offenses committed in Indian country exists as provided in 25 U.S.C. § 212.

(2) Canal Zone. This Code is applicable in the Canal Zone as provided in the Canal Zone Code. It is also applicable, as there provided, to the corridor over which the United States exercises jurisdiction pursuant to the provisions of Article IX of the General Treaty of Friendship and Cooperation between the United States of America and the Republic of Panama, signed March 2, 1936, to the extent that such application to the corridor is consistent with the nature of the rights of the United States in the corridor as provided by treaty.

Comment

Title 18 presently contains provisions prescribing federal criminal jurisdiction in Indian country and the Canal Zone. It is intended that the bill enacting the Code will contain sections which adapt those provisions to the new Code; but they will not be included in the Code itself.

The scope of Indian country jurisdiction appears to change periodically, depending upon the desires of particular tribes and complex relationships with the states. Moreover, appropriate reform of such jurisdictional provisions comprehends more than criminal law reform, including such questions as "who is an Indian?" Accordingly it is recommended that the jurisdictional provisions be returned to Title 25, where they were located prior to the 1948 revision, with appropriate reference thereto in the Code.

The Canal Zone, like the District of Columbia, has its own Criminal Code, enacted by the Congress. The extent to which those by jurisdictions will be relying on Title 18 provisions need not be provided in the Code itself. Subsection (2) even as presented here is probably superfluous, if the appropriate amendments are made to the Canal Zone Code.

§ 212. Piracy As Jurisdictional Base.

For the purposes of section 201 (*l*) the offense is within piracy jurisdiction if it is committed for private ends by the crew or the passengers of a private ship or a private aircraft, or committed by the crew of a warship or government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft, and is directed:

(a) on or over the high seas, against another ship or aircraft or against persons or property on board another ship or aircraft; or

(b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any nation or government.

"High seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of any nation or government.

Comment

This section describes the circumstances which establish federal jurisdiction over crimes because they constitute piracy. The definition has been derived from the Convention on the High Seas adopted by the United Nations Conference on the Law of the Sea, ratified by the United States Senate in 1960. See Working Papers, pp. 502–06.

§ 219. Definitions for Chapter 2.

In this Chapter:

(a) "interstate commerce" means commerce between one state, as defined in section 109, and another state;

(b) "foreign commerce" means commerce with a foreign country;

(c) "President-elect" and "Vice President-elect" mean such persons as are the apparently successful candidates for the offices of President and Vice President, respectively, as ascertained from the results of the general elections held to determine the electors of President and Vice President in accordance with 3 U.S.C. §§ 1, 2;

(d) "national credit institution" means a member bank of the Federal Reserve System; a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States; a bank the deposits of which are insured by the Federal Deposit Insurance Corporation; a Federal Savings and Loan Association; an "insured institution" as defined in 12 U.S.C. § 1724; and a "Federal Credit Union" as defined in 12 U.S.C. § 1752.

Comment

The definitions of interstate and foreign commerce are from 18 U.S.C. § 10; the definitions of President-elect and Vice President-elect are from 18 U.S.C. § 1751(f); and the definition of national credit institution is substantially from 18 U.S.C. § 2113. For other commonly-used terms, see General Definitions in § 109. Note that "state" in the definition of interstate commerce, by virtue of § 109(ak), includes the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Chapter 3. Basis of Criminal Liability; Culpability; Causation

§ 301. Basis of Liability for Offenses.

(1) Conduct. A person commits an offense only if he engages in conduct, including an act, an omission, or possession, in violation of a statute which provides that the conduct is an offense.

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

(3) Publication Required. A person does not commit an offense if he engages in conduct in violation only of a statute or regulation thereunder that has not been published.

Comment

Federal criminal law does not, at present, contain statutes stating basic conditions of liability. Chapter 3 would make the treatment and understanding of these issues clear and uniform.

Subsection (1) states the minimum condition of criminal liability: a person must engage in conduct; that he has a certain status or that certain circumstances exist will not render him criminally liable. Conduct includes omissions and possessions. The issue of the voluntariness of the conduct, *i.e.*, whether or not it is conscious and the result of determination or effort, is not dealt with explicitly in this subsection because, while doing so would have limited utility, it would raise the possibility of evasion of limitations placed on defenses such as intoxication and mental illness through inquiries as to voluntariness.

Subsection (2) restates present federal law: a person is not liable for an omission unless he has a duty to act.

Subsection (3) constitutes the basic prohibition against secret criminal laws.

See Working Papers, pp. 106–18 and 361.

§ 302 Requirements of Culpability.

(1) Kinds of Culpability. A person engages in conduct:

(a) "intentionally" if, when he engages in the conduct, it is his purpose to do so;

(b) "knowingly" if, when he engages in the conduct, he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so;

(c) "recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of con-

duct, except that, as provided in section 502, awareness of the risk is not required where its absence is due to voluntary intoxication;

(d) "negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; and

(e) "willfully" if he engages in the conduct intentionally, knowingly, or recklessly.

(2) Where Culpability Not Specified. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully. Except as otherwise expressly provided or unless the context otherwise requires, if a statute provides that conduct is an infraction without including a requirement of culpability, no culpability is required.

(3) Factors to Which Requirement of Culpability Applies.

(a) Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is "intentionally," the culpability required as to an attendant circumstance is "knowingly."

(b) Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required kind of culpability is required with respect to the result.

(c) Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for federal jurisdiction or for grading.

(d) Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in Part A of this Code or Chapter 10; otherwise the least kind of culpability required for the offense is required with respect to such facts.

(e) A factor as to which it is expressly stated that it must "in fact" exist is a factor for which culpability is not required.

(4) Specified Culpability Requirement Satisfied by Higher Culpability. If conduct is an offense if a person engages in it negligently, the conduct is an offense also if a person engages in it intentionally, knowingly, or recklessly. If conduct is an offense if a person engages in it recklessly, the conduct is an offense also if a person engages in it intentionally or knowingly. If conduct is an

offense if a person engages in it knowingly, the conduct is an offense also if a person engages in it intentionally.

(5) No Requirement of Awareness that Conduct is Criminal. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this Code.

Comment

There is, at present, no general federal statute setting forth the circumstances under which proof of culpability is required. There is no pattern or rationale for the many different and often elastic words used in designating culpability. This section defines the kinds of culpability and establishes the general rules governing what kind of, and when, culpability is required.

Subsection (1) sets forth the four possible culpable mental states recognized in the Code. "Intentionally" imports purpose. When a special motive (specific intent) is required, the offense will be defined as conduct "with intent to." "Knowingly" is distinguished from "intentionally," to differentiate between the man who wills and one who is merely willing. It is distinguished from "recklessly" by the phrase "unaccompanied by substantial doubt." "Recklessly" requires conscious and unjustifiable disregard. The "gross deviation" phrase of subsection (1)(c) makes clear that criminal recklessness is not the same as the recklessness which incurs tort liability. Subsection (1)(d) uses the term "unreasonable" to make clear that the criminally negligent person need not be conscious of the likelihood that he is engaging in the prohibited conduct; a negligent failure to be aware is sufficient. The "negligence" contemplated for criminal liability also differs from the tort standard insofar as a "gross deviation" from acceptable behavior is required. "Willfully" is defined to encompass the three higher kinds of culpability, and thus has a meaning clearly different from its variable and uncertain meaning in existing law.

Codification of these concepts, heretofore found in judicial opinions and judges' instructions to juries, has been essayed with an economy of language. It is expected that, as with other difficult legal concepts, such as "reasonable doubt" and "criminal negligence" under prevailing law, they will continue to be translated to juries in laymen's terms and not transmitted *in haec verba*. A substantial body of opinion in the Commission has serious reservations about the introduction into federal jurisprudence of the highly refined scheme of mental culpability here proposed. It is not that clear that it can be satisfactorily translated into intelligible jury instructions or that it is susceptible of proof given present limitations on sources of evidence. Indeed, it can be argued that such a scheme might lead over the long run to pressures to obtain evidence of culpability in fashions not now thought lawful. See Esmein, *History of Continental Criminal Procedure* App. B, pp. 626–27 (1913). Absent such proof, the scheme might tend to undermine the proposed grading of offenses, *e.g.*, homicide (§§ 1601–03).

On the other hand, recent experience with similar arrays of culpability definitions in modern state codes has not led to any substantial difficulties.

Subsection (2) not only permits economy in drafting but also has the effect of requiring an express statement if strict liability is being imposed or if criminal negligence is to suffice for a crime. For infractions the issue of culpability is eliminated since they are not punishable by imprisonment.

Application of the requirement of culpability to the various factors which the prosecution must prove beyond a reasonable doubt is set forth in subsection (3). Subsection (3)(b) changes the doctrine of "transferred intent," so that one will not be guilty of intentional assault of *B* if he intends to injure *A* but misses. (He would be guilty of reckless assault of *B* and attempted assault of *A*). As to subsection (3)(c), see comment to a similar provision in § 204, *supra*.

Grading factors as well as jurisdiction do not generally require culpability. If this rule were applied across the board it would be the equivalent of the much criticized proposition that a mistake of fact is no defense unless the conduct would have been wholly innocent under defendant's misapprehension of the circumstances. However, this Code does not adopt such an inflexible position; it explicitly provides, where appropriate, that defendant must have been aware of particular aggravating circumstances. See, *e.g.*, the discriminations made in § 1411(2) (smuggling); § 1711(2)(a) (burglary).

With respect to defenses, culpability is or is not required, depending on the nature of the defense. As to defenses set forth in the provisions of general applicability (Part A and Chapter 10), which the prosecution has the burden of proving the nonexistence of a defense once it has satisfactorily been raised, *e.g.*, it must prove that the defendant was not suffering from mental disease or defect if that is claimed under § 503, it does not have to prove that defendant was culpable as to the nonexistence of the defense, *e.g.*, that he knew he was not suffering from mental disease or defect. (Section 608—Excuse—contains a provision dealing with defendant's mistaken belief in the justification and excuse defenses). As to defenses included in the definitions of specific offenses, culpability is required unless the reverse is expressly provided. For "affirmative" defenses, see § 303.

As a device for avoiding ambiguity as to whether culpability is required as to certain factors, subsection 3(e) provides for use of the phrase "in fact."

Subsection (4) provides that a lower kind of culpability includes all higher kinds.

Subsection (5) operates in two distinct situations. First, it obviates any contention that the defendant must know that his behavior is criminal. Second, it deals with those instances in the Code where guilt of one offense depends upon knowledge that another offense is being or has been committed, *e.g.*, facilitating commission of a felony (§ 1002); *cf.* § 401 (accomplice: "with intent that an offense be committed"). In such cases it is sufficient that the defendant know of the relevant behavior, whether or not he knows it is criminal. For those specific circumstances under which mistake of law is a defense, see § 609.

See Working Papers, pp. 118–35, 149–52, 262, 409, 540, 919–20, 924–25, 934–35.

§ 303. Mistake of Fact in Affirmative Defenses.

Except as otherwise expressly provided, a mistaken belief that the facts which constitute an affirmative defense exist is not a defense.

Comment

The distinguishing of defenses according to whether the prosecution or defendant has the burden of proof, as provided in § 103, has resulted in a line between them in the Code which permits provision of general rules as to the culpability requirements. Section 302(3)(d) deals with the general culpability rules with respect to "defenses," which the prosecution must disprove beyond a reasonable doubt. This section deals with the general culpability rule for "affirmative defenses," which the defense must establish by a preponderance of the evidence. Most of the defenses in the "affirmative defense" category in this Code are of such a nature that a mistaken belief in their existence should not be exculpating, *e.g.*, renunciation and withdrawal with respect to inchoate offenses (§ 1005); and that is stated as the general rule. Where exceptions are warranted, they are expressly provided for in the definition of the affirmative defense. See, *e.g.*, § 1321(3)(b) (tampering with witnesses).

§ 304. Ignorance or Mistake Negating Culpability.

A person does not commit an offense if when he engages in conduct he is ignorant or mistaken about a matter of fact or law and the ignorance or mistake negates the kind of culpability required for commission of the offense.

Comment

This section states the obvious fact that if a mistake negates the culpability which is required, a person does not commit an offense. That is, if a man thinks he is shooting a deer, but it is really a man, he is not guilty of intentional murder. (Of course, if he was reckless, he might be guilty of manslaughter.) The mistake must negate culpability; that he thought he was shooting a woman when the object was a man is irrelevant. Although the section may be unnecessary from the point of view of strict logic, it is included as a convenient cross-reference for those accustomed to regarding mistake as an issue distinct from the culpability requirements in the definition of the offense. See Working Papers, pp. 135–36, 885.

§ 305. Causal Relationship Between Conduct and Result.

Causation may be found where the result would not have occurred but for the conduct of the accused operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient.

Comment

Rules governing causation have never been specified in federal criminal statutes. The major problem in enunciating such rules is presented by situations in which two or more factors "cause" the result. This section is a modified "but for" test with a proviso that excludes those situations in which the concurrent cause was clearly sufficient to produce the result and the accused's conduct clearly insufficient. An alternative approach would be to have no specific provision on causation, leaving the matter to judge-made law. 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. See Working Papers, pp. 143–48.

Chapter 4. Complicity

§ 401. Accomplices.

(1) Liability Defined. A person may be convicted of an offense based upon the conduct of another person when:

(a) acting with the kind of culpability required for the offense, he causes the other to engage in such conduct; or

(b) with intent that an offense be committed, he commands, induces, procures, or aids the other to commit it or, having a legal duty to prevent its commission, he fails to make proper effort to do so; or

(c) he is a co-conspirator and his association with the offense meets the requirements of either of the other paragraphs of this subsection.

A person is not liable under this subsection for the conduct of another person when he is either expressly or by implication made not accountable for such conduct by the statute defining the offense or related provisions, because he is a victim of the offense or otherwise.

(2) Defenses Precluded. Except as otherwise provided, in any prosecution in which the liability of the defendant is based upon the conduct of another person, it is no defense that:

(a) the defendant does not belong to the class of persons who, because of their official status or other capacity or characteristic, are by definition of the offense the only persons capable of directly committing it; or

(b) the person for whose conduct the defendant is being held liable has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice.

Comment

This section is basically a restatement of 18 U.S.C. § 2 with modifications to codify or alter case law. The proposed language is substantially similar to that used in a number of recent state revisions. Subsection (1)(a) sets forth the circumstances under which liability for causing the conduct of another will attach and clarifies 18 U.S.C. § 2(b). Subsection (1)(b) must be examined in connection with § 1002 (Criminal Facilitation). Accomplice liability is limited to a person who aids another with *intent* that the other commit an offense; aiding with *knowledge* that the person aided intends to commit a crime is punishable, if at all, as the lesser offense of facilitation. This subsection also states explicitly that breach of a legal duty to

prevent the commission of an offense will produce liability therefor. Subsection (1)(c) rejects the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), that mere membership in a conspiracy creates criminal liability for all specific offenses committed in furtherance of the conspiracy. *Cf.* § 1004.

Subsection (2) codifies existing case law. See §§ 1002(2), 1004(4) for similar provisions with respect to criminal facilitation and conspiracy.

See Working Papers, pp. 153–59, 187–88, 462, 670, 764–65, 1191, 1194.

§ 402. Corporate Criminal Liability.

(1) Liability Defined. A corporation may be convicted of:

(a) any offense committed by an agent of the corporation within the scope of his employment on the basis of conduct authorized, requested or commanded, by any of the following or a combination of them:

[(a) any offense committed in furtherance of its affairs on the basis of conduct done, authorized, requested, commanded, ratified or recklessly tolerated in violation of a duty to maintain effective supervision of corporate affairs, by any of the following or a combination of them:]

(i) the board of directors;

(ii) an executive officer or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees;

(iii) any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy;

(iv) any other person for whose act or omission the statute defining the offense provides corporate responsibility for offenses;

(b) any offense consisting of an omission to discharge a specific duty of affirmative conduct imposed on corporations by law;

(c) any misdemeanor committed by an agent of the corporation within the scope of his employment; or

(d) any offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation within the scope of his employment.

(2) Defense Precluded. It is no defense that an individual upon whose conduct liability of the corporation for an offense is based has been acquitted, has not been prosecuted or convicted

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

Comment

This section sets forth those circumstances under which a corporation becomes liable for offenses committed by its agents. For felonies, the prosecution must prove involvement of management, an act or omission by a person as to whom the statute defining the offense provides liability, or an omission when a duty of affirmative conduct is imposed on corporations by law. Liability for misdemeanors and nonculpable offenses also rises from the conduct of *any* agent of the corporation who commits the offense within the scope of his employment.

Subsection (1)(a) in effect identifies the persons in management whose complicity is required before the corporation may be convicted of a felony. It is premised on the view that vicarious liability of corporations should be close to ordinary accomplice liability. Evidentiary considerations peculiar to corporate conduct should not lead to the adoption of substantially different standards of substantive liability. When such persons are involved, the offense must have been committed within the scope of the agent's employment, rather than only in furtherance of the corporation's affairs, and actual complicity of management is required, rather than ratification of the agent's conduct or reckless toleration of the conduct in violation of a duty to maintain effective supervision of corporate affairs. The broader base for liability set forth in the bracketed alternative reflects the view of some members of the Commission that the criminal liability of corporations poses issues quite different from ordinary accomplice liability of individuals. The diffusion of responsibilities necessitates more flexible attribution of criminality to artifical entities not subject to grave penalties like imprisonment.

See Working Papers, pp. 164, 167–73, 180–81, 188–203, 207–08.

§ 403. Individual Accountability for Conduct on Behalf of Organizations.

(1) Conduct on Behalf of Organization. A person is legally accountable for any conduct he performs or causes to be performed in the name of an organization or in its behalf to the same extent as if the conduct were performed in his own name or behalf.

(2) Omission. Except as otherwise expressly provided, whenever a duty to act is imposed upon an organization by a statute or regulation thereunder, any agent of the organization having primary responsibility for the subject matter of the duty is legally accountable for an omission to perform the required act to the same extent as if the duty were imposed directly upon himself.

(3) Accomplice of Organization. When an individual is convicted of an offense as an accomplice of an organization, he is sub-

ject to the sentence authorized when a natural person is convicted of that offense.

(4) Default in Supervision. A person responsible for supervising relevant activities of an organization is guilty of an offense if he manifests his assent to the commission of an offense for which the organization may be convicted by his willful default in supervision within the range of that responsibility which contributes to the occurrence of that offense. Conviction under this subsection shall be of an offense of the same class as the offense for which the organization may be convicted, except that if the latter offense is a felony, conviction under this subsection shall be for a Class A misdemeanor.

Comment

This section deals with the liability of agents of an organization. It makes explicit the rule that the human perpetrator is not absolved by the fact that an organization is liable for the offense. It also imposes liability upon agents for omissions to perform acts required for organizations and for manifesting assent to the criminal conduct by default in supervision which contributes to the occurrence of an offense. See Working Papers, pp. 166, 176–88, 193–203, 209–13.

§ 409. General Provisions for Chapter 4.

(1) Definitions. In this Chapter:

(a) "organization" means any legal entity, whether or not organized as a corporation or unincorporated association, but does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) "agent" means any partner, director, officer, servant, employee, or other person authorized to act in behalf of an organization.

(2) Unincorporated Associations. Nothing in this Chapter shall limit or extend the criminal liability of an unincorporated association.

Comment

Governments are excluded from the definition of "organization" and hence from liability for offenses under this Chapter. Even if states are exempted, there are considerations which may call for changing the definition, in the opinion of some Commissioners, to make municipalities and state administrative agencies amendable to federal prosecution, particularly in areas such as environmental pollution and civil rights. If this change is made, § 3502, dealing with disqualifying convicted organization officials from holding regular positions, would probably have to be modified to preclude federal re-

moval or disqualification of state or local officials. Liability of unincorporated associations is left to specific statutory provisions and judicial development. See Working Papers, pp. 165, 175–76.

Chapter 5. Responsibility Defenses: Juveniles; Intoxication; Mental Disease or Defect

§ 501. Juveniles.

A prosecution of any person as an adult shall be barred if the offense was committed:

(a) when he was less than fifteen years old in any case, or when he was less than sixteen years old in the case of offenses other than murder, aggravated assault, rape and aggravated involuntary sodomy; or

(b) when he was less than eighteen years old unless trial as an adult is ordered by the district court to promote justice.

Comment

This section substantially codifies existing federal practice, except that it lowers the critical age to 15 for serious crimes against persons. Although the listed offenses have been selected on the basis of their involving crimes against persons, they would extend to certain property crimes as well, *e.g.*, Class A robbery, because those crimes involve aggravated assault. Under 18 U.S.C. § 5032 a child of any age must be tried as an adult if the Attorney General so directs, if the child has committed a crime punishable by death or life imprisonment, or if he refuses to consent to prosecution as a juvenile. In recent years, however, no child under 16 has been prosecuted as an adult.

Being under age is denominated a bar; the prosecution need not introduce any evidence as to a defendant's age unless the issue has been raised. By making lack of age a bar, the question of when the issue is to be decided is left to procedural provisions.

This section requires conforming amendments to existing provisions dealing with juvenile procedure now set forth in 18 U.S.C. §§ 5031–33.

See Working Papers, pp. 217–22.

§ 502. Intoxication.

(1) Defense Precluded. Except as provided in subsection (3), intoxication is not a defense to a criminal charge. Intoxication does not, in itself, constitute mental disease within the meaning of section 503. Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged.

(2) Recklessness. A person is reckless with respect to an element of an offense even though his disregard thereof is not con-

scious, if his not being conscious thereof is due to self-induced intoxication.

(3) When a Defense. Intoxication which (a) is not self-induced, or (b) if self-induced, is grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible, is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacked substantial capacity either to appreciate its criminality or to conform his conduct to the requirements of law.

(4) Definitions. In this section:

(a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of alcohol, drugs or other substances into the body;

(b) "self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would otherwise afford a defense to a charge of crime.

Comment

This section largely codifies existing law as to when or whether intoxication is a defense to a criminal charge. Subsection (1) states the general rule that intoxication is no defense, but that evidence of it is admissible to the extent that it negates or establishes an element of the offense. Subsection (2) parallels existing law and some recent state revisions in providing that where recklessness, *i.e.*, disregard of a risk, is the standard of culpability for a crime, lack of awareness of the risk because of self-induced intoxication does not negate culpability. Subsection (3) denominates two forms of intoxication which are affirmative defenses.

An alternative to this section preferred by some members of the Commission is as follows: "Intoxication is a defense to the criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of intoxication of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense charged, except as provided in subsection (2)." Under this alternative subsections (3) and (4) would be omitted. For the rationale, see comment to § 503, *infra*.

The Congress and the Advisory Committee on the Federal Rules of Criminal Procedure should give consideration to requiring pretrial notice of these defenses.

See Working Papers, pp. 223–28.

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§ 503. Mental Disease or Defect.

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. "Mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Lack of criminal responsibility under this section is a defense.

Comment

Present federal law as to the defense of insanity is not uniform. Neither Congress nor the Supreme Court has set forth a definitive rule. The courts of appeals have greatly developed the law on the subject in recent years, generally tending to move from a *M'Naghten* formulation toward the American Law Institute formulation substantially presented here. In the District of Columbia Circuit the defense applies where the unlawful act is the "product" of mental disease or defect (*Durham* v. *United States*, 214 F.2d 862 (1954)), defined as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls" (*McDonald* v. *United States*, 312 F.2d 847, 851 (1962)). In the Third Circuit emphasis has been placed on the accused's capacity to conform his conduct to the requirements of the law violated; lack of appreciation of the criminality is regarded as a factor supporting inability to conform. (*United States* v. *Currens*, 290 F.2d 751 (1961)). In the Second, Sixth, Seventh, Ninth and Tenth Circuits the defense is similar to the formulation of this section (*United States* v. *Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States* v. *Smith*, 404 F.2d 720 (6th Cir. 1968); *United States* v. *Shapiro*, 383 F.2d 680 (7th Cir. 1967); *Wade* v. *United States*, 426 F.2d 164 (9th Cir. 1970); *Wion* v. *United States*, 325 F.2d 420 (10th Cir. 1963)). Other possibilities are a modified *M'Naghten* formulation and abolition of the defense completely. Both are expressed in statutory form in the Working Papers, footnote, p. 234.

An alternative to this section preferred by some members of the Commission, as adapted from the consultant's report (Working Papers, p. 234), is as follows: "Mental disease or mental defect is a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense."

Against this alternative and in favor of § 503 as it appears in the text, it is argued that a person maniacally "intent" on committing murder or other crime would satisfy all the culpability requirements specified elsewhere in the Code. Yet he might be hopelessly insane under uncontradicated psychiatric testimony, his insanity manifesting itself precisely in the crazed intent to kill or a mad illusion as to a justification for killing. It is further argued against the alternative that any effort to refer the mental illness issue to the general formula-

tions on culpability could lead only to a confusing and contradictory judicial interpretation of the culpability requirements, as judges were forced, without legislative guidance, to develop a jurisprudence relating to mental illness under the rubrics of "intent", "knowledge", and "recklessness". Opposition to the alternative also rests on the view that it would be immoral and inconsistent with the aim of a criminal code to attribute "guilt" to a manifestly psychotic person.

In favor of the alternative, it is argued that it integrates the insanity and culpability provisions of the Code, and avoids the logical difficulty of finding "culpability" present but nevertheless exonerating on the ground of mental illness. Those who favor this view also believe it would facilitate jury consideration of guilt, since only one standard of culpability would be employed. Far from artifically limiting medical testimony, the alternative would direct it into intelligible legal channels and lead hopefully to the end of confusing dual notions of "medical" and "legal" insanity.

Those who favor the alternative recognize that it would be difficult, if not constitutionally impossible, to make mental illness an affirmative defense (with the burden of proof on the defendant) under their approach, which makes no distinction between the insanity defense and any other issue involved in guilt.

This section follows the A. L. I. formulation by explicitly denying the defense to "sociopaths," *i.e.*, habitual offenders without other symptoms. Although it clarifies the scope of the defense, such a provision may be of questionable utility in view of the near certainty that some additional symptom will be found by any psychiatrist inclined to the ultimate conclusion that the accused was mentally ill. The Sixth and Ninth Circuits have not adopted that portion of the A. L. I. formulation.

As a defense the issue of lack of responsibility under this section will not be in the case unless there is evidence to give rise to a reasonable doubt on the issue. At that time the prosecution has the burden of proving the nonexistence of the defense beyond a reasonable doubt. See § 103. This is similar to the present general rule, although sometimes it is stated in terms of the defense having the burden of establishing a prima facie case of insanity, at which time the burden of disproof shifts to the prosecution. Note, however, that section 207 of the District of Columbia Court Reform and Criminal Procedure Act of 1970 requires the defendant to establish the defense by a preponderance of the evidence, the standard which applies to an "affirmative defense" under § 103 of this Code.

Comprehensive reform in this area would require resolution by statute or rule of certain procedural questions not dealt with in this section, including: whether notice by the defendant of intent to raise the defense should be required; whether there should be a special verdict of acquittal by reason of insanity; whether civil commitment or some form of special treatment should be the consequence of such an acquittal, and, if so, whether the defense can be raised by the prosecution or the court over the defendant's objection. Attention should also be given to possible reform with respect to competency to stand trial, decisions on which, as a practical matter, dispose of most cases in which insanity might be an issue.

Revision of procedures related to mental illness in criminal cases has been undertaken by the Department of Justice and the Judicial Conference of the United States, making it unnecessary to canvass here the possibilities. Procedural proposals based on the A. L. I. Model Penal Code are included in the Working Papers, pp. 245–59.

See Working Papers, pp. 225, 226, 229–59.

Chapter 6. Defenses Involving Justification and Excuse

§ 601. Justification.

(1) Defense. Except as otherwise expressly provided, justification or excuse under this Chapter is a defense.

(2) Danger to Other Persons. If a person is justified or excused in using force against another, but he recklessly or negligently injures or creates a risk of injury to other persons, the justifications afforded by this Chapter are unavailable in a prosecution for such recklessness or negligence, as the case may be.

(3) Civil Remedy Unimpaired. That conduct may be justified or excused within the meaning of this Chapter does not abolish or impair any remedy for such conduct which is available in any civil action.

(4) State Prosecution of Federal Public Servant. The defenses of justification and excuse may be asserted in a state or local prosecution of a federal public servant, or a person acting at his direction, based on acts performed in the course of the public servant's official duties.

Comment

Congress has never enacted the rules which justify or excuse the use of force against another or which generally provide a justification or an excuse for the commission of otherwise unlawful conduct. Chapter 6 sets them forth: to change some undesirable judicial decisions, to clarify areas which are not clear under existing law and to codify aspects of the federal law on the subject. This partial codification is not an attempt to freeze the rules as they now exist. It may therefore be desirable to be explicit that the statutory definition of these rules is not intended to preclude the judicial development of other justifications. For example, the so-called "choice of evils" rule, *i.e.*, that emergency measures to avoid greater injury may be justified, has not been included in this Chapter on the view that, while its intended application would be extremely rare in cases actually prosecuted, even the best of statutory formulations (see N.Y. Pen.L. § 35.10) is a potential source of unwarranted difficulty in ordinary cases, particularly in the context of the adoption of the broad mistake of fact and law provisions found in the Code. Codification, as opposed to case-by-case prosecutive discretion, is regarded as premature. On the other hand, some Commissioners believe that a penal code is seriously deficient if it does not explicitly recognize that avoidance of greater harm is, if not a duty, at least a privilege of the citizen.

The language used to define some of the rules of justification is necessarily complex and technical. It is not contemplated that judges will charge juries in the precise language of the statutes.

All justifications and excuses are either defenses (the burden of disproof is on the prosecutor) or affirmative defenses (the burden of proof is on the defendant). See § 103 (2) and (3).

Since justifications and excuses have similar consequences, the principal reason for distinguishing between them is clarity of analysis. A justification is a circumstance which actually exists and which makes harmful conduct proper and noncriminal. An excuse is a circumstance for which the Code excuses the actor from criminal liability even though the actor was not "justified" in doing what he did, *e.g.*, a nonculpable but mistaken belief that facts affording a justification exist.

A criminal code should proscribe only conduct which egregiously departs from norms. Chapter 6 does not attempt to delineate what conduct one has a "right" to engage in. Conduct may be justified in a criminal context but may nevertheless subject the actor to civil suit or dismissal from his job, or other noncriminal sanction.

Subsection (4) provides that a federal public servant can rely on federal defenses in carrying out his official duties, notwithstanding the fact that a state may impose stricter standards within its jurisdiction.

See Working Papers, pp. 261–63.

§ 602. Execution of Public Duty.

(1) Authorized by Law. Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law.

(2) Directed by a Public Servant. A person who has been directed by a public servant to assist that public servant is justified in using force to carry out the public servant's direction, unless the action being taken by the public servant is plainly unlawful.

(3) Citizen's Arrest. A person is justified in using force upon another in order to effect his arrest or prevent his escape when a public servant authorized to make the arrest or prevent the escape is not available, if the other person has committed, in the presence of the actor, any crime which the actor is justified in using force to prevent or if the other person has committed a felony involving force or violence.

Comment

Subsection (1) is a general provision which incorporates as justifications the many laws permitting public servants to use force, *e.g.*, in the execution of legal process. The phrase "by law" includes state law, so that a state sheriff, for example, who levies execution on a shipment of goods in interstate commerce is not guilty of theft under the federal code. Federal supremacy prohibits a person from relying on a state law which he knows contradicts federal law.

Subsection (2) prohibits a person from relying on plainly unlawful orders from a public servant, but recognizes that the average citizen

cannot be expected to be familiar with the many rules and regulations governing the conduct of public servants.

Subsection (3) provides that use of force is justified in the making of a citizen's arrest. The limitation to "any crime which the actor is justified in using force to prevent" is a reference principally to §§ 603, 604 and 606. It should be recognized that this section determines only the question of criminal liability in using force in such circumstances and does not establish the authority to make the arrest or affect questions as to civil liability. Accordingly, it is the basis for excusing the use of force even when the actor is mistaken as to the underlying facts (see § 608).

See Working Papers, pp. 263–64.

§ 603. Self-Defense.

A person is justified in using force upon another person in order to defend himself against danger of imminent unlawful bodily injury, sexual assault or detention by such other person, except that:

(a) a person is not justified in using force for the purpose of resisting arrest, execution of process, or other performance of duty by a public servant under color of law, but excessive force may be resisted; and

(b) a person is not justified in using force if (i) he intentionally provokes unlawful action by another person in order to cause bodily injury or death to such other person, or (ii) he has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances. A person's use of defensive force after he withdraws from an encounter and indicates to the other person that he has done so is justified if the latter nevertheless continues or menaces unlawful action.

Comment

This section states the rule permitting the use of force to protect oneself from imminent harm. Present federal law on resisting unlawful arrest has been changed, by paragraph (a), to make legality of the arrest irrelevant. The purpose of this change is to discourage self-help for the resolution of such an issue. The rule in paragraph (b) (ii) approximates the common law rule. An alternative would be to delete the limitation altogether, with the result that the aggressor would be free to resist any "unlawful" response to his aggression, *i.e.*, excessive responses. See Working Papers, pp. 264–65.

§ 604. Defense of Others.

A person is justified in using force upon another person in order to defend anyone else if (a) the person defended would be justified

in defending himself, and (b) the person coming to the defense has not, by provocation or otherwise, forfeited the right of self-defense.

Comment

This section treats defense of strangers and defense of one's family in the same manner; contrary to some traditional formulations, reasonable mistake of fact under § 608(1) excuses in both situations. The defense is denied under paragraph (b) to a person who provokes attack to gain an opportunity to injure the attacker, as it is under § 603(b). See Working Papers, p. 265.

§ 605. Use of Force by Persons with Parental, Custodial or Similar Responsibilities.

The use of force upon another person is justified under any of the following circumstances:

(a) a parent, guardian or other person responsible for the care and supervision of a minor under eighteen years old, or teacher or other person responsible for the care and supervision of such a minor for a special purpose, or a person acting at the direction of any of the foregoing persons, may use force upon the minor for the purpose of safeguarding or promoting his welfare, including prevention and punishment of his misconduct, and the maintenance of proper discipline. The force used for this purpose may be such as is reasonable, whether or not it is "necessary" as required by section 607(1), but must not be designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement or gross degradation;

(b) a guardian or other person responsible for the care and supervision of an incompetent person, or a person acting at the direction of the guardian or responsible person, may use force upon the incompetent person for the purpose of safeguarding or promoting his welfare, including the prevention of his misconduct or, when he is in a hospital or other institution for care and custody, for the purpose of maintaining reasonable discipline in the institution. The force used for these purposes may be such as is reasonable, whether or not it is "necessary" as required by section 607(1), but must not be designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement or gross degradation;

(c) a person responsible for the maintenance of order in a vehicle, train, vessel, aircraft, or other carrier, or in a place

where others are assembled, or a person acting at the responsible person's direction, may use force to maintain order;

(d) a duly licensed physician, or a person acting at his direction, may use force in order to administer a recognized form of treatment to promote the physical or mental health of a patient if the treatment is adminisered (i) in an emergency, or (ii) with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian or other person entrusted with his care and supervision, or (iii) by order of a court of competent jurisdicton;

(e) a person may use force upon another person about to commit suicide or suffer serious bodily injury in order to prevent the death or serious bodily injury of such other person.

Comment

This section defines the permissible use of nondeadly force by persons in a position of responsibility for the welfare of others. A distinctive feature of the privilege enjoyed by parents and others in loco parentis under paragraphs (a) and (b) is that "necessity" for the use of reasonable force need not be proved. The criminal law is plainly inappropriate for regulating parental choices in disciplining children. See Working Papers, pp. 265–66.

§ 606. Use of Force in Defense of Premises and Property.

Force is justified if it is used to prevent or terminate an unlawful entry or other trespass in or upon premises, or to prevent an unlawful carrying away or damaging of property, if the person using such force first requests the person against whom such force is to be used to desist from his interference with the premises or property, except that:

(a) request is not necessary if (i) it would be useless to make the request, or (ii) it would be dangerous to make the request, or (iii) substantial damage would be done to the property sought to be protected before the request could effectively be made;

(b) the use of force is not justified to prevent or terminate a trespass if it will expose the trespasser to substantial danger of serious bodily injury.

Comment

The only change in present law on the use of nondeadly force to protect property made by this section is the imposition of the explicit requirement that a request to desist be made, if feasible and safe. Paragraph (b) precludes the defense if termination of the trespass

creates a substantial risk of serious bodily injury to the trespasser. For example, a ship's captain may not justifiably use force to remove a stowaway from his ship in mid-ocean. See Working Papers, p. 266.

§ 607. Limits on the Use of Force: Excessive Force; Deadly Force.

(1) Excessive Force. A person is not justified in using more force than is necessary and appropriate under the circumstances.

(2) Deadly Force. Deadly force is justified in the following instances:

(a) when it is expressly authorized by a federal statute or occurs in the lawful conduct of war;

[(a) when it is authorized by a federal law or occurs in the necessary and appropriate conduct of war;]

(b) when used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence, except that the use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the person menaced. A person seeking to protect someone else must, before using deadly force, try to cause that person to retreat, or otherwise comply with the requirements of this provision, if safety can be obtained thereby; but (i) a public servant or an officer of a ship or aircraft justified in using force in the performance of his duties or a person justified in using force in his assistance need not desist from his efforts because of resistance or threatened resistance by or on behalf of the person against whom his action is directed, and (ii) no person is required to retreat from his dwelling, or place of work, unless he was the original aggressor or is assailed by a person who he knows also dwells or works there;

(c) when used by a person in possession or control of a dwelling or place of work, or a person who is licensed or privileged to be thereon, if such force is necessary to prevent commission of arson, burglary, robbery or a felony involving violence upon or in the dwelling or place of work or to prevent a person in flight immediately after committing a robbery or burglary from taking the fruits thereof from the dwelling or place of work, and the use of force other than deadly force

for such purposes would expose anyone to substantial danger of serious bodily injury;

(d) when used by a public servant authorized to effect arrests or prevent escapes, if such force is necessary to effect an arrest or to prevent the escape from custody of a person who has committed or attempted to commit a felony involving violence, or is attempting to escape by the use of a deadly weapon, or has otherwise indicated that he is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay;

(e) when used by a guard or other public servant, if such force is necessary to prevent the escape of a prisoner from a detention facility unless he knows that the prisoner is not such a person as described in paragraph (d) above. A detention facility is any place used for the confinement, pursuant to a court order, of a person (i) charged with or convicted of an offense, or (ii) charged with being or adjudicated a youth offender or juvenile delinquent, or (iii) held for extradition, or (iv) otherwise confined pursuant to court order;

(f) when used by a public servant, if such force is necessary (i) to prevent overt and forceful acts of treason, insurrection or sabotage, or (ii) to prevent murder, manslaughter, aggravated assault, arson, robbery, burglary or kidnapping in the course of a riot if the deadly force is employed following reasonable notice of intent to employ deadly force, and does not carry with it an unreasonable danger to life of nonparticipants in the riot, and is employed pursuant to a decision or order of a public servant having supervisory authority over ten or more other public servants concerned in the suppression of the riot;

(g) when used by an officer of a ship or aircraft if such force is necessary to prevent overt and forceful acts of mutiny, after the participants in such acts against whom such force is to be used have been ordered to cease and given reasonable notice of intent to employ deadly force;

(h) when used by a duly licensed physician, or a person acting at his direction, if such force is necessary in order to administer a recognized form of treatment to promote the physical or mental health of a patient and if the treatment is administered (i) in an emergency, or (ii) with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian or other person entrusted with his care and supervision, or (iii) by order of a court of competent jurisdiction;

(i) when used by a person who is directed or authorized to use deadly force by a public servant or an officer of a ship or aircraft and who does not know that, if such is the case, the public servant or such officer is himself not authorized to use deadly force under the circumstances.

Comment

Subsection (1) states the proposition that force in excess of that which is necessary and appropriate is not justified. Occasions for justified use of deadly force are listed in subsection (2). It is recognized that there may be a further judicial development with respect to justified or excusable use of deadly force. However, a proposal to add to the text an explicit standard or justification for the use of deadly force "where necessary and appropriate under all the facts and circumstances" was not adopted, on the ground that it would undermine the legislative effort to make its own views on deadly force effective. Nevertheless a substantial body of opinion in the Commission would prefer to see the justifications in this and related provisions (§§ 603–606) recast in positive terms, with the addition of such a provision, and to express the favored ideal as a "standard" rather than a "rule". See Pound, II Jurisprudence 124–28 (1959).

Subsection (2)(a) incorporates the laws of war and those federal laws which may explicitly authorize the use of deadly force, *e.g.*, the death penalty, if retained in the proposed Code. A substantial body of opinion in the Commission favors the broader rule set forth in the bracketed alternative, permitting judicial interpretation of legislative judgments and avoiding the possibility that the rule might be construed to make legality of war a justiciable issue.

Subsection (2)(b) confines the defensive use of deadly force to instances in which it is used to prevent serious danger to the person. Federal case law is changed by requiring retreat, if safe, except in the enumerated circumstances. *Cf. Brown* v. *United States*, 256 U.S. 335 (1921) (failure to retreat is ". . . a circumstance to be considered with all others. . . ."). One such exception—that retreat from one's place of work is not necessary—avoids the possibility that government files or equipment would be required to be left unprotected where a justification is not available under paragraph (c).

Subsection (2)(c) deals with the use of deadly force to prevent specified "property" crimes and any "felony involving violence." An alternative to the latter phrase would be "other felonious theft or property destruction;" but since that would embrace such crimes as theft of more than $500, it may be viewed as placing too little value on human life. Because it is arguable that a robbery or a burglary may be completed when the felon turns to leave the premises, it is provided explicitly that the use of deadly force is still justified at that time. The use of deadly force is not, however, justified if the felon has abandoned his crime, or after he has left the dwelling or place of work. An alternative to "substantial danger" in the last part is "risk," which, with § 608(1), would make apprehensiveness enough to justify the use of deadly

force. The issue is as to the degree of danger to which a person must believe he is subject before his use of deadly force is justified. Provisions dealing with these matters in other modern codifications have proved to be highly controversial.

Subsection (2)(d) justifies the use of deadly force by a public servant to arrest a person who has evidenced substantial dangerousness. Law enforcement agencies, such as the FBI, have rules on the use of weapons which are stricter than the one set forth in subsection (2)(d); but not every violation of these rules should produce liability for murder.

Subsection (2)(e) is necessary to secure the maintenance of order in detention facilities and the protection of the public from dangerous persons incarcerated therein. The "unless" clause in the first sentence is intended to make this provision consistent with justifications provided for the arresting officer in subsection (2)(d), while recognizing, through the requirement of knowledge, that a guard may not know the grounds upon which a prisoner is detained.

Subsection (2)(f)(i) justifies the use of deadly force by a public servant to prevent certain very serious felonies. (Arrest of the felon is covered by paragraph (d)). Subsection (2)(f)(ii) extends the justification for the use of deadly force in riot situations beyond the usual privilege to resist criminal aggression inasmuch as it authorizes shooting *at the rioters* on the basis of reasonable apprehension that they collectively are about to commit murder, burglary, arson, etc. The final sentence of subsection (2)(f) requires authorization of a superior officer for use of deadly force against rioters who do not present the kind of dangers covered by other subdivisions of subsection (2). Although this requirement is deemed an important limitation on the use of guns to suppress riots, a substantial body of opinion in the Commission prefers to drop it from the text on the view that it is an appropriate regulation for police or military authority, but ought not to be critical in assessing criminal liability, *e.g.*, for homicide, of a law enforcement officer who employs deadly force under circumstances where it was otherwise reasonable. Notwithstanding provisions designed to minimize needless taking of life, this subsection remains one of the most controversial in the proposed Code, even though it probably expresses existing law. An alternative would be to leave this provision out entirely and rely instead on subsection (2)(b) and (c).

Subsection (2)(g) recognizes a situation in which, because of the unavailability of police, the officers of a vessel are justified in using deadly force to maintain their authority over the vessel.

Subsection (2)(h) parallels § 605(d), dealing with ordinary force, and is necessary because "deadly force" is defined in § 619(b) as force, *i.e.*, physical action, which the actor knows creates a substantial risk of death or serious bodily injury. Major operations create this risk.

Subsection (2)(i) parallels § 602(2), dealing with aid to a public servant, and protects those directed to use deadly force by an officer of a vessel.

See Working Papers, pp. 266–70, 991, 1017.

§ 608. Excuse.

(1) Mistake. A person's conduct is excused if he believes that the factual situation is such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this Chapter, even though his belief is mistaken, except that, if his belief is negligently or recklessly held, it is not an excuse in a prosecution for an offense for which negligence or recklessness, as the case may be, suffices to establish culpability. Excuse under this subsection is a defense or affirmative defense according to which type of defense would be established had the facts been as the person believed them to be.

(2) Marginal Transgression of Limit of Justification. A person's conduct is excused if it would otherwise be justified or excused under this Chapter but is marginally hasty or excessive because he was confronted with an emergency precluding adequate appraisal or measured reaction.

Comment

This section sets forth two circumstances under which conduct, otherwise criminal, is excused from punishment. Subsection (1) determines that the culpability of one who mistakenly believes that the facts are such as to justify his conduct is to be measured by whether or not he was negligent or reckless in arriving at that belief. Subsection (2) incorporates a famous insight by Mr. Justice Holmes in *Brown* v. *United States*, 256 U.S. 335 (1921) ("Detached reflection cannot be expected in the presence of an uplifted knife.") Whether excuse, under subsection (1), is a defense or affirmative defense, depends upon what the justification or excuse is designated to be. Excuse under subsection (2) is a defense by virtue of § 601(1). Alternatively, it could be made an affirmative defense. See Working Papers, pp. 271–72.

§ 609. Mistake of Law.

Except as otherwise expressly provided, a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:

(a) a statute or other enactment;

(b) a judicial decision, opinion, order or judgment;

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

(d) an official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the crime.

Comment

This section sets forth those circumstances under which a person is excused from criminal liability for his conduct because he mistakenly believed his conduct did not constitute a crime. The defense is not available for infractions where proof of culpability is generally not required. Mistake of law is an affirmative defense; it must be established by a preponderance of the evidence. See § 103(3). Note that the reliance must be "reasonable," and that good faith is explicitly required. In most instances, it would be unreasonable for a layman to fail to consult a lawyer, and would not be in good faith if he failed to make full disclosure to him of all relevant facts. For a broader version of the defense, see Working Papers, p. 138.

An alternative preferred by a substantial body of opinion in the Commission would limit the defense to situations where knowledge of the law might be regarded as especially relevant to culpability, *e.g.*, tax and draft evasion, conflict of interest. This approach is premised on the view that ". . . to admit the excuse at all would be to encourage ignorance . . . ." Holmes, The Common Law 41 (Howe ed. 1963). Consequently, it is argued, mistake of law ought only be a defense where knowledge of the law is an element of the offense. It is argued for the view embodied in the text, however, that it does not "encourage ignorance" since it explicitly requires a good faith effort by the accused to inform himself from usually reliable sources, and puts the burden of proof on the defendant.

See Working Papers generally, pp. 136–41, 409, 881–82.

§ 610. Duress.

(1) Affirmative Defense. In a prosecution for any offense it is an affirmative defense that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another. In a prosecution for an offense which does not constitute a felony, it is an affirmative defense that the actor engaged in the proscribed conduct because he was compelled to do so by force or threat of force. Compulsion within the meaning of this section exists only if the force, threat or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.

(2) Defense Precluded. The defense defined in this section is not available to a person who, by voluntarily entering into a criminal enterprise, or otherwise, willfully placed himself in a situation in which it was foreseeable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

Comment

This section excuses from criminal liability conduct which is engaged in because of certain compelling circumstances which would have caused even a person of reasonable firmness to succumb. Present federal law recognizes the defense only where the apprehension of immediate death or serious injury is created by another person. The section affords a broader protection covering such apprehension regardless of the source of the threat or the identity of the victim. For misdemeanors, any force or threat of force which compels the conduct is sufficient to excuse it. Two factors constrict the availability of what may seem to be a very liberal excuse; the burden of proof is imposed upon the defendant (see § 103(3)) and a jury finding that a person of reasonable firmness would not have been able to resist the pressure is required.

Among the possible alternatives are: (1) to provide that the offense should not be available in the case of certain exceptionally grave offenses, *e.g.*, murder; and (2) to provide that compulsion should reduce the grade of the offense rather than constitute a full defense.

See Working Papers, pp. 273–79.

§ 619. Definitions for Chapter 6.

In this Chapter:

(a) "force" means physical action, threat or menace against another, and includes confinement;

(b) "deadly force" means 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 firing a firearm or hurling a destructive device in the direction of another person or at a moving vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force;

(c) "premises" means all or any part of a building or real property, or any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein;

(d) "dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a person's home or place of lodging.

Comment

In addition to the definitions set forth here, note should be taken of the definitions of "bodily injury," "harm" and "public servant" in § 109—General Definitions.

Chapter 7. Temporal and Other Restraints on Prosecution

§ 701. Statute of Limitations.

(1) Bar. A prosecution shall be barred if it was commenced after the expiration of the applicable period of limitation.

(2) Limitation Periods Generally. Except as provided in subsections (3)–(5), prosecution must be commenced within the following periods after the offense:

(a) ten years for sections 1101 (Treason), 1102 (Participating in or Facilitating War Against the United States Within Its Territory) and 1112 (Espionage). Any prosecution commenced more than five years after the offense shall be dismissed if the defendant, on a motion addressed to the court, establishes by a preponderance of the evidence that the crime and his connection with it were known to responsible officials for more than one year prior to commencement of prosecution and that prosecution could, with reasonable diligence, have been commenced more than one year prior to its commencement;

(b) five years for all other felonies; and

(c) three years for all other offenses.

(3) Extended Period for Murder. Murder may be prosecuted at any time. Any prosecution commenced more than ten years after the offense shall be dismissed if the defendant, on a motion addressed to the court, establishes by a preponderance of the evidence that the crime and his connection with it were known to responsible officials for more than one year prior to commencement of prosecution and that prosecution could, with reasonable diligence, have been commenced more than one year prior to its commencement.

(4) Extended Period for Organized Crime and Official Cover-Ups. The period of limitation shall be ten years for any felony committed in the course of the operation of a criminal syndicate involving connivance of a public servant. A prosecution which is timely only by virtue of this subsection shall be dismissed as to any defendant who, on a motion addressed to the court, establishes by a preponderance of the evidence that he was not a leader of the criminal syndicate or a public servant conniving in any part of the criminal business charged, or that the crime and his connection with it were known to responsible officials

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other than conniving participants more than one year prior to commencement of prosecution and prosecution could, with reasonable diligence, have been commenced more than one year prior to its commencement. "Leader" means one who organizes, manages, directs, supervises or finances a criminal syndicate or knowingly employs violence or intimidation to promote or facilitate its criminal objects, or with intent to promote or facilitate its criminal objects, furnishes legal, accounting or other managerial assistance. A "criminal syndicate" is an association of ten or more persons for engaging on a continuing basis in felonies of the following character: illicit trafficking in narcotics or other dangerous substances, liquor, weapons, or stolen goods; gambling; prostitution; extortion; bribery; theft of property having an aggregated value of more than $100,000; engaging in a criminal usury business; counterfeiting; bankruptcy or insurance frauds by arson or otherwise; and smuggling. If more than ten persons are so associated, any group of ten or more associates is a "criminal syndicate" although it is or was only a part of a larger association. Association, within the meaning of this subsection, exists among persons engaged in carrying on the criminal operation although:

(a) associates may not know each other's identity;

(b) membership in the association may change from time to time; and

(c) associates may stand in a wholesaler-retailer or other arm's length relationship in an illicit distribution operation.

(5) Extended Period to Commence New Prosecution. If a timely complaint, indictment or information is dismissed for any error, defect, insufficiency or irregularity, a new prosecution may be commenced within three months after the dismissal even though the period of limitation has expired at the time of such dismissal or will expire within such three months.

(6) Commencement of Prosecution.

(a) A prosecution is commenced upon the filing of a complaint before a judicial officer of the United States empowered to issue a warrant or upon the filing of an indictment or information. Commencement of prosecution for one offense shall be deemed commencement of prosecution for any included offenses.

(b) A prosecution shall be deemed to have been timely commenced notwithstanding that the period of limitation has expired:

(i) for an offense included in the offense charged, if as to

the offense charged the period of limitation has not expired or there is no such period, and there is, after the evidence on either side is closed at the trial, sufficient evidence to sustain a conviction of the offense charged; or

(ii) for any offense to which the defendant enters a plea of guilty or nolo contendere.

Comment

This section substantially revises existing federal law with respect to the statute of limitations, in some instances eliminating exceptions to general rules and in others making exceptional rules uniformly applicable to all or to similar offenses. In addition re-examination of basic principles has led to the development of new standards.

A basic change, accomplished in subsection (6)(a), is to stop the statute running at the time a complaint—as well as an indictment or information—is filed. Another basic change, provided in subsection (1), designates expiration of the period a bar to prosecution, so that if the claim is not timely raised, it is waived, unlike present law which permits raising the claim even after sentence.

Existing law provides for a general period of limitations of five years, with noteworthy exceptions for all capital offenses (no limitation), for certain internal security and naturalization offenses (ten years), and for revenue offenses (six years for some, three years for others).

The ten-year period for offenses against the existence of the state is carried forward in subsection (2), but applies only to those which are difficult to discover. All the six-year revenue offenses are brought into the five-year category, on the theory that the one-year distinction is unwarranted. A shorter period is provided for all minor offenses, rather than only the few minor revenue offenses presently subject to a short period.

Subsection (3) applies the no-limit provision to murder cases only, thus reviving pre-1939 law. Whether the effect of the change will be substantial will depend upon the extent, if at all, to which capital offenses are retained in the proposed Code.

Subsection (4) reflects a new concept, based both upon the seriousness with which organized crime is viewed and upon the possibility that normal law enforcement efforts have been undermined thereby. The exception provided in both subsections (3) and (4), as well as in subsection (2)(a), (to be established by a preponderance of the evidence) is designed to prevent prosecution abuse of these extended periods.

It should be noted that under this section the running of any period will no longer be tolled while the defendant is a "fugitive." The blanket exemption provided by existing law has provoked conflicting judicial interpretations; and while several resolutions have been considered, deletion of the exemption seems appropriate in view of the fact that the proposed provision explicitly recognizes special problems with respect to discovery of certain crimes and provides that the filing of a complaint within the period constitutes timely commencement of

prosecution. Alternatively, it could be provided that fugitivity extends the period for a limited time, such as three years.

See Working Papers, pp. 12, 281–99, 300–01.

§ 702. Entrapment.

(1) Affirmative Defense. It is an affirmative defense that the defendant was entrapped into committing the offense.

(2) Entrapment Defined. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(3) Law Enforcement Agent Defined. In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.

Comment

This section, which represents the first federal codification of the judicially-developed defense of entrapment, changes existing federal law in several respects. The defense is treated primarily as a curb upon improper law enforcement techniques, to which the predisposition of the particular defendant is irrelevant. By divided votes the Supreme Court has, up to now, adhered to the view that the entrapment issue involves a determination whether the particular defendant was inclined, apart from solicitation by the government's undercover agent, to commit the crime. That inquiry leads to introduction of evidence of prior offenses committed by the defendant.

As an "affirmative" defense, entrapment must be established by the defendant by a preponderance of the evidence. See § 103. Although entrapment is preserved as a ground for dismissal of the prosecution, its kinship to grounds for suppression of evidence illegally obtained by the prosecution could be reflected in a procedural provision that, upon election by the defendant, the issue be tried in a manner similar to that provided for suppression issues.

Alternatively, since the propriety of the prosecution depends upon the propriety of the law enforcement techniques, the defense could be stated as a bar to prosecution. This would have the effect of removing the issue from jury consideration, even though the court, in order to avoid duplication of effort, may defer hearing evidence on the issue until the trial.

A possible additional standard for law enforcement behavior would be to require reasonable suspicion that a person being solicited to commit an offense or with whom an illegal transaction is initiated is engaged in or prepared to engage in such an offense or transaction.

See Working Papers, pp. 303–29.

§ 703. Prosecution for Multiple Related Offenses.

(1) Multiple Related Charges. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(2) Limitation on Separate Trials. Unless otherwise ordered by the court to promote justice, a defendant shall not be subject to separate trials for multiple offenses (a) based on the same conduct, (b) arising from the same criminal episode, or (c) based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or persons or their property, if such offenses are within the jurisdiction of the court and known to the United States Attorney at the time the defendant is arraigned on the first indictment or information.

Comment

Present federal practice on multiple prosecutions has been developed by court decisions on constitutional questions of double jeopardy and due process and by guidelines of the Attorney General. In addition, certain procedural rules are set forth in the Federal Rules of Criminal Procedure. Sections 703–09 codify much of present case law but make some changes to reflect present federal practice. Substantial parts of these provisions are derived from the A.L.I. Model Penal Code.

This section sets forth rules for prosecution of a defendant for related offenses. Subsection (1) recognizes that multiple charges must be permitted, despite the possibility of abuse from overcharging, because of the uncertainty at the time of charging as to what the proof at trial will be, the constitutional restriction on amending indictments, and the requirement that the defendant be informed of the precise charges against him. Subsection (2) codifies present federal practice, but makes joinder compulsory unless otherwise ordered by the court. Note that, while the offenses to be joined are those known to the prosecutor at the time of the first indictment or information, only multiple *trials* of such offenses are prohibited. Thus the prosecution is not barred from filing additional charges before trial on the first takes place.

Separate trials "to promote justice" will include severance of counts against one defendant so that he can be tried jointly with other defendants on one or more counts.

Since § 705 bars subsequent prosecution for offenses required to be joined by this section, double jeopardy protection is extended well beyond the existing protection which applies only when offenses are "identical."

No limit on multiple convictions is established. Limitations on multiple convictions could be provided; but to require the court or prosecutor to choose one of several offenses to submit to the jury or upon which to enter judgment could result in an unjustified windfall to the defendant, where the charge for the offense chosen is dismissed on

appeal. Accordingly, limitations have been placed instead on sentencing (§ 3204).

See Working Papers, pp. 331–43, 367, 368, 893, 896, 946–47.

§ 704. When Prosecution Barred by Former Prosecution for Same Offense.

A prosecution is barred by a former prosecution of the defendant if it is for violation of the same statute and is based upon the same facts as the former prosecution, and:

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

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

(c) the former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, or a verdict or plea of guilty which has not been set aside and which is capable of supporting a judgment; or

(d) the former prosecution was terminated after the jury was impaneled and sworn or, in the case of a trial by the court, after the first witness was sworn, except that termination under the following circumstances does not bar a subsequent prosecution:

(i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination;

(ii) it was physically impossible to proceed with the trial in conformity with law; or there was a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the government; or the jury was unable to agree upon a verdict; or false statements of a juror on voir dire prevented a fair trial, provided that the prosecution did not bring about any of the foregoing circumstances with intent to cause termination of the trial.

Comment

This section substantially restates present federal case law on double jeopardy. Paragraphs (a) and (c) state the effect of prior acquittal or conviction, including the rule that conviction of an included offense means acquittal of the inclusive offense. Paragraph (b) incorporates doctrines of res judicata and collateral estoppel, including as a bar, for example, a finding that the period of limitation had expired as to the offense. Paragraph (d) deals with trials which abort after jeopardy attaches, and attempts to draw a reasonable balance between requiring an accused to go to trial a second time and forbidding a second prosecution although the first had to be terminated through no fault of the court or prosecution. See Working Papers, pp. 331–36, 343–45.

§ 705. When Prosecution Barred by Former Prosecution for Different Offense.

A prosecution is barred by a former prosecution of the defendant although it is for a violation of a different statute or is based on facts different from those in the former prosecution, if:

(a) the former prosecution resulted in an acquittal or in a conviction as defined in section 704 (a) and (c) or was a barring termination under section 704(d) and the subsequent prosecution is for any offense for which the defendant should have been tried in the first prosecution under section 703(2) unless the court ordered a separate trial of the charge of such offense; or

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

Comment

Federal case law is far from clear at present as to what constitutes "the same offense" for double jeopardy purposes. This section complements § 703(2) and § 704. If the different offense should have been tried with the first offense under the compulsory joinder provision of § 703(2), the double jeopardy provisions of § 704 apply. Even if the different offense was not subject to compulsory joinder, *e.g.*, if the court ordered a separate trial to promote justice or the United States Attorney did not know of the offense at the time of the first arraignment, a second prosecution is barred if res judicata or collateral estoppel applies. See Working Papers, pp. 331–36, 345–46.

§ 706. Prosecutions Under Other Federal Codes.

Sections 704 and 705 shall apply to prosecutions and former prosecutions under the Uniform Code of Military Justice, the District of Columbia Code, the Canal Zone Code, the criminal laws of Puerto Rico and of the territories and possessions of the United States, except that "violation of the same statute" in section 704 shall be construed as violation of a cognate statute.

Comment

This section codifies the rule that prosecutions by the same sovereign under different bodies of law are subject to the restrictions provided in §§ 704 and 705. See *Waller* v. *Florida*, 397 U.S. 387 (1970; *Grafton* v. *United States*, 206 U.S. 333 (1907).

§ 707. Former Prosecution in Another Jurisdiction: When a Bar.

When conduct constitutes a federal offense and an offense under the law of a local government or a foreign nation, a prosecution by the local government or foreign nation is a bar to a subsequent federal prosecution under either of the following circumstances:

(a) the first prosecution resulted in an acquittal or a conviction as defined in section 704 (a) and (c) or was a barring termination under section 704(d) and the subsequent prosecution is based on the same conduct or arose from the same criminal episode, unless (i) the law defining the offense of which the defendant was formerly convicted or acquitted is intended to prevent a substantially different harm or evil from the law defining the offense for which he is subsequently prosecuted, or (ii) the second offense was not consummated when the first trial began; or

(b) the first prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted;

unless the Attorney General of the United States certifies that the interests of the United States would be unduly harmed if the federal prosecution is barred. In this section, "local" means of or pertaining to any of the 50 states of the United States or any political unit within any of the 50 states.

Comment

In 1959, in *Abbate* v. *United States*, 359 U.S. 187 (1959) the Supreme Court held that federal prosecution for conduct previously prosecuted by a state did not put the defendant twice in jeopardy. The Attorney General quickly announced federal policy highly restrictive of subsequent federal prosecutions. This section, in effect, codifies existing practice, establishing a presumptive bar but permitting the Attorney General to authorize a subsequent prosecution in an exceptional case. Note that the bar is not co-extensive with that applying when the first prosecution is federal; there the scope is determined by § 703(2), the provision imposing compulsory joinder. Here it is somewhat narrower, although still broader than the "identical offense" or "same facts" doctrines. Alternative possibilities would include an absolute bar of any of the varying dimensions mentioned above. Considerations supporting this provision are maintenance of federal supremacy and the generally successful experience under the Attorney General's voluntary policy.

Note that prosecution by a foreign nation is treated in the same manner as first prosecution by a local government. See § 208 regarding extraterritorial federal jurisdiction.

"Local" is specially defined here (in lieu of using the definitions of "state" and "local" in § 109) in order to exclude those entities, such as the District of Columbia, which are treated as states for other purposes, *e.g.*, interstate transportation. For double jeopardy purposes those entities are part of the same sovereign. See § 706.

See Working Papers, pp. 331–36, 346–48.

§ 708. Subsequent Prosecution by a Local Government: When Barred.

When conduct constitutes a federal offense and an offense under local law, a federal prosecution is a bar to subsequent prosecution by a local government under either of the following circumstances.

(a) the federal prosecution resulted in an acquittal or a conviction as defined in section 704(a) and (c) or was a barring termination under section 704(d) and the subsequent prosecution is based on the same conduct or arose from the same criminal episode, unless (i) the statute defining the offense of which the defendant was formerly convicted or acquitted is intended to prevent a substantially different harm or evil from the law defining the offense for which he is subsequently prosecuted; or (ii) the second offense was not consummated when the first trial began; or

(b) the federal prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which necessarily required a determination inconsistent with a fact or a legal

proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted. In this section, "local" has the meaning prescribed in section 707.

Comment

This section represents a novel attempt to have a federal standard apply where a locality seeks to prosecute following a federal prosecution within the scope of double jeopardy. At present there is no uniform policy, some states imposing some kind of bar, others leaving it to the local prosecutor's discretion. This provision is similar to § 707, which is applicable when the locality prosecutes first; and the comment to that section is substantially relevant here. Note, however, that a consideration there—federal supremacy—favoring discretionary power in the Attorney General to proceed notwithstanding a prior local acquittal does not apply here, so that there is here an absolute bar against a subsequent local prosecution.

A substantial body of opinion in the Commission, while not in disagreement with the end to be achieved, favors deletion of this section, both because of strong doubts as to its constitutionality and because of the view that, even if constitutional, it would be preferable, as a matter of comity within the federal system, to permit the states to deal with the problem themselves rather than to force this result by Congressional action.

See Working Papers, pp. 331–36, 349–50.

§ 709. When Former Prosecution Is Invalid or Fraudulently Procured.

A former prosecution is not a bar within the meaning of sections 704, 705, 706, 707 and 708 under any of the following circumstances:

(a) it was before a court which lacked jurisdiction over the defendant or the offense;

(b) it was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriae prosecutor, for the purpose of avoiding prosecution for a greater offense and the possible consequences thereof; or

(c) it resulted in a judgment of conviction which was held invalid in a subsequent proceeding on a writ of habeas corpus, coram nobis or similar process.

Comment

This section sets forth three circumstances under which the rules against successive prosecution in the preceding sections do not apply. Paragraph (b) attempts to avoid the danger that a defendant may fraudulently procure his own prosecution for a lesser offense, *e.g.*,

pleading guilty to a minor offense before a lower judicial officer, so that double jeopardy would apply to prosecution for a greater offense, *e.g.*, a felony within the concern of a district attorney. See Working Papers, pp. 331–36.

Part B. Specific Offenses

Chapter 10. Offenses of General Applicability

§ 1001. Criminal Attempt.

(1) Offense. A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime. A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be.

(2) Complicity. 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 section 401 were the crime committed by the other person, even if the other is not guilty of committing or attempting the crime, for example, because he has a defense of justification or entrapment.

(3) Grading. Criminal attempt is an offense of the same class as the offense attempted, except that (a) an attempt to commit a Class A felony shall be a Class B felony, and (b) whenever it is established by a preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the crime, an attempt to commit a Class B felony shall be a Class C felony and an attempt to commit a Class C felony shall be a Class A misdemeanor.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section as prescribed in section 203.

Comment

This section establishes a general provision on attempt which is applicable to every federal crime. There has never been such a provision in federal criminal law. With such a provision there is no need for special statutes to prohibit conduct which merely amounts to an attempt to commit another crime. The section would establish standards as to the requisite intent and conduct and deal uniformly with such questions as impossibility, corroboration, punishment and incapacity of the actor.

Federal law is, at present, unclear as to when preparation ends and attempt begins. In addition to the provision with respect to a substantial step in subsection (1), a provision could be added listing kinds of

conduct which would ordinarily constitute substantial steps, as in A.L.I. Model Penal Code § 5.01(2). As in many modern criminal law revisions, the defense of impossibility is precluded.

Subsection (3) follows existing federal law in grading attempts at the same level as the completed offense, but makes the two exceptions stated. Exception (b) is a version of the dangerous proximity doctrine. The decision to lower the grade of an attempt is a sentencing decision which could be reviewable on appeal. In a few instances in the Code, attempts are to be graded at the same level as the completed offense regardless of the proximity to completion. Such attempts are prohibited in the section defining the offense itself. See, *e.g.*, espionage (§ 1112). Under § 3204, a person cannot be sentenced consecutively for attempt and the completed offense.

See comment to § 203, *supra*, for discussion of attempt jurisdiction.

See Working Papers, pp. 351–68, 431, 434, 453, 668, 748, 753–54, 892, 896–97, 1107–08.

§ 1002. Criminal Facilitation.

(1) Offense. A person is guilty of criminal facilitation if he knowingly provides substantial assistance to a person intending to commit a felony, and that person, in fact, commits the crime contemplated, or a like or related felony, employing the assistance so provided. The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial. This section does not apply to a person who is either expressly or by implication made not accountable by the statute defining the felony facilitated or related statutes.

(2) Defense Precluded. Except as otherwise provided, it is no defense to a prosecution under this section that the person whose conduct the defendant facilitated has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.

(3) Grading. Facilitation of a Class A felony is a Class C felony. Facilitation of a Class B or Class C felony is a Class A misdemeanor.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the felony facilitated is a federal felony.

Comment

This section, in effect, creates an included offense to accomplice liability, and would provide a legislative solution to the dilemma faced by a court which has to choose between holding a facilitator as a full accomplice or absolving him completely of criminal liability. See § 401 and comment thereto, *supra*. The culpability required of a facili-

tator is only *knowledge*, whereas that required of an accomplice is *intent* that the crime be committed. But a facilitator must provide substantial assistance. Under this section the fact that the person facilitated could easily and lawfully have gotten the aid elsewhere is evidence negating the substantiality of the assistance. Alternatively, the ready lawful availability of the assistance from others could be made a defense. The principal must actually have committed the felony contemplated or a similar felony; one cannot facilitate an attempt. See § 1005. The last sentence of subsection (1) has its counterpart in § 401(1), dealing with complicity. See comment to § 401, *supra*. See Working Papers, pp. 153–54, 159–61, 431, 434, 462, 670.

§ 1003. Criminal Solicitation.

(1) Offense. A person is guilty of criminal solicitation if he commands, induces, entreats, or otherwise attempts to persuade another person to commit a particular felony, whether as principal or accomplice with intent to promote or facilitate the commission of that felony, and under circumstances strongly corroborative of that intent, and the person solicited commits an overt act in response to the solicitation.

(2) Defense. It is a defense to a prosecution under this section that, if the criminal object were achieved, the defendant would be a victim of the offense or the offense is so defined that his conduct would be inevitably incident to its commission or he otherwise would not be guilty under the statute defining the offense or as an accomplice under section 401.

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

(4) Grading. Criminal solicitation is an offense of the class next below that of the crime solicited.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section as prescribed in section 203.

Comment

While a few statutes prohibit specific solicitations as substantive offenses, existing federal law has no general prohibition against solicitation of crimes. If the solicitation is successful, the solicitor is criminally liable as an accomplice; if the solicitation does not result in commission of the crime, but the solicitee agrees and an overt act is thereafter committed, the solicitor is criminally liable for conspiracy. Thus, solicitation may be viewed as an attempt to form a conspiracy. The solicitee either has not yet agreed (although he has committed an overt act, such as coming back for further discussions) or he has

agreed but no overt act has been committed sufficient to make the crime a conspiracy. This section would thus expand federal law to cover unsuccessful solicitations of felonies, so as to permit earlier intervention against a criminal enterprise which has moved well beyond mere talk. An overt act is required so that criminality depends upon something besides speech. An alternative would be to penalize solicitation whether or not the person solicited committed an overt act. It should be noted that some other modern criminal code revisions would make solicitation of any crime an offense. In this Code solicitations of crimes which are not felonies are proscribed in a few particular instances rather than by general provision here. See § 1346, dealing with solicitation of offenses obstructing justice.

Instigation is required; mere encouragement is not enough. A "particular" felony must be solicited because to prohibit general exhortations would raise free speech problems. The circumstances under which the solicitation is made must strongly corroborate that the solicitor is serious about having the person solicited act upon the solicitation.

See Working Papers, pp. 351–52, 368–79, 431, 434, 447, 448, 668.

§ 1004. Criminal Conspiracy.

(1) Offense. A person is guilty of conspiracy if he agrees with one or more persons to engage in or cause the performance of conduct which, in fact, constitutes a crime or crimes, and any one or more of such persons does an act to effect an objective of the conspiracy. The agreement need not be explicit but may be implicit in the fact of collaboration or existence of other circumstances.

(2) Parties to Conspiracy. If a person knows or could expect that one with whom he agrees has agreed or will agree with another to effect the same objective, he shall be deemed to have agreed with the other, whether or not he knows the other's identity.

(3) Duration of Conspiracy. A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated or abandoned. "Objectives" includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it. A conspiracy shall be deemed to have been abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations.

(4) Defense Precluded. It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been acquitted, has not been prosecuted or

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

(5) Liability as Accomplice. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined as provided in section 401.

(6) Grading. Conspiracy shall be subject to the penalties provided for attempt in section 1001(3).

(7) Jurisdiction. There is federal jurisdiction over an offense defined in this section as prescribed in section 203.

Comment

The treatment of conspiracy in this Code differs from its treatment under existing federal conspiracy statutes and law in several respects.

1. *Objectives.* In addition to making conspiracy an offense when its objectives are to commit defined offenses, existing statutes define as separate crimes conspiracies which have harmful objectives regardless of whether the objective is a crime if committed by a single person, *e.g.*, "to defraud the United States, or any agency thereof in any manner or for any purpose" (18 U.S.C. § 371). This section is limited to agreements to engage in a crime or crimes which are defined elsewhere. Defrauding the United States, for example, is covered in theft of property (§ 1732), theft of services (§ 1733), forgery (§ 1751), false statements (§ 1352) tax evasion (§ 1401), hindering law enforcement (§ 1303), etc. If there is any doubt about the coverage of these specific offenses, an alternative might be to draft a substantive offense of "defrauding the United States." Consideration might also be given to articulating in subsection (2) the extent to which a conspirator assumes the risk that those with whom he conspires will have additional but related objectives. *Cf. Blumenthal* v. *United States*, 332 U.S. 539 (1947); *Reider* v. *United States*, 281 Fed. 516 (6th Cir.), *cert. denied*, 260 U.S. 734 (1922). It may also be useful to consider replacing the term "objectives" by language that refers more immediately to the "conduct" agreed upon.

2. *Culpability.* Because most crimes in the Code are defined without the federal jurisdictional factor and because culpability is not required as to the facts upon which federal jurisdiction is based, it would not be necessary under this Code to establish that the conspirators contemplated the circumstances which give rise to federal jurisdiction. Under § 203 all that is required is that the jurisdictional circumstance has occurred or would occur if the objectives were accomplished. See comment to § 203, *supra.*

3. *Act.* Under subsection (1) as in existing law any act to effect an objective of the conspiracy suffices for criminal liability; the act need not constitute a "substantial step" as is required in the case of attempt. *Cf.* § 1001. 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.

4. *Grading and Sentencing.* Existing law (18 U.S.C. § 371) estab-

lishes a maximum term of five years' imprisonment for conspiracy to commit any felony, regardless of whether the felony itself carries a penalty of 2 or 20 years; many existing statutes defining specific offenses therefore do not rely upon the general conspiracy statute and repeat the conspiracy provision in order to correlate the sentencing provisions. Subsection (6) of this section relates the penalty to the class of the offense which is the objective of the conspiracy. The Code treats conspiracy, however, as a species of multi-party attempt; the grading is comparable to that provided for attempt and, as is provided for attempt, under § 3204 one cannot be sentenced consecutively for conspiracy and the substantive crime. Although, under the general rule of § 1001, the grading of a conspiracy offense would be lower where the conspiracy had not come dangerously close to accomplishing its goals, conspiracy is punishable equally with the completed offense in the case of certain offenses in the Code, where explicit provision is made for such grading. See, *e.g.*, § 1112 (espionage).

5. *Complicity.* Subsection (5) complements a provision in the complicity draft, § 401(1)(c), reversing a judicially-developed doctrine which imposes complicity liability based solely upon membership in the conspiracy. See comment to § 401, *supra.*

6. *Codification and Clarification.* Subsections (2), (3) and (4) constitute statutory treatment of matters which have been heretofore been left to judicial development. Such codification should not be construed as abandonment of the wealth of federal decisional law on the subject of conspiracy nor as an expression of opinion as to whether procedural aspects of conspiracy trials should or should not be treated by statute elsewhere.

7. *Relation to Organized Crime.* Some opinion favors supplementing conspiracy law with a separately defined offense authorizing very high penalties against leaders of large criminal syndicates. See Working Papers, pp. 381–84; Study Draft § 1005. Proposals of this character were shelved in favor of the provisions in § 3202 authorizing use of the "upper ranges" of imprisonment for dangerous special offenders, including leaders of organized crime. This solution might have to be reconsidered if there were a disposition to change conspiracy from an inchoate offense to an independent offense, since a mere two-party agreement on crime, contemplated by § 1004, inadequately describes the large scale continuous criminal syndicate which should be the target of any such independent offense.

8. *Alternative Treatment of Conspiracy.* A substantial body of opinion in the Commission favors an alternative to subsection (6) which would read as follows: "Grading. Conspiracy shall be graded at the same level as the highest crime conduct constituting which was agreed to be performed or caused." This would reflect the view that conspiracy should be treated not only as an inchoate offense, but also as a separate crime. See Model Penal Code, Tent. Draft No. 10, p. 96 (1960); *Callanan* v. *United States*, 364 U.S. 587, 593–94 (1961). In the opinion of these Commissioners, there is insufficient justification, either in theory or experience, to warrant the approach of the text, which would narrow the scope of present conspiracy law. These same Commissioners wish to express concern that the Code would not permit the

imposition of a consecutive sentence for conspiracy and the commission of the contemplated offense (see § 3204(2)(b); *cf. Clune* v. *United States*, 159 U.S. 590 (1895)), and that subsection (5) of this section overrules the Supreme Court's decision in *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Finally, these Commissioners wish to alert the Congress to the need to give special attention to procedural and evidentiary aspects of conspiracy law when it undertakes substantive reform. See Working Papers, pp. 395–400.

See Working Papers, pp. 155-57, 381–82, 383–402, 431, 434, 1106–07.

§ 1005. General Provisions Regarding Sections 1001 to 1004.

(1) Not to Apply to One Another. An offense defined in sections 1001 to 1004 shall not apply to another offense defined in sections 1001 to 1004.

(2) Attempt and Conspiracy Offenses Outside this Chapter. Whenever "attempt" or "conspiracy" is made an offense outside this Chapter, it shall mean attempt or conspiracy, as the case may be, as defined in this Chapter.

(3) Renunciation Defense.

(a) Attempt. In a prosecution under section 1001 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 abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

(b) Solicitation and Conspiracy. In a prosecution under section 1003 or 1004 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 or crimes contemplated by the conspiracy, as the case may be.

(c) "Voluntary and Complete" Defined. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (i) 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 (ii) a decision to postpone the criminal conduct until another time or to substitute another victim or another but similar objective.

Comment

Subsection (1) makes it clear that the various forms of inchoacy dealt with in this Chapter are not to be cumulated, *i.e.*, one cannot be guilty of an attempt to attempt, or a conspiracy to solicit. Subsection (2) makes the definitions of "attempt" and "conspiracy" applicable to the use of these words elsewhere in the Code. Note that the definitions of "solicit" and "facilitate" are not given a similar generalized application; when these terms are used elsewhere their scope must be derived by the ordinary rules of statutory construction, since limitations appropriate to the definition of a separate offense under this Chapter are not necessarily appropriate elsewhere. For example, although the person solicited must perform an overt act in response to the solicitation under § 1003, an overt act is not required under § 1361 (soliciting a bribe). When read in connection with subsection (1), subsection (2) has the further result that if attempt is explicitly prohibited in the definition of a specific substantive offense, the offenses in §§ 1001 to 1004 do not apply to that attempt. The general offenses may apply, however, to an offense outside of Chapter 10 in which "solicits" or "facilitates" is an element, *e.g.*, conspiracy to solicit a bribe.

Subsection (3) defines an affirmative defense of renunciation to apply to inchoate offenses where the defendant prevented commission of the substantive crime. The defense encourages voluntary abandonment of a crime prior to the causing of harm and also serves to moderate the potentially broad scope of the inchoate offenses. The defense is not available for facilitation, however, because the crime of facilitation itself requires that the crime facilitated be committed.

See Working Papers, pp. 362–64, 376.

§ 1006. Regulatory Offenses.

(1) Section Applicable When Invoked by Another Statute. This section shall govern the use of sanctions to enforce a penal regulation whenever and to the extent that another statute so provides. The limits on a sentence to pay a fine provided in Part C of this Code shall not apply if the other statute fixes a different limit. "Penal regulation" means any requirement of a statute, regulation, rule, or order which is enforcible by criminal sanctions, forfeiture or civil penalty.

(2) General Scheme of Regulatory Sanctions.

(a) Nonculpable Violations. A person who violates a penal regulation is guilty of an infraction. Culpability as to conduct or the existence of the penal regulation need not be proved under this paragraph, except to the extent required by the penal regulation.

(b) Willful Violations. A person who willfully violates a penal regulation is guilty of a Class B misdemeanor. Willful-

ness as to both the conduct and the existence of the penal regulation is required.

(c) Flouting Regulatory Authority. A person is guilty of a Class A misdemeanor if he flouts regulatory authority by willful and persistent disobedience of any body of related penal regulations.

(3) Dangerous Violations of Prophylactic Regulations. A person is guilty of a Class A misdemeanor if he willfully violates a penal regulation and thereby, in fact, creates a substantial likelihood of harm to life, health, or property, or of any other harm against which the penal regulation was directed.

Comment

There are many offenses in the United States Code, both in and outside Title 18, which, for a variety of reasons, do not belong in the Criminal Code, but which nevertheless should be subject to criminal or quasi-criminal sanctions. These provisions are regulatory in nature, generally *malum prohibitum* offenses. They are usually detailed and complex or intimately related to other provisions as part of a regulatory scheme. Often they have been drafted without regard to whether they are consistent with fundamental principles of criminal law. Section 1006 represents a novel method for achieving consistency in penal policy with respect to regulatory offenses. It is proposed that the penalties for violation and grading, based upon culpability and other factors, should be governed by this section in the Criminal Code, even though the offense is defined elsewhere. This section can, where considered appropriate, be incorporated by reference in any regulatory provision outside the Code. Those committees in Congress with special competence in the regulated areas would thus be free to define the misconduct, leaving questions of penology to be resolved by the Criminal Code. Since many regulatory laws deal with regulation of business, higher fines than those provided in the Code may be appropriate. Accordingly, it is made clear that such fine levels may be maintained even though this section is incorporated for other purposes.

In the final enactment of this provision it may be appropriate to include a declaration of policy to the following effect:

Declaration of Policy. The great increase of statutory and administrative regulation comanding affirmative acts or forbidding behavior not condemned by generally recognized ethical standards emphasizes the need for discrimination in the use of the criminal law to enforce such regulation. Use of penal sanctions to enforce regulation involves substantial risk that a person may be subjected to conviction, disgrace, and punishment although he did not know that his conduct was wrongful. When penal sanctions are employed for regulatory offenses, considerations with respect to fair treatment of human beings, as well as the substantive aims of the regulatory statute, must enter into legislative, judicial, and administrative decisions with regard to sanctions. It is the policy of the United

States to prefer nonpenal sanctions over penal sanctions to secure compliance with regulatory law unless violation of regulation manifests disregard for the welfare of others or of the authority of government. It is further the policy of the United States that no purely regulatory offense shall be punishable as a felony.

"Willfully violates," in subsection (2)(b), requires not only that conduct which is, in fact, contrary to a penal regulation be engaged in willfully as defined in § 302(1)(e) but that the willfullness extend to the existence of a prohibition on such conduct as well. For example, a camper who intentionally sets a fire in a forbidden area must also have reason to believe that setting fires there is illegal in order to be guilty of willfully violating the regulation. In the regulatory law area, conduct which is not generally understood to be illegal is often the subject of prohibition.

See Working Papers, pp. 198–203, 403–17, 445–46, 492, 496, 599, 717–18.

Chapter 11. National Security

Introductory Note

Sections 1101 through 1129 are based, for the most part, on the national security provisions currently located in Chapters 37, 105 and 115 of Title 18. Some existing Title 18 provisions, such as those involving trespassing, are dealt with by provisions in other Chapters of the proposed Code. Others are to be relocated outside Title 18.

Some existing felonies relating to national defense are defined outside Title 18. In accordance with the policy that all felonies be brought into the proposed Code, these offenses have been analyzed to determine the extent to which felony penalties are appropriate. Those not brought into the proposed Code would either be retained in their present titles, but graded no higher than misdemeanors, or repealed. Thus, revelation and destruction of restricted data on atomic energy, now dealt with in Title 42, are covered by sections 1112, 1113 and 1121; some Trading With the Enemy Act provisions, now in Title 50, are covered by section 1117; others are covered by section 1204 in the Foreign Relations Chapter and still others would remain outside Title 18. A felony dealing with employment of communists (50 U.S.C. § 784) presents some difficult constitutional issues, recently considered by the Supreme Court. Resolution of these issues, by recasting the offense or otherwise, did not appear essential in a general criminal law reform effort. Therefore, it is contemplated that the offense, which is essentially regulatory, remain in Title 50 with nonfelony sanctions.

The term "war" is used in various sections of Chapter 11. It is not defined and is subject to judicial construction depending upon the circumstances. As under present law a state of war may exist without, or before, a declaration of war. For example, an American who participated in Japan's attack on Pearl Harbor would be guilty of wartime treason under § 1101. Use of other terms in lieu of "war," such as "armed conflict" and "armed hostilities," is not clearly preferable to continuing present usage of "war," since those terms would still require judicial determination as to whether they apply to brief engagements of United States armed forces abroad, such as in the Dominican Republic during 1965, as well as to long conflicts, such as in Southeast Asia.

§ 1101. Treason.

A national of the United States is guilty of treason, a Class A felony, if, when the United States is engaged in international war, he participates in or facilitates military activity of the enemy with intent to aid the enemy or prevent or obstruct a victory of the United States. It is a defense to prosecution under this section that the defendant believed that he was not a national of the United States and such belief was not recklessly held or arrived

at. "National of the United States" means a person who is a citizen of the United States or is domiciled in the United States, except that a person shall not be deemed a national solely because of domicile if by treaty or international law such domicile does not entail allegiance to the United States.

Comment

This section represents an attempt to cast the offense of treason in contemporary terms, and to reduce the difficulties of construction surrounding the current formulation in 18 U.S.C. § 2381 which is derived from the antiquated language in Article III, § 3 of the Constitution. The proposal is based on the conclusion that the Congress need not adhere to the constitutional language in defining treason and that retention of the current provision would be an anachronism in a modern code.

The explicit statutory requirement of culpability, defined as "intent to aid the enemy or prevent or obstruct a victory of the United States," is new. The existing statute contains no separately identifiable culpability element. Instead, the *mens rea* of "intent to betray" has been developed by judicial decision, resulting in difficulties and confusion. The limitation of treasonous conduct to participation in or facilitation of military activity of the enemy during international war is also new. The current catchall language in 18 U.S.C. § 2381, *i.e.*, giving aid and comfort to the enemy, covers both serious and trivial conduct and affords no rational basis for grading. Since "facilitates" could also be construed to cover trivial conduct, an alternative would be to delete that word, relying upon judicial construction of "participates" to reach conduct beyond actual membership in military forces. Note that wartime or peacetime hostile conduct, whether or not by a national, is embraced by espionage or sabotage.

Present law designates the persons capable of committing treason as those who "owe allegiance" to the United States. Section 1101 undertakes to give more precision to the scope of the offense by making it applicable to "nationals" of the United States, and defining that concept primarily in terms of citizenship and domicile. However, as appears in the final clause of § 1101, a vestigial reliance on the concept of allegiance is necessary in order to exclude several classes of nonimmigrant aliens, *e.g.*, treaty traders, officers of international organizations and certain persons who are noncitizen nationals by virtue of domicile in overseas territories of the United States. Some "traitorous" conduct by nonnationals is covered in § 1102 if it occurs within the United States.

The constitutional requirement of two witnesses to an overt act of treason is not codified in § 1101, which in this respect is patterned on existing law.

As respects the possibility that treason may be subjected to the death penalty or life imprisonment, see Chapter 36.

See Working Papers, pp. 419–30, 462.

§ 1102. Participating in or Facilitating War Against the United States Within Its Territory.

(1) Offense. A person is guilty of a Class A felony if, within the territory of the United States when the United States is engaged in international war, he participates in or facilitates military activity of the enemy with intent to aid the enemy or prevent or obstruct a victory of the United States.

(2) Defense. It is an affirmative defense to a prosecution under this section that the defendant acted as a member of the armed service of the enemy in accordance with the laws of war and that he was not or reasonably believed he was not a national of the United States, as defined in section 1101.

Comment

This offense is coordinate with treason (§ 1101), but has broader scope inasmuch as it covers hostile acts by nonnationals when committed within the United States. A nonnational's service in enemy armed forces pursuant to the laws of war is, of course, excepted from the section. See Working Papers, pp. 419–30, 462.

§ 1103. Armed Insurrection.

(1) Engaging in Armed Insurrection. A person is guilty of a Class B felony if he engages in an armed insurrection with intent to overthrow, supplant or change the form of the government of the United States or of a state.

(2) Leading Armed Insurrection. A person is guilty of a Class A felony if, with intent to overthrow, supplant or change the form of the government of the United States or of a state, he directs or leads an armed insurrection, or organizes or provides a substantial portion of the resources of an armed insurrection which is in progress or is impending or any part of such insurrection involving 100 persons or more.

(3) Advocating Armed Insurrection. A person is guilty of a Class C felony if, with intent to induce or otherwise cause others to engage in armed insurrection in violation of subsection (1), he:

(a) advocates the desirability or necessity of armed insurrection under circumstances in which there is substantial likelihood his advocacy will imminently produce a violation of subsection (1) or (2); or

(b) organizes an association which engages in the advocacy prohibited in paragraph (a), or, as an active member of such association, facilitates such advocacy.

(4) Attempt; Conspiracy; Facilitation; Solicitation. A person shall not be convicted under sections 1001 through 1004:

(a) with respect to subsection (3)(a) unless he engaged in conduct under circumstances in which there was a substantial likelihood that it would imminently produce a violation of subsection (1) or (2); or

(b) with respect to subsection (1), (2) or (3)(b) if his conduct constituted no more than an attempt or conspiracy to violate subsection (3)(a) under circumstances in which there was no substantial likelihood that such attempt or conspiracy would imminently produce a violation of this section.

Comment

This section covers a wide variety of conduct directed toward insurrection as distinguished from conduct involving the commission of specific crimes such as murder, assault and property offenses. Subsections (1) and (2) would replace 18 U.S.C. §§ 2383 and 2384, which deal with armed insurrection and seditious conspiracy. The major change with respect to existing law is that, for purposes of grading, § 1103 distinguishes between leaders (subsection (2)) and mere participants (subsection (1)).

Subsection (3) carries forward 18 U.S.C. § 2385 (Smith Act) taking into account the construction of it developed by the courts. Inoperative language has been deleted; but the essential prohibition against advocating armed insurrection has been retained. It is keyed to subsections (1) and (2) through its culpability element, the intent to induce armed insurrection, and the requirement that the conduct be likely to induce a violation of subsections (1) and (2). The offense of advocacy is viewed like an inchoate offense, as a step removed from actual insurrection. This section incorporates judicially-expressed constitutional requirements, *e.g.*, the "clear and present danger" test.

Present 18 U.S.C. §§ 2383 and 2384 only cover insurrection against the government of the United States. Present 18 U.S.C. § 2385 covers advocating insurrection against the government of the United States, of any state or of any political subdivision of any state. The inchoate and the completed offense have here been made parallel to the extent that actual armed insurrection against state governments is also subject to federal prosecution. Advocacy of armed insurrection against a political subdivision of a state has been left to the states to deal with.

See Working Papers, pp. 430–35.

§ 1104. Para-Military Activities.

(1) Offense. A person is guilty of an offense if he knowingly engages in, or intentionally facilitates, para-military activities not authorized by law. "Para-military activities" means acquisition, caching, use, or training in the use, of weapons for political purposes by or on behalf of an association of ten or more persons.

Activities authorized by law include activities of the armed forces of the United States or of a state, including reserves and the National Guard, and federal, state or local law enforcement operations.

(2) Grading. The offense is a Class B felony if the actor organizes, directs, leads or provides a substantial portion of the resources for para-military activities involving an association of 100 or more persons. Otherwise the offense is a Class C felony.

Comment

This section is designed to outlaw private armies. Except for the unenforced provisions of 18 U.S.C. § 2386, which require registration of such organizations, there is no similar provision in existing law. There are a number of counterparts in the laws of other nations, including Canada and the United Kingdom; the problems with which those laws deal are similar to problems existing in the United States. Troublesome questions which arise in connection with this section are: (1) does it effectively reach private armed groups whose alleged objective is "self-defense"? (2) does it improperly jeopardize groups who have indeed armed themselves for protective purposes, *e.g.*, to patrol neighborhoods with high rates of violent crimes? See Working Papers, pp. 431, 436–39.

§ 1105. Sabotage.

(1) Wartime Sabotage. A person is guilty of sabotage if, in time of war and with intent to impair the military effectiveness of the United States, he:

(a) damages or tampers with anything of direct military significance or a vital public facility as defined in section 1709(c);

(b) defectively makes or repairs anything of direct military significance;

(c) delays or obstructs transportation, communication or power service of or furnished to the defense establishment; or

(d) causes or creates a risk of catastrophe as defined in section 1704(4) by any means listed in section 1704(1).

Sabotage under this subsection is a Class A felony if it jeopardizes life or the success of a combat operation. Otherwise it is a Class B felony.

(2) Other Catastrophic Sabotage. A person is guilty of a Class A felony if, whether or not in time of war, with intent to impair the military effectiveness of the United States, he impairs the efficacy of military missiles, space vessels, satellites, nuclear

weaponry, early warning systems, or other means of defense or retaliation against catastrophic enemy attack.

(3) Definitions. In this section:

(a) "defense establishment" means the defense establishment of the United States or of a nation at war with any nation with which the United States is at war;

(b) "anything of direct military significance" means armament or anything else peculiarly suited for military use, and includes such a thing in course of manufacture, transport, or other servicing or preparation for the defense establishment.

Comment

This section, together with §§ 1106 and 1107, would replace the existing sabotage statutes (18 U.S.C. §§ 2151–2156) with a scheme which is less complex, which covers some conduct not presently covered, and which takes contemporary conditions into account.

Existing law attempts to list property which may be subject to sabotage, *e.g.*, ". . . stores of clothing, air [*sic*], water, food, foodstuffs . . ."; but the presence of a catchall phrase at the end of the list is testimony to the difficulty of the task, *i.e.*, ". . . and all articles, parts or ingredients intended for, adapted to, or suitable for the use of the United States or any associate nation, in connection with the conduct of war or defense activities" (18 U.S.C. § 2151). This section takes a different approach. It describes both the kinds of property and the prohibited conduct in general terms, requiring that an intent to impair the military effectiveness of the United States accompany the conduct with respect to the property so described.

The references to a thing of *direct* military significance in subsections (1)(a) and (1)(b) are intended to exclude property which, while belonging to the military establishment, is of a clearly nonmilitary character, *e.g.*, typewriters. Delays and obstructions covered by subsection (1)(c) are additions to existing law. Damage to vital civilian facilities in war with the appropriate intent is federally punishable as sabotage under subsections (1)(a) and (1)(d) because jurisdiction over arson and catastrophe is not plenary.

The requirement of "intent to impair the military effectiveness of the United States" is similar to existing law, but differs in that existing law also comprehends an intent to injure an ally. Under the definition of "defense establishment" in subsection (3)(a), this section covers injuries to allies if there is an intent thereby to injure the United States.

Grading under existing law distinguishes between war and national emergency, on the one hand, and peace on the other. But the most serious and irreparable harm to national defense can occur even before a national emergency is recognized, through injury to sudden strike systems and defenses against such systems. Thus this section classifies sabotage of that variety as well as sabotage in wartime as the most serious offenses.

Contrary to existing law, the existence of a "national emergency" is not an element of grading here. National emergency declarations

by the President, primarily significant for civil and administrative purposes, have continued in force for decades, and therefore operate arbitrarily, if at all, in grading. It should be emphasized that this has significance only with respect to grading, not the definition of an offense. Intentionally impairing the military effectiveness of the United States during peacetime, not amounting to sabotage under this section, could nevertheless be a Class C felony under § 1107.

See Working Papers, pp. 423, 426, 439–45, 453, 454, 464, 465.

§ 1106. Recklessly Impairing Military Effectiveness.

A person is guilty of a Class C felony if, in reckless disregard of a substantial risk of seriously impairing the military effectiveness of the United States, he intentionally engages, in time of war, in the conduct prohibited in paragraphs (a) through (d) of section 1105(1), or, whether or not in time of war, in the conduct prohibited in section 1105(2).

Comment

This section replaces those portions of existing sabotage statutes which impose criminal liability upon a person who acts "with reason to believe that his act may injure, interfere with, or obstruct the United States" in preparing for or carrying on war or defense activities (18 U.S.C. §§ 2153, 2154). While it is similar to existing law in not requiring that an intent to harm the military effort accompany intentional misconduct, this section is more explicit as to the requirement of a culpability greater than mere negligence. See Working Papers, pp. 439–45, 464.

§ 1107. Intentionally Impairing Defense Functions.

A person is guilty of a Class C felony if, with intent to impair the military effectiveness of the United States, he engages in the conduct prohibited in paragraphs (a) through (d) of section 1105 (1) and thereby causes a loss which is, in fact, in excess of $5,000.

Comment

This offense is similar to sabotage, but is a Class C, rather than Class A, felony, absent circumstances of war or risk of catastrophic defense impairment. The requirement that the loss caused be in excess of $5,000 parallels the felony grading provisions of criminal mischief (§ 1705), leaving less serious harms to the misdemeanor grading provisions of that section. See Working Papers, pp. 439–45.

§ 1108. Avoiding Military Service Obligations.

(1) Offense. A person is guilty of a Class C felony if, in violation of the regulatory act and with intent to avoid service in the

armed forces of the United States or the performance of civilian work in lieu of induction into the armed forces, he:

(a) fails to register;

(b) fails to report for induction into the armed forces;

(c) refuses induction into the armed forces; or

(d) refuses or fails to perform, or avoids the performance of, civilian work required of him.

"Regulatory act" means Selective Service Act of 1967, or any other statute applicable to the recruiting of personnel for the armed forces, and any rules or regulations issued pursuant thereto.

(2) Duration of Offense. An offense under subsection (1)(a) is deemed to continue until the actor is no longer under a duty to register as provided in the regulatory act.

Comment

Existing law makes any violation of the Selective Service Act, regardless of how trivial or the kind of intent, subject to felony penalties (50 U.S.C. App. § 462).

Section 1108 restricts the felony to major violations where there is intent to avoid military or substitute service; other violations would be subject to nonfelony sanctions under the Selective Service Act or equivalent legislation appearing in Title 50.

Subsection (2) is necessary to counteract the recent Supreme Court construction of the Selective Service Act in *Toussie* v. *United States*, 397 U.S. 112 (1970), that the statute of limitations for failure to register begins to run when defendant is 18, thus barring prosecution when defendant is 23.

See Working Papers, pp. 445–46.

§ 1109. Obstruction of Recruiting or Induction into Armed Forces.

A person is guilty of a Class C felony if:

(a) in time of war, he intentionally and substantially obstructs the recruiting service by physical interference or obstacle or solicits another to violate section 1108; or

(b) with intent to avoid or delay his or another's service in the armed forces of the United States, he employs force, threat or deception to influence a public servant in his official action.

"Recruiting service" means a voluntary enlistment system, the Selective Service System or any other system for obtaining personnel for the armed forces of the United States.

Comment

This section recasts 18 U.S.C. § 2388, which deals with obstruction of recruiting services, in order to meet constitutional issues, correct

grading disparities and integrate the offense into the Code as a whole. Thus, while reducing the 20-year penalty provided in existing law, paragraph (a) upgrades physical obstruction of recruiting services (from the Class A misdemeanor of obstructing any government function, § 1301) to a Class C felony when it occurs in time of war. Similiarly, an unsuccessful solicitation to violate § 1108 (a Class A misdemeanor under § 1003) is raised here to a Class C felony when it is committed in time of war. In addition, paragraph (b) covers the use of force, threat, or deception against a public servant to prevent service in the armed forces, whether under the Selective Service Act or otherwise. See Working Papers, pp. 445, 446–48, 448–50.

§ 1110. Causing Insubordination in the Armed Forces.

(1) Offense. A person is guilty of an offense if he intentionally causes insubordination, mutiny or refusal of duty by a member of the armed forces of the United States.

(2) Grading. The offense is a Class B felony if committed in time of war and it consists of (a) causing mutiny, or (b) causing insubordination or refusal of duty of ten or more persons, or (c) causing insubordination or refusal of duty in or directly relating to a combat operation. Otherwise it is a Class C felony.

Comment

This section covers those aspects of 18 U.S.C. §§ 2387 and 2388 which have been described as dealing with impairing the morale of the armed forces. Under existing law, grading is based upon the existence or nonexistence of war. Here grading is more discriminating, because the factor of wartime should not alone aggravate all causing of insubordination, *e.g.*, causing one soldier to refuse to perform KP. See Working Papers, pp. 446–47, 448, 449–50.

§ 1111. Impairing Military Effectiveness by False Statement.

(1) Offense. A person is guilty of an offense if, in time of war and with intent to aid the enemy or to prevent or obstruct the success of military operations of the United States, he knowingly makes or conveys a false statement of fact concerning losses, plans, operations or conduct of the armed forces of the United States or those of the enemy, civilian or military catastrophe, or other report likely to affect the strategy or tactics of the armed forces of the United States or likely to create general panic or serious disruption.

(2) Grading. The offense is a Class B felony if it causes serious impairment of the military effectiveness of the United States. Otherwise it is a Class C felony.

Comment

This section covers matters now dealt with in 18 U.S.C. § 2388. As under existing law, the proscription is limited to conduct occurring in time of war and accompanied by an intent adversely to affect United States military operations. The statement must be one of "fact"—that is, susceptible of proof of truth or falsity—as distinguished from political opinion. See *Pierce* v. *United States*, 252 U.S. 239 (1920). See Working Papers, pp. 446–47, 448–50.

§ 1112. Espionage.

(1) Offense. A person is guilty of espionage if he:

(a) reveals national security information to a foreign power or agent thereof with intent that such information be used in a manner prejudicial to the safety or interest of the United States; or

(b) in time of war, elicits, collects or records, or publishes or otherwise communicates national security information with intent that it be communicated to the enemy.

(2) Grading. Espionage is a Class A felony if committed in time of war or if the information directly concerns military missiles, space vessels, satellites, nuclear weaponry, early warning systems or other means of defense or retaliation against catastrophic enemy attack, war plans, or any other major element of defense strategy, including security intelligence. Otherwise espionage is a Class B felony.

(3) Attempt and Conspiracy. Attempted espionage and conspiracy to commit espionage are punishable equally with the completed offense. Without limiting the applicability of section 1001 (Criminal Attempt), any of the following acts is sufficient to constitute a substantial step under section 1001 toward commission of espionage under subsection (1)(a): obtaining, collecting, or eliciting national security information or entering a restricted area to obtain such information.

(4) Definitions. In this section:

(a) "national security information" means information regarding:

(i) the military capability of the United States or of a nation at war with a nation with which the United States is at war;

(ii) military or defense planning or operations of the United States;

(iii) military communications, research or development of the United States;

(iv) restricted data as defined in 42 U.S.C. § 2014 (relating to atomic energy);

(v) security intelligence of the United States, including information relating to intelligence operations, activities, plans, estimates, analyses, sources and methods;

(vi) classified communications information as defined in section 1114;

(vii) in time of war, any other information relating to national defense which might be useful to the enemy;

(b) "military" connotes land, sea or air military and both offensive and defensive measures;

(c) "foreign power" includes any foreign government, faction, party, or military force, or persons purporting to act as such, whether or not recognized by the United States, any international organization, and any armed insurrection within the United States.

(d) "agent" means representative, officer, agent or employee or, in case of a nation, a subject or citizen.

Comment

This formulation of espionage substantially carries forward existing espionage statutes, 18 U.S.C. §§ 793–798. The term "reveals" is used in subsection (1)(a), however, to deal with problems raised in connection with the transmittal of information in the public domain. It permits a court to distinguish between the assembly and analysis of such information so as to constitute a revelation, and the simple transmittal of, for example, a daily newspaper. The culpability requirement of subsection (1)(a) is taken from 18 U.S.C. § 798. The definition of national security information in subsection (4)(a) is suggested by judicial construction of existing law. Note the inclusion of restricted data under the Atomic Energy Act and of intelligence and communications matters, now covered by 42 U.S.C. § 2274 and 18 U.S.C. §§ 798 and 952.

Subsection (2) changes the grading scheme of existing law in a manner similar to the change with respect to sabotage. See comment to § 1105, *supra*.

Subsection (3) grades attempts at the same level as the completed offense, which will not always be the case under the general attempt provision, § 1001. By specifying conduct sufficient to constitute an attempt (provided culpability is also present), this subsection eliminates the need for separate statutes dealing with those matters. *Cf.* 18 U.S.C. § 793 (a) and (b).

See Working Papers, pp. 450–54.

§ 1113. Mishandling National Security Information.

A person is guilty of a Class C felony if, in reckless disregard of potential injury to the national security of the United States, he:

(a) knowingly reveals national security information to anyone not authorized to receive it;

(b) violates a known duty, to which he is subject as a public servant, as to custody, care or disposition of national security information or as to reporting an unlawful removal, delivery, loss, destruction, or compromise of the security of such information; or

(c) knowingly having possession of a document or thing containing national security information, fails to deliver it on demand to a public servant of the United States entitled to receive it.

"National security information" has the meaning prescribed in section 1112(4).

Comment

This section deals with reckless mishandling of national security information in substantially the same manner as does existing law, under 18 U.S.C. § 793(c) (d) and (e) and other Title 18 provisions addressed to communication with reason to believe the conduct may injure the United States. This section also covers provisions on restricted data under the Atomic Energy Act and provisions dealing with intelligence and communications matters. See 42 U.S.C. § 2274; 18 U.S.C. §§ 798, 952.

See Working Papers, pp. 454–56.

§ 1114. Misuse of Classified Communications Information.

(1) Offense. A person is guilty of a Class C felony if he knowingly:

(a) communicates classified communications information or otherwise makes it available to an unauthorized person;

(b) publishes classified communications information; or

(c) uses classified communications information in a manner prejudicial to the safety or interest of the United States.

(2) Attempt and Conspiracy. Attempt and conspiracy to violate this section are punishable equally with the completed offense.

(3) Definitions. In this section:

(a) "communications information" means information:

(i) regarding the nature, preparation or use of any code, cipher or cryptographic system of the United States or of a foreign power;

(ii) regarding the design, construction, use, maintenance or repair of any device, apparatus or appliance used or

prepared or planned for use by the United States or a foreign power for cryptographic or intelligence surveillance purposes;

(iii) regarding the intelligence surveillance activities of the United States or a foreign power; or

(iv) obtained by the process of intelligence surveillance from the communications of a foreign power;

(b) communications information is "classified" if, at the time the conduct is engaged in, the communications information is, for reasons of national security, specifically designated by a United States government agency for limited or restricted dissemination or distribution;

(c) "code," "cipher" and "cryptographic system" include, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance or means of communications;

(d) "intelligence surveillance" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

(e) "unauthorized person" means a person who, or agency which, is not authorized to receive communications information by the President or by the head of a United States government agency which is expressly designated by the President to engage in intelligence surveillance activities for the United States;

(f) "foreign power" has the meaning prescribed in section 1112(4).

(4) Congressional Use. This section shall not apply to the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States or joint committee thereof. Inapplicability under this subsection is a defense.

Comment

This section substantially carries forward the provisions of 18 U.S.C. § 798. Subsection (1)(c), in present law, reads: ". . . in a manner prejudicial to the safety or interest of the United States or for the advantage of any foreign power to the injury of the United States." The latter phrase has been dropped as surplusage. The present law also contains the culpability requirement of "willfully," as well as

"knowingly;" but that requirement, which would probably be "intentionally" under the Code formulations, has also been dropped. At the same time, however, the offense is graded somewhat lower than in present law (10 years), and the matters covered by this section are explicitly included in the definition of "national security information" in espionage (§ 1112), where intent to injure the United States is required and grading is at the Class A and B felony levels.

§ 1115. Communication of Classified Information by Public Servant.

(1) Offense. A public servant or former public servant is guilty of a Class C felony if he communicates classified information to an agent or representative of a foreign government or to an officer or member of an organization defined in 50 U.S.C. § 782(5) (communist organizations). "Classified information" means information the dissemination of which has been restricted by classification by the President or by the head of a United States government agency with the approval of the President as affecting the security of the United States.

(2) Defenses.

(a) It is a defense to a prosecution under this section that the public servant or former public servant was specifically authorized by the President or by the head of the United States government agency which he served to make the communication prohibited by this section.

(b) It is an affirmative defense to a prosecution under this section that the former public servant obtained the information in a manner unrelated to his having been a public servant or, if not so obtained, it was not classified while he was a public servant.

Comment

This section brings the provisions of 50 U.S.C. § 783(b) into Title 18, but extends the scope of the prohibitions to former public servants, subject to an appropriate affirmative defense. The section continues existing law in requiring proof only of intentional communication of classified information by a public servant to a foreign nation or the proscribed organization. No defense of faulty classification is provided. An alternative provision, prohibiting communication of classified information by anyone, together with a defense of inappropriate classification, has been considered. No need for a change from current policy to a broader prohibition, long rejected by the Congress, appears to have been established. See Working Papers, pp. 442, 450–53, 454–56, 457–61.

§ 1116. Prohibited Recipients Obtaining Information.

An agent or representative of a foreign government or an officer or member of an organization defined in 50 U.S.C. § 782(5) (communist organizations) is guilty of a Class C felony if he:

(a) knowingly obtains classified information, as defined in section 1115; or

(b) solicits another to commit a crime defined in sections 1112, 1113, 1114 or 1115.

Comment

This section is the counterpart of § 1115 for certain recipients of sensitive information and provides Class C felony treatment of such persons when they solicit violations of §§ 1112 to 1115. See Working Papers, pp. 442, 450–56, 457, 458–61.

§ 1117. Wartime Censorship of Communications.

A person is guilty of a Class C felony if, in time of declared war and in violation of a statute of the United States, or regulation, rule or order issued pursuant thereto, he:

(a) knowingly communicates or attempts to communicate with the enemy or an ally of the enemy;

(b) knowingly evades or attempts to evade submission to censorship of any communication passing or intended to pass between the United States and a foreign nation;

(c) uses any code or device with intent to conceal from censorship the meaning of a communication described in paragraphs (a) and (b); or

(d) uses any mode of communication knowing it is prohibited by such statute or regulation, rule or order issued pursuant thereto.

Comment

This section brings into the Code the wartime censorship provisions of the Trading With the Enemy Act (50 U.S.C. App. § 3(c) and (d)). The Trading With the Enemy Act refers to "declared war;" and that limitation is continued here. See Working Papers, pp. 450–56, 457, 458–61.

§ 1118. Harboring or Concealing National Security Offenders.

A person is guilty of a Class C felony if he knowingly harbors or conceals another who has committed or is about to commit treason (section 1101), sabotage (section 1005), espionage (section 1112), or murder of the President or Vice President (section 1601).

Comment

This section is derived from 18 U.S.C. § 792, which makes it a crime to harbor or conceal those who have committed or are about to commit espionage. Coverage is somewhat broadened to include traitors, saboteurs, and assassins of the President and Vice President. In its "after-the-fact" aspect, this offense overlaps the Code's prohibition against giving aid to any offender (§ 1303), but does not require proof of an intent to hinder law enforcement. See comment to § 1303, *infra*. In its "before-the-fact" aspect, this section, unlike the complicity provisions (§ 401) and the general offense of criminal facilitation (§ 1002), does not require that the crime the other is about to commit, or even an attempt, ultimately be committed. Thus the harborer may be subject to criminal liability when, as is possible in some situations, the person he has harbored is not. Accordingly the list of crimes included has been carefully limited. See Working Papers, pp. 461–63, 468.

§ 1119. Aiding Deserters.

(1) Offense. A person is guilty of an offense if he intentionally assists a member of the armed forces of the United States to desert or attempt to desert or, knowing that a member of the armed forces has deserted, he engages in the conduct prohibited in paragraphs (a) through (d) of subsection (1) of section 1303 with intent to aid the other to avoid discovery or apprehension.

(2) Grading. The offense is a Class C felony if it is committed in time of war. Otherwise it is a Class A misdemeanor.

Comment

This section carries forward the provisions of 18 U.S.C. § 1381, in terms of the formulation developed for hindering law enforcement under § 1303 of the proposed Code. See Working Papers, pp. 463–64.

§ 1120. Aiding Escape of Prisoner of War or Enemy Alien.

A person is guilty of a Class C felony if he intentionally:

(a) facilitates the escape of a prisoner of war held by the United States or any of its allies or of a person apprehended or detained as an enemy alien by the United States or any of its allies; or

(b) interferes with, hinders, delays or prevents the discovery or apprehension of a prisoner of war or an enemy alien who has escaped from the custody of or detention by the United States or any of its allies, by engaging in the conduct prohibited in paragraphs (a) through (d) of subsection (1) of section 1303.

Comment

This section substantially replaces 18 U.S.C. § 757, which authorizes up to ten years' imprisonment for the prohibited conduct.

§ 1121. Offenses Relating to Vital Materials.

A person is guilty of a Class B felony if, with intent to injure the United States or to secure an advantage to a foreign power in the event of a military confrontation with the United States, he engages in conduct prohibited or declared to be unlawful by 42 U.S.C. §§ 2077, 2122, 2131, 2276 (relating to atomic energy) or 50 U.S.C. § 167c (relating to helium). "Foreign power" has the meaning prescribed in section 1112(4).

Comment

This section substantially carries forward the provisions of 42 U.S.C. § 2272, which impose high penalties for violations of Atomic Energy Act provisions relating to unlicensed trafficking in and use of nuclear materials, atomic weapons, utilization and production facilities and destruction of restricted data. Comment as to disposition of other offenses related to nuclear energy may be found in the Working Papers. Also covered by this section are unlicensed sale or transfers of helium in interstate commerce after the President determines that regulation thereof is required for the defense, security and general welfare of the United States. Such sales or transfers are presently felonies under 50 U.S.C. § 167k. See Working Papers, pp. 464–65.

§ 1122. Person Trained in Foreign Espionage or Sabotage.

A person is guilty of a Class C felony if he knowingly:

(a) fails to register with the Attorney General as required by 50 U.S.C. § 851 (relating to persons trained in a foreign espionage or sabotage system); or

(b) makes a false written statement in a registration statement required by 50 U.S.C. § 851, when the statement is material and he does not believe it to be true.

Comment

This section brings into the Code the felony defined in 50 U.S.C. § 851. Absent this section's explicit coverage, the making of the material false statements contemplated here would only be a Class A misdemeanor under § 1352 of the proposed Code. See Working Papers, p. 466.

§ 1129. Time of War; Culpability.

Time of war or wartime, for the purposes of this Chapter, means time when the United States is at war. Culpability as to the state of war need not be proved.

Comment

This section is intended to be explicit that time of war means only a war involving the United States. The last sentence will make it unnecessary for the government to prove that the defendant knew the United States was at war, a state of mind difficult to prove but almost certain to exist.

Chapter 12. Foreign Relations, Immigration and Nationality

FOREIGN RELATIONS AND TRADE

§ 1201. Military Expeditions Against Friendly Powers.

(1) Offense. A person is guilty of a Class C felony if he:

(a) launches an air attack from the United States against a friendly power;

(b) organizes a military expedition assembled in the United States to engage in armed hostilities against a friendly power; or

(c) within the United States, joins or knowingly provides substantial resources or transportation from the United States to a military expedition described in paragraph (b).

(2) Definitions. In this section:

(a) "friendly power" means a foreign government, whether or not recognized by the United States, or a faction engaged in armed hostilities, with which the United States is at peace;

(b) "armed hostilities" means international war or civil war, rebellion or insurrection.

Comment

This section, carrying forward the substance of 18 U.S.C. § 960, implements a national obligation under international law and protects neutrality. Existing law deals with both expeditions and enterprises. The proposed section continues use of the term "expedition" because of its fairly well-developed meaning under existing law, but covers the substance of "enterprise" in § 1202. Coverage of launching an air attack from the United States, whether or not more than one person is involved, is made explicit. Note that it is an offense to engage in organizational activities regardless of where such activities take place; but it is an offense to join the expedition or knowingly provide it with transportation or substantial resources only if that conduct occurs within the United States. The distinction is made in order to avoid undue interference in activities which should not concern the United States, such as joining the expedition when it is on the high seas. As under existing law, the offense is committed if the expedition is assembled in the United States with the prohibited purpose, even though it is not launched from the United States. See Working Papers, pp. 484–91, 497, 506–09.

§ 1202. Conspiracy to Commit Offenses Against a Friendly Nation.

A person is guilty of a Class C felony if he agrees with another to engage in conduct hostile to a friendly nation within the terri-

tory of any foreign nation and if a party to the agreement engages in conduct within the United States constituting a substantial step toward effecting the objective of the agreement. "Conduct hostile to a friendly nation" means:

(a) gathering information relating to the national defense of a friendly nation while such nation is engaged in international war, with intent to reveal such information to the injury of such nation or to aid its enemy;

(b) intentionally killing a public servant of a friendly nation on account of his official duties; or

(c) engaging in theft or intentional destruction of or damage to or tampering with property belonging to or in the custody of the government of a friendly nation, or the intentional destruction of or damage to or tampering with a vital public facility located within the territory of a friendly nation, provided the conduct under this paragraph would constitute a felony if the property belonged to the United States or was a vital public afcility as defined in section 1709(c).

"Friendly nation" means a nation with which the United States is at peace.

Comment

This section is largely derived from 18 U.S.C. § 956, although the current provision deals only with property depredations (paragraph (c) of the section). Also carried forward under this formulation is the aspect of 18 U.S.C. § 960 dealing with the launching of "military enterprises" (as well as "military expeditions," see § 1201) from the United States. Section 960 has been judicially construed to include intelligence activities (paragraph (a) of the section). The provision dealing with murder of foreign officials (paragraph (b)), while new, is a logical extension of the list of activities prohibited under existing law. The qualification in paragraph (c) that the property crimes constitute felonies under the proposed Code, were United States property or vital facilities involved, avoids involvement of American law enforcement in trivial foreign crimes. See Working Papers, pp. 441, 484–91, 506–509.

§ 1203. Unlawful Recruiting for and Enlistment in Foreign Armed Forces.

(1) Offense. A person is guilty of a Class A misdemeanor if, within the United States, he:

(a) enters or agrees to enter the armed forces of a foreign nation; or

(b) recruits or attempts to recruit another for the armed forces of a foreign nation.

(2) Defense. It is an affirmative defense to a prosecution under this section that the conduct was authorized by statute or a regulation, rule, or order issued pursuant thereto.

Comment

This section substantially re-enacts 18 U.S.C. § 959. Parts of the existing law describe special situations to which the prohibitions do not apply, *e.g.*, recruitment of a person who is not a citizen of the United States by a citizen of a war-time ally. There is no need to deal with these situations in the Criminal Code; and it is recommended that the provisions which do so be transferred to Title 22. That the conduct has been authorized by those provisions is an affirmative defense, pursuant to subsection (2). It should be noted that neither this provision nor § 1201 prohibits a person from leaving the United States with intent to enlist abroad. This continues current policy. See Working Papers, pp. 427, 496–98.

§ 1204. International Transactions.

(1) Offense. A person is guilty of a Class C felony if he engages in conduct prohibited or declared to be unlawful by a statute listed in subsection (2), with intent to conceal a transaction from a government agency authorized to administer the statute or with knowledge that his unlawful conduct substantially obstructs, impairs or perverts the administration of the statute or any government function.

(2) Statutes. The following statutes are covered by subsection (1):

(a) 12 U.S.C. § 95a or 50 U.S.C. App. § 5(b) (relating to embargo on gold bullion and regulation of foreign-owned property);

(b) 22 U.S.C. § 447(c) (relating to financial and arms transactions with belligerents);

(c) 22 U.S.C. § 287c(b) (relating to support of United Nations Security Council resolutions);

(d) 50 U.S.C. App. § 3(a) (relating to unlicensed trading with the enemy);

(e) 50 U.S.C. App. § 2405(b) (relating to exports to communist-dominated nations under Export Control Act).

Comment

The purpose of this section is to identify the kinds of culpability which should make violation of the myriad regulatory provisions of the listed statutes subject to a felony penalty. The statutes involved have in common the fact that they deal with the normally legitimate conduct of exporting goods, services, money or credit, but use criminal

sanctions to enforce prohibitions or complex regulatory schemes which are designed to conserve American assets or to implement American foreign policy, such as quarantine of certain nations, obligations of neutrality and other international obligations. Contrary to the policy of this Code, these laws indiscriminately provide serious felony penalties for virtually any violation, including the most trivial. For example, an exporter to a U.N.-quarantined nation who fails to make appropriate presentation of an "original" license with the required notations thereon "in ink" (31 C.F.R. § 530.808) could be subject to a ten-year prison term under 22 U.S.C. § 287c. Only deception and other substantial obstructions of the regulatory scheme are here made subject to the felony penalty.

The two similar statutes referred to in subsection (2)(a) permit the President, during time of war or "any other period of national emergency declared by the President," to regulate or prohibit, by proclamation, transactions in foreign exchange, transfers of credit or payments between, by or to banking institutions, hoarding or dealing in gold or silver, or use of or dealing in any property in which there is a foreign interest. Violations are presently subject to ten years' imprisonment. While the culpability requirements of this section tend to narrow the potentially vast scope of felonious conduct under those statutes, it may nevertheless be preferable to delete them from the list in subsection (2), and thereby reduce violations of them to the level of misdemeanors, by virtue of § 3007 of the Code, except as a few defined felonies might be articulated for inclusion in Title 18. See Working Papers, pp. 487, 491–96, 1049–50.

§ 1205. Orders Prohibiting Departure of Vessels and Aircraft.

A person is guilty of a Class C felony if he knowingly causes the departure from the United States of a vessel or aircraft in violation of an order prohibiting its departure. "Order" means an order issued pursuant to a federal statute designed to restrict the delivery of the vessel or aircraft, or the supply of goods or services, to a foreign nation engaged in armed hostilities.

Comment

This section picks up the core felonies in some rather detailed regulations about the movement of vessels during a war in which the United States is a neutral nation. See 18 U.S.C. §§ 963, 965–67. The bulk of the sections would appropriately be moved to Title 22—Foreign Relations and Intercourse, with minor offenses punishable under § 1006. See Working Papers, pp. 491–96, 1049–50.

§ 1206. Failure of Foreign Agents to Register.

A person who fails to register as a foreign agent as required by a federal statute is guilty of a Class C felony if he surreptitiously engages in the activity with respect to which the registra-

tion requirement is imposed or attempts to conceal the fact he is a foreign agent.

Comment

Existing provisions—22 U.S.C. §§ 611–21 and 18 U.S.C. § 951—require agents of foreign governments to register with or give notice of their presence to the Attorney General and Secretary of State, respectively. Under this section mere failure to register is not a felony, although it may remain as a minor offense under a regulatory statute outside Title 18. The felony requires both failure to register and surreptitiously engaging in the activity with respect to which registration is required or attempting to conceal one's status as a foreign agent. These requirements carry out the principles concerning grading considered in connection with § 1204. It is also proposed that 18 U.S.C. § 951 be integrated with the other registration provisions in Title 22. See Working Papers, pp. 498–99.

IMMIGRATION, NATURALIZATION, AND PASSPORTS

Introductory Note

Sections 1221 through 1229 represent an effort to integrate into the proposed Code many existing penal provisions designed to implement government regulation of immigration, citizenship, and foreign travel by citizens. Generally speaking, the approach has been:

(1) to avoid interfering with existing substantive policy;

(2) to eliminate duplication of general offenses such as bribery, perjury, false statements and forgery; and

(3) to segregate offenses which ought to remain in Title 18—usually the felonies—from lesser-grade matters which ought to be regarded as regulatory offenses and placed in other Titles, amended, if necessary, to provide for minor penalties or incorporation of the regulatory offense provision (§ 1006). The grading and definition of those offenses which are to be incorporated in Title 18 have been reconciled with the general penal policy of the remainder of the Code.

The principal substantive changes which result from this process are in grading. These sections give to Congress the primary role of identifying more discriminately than existing law which misconduct should be a felony and which a misdemeanor.

In considering these provisions, one should bear in mind that much of the misbehavior which can occur in this area, *e.g.*, making or using forged documents, is covered by other Code provisions.

§ 1221. Unlawful Entry Into the United States.

(1) Offense. An alien is guilty of an offense if he intentionally:

(a) enters the United States at a time or place other than as designated pursuant to a federal statute;

(b) eludes examination or inspection by immigration officers;

(c) obtains entry to the United States by deception; or

(d) enters the United States after having been arrested and deported or excluded and deported from the United States.

(2) Grading. The offense is a Class C felony if:

(a) entry is obtained by the use of an entry document or certificate of naturalization or citizenship which the actor knows is forged or counterfeit or belongs or pertains to another; or

(b) the offense constitutes a violation of subsection (1)(d) and the alien previously has been arrested and deported because he was convicted of a felony involving moral turpitude.

Otherwise the offense is a Class A misdemeanor.

(3) Defense. It is an affirmative defense to a prosecution under subsection (1)(d) that:

(a) the Attorney General had expressly consented to the alien's reapplying for admission to the United States prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory; or

(b) with respect to an alien previously excluded and deported, he was not required by a federal statute to obtain such advance consent.

(4) Presumption. In a prosecution under subsection (1)(d), an alien who is found in the United States after having been deported is presumed to have intentionally re-entered the United States.

Comment

This section deals with offenses now defined outside Title 18, in 8 U.S.C. §§ 1325 and 1326. The offenses are defined substantially as they are defined in existing law; but the grading is changed to accord with current views as to gravity, and to take account of the availability of administrative remedies. The section makes it a felony to use false documents for the purpose of entry or to re-enter after deportation for conviction of a felony. In any event, persistent violators will be subject to felony treatment under § 3003. See Working Papers, pp. 511–12.

§ 1222. Unlawfully Bringing Aliens Into the United States.

(1) Offense. A person is guilty of an offense if he intentionally brings into or lands in the United States another who is an alien, including an alien crewman, not admitted to the United States by an immigration officer or not lawfully entitled to enter or reside within the United States.

(2) Grading. The offense is a Class C felony if the actor engages in the prohibited conduct as consideration for a thing of pecuniary value or with knowledge the alien intends to commit a felony in the United States. Otherwise it is a Class A misdemeanor.

Comment

This section carries forward the provisions on smuggling of aliens found in 8 U.S.C. § 1324(a)(1). The significant change is with respect to grading. Under existing law all such conduct is felonious. This section distinguishes between those less serious cases in which no more than ordinary complicity in unlawful entry is involved, such as with a family member, and cases which warrant felony treatment: smuggling for gain or aiding entry of a person who intends to commit a felony. Class C felony treatment for aiding aliens who intend to commit felonies is intended to cover the most serious aspects of 8 U.S.C. §§ 1327 and 1328 (aiding subversives and prostitutes). Note that felony treatment is accorded to the procurement of prostitutes, whatever their origins, under § 1841. See Working Papers, p. 513.

§ 1223. Hindering Discovery of Illegal Entrants.

(1) Offense. A person is guilty of an offense if, with intent to hinder, delay or prevent the discovery or apprehension of another who is an alien, including an alien crewman, and who has unlawfully entered or is unlawfully within the United States, he:

(a) harbors or conceals such alien;

(b) provides such alien with a weapon, money, transportation, disguise or other means of avoiding discovery or apprehension;

(c) conceals, alters, mutilates or destroys a document or thing; or

(d) warns such alien of impending discovery or apprehension.

(2) Grading. The offense is a Class C felony if the actor engages in the conduct:

(a) as consideration for a thing of pecuniary value;

(b) with intent to receive consideration for placing such alien in the employ of another;

(c) with intent such alien be employed or continued in the employ of an enterprise operated for profit; or

(d) with knowledge such alien intends to commit a felony in the United States.

Otherwise the offense is a Class A misdemeanor.

Comment

This section carries forward what are essentially accessory-after-the-fact provisions concerning illegal aliens now contained in 8 U.S.C. §§ 1324(2) and (3). The formulation is similar to the provisions of § 1303 on hindering law enforcement. There is no change in substance; but the grading represents a departure from existing law in line with the grading principles discussed in the comment to § 1222. Consideration was given to including in this section a statement explicitly excluding "mere employment" of an alien from the scope of the offense, as is contained in existing law; but "mere employment" is not covered by the definition of the offense in any event. See Working Papers, pp. 513–14.

§ 1224. Obtaining Naturalization or Evidence of Citizenship by Deception.

A person is guilty of a Class C felony if he intentionally obtains by deception United States naturalization, registration in the alien registry of the United States, or the issuance of a certificate of United States naturalization or citizenship for or to any person not entitled thereto.

Comment

This section consolidates a number of existing provisions, 18 U.S.C. §§ 1015(a), 1424, 1425(a) and (b), and carries forward the policy of existing law, treating as a serious matter the obtaining of citizenship or evidence of citizenship by deception. This is an instance in which making false statements, otherwise a misdemeanor under § 1352, is upgraded to a felony. Note that obtaining the result by deception requires that the deception be material. See Working Papers, pp. 514–15.

§ 1225. Fraudulent Acquisition or Improper Use of Passports.

A person is guilty of a Class C felony if:

(a) he intentionally obtains the issuance of a United States passport by deception; or

(b) with intent to obstruct, impair or pervert a government function which is, in fact, federal, he uses a United States passport the issuance of which was obtained by deception or which was issued for the use of another.

Comment

This section carries forward the policy of 18 U.S.C. § 1542, treating fraudulent acquisition or improper use of passports as a serious offense. Like § 1224, it is one of the instances in which making false statements, otherwise a misdemeanor (§ 1352), is upgraded to a felony.

This offense is also similar to § 1224 in the implicit requirement that the deception be material. See Working Papers, pp. 514–15.

§ 1229. Definitions for Sections 1221 to 1225.

(1) "Alien" and Related Terms. The definitions of "alien", "application for admission", "crewman", "entry", "immigration officer", and "United States" provided in 8 U.S.C. § 1101 shall apply to sections 1221 to 1223.

(2) "Deception". In sections 1221, 1224 and 1225, "deception" means:

(a) creating or reinforcing a false impression as to fact, law, status, value, intention or other state of mind by false written statement, impersonation or the presentation of a forged or counterfeit writing; or

(b) preventing a public servant from acquiring information which would affect his official action.

Comment

The definition of "deception" is derived from the definition developed for use in the theft provisions (§ 1741) and is adapted to the special needs of this Chapter.

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Chapter 13. Integrity and Effectiveness of Government Operations

PHYSICAL OBSTRUCTION OF GOVERNMENT FUNCTION AND RELATED OFFENSES

§ 1301. Physical Obstruction of Government Function.

(1) Offense. A person is guilty of a Class A misdemeanor if, by physical interference or obstacle, he intentionally obstructs, impairs or perverts the administration of law or other government function.

(2) Applicability to Arrest. This section does not apply to the conduct of a person obstructing arrest of himself; but such conduct is subject to section 1302. This section does apply to the conduct of a person obstructing arrest of another. Inapplicability under this subsection is a defense.

(3) Defense. It is a defense to a prosecution under this section that the administration of law or other government function was not lawful; but it is no defense that the defendant mistakenly believed that the administration of law or other government function was not lawful. For the purposes of this section the conduct of a public servant acting in good faith and under color of law in the execution of a warrant or other process for arrest or search and seizure shall be deemed lawful.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the government function is a federal government function.

Comment

This section, a general prohibition of physical interference with governmental functions, replaces several existing statutes covering narrow aspects of the general problem (18 U.S.C. §§ 1501, 1502, 2231). The doubt as to the kind of culpability necessary under present law is removed; proof of intent to interfere with a government function is specifically required. Since culpability need not be proved as to purely jurisdictional facts under § 204, proof that the government function intended to be obstructed was in fact federal, regardless of what the actor thought it was, would suffice to establish jurisdiction under subsection (4).

In addition to making physical obstruction of a government function an offense in itself, this section will serve as a jurisdictional base for prosecuting more serious offenses, such as murder where homicide is the consequence of the violation. See § 201(b) (the piggyback jurisdictional provision). Physical interference warranting more severe sanctions than the misdemeanor treatment authorized by this section are dealt with elsewhere in the Code. See, *e.g.*, § 1321 under which assaulting a witness is a Class C felony.

Only physical interferences are covered; interposition of physical barriers, destruction of property, the introduction of a stench or persistent noise would violate the section, but an attempt to persuade by verbal means would not. Obstruction by threats has not been included in this general offense in favor of more precise definition in other sections. See, *e.g.*, sections 1321 (witnesses), 1366 (public servants), 1617 (criminal coercion). See Working Papers, pp. 74, 431, 446, 464, 468, 517–29, 535, 544, 624, 805–06.

§ 1302. Preventing Arrest or Discharge of Other Duties.

(1) Offense. A person is guilty of a Class A misdemeanor if, with intent to prevent a public servant from effecting an arrest of himself or another or from discharging any other official duty, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of the duty.

(2) Defense. It is a defense to a prosecution under this section that the public servant was not acting lawfully; but it is no defense that the defendant mistakenly believed that the public servant was not acting lawfully. A public servant executing a warrant or other process in good faith and under color of law shall be deemed to be acting lawfully.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the public servant is a federal public servant or the official duty is a federal official duty.

Comment

This section singles out and treats specially physical interference with an arrest.The conflicts in present federal law on the right to resist arrest are resolved under §§ 1301 and 1302 and under § 603(a), which deals with self-defense; these sections provide a consistent pattern of affording protection from risk of serious injury to an officer engaged in his duty in good faith and under color of law. Execution of official duties other than arrest is also covered, so that the public servant is protected against risk of bodily injury by reason of conduct which may not constitute "physical interference" under § 1301 or an assaultive offense under §§ 1611 *et seq.* Slight interferences which create no substantial risk to the officer are not offenses under this section. The section proscribes conduct against a public servant executing a warrant or other process in "good faith, under color of law". Conduct in response to otherwise unlawful acts of a public servant is governed by the provisions generally applicable to use of force. The circumstances under which there is justification for use of force against a federal law enforcement officer in such cases are limited by § 603(a).

Although the offense is graded as a Class A misdemeanor, violation of the section, as does violation of § 1301, serves as a jurisdictional base for prosecution for murder, aggravated assault, and other serious offenses committed during the course of the violation. See § 201(b). See Working Papers, pp. 517–29, 544.

§ 1303. Hindering Law Enforcement.

(1) Offense. A person is guilty of hindering law enforcement if he intentionally interferes with, hinders, delays or prevents the discovery, apprehension, prosecution, conviction or punishment of another for an offense by:

(a) harboring or concealing the other;

(b) providing the other with a weapon, money, transportation, disguise or other means of avoiding discovery or apprehension;

(c) concealing, altering, mutilating or destroying a document or thing, regardless of its admissibility in evidence; or

(d) warning the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law.

(2) Grading. Hindering law enforcement is a Class C felony if the actor:

(a) knows of the conduct of the other and such conduct constitutes a Class A or Class B felony; or

(b) knows that the other has been charged with or convicted of a crime and such crime is a Class A or Class B felony.

Otherwise hindering law enforcement is a Class A misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the principal offense is a federal offense.

Comment

This section replaces the provisions of 18 U.S.C. §§ 1071 and 1072, covering concealment of fugitives from arrest and escaped prisoners, and 18 U.S.C. §§ 3 and 4, covering accessory-after-the-fact and misprision of a felony, with the consolidated offense of hindering law enforcement by aiding a fugitive. The harboring and concealing prohibition of existing law is expanded to cover the other conduct specified in the section. Grading follows the principle of 18 U.S.C. § 3 in providing a lesser penalty for the accessory. Intimidating informers and making false reports to law enforcement authorities are specifically dealt with in §§ 1322 and 1354, respectively.

While the section absorbs the concealment-of-the-offense aspect of misprision, the other element of misprision—failure to give notice to appropriate authorities—is not stated. Proof of concealment estab-

lishes that element in any event; in addition the explicit imposition of such an obligation could raise constitutional difficulties. Compare this offense to § 1118 (Harboring or Concealing National Security Offenders), under which broader criminal liability is imposed for certain offenses.

There is federal jurisdiction over the offense when the person aided is being or might be sought for a federal offense. Note that, pursuant to § 204, the actor need not know that the latter offense is federal. See Working Papers, pp. 462, 463, 464, 529–36.

§ 1304. Aiding Consummation of Crime.

(1) Offense. A person is guilty of aiding consummation of crime if he intentionally aids another to secrete, disguise, or convert the proceeds of a crime or otherwise profit from a crime.

(2) Grading. Aiding consummation of a crime:

(a) is a Class C felony if the actor knows of the conduct of the other and such conduct constitutes a Class A or Class B felony; and

(b) is a Class A misdemeanor if the actor knows of the conduct of the other and such conduct constitutes a Class C felony or a Class A misdemeanor.

Otherwise aiding consummation of a crime is a Class B misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the principal crime is a federal crime.

Comment

This section penalizes aiding another to benefit from his crime. It replaces and broadens the more specific coverage of 18 U.S.C. § 1202, which covers only the exchange of kidnapping ransom money. Since the conduct prohibited is essentially accessorial in nature, grading is oriented to the principal offense. Like § 1303, culpability is required as to the conduct which constitutes the principal offense. Federal jurisdiction is limited to cases in which the principal offense is a federal crime, as it is under § 1303; the aider need not know of the federal character of the principal crime. See Working Papers, p. 536.

§ 1305. Failure to Appear After Release; Bail Jumping.

(1) Offense. A person is guilty of an offense if, after having been released pursuant to the Bail Reform Act of 1966, upon condition or undertaking that he will subsequently appear before a court or judicial officer as required, he fails to appear as required.

(2) Grading. The offense is a Class C felony if the actor was released in connection with a charge of felony or while awaiting

sentence or pending appeal or certiorari after conviction of any crime. Otherwise it is a Class A misdemeanor.

(3) Defense. It is an affirmative defense to a prosecution under this section that the defendant was prevented from appearing at the specified time and place by circumstances to the creation of which he did not contribute in reckless disregard of the requirement to appear.

Comment

This section substantially re-enacts 18 U.S.C. § 3150, the current bail jumping provision. The grading scheme also substantially follows existing law, although other grading schemes, perhaps equally meritorious, such as grading on the basis of the intent of the actor to conceal himself or on the need to apprehend him to compel his appearance, were considered.

The defense in subsection (3) was deemed necessary to take into account excuses for failing to appear which would be cognizable under an elastic construction of "willfully", permitted by existing law but not by the proposed Code. See § 302.

No separate jurisdictional base is stated in this section because the offense itself requires release under federal laws.

See Working Papers, pp. 536–43.

§ 1306. Escape.

(1) Offense. A person is guilty of escape if, without lawful authority, he removes or attempts to remove himself from official detention or fails to return to official detention following temporary leave granted for a specified purpose or limited period.

(2) Grading. Escape is a Class B felony if the actor uses a firearm, destructive device or other dangerous weapon in effecting or attempting to effect his removal from official detention. Escape is a Class C felony if (a) the actor uses any other force or threat of force against another in effecting or attempting to effect his removal from official detention, or (b) the person escaping was in official detention by virtue of his arrest for, or on charge of, a felony or pursuant to his conviction of any offense. Otherwise escape is a Class A misdemeanor.

(3) Definitions. In this section:

(a) "official detention" means arrest, custody following surrender in lieu of arrest, detention in any facility for custody of persons under charge or conviction of an offense or alleged or found to be delinquent, detention under a law authorizing civil commitment in lieu of criminal proceedings or authorizing such detention while criminal proceedings are held in abeyance, detention for extradition or deportation, or custody for

purposes incident to the foregoing, including transportation, medical diagnosis or treatment, court appearances, work and recreation; but "official detention" does not include supervision on probation or parole or constraint incidental to release under [18 U.S.C., Chapter 207 (Release) and § 5035 (Juvenile)];

(b) "conviction of an offense" does not include an adjudication of juvenile delinquency.

(4) Defenses. Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority shall not be a defense to a prosecution under this section if the escape is from prison or other facility used for official detention or from detention pursuant to commitment by an official proceeding. In the case of other detentions, irregularity or lack of jurisdiction shall be an affirmative defense if (a) the escape involved no substantial risk of harm to the person or property of anyone other than the detainee, or (b) the detaining authority did not act in good faith under color of law.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the official detention involves federal law enforcement or the escape is from a federal public servant or federal facility used for official detention.

Comment

This section carries forward most of the principles now embodied in 18 U.S.C. § 751. Changes include definition of "escape" and "official detention". This section also broadens the offense, thereby resolving some difficulties of construction under existing law with respect to narcotics addict rehabilitation and juvenile proceedings. Subsection (4) deals explicitly with the effect of illegal detention. It follows existing law by generally denying a defense based on illegality, but changes the present requirement, when the prosecution is for escape from arrest, that the arrest be lawful to a requirement only that the arrest be in good faith and under color of law. The escape, however, may not in any event create substantial risk of harm to others.

Grading keyed to the status of the defendant and the grade of offense with which he is charged is retained; but this section changes existing law to make escape a Class B felony if dangerous means are used and a Class C felony if any other force against the person is used, regardless of how the offense would otherwise be graded. Escape by juveniles is treated, as under existing law, as a misdemeanor, if force or dangerous means are not used, through exclusion of adjudication as a juvenile delinquent from "conviction of an offense".

The section does not contain special provisions on intentionally aiding or knowingly facilitating escape (18 U.S.C. § 752), since the general accomplice and facilitation provisions of the Code will apply. Public servants who recklessly or negligently permit escape, however, are dealt with explicitly in § 1307.

The federal jurisdiction provided for this offense covers prisoners who are in state custody in aid of federal law enforcement and in federal custody in aid of state law enforcement, as well as federal prisoners in federal custody.

See Working Papers, pp. 442, 467, 543–50.

§ 1307. Public Servants Permitting Escape.

(1) Offense. A public servant concerned in official detention pursuant to process issued by a court, judge or magistrate is guilty of a Class A misdemeanor if he recklessly permits an escape and is guilty of a Class B misdemeanor if he negligently permits an escape. "Official detention" has the meaning prescribed in section 1306(3).

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the public servant is a federal public servant or the process is federal process.

Comment

This section continues the policy of 18 U.S.C. § 755, dealing with public servants having custody of a prisoner who "voluntarily" or "negligently" suffer the prisoner to escape, but adapts the culpability requirements to the definitions in the proposed Code, and leaves to the complicity provisions criminal liability for escape involvement more serious than recklessness and negligence. A fundamental issue is whether this provision should be retained at all, since it now deals only with incompetent custodians, for whom dismissal or other nonpenal sanctions would be sufficient. If the provision is continued, an issue to be considered is whether it should apply to those having custody of persons for such nonpenal purposes as commitment to mental institutions. Such additional coverage could be accomplished by the following:

> For the purposes of this section, "official detention" means, in addition to the meaning prescribed in section 1306(3), any detention pursuant to process or commitment issued by a court, judge or magistrate.

See Working Papers, pp. 548–49.

§ 1308. Inciting or Leading Riot in Detention Facilities.

(1) Offense. A person is guilty of a Class C felony if, with intent to cause, continue, or enlarge a riot, he solicits a group of five or more persons to engage in a riot in a facility used for official detention or engages in conduct intended to serve as the beginning of or signal for such riot, or participates in planning such riot, or, in the course of such riot, issues commands or instructions in furtherance thereof.

(2) Definitions. In this section:

(a) "riot" means a disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs the operation of the facility or other government function;

(b) "official detention" has the meaning prescribed in section 1306(3).

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the facility is a federal facility.

Comment

This section carries forward the policy of existing 18 U.S.C. § 1792, to the extent that section provides special criminal sanctions for leading or inciting prison riots. This section differs from existing law in that it includes a definition of the term "riot" and states more precisely the kinds of participation which call for such sanctions. It should be noted that other provisions of the Code, dealing with injury to persons and damage to property, as well as physical obstruction of government function (§ 1301), cover riots generally, and that prison rioters who commit more serious specific offenses will be subject to greater penalties. The definition of riot and other features of the section are similar to those in the inciting riot provisions of the Code (§ 1801). Note that the section does not perpetuate the existing proscription of prison mutiny, which is not defined in 18 U.S.C. § 1792. Mutinies which do not lead to rioting do not appear to have presented problems requiring special criminal sanctions. See Working Papers, p. 550.

§ 1309. Introducing or Possessing Contraband Useful for Escape.

(1) Introducing Contraband. A person is guilty of a Class C felony if he unlawfully provides an inmate of an official detention facility with any tool, weapon or other object which may be useful for escape. Such person is guilty of a Class B felony if the object is a firearm, destructive device or other dangerous weapon.

(2) Possession of Contraband. An inmate of an official detention facility is guilty of a Class C felony if he unlawfully procures, makes or otherwise provides himself with, or has in his possession, any tool, weapon or other object which may be useful for escape. Such person is guilty of a Class B felony if the object is a firearm, destructive device or other dangerous weapon.

(3) Definitions. In this section:

(a) "unlawfully" means surreptitiously or contrary to a statute or regulation, rule or order issued pursuant thereto;

(b) "official detention" has the meaning prescribed in section 1306(3).

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the facility is a federal facility.

Comment

This section replaces the parts of 18 U.S.C. §§ 1791 and 1792 which deal with introduction into prison or illegal possession in prison of articles useful for escape. Violation of rules against other kinds of contraband would not be subject to the high felony penalty now authorized indiscriminately by 18 U.S.C. § 1791. That provision would be transferred to a procedural part of Title 18 and would be made subject to lesser penalties in the manner of any other regulatory offense. See Working Papers, pp. 549–50.

§ 1310. Flight to Avoid Prosecution or Giving Testimony.

(1) Offense. A person is guilty of a Class C felony if he moves or travels across a state or United States boundary with intent:

(a) to avoid prosecution, or detention after conviction, under the laws of the place from which he flees, for an attempt or conspiracy to commit, or commission of: (i) an offense involving willful infliction of bodily injury, property damage or property destruction by fire or explosion, or (ii) any felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of that state; or

(b)(i) to avoid appearing as a witness, producing information, or giving testimony in any official proceeding in such place in which the commission of an offense described in paragraphs (a)(i) or (a)(ii) of this section is charged or under investigation; or (ii) to avoid contempt proceedings or other criminal prosecution, or custody or confinement after conviction, for such avoidance.

(2) Discretionary Exercise of Jurisdiction. In addition to the authorization for discretionary restraint in the exercise of federal jurisdiction by section 207, federal law enforcement agencies are authorized to decline or discontinue federal enforcement efforts whenever it appears that the conduct which is the subject of the official proceeding, prosecution or conviction would not, were it committed within federal jurisdiction, constitute a federal felony. No prosecution shall be instituted under this section unless expressly authorized by the Attorney General.

(3) Commission of Other Offenses in the Course of Flight. Commission of an offense defined in this section shall not be a basis for application of section 201(b) to confer federal jurisdiction over commission of another offense.

(4) Venue. Violations of this section may be prosecuted only in the federal judicial district in which the original crime or contempt was alleged to have been committed, or in which the person was held in custody or confinement.

Comment

This section carries forward the Fugitive Felon Act, 18 U.S.C. § 1073, and its companion section, 18 U.S.C. § 1074. Since arrest for these offenses is almost exclusively a device to permit the federal government to aid the states in apprehending wanted persons, the possibility of formulating provisions which permit such aid directly has been explored, and a possible, but not clearly superior, alternative is discussed in the Working Papers.

A new provision authorizes federal officials to decline or discontinue their law enforcement efforts if the state crime would not constitute a felony under federal law, thus providing a basis for uniform treatment of fugitive problems. An alternative approach would be to define the crime in subsection (1) as a felony under federal law. Despite the fact that the latter approach is more feasible under the proposed Code than under existing statutes (because federal and state offenses will be more alike), the former approach is preferred because there will be differences in definitions, as well as in penalties, and those differences will often pose complex problems that federal law enforcement officers should not be required to resolve.

Commission of another federal offense is a jurisdictional base for many offenses in the Code, by reference to § 201(b). Subsection (3) excludes commission of this offense as such a jurisdictional base because there is no federal interest in prosecuting all crimes committed by state fugitives.

Consideration has been given to reducing the grade of the offense to a Class A misdemeanor because the misconduct is not itself seriously harmful; but felony grading was retained because of the occasional need of federal officers to make arrests without warrants, the fact that the underlying crime is a serious one, and the requirement of Attorney General authorization as a prerequisite to prosecution.

See Working Papers, pp. 544, 551–66.

OBSTRUCTION OF JUSTICE

§ 1321. Tampering With Witnesses and Informants in Proceedings.

(1) Tampering. A person is guilty of a Class C felony if he uses force, threat, deception or bribery:

(a) with intent to influence another's testimony in an official proceeding; or

(b) with intent to induce or otherwise cause another:

(i) to withhold any testimony, information, document or thing from an official proceeding, whether or not the other person would be legally privileged to do so;

(ii) to violate section 1323 (Tampering With Physical Evidence);

(iii) to elude legal process summoning him to testify in an official proceeding; or

(iv) to absent himself from an official proceeding to which he has been summoned.

(2) Soliciting Bribe. A person is guilty of a Class C felony if he solicits, accepts or agrees to accept from another a thing of pecuniary value as consideration for:

(a) influencing the actor's testimony in an official proceeding; or

(b) the actor's engaging in the conduct described in paragraphs (i) through (iv) of subsection 1(b).

(3) Defenses.

(a) It is a defense to a prosecution under this section for use of threat with intent to influence another's testimony that the threat was not of unlawful harm and was used solely to influence the other to testify truthfully.

(b) In a prosecution under this section based on bribery, it shall be an affirmative defense that any consideration for a person's refraining from instigating or pressing the prosecution of an offense was to be limited to restitution or indemnification for harm caused by the offense.

(c) It is no defense to a prosecution under this section that an official proceeding was not pending or about to be instituted.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the official proceeding is a federal official proceeding.

(5) Witness Fees and Expenses. This section shall not be construed to prohibit the payment or receipt of witness fees provided by statute, or the payment, by the party upon whose behalf a witness is called, and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at an official proceeding, or in the case of expert

witnesses, a reasonable fee for preparing and presenting an expert opinion.

Comment

This section deals with corruption of actual or potential witnesses or informants. It replaces those aspects of 18 U.S.C. §§ 1503 and 1505 which condemn "corrupt endeavors" directed towards "witnesses" which obstruct the "due administration of justice". See also 18 U.S.C. § 201(d), dealing with bribery of witnesses. Difficult issues of construction of the quoted terms have made the scope of current law uncertain. Despite the apparent broad sweep of those terms, the courts often have strictly construed the term "witness" and have required there be a "pending proceeding" at the time the defendant acted.

The section avoids the difficulties raised by the terms "corrupt" and "endeavors" by describing the conduct or endeavor, *e.g.*, use of force, which is corrupt when accompanied by the requisite culpability. Moreover, the manner in which the culpability elements are described, *e.g.*, intent to cause another to withhold testimony, avoids the requirements of existing law that a proceeding be pending or that the other person be a "witness".

An essential element of the felony under subsection (1) is the use of force, threat, deception or bribery. If force reaches the level of serious aggression, *e.g.*, homicide or kidnapping, commission of this offense would be the basis for federal jurisdiction over the other offense under the "piggyback" jurisdictional provision, § 201(b). Use of the proscribed means to influence testimony will be a felony, without inquiry into the truthfulness of the testimony sought by the actor, except with respect to threats. So long as the actor is seeking truthful testimony, he may threaten lawful harm, *e.g.*, to seek a perjury prosecution. Solicitation of or other participation in perjury is left to the perjury statute (§ 1351), and relevant general provisions and offenses of general applicability (Chapter 10). It should be noted that use of the wrongful means to induce misconduct by participants in official proceedings may be criminal under this section even if the "misconduct" is not, *e.g.*, eluding process, claiming a privilege not to testify.

Other tampering with witnesses and with evidence by other than the proscribed felonious means, covered by existing obstruction of justice statutes, is dealt with in the proposed Code under new specific offenses such as § 1323, tampering with physical evidence; § 1342, failure to appear as witness or produce information, and § 1343, refusal to testify. Retaliation against a witness is covered by § 1367.

Under the provision that culpability is not required as to jurisdictional facts (§ 204), it will be sufficient to establish that the tamperer thought the other was or would be a witness in some kind of official proceeding. Elimination of the requirement that a federal official proceeding actually be pending or about to be instituted extends federal jurisdiction beyond its present limits wherever concurrent jurisdiction over the official matter exists. In such circumstances the policy of restraint on exercise of federal jurisdiction, stated in § 207, will be significant.

Although not absolutely essential (since the prohibition is only against influencing testimony), subsection (5) is carried forward in

virtually the same terms as it appears in the existing bribery law, 18 U.S.C. § 201(j).

See Working Papers, pp. 567–83.

§ 1322. Tampering With Informants in Criminal Investigations.

(1) Offense. A person is guilty of a Class C felony if, believing another may have information relating to an offense, he deceives such other person or employs force, threat or bribery with intent to hinder, delay or prevent communication of such information to a law enforcement officer. The affirmative defense in subsection (3)(b) of section 1321 applies to this section.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the principal offense is a federal offense or when the law enforcement officer is a federal public servant.

Comment

This section replaces 18 U.S.C. § 1510, which prohibits obstruction of criminal investigations by intimidation or bribery of informants. It contemplates no change in the substance of current law, but is more explicit in limiting coverage to deception of the informant only, not deception of the official. The changes with respect to jurisdiction have implications similar to those discussed in the comment to § 1321, *supra*. Note that, as with § 1321, this provision can be a jurisdictional base for prosecution of even more serious crimes. Note also that injuring a person on account of his being an informant is covered by the offense of retaliation (§ 1367), which may be "piggybacked" as a jurisdictional base for prosecution of more serious crimes. See Working Papers, p. 571.

§ 1323. Tampering With Physical Evidence.

(1) Offense. A person is guilty of an offense if, believing an official proceeding is pending or about to be instituted or believing process, demand or order has been issued or is about to be issued, he alters, destroys, mutilates, conceals or removes a record, document or thing with intent to impair its verity or availability in such official proceeding or for the purposes of such process, demand or order.

(2) Grading. The offense is a Class C felony if the actor substantially obstructs, impairs or perverts prosecution for a felony. Otherwise it is a Class A misdemeanor.

(3) Definition. In this section "process, demand or order" means process, demand or order authorized by law for the seizure, production, copying, discovery or examination of a record, document or thing.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the official proceeding which is pending or contemplated is or would be a federal official proceeding or when the process, demand, or order is or would be issued by a federal public servant.

Comment

This section covers the physical evidence aspects of the current obstruction of justice provisions (18 U.S.C. §§ 1503 and 1505) and resolves problems which have arisen under them in substantially the same way that the witness aspects are resolved in § 1321. Note related provisions: § 1342, dealing with failure to produce under a subpoena *duces tecum*; § 1351, perjury; and § 1352, false statements. An issue posed by the section is whether any felony penalty is warranted for conduct short of actual perjury and, if it is, whether the limitation proposed in subsection (2) is sufficient. Another issue is whether unsuccessful solicitation of the misdemeanor violation of this section should be specifically prohibited. Solicitation of a felony violation is covered by § 1003. See Working Papers, pp. 575–78.

§ 1324. Harassment of and Communication With Jurors.

(1) Offense. A person is guilty of a Class A misdemeanor if, with intent to influence the official action of another as a juror, he communicates with him other than as part of the proceedings in a case, or harasses or alarms him. Conduct directed against the juror's spouse or other relative residing in the same household with the juror shall be deemed conduct directed against the juror.

(2) Definition. In this section "juror" means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the juror is a federal juror.

Comment

The major purpose of this section is to insulate the juror from any external influence on his official action. It carries forward existing federal law under 18 U.S.C. §§ 1503 and 1504, broadening the latter's coverage of written communications to include all communications. Bribery of and force or threats directed at jurors, who are defined in this Code as public servants under § 109, are covered by the general provisions on bribery of and threats against public servants (§§ 1361, 1366). The second sentence of subsection (1) carries forward the scope of existing obstruction of justice provisions as construed by the courts; but broader coverage may be warranted. See Working Papers, pp. 583–89, 623.

§ 1325. Demonstrating to Influence Judicial Proceedings.

(1) Offense. A person is guilty of a Class B misdemeanor if, with intent to influence a judge, juror or witness in the discharge of his duties in a judicial proceeding, he pickets, parades, uses a sound-amplifying device, displays a placard or sign containing written or pictorial matter, or otherwise engages in a demonstration in or on the grounds of a building housing a court of the United States or of a residence of or usual place of occupancy by such judge, juror or witness or on a public way near such building, residence or place. "Near" shall not be construed to mean a place more than 200 feet from such building, residence or place, unless otherwise modified by court rule.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the judicial proceeding is a federal judicial proceeding.

Comment

This section, prohibiting picketing and demonstration with intent to influence a judge, juror or witness in a judicial proceeding, carries forward the substance of 18 U.S.C. § 1507. In *Cox* v. *Louisiana*, 379 U.S. 559 (1965), the Supreme Court upheld the constitutionality of a state statute modeled on the current federal provisions, but reversed a conviction under that statute because of difficulties arising from the term "near." To minimize such difficulties the section, borrowing from a similar New York statute (N.Y. Penal Law § 215.50(7)), draws an outside line at 200 feet, in the absence of a court rule which takes into account the particular features of the court's location. Closer than that distance may not be "near," depending on the circumstances; but it will be clear to both demonstrators and law enforcement officials that demonstrating at a greater distance will not be criminal. Difficulties with respect to distance might be avoided entirely by proscribing only actual obstructions with respect to demonstrations near a courthouse. See *Dorfman* v. *Meiszner*, 430 F.2d 558 (7th Cir. 1970) for discussion of similar problems. See Working Papers, pp. 622–23.

§ 1326. Eavesdropping on Jury Deliberations.

(1) Offense. A person is guilty of a Class A misdemeanor if he intentionally:

(a) records the proceedings of a jury while such jury is deliberating or voting; or

(b) listens to or observes the proceedings of any jury of which he is not a member while such jury is deliberating or voting.

(2) Defense. This section shall not apply to the taking of notes by a juror in connection with and solely for the purpose of assist-

ing him in the performance of his official duties. Inapplicability under this subsection is a defense.

(3) Definitions. In this section "jury" means grand jury or petit jury, and "juror" means grand juror or petit juror.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the jury is a federal jury.

Comment

This section changes 18 U.S.C. § 1508, prohibiting eavesdropping on jury deliberations, only to conform the provisions to the style of the proposed Code. See Working Papers, pp. 585–86.

§ 1327. Nondisclosure of Retainer in Criminal Matter.

(1) Offense. A person employed for compensation to influence the official action of a public servant with respect to the initiation, conduct or dismissal of a prosecution for an offense or the imposition or modification of a sentence is guilty of a Class A misdemeanor if he privately addresses to such public servant any representation, entreaty, argument or other communication intended to influence official action without disclosing the fact of such employment, knowing that the public servant is unaware of it.

(2) Applicability to Attorney-At-Law. This section does not apply to an attorney-at-law or to a person authorized by statute or regulation to act in a representative capacity with respect to the official action when he is acting in such capacity and makes known to the public servant or has indicated in any manner authorized by law that he is acting in such capacity. Inapplicability under this subsection is a defense.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the public servant is a federal public servant.

Comment

This section makes it a Class A misdemeanor for a person to fail to reveal he has a retainer when he seeks to influence a public servant's official action in a criminal matter. Subsection (2) makes a filed notice of appearance sufficient for this purpose. The provision covers the situations involved in *United States v. Kahaner*, 317 F.2d 459 (2d Cir. 1963) and *United States v. Polakoff*, 121 F.2d 333 (2d Cir. 1941), which were prosecuted as corrupt endeavors "to influence, obstruct, or impede" the "due administration of justice" under 18 U.S.C. § 1503. Compare § 1365 which prohibits trading in special influence—offering or accepting money for using the influence of kinship or official position upon a public servant. See Working Papers, pp. 592–96.

389-626—71——10

CRIMINAL CONTEMPT AND RELATED OFFENSES

§ 1341. Criminal Contempt.

(1) Power of Court. A court of the United States shall have power to punish, as authorized under this section, such contempt of its authority, and none other, as:

(a) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(b) misbehavior of any of its officers in their official transactions;

(c) disobedience or resistance to its lawful writ, process, order, rule, decree or command.

(2) Status as Offense; Grading. Except as otherwise provided, a criminal contempt proceeding under this section shall be deemed prosecution for an offense for the purposes of Part A (General Provisions) and Part C (Sentencing) of this Code. Criminal contempt shall be treated as a Class B misdemeanor, except that the defendant may be sentenced to a term of imprisonment of no more than six months, and, if the criminal contempt is disobedience of or resistance to a court's lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, the defendant may be sentenced to pay a fine in any amount deemed just by the court.

(3) Successive Prosecutions. Notwithstanding the provisions of sections 704, 705, 706, 707 and 708 (relating to multiple prosecutions), a criminal contempt proceeding under this section is not a bar to subsequent prosecution for a specific offense if the court certifies in the judgment of conviction of criminal contempt, or the order terminating the proceeding without acquittal or dismissal, that a summary criminal contempt proceeding was necessary to prevent repetition of misbehavior disruptive of an ongoing proceeding and that subsequent prosecution as a specific offense is warranted. In a subsequent prosecution the defendant shall receive credit for all time spent in custody and any fine paid by him pursuant to the criminal contempt proceeding.

(4) Civil Contempt Preserved. This section shall not be construed to deprive a court of its power, by civil contempt proceedings, to compel compliance with its lawful writ, process, order, rule, decree, or command, or to compensate a complainant for losses sustained by reason of disobedience or resistance thereto, in accordance with the prevailing usages of law and equity, including the power of detention.

Comment

This section is based upon 18 U.S.C. § 401, in which Congress has imposed restraints on the courts' inherent power to punish for criminal contempt outside the course of regular criminal proceedings. Although legislative restraints on this power are unusual in American jurisprudence, the provisions of 18 U.S.C. § 401 have been federal law since 1831. Supreme Court decisions have restricted the scope of the power to contempts—other than disobedience of orders and the like—which are committed in or near the courtroom, and have imposed a six-month maximum on imprisonment if the contempt charge is not tried before a jury.

No effort has been made to modify the language of 18 U.S.C. § 401; and its provisions have been retained in subsection (1), a step which will perpetuate the judicial construction of them which has occurred over the years. A six-month prison term, held by the Supreme Court to be the maximum which can be imposed without a jury trial, is set as the maximum for all cases. This is supplemented by the creation of specific statutory offenses under which a regular prosecution for a Class A misdemeanor may be conducted: § 1342 (failure to appear as witness), § 1343 (refusal to testify), § 1344 (hindering proceedings by disorderly conduct) and § 1345 (disobedience of judicial order). Criminal contempt is classified as a Class B misdemeanor, with the result that consecutive sentences may be imposed up to one year under § 3204. Consecutive terms longer than one year can only be imposed after prosecution under the specific offenses.

An alternative to the six-month maximum would be to limit the court's summary power to punish for contempt, *e.g.*, to 5 days' imprisonment, relying for greater deterrence on the threat of prosecution as an offense under sections 1342–45. This might have the advantage of interposing an impartial tribunal between the offending defendant and offended judge prior to the imposition of an extended jail term. Nevertheless, it was thought preferable to recognize a broader need for the court to vindicate its authority. The danger of abuse was acknowledged, but thought not to be, on balance, dispositive.

The court's power to impose a fine in any amount it deems just is preserved for disobedience of a final order or injunction in view of the fact that fines considerably greater than the amount otherwise fixed for Class B misdemeanants are from time-to-time imposed and sustained by appellate courts.

Since the section explicitly provides that contempt proceedings are subject to the General Provisions of the proposed Code, including those dealing with multiple prosecutions, subsection (3) provides an exception to the usual rules when an immediate contempt prosecution is necessary to prevent repetition of misbehavior disruptive of an ongoing proceeding.

Subsection (4) preserve the courts' civil contempt power to compel obedience or to compensate for failure to obey, as distinguished from punishment for past conduct. See P.L. 91–452 (28 U.S.C. § 1826) for provisions regarding civil contempt proceedings against recalcitrant witnesses, including a maximum limitation on confinement of 18 months.

For a provision granting power to the court to recommend prosecution for contumacious conduct as a specific offense, see § 1349.

See Working Papers, pp. 601–10, 616, 626.

§ 1342. Failure to Appear as Witness, to Produce Information or to be Sworn.

(1) Failure to Appear or to Produce. A person who has been lawfully ordered to appear at a specified time and place to testify or to produce information in an official proceeding is guilty of a Class A misdemeanor if, without lawful privilege, he fails to appear or to produce the information at that time and place.

(2) Refusal to be Sworn. A person attending an official proceeding is guilty of a Class A misdemeanor if, without lawful privilege, he fails to comply with a lawful order:

(a) to occupy or remain at the designated place from which he is to testify as a witness in such proceeding; or

(b) to be sworn or to make equivalent affirmation as a witness in such proceeding.

(3) Defenses. It is a defense to a prosecution under this section that the defendant:

(a) was prevented from appearing at the specified time and place or unable to produce the information because of circumstances to the creation of which he did not contribute in reckless disregard of the requirement to appear or to produce; or

(b) complied with the order before his failure to do so substantially affected the proceeding.

(4) Definitions. In this section:

(a) "official proceeding" means

(i) an official proceeding before a judge or court of the United States, a United States magistrate, a referee in bankruptcy or a federal grand jury;

(ii) an official proceeding before Congress;

(iii) a federal official proceeding in which pursuant to lawful authority a court orders attendance or the production of information;

(iv) an official proceeding before an authorized agency;

(v) an official proceeding which otherwise is made expressly subject to this section;

(b) "authorized agency" means an agency authorized by federal statute to issue subpoenas or similar process supported by the sanctions of this section;

(c) "official proceeding before Congress" means an inquiry authorized before either House or any joint committee established by a joint or concurrent resolution of the two Houses of Congress or any committee or subcommittee of either House of Congress;

(d) "information" means a book, paper, document, record, or other tangible object.

Comment

This section, together with §§ 1343–45, contributes to the general scheme of reform in the contempt area by defining specific offenses consisting of conduct currently dealt with under the general rubric of contempt. Most of this conduct is covered in existing specific offenses insofar as administrative proceedings and Congressional hearings are involved. A major change is that misconduct relating to judicial proceedings would also be covered by the specific offenses defined in §§ 1342–45. Another change is to subject administrative proceedings to one provision in lieu of the multitude of provisions spread through many titles of the United States Code.

The scope of this section is determined by the definitions in subsection (4). Note that what constitutes an "official proceeding before Congress" is a formulation carried forward from existing law (2 U.S.C. §§ 192, 194). Existing policy is carried forward by the definition of "authorized agency" so that disobedience of the subpoenas contemplated by the section will be a direct offense, *i.e.*, without an intervening court order, only when another law so provides. The determination as to which agencies' subpoenas should be so treated is to be made outside the Code, in the statute which defines the agency's powers.

Since the offense is one of omission and the power to issue process is broadly conferred, various protections have been provided. First, what constitutes an official proceeding for other purposes, *e.g.*, perjury, is not necessarily an official proceeding under this section. Second, the process must be "lawfully" served or the order "lawfully" issued. Third, lawful privileges are recognized, *e.g.*, executive privilege. Fourth, defenses are provided in subsection (3) for nonreckless failure to appear or inability to produce and for insubstantial noncompliance. Finally, the certification procedure as a condition for prosecution of Congressional contempts under existing law has been adapted to court, grand jury and magistrate contempts, so that, in effect, there can be no prosecution unless a judge, who would otherwise be able to make the contempt determination, first approves it. See § 1349.

See Working Papers, pp. 610–14, 626.

§ 1343. Refusal to Testify.

(1) Offense. A person is guilty of a Class A misdemeanor if, without lawful privilege, he refuses:

(a) to answer a question pertinent to the subject under inquiry in an official proceeding before Congress and continues in such a refusal after the presiding officer directs him to answer and advises him that his continuing refusal may make him subject to criminal prosecution; or

(b) to answer a question in any other official proceeding and continues in such refusal after a federal court or federal judge or, in a proceeding before a United States magistrate or referee in bankruptcy, the presiding officer directs or orders him to answer and advises him that his continuing refusal may make him subject to criminal prosecution.

(2) Defense. It is a defense to a prosecution under this section that the defendant complied with the direction or order before his refusal to do so substantially affected the proceeding.

(3) Definition. "Official proceeding before Congress" has the meaning prescribed in subsection (4)(c) of section 1342.

Comment

This section carries out the Code reform of treatment of contempt by making it a Class A misdemeanor to refuse to testify in an official proceeding after being directed to answer by the presiding officer in a Congressional hearing or by a judicial officer in other proceedings. Corresponding specific offenses in existing law deal with Congressional hearings (2 U.S.C. §§ 192, 194) and certain administrative hearings (*e.g.*, 16 U.S.C. § 825f(c)). Unlike § 1342, which deals with failures to appear, this provision does require defiance of a judicial order even when administrative proceedings are involved. This is consistent with current practice, although the language of some statutes may appear to give some agencies broader power. In view of the fact that a judge will be "previewing" the propriety of the question, there is no requirement that the question under subsection (1)(b) be relevant, material or otherwise proper. The requirement of "pertinency" in Congressional proceedings has been maintained, however, in view of the judicial development of that concept and its jurisdictional significance. See Working Papers, pp. 614–21, 626.

§ 1344. Hindering Proceedings by Disorderly Conduct.

(1) Intentional Hindering. A person is guilty of a Class A misdemeanor if he intentionally hinders an official proceeding by noise or violent or tumultuous behavior or disturbance.

(2) Reckless Hindering. A person is guilty of an offense if he recklessly hinders an official proceeding by noise or violent or tumultuous behavior or disturbance. The offense is a class B misdemeanor if it continues after explicit official request to desist. Otherwise it is an infraction.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the official proceeding is a federal official proceeding.

Comment

This section, for which there is no counterpart in existing law, permits prosecution as a specific offense, in the normal manner, for conduct heretofore treated as contempt when engaged in at or so close as actually to affect a judicial proceeding. The section extends the prohibition to all official proceedings, Congressional and administrative as well as judicial. See Working Papers, pp. 621–22, 626.

§ 1345. Disobedience of Judicial Order.

(1) Offense. A person is guilty of a Class A misdemeanor if he disobeys or resists a lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, of a court of the United States.

(2) Fines. Notwithstanding the limitations of section 3301 (Authorized Fines), the defendent may be sentenced to pay a fine in any amount deemed just by the court.

Comment

This section makes a specific offense of conduct heretofore treated only as contempt of court. Since similar punishment is authorized under the contempt provisions in § 1341, a principal function of this section will be to permit the United States, when it is a party to the underlying proceedings, to prosecute violations of the specified court orders without the prior authorization by the court required under § 1349 for prosecutions in other cases. The lawfulness of the order or injunction is to be determined by principles developed under contempt law. See comment to § 1341, *supra*, with respect to the provision regarding fines. See Working Papers, p. 624.

§ 1346. Soliciting Obstruction of Proceedings.

A person is guilty of a Class A misdemeanor if he solicits another to commit an offense defined in sections 1342, 1343, 1344(1) or 1345.

Comment

This section carries forward areas of the coverage of 18 U.S.C. §§ 1503 and 1505 with respect to obstruction of judicial, Congressional and administrative proceedings. A separate provision to do so is necessary because the general solicitation offense (§ 1003) applies only to solicitation of felonies. Note that when bribery, threat, force or deception is employed, the conduct is a Class C felony under the proposed Code § 1321. No certification of a judge or Congress is required for prosecution under this section, as it is for prosecution of the principal,

under § 1349, because neither is in a position to make a prosecutorial judgment regarding the conduct proscribed by this section. See Working Papers, pp. 572–75, 626.

§ 1349. Certification for Prosecution of Offenses Under Sections 1342 to 1345.

(1) Judicial Proceeding. No person shall be prosecuted under sections 1342, 1343, 1344 or 1345 if the official proceeding involved is before a court of the United States unless the judge or a majority of the judges sitting certifies the case to the appropriate United States Attorney to be considered for possible prosecution, except that this provision does not apply to a prosecution under section 1345 if the United States or an agency thereof is a party to the matter in which the order issues. If the certification includes a recommendation that a prosecution be instituted, the United States Attorney shall have the duty to institute prosecution or to bring the matter before the grand jury for its action.

(2) Grand Jury Proceeding. If the official proceeding involved is a grand jury proceeding, no person shall be prosecuted:

(a) under section 1342 unless a judge certifies the case to the appropriate United States Attorney to be considered for possible prosecution;

(b) under section 1343 unless the judge whose direction has allegedly been disobeyed, or any other judge of that court if the original judge is no longer serving, certifies the case to the appropriate United States Attorney to be considered for possible prosecution.

If the certification includes a recommendation that a prosecution be instituted, the United States Attorney shall have the duty to institute prosecution or to bring the matter before the grand jury for its action.

(3) Proceedings Before Magistrate or Referee in Bankruptcy. No person shall be prosecuted under sections 1342 or 1343 if the official proceeding involved is before a United States magistrate or referee in bankruptcy unless a district court judge certifies the case to the appropriate United States Attorney to be considered for possible prosecution. If the certification includes a recommendation that a prosecution be instituted, the United States Attorney shall have the duty to institute prosecution or to bring the matter before the grand jury for its action.

(4) Congressional Proceedings. No person shall be prosecuted under sections 1342 or 1343 if the official proceeding involved is

before Congress, unless the facts of such violation are reported to either House of Congress while Congress is in session, or, when Congress is not in session, a statement of the facts constituting such violation is reported to and filed with the President of the Senate or the Speaker of the House. If the report is made while Congress is in session and the appropriate House has so ordered, the President of the Senate or the Speaker of the House, as the case may be, shall certify, or if the report is made when Congress is not in session, such officer may certify, the statement of facts under the seal of the appropriate House to the appropriate United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action.

(5) Lack of Certification a Bar. Failure to comply with the certification requirements of this section is a bar to prosecution. The defendant shall have the burden of proving such failure to comply by a preponderance of the evidence, and shall be entitled to have the issue determined by the court out of the presence of the jury, if any, and to exclusion of any reference to the need or fact of certification from the attention of the jury.

Comment

Subsections (1), (2) and (3) of this section adapt the certification prerequisite to prosecution, now applicable to Congressional contempts under 2 U.S.C. §§ 192 and 194, to judicial and grand jury contempts. The Congressional power is retained intact in subsection (4), with modifications to codify judicial construction of the existing provisions. As under the existing Congressional statute, a duty is imposed on the appropriate United States Attorney to act on the judicial recommendation. As part of the scheme of reform in the contempt area, this section would preserve the power of the judiciary, as well as that of Congress, over its proceedings, by requiring certification by the offended tribunal before a prosecution could be instituted. When a Congressional contempt is involved, certification requires that the grand jury consider it. When other proceedings are involved, action by the United States Attorney is required only when the judge affirmatively recommends such action. Otherwise, certification is only a condition precedent to the exercise of usual prosecutorial discretion. Subsection (5) makes failure to certify a bar to prosecution, as it is under current law when Congress is involved. See Working Papers, pp. 625–26.

PERJURY, FALSE STATEMENTS AND INTEGRITY OF PUBLIC RECORDS

§ 1351. Perjury.

(1) Offense. A person is guilty of perjury, a Class C felony, if, in an official proceeding, he makes a false statement under oath

or equivalent affirmation, or swears or affirms the truth of a false statement previously made, when the statement is material and he does not believe it to be true.

(2) Corroboration. No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by the testimony of one person.

[(2) Proof. Commission of perjury need not be proved by any particular number of witnesses or by documentary or other types of evidence.]

(3) Inconsistent Statements. Where in the course of one or more official proceedings, the defendant made a statement under oath or equivalent affirmation inconsistent with another statement made by him under oath or equivalent affirmation to the degree that one of them is necessarily false, both having been made within the period of the statute of limitations, the prosecution may set forth the statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant to be true. Proof that the defendant made such statements shall constitute a prima facie case that one or the other of the statements was false; but in the absence of sufficient proof of which statement was false, the defendant may be convicted under this section only if each of such statements was material to the official proceeding in which it was made.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the official proceeding is a federal official proceeding.

Comment

This section retains the basic definition of perjury under 18 U.S.C. § 1621, including the requirement of materiality, but makes some significant changes with respect to proof. Section 1352 deals with nonmaterial false statements under oath.

Under this section, culpability is sufficiently established by proof that the defendant did not believe the statement to be true; affirmative disbelief need not be shown. Thus the section follows existing law which treats misstatements as perjury when made with reckless disregard as to truth or falsity. "Statement" is defined in § 1355 to include a representation concerning a state of mind if the state of mind is a separate subject of the statement. Under § 1355 materiality of the statement is a question of law; thus it is provided that culpability is not required with respect to that element of the offense. The definition of "materiality" in § 1355 preserves the broad formulation of the concept under existing law.

In accordance with prevailing criticism of existing law and the trend in recent state revisions, the two witness corroboration rule in perjury cases is eliminated; but conviction may not be had for perjury when proof of falsity is "solely upon contradiction by the testimony

of one person." The bracketed alternative reflects the view of a substantial body of opinion in the Commission, embodied in P.L. 91–452 (18 U.S.C. § 1623) with respect to "false declarations" before federal courts and grand juries and proceedings ancillary thereto, that the requirement of any corroboration is outmoded and that this offense should be treated like any other.

Subsection (3) carries forward a provision of P.L. 91–452 (18 U.S.C. § 1623), but applies it to all perjury prosecutions. When two manifestly inconsistent material statements are made in the course of one or more official proceedings, proof as to which of the two statements is false is not required; proof of their inconsistency establishes a prima facie case of falsity. The procedure is limited to perjury prosecutions, however, and is not available to support convictions for making false statements under § 1352.

Section 1355 minimizes the effect of irregularities in proceedings and provides a retraction defense. A separate provision for subornation of perjury is unnecessary in the proposed Code. Successful subornation would make the actor an accomplice. Unsuccessful subornation is covered by the general solicitation statute (§ 1003). This is in accord with recent state revisions.

See Working Papers, pp. 660–68.

§ 1352. False Statements.

(1) False Swearing in Official Proceedings. A person is guilty of a Class A misdemeanor if, in an official proceeding, he makes a false statement, whether or not material, under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, if he does not believe the statement to be true.

(2) Other Falsity in Governmental Matters. A person is guilty of a Class A misdemeanor if, in a governmental matter, he:

(a) makes a false written statement, when the statement is material and he does not believe it to be true;

(b) intentionally creates a false impression in a written application for a pecuniary or other benefit, by omitting information necessary to prevent a material statement therein from being misleading;

(c) submits or invites reliance on any material writing which he knows to be forged, altered or otherwise lacking in authenticity;

(d) submits or invites reliance on any sample, specimen, map, boundary-mark or other object which he knows to be false in a material respect; or

(e) uses a trick, scheme or device which he knows to be misleading in a material respect.

(3) Statement in Criminal Investigation. This section does not apply to information given during the course of an investigation into possible commission of an offense unless the information is given in an official proceeding or the declarant is otherwise under a legal duty to give the information. Inapplicability under this subsection is a defense.

(4) Definition. A matter is a "governmental matter" if it is within the jurisdiction of a government agency or of an office, agency or other establishment in the legislative or the judicial branch of government.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in:

(a) subsection (1) when the official proceeding is a federal official proceeding:

(b) subsection (2) when the government is the government of the United States, or when the government is a state or local government and the falsity constituting the offense is that a person is a citizen of the United States.

Comment

Subsection (1) applies to official proceedings, as does the offense of perjury (§ 1351), but dispenses with materiality. In effect, it is a lesser included offense to perjury. Although the section reflects the view that an immaterial falsity should be an offense when under oath in an official proceeding, the issue remains whether it should be an offense even then.

Subsection (2) represents a new approach to the nonperjurious false statement under federal law. Under existing law, the general false statement offense (18 U.S.C. § 1001) is a felony, with a maximum penalty of five years' imprisonment, while the offense is graded under many specific false statement statutes as a lesser felony, misdemeanor, or petty offense. It is proposed to reverse this situation, so that the general offense is a misdemeanor and specific frauds are upgraded to the felony level where appropriate. For example, false statements made as part of fraudulent efforts to obtain something of value would be covered by the appropriate theft provisions, and false statements made to obtain citizenship or to avoid the draft are felonies under §§ 1224 and 1108, respectively.

The scope of the general false statement offense is expanded beyond that of existing 18 U.S.C. § 1001, which is limited to executive departments and independent agencies, to include operations of the judicial and legislative branches. Since some activities within those branches are similar to the activities currently covered, focus on the nature of the activity, as set forth in subsection (2), is preferable to arbitrary distinctions between branches. The definition in subsection (4) will preserve judicial construction of 18 U.S.C. § 1001 with respect to what is within the "jurisdiction" of an agency. Under subsection (2) the false statement must be in writing. This is in accord with current

practice of requiring significant statements to be in writing whenever a governmental interest is involved. In addition, except as noted below, the statement must be material, although not all federal circuits require materiality under 18 U.S.C. § 1001.

Statements to investigating officers are not covered by this section unless they are given in an official proceeding, *e.g.*, grand jury, or the declarant is otherwise under a legal duty to make the report. This resolves the recent concern expressed by Congress in enacting 18 U.S.C. § 1510, dealing with tampering with informants, and by the courts in construing 18 U.S.C. § 1001. False statements to law enforcement officers are separately treated in § 1354.

Note that under § 1355 "statement" and "materiality" are defined; and the treatment of irregularities and retractions there provided is the same as that for perjury.

In addition to federal matters, federal jurisdiction under this section is extended to state and local matters when the false representation is that a person is a United States citizen. This carries forward the offense of misrepresentation of citizenship, now in 18 U.S.C. § 911, with respect to matters upon which most prosecutions have been based, *e.g.*, registering as a voter or applying for a license. This approach narrows the existing provisions by barring federal prosecutions for false citizenship statements in employment applications to private employers.

See Working Papers, pp. 668–74, 766, 932, 1049.

§ 1353. False Statement Obstructing the Foreign Relations of the United States.

A person is guilty of a Class C felony if, in relation to a dispute between a foreign government and the United States, he makes a false statement under oath or equivalent affirmation, when the statement is material and he does not believe it to be true:

(a) with knowledge that it may be used to influence the measures or conduct of any foreign government or public servant thereof to the injury of the United States; or

(b) with intent to influence any measure of or action by the United States to the injury of the United States.

Comment

This section substantially re-enacts present 18 U.S.C. § 954, using the Code's grading and terminology.

§ 1354. False Reports to Security Officials.

(1) Offense. A person is guilty of a Class A misdemeanor if he:

(a) gives false information to a law enforcement officer with intent to falsely implicate another; or

(b) falsely reports to a law enforcement officer or other security official the occurrence of a crime of violence or other incident calling for an emergency response when he knows that the incident did not occur. "Security official" means fireman or other public servant responsible for averting or dealing with emergencies involving public safety.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the law enforcement officer or security official is a federal law enforcement officer or security official.

Comment

This section has no counterpart in existing law, although the issues with which it deals have arisen in prosecutions brought under the existing general false statement section, 18 U.S.C. § 1001, principally in cases where the officer is an F.B.I. agent. It provides Class A misdemeanor penalties for essentially malicious conduct in the making of false statements to law enforcement officers and other security officials: false accusations or false alarms concerning emergency situations. Possible extensions of the section would be to include within subsection (1)(b) all kinds of false reports and to add the pretense of furnishing the officer with material information relating to an offense when the actor knows that he has no such information. Note that § 1614 deals with bomb scares and similar situations which cause terror, disruptions and public inconvenience.

A significant issue posed by this section is whether there should be criminal sanctions at all for false reports to officials other than the type dealt with in subsection (1)(b), in view of the dangers presented in making criminal the conduct of persons who thoughtlessly make reports and in view of the potential of official abuse. These dangers might be lessened if the prohibition were limited to written (or even signed) statements, if it is required that notice of the statute be given to a reporting individual, and if distinctions were made among kinds of investigators in order to avoid application of the section to a casual street encounter. The potential for official abuse could also be lessened by requiring corroboration of the falsity of the statement and of the f- .tement was made.

See Working Papers, pp. 671–73.

Note that "law enforcement officer" is defined in § 109.

§ 1355. General Provisions for Sections 1351 to 1354.

(1) Materiality. Falsification is material under sections 1351, 1352, 1353 and 1354 regardles of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the official proceeding or the disposition of the matter in which the statement is made. Whether a falsification is material in a given factual situation is a question of law. It is no

defense that the declarant mistakenly believed the falsification to be immaterial.

(2) Irregularities No Defense. It is no defense to a prosecution under sections 1351, 1352 or 1353 that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at a time when the actor represents it as being so verified shall be deemed to have been duly sworn or affirmed.

(3) Defense of Retraction. It is a defense to a prosecution under sections 1351, 1352, 1353 or 1354 that the actor retracted the falsification in the course of the official proceeding or matter in which it was made, if in fact he did so before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding or the matter.

(4) Definition of "Statement". In sections 1351, 1352 and 1353 "statement" means any representation, but includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

Comment

This section offers a convenient method of dealing with matters common to §§ 1351–1354. The provisions on materiality are derived from existing decisional law. To avoid irrational results, subsection (2) precludes a defense based on irregularities short of total lack of jurisdiction. Subsection (3) represents a change in existing law which is consistent with the approach of recent state revisions and with P.L. 91–452 (18 U.S.C. § 1623) in its application to false statements in court and grand jury proceedings; retraction is encouraged in order that the truth be learned; recantation must occur before it is manifest that the lie is or would be discovered and before the proceeding is substantially affected. See Working Papers, pp. 673–74.

§ 1356. Tampering With Public Records.

(1) Offense. A person is guilty of a Class A misdemeanor if he:

(a) knowingly makes a false entry in or false alteration of a government record; or

(b) knowingly without lawful authority destroys, conceals, removes or otherwise impairs the verity or availability of a government record.

(2) Definition. In this section "government record" means:

(a) any record, document or thing belonging to, or received or kept by the government for information or record;

(b) any other record, document or thing required to be kept by law, pursuant, in fact, to a statute which expressly invokes the sanctions of this section.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the government is the federal government or the statute which invokes the sanctions of this section is a federal statute.

Comment

This section replaces 18 U.S.C. § 2071, the existing general provision dealing with concealment, removal and mutilation of public records, and portions of 18 U.S.C. § 1506, which deals with certain judicial records. The section is designed to aid in assuring the integrity of public records, regardless of the purpose for which they are altered or destroyed; thus proof of culpability such as an intent to defraud is not required, and the offense is graded as a Class A misdemeanor. When the conduct prohibited furthers more serious harms, the prosecution will be for such other harms, either independently or using the offense as a jurisdictional base (under § 201(b)). Note that the section does not generally include *all* records required to be kept by others for the government, but permits discriminating inclusion of such records by so providing in another statute. See Working Papers, pp. 668–74, 766, 932, 1049.

BRIBERY AND INTIMIDATION

§ 1361. Bribery.

(1) Offense. A person is guilty of bribery, a Class C felony, if he knowingly offers, gives or agrees to give to another, or solicits, accepts or agrees to accept from another, a thing of value as consideration for:

(a) the recipient's official action as a public servant; or

(b) the recipient's violation of a known legal duty as a public servant.

(2) Defense Precluded. It is no defense to a prosecution under this section that a recipient was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(3) Prima Facie Case. A prima facie case is established under this section upon proof that the actor knew that a thing of pecuniary value was offered, given or agreed to be given by, or solicited, accepted or agreed to be accepted from, a person having an interest in an imminent or pending (a) eramination, investigation, arrest, or judicial or administrative proceeding, or (b) bid, contract, claim, or application, and that interest could be affected by

the recipient's performance or nonperformance of his official action or violation of his known legal duty as a public servant.

Comment

This section deals only with bribery of public servants, defined in § 109 as officers, employees, advisers, consultants and anyone authorized to act for or on behalf of the government, including members of Congress, judges and jurors. Other sections deal with bribery of witnesses (§ 1321) and informants (§ 1322), and specified private briberies, including bribery of bank officials (§ 1756) and sports participants (§ 1757). "Official action", as defined in § 109, means any exercise of discretion. Note that, by virtue of the jurisdictional base designated in § 1368, this section will to some extent cover state and local official bribery as well as federal official bribery.

While this provision will primarily replace the existing official bribery statutes in Title 18, principally 18 U.S.C. § 201, it is also intended to replace all bribery statutes outside Title 18 which affect public servants and contain conflicting requirements and penalties. In defining the culpability requirement, the section avoids reliance upon the term "corruptly", used in existing law, which is a term of uncertain meaning. This requires exclusion of "log-rolling" from the scope of the offense. See § 1369(a). "[A]s consideration for" has been substituted for "intent to influence," in existing law, in order to emphasize the bargain aspect of bribery. Trading in special influence—being paid to use kinship or a position as a public servant to influence another's official action—is separately dealt with in § 1365.

By focusing upon what is being bargained for, this section is able to avoid issues, presently treated at length in existing 18 U.S.C. § 201, relating to the time when the recipient is in a position to be "corruptly influenced." So long as what is being sought is his official action when or if he becomes a public servant, it is irrelevant that he is only being considered for or seeking nomination, rather than actually being nominated, appointed, confirmed, elected, or in the official position.

The prima facie case provision (see § 103 for precise effect) is intended not only to insure uniform treatment by the courts of situations which circumstantially establish bribery, but also to provide an explicit warning to public servants and others of the conduct, even if innocent, which ought to be avoided. Most of the prophylactic provisions which prohibit conflicts of interest now contained in Chapter 11 of Title 18 are recommended for transfer to Title 5 (Government Organization and Employees). Such provisions tend to be complex, detailed and regulatory in nature. They are now penalized as misdemeanors and may be continued as such, or may be made subject to the regulatory offense provision, § 1006.

See Working Papers, pp. 577, 591, 685–98, 929.

§ 1362. Unlawful Rewarding of Public Servants.

(1) Receiving Unlawful Reward. A public servant is guilty of a Class A misdemeanor if he solicits, accepts or agrees to accept a thing of pecuniary value for:

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(a) having engaged in official action as a public servant; or

(b) having violated a legal duty as a public servant.

(2) Giving Unlawful Reward. A person is guilty of a Class A misdemeanor if he knowingly offers, gives or agrees to give a thing of pecuniary value, receipt of which is prohibited by this section.

Comment

This section complements the bribery provision (§ 1361). It eliminates difficulties under existing bribery statutes when the defense is made that the payment was not offered or solicited until *after* the official action was taken or the legal duty violated. Payment for past favors implies the possibility of rewards in the future for further favors and thus tends to corrupt officials.

As under existing law (18 U.S.C. § 201(f) and (g)), the offense carries a lesser penalty than bribery because the element of corrupt bargain is absent or unprovable.

See Working Papers, pp. 698–703.

§ 1363. Unlawful Compensation for Assistance in Government Matters.

(1) Receiving Unlawful Compensation. A public servant is guilty of a Class A misdemeanor if he solicits, accepts or agrees to accept a thing of pecuniary value as compensation for advice or other assistance in preparing or promoting a bill, contract, claim or other matter which is or is likely to be subject to his official action.

(2) Giving Unlawful Compensation. A person is guilty of a Class A misdemeanor if he knowingly offers, gives or agrees to give a thing of pecuniary value to a public servant, receipt of which is prohibited by this section.

Comment

This section covers aspects of existing prophylactic provisions in Chapter 11 of Title 18 (principally 18 U.S.C. §§ 203, 205 and 209) prohibiting payment to, and receipt of payment by, public servants for promotional advice or assistance concerning matters over which the public servant has discretionary authority. Other restrictions on payment to or receipt of compensation by public servants or as to their activities are regarded as regulatory measures to be transferred to Title 5 (Government Organization and Employees). See Working Papers, pp. 698–703.

§ 1364. Trading in Public Office and Political Endorsement.

(1) Offense. A person is guilty of a Class A misdemeanor if he solicits, accepts or agrees to accept, or offers, gives or agrees to

give, a thing of pecuniary value as consideration for approval or disapproval by a public servant or party official of a person for:

(a) appointment, employment, advancement or retention as a public servant; or

(b) designation or nomination as a candidate for elective office.

(2) Definitions. In this section:

(a) "approval" includes recommendation, failure to disapprove, or any other manifestation of favor or acquiescence;

(b) "disapproval" includes failure to approve, or any other manifestation of disfavor or nonacquiescence;

(c) "party official" means a person who holds a position or office in a political party, whether by election, appointment or otherwise.

Comment

This section prohibits payments to, or receipt of payments by, public servants or party officials for action respecting federal employment or endorsement for federal elective office. Coverage of political endorsements is added to existing provisions governing federal employment (18 U.S.C. §§ 210, 211; 13 U.S.C. § 211). The section is intended to cover payments to political parties; and the inclusion in the definition of "thing of value" (§ 109) of payments to one other than the actual recipient should be adequate for this purpose. Existing provisions in 18 U.S.C. § 211 governing employment agencies will be located outside Title 18, possibly subject to the regulatory offense provision (§ 1006). See Working Papers, pp. 704–07.

§ 1365. Trading in Special Influence.

A person is guilty of a Class A misdemeanor if he knowingly offers, gives or agrees to give, or solicits, accepts or agrees to accept a thing of pecuniary value for exerting, or procuring another to exert, special influence upon a public servant with respect to his legal duty or official action as a public servant. "Special influence" means power to influence through kinship or by reason of position as a public servant or party official, as defined in section 1364.

Comment

This section, together with § 1363, which deals with unlawful compensation for assistance in government matters, carries forward in the proposed Code provisions dealing with some of the more egregious misconduct covered by the prophylactic provisions of Chapter 11 of Title 18. "Special influence" has been limited to comparatively well-defined relationships, rather than extended to include "friendship or other relationship, apart from the merits of the transaction" (*cf.* A.L.I. Model Penal Code § 240.7). The purpose of the limitation is

to avoid casting the shadow of criminality over employment of professional representatives who, because of their specialty or former official employment, are friends of the persons in government with whom they deal. The provisions regarding disqualification of former officials (18 U.S.C. § 207) would be continued, however, but would be transferred to Title 5. (Compare this section with § 1327, which deals with failure to reveal a retainer to influence a criminal proceeding). See Working Papers, pp. 707–09.

§ 1366. Threatening Public Servants.

(1) Threats Relating to Official Proceedings or to Secure Breach of Duty. A person is guilty of a Class C felony if he threatens harm to another with intent to influence his official action as a public servant in a pending or prospective judicial or administrative proceeding held before him, or with intent to influence him to violate his duty as a public servant.

(2) Other Threats. A person is guilty of a Class C felony if, with intent to influence another's official action as a public servant, he threatens:

(a) to commit any crime or to do anything unlawful;

(b) to accuse anyone of a crime; or

(c) to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or deceased, to hatred, contempt or ridicule, or to impair another's credit or business repute.

(3) Defense Precluded. It is no defense to a prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction or for any other reason.

Comment

This section, prohibiting coercion of public servants in their official functions, consolidates a number of existing federal provisions dealing with threats to public officials. The consolidated offense, which complements bribery (§ 1361), follows the formulation of that provision in covering all public servants and eliminating the requirement that a proceeding be pending (18 U.S.C. §§ 1503, 1505) and the need to prove the victim was in fact a public servant at the time harm was threatened.

This section raises to Class C felony status some threats which would not constitute offenses or would constitute misdemeanors absent a threat to governmental integrity.

The distinction between subsections (1) and (2) is that (1) covers any "harm" (see definition in § 109), whereas (2) deals with selected egregious harms not including, for example, social and political dis-

advantages, lawful termination of commercial relations, and the like. The broader range of harms in subsection (1) is appropriate because of the special disapprobation of intimidating influences on judges and jurors and on those who make decisions in administrative proceedings, or where the pressure is directed at breach of duty. Where the object of the intimidator is not so clearly noxious, as under subsection (2), the means of intimidation should in themselves be reprehensible in order to render the transaction criminal. See Working Papers, pp. 589–92.

§ 1367. Retaliation.

A person is guilty of a Class A misdemeanor if he harms another by an unlawful act in retaliation for or on account of the service of another as a public servant, witness or informant. "Informant" means a person who has communicated information to the government in connection with any government function.

Comment

This section, like § 1301 (physical obstruction of government function), may have its greatest utility as a jurisdictional base for prosecution of more serious offenses such as murder, aggravated assault and kidnapping pursuant to the "piggyback" provision in § 201(b). A retaliatory purpose raises lesser offenses to the Class A misdemeanor level; and otherwise noncriminal but nevertheless unlawful conduct, such as libel and defamation, is criminalized. "Unlawful" embraces torts as well as crimes, under both state and federal law. Existing law is broadened to cover all public servants and all informants, not only those involved in criminal matters. Harm to property, as well as harm to the person, is covered, as is the case under 18 U.S.C. §§ 1503, 1505, and 1510, which deal with harm to witnesses, informants, jurors and judicial officials, and 18 U.S.C. § 372, which deals with conspiracies to harm officials.

An issue under this section is whether the government should be required to prove that the official action against which the defendant retaliated was "lawful." For example, should this section penalize retaliation against "perjury" by a witness? It would appear prudent not to make this an issue in these cases, although the consideration might be relevant to the exercise of discretion in prosecution or sentence.

See Working Papers, pp. 596–97.

§ 1368. Federal Jurisdiction Over Offenses in Sections 1361 to 1367.

(1) Federal Bribery and Intimidation. There is federal jurisdiction over offenses defined in:

(a) sections 1361, 1362, 1365, and 1366 when the official action or duty involved is as a federal public servant;

(b) section 1363 when the public servant is a federal public servant;

(c) section 1364 when the service involved in subsection (1)(a) is federal public service or the elective office is federal elective office;

(d) section 1367 when the service involved was as a federal public servant, a federal witness or a federal informant.

(2) State and Local Bribery and Intimidation. There is federal jurisdiction over offenses defined in sections 1361, 1362, 1366 and 1367 under paragraphs (a), (b), (e) and (h) of section 201.

Comment

The jurisdiction prescribed by subsection (1) derives from the inherent power of the federal government to regulate and protect its own employees, functions and proceedings. Federal jurisdiction in subsection (2) as to bribery and intimidation of state and local officials recognizes a federal interest in preserving the effectiveness of local law enforcement, particularly against subversion by organized criminals, when conventional bases of federal jurisdiction are involved, *e.g.*, use of the mails, or when it is connected with another federal offense.

Violations of state bribery and extortion laws are federally penalized under 18 U.S.C. § 1952, which deals with interstate and foreign travel and use of interstate facilities to further unlawful activity related to racketeering enterprises. This section carries forward this provision and extends the policy to all of the coercive and retaliatory conduct covered by §§ 1366 and 1367. Use of the federal definitions of the crimes allows uniform treatment for federal prosecutions, and permits discriminations in grading not now possible under 18 U.S.C. § 1952, particularly when these provisions are used as jurisdictional bases for prosecuting more serious crimes under § 201(b).

The Study Draft version of § 1368 invoked each possible basis of federal jurisdiction, including, for example, § 201(g) ("affecting" interstate commerce). Reliance for restraint in the exercise of so comprehensive a jurisdictional base would have been placed on § 207 and a special requirement that the Attorney General certify to the existence of a substantial federal interest. Concerns about federalism led to cutting back on the jurisdictional bases: those that remain include use of the mails and telephone or movement of persons across state boundaries in connection with the offense—an ample but by now conventional federal power base.

See Working Papers, pp. 709–13.

§ 1369. Definition for Sections 1361 to 1368.

In sections 1361 through 1368 "thing of value" and "thing of pecuniary value" do not include (a) salary, fees and other compensation paid by the government in behalf of which the official action or legal duty is performed, or (b) concurrence in official

action in the course of legitimate compromise among public servants.

Comment

The limitation on the meaning of "thing of value" and "thing of pecuniary value" is necessary here because of the broader general definitions prescribed in § 109. Although not explicitly dealt with in the existing bribery statute (18 U.S.C. § 201), the matters covered here would probably be excluded by judicial construction of the term "corrupt" in existing law. See Working Papers, p. 686.

OFFICIAL MISCONDUCT REGARDING CONFIDENTIAL INFORMATION AND SPECULATION

§ 1371. Disclosure of Confidential Information Provided to Government.

A person is guilty of a Class A misdemeanor if, in knowing violation of a duty imposed on him as a federal public servant, he discloses any confidential information which he has acquired as a federal public servant. "Confidential information" means information made available to the United States government under a governmental assurance of confidence.

Comment

This section is principally derived from 18 U.S.C. § 1905, which prohibits disclosure by a federal official of confidential information relating to trade secrets and other business matters. Numerous other provisions in the United States Code deal with prohibitions as to similar and other matters. This section consolidates these provisions under the general definition of "information made available to the United States government under a governmental assurance of confidence." The scope of criminal liability under this section is somewhat narrower than liability under 18 U.S.C. § 1905; the latter permits disclosure as "authorized by law," whereas in this section disclosure "in knowing violation of a duty" is prohibited, allowing consideration of the propriety of the disclosure apart from the authority of law. Such treatment does not preclude other sanctions or the promulgation of regulations regarding specified information defining the duty more rigorously.

A major issue raised by the section is whether there should be such a broad criminal statute at all; one alternative would be to place outside Title 18 a number of narrow provisions, specifying the protected material and the public servants affected.

See Working Papers, pp. 723–25.

§ 1372. Speculating or Wagering on Official Action or Information.

(1) Speculating During and After Employment. A person is

guilty of a Class A misdemeanor if during employment as a federal public servant, or within one year thereafter, in contemplation of official action by himself as a federal public servant or by an agency of the United States with which he is or has been associated as a federal public servant, or in reliance on information to which he has or had access only in his capacity as a federal public servant, he:

(a) acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action;

(b) speculates or wagers on the basis of such information or official action; or

(c) aids another to do any of the foregoing.

(2) Taking Official Action After Speculation. A person is guilty of a Class A misdemeanor if as a federal public servant he takes official action which is likely to benefit him as a result of an acquisition of a pecuniary interest in any property, transaction or enterprise, or of a speculation or wager, which he made, or caused or aided another to make, in contemplation of such official action.

Comment

This section, as a conflict-of-interest and self-dealing offense applicable to all public servants, is new to federal law, although there are a few existing prohibitions of similar import applicable to specific employees speculating with respect to specific matters (Agriculture Department, 7 U.S.C. § 1157; Small Business Administration, 15 U.S.C. § 645(c); Internal Revenue Service, 26 U.S.C. § 7240). Subsection (1) is based on the view that, during a person's federal service and for a period thereafter, he should be barred from making the prohibited acquisitions and speculations, or helping another to do so, regardless of whether the official action occurs. It is derived from the A.L.I. Model Penal Code § 243.2. The requirement of a one-year period is derived from provisions of 18 U.S.C. § 207, which deals with disqualification of former officials from certain activities.

Subsection (2), which overlaps subsection (1), is intended primarily to reach the person who has made the acquisition or speculation (or helped another to do so) *prior* to entering federal service but in contemplation of something he intends to do as a public servant. Because there is no federal connection at the time of the acquisition or speculation, the focus of the proscription is on proceeding with the official action when benefit therefrom is likely to occur. A principal issue, similar to the issue raised by § 1371, is whether the conduct covered should be the subject of a general criminal proscription or of narrower specific prohibitions.

See Working Papers, pp. 724–25.

IMPERSONATING OFFICIALS

§ 1381. Impersonating Officials.

(1) Offense. A person is guilty of an offense if he falsely pretends to be:

(a) a public servant or foreign official and acts as if to exercise the authority of such public servant or foreign official; or

(b) a public servant or a former public servant or a foreign official and thereby obtains a thing of value.

(2) Defense Precluded. It is no defense to prosecution under this section that the pretended capacity did not exist or the pretended authority could not legally or otherwise have been exercised or conferred.

(3) Definition. In this section "foreign official" means an official of a foreign government of a character which is customarily accredited as such to the United States, the United Nations or the Organization of American States, and includes diplomatic and consular officials.

(4) Grading. An offense under subsection (1)(a) is a Class A misdemeanor. An offense under subsection (1)(b) is a Class B misdemeanor.

(5) Jurisdiction.

(a) There is federal jurisdiction over an offense of impersonation of a public servant, present or former, defined in this section when the public servant is a federal public servant.

(b) Federal jurisdiction over an offense of impersonation of a foreign official defined in this section extends to any such offense committed anywhere within the United States or the special maritime or territorial jurisdiction as defined in secton 210.

Comment

The existing laws regarding impersonation of officials to be replaced by this provision (18 U.S.C. §§ 912, 913, 915) attempt unsatisfactorily to encompass both the injury, in itself relatively minor, to the federal government which occurs when the credentials of federal officials are undermined, and the harm which impersonation of an official may cause to another. The existing felony treatment of the former is too severe; and the arbitrary maximum of three years is too low for the latter if the harm is kidnapping or a major fraud. Under the proposed Code, by virtue of the "piggyback" jurisdictional provision (§ 201(b)), the minor, undifferentiated impersonation can be classified as a misdemeanor, but remain a vehicle for prosecution of the more serious crimes. The section expands the definition of "foreign official" to

include the officials of the U.N. and O.A.S. Subsection (2) codifies a judicial construction of current law.

Serious aspects of offenses presently in Chapter 33 of Title 18, which deals largely with petty offenses involving unlawful wearing of a uniform and use of official emblems, insignia and names, can be prosecuted under this section. It is recommended that the balance be transferred from the Criminal Code, and perhaps made subject to the regulatory offense provision (§ 1006).

See Working Papers, pp. 729–42.

Chapter 14. Internal Revenue and Customs Offenses

Introductory Note

Pursuant to the policy of integrating into the proposed Code all serious federal offenses, the present Chapter incorporates the principal tax offenses now located in Title 26, with the exception of those relating to firearms, which are incorporated in Chapter 18. Many minor offenses, especially of a regulatory character, will remain in the revenue title. The serious customs offenses are presently located in Title 18; and they are consolidated here in a single section or covered by other provisions of the proposed Code.

INTERNAL REVENUE OFFENSES

§ 1401. Tax Evasion.

(1) Offense. A person is guilty of tax evasion if:

(a) with intent to evade any tax, he files or causes the filing of a tax return or information return which is false as to a material matter;

(b) with intent to evade payment of any tax which is due, he removes or conceals assets;

(c) with intent to evade payment, he fails to account for or pay over when due taxes previously collected or withheld, or received from another with the understanding that they will be paid over to the United States;

(d) with intent to evade any tax, he removes, destroys, mutilates, alters or tampers with any property in the custody, control or possession of the United States or any agent thereof;

(e) with intent to evade any tax, he knowingly fails to file an income, excise, estate or gift tax return when due; or

(f) he otherwise attempts in any manner to evade or defeat any income, excise, estate or gift tax.

(2) Grading. Tax evasion is:

(a) a Class B felony if the amount of the tax deficiency exceeds $25,000; and

(b) a Class C felony if the amount of the tax deficiency exceeds $500.

Otherwise it is a Class A misdemeanor.

Comment

This section is principally derived from the existing broadly-defined tax evasion offense, 26 U.S.C. § 7201. That provision itself is substantially re-enacted as a "catch-all" in paragraph (f) of subsection (1).

Exploration of the possibility of replacing the broad definition with specific proscriptions of conduct which constitutes tax evasion led to the formulations of the other paragraphs, taking into account, as well, some aspects of 26 U.S.C. § 7202 (here embodied in paragraph (c)) and 26 U.S.C. § 7206, which deals with material false statements, aid and assistance, and removal and concealment of property. Inclusion of both general and specific formulations in the section recognizes that each has value. The particularized formulation provides notice, utility in prosecution, and convenience in changing coverage, and the generalized form assures that all means of evasion are prohibited. The issue remains, however, whether the broad formulation should be retained to the extent that it makes a felony of, for example, oral misleading statements to investigators. Such conduct might be explicitly excluded. *Cf.* § 1352 (the general false statements provision).

The requirement of an intent to evade any tax in subsection (1)(a) effects two principal changes in existing law. One is that criminal liability may be established even when there is no tax deficiency, contrary to present judicial interpretation of 26 U.S.C. § 7201. The other change is that the making of false material statements will not, in all cases, be felonious, as it presently is under 26 U.S.C. § 7206, without intent to evade. The existence of that intent in felony situations distinguishes tax evasion from the general false statement misdemeanor (§ 1352).

Grading of tax evasion, a change from present law, parallels the treatment of other frauds against the government prosecutable under the theft provisions (§ 1735). If grading comparable to present law were retained (making tax evasion a Class C felony in all cases), it might be preferable to exclude excise taxes from subsection (1)(e) and (f) and to treat substantial evasion of excise taxes covered by those paragraphs under an addition to § 1403(2), making unlawful trafficking in a taxable object a Class C felony if the actor acts with intent to evade the tax and the tax which would have been due on the object exceeds $500.

The general provisions on complicity and facilitation in the proposed Code §§ 401 and 1002 make it unnecessary to carry forward in this section explicit reference to preparing and aiding in the preparation of the return. Also, explicit venue provisions relating to such activity and to subscribing and mailing the return, if needed, would be incorporated in an amendment of 18 U.S.C. § 3237, where they would apply to all offenses.

See Working Papers, pp. 743–44, 746–54, 756–57, 763–66.

§ 1402. Knowing Disregard of Tax Obligations.

A person is guilty of a Class A misdemeanor if he knowingly:

(a) fails to file a tax return when due;

(b) engages in an occupation or enterprise without having registered or purchased a stamp if that is required by a statute in Title 26 of the United States Code:

(c) fails to withhold or collect any tax which he is required by statute to withhold or collect;

(d) after having received the notice provided for in 26 U.S.C. § 7512(a), fails to deposit collected taxes in a special bank account as provided in 26 U.S.C. § 7512(b), or having deposited funds in such account, pays any of them to anyone other than the United States or authorized agent thereof; or

(e) fails to furnish a true statement to an employee regarding tax withheld as required under 26 U.S.C. § 6051.

Comment

Although the misdemeanor offenses covered by this section could in principle have been left in Title 26, in view of their regulatory character, they are included here because of their close association with the offenses covered by § 1401. Failure to file a return, for example, is an alternative misdemeanor charge in some situations which may also be prosecuted as a felonious attempt to evade under § 1401. An employer's knowing omission to withhold income tax when paying employees' wages is a misdemeanor under paragraph (c) of this section, but becomes a felony in the near-embezzlement situation where he does withhold but fails to pay over to the government (§ 1401(1)(c)). Among closely related offenses not included in this section are failure to pay and failure to keep records or supply required information. *Cf.* 26 U.S.C. § 7203. If criminal sanctions are retained for such conduct, the regulatory offense provision (§ 1006) should be made applicable. Note that refusal to produce information pursuant to subpoena or order is dealt with in § 1342. See Working Papers, pp. 744, 754–56, 766.

§ 1403. Unlawful Trafficking in Taxable Objects.

(1) Offense. A person is guilty of an offense if he traffics in a taxable object knowing that the object has been or is being imported, manufactured, produced, removed, possessed, used, transferred or sold in violation of a federal revenue statute or a regulation, rule or order issued pursuant thereto.

(2) Grading. The offense is a Class C felony if the taxable object is distilled spirits and the actor is not qualified under Title 26 of the United States Code as a distiller, bonded warehouseman, rectifier or bottler of distilled spirits or is so qualified and acts with intent to evade the tax. Otherwise it is a Class A misdemeanor.

(3) Defenses. It is an affirmative defense to a prosecution under this section that all taxes imposed upon the object or upon trafficking therein were paid prior to the defendant's trafficking in the object; but it is no defense that such taxes were not yet due.

Comment

The tax evasion offenses cover evasion of excise, as well as income, taxes; but they do not permit adequate enforcement with respect to excise taxes because of the difficulties involved in determining who is obliged to pay the tax or file the return, and the amount of tax evaded. The principal problem involves "moonshining," because the tax on liquor may run as high as 20 times the cost of production, and liquor is relatively easy to produce. Title 26 contains many offenses relating to liquor production, most of them felonies. See 26 U.S.C. §§ 5601–08. This section, together with the definitions in § 1409 and the presumptions in § 1405, carries forward such offenses in a simplified form. (Compare this section with the illicit drug trafficking offenses in §§ 1821–29.) Trafficking in other taxable objects, *e.g.*, beer, wine, tobacco, are also covered by this section, but, since they do not pose the same problems as liquor trafficking, are graded as Class A misdemeanors, unless they qualify for felony treatment under § 1401. The counterfeiting provisions of Title 26 are carried forward elsewhere in the proposed Code. See § 1751. Other offenses would remain in Title 26, as misdemeanors or subject to the regulatory offense provision (§ 1006) if made applicable by amendment of Title 26.

The grading of liquor trafficking distinguishes between clandestine operations and those engaged in by persons qualified under Title 26, so that violation by the latter of the various prophylactic regulatory provisions will not be felonious absent an intent to evade the tax. See comment to § 1401, *supra*, for an addition to the grading provision here as an alternative to the coverage of excise tax evasions under the grading scheme in that section.

The definition of the offense prohibits any trafficking once a violation, even though rectified, has occurred; and some existing laws produce the same result. Accordingly, an affirmative defense is provided in subsection (3) where trafficking occurs after the taxes have been paid. The last phrase—stating that it is no defense if the trafficking occurs before the taxes are due—is intended to make clear that the defense is not available when the violations, such as with regard to bonding or registration, occur before taxes are due.

See Working Papers, pp. 744, 757–61.

§ 1404. Possession of Unlawfully Distilled Spirits.

A person is guilty of a Class B misdemeanor if he possesses distilled spirits, knowing that a tax imposed thereon or on the trafficking therein has not been paid.

Comment

A principal change in policy with respect to the liquor tax laws proposed in the Code is to remove the possibility of felony treatment for the consumer of nontaxpaid liquor, present under existing laws (26 U.S.C. §§ 5601(a),(11), 5604(a)). While discrimination between the trafficker and mere possessor undoubtedly makes law enforcement more difficult, such discrimination is recognized as appropriate even in the narcotics area, where the article itself is contraband and

has not merely become such because no tax has been paid. However, the knowing consumer does provide the market, and thus, like the receiver of stolen goods, may appropriately be deterred by criminal sanctions. Note that possession of more than five gallons of liquor gives rise to a presumption of trafficking under § 1405(3). It is recognized that the appropriate quantity might be less than five gallons. See Working Papers, pp. 744, 757–61.

§ 1405. Presumptions Applicable to Sections 1403 and 1404.

(1) Containers, Stamps, Certificates and Labels. For purposes of sections 1403 and 1404, proof that a person was found in possession of an object therein described, which object was not in the container required by statute or a regulation issued pursuant thereto, or which did not bear a stamp, certificate or label required by statute or a regulation issued pursuant thereto, gives rise to a presumption of the culpability specified in those sections and that the tax was not paid.

(2) Presence at Still or Distilling Apparatus. For the purposes of section 1403, proof that a person was present at a place where a still or distilling apparatus was then set up or where mash, wort or wash was then possessed gives rise to a presumption:

(a) that such person was a trafficker in distilled spirits; and

(b) if the signs or permits were not there displayed as required by statute or a regulation issued pursuant thereto, that such person had the culpability specified in that section.

(3) Possession of Distilled Spirits. For the purposes of section 1403, possession of a quantity of distilled spirits in excess of five gallons gives rise to a presumption that the possessor was trafficking in such distilled spirits.

Comment

The presumptions in this section are intended as an aid to enforcement of §§ 1403 and 1404; but developments in the law as to the constitutionality of presumptions (see *Turner* v. *United States*, 396 U.S. 398 (1970)) may require a different approach. The presumptions set forth in subsection (2) appear to be valid under the test laid down in *United States* v. *Gainey*, 380 U.S. 63 (1965), in which the Supreme Court considered the existing law (26 U.S.C. § 5601(b)) from which the subsection is derived. The validity of the principle expressed in subsection (3)—that possession of a certain quantity of distilled spirits presumes trafficking—appears to be more dubious; the amount may be decisive. Subsection (1) appears to present the most difficulties; but it should be noted that it has been derived from existing statutes which make the conduct there described offenses in themselves, without

the possibility of rebuttal. See 26 U.S.C. §§ 5604(1), 5606, 5723(a), 5751(a)(2)–(3), 5762(a)(5). See Working Papers, pp. 744, 761–62.

§ 1409. Definitions for Sections 1401 to 1409.

In sections 1401 to 1409:

(a) "object" includes certificates and other documents;

(b) "possession" includes custody or control, jointly or severally exercised;

(c) "produce" and "manufacture," and variants thereof, include the gathering together of equipment or materials for the purpose of producing or manufacturing, as the case may be;

(d) "tax" means a tax imposed by a federal statute, an exaction denominated a "tax" by a federal statute, and any penalty, addition to tax, additional amount, or interest thereon, but does not include tariffs or customs duties or tolls, levies or charges which are not denominated a "tax" by a federal statute;

(e) "tax return" means a written report of the taxpayer's tax obligations which is required to be filed by a federal statute or regulation issued pursuant thereto. The term includes reports of taxes withheld or collected, income tax returns, estate and gift tax returns, excise and other tax returns of any individual, corporation or other entity required to file returns and pay taxes in conjunction with a tax return, but does not include interim reports, information returns or returns of estimated tax;

(f) "taxable object" means an object upon the manufacture, production, removal, possession, import, sale or transfer of which a tax is imposed;

(g) "traffics in" means produces, manufactures, possesses with intent to transfer, transfers, dispenses, imports, receives with intent to transfer, sells or offers or agrees to do any of the foregoing.

Comment

Note that the definitions of "tax return" and "tax" include taxes and returns which may be required outside of Title 26. "Tax return," for general purposes, excludes collateral documents such as interim reports and information and estimated tax returns, principally to preclude criminal sanctions for failure to file such documents. Note that explicit inclusion of information returns in § 1401(1)(a), dealing with false material statements with intent to evade, is thus required to reach such means of evasion.

§ 1411. Smuggling.

(1) Offense. A person is guilty of smuggling if he:

(a) knowingly evades examination by the government of an object being introduced into the United States;

(b) knowingly deceives or makes a false statement with intent to deceive the government as to a matter material to the purpose of an examination by the government of an object being introduced into the United States;

(c) knowingly evades assessment or payment when due of the customs duty upon an object being introduced into the United States;

(d) knowingly introduces an object into the United States the introduction of which is prohibited, whether absolutely or conditionally, pursuant to a federal statute; or

(e) receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of an object the assessment or payment of the duty upon which, in fact, is being or has been evaded or the introduction of which, in fact, is prohibited, absolutely or conditionally, pursuant to a federal statute, knowing that the object was unlawfully introduced into the United States.

(2) Grading. Smuggling is a Class C felony if:

(a) the value of the object exceeds $500;

(b) the duty which would have been due on the object exceeds $100;

(c) the object is being or was introduced for use in a business; or

(d) the actor knows that introduction is prohibited, whether absolutely or conditionally, because objects of that class may cause or be used to cause bodily injury or property damage.

Otherwise smuggling is a Class A misdemeanor. Notwithstanding the grading provided in this subsection, if the statute prohibiting introduction of an object, or a related statute, provides lesser grading for the same conduct, the lesser grading applies.

(3) Definitions. In this section:

(a) "introduces" and variants thereof mean importing or transporting or bringing into, or landing in, the United States from outside the United States or from customs custody or control;

(b) "object" includes any article, goods, wares and merchandise and an animate as well as inanimate thing;

(c) "United States" does not include the Virgin Islands,

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American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island or Guam.

(4) Determining Value and Duty. The value of an object shall be its highest value, determined by any reasonable standard, regardless of its value for purposes of determining the amount of duty owing, if any. Smugglings committed pursuant to one scheme or course of conduct may be charged as one offense, and the value of, or the duty owing on, the objects introduced may be aggregated in determining the grade of the offense.

(5) Charging Smuggling. An indictment or information charging smuggling under this section which fairly apprises the defendant of the nature of the charges against him shall not be deemed insufficient because it fails to specify a particular category of smuggling. The defendant may be found guilty of smuggling under such an indictment or information if his conduct falls under any of the paragraphs of subsection (1), so long as the conduct proved is sufficiently related to the conduct charged that the accused is not unfairly surprised by the case he must meet.

Comment

This section essentially carries forward the provisions of the existing smuggling statute, 18 U.S.C. § 545, and replaces a number of other sections with overlapping prohibitions against various schemes to defeat enforcement of the customs laws. The principal substantive change is that the overly broad "knowingly import . . . merchandise contrary to law," which literally makes felonious all kinds of trivial violations, is replaced by the proscriptions of evasion of duty and examination and introduction of contraband. The judgment is that any violations of customs laws which are not embraced by subsection (1) should be treated as regulatory offenses or misdemeanors.

Paragraphs (a) and (b) of subsection (1)—evasion of examination and deception of customs officers—will cover most forms of smuggling. Significantly, proof as to the reasons for frustrating customs enforcement is not required; whether the purpose of the evasion of examination or deception is to evade duty or introduce a forbidden object—or a mistaken belief that such a purpose will be accomplished thereby—is irrelevant. Paragraphs (c), (d) and (e) are largely "mopping-up" provisions, covering any misbehavior accompanied by a purpose to evade duty or introduce contraband. They would cover, for example, unlawful removal of goods from customs custody, after examination by customs officials has taken place. See 18 U.S.C. § 549, dealing with removing goods from customs custody, a provision which can thus be eliminated, since the general theft provisions will cover the balance of the conduct prohibited thereby.

The single concept of introduction into the United States is sub-

stituted in place of the variety of characterizations in existing law: "smuggles", "clandestinely introduces", "brings in", "imports", used in 18 U.S.C. § 549, and terms such as not presenting for inspection, unlading, landing, etc., used in other statutes or in regulations.

The proposed Code would make attempted smuggling an offense for the first time in federal law. Litigation over whether preparatory acts are criminal would focus on whether such acts are *substantial steps* under the attempt provision (§ 1001) towards evasion of examination rather than whether they themselves constitute "smuggling" or "importation" or "bringing in", as is presently the case. Steps designed to frustrate examination, such as by concealment under a false bottom in a container, would constitute attempted evasion, if an examination does not actually take place.

Section 1411 does not continue the provision in 18 U.S.C. § 545 that possession of smuggled goods warrants conviction unless "explained to the satisfaction of the jury." Under the definitions of the Code, the provision, if preserved, would constitute a "prima facie case." It is rejected because, although possession, depending on the circumstances, could constitute a prima facie case, it should not constitute one in all cases.

The definition of "object" in subsection 3(c) is intended to avoid the kind of litigation which has arisen with respect to the word "merchandise" in existing 18 U.S.C. § 545 (psittacine bird?). Existing policy with respect to various island possessions is carried forward in the definition of "United States" in subsection 3(d).

Smuggling under 18 U.S.C. § 545 is now punishable by up to five years in prison, and since that provision embraces all bringing in of merchandise contrary to law, it permits felony treatment of a wide variety of technical violations. Section 545 makes no distinction based upon the nature of the article introduced, although other statutes prohibiting certain importations do.

Felony penalties for all smuggling are not retained although it may be argued that the Bureau of Customs needs broad discretion for effective enforcement and that deterrent value of felony penalties is necessary in the enforcement scheme. In fact, official policies of the Bureau of Customs tend to ameliorate the harsh provisions of 18 U.S.C. § 545. Minor tourist smuggling is dealt with by permitting payment of the duty or by confiscation of the contraband. Civil penalties and forfeitures are also used. Section 1411 distinguishes between conduct deserving of felony treatment and that for which misdemeanor treatment would be appropriate. Most tourists seem to know how the Bureau exercises its discretion. With realistic penalties, misdemeanor prosecutions of tourists might be undertaken and respect for the law increased.

The bases proposed for discriminating between felonious and nonfelonious smuggling—value, amount of duty and business use—are expected to draw the line roughly between professionals and amateurs, profiteers and users, big cheats and little cheats. Subsection 2(d) grades as a felony knowing importation of dangerous contraband, *e.g.*, diseased animals. The deference to the provision for a lesser penalty in another statute is based on the theory that such grading, which has taken into account the nature of a specific object, is more discriminat-

ing. This principal may have general applicability and might be considered for inclusion in the general sentencing provisions.

Subsections (4) and (5) are adapted from provisions proposed for the theft offenses under the Code (§§ 1735(7), 1731(2)). Subsection (5) should not only aid in economizing on language in an indictment but also should prove to be of substantive value in cases in which it develops that the defendant was a receiver of the object rather than the person—or an accomplice of the person—on whom the requirements of examination, declaration, and payment of duty are imposed.

Chapter 15. Civil Rights and Elections

PROTECTION OF FEDERAL RIGHTS GENERALLY

§ 1501. Conspiracy Against Rights of Citizens.

A person is guilty of a Class A misdemeanor:

(a) if he conspires with another to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of, or because of his having so exercised, any right or privilege secured to him by the constitution or laws of the United States; or

(b) if, with intent to prevent or hinder another's free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, he goes on such other's premises with another or others or goes in disguise on the highway with another or others.

Comment

See Comment to § 1502, *infra*.

§ 1502. Deprivation of Rights Under Color of Law.

A person is guilty of a Class A misdemeanor if, under color of any law, statute, ordinance, regulation or custom, he intentionally subjects any inhabitant of any state:

(a) to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States; or

(b) to different punishments, pains or penalties on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens.

Comment

Sections 1501 and 1502 preserve post-Civil War civil rights legislation presently embodied in 18 U.S.C. §§ 241 and 242. Present sections have been carried forward virtually without change because, as written, they were regarded as the basic provisions to which the specific provisions of the Civil Rights Act of 1968 (carried forward by subsequent sections of this Chapter) were complementary. The sections are also important because their generality affords opportunity for continued case-by-case development of the civil rights law. "Willfully" in present § 242 has been changed, however, to "intentionally" in Code § 1502 to adopt the culpability requirement articulated in *Screws* v. *United*

States, 325 U.S. 91 (1945), that there be shown a specific intent to deprive the victim of his federal *rights*, not merely, for example, to beat or murder him. The definition of "state" in Code § 109 embraces "state, territory, or District" in present § 242.

Some Commissioners favor a modernization of these provisions, by, among other things: (1) broadening present § 241 to include any person, whether or not a citizen; (2) deleting the requirement of present § 241 that at least two persons commit the offense; and (3) deleting as superfluous the final clause of present § 242 (Code § 1502(b)), which unnecessarily spells out that there is a federal right not to be subjected to discriminatory penalties. *Cf.* Study Draft § 1501.

Other Commissioners favor deletion of these provisions entirely on the grounds that they do not meet modern standards of due process in the definiteness of the language, their major provisions are covered by other provisions in the Chapter, and new crimes in the area, if any, should not be created by judicial construction but expressly by the Congress.

Present § 241 is a felony carrying up to ten years' imprisonment; present § 242 is a misdemeanor with a one-year maximum. Both sections authorize life imprisonment "if death results" from the commission of the offense. Under the Code both offenses are classified as Class A misdemeanors because of the provision for "piggyback" jurisdiction (§ 201(b)), under which the civil rights offender would be subject to federal prosecution for such offenses as aggravated assault, kidnapping, arson and murder, committed in the course of violating §§ 1501 and 1502. This jurisdiction thus gives federal law enforcement full power to deal appropriately with the whole range of deprivations of federal rights from the minor to the most atrocious.

Succeeding sections of this Chapter deal with a variety of *specific* civil rights and elections offenses most of which have been and might be embraced within the generality of §§ 1501 and 1502. These two sections will continue to provide a base for further development of federal protection of federal rights by judicial interpretation. Note that §§ 1501 and 1502, like present §§ 241 and 242, apply to any form of "injury" or "intimidation"; there is no requirement of forceful intimidation or discrimination such as appears in the more specfic provisions below.

See Working Papers, pp. 769–78, 806–10.

INTERFERENCE WITH PARTICIPATION IN SPECIFIED ACTIVITIES

Introductory Note

Sections 1511 through 1516 are largely a re-enactment of criminal provisions of the Civil Rights Act of 1968, now found in 18 U.S.C. § 245, dealing with federally protected activities generally, and 42 U.S.C. § 3631, dealing with fair housing practices. The Code sections are only intended to effect technical variations from the language of present law. The various subsections of 18 U.S.C. § 245 have been reorganized into separate sections for purposes of clarity. The provisions of 18 U.S.C. § 245 and 42 U.S.C. § 3631 have been integrated and duplications between them and within 18 U.S.C. § 245 have been eliminated. In addition, matters which are ambiguous under existing

law have been treated explicitly, *e. g.*, in subparagraphs (b) (ii) and (iii) of § 1511, and matters treated under Code provisions having general application are not repeated in these sections. *e.g.*, federal jurisdiction not pre-emptive (Code § 206; present 18 U.S.C. § 245 (a)(1)), justification of execution of public duty (Code § 602(1); present 18 U.S.C. § 245(c)). Minor changes in substance are: substitution of "any person" for "citizen" in the provisions of 18 U.S.C. § 245(b)(5) (Code §§ 1514–15); deletion of 18 U.S.C. §245(b)(3), which authorizes federal prosecution for forceful or intimidating interference, in the course of a riot, with "any person engaged in a business" affecting interstate commerce, to permit treatment of the issue as an aspect of federal jurisdiction under the Code's riot provisions; bringing the fair housing provisions of 42 U.S.C. § 3631 under the general requirement of 18 U.S.C. § 245 that the Attorney General expressly authorize prosecutions under these sections (Code § 1516).

Although the principal text carries forward existing law, some Commissioners favored changes which had been rejected at the time of its enactment. One change would be expansion of the scope of existing law by adding the phrase "or by economic coercion", on the ground that such coercion can be virtually as effective and harmful a means of deprivation of civil rights as force or threat of force. The Commission decided, however, that the difficulties of enforcement of such a general concept outweighed its possible benefit. Another change favored by some would be to contract the scope of existing law (1) by making it applicable only to conduct under color of law, on the ground that the only valid justification for federal intervention today is the failure of state process, and (2) by requiring intent to interfere with a described right, in order to provide a nexus in all cases between the prohibited conduct and the federal interest. Such curtailment would be accompanied by a recommendation that Congress consider legislation making federal investigative assistance available for difficult cases which would be federal offenses were "color of law" not required.

The offenses in §§ 1511–15 are classified as misdemeanors for reasons set forth in the comment to § 1501. Note the arbitrary divergence in existing treatment provisions between 18 U.S.C. §§ 241 and 245: the former authorizes up to ten years' imprisonment unconditionally, whereas the latter authorizes that penalty only "if bodily injury results."

To the extent that §§ 1511 through 1516 may vary from the wording of their progenitor provisions in present law, they do so only marginally and such minor differences are not intended to effect anything beyond a recodification of present law.

See Working Papers, pp. 778–805.

§ 1511. Interference With Elections, Federal or Federally Assisted Programs and Employment.

A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force

[or by economic coercion], intentionally injures, intimidates or interferes with another because he is or has been, or in order to intimidate him or any other person from:

(a) voting for any candidate or issue or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in any primary, special, or general election;

(b) participating in or enjoying the benefits of any program, service, facility, or activity provided or administered by the United States, or receiving federal financial assistance, including (i) serving as a grand or petit juror in any court of the United States or attending court in connection with such possible service, or (ii) qualifying for or operating in a contractual relationship with the federal government, or (iii) qualifying for or enjoying the benefits of a federal loan or federal guarantee of any loan; or

(c) applying for or enjoying employment, or any perquisite thereof, by any federal government agency.

Comment

This is largely a re-enactment of paragraph (1) of 18 U.S.C. § 245 (b), part of the Civil Rights Act of 1968. Paragraph (2) of 18 U.S.C. § 245(b) is picked up in § 1512, *infra*. The relation between the two sections is as follows. This section deals with a list of federal rights protected against impairment regardless of motive or context: § 1512 protects certain other federal rights but only when the interference is discriminatory on the basis of race, color, religion or national origin. This section's list of rights essentially comprehends those that are deemed distinctively federal, *e.g.*, to vote, hold a federal job or benefit; the § 1512 list embraces such matters as the right to attend a school, hold a job, enjoy public accommodations. Such rights are left to be vindicated by *state* penal law except where discrimination is involved.

As indicated in the Introductory Note preceding § 1511, the bracketed phrase "or by economic coercion" was favored by a substantial body of opinion in the Commission because of the importance of economic pressures in causing people to forgo registration, voting and other rights. Opposition to the ban on economic coercion focussed on the vulnerability of employers and landlords to false charges in cases of discharge or eviction that might actually have been due to legitimate business reasons. One countersuggestion was to confine the economic coercion offense to cases of *threats* to use such coercion to prevent exercise of rights; requiring proof of threat would eliminate any ambiguity as to the motivation of an economic injury. The possibility of false claims of threats, however, would remain.

See Working Papers, pp. 779–89, 796.

§ 1512. Discrimination in Public Education, State Activities, Employment, Public Accommodations, Housing, Interstate Travel.

A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force [or by economic coercion], intentionally injures, intimidates or interferes with another because of his race, color, religion or national origin and because he is or has been, or in order to intimidate him or any other person from:

(a) enrolling in or attending any public school or public college;

(b) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any state or subdivision thereof;

(c) serving, or attending upon any court of any state in connection with possible service, as a grand or petit juror;

(d) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishment. Nothing in this paragraph shall limit the lawful action in support of such guest policy as he chooses to adopt of a proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence;

(e) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any

state or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(f) selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(g) traveling among the states or in interstate commerce, or using any facility which is an integral part of interstate travel, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air.

Comment

See comment to § 1511. An issue involved here is whether paragraph (g), dealing with the right to travel interstate, ought to be located in § 1511 rather than in this section, *i.e.*, should that right be federally protected aginst interference even where no racial discrimination is involved—for example, against a local effort to intimidate "outsiders" from coming into the state to organize workers or to establish competition with local businessmen. The 1968 Congressional resolution of this issue was retained, absent a convincing showing of past abuses and current need. Here, as elsewhere in considering specific civil rights offenses, it must be borne in mind that the general protection under §§ 1501 and 1502 of federal rights supplements all civil rights provisions. See Working Papers, pp. 785, 788–96.

§ 1513. Interference With Persons Affording Civil Rights to Others.

A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force [or by economic coercion], intentionally injures, intimidates or interferes with another because he is or has been, or in order to intimidate him or any other person from, affording, in official or private capacity, another person or class of persons opportunity or protection to participate in any benefit or activity described in section 1511 or to participate without discrimination on account of race, color, religion, or national origin in any benefit or activity described in section 1512.

Comment

This section corresponds to paragraph (4) of 18 U.S.C. § 245(b). Paragraph (4) protects persons who are willing to accord federal rights, *e.g.*, to providers of nondiscriminatory housing, but who may be subjected to intimidation or retaliation for that willingness. See Working Papers, pp. 797–99.

§ 1514. Interference With Persons Aiding Others to Avail Themselves of Civil Rights.

A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force [or by economic coercion], intentionally injures, intimidates or interferes with another because he is or has been, or in order to intimidate him or any other person from, lawfully aiding or encouraging other persons to participate in any benefit or activity described in section 1511 or to participate without discrimination on account of race, color, religion, or national origin in any benefit or activity described in section 1512.

Comment

This section corresponds to paragraph (5) of 18 U.S.C. § 245(b), except that the final clause of that paragraph is picked up in § 1515, *infra*. Paragraph (5) protects those aiding or encouraging others to take advantage of their rights.

This section substitutes "persons" for the term "citizen" used in existing law. Paragraph (5) is the only provision in 18 U.S.C. § 245 which restricts protection to citizens. It seems anomalous, to some Commissioners, that the alien is protected in all his substantive rights except the right to be assisted by another alien (his wife? his father?) in claiming them.

See Working Papers, pp. 799–800.

§ 1515. Discriminatory Interference With Speech or Assembly Related to Civil Rights Activities.

A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force [or by economic coercion], intentionally injures, intimidates or interferes with another because he is or has been, or in order to intimidate him or any other person from participating lawfully in speech or peaceful assembly opposing any denial of opportunity to participate in any benefit or activity described in section 1511 or to participate without discrimination on account of race, color, religion, or national origin in any benefit or activity described in section 1512.

Comment

This section picks up the final clause of paragraph (5) of 18 U.S.C. § 245(b). It protects speeches and demonstrations in favor of the exercise of civil rights. Among the issues presented are the following. Should this specific federal penal protection of First Amendment rights be limited to the rights listed in §§ 1511 and 1512? There has been some demand for broader protection. See *Final Report of the National Commission on Causes and Prevention of Violence*, p. 78 (Dec. 1969), which recommends federal injunctive remedies. Congress' reso-

lution of this issue in the 1968 legislation is retained absent a convincing case for extending federal penal jurisdiction to make a federal case out of every brawl between opposing demonstrators on political, social, economic, and international issues. Some Commissioners, however, favor extension of the provision to protect lawful speech and demonstrations on both sides of the issue, not only that engaged in by those opposing a denial of opportunity to participate.

A substantial body of opinion in the Commission favored deleting the word "lawfully" in line four of the text on the ground that it should not be part of the government's burden to prove beyond a reasonable doubt that the person whose speech or assembly was being protected from coercive interference was not himself a lawbreaker. Considering that the government must in any event prove the defendant guilty of coercive anti-civil rights behavior, it seems inadvisable to make the same trial a vehicle for passing on the lawfulness of the demonstration or a particular person's participation in it. A reasonable doubt as to the "victim's" lawfulness would then become available as a defense to the clearly wrong-doing defendant. Resistance to violence would in any event be justifiable under Chapter 6 of this Code, so that a person who did no more than that could not be prosecuted under this section. The text retains the word "lawfully", however, since it reflects the recent and considered judgment of the Congress after full debate.

See Working Papers, pp. 800–03.

§ 1516. Attorney General Certification for Prosecutions Under Sections 1511 to 1515.

No prosecution shall be instituted for offenses defined in sections 1511 to 1515 unless the Attorney General certifies that a prosecution by the United States is in the public interest and necessary to secure substantial justice. Nothing in this section shall be construed, however, to limit the authority of federal officers, or a federal grand jury, to investigate possible violations of sections 1511 to 1515.

Comment

This section carries forward parts of subsection (a) of 18 U.S.C. § 245. Other parts of that subsection are covered by general provisions in the Code, *e.g.*, § 104 (Attorney General's certification), and § 206 (negativing intent to pre-empt state jurisdiction). See Working Papers, pp. 803–04.

ABUSE OF FEDERAL OFFICIAL AUTHORITY

§ 1521. Unlawful Acts Under Color of Federal Law.

A federal public servant acting under color of law or a person acting under color of federal law is guilty of a Class A misdemeanor if he intentionally:

(a) subjects another to unlawful violence or detention; or

(b) exceeds his authority in making an arrest or a search and seizure.

Comment

Paragraph (a) makes a specific offense of the kind of misbehavior on the part of law enforcement or prison officials that has been most often dealt with under the general provisions of 18 U.S.C. § 242. It also covers all other official misuse of force. It dispenses with the need for providing the *Screws*-type specific intent to deprive the victim of federal constitutional rights. In its limitation to federal officials, to those purporting to exercise federal official authority, and to those private persons acting in concert with federal officials, it reflects the view that similar conduct by state and local officials or under color of state or local law should not be subject to federal prosecution beyond what is permitted under 18 U.S.C. §§ 241–242 (Code §§ 1501–02). *Cf. United States* v. *Price*, 383 U.S. 787 (1966) and *Williams* v. *United States*, 341 U.S. 97 (1951). A substantial body of opinion in the Commission, however, favors specific coverage of the latter under this section.

Paragraph (b) retains in a more generalized form the misdemeanors regarding searches and seizures presently found in 18 U.S.C. §§ 2234–36.

Note that "piggyback" jurisdiction (§ 201(b)) will permit appropriate prosecution and punishment of offenses such as homicide, aggravated assault and kidnapping in connection with oppressive official conduct covered by § 1521. General penal provisions against official oppression found in some state legislation, *cf.* A.L.I. Model Penal Code § 243.1, do not appear to be required in view of the fact that the flexible provisions of 18 U.S.C. §§ 241–42 are retained in proposed §§ 1501 and 1502.

See Working Papers, pp. 810–11, 1018–19, 1027–28.

PROTECTION OF POLITICAL PROCESSES

§ 1531. Safeguarding Elections.

A person is guilty of a Class A misdemeanor if, in connection with any primary, general or special election, he:

(a) makes or induces any false voting registration;

(b) offers, gives or agrees to give a thing of pecuniary value to another as consideration for the recipient's voting or withholding his vote or voting for or against any candidate or issue or for such conduct by another;

(c) solicits, accepts or agrees to accept a thing of pecuniary value as consideration for conduct prohibited under paragraphs (a) or (b); or

(d) otherwise obstructs or interferes with the lawful conduct of such election or registration therefor.

Comment

This section accomplishes three things: (1) it makes a specific offense of vote frauds typically prosecuted under the general language of 18 U.S.C. § 241; (2) it encompasses present 18 U.S.C. § 597 (vote bribery); and (3) it embraces in its general language the obstruction of elections penalties of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(c). However, it is not confined, as is § 1973i(c), to federal elections, but reaches all elections as do existing 18 U.S.C. §§ 241 and 245(b)(1)(A). Paragraph (d) reaches subversion of the election process apart from impact on a particular voter's ballot, *e.g.*, by ballot box stuffing, tampering with machines, corrupting election officials, suppressing absentee ballots. See Working Papers, pp. 812–14.

§ 1532. Deprivation of Federal Benefits for Political Purposes.

A person is guilty of a Class A misdemeanor if he intentionally withholds from or deprives another or threatens to withhold from or deprive another of the benefit of any federal program or federally-supported program, or a federal government contract, with intent to interfere with, restrain, or coerce any person in the exercise of his right to vote for any candidate or issue at any election, or in the exercise of any other political right.

Comment

This section derives primarily from 18 U.S.C. § 598, drawing some elements from 18 U.S.C. §§ 595, 601, and 605. The older legislation, speaking in obsolete terms of "work relief" appropriations, is generalized to prohibit the withholding or depriving of any federal benefit for the purpose of constraining the political freedom of the beneficiary thereof or others. See Working Papers, p. 818.

§ 1533. Misuse of Personnel Authority for Political Purposes.

A federal public servant is guilty of a Class A misdemeanor if he discharges, promotes, or degrades another federal public servant, or in any manner changes or promises or threatens to change the official rank or compensation of another federal public servant, for giving or withholding or neglecting to make a contribution of money or other thing of value for any political purpose.

Comment

This section continues existing law under 18 U.S.C. § 606. The present maximum sentence of three years' imprisonment falls between the misdemeanor penalty proposed in the new Code for deterrent purposes and the longer maximum provided for Class C felonies with the goal of rehabilitation. Deterrent penalties seem appropriate and adequate for the offense defined here. See Working Papers, p. 818.

§ 1534. Political Contributions of Federal Public Servants.

(1) Solicitation by Federal Public Servant. A federal public servant is guilty of a Class A misdemeanor if he solicits a contribution for any political purpose from another federal public servant, or if, in response to such a solicitation, he makes a political contribution to another federal public servant.

(2) Solicitation in Federal Facility. Any person is guilty of a Class A misdemeanor if he solicits or receives a political contribution in a federal building or facility.

Comment

This section carries forward existing law as expressed in 18 U.S.C. §§ 602, 603, and 607, dropping, however, the provision of § 607 that appears to make it criminal for any federal employee to volunteer a political contribution to any other federal employee or to a Senator or Congressman. It would remain criminal to make such a contribution in response to a solicitation. The purpose here is to give the solicited employee a firm basis for resisting exactions.

While the provisions may reach the limits of desirability and even constitutionality in restricting political rights (see *Bagley* v. *Washington Twp. Hosp. Dist.*, 55 Cal. Rptr. 401, 421 P. 2d 409 (1967); *Fort* v. *Civil Service Comm'n*, 38 Cal. Rptr 625, 392 P. 2d 385 (1964); *cf. United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), it is nevertheless desirable to protect federal public servants from political coercion.

See Working Papers, pp. 818–19.

§ 1535. Troops at Polls.

A public servant is guilty of a Class C felony if he orders, brings, keeps, or has under his authority or control any troops at any place where a general or special election or primary election is held, unless such force be necessary to repel armed invasion or violent interference with the election process.

Comment

This section carries forward and modifies existing 18 U.S.C. § 592. It is designed to prevent intimidation of the electorate by the mere presence of armed forces at the polls. Although §§ 1501, 1511(a) and 1531(d) of the proposed Code safeguard against actual intimidation of voters or interference with the conduct of an election, it was thought desirable to retain this longstanding specific safeguard against military presence at the polls. Title 18 U.S.C. § 593, concerning interference by armed forces in elections, has been dropped in view of the coverage of the sections referred to above.

Under 18 U.S.C. § 592, the only exception to the prohibition of military forces at the polls is where "such force be necessary to repel armed enemies of the United States." It seems appropriate to permit use of

troops also where necessary to suppress violent interference with the election process; and this exception has been added. Another change from present law is deletion of the prohibition on "armed men" at the polls since, taken literally, that provision would prohibit stationing a policeman at an election site. Compare also § 602 of the proposed Code, which provides a defense for behavior in execution of a public duty.

See Working Papers, pp. 817, 819.

FOREIGN POLITICAL CONTRIBUTIONS

§ 1541. Political Contributions by Agents of Foreign Principals.

(1) Contributor. An agent of a foreign principal is guilty of a Class C felony if, directly or indirectly, in his capacity as such agent he knowingly makes a contribution or promises to make a contribution, in connection with any primary, special, or general election, or political convention or caucus held to select candidates for any political office.

(2) Recipient. A person is guilty of a Class C felony if he knowingly solicits, accepts or agrees to accept any contribution prohibited by subsection (1).

(3) Definitions. In this section:

(a) "foreign principal" has the meaning prescribed in 22 U.S.C. § 611(b), but does not include a person who is a citizen of the United States;

(b) "agent of a foreign principal" means a person who acts as an agent, representative, employee, or servant, or a person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any substantial portion of whose activities are directly or indirectly supervised, directed, or controlled by a foreign principal.

Comment

This section carries forward 18 U.S.C. § 613 which prohibits political contributions from foreign sources in order to exclude the influence of "foreign money" on domestic politics. Because of this purpose it is treated as a serious crime to be included in the Code, rather than as a regulatory measure, like 18 U.S.C. §§ 608–11, which, it is recommended, should be transferred out of Title 18 to Title 2. Nevertheless the effectiveness of the existing law and this section may be limited in view of: (1) the exclusion of American citizens, who may be living abroad and operating in fact for foreign commercial or governmental interests; (2) the general problem of proving an agency, which makes enforcement more difficult; (3) the problem of identification of "foreigners" in relation to expenditures by transnational enterprises, *e.g.*,

an American holding company or individual controlling a foreign corporate enterprise, an American subsidiary of a foreign parent.

The limited effectiveness of a total exclusion provision suggests that a provision imposing registration and disclosure requirements might be preferable, in which case this section would be eliminated entirely.

See Working Papers, pp. 820–21.

PROTECTION OF LEGITIMATE LABOR ACTIVITIES

§ 1551. Strikebreaking.

(1) Offense. A person is guilty of a Class A misdemeanor if he intentionally, by force or threat of force, obstructs or interferes with:

(a) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor; or

(b) the exercise by employees of any of the rights of self-organization or collective bargaining.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (h) of section 201.

Comment

This provision would incorporate into the proposed Code 18 U.S.C. § 1231, which proscribes the transportation in interstate or foreign commerce of persons employed as strikebreakers, but explicitly exempts common carriers. By separating out the jurisdictional aspect of the crime, interstate transportation, the section provides a clear statement of the requisite misbehavior. It is strikebreaking, not mere transportation or employment, that is prohibited. However, except as it would apply to federal enclaves, the jurisdictional reach of the statute would not be extended. Federal jurisdiction would exist only where movement of persons across state lines is involved (§ 201(h)).

The utility of this statute in labor situations may be somewhat attenuated today because of the operation of the National Labor Relations Act against unfair labor practices. The strikebreaking provision may usefully remain in the proposed Code, however, since it imposes direct criminal liability for violence and reaches outsiders trying to interfere with the collective bargaining process. By virtue of the jurisdictional "piggyback" provision (§ 201(b)), offenses such as murder and assault in the course of the conduct prohibited by this section will be subject to prosecution as such. Accordingly, as between Class C felony and Class A misdemeanor grading, the latter has been chosen. The present penalty of up to two years is closer to that in any event.

An issue raised by this section is whether it should further be used as a basis for extension of federal criminal sanctions to all intentional disruption of any peaceful picketing activity or, indeed, to violent disruption of any exercise of First Amendment rights. See comment to § 1515, *supra*.

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INTERCEPTION OF PRIVATE COMMUNICATIONS

§ 1561. Interception of Wire or Oral Communications.

(1) Offense. A person is guilty of a Class C felony if he:

(a) intentionally intercepts any wire or oral communication by use of any electronic, mechanical, or other device; or

(b) intentionally discloses to any other person or intentionally uses the contents of any wire or oral communication, knowing that the information was obtained through the interception of a wire or oral communication.

(2) Defenses. It is a defense to a prosecution under this section that:

(a) the actor was authorized to intercept, disclose or use, as the case may be, the wire or oral communication under [18 U.S.C. §§ 2516–19, 2511(2)(a) & (b)];

(b) the actor was (i) a person acting under color of law to intercept a wire or oral communication and (ii) he was a party to the communication or one of the parties to the communication had given prior consent to such interception;

(c)(i) the actor was a party to the communication or one of the parties to the communication had given prior consent to such interception and (ii) such communication was not intercepted for the purpose of committing a crime or other unlawful harm; or

(d) the provisions of [18 U.S.C. § 2511(3)] apply.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (c), (e), (f) or (g) of section 201.

Comment

This section and §§ 1562 and 1563 substantially re-enact 18 U.S.C. §§ 2510–12, enacted June 19, 1968, insofar as these provisions define crimes of wiretapping and eavesdropping; but changes have been made to integrate the existing criminal provisions into the proposed Code. The section thus deletes present explicit coverage in 18 U.S.C. §§ 2511 and 2512 of attempts to commit the proscribed acts, and of procurement of others to commit such acts. Such conduct will be covered by the general attempt and solicitation provisions (§§ 1001, 1003). The stated defenses in subsection (2) correspond to exceptions in current law. The bracketed references in subsection (2)(a) are to provisions dealing with procedure for obtaining a judicial order for wiretapping or eavesdropping and excepting certain communications personnel, *e.g.*, switchboard operators. Those provisions will have different section numbers, whether they are retained in the new Title 18 or are transferred to Title 47, which regulates telecommunications.

Subsection (2)(d) makes it clear that the national security excep-

tion (in present 18 U.S.C. § 2511(3)) is to be retained in the new Title 18 and to be treated as a defense.

The present provisions also proscribe "willful" interception and disclosure of wire or oral communications. In terms of the culpability definition of the proposed Code, the section proscribes *intentional* or *knowing* misconduct. "Willful" under the Code would include reckless interceptions, which do not warrant felony treatment. The present statutes also proscribe disclosure of information where the actor "has reason to know" such information was obtained by unlawful wiretapping or eavesdropping, or possessing or advertising equipment one "has reason to know" may be used for illicit wiretapping or eavesdropping purposes. In terms of the Code's culpability provisions, this could be translated into acts "in reckless disregard" of the requisite facts. The section, however, retains the higher standard of culpability—knowing or intentional misconduct—since felony sanctions are imposed.

The offenses defined in this section and § 1562 are presently felonies, and the section retains felony liability for unlawful acts of eavesdropping, wiretapping, and manufacture and possession of wiretapping and eavesdropping equipment. Advertising of wiretapping or eavesdropping equipment is, however, graded as a misdemeanor in § 1562, since such conduct neither causes the harm that the other conduct does nor evinces dangerousness on the part of the offender. The deterrent value of a misdemeanor penalty should be sufficient.

§ 1562. Traffic in Intercepting Devices.

(1) Manufacture, Distribution, or Possession. A person is guilty of a Class C felony if he manufactures, assembles, possesses, transports or sells an electronic, mechanical, or other device, knowing that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

(2) Advertising. A person is guilty of a Class A misdemeanor if he places in a newspaper, magazine, handbill, or other publication an advertisement of an electronic, mechanical, or other device, knowing that the design of such device renders it primarily useful for surreptitious interception of wire or oral communications, or knowing that such advertisement promotes the use of such device for surreptitious interception of wire or oral communications.

(3) Defenses. It is a defense to a prosecution under this section that the actor was:

(a) an officer, agent, or employee of, or a person under contract with, a communications common carrier, acting within the normal course of the business of the communications common carrier; or

(b) a public servant acting in the course of his official duties or a person acting within the scope of a government contract made by a person acting in the course of his official duties.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (e), (g) or (j) of section 201.

Comment

See comment to § 1561, *supra*. The defenses in subsection (3) are substantially a re-enactment of the exemptions in the existing statute. Since there are no regulatory provisions with regard to trafficking in eavesdropping devices, the scope of legitimate activity will depend upon what is the "normal course of the business" of the communications carrier and what constitutes "official duties" of a federal or state public servant. *Cf.* § 602, under which conduct is justified because required or authorized by law.

§ 1563. Definitions for Sections 1561 to 1563.

In sections 1561 to 1563:

(a) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(b) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(c) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of an electronic, mechanical, or other device;

(d) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

(i) any telephone or telegraph instrument, equipment or facility, or any component thereof, (A) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (B) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(ii) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(e) "contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(f) "communications common carrier" shall have the meaning prescribed for the term "common carrier" by 47 U.S.C. § 153(h).

Comment

See comment to § 1561, *supra*. An alternative would be to leave the definitions with the regulatory law and incorporate them here by reference.

§ 1564. Interception of Correspondence.

(1) Offense. A person is guilty of a Class A misdemeanor if, knowing that a letter, postal card, or other written private correspondence has not yet been delivered to the person to whom it is directed, and knowing that he does not have the consent of the sender or receiver of the correspondence, he:

(a) damages or destroys the correspondence, with intent to prevent its delivery;

(b) opens or reads sealed correspondence, with intent to discover its contents; or

(c) knowing that sealed correspondence has been opened or read in violation of paragraph (b), intentionally divulges its contents, in whole or in part, or a summary of any portion thereof.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (c), (e) or (f) of section 201.

Comment

This section substantially re-enacts 18 U.S.C. § 1702, proscribing intentional obstruction of correspondence. The text here somewhat expands the present offense by including a prohibition against disclosure of the contents of a sealed communication after it has been opened. This parallels the prohibition in § 1561(1)(b) against disclosure of information obtained by wiretapping or eavesdropping. Other provisions of the proposed Code deal with aspects of the present statute which are not within the concept of invasion of privacy. Thus the theft provisions cover taking of both letters and packages, for which a felony penalty is generally provided (§ 1735), and the criminal mischief provisions (§ 1705) cover damage to packages. The gen-

eral justification for execution of public duty (§ 602) will make execution of, for example, a search warrant a defense.

The offense defined in this section is a felony under existing law. Grading it as a Class A misdemeanor, while interception of information obtained by electronic eavesdropping remains a felony, reflects the view that the persons committing the latter are likely to be more professional and to constitute a greater menace, not only because their conduct is premeditated but also because the invasion of privacy they cause is unexpected and almost impossible to guard against.

The existing statute is limited to letters in the United States mails. Section 1564 expands coverage to all private correspondence. See N.Y. Penal Law § 250.25.

Chapter 16. Offenses Involving Danger To The Person

HOMICIDE

§ 1601. Murder.

A person is guilty of murder, a Class A felony, if he:

(a) intentionally or knowingly causes the death of another human being;

(b) causes the death of another human being under circumstances manifesting extreme indifference to the value of human life; or

(c) acting either alone or with one or more other persons, commits or attempts to commit treason, offenses defined in sections 1102 or 1103, espionage, sabotage, robbery, burglary, kidnapping, felonious restraint, arson, rape, aggravated involuntary sodomy, or escape and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this paragraph in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(i) did not commit the homicidal act or in any way solicit, command, induce, procure, counsel or aid the commission thereof; and

(ii) was not armed with a firearm, destructive device, dangerous weapon or other weapon which under the circumstances indicated a readiness to inflict serious bodily injury; and

(iii) reasonably believed that no other participant was armed with such a weapon; and

(iv) reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

Paragraphs (a) and (b) shall be inapplicable in the circumstances covered by paragraph (b) of section 1602.

Comment

This section provides for only a single class of murder, replacing the definition in 18 U.S.C. § 1111. The degree system, originally an important and useful method of discriminating between capital and noncapital murder, has broken down with the decline of capital pun-

ishment and the blurring of the distinction between the terms "deliberate and premeditated" and "intentional". As respects the possibility of life imprisonment or capital punishment for some murders, see Chapter 36. Under the principal text presented in Chapter 36 the judge would be authorized to impose life imprisonment rather than Class A felony sanctions if he determines at the sentencing stage that the killing was intentional. If capital punishment is retained, as outlined in Provisional Chapter 36, it is contemplated that a degree system involving discriminations made by the jury at the trial stage would be a prerequisite.

Paragraph (b), designed to cover generally all sorts of extreme recklessness of life, includes also the case often referred to as "transferred intent"; *i.e.*, where defendant intends to kill A but causes the death of B. Proof of intent to kill is sufficient manifestation of "extreme indifference to the value of human life". If distinct and explicit reference to this class of cases is deemed desirable, this might be done in a separate paragraph. *Cf.* 18 U.S.C. § 1111(a).

Paragraph (c), derived from § 125.25 of the recently enacted New York Penal Law, sets forth the felony-murder law. Under the traditional felony-murder doctrine, which serves to upgrade certain criminal killings that would normally be, at most, manslaughter (as where defendant did not intend death or knowingly risk grave harm), a purely accidental death becomes murder if it occurs in the course of robbery or some other violent felony. Paragraph (c) would ameliorate the harshness involved in applying the old rule to the person who is not homicidal, but would place a heavy burden on the defendant to establish his lack of culpability in that regard. An accomplice involved in a felony in which a death has been caused would escape murder liability only by establishing the several conjunctive elements. The felonies to which the provision applies are specified; and liability for a death not directly caused by a participant to a nonparticipant in the crime is excluded. The standards to be considered may be easier to comprehend and weigh than an alternative test which would make involvement in a felony presumptive evidence of extreme indifference to the value of human life, under paragraph (b). *Cf.* Study Draft § 1601(b) (Alternative A).

Note that under § 109 of this Code "human being" means a person who has been born and is alive. The Code therefore adopts the common-law rule that there is no homicide unless the deceased had been born alive.

See § 1609 for federal jurisdiction.

See Working Papers, pp. 132–33, 431, 824–27.

§ 1602. Manslaughter

A person is guilty of manslaughter, a Class B felony, 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 murder, except that he causes the death under the influence of extreme emotional disturbance for

which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in his situation under the circumstances as he believes them to be. An emotional disturbance is excusable, within the meaning of this paragraph, if it is occasioned by any provocation, event or situation for which the offender was not culpably responsible.

Comment

Three principal innovations in the definition of manslaughter in 18 U.S.C. § 1112 are made by this section:

(1) As to "voluntary manslaughter," the scope of admissible "provocation" is broadened to include anything that excusably leads to "extreme emotional disturbance." For example, taunts or seduction of female relatives might suffice. But extreme emotional disturbance will not reduce murder to manslaughter if the actor has culpably brought about his own mental disturbance, such as by involving himself in a crime, or if the excuse is not reasonable, such as where political events provoke an assassination. *Cf.* § 3604(2)(f) and A.L.I. Model Penal Code § 210.3(1) for alternative formulations designed to exclude aberrant excuses.

(2) The existing federal offense of "involuntary manslaughter" is, in the proposed Code, divided into two categories. One, involving "recklessness," is punishable equally with voluntary manslaughter; but proof that the defendant was *aware* that he was unjustifiably risking life or limb is required. The other category, designated "negligent homicide" under § 1603, *infra*, carries a lower (but still severe) penalty and proof of criminal negligence only is required. See § 302 for definitions of recklessness and negligence.

(3) Provisions of existing law designating as manslaughter any killing "in the commission of an unlawful act" are deleted. They amount to an arbitrary and undesirable "misdemeanor-manslaughter" analogue to the "felony-murder" rule, and do not accurately describe existing law as enforced by the courts.

See § 1609 for federal jurisdiction.

See Working Papers, pp. 125–27, 431, 827–29.

§ 1603. Negligent Homicide.

A person is guilty of a Class C felony if he negligently causes the death of another human being.

Comment

This section and paragraph (a) of § 1602 cover the conduct embraced in 18 U.S.C. § 1112 under the phrase "without due caution and circumspection." That language, however, misleadingly suggests that the standard for criminal liability is the same as for tort liability. Under the definition of "negligently" in § 302 of the proposed Code, a person will be guilty of negligent homicide only if he causes the death of another "in unreasonable disregard of a substantial likelihood of

the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct." A person acts "recklessly," on the other hand, if he acts "in conscious and unjustifiable disregard . . . ." See Working Papers, pp. 125–28, 431, 829–30.

§ 1609. Federal Jurisdiction Over Homicide Offenses.

There is federal jurisdiction over an offense defined in sections 1601 to 1603 under paragraphs (a), (b), (c) or (*l*) of section 201.

Comment

At present there is federal homicide jurisdiction over killings on federal enclaves (18 U.S.C. §§ 1111–1112); killing of specified federal officers or employees in the course of their duties (18 U.S.C. § 1114) or of the President or his successors (18 U.S.C. § 1751); and killing in the commission of certain federal crimes, such as bank robbery (18 U.S.C. § 2113) and civil rights offenses (18 U.S.C. § 245). Under § 1609 federal homicide jurisdiction is expanded to cover the killing of *any* federal officer or employee in the course of his duties and to homicides occurring in the course of committing any federal crime defined in this Code, *e.g.*, post office robbery, obstruction of justice through intimidation of federal jurors and witnesses. Although cases can be imagined where it would be unnecessary and inadvisable for the federal government to intervene, *e.g.*, where a jealous wife of a federal employee kills her husband in his office, provision must be made for the more likely situation where attack on an official in the course of his duties is related to his work. See § 207, which defines the policy against invoking federal jurisdiction, absent a genuine federal concern. See Working Papers, p. 832.

ASSAULTS, LIFE ENDANGERING BEHAVIOR AND THREATS

§ 1611. Simple Assault.

(1) Offense. A person is guilty of an offense if he:

(a) willfully causes bodily injury to another human being; or

(b) negligently causes bodily injury to another human being by means of a firearm, destructive device or other weapon the use of which against a human being is likely to cause death or serious bodily injury.

(2) Grading. Simple assault is a Class A misdemeanor, unless committed in an unarmed fight or scuffle entered into mutually, in which case it is a Class B misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (c) or (*l*) of section 201.

Comment

This section provides misdemeanor penalties for nonserious bodily attacks which are committed upon federally protected persons—federal officials or employees in the course of their duties or persons in federal enclaves—or which are committed in the course of committing other federal crimes defined in the Code. The term "assault" is not presently defined by statute (see 18 U.S.C. §§ 111, 113), but has been given meaning by judicial interpretation.

Classifying simple assaults as Class B misdemeanors if they occur in unarmed mutual combat encourages the disposition of such cases by a United State magistrate rather than a federal district court. An issue is whether the remaining simple assault offenses should be similarly graded to facilitate trials of these petty offenses.

See Working Papers, pp. 431, 835–36.

§ 1612. Aggravated Assault.

(1) Offense. A person is guilty of a Class C felony if he:

(a) willfully causes serious bodily injury to another human being;

(b) knowingly causes bodily injury to another human being with a dangerous weapon or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury;

(c) causes bodily injury to another human being while attempting to inflict serious bodily injury on any human being; or

(d) fires a firearm or hurls a destructive device against another human being.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (c) or (*l*) of section 201.

Comment

Under existing law felonious assault is restricted to cases of maiming, assault with a dangerous weapon, and assault constituting an attempt to commit certain violent felonies (18 U.S.C. §§ 113, 114). Under this section an assault is aggravated if serious injury is willfully inflicted, if any injury is knowingly inflicted by use of a weapon under circumstances indicating a readiness to inflict serious injury, or if a firearm or destructive device is used against another whether or not injury is caused.

Grading distinctions finer than those proposed might be made. For example, willful assaults could be graded at the Class A misdemeanor level reserving the Class C felony penalty for assaults accompanied by an intent to cause serious injury. Indeed, intentional infliction of a crippling injury (*i.e.*, an injury which creates a substantial and permanent inability to carry on normal bodily functions, such as blind-

ness, substantial paralysis, or multiple amputation) could be graded at a higher felony level. A substantial body of opinion in the Commission favors reclassifying such crippling injuries as Class A felonies, and injuries under subsection (1) (a) as Class B felonies. See Working Papers, pp. 431, 835–36, 1040–42.

§ 1613. Reckless Endangerment.

(1) Offense. A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another. The offense is a Class C felony if the circumstances manifest his extreme indifference to the value of human life. Otherwise it is a Class A misdemeanor. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (*l*) of section 201 or when the offense is committed in the course of committing or in immediate flight from the commission of any other offense over which federal jurisdiction exists.

Comment

Although existing federal law penalizes some particular forms of endangering, *e.g.*, tampering with motor carriers (18 U.S.C. § 33), the present section is new in generalizing the offense. The operation of dams, nuclear facilities, transportation facilities, etc. obviously affords many opportunities for recklessly endangering life in circumstances that would subject the actor to murder penalties if death resulted. The section will also cover reckless driving. This section has a special "piggyback" jurisdiction which includes offenses outside this Code, unlike § 201(b), which is limited to underlying offenses defined in the Code. Thus, this section will apply when endangerment occurs in the course of violation of penalized federal safety regulations, *e.g.*, those relating to interstate shipment of flammable fabrics. See Working Papers, 125–27, 836–37, 880.

§ 1614. Terrorizing.

(1) Offense. A person is guilty of a Class C felony if he:

(a) threatens to commit any crime of violence or act dangerous to human life, or

(b) falsely informs another that a situation dangerous to human life or commission of a crime of violence is imminent knowing that the information is false,

with intent to keep another human being in sustained fear for his or another's safety or to cause evacuation of a building, place

of assembly, or facility of public transportation, or otherwise to cause serious disruption or public inconvenience, or in reckless disregard of the risk of causing such terror, disruption or inconvenience.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (c), (e), (f) or (*l*) of section 201.

Comment

This section has a dual purpose: (1) it reaches, in one consolidated statute, efforts to terrorize a person by a threat serious enough to cause sustained fear, for example, through mailed threats to kidnap or to murder, presently proscribed in 18 U.S.C. §§ 876–77; and (2) it reaches acts of public terrorism, such as bomb scares, presently proscribed in 18 U.S.C. §§ 35, 837(d). More remote threats, not intended to terrorize or disrupt, and not recklessly resulting in public disruption or in the creation of sustained fear in an individual, are dealt with as lesser crimes under §§ 1617 and 1618. See Working Papers, pp. 670, 837.

§ 1615. Threats Against the President and Successors to the Presidency.

A person is guilty of a Class C felony if he threatens to commit any crime of violence against the President of the United States, the President-elect, the Vice President or, if there is no Vice President, the officer next in order of succession to the office of President of the United States, the Vice President-elect, or any person who is acting as President under the Constitution and laws of the United States:

(a) by a communication addressed to or intended to come to the attention of such official or his staff; or

(b) under any circumstances in which the threat is likely to be taken seriously as an expression of settled purpose.

"Threat" includes any knowingly false report that such violence is threatened or imminent. "President-elect" and "Vice President-elect" have the meanings prescribed in section 219(c).

Comment

Existing law, 18 U.S.C. § 871, penalizes, by up to five years' imprisonment, the making of threats against the President or successors to the Presidency. The Supreme Court has recently ruled that, in order to differentiate criminal conduct from privileged speech, the use of threatening language against the President must constitute a "real" threat of physical violence, not just "political hyperbole." *Watts* v. *United States*, 394 U.S. 705 (1969). Yet, even if the threat is not seriously meant, the President should be protected from "the detrimental effect upon Presidential activity and movement that may re-

sult simply from a threat upon the President's life." *Roy* v. *United States*, 416 F.2d 874, 877 (9th Cir. 1969).

The proposed statute seeks to protect the President from threats which, even if they turn out to be prankish or ineffectual, cannot be taken lightly. Many threats are nonserious, if foolish, efforts to express temporary anger. Someone seriously bent on assassination would not be likely to reveal himself prematurely by overt threats. Therefore, drunken threats or angry political comments by persons clearly incapable under the circumstances of carrying out such threats would not be criminal. But if the threat is sought to be communicated to the President or his entourage, or if it is followed by some overt act to carry it out, or if it is made under circumstances calculated to cause fear for the President among persons responsible for his safety and to evoke substantial counter-measures for the President's security, the threatener must clearly be dealt with as a criminal offender.

See Working Papers, p. 837.

§ 1616. Menacing.

(1) Offense. A person is guilty of a Class A misdemeanor if he knowingly places or attempts to place another human being in fear by menacing him with imminent serious bodily injury.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (c) or (*l*) of section 201.

Comment

The term "assault" having replaced the common law term "battery" to denominate the offense of actual infliction of injury, the term "menacing" is employed to denominate certain aggressions falling within traditional assault. However, the section is narrower than common law assault since it is limited to menacing imminent *serious* bodily injury. Nevertheless an attempt to commit any bodily injury will be an offense under the attempt (§ 1001) and simple assault (§ 1611) provisions. Conduct which might include menacing, *e.g.*, "intimidation" and "threat", is proscribed in other sections, in some instances with more severe penalties. See, for example, civil rights offenses (§§ 1501–02, 1511–15), robbery (§ 1721), definition of "restrain" for kidnapping and related offenses (§ 1639(a)). See Working Papers, p. 837.

§ 1617. Criminal Coercion.

(1) Offense. A person is guilty of a Class A misdemeanor if, with intent to compel another to engage in or refrain from conduct, he threatens to:

(a) commit any crime;

(b) accuse anyone of a crime;

(c) expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or deceased, to hatred, contempt or ridicule, or to impair another's credit or business repute; or

(d) take or withhold official action as a public servant, or cause a public servant to take or withhold official action.

(2) Defense. It is an affirmative defense to a prosecution under this section that the actor believed, whether or not mistakenly: (a) that the primary purpose of the threat was to cause the other to conduct himself in his own best interests, or (b) that a purpose of the threat was to cause the other to desist from misbehavior, engage in behavior from which he could not lawfully abstain, make good a wrong done by him, or refrain from taking any action or responsibility for which he was disqualified.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section:

(a) under paragraphs (a), (b), (c), (e) or (*l*) of section 201;

(b) when the threat is to accuse anyone of a federal crime or to commit a federal crime; or

(c) when the threat in subsection (1)(d) involves federal official action.

Comment

This provision is intended to consolidate and replace existing "blackmail" and coercive threat statutes (18 U.S.C. §§ 872–77). Certain forms of coercion are covered by rape and extortion legislation. See §§ 1641, 1643, 1732. See also threatening public servants (§ 1366), witnesses (§ 1321), informants (§ 1322). In view of the availability of felony penalties for such categories of aggravated coercion, the basic coercion section here is classified as a misdemeanor.

Federal jurisdiction under subsection (3) parallels existing law, but is somewhat enlarged to reach coercive threats *to* federal employees not covered by proposed § 1366, as well as threats *by* federal employees concerning their official duties for which there is jurisdiction under existing law. See, *e.g.*, 18 U.S.C. § 872.

See Working Papers, pp. 589, 592, 841–47, 1195.

§ 1618. Harassment.

(1) Offense. A person is guilty of an offense if, with intent to frighten or harass another, he:

(a) communicates in writing or by telephone a threat to commit any violent felony;

(b) makes a telephone call anonymously or in offensively coarse language; or

(c) makes repeated telephone calls, whether or not a conversation ensues, with no purpose of legitimate communication.

(2) Grading. The offense is a Class A misdemeanor if it is under paragraph (a) of subsection (1). Otherwise it is a Class B misdemeanor.

(3) Jurisdiction. There is a federal jurisdiction over an offense defined in this section under paragraphs (a) or (e) of section 201.

Comment

This provision substantially re-enacts present 47 U.S.C. § 223, concerning harassing telephone calls, and 18 U.S.C. §§ 876–77, concerning the mailing of threats, to the extent that the threats are designed to harass or frighten but do not amount to more serious acts of terrorizing or coercion, covered by proposed §§ 1614 and 1617, respectively. Grading distinguishes between fear and annoyance.

§ 1619. Consent as a Defense.

(1) When a Defense. When conduct is an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury by all persons injured or threatened by the conduct is a defense if:

(a) neither the injury inflicted nor the injury threatened is such as to jeopardize life or seriously impair health;

(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, having been made aware of the risks involved, consent to the performance of the conduct or the infliction of the injury.

(2) Ineffective Consent. Assent does not constitute consent, within the meaning of this section, if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor;

(b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) it is induced by force, duress or deception.

Comment

Often the effect of consent is specified in the definition of an offense, *e.g.*, rape, theft. But an explicit consent provision for crimes of assault and endangerment is necessary because they are crimes of infliction of bodily injury upon others, and even intentional infliction of injury may be consented to, as in surgery. The defense provided here serves to explicate matters which would, absent the statute, probably be resolved by prosecutorial discretion. See Working Papers, pp. 849–52.

KIDNAPPING AND RELATED OFFENSES

§ 1631. Kidnapping.

(1) Offense. A person is guilty of kidnapping if he abducts another or, having abducted another, continues to restrain him, with intent to do the following:

(a) hold him for ransom or reward;

(b) use him as a shield or hostage;

(c) hold him in a condition of involuntary servitude;

(d) terrorize him or a third person;

(e) commit a felony or attempt to commit a felony; or

(f) interfere with the performance of any government or political function.

(2) Grading. Kidnapping is a Class A felony unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a Class B felony.

Comment

The existing federal kidnapping statute (18 U.S.C. § 1201) prohibits the taking of another person across state lines not only for the purpose of holding him for ransom and reward, the kind of conduct to which it originally was addressed, but for any purpose. It is generally recognized as having too broad a reach, particularly in light of the fact that the maximum penalty is life imprisonment. The proposed kidnapping provision, which requires both abduction (defined in § 1639) and a specified criminal purpose, embraces only the most serious cases of unlawful restraint.

The policy of existing federal law has been to make the highest penalty for kidnapping available when the victim has not been returned "unharmed". This might encourage the kidnapper to kill the victim who has suffered a minor injury, or to hold him until he has recovered. Accordingly, the distinction between Class A and Class B felony grading adopted here is whether or not the victim was released "alive in a safe place." However, if kidnapping is not to be a capital offense (*cf. Jackson* v. *United States*, 390 U.S. 570 (1968)), the distinction may lose some of its significance for the kidnapper. In that event,

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a preferable grading distinction might be whether or not the kidnapping victim was returned without having suffered serious bodily injury.

A substantial body of opinion in the Commission favors a grading distinction between kidnapping of important government officials, federal, state or foreign, and kidnapping of others, in view of the vulnerability of public officials in the case of extortionate demands by political groups acting through violence. See Chapter 36 as to possibility of life sentence or capital punishment as alternative to Class A sanctions in exceptional cases. If the Congress should adopt the death penalty, special consideration should be given to so grading the offense that those holding the victim would be given every incentive to release him unharmed.

See § 1634 for federal jurisdiction.

See Working Papers, pp. 856–58, 863–64, 1045, 1200.

§ 1632. Felonious Restraint.

A person is guilty of a Class C felony, if he:

(a) knowingly abducts another;

(b) knowingly restrains another under terrorizing circumstances or under circumstances exposing him to risk of serious bodily injury; or

(c) restrains another with intent to hold him in a condition of involuntary servitude.

Comment

Under this section and the definitions in § 1639 a middle range of conduct between kidnapping and unlawful imprisonment is covered and an appropriate penalty is provided. Paragraph (a) proscribes abduction absent the special culpability listed in § 1631; paragraph (b) serves to upgrade the offense of simple unlawful imprisonment when committed under terrorizing or endangering circumstances. Paragraph (c) proscribes conduct presently covered by federal peonage and slavery enactments (18 U.S.C. §§ 1581–88).

See § 1634 for federal jurisdiction.

See Working Papers, pp. 858–60, 864.

§ 1633. Unlawful Imprisonment.

(1) Offense. A person is guilty of a Class A misdemeanor if he knowingly subjects another to unlawful restraint.

(2) Defense. It is a defense to a prosecution under this section that the actor is a parent or person in equivalent relation to the person restrained and that the person restrained is a child less than eighteen years old.

Comment

The unlawful imprisonment provision concerns restraints upon persons where no further harm is imposed or threatened. It would apply to moving persons across state lines against their will, to restraints occurring on federal enclaves and to restraints on federal officials. See § 1634. To the extent such conduct involves interstate movement, it is presently covered by 18 U.S.C. § 1201.

The defense provided is essentially a jurisdictional limitation, intended to avoid federal intervention in child custody disputes. As such, it could, alternatively, be explicitly treated as a jurisdictional provision, rather than as a substantive defense. In any event, it should be clear that this is by no means the sole defense to a charge of unlawful imprisonment. "Unlawful", contained in the definition of "restrain" in § 1639 and repeated here for clarity, invokes the civil law of legality of restraint, *e.g.*, regarding parental privileges, citizen-arrests. Further, general defenses provided in the Code, *e.g.*, § 605 (Use of Force by Persons with Parental, Custodial or Similar Responsibilities), would be available.

See Working Papers, pp. 860–61.

§ 1634. Federal Jurisdiction Over Kidnapping and Related Offenses.

(1) Generally. There is federal jurisdiction over an offense defined in sections 1631 to 1633 under paragraphs (a), (b), (c), (h) or (*l*) of section 201, or when the victim is a member of the immediate family of: the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice President-elect, or any person who is acting as President under the Constitution and laws of the United States. "President-elect" and "Vice President-elect" have the meanings prescribed in section 219(c).

(2) Involuntary Servitude. Federal jurisdiction over an offense defined in sections 1631(c) or 1632(c) extends to any such offense committed anywhere within the United States or within the special maritime or territorial jurisdiction of the United States, as defined in section 210.

Comment

The present federal jurisdiction over kidnapping and other crimes involving restraint upon persons taken across state lines (18 U.S.C. § 1201) would be continued. In addition, there would be jurisdiction where the offense involves a person on a federal enclave or a federal official engaged in his official duties. There would also be coverage when the kidnapping occurs in the course of committing another federal offense, *e.g.*, impersonating a federal official, or where it comes within piracy jurisdiction. The protection of the federal laws

would be explicitly extended to members of the immediate family of the President and his successors. Under the Thirteenth Amendment there is plenary federal protection over any acts in the United States amounting to slaveholding; and subsection (2) makes this jurisdiction explicit.

At present, involvement of federal investigatory resources in kidnapping cases is triggered by a presumption that if a victim is not released in 24 hours, state lines have been crossed in the course of his abduction. It is recommended that there be a provision in the procedural part of the Code which would obviate the need for such an arbitrary device by explicitly providing that federal investigative resources may be called upon at any time upon request of local authorities. *Cf.* Study Draft § 1634(3). In cases where federal jurisdiction appears to exist—as when a federal official is kidnapped or state lines have been crossed or the kidnapping is part of another federal crime—federal investigative authorities may intervene without the request of local authorities.

See Working Papers, pp. 864–66.

§ 1635. Usurping Control of Aircraft.

(1) Offense. A person is guilty of a Class A felony if, by force of threat of force, he usurps control of an aircraft in flight.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b) or (*l*) of section 201.

Comment

This section carries forward the existing air piracy offense (49 U.S.C. § 1472(i)). The formulation in the existing statute—"seizure or exercise" of control "with wrongful intent"—has been encompassed in this section by the term "usurps", which has a legislative and judicial history with respect to mutiny aboard a vessel (18 U.S.C. § 2193). *Cf.* § 1805 in the proposed Code. Jurisdiction provided for the offense in existing law—when the aircraft is within the special aircraft jurisdiction of the United States as defined in 49 U.S.C. § 1301(32)—has been expressly carried forward as part of the definition of "special maritime and territorial jurisdiction of the United States" (§ 210(g)). Note that, by virtue of such general incorporation of the Title 49 jurisdictional provisions, all offenses defined in the proposed Code will be subject to federal prosecution when committed aboard such aircraft. This obviates the need for most of the special criminal provisions in Title 49 other than as provided in this section. See Working Papers, p. 858.

§ 1639. Definitions for Sections 1631 to 1639.

In sections 1631 to 1639:

(a) "restrain" means to restrict the movements of a person unlawfully and without consent, so as to interfere substan-

tially with his liberty by removing him from his place of residence or business, by moving him a substantial distance from one place to another, or by confining him for a substantial period. Restraint is "without consent" if it is accomplished by (i) force, intimidation or deception, or (ii) any means, including acquiescence of the victim, if he is a child less than fourteen years old or an incompetent person, and if the parent, guardian or person or institution responsible for the general supervision of his welfare has not acquiesced in the movement or confinement;

(b) "abduct" means to restrain a person with intent to prevent his liberation by (i) secreting or holding him in a place where he is not likely to be found, or (ii) endangering or threatening to endanger the safety of any human being.

Comment

The concept of "restraint" is essentially one of unlawful imprisonment. When the element of hiding or endangering the victim is added, "restraint" becomes "abduction" which, when the abduction is for the purposes specified in § 1631, constitutes kidnapping. See Working Papers, 856–58, 862.

RAPE, INVOLUNTARY SODOMY AND SEXUAL ABUSE

§ 1641. Rape.

(1) Offense. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force, or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge intoxicants or other means with intent to prevent resistance; or

(c) the victim is less than ten years old.

(2) Grading. Rape is a Class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subsection (1)(c), or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise rape is a Class B felony.

Comment

In addition to proscribing forcible acts of rape accomplished by force or threat of serious harm, presently covered by 18 U.S.C. § 2031,

this section explicitly proscribes intercourse obtained through the drugging of an unwitting victim and any sexual intercourse, whether or not forceful, with a child under the age of ten. The age-level is intended to express the strong social condemnation of intercourse with a pre-pubescent child, even nonforcefully, such conduct being graded as equivalent to forcible rape. An issue is whether the age level is appropriate: should it be set at 12; or is the age of 10 proper, considering the trend toward earlier onset of puberty and the variety of circumstances and attitudes towards such acts? Or should the requirement be, for Class A felony treatment, that intercourse with the child was accomplished by threat, force, or intoxication?

The section introduces into federal criminal law the important distinction between ravishment by a stranger and the troublesome category of rape by "boyfriend". The latter category involves difficult issues regarding consent, the degree of sexual contact permitted prior to actual intercourse, and therefore the lesser "outrage" by consummation. Under subsection (2) such cases, although punishable at the very serious level of Class B felony, are excluded from the highest category of offense. See also bracketed § 1648(5). *Cf.* A.L.I. Model Penal Code § 213.1.

See §§ 1648–50 for additional applicable provisions. See Working Papers, pp. 869–70.

§ 1642. Gross Sexual Imposition.

A male who has sexual intercourse with a female not his wife is guilty of a Class C felony if:

(a) he knows that she suffers from a mental disease or defect which renders her incapable of understanding the nature of her conduct;

(b) he knows that she is unaware that a sexual act is being committed upon her, or knows that she submits because she mistakenly supposes that he is her husband; or

(c) he compels her to submit by any threat that would render a female of reasonable firmness incapable of resisting.

Comment

This section deals with nonforceful imposition on females, *e.g.*, intercourse with mental incompetents, or by means of trick or duress. Some of these impositions might amount to "rape" under the common law and, perhaps, under existing federal law (18 U.S.C. § 2031), but they do not warrant the highest felony penalties, since they involve less physical danger or psychic harm than does the behavior covered by § 1641.

See §§ 1648–50 for additional applicable provisions. See Working Papers, pp. 870–71.

§ 1643. Aggravated Involuntary Sodomy.

(1) Offense. A person who engages in deviate sexual intercourse with another, or who causes another to engage in deviate sexual intercourse, is guilty of an offense if:

(a) he compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;

(b) he has substantially impaired the victim's power to appraise or control his or her conduct by administering or employing without his or her knowledge intoxicants or other means with intent to prevent resistance; or

(c) the victim is less than ten years old.

(2) Grading. The offense is a Class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subsection (1)(c), or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise the offense is a Class B felony.

Comment

This provision is new to federal law. It is based on the premise that forcible acts of sodomy are aggressions as dangerous or detestable as forcible acts of rape. The definition and grading of the crime therefore parallel the rape provisions (§ 1641). See §§ 1648–50 for additional applicable provisions. See Working Papers, p. 871.

§ 1644. Involuntary Sodomy.

A person who engages in deviate sexual intercourse with another, or who causes another to engage in deviate sexual intercourse, is guilty of a Class C felony if:

(a) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;

(b) he knows that the other person is unaware that a sexual act is being committed upon him or her; or

(c) he compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting.

Comment

This provision parallels § 1642, which deals with imposition on females. See §§ 1648–50 for additional applicable provisions. See Working Papers, p. 871.

§ 1645. Corruption of Minors.

(1) Offense. A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of an offense if the other person is less than sixteen years old and the actor is at least five years older than the other person.

(2) Grading. The offense is a Class C felony, except when the actor is less than twenty-one years old, in which case it is a Class A misdemeanor.

Comment

This section replaces the present "statutory rape" provision which proscribes intercourse (even voluntary) with girls less than 16 years old (18 U.S.C. § 2032). It proscribes intercourse and sodomy by older persons with boys or girls less than 16, but does not criminalize sexual experimentation among generational peers. It is not an offense when the actor is less than five years senior to the sexual partner. A further distinction in grading is made between adult corrupters of youth and younger offenders: a person over 21 who commits this crime is guilty of a felony; if the offender is under 21 the crime is a misdemeanor . If a youngster is abducted by an adult for the purpose of sexual abuse, the crime is elevated to kidnapping (§ 1631(1)(e)); but that would not be the result in the case of a younger offender, whose crime would remain a misdemeanor.

See §§ 1648–50 for additional applicable provisions. Note particularly § 1648(4), which provides a defense for conduct which is not criminal under the law of a surrounding state. See Working Papers, pp. 871–72, 1064.

§ 1646. Sexual Abuse of Wards.

A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of a Class A misdemeanor if:

(a) the other person is in official custody or detained in a hospital, prison or other institution and the actor has supervisory or disciplinary authority over the other person; or

(b) the other person is less than twenty-one years old and the actor is his or her parent, guardian or otherwise responsible for general supervision of the other person's welfare.

Comment

The need for definition of these sexual crimes for federal enclaves is discussed in the comment to § 1647, *infra*. See §§ 1648–50 for additional applicable provisions. See Working Papers, p. 872.

§ 1647. Sexual Assault.

A person who knowingly has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of a Class B misdemeanor if:

(a) he knows that the contact is offensive to the other person;

(b) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct;

(c) the other person is less than ten years old;

(d) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge intoxicants or other means for the purpose of preventing resistance;

(e) the other person is in official custody or detained in a hospital, prison or other institution and the actor has supervisory or disciplinary authority over him or her;

(f) the other person is less than twenty-one years old and the actor is his or her parent, guardian or otherwise responsible for general supervision of the other person's welfare; or

(g) the other person is less than sixteen years old and the actor is not less than twenty-one years old.

Comment

This provision on minor sexual offenses parallels the proposed felony provisions on sexual misconduct. involving actual or attempted intercourse, normal or deviate. There is some opinion that minor sex crimes should be left to state law, assimilated for federal enclaves by § 209; but the great variety of state laws on sexual offenses, and the differences in penalties from one area to another seem to call for some consistency in definition of what constitutes criminal sexual misconduct in federal enclaves.

See §§ 1648–50 for additional applicable provisions. See Working Papers, pp. 872–73.

§ 1648. General Provisions for Sections 1641 to 1647.

(1) Mistake as to Age. In sections 1641 to 1647: (a) when the criminality of conduct depends on a child's being below the age of ten, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than ten; (b) when criminality depends on the child's being below a critical age older than ten, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

(2) Spouse Relationships. In sections 1641 to 1647, when the

definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a female, this shall not preclude conviction of a spouse or female as accomplice in an offense which he or she causes another person, not within the exclusion, to perform.

(3) Prompt Complaint. No prosecution may be instituted or maintained under sections 1641 to 1647 unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specifically interested in the victim, other than the alleged offender, learned of the offense.

(4) State Law. Sections 1645 to 1647 shall not apply to conduct which is not criminal under the law of a state within which the conduct occurs. Inapplicability under this subsection is a defense.

[(5) Testimony of Complainants. No person shall be convicted of any felony under sections 1641 to 1645 upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In a prosecution before a jury for an offense under sections 1641 to 1647, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.]

Comment

These provisions are designed to clarify special problems of proof which arise in cases of sexual offenses. They are adapted from modern code revisions on this subject. Note, especially, that under subsection (1) a reasonable mistake that a sexual partner is over 16, when age is relevant, will exculpate the offender; mistake as to the age of a child under 10 cannot exculpate. Subsection (2), on spouse relationships, is designed to exculpate persons intentionally living in common-law relationships from charges of "rape;" seduction by pretended marriage, however, is an offense under § 1642.

A substantial body of opinion in the Commission favors deletion of subsection (3), requiring prompt complaint, on the ground that it deals inflexibly with a matter which should be dealt with at trial as a question of credibility. A substantial body of opinion in the Commission favors addition of bracketed subsection (5) on the ground that

sex cases are peculiarly susceptible to false charges. Consideration might also be given to providing an affirmative defense that the complainant was sexually promiscuous where the charge is consensual relations, as under § 1645 (corruption of minors). The contrary argument to both of these suggestions is that they attempt to reduce an issue of credibility to a fixed rule.

See Working Papers, pp. 873–76.

§ 1649. Definitions for Sections 1641 to 1649.

In sections 1641 to 1649:

(a) "sexual intercourse" occurs upon penetration, however, slight; emission is not required;

(b) "deviate sexual intercourse" means sexual contact between human beings who are not husband and wife consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva, or any form of sexual intercourse with an animal;

(c) "sexual contact" means any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

Comment

This section serves drafting convenience and introduces no significant novelty.

§ 1650. Federal Jurisdiction Over Offenses in Sections 1641 to 1647.

There is federal jurisdiction over an offense defined in sections 1641 to 1647 under paragraphs (a), (b) or (*l*) of section 201.

Comment

Jurisdiction over sex offenses exists when they are committed in federal enclaves, in the course of committing another federal crime defined in the Code, *e.g.*, rape in the course of a federal kidnapping, and on the high seas in a "piracy" setting. See Working Papers, p. 876.

Chapter 17. Offenses Against Property

ARSON AND OTHER PROPERTY DESTRUCTION

§ 1701. Arson.

(1) Offense. A person is guilty of arson, a Class B felony, if he starts or maintains a fire or causes an explosion with intent to destroy an entire or any substantial part of a building or inhabited structure of another or a vital public facility.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d), (e), (f), (h), (i) or (*l*) of section 201 and, in addition, when the offense is committed by means of an explosive or destructive device, under paragraph (g) of section 201 or if the building, inhabited structure or vital public facility is in whole or in part owned, possessed, or used by or leased to, any institution or organization receiving federal financial assistance.

Comment

In defining the offense of arson and grading it as a Class B felony, this section represents the view that intended destruction of the kinds of property listed in § 1709 by fire or explosion evidences extraordinary dangerousness on the part of the perpetrator. While human endangerment is the principal concern, note that the section makes no explicit distinction based upon the fact that humans are present or absent at the time of the act, and, that some kinds of property are included, *e.g.*, communications and radar installations and power substations, at which humans may rarely be present. The policy thus expressed is that the difference between arson accompanied and arson unaccompanied by the awareness, or consequences, of actual human occupation of the property is insufficient to warrant requiring proof as to the awareness or consequences in order to distinguish between the availability of Class B and Class C felony penalties. That policy is based on the view that the means employed usually pose dangers of conflagration, total destruction or irreparable damage, human endangerment due to fire-fighting efforts, or significant pecuniary loss, human inconvenience or suffering.

Under the jurisdictional provisions the facilities of interstate or foreign commerce, including airplanes, ships, and trucks (now covered by 18 U.S.C. §§ 32, 33, 1992, 2275) will continue to be federally protected. An issue is whether the federal jurisdiction over property destruction when goods moving in interstate commerce happen to be involved, established in recent legislation, 15 U.S.C. § 1281, should be continued. Section 1701 continues such federal jurisdiction, which is similar to that long provided under federal law when the crime is theft. The jurisdiction provided for arson is somewhat broader than

that provided for criminal mischief (§ 1705) in that paragraphs (e) (use of interstate facility) and (h) (movement of person across state lines) of § 201 are incorporated for the former but not the latter. The policy of 18 U.S.C. § 1952 (travel or transportation in aid of racketeering enterprises), which lists arson among the relevant offenses, is thus carried forward. The last clause of subsection (2) substantially carries forward the broad jurisdiction of new 18 U.S.C. § 844(f) and (i), enacted in the Organized Crime Control Act of 1970 (P.L. 91–452). When personal injury or death results the arsonist can be prosecuted for homicide, by virtue of "piggyback" jurisdiction. Transporting an explosive in interstate commerce with intent to commit arson will constitute an attempt under this section and the attempt provision (§ 1001). See Working Papers, pp. 431, 444, 878–79.

§ 1702. Endangering by Fire or Explosion.

(1) Offense. A person is guilty of an offense if he intentionally starts or maintains a fire or causes an explosion and thereby recklessly:

(a) places another person in danger of death or bodily injury;

(b) places an entire or any substantial part of a building or inhabited structure of another or a vital public facility in danger of destruction; or

(c) causes damage to property of another constituting pecuniary loss in excess of $5,000.

(2) Grading. The offense is a Class B felony if the actor places another person in danger of death under circumstances manifesting an extreme indifference to the value of human life. Otherwise it is a Class C felony.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d), (f) or (*l*) of section 201.

Comment

This section deals with reckless use of fire and explosives, conduct which does not fall neatly within the traditional arson offense, of which intentional destruction is an element. This provision upgrades the general reckless endangerment offense (§ 1613 in the homicide-assault Chapter) because of the special dangers posed by use of fire or explosives. See Working Papers, pp. 431, 444, 879–81.

§ 1703. Failure to Control or Report a Dangerous Fire.

(1) Offense. A person who knows that a fire which was started or maintained, albeit lawfully, by him or with his assent, is endangering life or a substantial amount of property of another is

guilty of a Class A misdemeanor if he willfully fails either to take reasonable measures to put out or control the fire when he can do so without substantial risk to himself, or to give a prompt fire alarm.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (d) of section 201.

Comment

This section extends existing law, which protects federal forest land from endangerment by persons setting fires (18 U.S.C. § 1856), to apply to endangerment of any public property or any property on federal enclaves. Consideration was given to extending liability under this provision to persons responsible for the safekeeping of the property as well as to persons setting dangerous fires. This was rejected on the ground that conviction of crime is an unnecessary and harsh sanction for default in employment responsibilities. See Working Papers, pp. 116–17, 431, 881–82.

§ 1704. Release of Destructive Forces.

(1) Causing Catastrophe. A person is guilty of a Class B felony if he intentionally causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison, radioactive material, bacteria, virus, or other dangerous and difficult-to-confine force or substance, and is guilty of a Class C felony if he does so willfully.

(2) Risking Catastrophe. A person is guilty of a Class A misdemeanor if he willfully creates a risk of catastrophe by fire, explosives or other means listed in subsection (1), although no fire, explosion or other destruction results.

(3) Failing to Prevent Catastrophe. A person who knowingly does an act which causes or which he knows is likely to cause an explosion, fire, flood, avalanche, collapse of building, or release of poison, radioactive material, bacteria, virus or other dangerous and difficult-to-confine force or substance, or assents to the doing of such act, is guilty of a Class A misdemeanor if he willfully fails to take reasonable measures to prevent catastrophe.

(4) Catastrophe Defined. Catastrophe means serious bodily injury to ten or more people or substantial damage to ten or more separate habitations or structures, or property loss in excess of $500,000.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d), (e), (f), (h),

(i) or (*l*) of section 201, or when commission of the offense causes or threatens damage to an area in two or more states.

Comment

This new offense, which carries substantial penalties, is proposed to deal with widespread destruction or injury caused not only by fire or explosion but also by other dangerous and difficult-to-confine forces and substances. *Cf.* 18 U.S.C. § 832. The provision deals with recklessly risking as well as causing such a disaster; it thus includes reckless conduct with respect to storage or handling of highly dangerous materials. See Working Papers, pp. 431, 441, 442, 882–83, 886–87.

§ 1705. Criminal Mischief.

(1) Offense. A person is guilty of an offense if he:

(a) willfully tampers with tangible property of another so as to endanger person or property;

(b) willfully damages tangible property of another; or

(c) negligently damages tangible property of another by fire, explosives, or other dangerous means listed in section 1704(1).

(2) Grading. The offense is:

(a) a Class C felony if the actor intentionally causes pecuniary loss in excess of $5,000 or damages tangible property of another by means of an explosive or a destructive device; and

(b) a Class A misdemeanor if the actor recklessly causes pecuniary loss in excess of $5,000 or if the actor intentionally causes pecuniary loss in excess of $500.

Otherwise the offense is a Class B misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d), (f), (i) or (*l*) of section 201, and, in addition, over the offense defined in subsection (1)(b) of this section when it is committed by means of an explosive or destructive device, under paragraph (g) of section 201 or if the tangible property is in whole or in part, owned, possessed, or used by or leased to, any institution or organization receiving federal financial assistance.

Comment

This section is intended to provide a rational grading structure for the numerous property-damage and property-tampering provisions in existing law which are consolidated in it. See, *e.g.*, 18 U.S.C. §§ 1361–64, 15 U.S.C. § 1281. In some circumstances criminal mischief could result in higher penalties than are provided in this section; for example, if there is an intention to kill or recklessness, the murder and

manslaughter provisions of the Code would apply in case death resulted.

Traditional jurisdiction is carried forward in subsection (3), supplemented by the expanded jurisdiction afforded by new 18 U.S.C. § 844(f) and (i), recently enacted in the Organized Crime Control Act of 1970 (P.L. 91–452).

A separate provision, which would have graded as a Class B felony any use of dangerously destructive means in carrying out a fraud, when other persons or property were endangered thereby, *e.g.*, sinking a ship (*cf.* 18 U.S.C. § 2272) or burning a building in an insurance fraud, was considered, but is not proposed. Such matters are adequately covered by the Class B felony grading of any theft of more than $100,000 (§ 1735), and by the provisions on arson, endangering by fire or explosion, and release of destructive forces in this Chapter.

See Working Papers, pp. 431, 441, 442, 883–85.

§ 1706. Tampering With or Damaging a Public Service.

(1) Offense. A person is guilty of an offense if he causes a substantial interruption or impairment of a public communication, transportation, supply of water, gas, power or other public service by: (a) tampering with or damaging the tangible property of another; (b) incapacitating an operator of such service; or (c) negligently damaging the tangible property of another by fire, explosive or other dangerous means listed in section 1704(1).

(2) Grading. The offense is a Class C felony if the actor engages in the conduct intentionally, and a Class A misdemeanor if the actor engages in the conduct knowingly or recklessly. Otherwise it is a Class B misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d), (f), (i) or (j) of section 201.

Comment

This section covers interruption of public facilities not only when caused by damaging property, but also when caused by incapacitating the person in charge. *Cf.* 18 U.S.C. § 33. The assault provisions are not sufficient because they are graded according to the seriousness of the physical injury and because there is no jurisdictional base that public facilities were thereby impaired.

§ 1708. Consent a Defense to Sections 1701 to 1706.

Whenever in sections 1701 to 1706 it is an element of the offense that the property is of another, it is a defense to a prosecution under those sections that the other has consented to the actor's conduct with respect to the property.

Comment

This section makes consent an issue which the defendant must introduce into the case rather than one which the prosecution must negate in every case in the first instance.

§ 1709 Definitions for Sections 1701 to 1709.

In sections 1701 to 1709:

(a) "inhabited structure" means a structure or vehicle:

(i) where any person lives or carries on business or other calling;

(ii) where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or

(iii) which is used for overnight accommodation of persons.

Any such structure or vehicle is deemed to be "inhabited" regardless of whether a person is actually present. If a building or structure is divided into separately inhabited units, any unit which is property of another constitutes an inhabited structure of another;

(b) property is that "of another" if anyone other than the actor has a possessory or proprietary interest therein;

(c) "vital public facility" includes a facility maintained for use as a bridge (whether over land or water), dam, tunnel, wharf, communications or radar installation, power station, or space launching facility.

Comment

The definition of "inhabited structure" in this section, applicable to the property destruction provisions, differs from the "occupied structure" definition applicable to burglary and other criminal intrusion offenses (§ 1719) by including places of assembly; the definition here thus incorporates 18 U.S.C. § 837, a property destruction provision in the area of civil rights. The definition of "vital public facility," which adds to the scope of federal property destruction offenses, has been left open-ended to permit judicial development of its meaning. See Working Papers, pp. 878–79.

BURGLARY AND OTHER CRIMINAL INTRUSION

§ 1711. Burglary.

(1) Offense. A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time

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the premises are not open to the public and the actor is not licensed, invited or otherwise privileged to enter or remain, as the case may be, with intent to commit a crime therein.

(2) Grading. Burglary is a Class B felony if:

(a) the offense is committed at night and is knowingly perpetrated in the dwelling of another; or

(b) in effecting entry or while in the premises or in immediate flight therefrom, the actor inflicts or attempts to inflict bodily injury or physical restraint on another, or menaces another with imminent serious bodily injury, or is armed with a firearm, destructive device or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

Otherwise burglary is a Class C felony.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d), (k), or (*l*) of section 201.

Comment

Present federal law defines no general offense, even for federal enclaves, which reflects the common law burglary concept of "breaking and entering into a dwelling at night." Thus, on enclaves, the offense must be assimilated from state law, a result which is undesirable in view of the wide variations in state laws and the extreme penalties provided in some of them.

Existing federal burglary-type provisions are theft oriented, applying, for example, to unlawful entry into premises used for storage, or vehicles used for transport of property in interstate commerce. 18 U.S.C. § 2117. There would have been little need for such "burglary" offenses if the traditional law of attempt had extended to conduct so far short of the intended theft as merely entering premises for the purpose of theft. Under this Code, attempt law would clearly apply, since the unlawful entry would constitute a "substantial step." See § 1001. Accordingly, burglary under § 1711 has been confined to entries into buildings and structures, where the danger of violent encounters with occupants aggravates the offense. Although entry into storage structures for goods moving in interstate commerce would not constitute the felony of burglary, such conduct would be a criminal trespass (§ 1712), as well as an attempted theft of an interstate shipment of goods (§§ 1732, 1735) or the offense of breaking into or concealing oneself in a vehicle (§ 1713).

As in the common law the crime intended to be committed is not specified. This avoids the necessity of proving the precise crime intended—theft, rape, robbery, kidnapping—by a person who criminally enters premises when people are likely to be encountered. In addition unlawful intrusion in itself engenders fear. Of course, the crime intended to be committed does not include unlawful entry or presence crimes, such as criminal trespass or stowing away.

See Working Papers, pp. 897–900.

§ 1712. Criminal Trespass.

(1) Dwelling; Highly Secured Premises. A person is guilty of a Class A misdemeanor if, knowing that he is not licensed or privileged to do so, he enters or remains in a dwelling or in highly secured premises.

(2) Building; Structure; Enclosed Premises. A person is guilty of a Class B misdemeanor if, knowing that he is not licensed or privileged to do so, he:

(a) enters or remains in any building, occupied structure or storage structure, or separately secured or occupied portion thereof; or

(b) enters or remains in any place so enclosed as manifestly to exclude intruders.

(3) Any Premises. A person is guilty of an infraction if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by actual communication to the actor by the person in charge of the premises or other authorized person or by posting in a manner reasonably likely to come to the attention of intruders.

(4) Defenses. It is a defense to a prosecution under this section that:

(a) the premises were abandoned; or

(b) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d), (f), (k) or (*l*) of section 201.

Comment

The federal interest in protecting various sites from trespass varies from protection of AEC installations (42 U.S.C. § 2278(a)) to national forests (18 U.S.C. § 1863). This section reflects the variety of interests in the grading: trespass into dwellings and highly secured areas (defined in § 1719 as guarded government buildings in which visible identification is required) is a Class A misdemeanor and trespass into other buildings and structures (including storage structures for interstate goods), and enclosed areas, is a Class B misdemeanor. Trespass upon other premises would be an infraction. Perhaps the principal issues with respect to trespass are whether the offense alone should ever warrant punishment more severe than 30 days in jail—a Class B misdemeanor—and whether some aggravating element, such as refusal to leave, should be a condition precedent to the imposition of any jail penalty. Note that entering a restricted area for espionage purposes is dealt with under § 1112. See Working Papers, pp. 465, 897–900.

§ 1713. Breaking Into or Concealment Within a Vehicle.

(1) Offense. A person is guilty of an offense if, knowing that he is not licensed or privileged to do so, he breaks into a vehicle, vessel or aircraft, or, with intent to commit a crime, conceals himself therein.

(2) Grading. The offense is a Class C felony if the actor is armed with a firearm, destructive device or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury. Otherwise it is a Class A misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b) or (*l*) of section 201.

Comment

In this section a new offense, in addition to the stowaway offense in § 1714, is proposed to deal with unlawful intrusions into vehicles, principally automobiles. Such intrusions, while similar to burglary, raise problems sufficiently different to warrant special treatment. For example, since "joy-riding" in an automobile is generally to be a misdemeanor (§ 1736), it would be inconsistent if unlawful entry into an automobile with intent to commit such crime constituted the felony of burglary. There should be a means, however, of charging an offense against a person who conceals himself in another's car to commit a crime, without the need for proving which crime he intended to commit—robbery, rape, kidnapping, etc. Moreover, the fact that various crimes may be intended by a person who breaks into a vehicle seems to warrant stating criminal breaking as an offense separate from the attempt, as is done with burglary. Note that for this offense the notion of forcible entry, dropped from burglary, has been retained. Mere unconcealed entry into an unlocked vehicle would not be an offense under this section. See Working Papers, pp. 896–97, 900–01.

§ 1714. Stowing Away.

(1) Offense. A person is guilty of a Class A misdemeanor if, knowing that he is not licensed or privileged to do so, he surreptitiously remains aboard a vessel or aircraft with intent to obtain transportation.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d) or (h) of section 201.

Comment

In carrying forward the existing provision regarding stowaways (18 U.S.C. § 2199), this section makes it clear that the thrust of the proscription is against those whose presence aboard the vessel or aircraft is concealed from the authorities. Open refusal to pay fare is left

to the provisions on theft of services (§ 1732). See Working Papers, p. 901.

§ 1719. Definitions for Sections 1711 to 1719.

In sections 1711 to 1719:

(a) "occupied structure" means a structure or vehicle:

(i) where any person lives or carries on business or other calling; or

(ii) which is used for overnight accommodation of persons.

Any such structure or vehicle is deemed to be "occupied" regardless of whether a person is actually present;

(b) "storage structure" means any structure, truck, railway car, vessel or aircraft which is used primarily for the storage or transportation of property;

(c) "highly secured premises" means any place, maintained, in fact, by the United States which is continuously guarded and where display of visible identification is required of persons while they are on the premises;

(d) "dwelling" has the meaning prescribed in section 619;

(e) "night" means the period between 30 minutes past sunset and 30 minutes before sunrise.

Comment

Differences in the definition of "inhabited structure" for the crimes of property destruction and of "occupied structure" for unlawful entry are discussed in the comment to § 1709, *supra*. See Working Papers, pp. 893–94, 899–900.

ROBBERY

§ 1721. Robbery.

(1) Offense. A person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another, or threatens or menaces another with imminent bodily injury.

(2) Grading. Robbery is a Class A felony if the actor fires a firearm or explodes or hurls a destructive device or directs the force of any other dangerous weapon against another. Robbery is a Class B felony if the robber possesses or pretends to possess a firearm, destructive device or other dangerous weapon, or menaces another with serious bodily injury, or inflicts bodily in-

jury upon another, or is aided by an accomplice actually present. Otherwise robbery is a Class C felony.

(3) Definitions. In this section:

(a) an act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, whether or not the theft is successfully completed, or in immediate flight from the commission of, or an unsuccessful effort to commit, the theft;

(b) "dangerous weapon" means a weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d), (g), (k) or (*l*) of section 201. No prosecution may be instituted under paragraph (g), however, unless expressly authorized by the Attorney General.

Comment

The gist of this offense is the combination of aggression against the person with aggression against property. Threats to use force in the future are not covered here. *Cf.* the extortion offense (§ 1732). Theft of property from a person without the use of force or threat of force, such as pickpocketing and purse-snatching or theft from a victim who is asleep or unconscious, is also excluded. An actual infliction, or threat of imminent infliction, of bodily injury upon another is necessary for robbery. Note that the scope of robbery has been expanded to include infliction, threat or menace of injury in immediate flight from a theft, regardless of whether the theft is successful.

Grading reflects primary concern with the danger to the person. Actual use of a dangerous weapon, whether or not injury results, puts the offense in the highest category, Class A felony. Class B felony penalties are accorded almost all other robberies—those in which the culprit possesses a dangerous weapon whether or not displayed; those in which serious injury is threatened either by a pretense to possession of a dangerous weapon, *e.g.*, by display of a mock gun, or by menacing the victim; those in which the robber is aided by an accomplice; and those in which the victim is actually injured.

The single robbery provision proposed consolidates without radical substantive change the several existing felony provisions dealing with robbery—robbery of banks (18 U.S.C. § 2113), the mails and other federal property (18 U.S.C. § 2114), robbery "affecting commerce" (18 U.S.C. § 1951), robbery in federal enclaves (18 U.S.C. § 2111). However, federal discretionary guidelines (§ 207) discourage unnecessary federal entry into local robbery cases. The vast "affecting commerce" jurisdiction for robbery, potentially capable of reaching almost every case of robbery in the nation (although in practice rarely exercised), is limited in subsection (4) by the explicit requirement that the Attorney General approve prosecutions brought on this

basis. Approval could be further limited to cases relating to organized crime; or the base could be dropped altogether.

See Working Papers, pp. 903–11, 1043–45.

THEFT AND RELATED OFFENSES

Introductory Note

The major reform which would be accomplished by the following provisions on theft would be the consolidation and unification of the dozens of existing provisions dealing with the taking of property of another. Two factors account for the present plethora of provisions: conduct is prohibited in terms of the jurisdictional base, *e.g.*, fraud by use of the mails (18 U.S.C. § 1341) and thefts from interstate shipments (18 U.S.C. § 659); and theft is broken down into a number of theoretically different kinds of conduct, *e.g.*, taking (18 U.S.C. § 2113(b)) and embezzlement (18 U.S.C. § 643). In the proposed theft provisions jurisdiction is treated in a manner similar to its treatment in other Code provisions; the jurisdictional bases are listed separately from the definition of the proscribed conduct. The various existing descriptions of the conduct which constitutes theft have been consolidated into a few provisions; and, in addition, the principle is articulated that the theory underlying the proscription is irrelevant so long as the defendant has been adequately forewarned as to the proof with which he must contend (§ 1731).

Seven sections in this group define the misbehavior. The key section is the section containing definitions (§ 1741), since it is there that "property" is defined as well as "deception" (fraud) and "threat" (extortion). One section (§ 1732) defines theft of property, another (§ 1733) theft of services, and a third (§ 1734) theft of lost or misdelivered property. Two sections introduce into federal law offenses which will often constitute included offenses: unauthorized use of vehicles (§ 1736) and unauthorized use of entrusted property which involves risk of loss or detriment (§ 1737). A final section defining an offense deals with misuse of secured property (§ 1738).

Four other sections, each of which applies to more than one offense, round out the group. Two deal with theft only: one detailing the consolidation approach (§ 1731), and one providing grading (§ 1735). A third (§ 1739) sets forth two defenses and the effect of proof of certain circumstances, for specified offenses. The fourth (§ 1740) deals with jurisdiction for all of the offenses in the group.

These provisions delineate two degrees of seriousness of improper dealing with property of another. The most serious conduct, theft, is characterized by an intent to deprive the owner of his property permanently or substantially so. The next degree involves borrowing of property under circumstances hazarding loss or damage. The least serious offenses, involving mishandling of property without any intent to appropriate it, are regarded as regulatory in nature and are not covered in the proposed Code. These differences are often blurred in existing federal law. For example, 18 U.S.C. § 650 provides the same maximum penalty for embezzlement and for a failure to keep money safely.

§ 1731. Consolidation of Theft Offenses.

(1) Construction. Conduct denominated theft in sections 1732 to 1734 constitutes a single offense designed to include the separate offenses heretofore known as larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like.

(2) Charging Theft. An indictment or information charging theft under sections 1732 to 1734 which fairly apprises the defendant of the nature of the charges against him shall not be deemed insufficient because it fails to specify a particular category of theft. The defendant may be found guilty of theft under such an indictment or information if his conduct falls under any of sections 1732 to 1734, so long as the conduct proved is sufficiently related to the conduct charged that the accused is not unfairly surprised by the case he must meet.

Comment

This section states the legal effect of consolidation. Subsection (2) permits a charge of "theft" with a description of the conduct, and should satisfy the constitutional requirements that the defendant must be apprised of the precise charge against him, tried on the charge stated in the indictment and provided with a basis for a claim of double jeopardy should he be charged anew. Moreover, treating theft as one offense precludes conviction of two offenses for the same conduct on the ground that the conduct falls within two theories of theft, *e.g.*, both taking and retaining the same property. See Working Papers, pp. 944–47, 965.

§ 1732. Theft of Property.

A person is guilty of theft if he:

(a) knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;

(b) knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat; or

(c) knowingly receives, retains or disposes of property of another which has been stolen, with intent to deprive the owner thereof.

Comment

This is the major section on theft in the proposed Code. The overlap among the three paragraphs of subsection (1) is intended to insure that

everything which is now theft by any name will be covered. The paragraphs do not differ otherwise in the elements which must be proved; the culpability requirement in each is "knowingly . . . with intent to deprive". Section 1731 makes clear that theft need not be charged under any particular paragraph. Some important defenses to prosecution under this section appear in § 1739. See Working Papers, pp. 883, 914–37.

§ 1733. Theft of Services.

A person is guilty of theft if:

(a) he intentionally obtains services, known by him to be available only for compensation, by deception, threat, false token or other means to avoid payment for the services; or

(b) having control over the disposition of services of another to which he is not entitled, he knowingly diverts those services to his own benefit or to the benefit of another not entitled thereto.

Where compensation for services is ordinarily paid immediately upon their rendition, as in the case of hotels, restaurants, and comparable establishments, absconding without payment or making provision to pay is prima facie evidence that the services were obtained by deception.

Comment

Theft of services is not presently covered by federal statute except in a few specific situations, *e.g.*, use of the mails without paying postage (18 U.S.C. §§ 1720 and 1725). There appears to be no good reason to distinguish takings on the basis of tangibility. This section covers not only theft of services which are ordinarily supplied for compensation, *e.g.*, transportation by taxicab, but also diversion of the services of an employee, *e.g.*, using a public servant as a driver for a private enterprise, a situation which is of particular significance to the federal government. Note that not all services obtained by deception are covered. Where the service is not normally viewed as a thing of value, the question of criminality depends on whether criminal means—proscribed in other provisions—were used to obtain the service, *e.g.*, force, menacing, criminal coercion. Thus merely deceiving a neighbor for the purpose of obtaining his "services" in driving one into town would not be an offense.

The last sentence of the provision defines a situation which is prima facie evidence of deception, although normally mere failure to perform on a promise is not a basis for an inference of fraud. See § 1741 (a)(i). A person who refuses to pay because he honestly considers the service to be poor can still present evidence which would warrant withholding the case from the jury.

See Working Papers, pp. 937–38.

§ 1734. Theft of Property Lost, Mislaid or Delivered by Mistake.

A person is guilty of theft if he:

(a) retains or disposes of property of another when he knows it has been lost or mislaid, or

(b) retains or disposes of property of another when he knows it has been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property,

and with intent to deprive the owner of it, he fails to take readily available and reasonable measures to restore the property to a person entitled to have it.

Comment

Existing federal law does not explicitly proscribe theft of property which was lost, mislaid, or delivered by mistake; but modern criminal code revisions do. Such thefts may be distinguished from other forms of theft in which the actor himself initiates the loss to the owner of the property. A sanction to encourage the return of property would seem warranted, at least where large amounts are involved. Issues are whether there should be a minimum dollar value for this offense, and whether it should be graded as an equivalent to theft.

Note that retention or disposal of the property must occur at a time when the actor has knowledge of the character of the property. The actor must have "intent to deprive" and must fail to take readily available and reasonable measures to return the property. Variables such as knowledge of who is the owner and the value of the property preclude setting forth a satisfactory definition of "reasonable measures."

See Working Papers, pp. 938–39.

§ 1735. Grading of Theft Offenses Under Sections 1732 to 1734.

(1) Class B Felony. Theft under sections 1732 to 1734 is a Class B felony if the property or services stolen exceed $100,000 in value or are acquired or retained by a threat to commit a Class A or Class B felony or to inflict serious bodily injury on the person threatened or on any other person.

(2) Class C Felony. Theft under sections 1732 to 1734 is a Class C felony if:

(a) the property or services stolen exceed $500 in value;

(b) the property or services stolen are acquired or retained by threat and (i) are acquired or retained by a public servant by a threat to take or withhold official action, or (ii) exceed $50 in value;

(c) the property or services stolen exceed $50 in value and are acquired or retained by a public servant in the course of his official duties;

(d) the property stolen is a firearm, ammunition, explosive or destructive device or an automobile, aircraft or other motor-propelled vehicle;

(e) the property consists of any government file, record, document or other government paper stolen from any government office or from any public servant;

(f) the defendant is in the business of buying or selling stolen property and he receives, retains or disposes of the property in the course of that business;

(g) the property stolen consists of any implement, paper, or other thing uniquely associated with the preparation of any money, stamp, bond, or other document, instrument or obligation of the United States;

(h) the property stolen consists of a key or other implement uniquely suited to provide access to property the theft of which would be a felony and it was stolen to gain such access; or

(i) the property is stolen from the United States mail and is first class mail or air mail.

(3) Class A Misdemeanor. All other theft under sections 1732 to 1734 is a Class A misdemeanor, unless the requirements of subsection (4) or (5) are met.

(4) Class B Misdemeanor. Theft under sections 1732 to 1734 of property or services of a value not exceeding $50 shall be a Class B misdemeanor if:

(a) the theft was not committed by threat;

(b) the theft was not committed by deception by one who stood in a confidential or fiduciary relationship to the victim of the theft; and

(c) the defendant was not a public servant or an officer or employee of a financial institution who committed the theft in the course of his official duties.

The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.

(5) Infraction. Theft under section 1733 of services of a value not exceeding $10 shall be an infraction if the defendant was not a public servant who committed the theft in the course of his official duties. The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.

(6) Attempt. Notwithstanding the provisions of section 1001 (3), an attempt to commit a theft under sections 1732 to 1734 is punishable equally with the completed offense when the actor has completed all of the conduct which he believes necessary on his part to complete the theft except receipt of the property.

(7) Valuation. For purposes of grading, the amount involved in a theft under sections 1732 to 1734 shall be the highest value by any reasonable standard, regardless of the actor's knowledge of such value, of the property or services which were stolen by the actor, or which the actor believed that he was stealing, or which the actor could reasonably have anticipated to have been the property or services involved. Thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be charged as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense.

Comment

Grading of the offenses defined in §§ 1732–1734 follows several principles: the nature of the conduct (threat), the value or character of the property, and the status of the thief (public servant, fiduciary).

Theft by Threat—Under existing federal law, a 20-year maximum penalty applies to all extortion. See, *e.g.*, 18 U.S.C. § 1951. In this section thefts by threat are graded according to the seriousness of the threat. Thefts committed by the most serious threats constitute Class B felonies, regardless of the amount of money involved, and are graded at a level comparable to robbery (§ 1721). Any threat which results in the acquisition or retention of property worth more than $50 makes the extortion a Class C felony. Thefts committed by public servants by threats to take or withhold official action are also Class C felonies, and thus parallel bribery in seriousness (§ 1361). The last sentence in the definition of "threat" in § 1741(k) is intended to preclude avoidance of liability for extortion by a public servant who claims that he was being bribed.

Value of Property—The second major grading principle for theft is the value of the property or services involved. This is traditional in federal law (see, *e.g.*, 18 U.S.C. § 659). Culpability as to value need not be proved. Under existing law the value distinction in grading is $100. In this section three values are mainly employed: $100,000 for the line between Class B and C felonies; $500 for the felony-misdemeanor line (reflecting the realities of inflation), and $50 for the Class B misdemeanor conditions set forth in subsection (4). Note that under subsection (7) the values of separate properties can be aggregated for grading purposes. This aggregation provision and the persistent misdemeanant sentencing provision (§ 3003) serve to focus felony sanctions more precisely on dangerous defendants. Theft of services worth less than $10 is an infraction. This is consistent with

existing provisions which make thefts of mail service fineable offenses only (18 U.S.C. §§ 1719, 1722, 1723, 1725).

Other Felony Grading—There are a number of other felony categories based on the character of the property or status of the defendant. A theft of more than $50 by a public servant in the course of his official duties is felonious because of the violation of public trust. Firearms, explosives, destructive devices, cars, counterfeiting equipment and keys are often stolen to be used in further crime; their value is not the significant feature of the theft. Theft of government documents can disrupt the normal functioning of the government. The professional fence is always a felon because he is vital to making theft lucrative.

Thefts from the mails present special grading problems. Although in theory it would appear that value grading would be appropriate, experimentation with value grading following the 1948 revision of Title 18 resulted in the return to all-felony grading embodied in 18 U.S.C. § 1708. That approach is substantially retained in this section because of the need for special protection of the integrity of the mails, the fact that thefts from the mails are not usually object-oriented, and the need for greater deterrence where there is usually greater vulnerability (because of the small size of the property or because of the kinds of places where undelivered mail can be stolen). Yet, unsuitability of felony treatment in some instances is recognized by such existing statutes as 18 U.S.C. § 1710, under which theft of a newspaper by a postal service employee is a misdemeanor. In order to maintain both policies, any theft of first class mail or air mail is graded as a Class C felony. All other thefts from the mail are graded according to general standards.

Subsection (6), dealing with attempts, is intended to insure that the issue of the vulnerability or gullibility of the intended victim of a fraud or extortion does not arise in grading the attempt; where the actor has done all that he considers necessary, his conduct is deemed as coming "dangerously close" to completion of the offense, the element that distinguishes equally-graded from lesser-graded attempts in § 1001(3). The principle stated here may warrant application to any attempt.

See Working Papers, pp. 923–24, 947–55, 1049.

§ 1736. Unauthorized Use of a Vehicle.

(1) Offense. A person is guilty of an offense if, knowing that he does not have the consent of the owner, he takes, operates, or exercises control over an automobile, aircraft, motorcycle, motorboat, or other motor-propelled vehicle of another.

(2) Defense. It is a defense to a prosecution under this section that the actor reasonably believed that the owner would have consented had he known of the conduct on which the prosecution was based.

(3) Grading. The offense is a Class C felony if the vehicle is

an aircraft or if the value of the use of the vehicle and the cost of restoration exceed $500. Otherwise the offense is a Class A misdemeanor.

Comment

There is no existing federal statute with respect to unauthorized use of motor vehicles, although current construction of the Dyer Act (18 U.S.C. § 2312) permits such vehicles to be regarded as stolen for purposes of prosecutions for transporting a stolen car. Since theft is treated in the proposed Code as a permanent or similarly final deprivation, conviction for theft of a motor vehicle under § 1732 would require proof of intent to deprive. In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most "joyriding" cases may be avoided.

Subsection (2) sets forth a defense to keep family disputes and arguments between friends out of the federal courts. The difficulty of disproving defendant's alleged reasonable belief may warrant converting this defense to an "affirmative defense", which would put the burden of proof on the accused. See § 103(3).

Subsection (3) grades unauthorized use of an aircraft as a felony, not only because of the greater danger posed by an aircraft in the hands of one who may not know much about flying and who is trying to avoid detection, but also because of the generally greater value of a plane and the greater distance that can quickly be covered. Usurping control of a plane with passengers aboard will constitute a separate offense under § 1635. In addition, extended unauthorized use of other vehicles is felonious to accord with the grading of theft of services. Obtaining the use of a car rental agency's car by fraudulent means and running up a $501 bill is a felonious theft of services. Under this section, similar use of the car of a private individual would be a felonious unauthorized use.

See Working Papers, pp. 939–41, 955.

§ 1737. Misapplication of Entrusted Property.

A person is guilty of a Class A misdemeanor if he disposes of, uses or transfers any interest in, property which has been entrusted to him as a fiduciary, or in his capacity as a public servant or an officer, director, agent, employee of, or a person controlling a financial institution, in a manner that he knows is not authorized and that he knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.

Comment

This offense is part of the three-step approach to the problems posed by mishandling of property by government employees and other persons in a fiduciary relationship. Under existing federal law, *e.g.*, 18 U.S.C. § 656, any intentional misapplication of property by a fiduciary

is treated in the same manner as is a felonious theft, regardless of whether there was a great risk of loss of the property resulting from the misapplication. The approach taken in the proposed Code is to define "deprive", a key element in theft, to include only those misapplications of property in which restoration of the property is unlikely. This is supplemented by the provision in § 1739(2)(a) that a failure to account upon demand amounts to a prima facie case of theft. This section constitutes the second step: *any* disposition of entrusted property that is not authorized and that exposes the property to a risk of loss or detriment is treated as a misdemeanor. The third step is the suggestion that any breach of duty with regard to entrusted property, regardless of risk of loss, be treated as a regulatory offense outside Title 18 (if it is to be subject to criminal sanctions at all). This three-tiered approach is thought to pose the issues relevant to proper criminal prosecution more appropriately than does existing law, without at the same time reducing the deterrent value of the criminal laws with respect to the handling of public funds. See Working Papers, pp. 974–75, 982.

§ 1738. Defrauding Secured Creditors.

(1) Offense. A person is guilty of an offense if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with intent to prevent collection of the debt represented by the security interest.

(2) Grading. The offense is a Class A misdemeanor if the property has a value exceeding $500 and a Class B misdemeanor if the property has a value exceeding $50. Otherwise it is an infraction. Value is to be determined as provided in section 1735(7).

Comment

Security interests are not included in the definition of "property" applicable to the theft provision generally (§ 1741(g)). This separate provision is therefore necessary if it is determined that interference with a security interest should be covered by the criminal law. (See 18 U.S.C. § 658 for an example of criminal treatment of disposition of property mortgaged or pledged to the Farm Credit Administration.) This offense is graded as a Class A misdemeanor or less on the judgment that interference with security interests differs essentially from theft—that resisting the collection of a debt is not to be classed at the same level with appropriation of property interests of another. The definition of "security interests" is left to judicial interpretation, but would ordinarily include workmen's and commercial liens. It should be noted that the A.L.I. Model Penal Code provisions on this subject (P.O.D. § 224.10) state as a culpability requirement a "purpose to hinder enforcement of [the security] interest." The intent required here is thought to be preferable since it focuses the offense more toward theft-like conduct than toward conduct which has the appearance of steps taken to postpone the payment of a debt. See Working Papers, pp. 973–74, 982.

§ 1739. Defenses and Proof as to Theft and Related Offenses.

(1) Defenses. It is a defense to a prosecution under sections 1732 to 1738 that:

(a) the actor honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him; or

(b) the victim is the actor's spouse, but only when the property involved constitutes household or personal effects or other property normally accessible to both spouses and the parties involved are living together. The term "spouse", as used in this section, includes persons living together as man and wife.

(2) Proof. (a) It shall be a prima facie case of theft under sections 1732 to 1734 if it is shown that a public servant or an officer, director, agent or employee of, or a person connected in any capacity with a financial institution has failed to pay or account upon lawful demand for money or property entrusted to him as part of his official duties or if an audit reveals a shortage or falsification of his accounts. (b) It shall be prima facie evidence that the actor knows that property has been stolen if it is shown that, being a dealer, he acquired it for a consideration which he knew to be far below its reasonable value. "Dealer" means a person, whether licensed or not, who has repeatedly engaged in transactions in the type of property involved. (c) In any prosecution under sections 1732 to 1734 or 1737 where it is alleged that there is federal jurisdiction over the offense under paragraph (i) of section 201, the place from which and to which the shipment was made is presumed to have been as designated in the waybill or other shipping document of such shipment and the interstate character of the shipment of any property by pipeline systems is presumed from the interstate extension of the pipeline system.

Comment

Subsection (1) of the section, which has no counterpart in existing federal statutes, delineates the outer limits of the theft offenses, dealing with matters handled today by the exercise of prosecutive discretion. The claim of right defense is redundant in some fact situations; if a defendant believes that the property he took was his, the prosecution will not be able to prove that he knowingly took property of another. Absent this defense, however, a defendant who knows that the specific property he is appropriating is not his is guilty of theft. For example, one who threatens to press criminal charges unless another settles a claim would otherwise be guilty of theft by threat because he knows the money he is obtaining is not his. Subsection (1) (b) is intended to keep certain family arguments out of the federal courts.

Subsection (2)(a), which establishes a prima facie case of theft for certain institutional fiduciaries, is derived from existing law (18 U.S.C. § 3487). Under a number of existing statutes failure to pay over is itself punishable as embezzlement. See, *e.g.*, 18 U.S.C. § 643.

Subsection (2)(b) delineates one fact situation which is prima facie evidence that the actor had knowledge of the stolen character of the property. "Prima facie" indicates an inference which is clear and need not be explained to a jury. See § 103 and comment thereto, *supra*. Other common fact situations—possession of recently stolen property or property stolen from two or more people on separate occasions—also imply culpable knowledge, and depending on the other facts and circumstances in a given case may warrant submission of the issue of knowledge to the jury; but it is not clear that the existence of either set of facts without other evidence makes it more likely than not that the actor had knowledge that the property was stolen. Accordingly those situations have not been included.

Subsection (2)(c) carries forward a similar provision now found in 18 U.S.C. § 659.

See Working Papers, pp. 930–32, 935–37, 941–44, 974.

§ 1740. Jurisdiction over Theft and Related Offenses.

(1) Common Bases for Sections 1732 to 1737. There is federal jurisdiction over an offense defined in sections 1732 to 1737 under paragraphs (a), (b), (d), (e), (h), (i), (j), (k) or (*l*) of section 201.

(2) Section 1738. There is federal jurisdiction over an offense defined in section 1738 under paragraphs (a) or (b) of section 201 or when the United States holds a security interest in the property which is the subject of the offense.

(3) Additional Common Base for Sections 1732 to 1734. There is federal jurisdiction over an offense defined in sections 1732 to 1734 under paragraph (g) of section 201 when the theft is one in which property or services are acquired or retained by threat; but no prosecution may be instituted under this subsection unless expressly authorized by the Attorney General.

(4) Special Bases for Sections 1732 to 1734 and 1737. Federal jurisdiction over an offense defined in sections 1732 to 1734 and section 1737 also exists under any of the following circumstances:

(a) Federal Public Servant—when the offense is committed by a public servant of the United States acting under color of office;

(b) Misrepresentation of Federal Interest—when the offense is committed by a misrepresentation of United States ownership, guarantee, insurance or other interest of the United States in property involved in a transaction;

(c) Impersonation of Creditors—when the offense is com-

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mitted by impersonation of a creditor of the United States;

(d) Indian Property—when the subject of the offense is property owned by or in the custody of a tribe, band, or community of Indians which is subject to federal statutes relating to Indian affairs or of any corporation, association or group which is organized under any of such statutes;

(e) Employee Benefit Plans—when the subject of the offense is property owned by or in the custody of any employee welfare benefit plan or employee pension benefit plan subject to 29 U.S.C., Ch. 10;

(f) Public Work Kickbacks—when any part of the compensation of a person employed in the construction, prosecution, completion or repair of any federal public building, federal public work, or building or work financed in whole or in part by loans or grants from the United States is obtained or retained by a threat or deception in relation to that person's employment;

(g) Funds Insured by Department of Housing and Urban Development—when the offense is committed in a transaction for a loan, advance of credit or mortgage insured by the United States Department of Housing and Urban Development;

(h) Small Business Investment Companies—when the offense is committed by an officer, director, agent, receiver or employee of, or person connected in any capacity with, a small business investment company, as defined in 15 U.S.C. § 662, and the subject of the offense is property owned by or in the custody of such small business investment company;

(i) Registered Investment Companies—when the subject of the offense is property owned by or in the custody of a registered investment company, as defined in 15 U.S.C. § 80a;

(j) Futures Commission Merchants—when the offense is committed by a futures commission merchant, as defined in 7 U.S.C. § 2, or any employee or agent thereof, and the subject of the offense is property of a customer received by such commission merchant;

(k) Common Carriers—when the offense is committed by an officer, director, manager or employee of a firm, association or corporation engaged in commerce as a common carrier, and the subject of the offense is property owned by or in the custody of such common carrier;

(*l*) Federal Economic Opportunity Program—when the offense is committed by an officer, director, agent or employee of, or person connected in any capacity with, any agency receiving financial assistance under 42 U.S.C., Ch. 34, and the

subject of the offense is property which is the subject of a grant or contract of assistance pursuant to such Chapter;

(m) Employment in Federal Economic Opportunity Program—when property of a person is obtained or retained by a threat in relation to that person's employment under a grant or contract of assistance pursuant to 42 U.S.C., Ch. 34;

(n) Labor Organizations—when the offense is committed by an officer, agent or employee of a labor organization, as defined in 29 U.S.C. § 152, and the subject of the offense is property owned by or in the custody of such labor organization;

(o) Commodity Credit Corporation—when the subject of the offense is property mortgaged or pledged to the Commodity Credit Corporation or is property mortgaged or pledged as security for any promissory note or other evidence of indebtedness which the Corporation has guaranteed or is obligated to purchase upon tender.

Comment

When existing federal theft statutes are consolidated, the vast federal jurisdiction as to thefts becomes apparent. In addition to jurisdiction over cases of theft arising in federal enclaves or in the course of commission of other federal offenses which are defined in this Code, or when federal property is stolen, there exists a general jurisdiction over theft offenses when the mails, radio, or television are used to commit fraud (18 U.S.C. §§ 1341, 1343), when a person is induced to travel interstate as part of a fraudulent scheme (18 U.S.C. § 2314), when property is stolen from an interstate shipment (18 U.S.C. § 659), when stolen property is shipped interstate (18 U.S.C. §§ 2314, 2315), or when property is stolen from a bank (18 U.S.C. § 2113). These general jurisdictional bases are reflected in subsection (1) of the proposed section. There has, on occasion, been some effort to restrict this jurisdiction arbitrarily. The National Stolen Property Act (18 U.S.C. § 2314), for example, confers federal jurisdiction only when stolen property of $5,000 or more is transported interstate. The approach of § 1741 to such lines is that the issue of value, appropriately litigable to determine grading, is not appropriately litigable to determine whether prosecution has been brought in the proper court, and that unnecessary exercise of federal jurisdiction is better curbed by a provision such as § 207 of the proposed Code, setting authority and standards for restraining federal intervention. If limits such as the $5,000 value on stolen property moving across state lines are regarded as appropriate, they should be retained as guidelines only, not as absolute (and litigable) jurisdictional conditions.

Subsection (3) of this section retains the broad existing Hobbs Act jurisdiction over extortion, a federal offense whenever the crime "affects commerce" (18 U.S.C. § 1951), but adds the requirement that the Attorney General authorize any prosecution brought on this juris-

dictional basis. Again, the federal interest could be limited, by discretionary guides, to major crimes involving interstate organized criminal activity.

Subsection (2) establishes relatively narrow jurisdiction over the defrauding of secured creditors. If the jurisdiction were as broad as that for theft, there would be federal jurisdiction over all mortgage frauds (property owned by a national credit institution—§ 201(k)).

The detailed listing of various jurisdictional bases in subsection (4) represents an effort to incorporate in the proposed Code the existing jurisdictional bases for federal theft prosecutions which are not covered by the common bases specified in subsections (1) and (3). No substantial change in federal jurisdiction is contemplated; thus, the list is largely an adaptation of the detailed jurisdictional specifications of existing theft statutes. Note that some of these specific bases refer to only one form of theft. Subsections (4) (b) and (c) deal with jurisdiction over certain instances of theft by deception; subsection (4) (f) deals with thefts by threat or deception, and subsection (4) (m) with thefts by threat.

See Working Papers, pp. 729, 955–57.

§ 1741. Definitions for Theft and Related Offenses.

In sections 1731 to 1741:

(a) "deception" means: (i) creating or reinforcing a false impression, including false impressions as to fact, law, status, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not substantially perform the promise unless it is part of a continuing scheme to defraud; or (ii) preventing another from acquiring information which would affect his judgment of a transaction; or (iii) failing to correct a false impression which the actor previously created or reinforced, or which he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or (iv) failing to correct an impression which the actor previously created or reinforced and which the actor knows to have become false due to subsequent events; or (v) failing to disclose a lien, adverse claim or other impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained or in order to continue to deprive another of his property, whether such impediment is or is not valid, or is or is not a matter of official record; or (vi) using a credit card, charge plate, or any other instrument which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer (A) where such instrument

has been stolen, forged, revoked or cancelled, or where for any other reason its use by the actor is unauthorized, and (B) where the actor does not have the intention and ability to meet all obligations to the issuer arising out of his use of the instrument; or (vii) any other scheme to defraud. The term "deception" does not, however, include falsifications as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares in communications addressed to the public or to a class or group;

(b) "deprive" means: (i) to withhold property or to cause it to be withheld either permanently or under such circumstances that a major portion of its economic value, or its use and benefit, has, in fact, been appropriated; or (ii) to withhold property or to cause it to be withheld with the intent to restore it only upon the payment of a reward or other compensation; or (iii) to dispose of property or use it or transfer any interest in it under circumstances that make its restoration, in fact, unlikely.

(c) "fiduciary" means a trustee, guardian, executor, administrator, receiver, or any other person acting in a fiduciary capacity, or any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary;

(d) "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;

(e) "obtain" means: (i) in relation to property, to bring about a transfer or purported transfer of an interest in the property, whether to the actor or another; or (ii) in relation to services, to secure performance thereof;

(f) "property" means any money, tangible or intangible personal property, property (whether real or personal) the location of which can be changed (including things growing on, affixed to, or found in land and documents although the rights represented thereby have no physical location), contract right, chose-in-action, interest in or claim to wealth, credit, or any other article or thing of value of any kind. "Property" also means real property the location of which cannot be moved if the offense involves transfer or attempted transfer of an interest in the property;

(g) "property of another" means property in which a person other than the actor or in which a government has an interest

which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. "Owner" means any person or a government with an interest in property such that it is "property of another" as far as the actor is concerned;

(h) "receiving" means acquiring possession, control or title, or lending on the security of the property;

(i) "services" means labor, professional service, transportation, telephone, mail or other public service, gas, electricity and other public utility services, accommodations in hotels, restaurants or elsewhere, admission to exhibitions, and use of vehicles or other property;

(j) "stolen" means property which has been the subject of theft or robbery or a vehicle which is received from a person who is then in violation of section 1736;

(k) "threat" means an expressed purpose, however communicated, to (i) cause bodily injury in the future to the person threatened or to any other person; or (ii) cause damage to property; or (iii) subject the person threatened or any other person to physical confinement or restraint; or (iv) engage in other conduct constituting a crime; or (v) accuse anyone of a crime; or (vi) expose a secret or publicize an asserted fact, whether true or false, tending to subject a person living or deceased, to hatred, contempt, or ridicule or to impair another's credit or business repute; or (vii) reveal any information sought to be concealed by the person threatened; or (viii) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (ix) take or withhold official action as a public servant, or cause a public servant to take or withhold official action; or (x) bring about or continue a strike, boycott, or other similar collective action to obtain property or deprive another of his property which is not demanded or received for the benefit of the group which the actor purports to represent; or (xi) cause anyone to be dismissed from his employment, unless the property is demanded or obtained for law-

ful union purposes; or (xii) do any other act which would not in itself substantially benefit the actor or a group he represents but which is calculated to harm another person in a substantial manner with respect to his health, safety, business, employment, calling, career, financial condition, reputation, or personal relationship. Upon a charge of theft, the receipt of property in consideration for taking or withholding official action shall be deemed to be theft by threat regardless of whether the owner voluntarily parted with his property or himself initiated the scheme.

Comment

This section defines 11 terms used in the theft provisions and, by incorporation in § 1754, the forgery provisions as well. Note the following:

1. "Deception." A false statement as to intention is included, *e.g.*, a promise to pay when one does not intend to do so; but falsity cannot be inferred from the fact alone that the promise was not performed unless nonperformance is part of a continuing scheme to defraud. *Cf.* § 1733 as to compensation due immediately for services. "Deception" also includes failure to disclose a lien, on the theory that there is an implied representation in a sale that the actor is entitled to sell what he is selling. Subparagraph (vii) carries forward the language of the present mail fraud statute (18 U.S.C. § 1341), which has been given content by judicial construction.

2. "Deprive." Proof of culpability as to the fact that the major portion of the economic value of property has been appropriated or that restoration is unlikely is not required; for example, the "borrower" of funds who mistakenly believes he has a sure thing at the racetrack and will therefore be able to restore the money is a thief.

3. "Property." Immovable real property can be stolen only by a transfer of an interest in it. Thus a landlord who evicts a tenant unlawfully is not guilty of theft of the premises.

4. "Property of another." Property in which another has a security interest is not included. See § 1738 for the offense of defrauding secured creditors.

5. "Receiving." Lending on the security of the property is included.

6. "Stolen." A vehicle which has been used without authority is included, but a receiver of such a vehicle must have the requisite intent to deprive before he is a thief. Thus a joyrider who borrows a vehicle from another joyrider is not a thief.

7. "Threat" is broader than coercion (§ 1617) because here the act coerced is narrowly defined—the giving up of property. Note in subparagraph (xi) the exclusion of union dues for lawful union purposes. The last sentence in the definition bars use of a defense to a charge of theft by threat that the charge should have been bribery.

See Working Papers, pp. 916–30, 932–35, 974.

FORGERY AND OTHER FRAUDS

§ 1751. Forgery or Counterfeiting.

(1) Offense. A person is guilty of forgery or counterfeiting if, with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such deception or harm by another person, he:

(a) knowingly and falsely makes, completes or alters any writing; or

(b) knowingly utters or possesses a forged or counterfeited writing.

(2) Grading. Forgery or counterfeiting is:

(a) a Class B felony if:

(i) the actor forges or counterfeits an obligation or other security of the United States; or

(ii) the offense is committed pursuant to a scheme to defraud another of money or property of a value in excess of $100,000;

(b) a Class C felony if:

(i) the actor is a public servant or an officer or employee of a financial institution and the offense is committed under color of office or is made possible by his office;

(ii) the actor forges or counterfeits foreign money or other legal tender, or utters or possesses any forged or counterfeited obligation or security of the United States or foreign money or legal tender;

(iii) the actor forges or counterfeits any writing from plates, dies, molds, photographs or other similar instruments designed for multiple reproduction;

(iv) the actor forges or counterfeits a writing which purports to have been made by the government;

(v) the actor utters a forged or counterfeited United States passport or certificate of United States naturalization or citizenship; or

(vi) the offense is committed pursuant to a scheme to defraud another of money or property of a value in excess of $500;

(c) a Class A misdemeanor in all other cases.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under any of the following circumstances:

(a) Common Bases—under paragraphs (a) or (b) of section 201;

(b) Nature of the Writing—when the writing which is the

subject of the offense (i) has been or purports to have been made by or on behalf of, or issued under the authority of, the United States, a national credit institution (as defined in section 219), or a foreign government or bank or (ii) is an endorsement on or otherwise a part of such writing;

(c) Misconduct by Bank Employee—when the offense is committed by an officer, director, agent, trustee, or employee, acting under color of office, of a national credit institution (as defined in section 219);

(d) Deception of Government or National Credit Institution—when the offense is committed pursuant to a scheme to deceive or injure the United States or a national credit institution (as defined in section 219);

(e) Interstate or Foreign Commerce—when the writing which is the subject of the offense is or purports to be a security or a tax stamp or part thereof which is in interstate or foreign commerce.

Comment

This single provision, supplemented by the definitions in § 1754, would replace a large number of existing statutes, many of which are now set forth in Chapter 25 of Title 18. This consolidation is permitted by the definitional provision included in § 1754(b). "Writing" is there defined to include any kind of document (and objects such as coins as well) which is a "symbol or evidence of value, right, privilege or identification which is capable of being used to the advantage or disadvantage of the government or any person." With this broad range of included instruments, the statute proscribes false making, completion or alteration, to cover all forms of doctoring or falsifying of instruments which make them appear to be what they are not.

The definition of the forgery offense is completed by the requirement that the conduct be "knowingly" engaged in and, further, that it be taken concurrently with "intent to deceive or harm." The alternative ("with knowledge that he is facilitating") is designed to cover the case in which the actor does not intend to use the forged material himself but is making, completing or altering the instrument for use by another.

The uttering and possession of a forged document are continued as criminal conduct integrated with the forgery itself. Absent an explicit proscription of possession with the prescribed intent, such conduct would be governed by the general attempt provision (§ 1001) raising the issue of the sufficiency of the "substantial step" taken to consummate the crime. Explicit proscription of possession obviates that issue but at some risk of convicting innocent possessors.

As is the case under existing law (18 U.S.C. § 471) counterfeiting United States money is graded at a level higher than other types of forgeries. Money is included in the definition of "obligation or other security of the United States," the meaning of which is largely carried forward (in § 1754) from existing law. Reference to "bills, checks, or

drafts for money, drawn by or upon an authorized officer of the United States", however, has been deleted. While forgery of any government writing will be a Class C felony, the Class B felony grading is reserved for forgery of money, government bonds, or other instruments negotiable on their face.

The other Class B felony—where the amount of $100,000 is involved—is included for consistency with a parallel provision in theft grading (see § 1735). Note, in subsection (2)(b)(i), that capitalization on government employment to perpetrate a fraud is regarded as sufficiently serious to warrant felony treatment in all cases. Subsection (2)(b)(ii) follows the judgment expressed above as regards money; while the making of United States money is a Class B felony, other related offenses involving counterfeit money (uttering and possessing) are retained at the Class C level, unless huge sums are involved. Counterfeiting of foreign monies in any amount is also treated as a felony, but at a lower-level than counterfeiting United States money, as it is at present (18 U.S.C. § 478). Subsection (2)(b)(iii) is aimed at the professional forger. One who makes false documents by use of sophisticated equipment of the sort described poses a danger to society much greater, it is felt, than the offender who forges a single signature or completes a blank check without authority. Subsection (2)(b)(iv) covers as a felony the forging of any government document not included within the meaning of "any obligation or other security of the United States". Subsection (2)(b)(v) continues felony grading of the use of a forged passport or naturalization certificate. The final category parallels the theft provisions (§ 1735) by providing felony sanctions for engaging in a fraudulent scheme which contemplates obtaining in excess of $500.

A final note should be added about the terms "forgery" and "counterfeiting." The offenses are combined because they involve essentially similar conduct. Both terms are retained because it is thought undesirable to attempt to change common usages. But, as provided in the definitional section (§ 1754(g)), in legal effect the terms are taken as synonyms.

Present federal jurisdiction is substantially carried forward in subsection (3), and expanded to cover forgery of any writing in federal enclaves.

See Working Papers, pp. 445, 514, 729, 959–67, 981.

§ 1752. Facilitation of Counterfeiting.

(1) Counterfeiting Implements. A person is guilty of an offense if, except as authorized by statute or by regulation, he knowingly makes, executes, sells, buys, imports, possesses or otherwise has within his control any plate, stone, paper, tool, die, mold or other implement or thing uniquely associated with or fitted for the preparation of any forged or counterfeited security or tax stamp or any writing which purports to be made by the United States or any foreign government.

(2) Counterfeiting Impressions. A person is guilty of an offense if, except as authorized by statute or by regulation, he:

(a) knowingly photographs or otherwise makes a copy of:

(i) money or other obligation or security of the United States or a foreign government, or any part thereof; or

(ii) any plate, stone, tool, die, mold or other implement or thing uniquely associated with or fitted for the preparation of any writing described in subsection (1); or

(b) knowingly sells, buys, imports, possesses or otherwise has within his control any photograph or copy the making of which is prohibited by subsection (2)(a).

(3) Authorization as Defense. In a prosecution under this section authorization by statute or by regulation is a defense.

(4) Grading. An offense defined in this section is a Class B felony if the implement or the impression relates to the forging or counterfeiting of money or other obligation or security of the United States. Otherwise it is a Class C felony.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b) or (j) of section 201 or when the offense involves a writing made by the United States or any foreign government.

Comment

This provision consolidates, without substantive change, a number of existing counterfeiting provisions. In subsection (1) the "securities" and "tax stamp" language is carried forward from 18 U.S.C. §§ 2314–15. The other objects and instruments now covered by 18 U.S.C. §§ 474, 481, 487, 488, and 506, would seem to fall within the concept of a writing which purports to be made by the United States or a foreign government. Subsection (1) is intended to apply only to implements uniquely associated with the preparation of such documents—implements which are not normally put to legitimate uses. The language of some existing provisions, *e.g.*, 18 U.S.C. § 2314, seems to embrace any tool used in making such documents, including a pencil or a screw driver: more restrictive language is therefore appropriate.

The scope of subsection (2) is slightly narrower than that of existing law. Obligations and securities of a foreign bank or corporation (but not of domestic banks or corporations), forms and requests for government transportation, and naturalization and citizenship blanks (presently included in 18 U.S.C. §§ 481, 509, 1426(h)) are excluded because a criminal sanction for merely making an impression of any such document does not appear to be warranted.

Title 18 U.S.C. § 504 sets forth, at length and in detail, an exception to the general rule proscribing the printing and filming of United States and foreign obligations and securities. That exception is a regulatory enactment, subject to change from time to time, and therefore belongs outside Title 18; its provisions would be shifted to Title

31, concerning money and finance. Making the reproductions within the permissible exception would not be an offense, since the proposed statute explicitly excepts conduct "authorized by statute or by regulation." Under subsection (3) the government need not negative the fact of authorization until the issue has been raised.

See Working Papers, pp. 514, 967–68, 982.

§ 1753. Deceptive Writings.

(1) Offense. A person is guilty of an offense if, with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such a deception or harm by another person, he knowingly issues a writing without authority to issue it or knowingly utters or possesses a deceptive writing.

(2) Grading. The offense is a Class B felony if it is committed pursuant to a scheme to defraud another of money or property of a value in excess of $100,000. The offense is a Class C felony if (a) the actor is a public servant or an officer or employee of a financial institution and the offense is committed under color of office or is made possible by his office; or (b) the offense is committed pursuant to a scheme to defraud another of money or property of a value in excess of $500. Otherwise it is a Class A misdemeanor.

(3) Jurisdiction. Federal jurisdiction over an offense defined in this section is the same as that prescribed for forgery or counterfeiting in section 1751.

Comment

This section, together with the definitions in § 1754, contains two new ideas. The first is that the act of issuing an instrument without authority is comparable to uttering forged or counterfeit documents. Thus, an agent who possesses a validly drawn instrument, with instructions as to when it is to be used, is really no different from the agent who utters a falsely-made document, if with the appropriate *mens rea* he issues the genuine instrument in breach of that authority. The fact that the instrument happens to be genuine on its face, in other words, is not a material basis for distinguishing his case: in both cases, the actor fraudulently takes advantage of his principal; in both cases the essence of the offense is the breach of authority and the misuse of documents that purported to be something that they were not. For existing analogous offenses, see 18 U.S.C. § 334 (issuance of federal reserve notes in breach of authority) and 18 U.S.C. §§ 1015(d), 1425(b), 1541 (wrongful issuance of citizenship certificates and passports).

The second new idea is related. It concerns the phrase "deceptive writing," which is defined in the general definition section to include two types of instruments: (1) a document issued in breach of authority; and (2) a document which has been procured by fraud. Each

is in some sense "false," *i.e.*, it is not in all respects what it appears to be. In much the same sense, a "forged" document is also false: it may be a complete fake, or it may have been altered or completed without authority. The judgment underlying this provision is that uttering all such documents—knowingly giving them currency with the intent to deceive or harm—ought to be treated in essentially the same manner. The judgment is reflected in existing law in many places, although in a form different from the recommendation. See, *e.g.*, 18 U.S.C. § 499 (misuse of military or official passes).

However, although there may be no difference in culpability between use of a forged writing and use of a deceptive writing, and thus no difference in the grading of the two kinds of misconduct, the offense defined here is separated from forgery, because the latter has traditionally dealt only with instruments which themselves are defective. The deceptive writing offense is also graded as a felony when it is a form of official misconduct or when it is part of a scheme to defraud involving a large sum of money or property. Federal jurisdiction is also the same as that for forgery.

See Working Papers, pp. 514, 968–71.

§ 1754. Definitions for Sections 1751 to 1754.

In sections 1751 to 1754:

(a) the definitions prescribed in section 1741 apply;

(b) "writing" means (i) any paper, document or other instrument containing written or printed matter or its equivalent, including money, a money order, bond, public record, affidavit, certificate, passport, visa, contract, security, or obligation, and (ii) any coin or any gold or silver bar coined or stamped at a mint or assay office of the United States or any signature, certification, credit card, token, stamp, seal, badge, decoration, medal, trademark or other symbol or evidence of value, right, privilege, or identification which is capable of being used to the advantage or disadvantage of the government or any person;

(c) "without authority" includes conduct that, on the specific occasion called into question, is beyond any general authority given by statute, regulation or agreement;

(d) "falsely makes" means to make a writing which purports to be made by the government or another person, or a copy thereof, but which is not because the apparent maker is fictitious or because the writing was made without authority;

(e) "falsely completes" means to make an addition to or an insertion in a writing, without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker;

(f) "falsely alters" means to make a change in a writing,

without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker;

(g) to "forge" or to "counterfeit" a writing means to falsely make, complete, or alter the writing, and a "forged" or "counterfeited" writing is a writing which has been falsely made, completed or altered. The terms "forgery" and "counterfeiting" and their variants are intended to be synonymous in legal effect;

(h) "utter" means to issue, authenticate, transfer, publish, sell, transmit, present, use or otherwise give currency to;

(i) "possess" means to receive, conceal or otherwise exercise control over;

(j) the term "obligation or other security of the United States" means a bond, certificate of indebtedness, national bank currency, Federal Reserve note, Federal Reserve bank note, coupon, United States note, Treasury note, gold certificate, silver certificate, fractional note, certificate of deposit, a stamp, a postage meter stamp or other representative of value of whatever denomination, issued pursuant to a federal statute, and a canceled United States stamp;

(k) "security" other than as provided in paragraph (j) includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in tangible or intangible property, instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise, uncanceled stamp issued by a foreign government (whether or not demonetized); or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant or right to subscribe to or purchase any of the foregoing;

(*l*) "tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a state, or evidence of the discharge thereof;

(m) a "deceptive writing" is a writing which (i) has been procured by deception, or (ii) has been issued without authority.

Comment

The cross-reference in paragraph (a) is to the definitions provided for theft offenses. Many of the words ("deception" and "fiduciary," for example) are used and have the same meaning in both places.

The word "writing" (paragraph (b)) is defined broadly to include all of the various types of things which now come under one of the many different existing statutes dealing with forgery and counterfeiting. There are presently some 42 different statutes in Title 18 alone which deal with essentially the same kind of conduct. The device of including an expanded definition of writing is the principal means by which consolidation of these many offenses is effected. See comment to § 1751, *supra*.

The definition of "without authority" has two purposes. The first is to insure that "authority" is not construed to refer to apparent as well as real authority. Knowingly acting in excess of authority in executing a note is the functional equivalent of forging a note for purposes of measuring the extent of criminal liability. The second purpose is to provide a basis for the inclusion of issuing documents in breach of authority, in § 1753. For example, it is now a felony (18 U.S.C. § 334) for a federal reserve agent to issue federal reserve notes in violation of law. Similarly, it is a felony (18 U.S.C. § 1016) for an officer authorized to administer oaths to make a false certification that an oath has been administered in a dealing with the United States. See also 18 U.S.C. §§ 1018, 1019, 1021, 1022, 1541. The definition of "without authority" and the definition of a "deceptive writing" (paragraph (m)) will provide for coverage of these offenses.

"Falsely makes" covers the classic counterfeiting situation, as well as many other instances of forgery. The term "makes" is not meant in its technical sense (as in the "maker" of a negotiable note), but rather is meant in its more common meaning (as in "making" a pie). The essential ingredients are twofold: (1) the writing must purport to have been made by someone other than the actor; and (2) the other must either not exist or not have authorized the making. To make something which purports to be a copy of the genuine, but which is not because the apparent maker is fictitious or because the writing copied was made without authority, is also included. Note also that a forged signature is a "writing" within these provisions.

Falsely "completes" and falsely "alters" are defined to assure that false completions or alterations of instruments are included within the concept of forgery. It is possible that a requirement of materiality should be added: that only "material" completions or alterations should be included. However, the requirement is omitted because the "intent to deceive or harm" that must accompany any offense includes such concepts. It is the intent to deceive or injure the victim that justifies the sanction.

Whether the actor makes, completes or alters a document so that the result is something other than what it appears to be, it would seem equally appropriate to subject him to criminal liability. The definition of "forge" or "counterfeit" expresses the purpose of these statutes to consolidate the functionally similar concepts of forgery and counterfeiting into offenses with identical elements. The two terms are still

used, however, so as to permit continuation of common usage—"counterfeiting" money, "forging" checks.

The definition of "utter" (paragraph (h)) expands upon the offense of using forged or counterfeited instruments in a fraudulent scheme. Since the conduct is criminal only when accompanied by an intent to deceive or harm, "uttering" need not include a notion of uttering only for unlawful purposes. Other uses of the term also require a *mens rea* that will exclude innocent conduct. Similarly, possession (paragraph (i)) will be an offense only if accompanied by an intent to deceive or harm another.

The definitions in paragraph (j), (k), and (*l*) are taken from existing law, 18 U.S.C. §§ 8 and 2311. The definition of "obligation or other security of the United States" gives effect to the special grading provisions of §§ 1751 and 1752, concerning the counterfeiting of United States monies. Definitions of "securities" and "tax stamps" are needed to describe special types of writing which may be forged with implements proscribed in § 1752.

See Working Papers, pp. 959–65, 968–71.

§ 1755. Making or Uttering Slugs.

(1) Offense. A person is guilty of an offense if he makes or utters a slug with intent to deprive a supplier of property or service sold or offered by means of a coin machine or with knowledge that he is facilitating such a deprivation by another person.

(2) Grading. The offense is a Class A misdemeanor if it involves slugs which exceed $50 in value. Otherwise it is a Class B misdemeanor.

(3) Definitions. In this section:

(a) "slug" means a metal, paper, or other object which by virtue of its size, shape or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill or token;

(b) "coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed:

(i) to receive a coin or bill of a certain denomination or a token made for the purpose; and

(ii) in return for the insertion or deposit thereof, automatically to offer, provide, assist in providing or permit the acquisition of property or a public or private service;

(c) "value" of the slugs means the value of the coins, bills or tokens for which they are capable of being substituted.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201 or when

the offense involves a coin machine designed to receive currency of the United States.

Comment

Slugs are presently dealt with in a lengthy and complex fashion in 18 U.S.C. § 491. This section represents a substantial departure in format, but not much change in substance. The gravamen of the offense as proposed, and as it exists, is the making or using of slugs with the intent to deprive another of goods or services obtainable by putting a coin in a vending machine, passing through a turnstile, etc. (Use of slugs is in actuality a form of theft, but it is included in this group of offenses because its principal jurisdictional base involves machines designed to receive United States currency. Further, the concept of "uttering," in this provision, includes, as does existing law, trafficking in slugs, as well as using them.) While existing law speaks separately to the manufacture of objects that can be used as slugs, the section covers such conduct by including "making" "with knowledge that he is facilitating such a deprivation by another person." The existing provision that a warning to a manufacturer of goods that his product is being used as slugs may provide such knowledge is a questionable one, and is not included in the section; it gives to a law enforcement officer the power to remove a wide range of objects from legitimate manufacture on the ground that they can be used as slugs. Some safeguards for the rights of the manufacturer seem to be needed, but are inappropriate in a criminal code. If necessary, a regulatory provision outside Title 18 establishing appropriate agency supervision could provide such safeguards.

Grading departs from existing law to the extent that Class A misdemeanor penalties attach only when the $50 limit is met, in order to be consistent with grading of theft.

See Working Papers, pp. 971–72, 982.

§ 1756. Bankruptcy Fraud.

(1) Offense. A person is guilty of a Class C felony if, with intent to deceive a court or its officers or to harm creditors of a bankrupt, he knowingly:

(a) transfers or conceals any property belonging to the estate of a bankrupt;

(b) receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding;

(c) transfers or conceals, in contemplation of a bankruptcy proceeding, his own property or the property of another;

(d) conceals, destroys, mutilates, alters or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt, or withholds any such document from the receiver, trustee or other officer of the court entitled to its possession; or

(e) gives, obtains or receives a thing of value for acting or forbearing to act in any bankruptcy proceeding.

(2) Duration of Offense. The concealment of any property of a bankrupt is a continuing offense and the period of limitations shall not begin to run until the bankrupt shall have been finally discharged from bankruptcy or a discharge from bankruptcy finally denied.

(3) Definitions. In this section "bankrupt" means a debtor by or against whom a petition has been filed under Title 11 of the United States Code, and "bankruptcy proceeding" includes any proceeding, arrangement or plan pursuant to Title 11.

Comment

This section retains the portion of 18 U.S.C. § 152 that is not covered by other sections of the proposed Code. No substantive change in existing law is intended. One issue involves the manner of stating the intent which should accompany these offenses. Existing law requires that the defendant act "knowingly and fraudulently" and in certain instances that he intend "to defeat the bankruptcy law." The word "fraudulently" is not used here because of its imprecision. The "intent to defeat" language is not included because it does not seem appropriate or necessary to require that the actor know what the bankruptcy laws are and affirmatively intend to undercut them. Knowingly engaging in the described conduct with an intent to deceive the court or its officers, or with an intent to harm creditors of the bankrupt more accurately describes the appropriate *mens rea.* Federal jurisdiction over bankruptcy matters is plenary, under Article I. Section 8. of the Constitution: therefore, no jurisdictional base for this offense is here stated. Subsection (2) carries forward present 18 U.S.C. § 3284. See Working Papers, pp. 972, 982.

§ 1757. Rigging a Sporting Contest.

(1) Interference With a Sporting Contest. A person is guilty of a Class C felony if, with intent to prevent a publicly-exhibited sporting contest from being conducted in accordance with the rules and usages purporting to govern it, he:

(a) confers or offers or agrees to confer any benefit upon, or threatens any harm to, a participant, official or other person associated with the contest; or

(b) tampers with any person, animal or thing.

(2) Soliciting or Accepting Benefits. A person is guilty of a Class C felony if he knowingly solicits, accepts or agrees to accept any benefit the giving of which is prohibited under subsection (1).

(3) Definition. A "publicly-exhibited sporting contest" is any contest in any sport, between individual contestants or teams of

contestants, the occurrence of which is publicly announced in advance of the event.

(4) Status of Contestant. The status of the contestant as amateur or professional is not material to the commission of the offense described in this section.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (e) or (h) of section 201.

Comment

The proposal advanced here is somewhat more elaborate than the existing statute (18 U.S.C. § 224), but is not intended to alter its coverage substantially. Expansion of the offense to reach other public exhibitions, *e.g.*, quiz contests, was considered, but was not provided because of uncertainty as to public expectations and accepted practices with respect to other public exhibitions.

Another possible expansion of existing law would be proscription of mere participation in a rigged contest with knowledge it has been rigged. Such participation constitutes a fraud on the public similar to direct receipt or offer of the bribe. The difference in the degree of culpability could be reflected in grading. The offense has not been so extended, however, on the ground that those truly culpable in such affairs can be reached by provisions on complicity and that the offense would, in effect, be one of failure to inform on others (an omission for which criminal sanctions are rarely employed).

See Working Papers, pp. 972–73, 982.

§ 1758. Commercial Bribery.

(1) Giving Bribe. A person is guilty of a Class A misdemeanor if he:

(a) confers or agrees or offers to confer any benefit upon an employee or agent without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs; or

(b) confers or agrees or offers to confer any benefit upon any fiduciary without the consent of the beneficiary, with intent to influence the fiduciary to act or conduct himself contrary to his fiduciary obligation.

(2) Receiving Bribe. A person is guilty of a Class A misdemeanor if he knowingly solicits, accepts or agrees to accept any benefit the giving of which is prohibited under subsection (1).

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under any of the following circumstances:

(a) Common Bases—under paragraphs (a) or (b) of section 201;

(b) National Credit Institutions—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of a national credit institution (as defined in section 219) or of a small business investment company (as defined in 15 U.S.C. § 662), and the offense is committed in connection with his duties;

(c) Employee Welfare or Pension Plan—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of an employee welfare benefit plan or employee pension benefit plan subject to 29 U.S.C., Ch. 10; or is an employer any of whose employees are covered by such plan; or is an agent, fiduciary or employee of an employer any of whose employees are covered by such plan; or is an agent, fiduciary or employee of an employee organization any of whose members are covered by such plan; or is a person who, or an agent, fiduciary or employee of an organization which, provides benefit plan services to such plan; and the offense is committed in connection with his duties:

(d) Interstate Facilities—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of any interstate facility and the offense is committed in the course of his duties;

(e) Military Service Clubs—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of a military officers' or servicemen's club for personnel on active duty, or of a military post exchange, and the offense is committed in connection with his duties.

Comment

Existing law proscribes commercial bribery committed in specific areas of federal regulation, such as with respect to banks, employee benefit plans and railroads. See 18 U.S.C. § 214 (failing to disclose fee for endeavoring to procure Federal Reserve bank loan for another) and § 215 (bank officer receiving gift for making loan). The scheme of § 1758 is to carry forward these provisions under a common definition and common grading of the misconduct and by a description of the specific situations invoking federal concern in the jurisdictional bases. Added to the list of current application are military service clubs (subsection (3)(e)), interstate facilities other than railroads and any commercial bribery in federal enclaves. See Working Papers, pp. 973, 982.

§ 1759. Unlawful Trafficking in Food Stamp Coupons.

(1) Offense. A person is guilty of an offense if he knowingly traffics in food stamp coupons in violation of the regulatory law.

(2) Definitions. In this section:

(a) "traffics" means:

(i) transfers or otherwise disposes of the coupons to another;

(ii) possesses the coupons with intent to transfer or otherwise dispose of them to another; or

(iii) obtains or receives the coupons;

(b) "regulatory law" means Chapter 51 of Title 7, United States Code, and regulations issued pursuant thereto.

(3) Grading. The offense is a Class C felony if the value of the coupons exceeds $500 and the trafficking was engaged in with intent that the coupons be used by a person not authorized to use them or that the coupons be used to purchase a thing other than food, as defined in the regulatory law. Otherwise the offense is a Class A misdemeanor.

(4) Valuation. For purposes of grading, the value of the coupons shall be the face value. Trafficking committed pursuant to one scheme or course of conduct may be charged as one offense and the value of the coupons involved may be aggregated in determining the grade of the offense.

Comment

This section brings into the Code criminal provisions connected with the federal food stamp program, primarily to provide felony grading for certain violations, rather than to leave all violations subject to reduction to Class A misdemeanors pursuant to Code § 3006. Instead of the $100 felony/misdemeanor line of 7 U.S.C. § 2023, grading follows the $500 felony/misdemeanor line found in Code provisions dealing with theft and forgery and, in addition, requires for the felony a specific intent to undermine the basic purposes of the program, in order to exclude from felony treatment technical violations which may involve coupons valued at more than $500. Serious violations now covered by 7 U.S.C. § 2023 which are not within this section are covered by other Code provisions, *e.g.*, presenting illegally obtained coupons to the government for redemption would be attempted theft.

ECONOMIC REGULATION

§ 1771. Engaging in or Financing Criminal Usury Business.

(1) Offense. A person is guilty of a Class C felony if he knowingly engages in, or directly or indirectly provides financing for, the business of making extensions of credit at such a rate of interest that repayment or performance of any promise given in consideration thereof is unenforceable through civil judicial process (a) in the jurisdiction where the debtor, if a natural person,

resided at the time credit was extended or (b) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time credit was extended.

(2) Presumptions. Knowledge of unenforceability shall be presumed, in the case of a person engaging in the business, if any of the following exist, and in the case of a person directly or indirectly providing financing, if he knew any of the following:

(a) it is an offense in the relevant jurisdiction described in subsection (1) to charge, take or receive interest at the rate involved;

(b) the rate of interest charged, taken or received is 50 or more percentum greater than the maximum enforceable rate of interest in the relevant jurisdiction described in subsection (1); or

(c) the rate of interest involved exceeds 45 percentum per annum or the equivalent rate for a longer or shorter period.

(3) Rate of Interest. Unless otherwise provided by the law of the relevant jurisdiction described in subsection (1), the rate of interest is to be calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(4) Defense. It is a defense to a prosecution under this section that the defendant was licensed or otherwise authorized by the United States or a state government to engage in the business of making extensions of credit.

(5) Definitions. In this section:

(a) an "extension of credit" means any loan, or any agreement tacit or express whereby the repayment or satisfaction of any debt, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred;

(b) "debtor" means any person to whom an extension of credit is made, or who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same;

(c) the repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(6) Judicial Notice of State Law. For the purposes of this section, relevant state law, including conflicts of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This subsection does not impair any authority which any court would otherwise have to take judicial notice of any matter of state law.

(7) Jurisdiction. Federal jurisdiction over an offense defined in this section extends to any such offense committed anywhere within the United States, pursuant to the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy, and under the findings of Congress expressed in section 201 of the Consumer Credit Protection Act (Public Law 90–321), and to any such offense committed within the special maritime and territorial jurisdiction of the United States, as defined in section 210.

Comment

This section is proposed for consideration as a substitute for the recently-enacted provisions of Chapter 42 of Title 18 (§§ 891–96), dealing with extortionate credit transactions. Chapter 42 proscribes all extensions of credit made upon an understanding between the creditor and debtor that failure to make timely payments could result in violence or other criminal harm. Since proof of such an understanding is exceedingly difficult, the statute relies upon definitions of what constitutes a prima facie case: civil unenforceability plus 45 percent interest plus a reasonable belief by the debtor as to the creditor's use or reputation for use of extortionate means of collection. If direct evidence of the debtor's belief is not available, evidence of the creditor's reputation in the debtor's community may be substituted.

In order to avoid possible constitutional objections to the existing law (fear of which appears to be limiting its utility), the approach of this section is to narrow the gap between the definition of the offense and the facts which are considered sufficient to establish it. This is accomplished by considering the business of making uncollectible loans as one which *must* rest on either implicit threat of violent collection or multiple fraudulent representations that loans, interest rates, etc., are in fact valid and enforceable. This section is thus closer to the anti-loansharking offense recently enacted in New York, which flatly makes it a felony to charge interest at a rate higher than 25 percent, unless authorized by law to do so (N.Y. Pen. Law § 190.40). In order to avoid establishing a *national* legal rate of interest, the notion of unenforceability in the jurisdiction where the debtor resides is borrowed from the existing federal statute as the gist of the offense, and the presumptions are keyed either to local rates or the existing 45 percent limit. Since the element of threat or fear is no longer required, § 1771 focuses more sharply on loansharking by requiring that the illegal

lending be engaged in as a "business," a concept which has been given content through judicial construction of federal gambling legislation. Additionally a defense is provided for businesses which are government-supervised.

Since the existing law was conceived as an attack on organized crime, present federal jurisdiction is plenary. Such jurisdiction may be overbroad; perhaps jurisdiction should be co-extensive with that over illegal gambling. See § 1831.

See Working Papers, pp. 929–30, 983–85.

§ 1772. Securities Violations.

A person is guilty of a Class C felony if he:

(a) knowingly does anything declared to be unlawful in 15 U.S.C. §§ 77e, 77q, 77w, 77fff, 77xxx, 78i(a)(1)–(5) or [Rule 10b–5]; or

(b) in a registration statement filed under subchapter I of 15 U.S.C., Ch. 2A, or in an application, report or document filed under subchapter III of 15 U.S.C., Ch. 2A or any rule, regulation, or order issued pursuant thereto, knowingly makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading.

Comment

In accordance with the policy of including in the proposed Code all crimes punishable as felonies, this section serves to incorporate by reference certain penal provisions in Title 15 which are part of the complex and detailed scheme for regulating securities transactions. Encompassed are the Securities Act of 1933, Securities Exchange Act of 1934, and Trust Indenture Act of 1939, virtually all violations of which are now punishable as felonies by up to five years' imprisonment under the general penalty provisions of the 1933 and 1939 Acts (15 U.S.C. §§ 77x, 77yyy) and up to two years' in the 1934 Act (15 U.S.C. § 78ff). Some of the securities offenses there defined constitute offenses already defined in the proposed Code and are, therefore, not explicitly incorporated here and can be repealed; for example, 15 U.S.C. § 77f (falsely affixing signature to registration statement) in its felonious aspects is forgery. But the other offenses either do not fall within any of the general crimes in the proposed Code (for example, proscriptions against selling unregistered stock and against publicizing a stock without disclosing receipt of payment for the publicity), or are false statement provisions which merit grading as a felony.

Even though, absent the requirement of intent to defraud, the offenses are largely *malum prohibitum* or prophylactic, § 1772 proposes retention of felony penalties for misconduct in the securities area, largely because of uncertainty as to the effect on the regulatory scheme of lesser deterrence than the felony penalties. (It appears

that prison sentences of felony length are rarely imposed for violations of the securities laws in the absence of a showing of an underlying fraud of great magnitude). The regulatory scheme is focused principally on the activities of highly sophisticated professionals, who are alert to the existence of the requirements imposed upon them, and relies to a great extent upon self-regulation. It is virtually impossible to predict whether the standards of self-regulation, developed over the 35 years of the Acts' existence, might be relaxed should the maximum prison penalties for violations be significantly reduced. Other factors tend to support the need for felony penalties as a deterrent particularly with respect to the national exchanges. Certain practices, not necessarily fraudulent, entail the risk of serious consequences for the securities market, perhaps the national economy; yet the temptations to violate prohibitions, because of the possibility of large and quick "killings", are great, while the means are easily available.

In addition to the false statements felony contained in the 1933 and 1939 Acts (15 U.S.C. §§ 77x, 77yyy), the section retains felony penalties for selling unregistered securities (15 U.S.C. §§ 77e, 77fff), fraud (15 U.S.C. § 77q(a)), advertising a security without revealing the fact of payment for doing so from the issuer or dealer (15 U.S.C. § 77q(b)–(c)), and indicating approval by the SEC of any security (15 U.S.C. §§ 77w, 77xxx). The proposed Code thus provides felony coverage of most conduct declared unlawful in the 1933 and 1939 Acts. In the case of securities fraud (15 U.S.C. § 77q(a)), although it falls largely within the scope of a general Code crime (theft by deception), a separate offense is here retained because the existing law has been given a somewhat different meaning by judicial construction.

With respect to the 1934 Act, the policy of the Code is not to incorporate most offenses as Class C felonies. There the present maximum two-year penalty represents a view of the relative seriousness of the violations as being closer to classification as a Class A misdemeanor than as a Class C felony. The section, however, would raise the penalty for violations of the first subparagraphs of 15 U.S.C. § 78i(a), dealing with manipulation of security prices, on the basis of the need for the greater deterrence. The line between those subparagraphs and the remainder of that section is based on the fact that the latter prohibitions are dependent upon SEC rules and regulations. The policy is that felonies should be explicitly enacted by the Congress, rather than only defined and promulgated by the SEC. The section would, however, make a violation of Rule 10b–5 a Class C felony. The reference is in brackets in § 1772 because it is contemplated that Congress would enact the rule into statute with its own section number. It is intended that the remaining penal provisions in the 1934 Act concerning willful violations of regulations on the operation of securities exchanges (including such matters as violation of margin requirements) and other penal provisions relating to public utility companies, investment companies and investment advisers, all of which carry maximum jail penalties of two years (15 U.S.C. §§ 78ff, 79z–3, 80a–48, 80b–17), be reclassified as Class A misdemeanors or perhaps made subject to the regulatory offense provision (§ 1006).

§ 1773. Banking Violations.

A person is guilty of a Class C felony if he engages in conduct prohibited or declared to be unlawful by 12 U.S.C. § 95 (relating to emergency restrictions on members of federal reserve system), with intent to conceal a transaction from a government agency authorized to administer the statute or with knowledge that his unlawful conduct substantially obstructs, impairs or perverts the administration of the statute or any government function.

Comment

This section incorporates in the Code an economic regulation felony outside Title 18. Because 12 U.S.C. § 95 prohibits a violation of rules and regulations promulgated by administrative authority, not Congress, sound penological policy would suggest that such a violation should, at most, be a misdemeanor. However, the class which can violate the rules and regulations is very narrow and highly regulated. Culpability requirements have been added for the felony similar to those for commission of felonies regarding international transactions, also incorporated into the Code. See Code § 1204. It is contemplated that any other regulatory felonies to be incorporated in the Code would be similarly treated.

Chapter 18. Offenses Against Public Order, Health, Safety and Sensibilities

RIOT AND MUTINY

§ 1801. Inciting Riot.

(1) Offense. A person is guilty of an offense if he:

(a) incites or urges five or more persons to create or engage in a riot; or

(b) gives commands, instructions or directions to five or more persons in furtherance of a riot.

"Riot" means a public disturbance involving an assemblage of five [ten] or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function.

(2) Attempt, Solicitation and Conspiracy. A person shall be convicted under sections 1001, 1003 or 1004 of attempt, solicitation or conspiracy to commit an offense under this section only if he engages in the prohibited conduct under circumstances in which there is a substantial likelihood that his conduct will imminently produce a violation of this section.

(3) Grading. The offense is a Class C felony if it is under subsection (1)(b) and the riot involves 100 or more persons. Otherwise it is a Class A misdemeanor.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (e) or (h) of section 201; but no prosecution shall be instituted under paragraphs (e) or (h) unless the Attorney General certifies that a federal interest exists by reason of the fact the circumstances under which the offense occurred manifestly portended involvement of 100 or more persons or the riot involved 100 or more persons and its occurrence was or was being substantially furthered from outside the state where the riot occurred or would have occurred.

Comment

This section is based on recently-enacted federal legislation for the District of Columbia defining "rioting" for the District. The definition of riot in subsection (1) is derived from D.C. Code § 22–1122 (1969) ("public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct or threat thereof creates grave danger or injury to property or persons"); its constitu-

tionality was sustained in *United States v. Matthew*, 419 F.2d 1177 (D.C. Cir. 1969). It is important that federal legislation on the subject be uniform rather than assimilated from widely divergent, constitutionally vulnerable state statutes. A good riot provision in the federal code will also serve as a useful model for state law revisions which may be expected to follow the federal pattern. One issue here is whether the minimum number of participants should be set at 5, 12, 20 or some other figure. This question should be approached from the point of view of what numbers create extraordinary problems for a mobile modern urban police force. The minimum of three, often found in older state legislation and in the 1968 federal riot legislation, 18 U.S.C. §§ 232(1), 2102, seems too low from this point of view as well as from the point of view of confining federal jurisdiction to fairly extensive disorders. The principal text's requirement of 5 and the bracketed alternative of 10, which is supported by a substantial body of opinion in the Commission, reflects the divergence of views on this issue.

The reference in the District of Columbia definition to "threat" of tumult is omitted from the present text as excessively vague. However, evidence of actual threats would be relevant in determining the "tumultuous" character of the disturbance, as well as its imminence. Neither the recent New York revision (N.Y. Pen. L. § 240.05) nor the proposed Michigan revision (§ 5501) contain "threat" in the definition of riot. But *cf.* Chapter 102 (Riots) of Title 18 (18 U.S.C. § 2102(a)(2)), threat modified by "clear and present danger" and requirement of "ability to execute."

The definition of riot in this section includes obstruction of government functions and thereby incorporates those aspects of 18 U.S.C. § 231 relating to obstruction.

Inciting riot is graded as a Class A misdemeanor. Under the D.C. provision, such conduct is a misdemeanor, while under the nearly contemporary Congressional enactment, 18 U.S.C. § 2101 (interstate travel or use of interstate facilities with intent to incite riot, etc.), it is a felony to incite or organize a riot. Misdemeanor classification is especially appropriate in a code which, like the present one, permits federal prosecution for serious crimes to persons or property committed in the course of another federal offense. By virtue of the "piggyback" jurisdiction (§ 201(b)), arson, burglary or murder, committed by one who commits a federally punishable riot offense, would be subject to direct federal prosecution under the appropriate substantive section of the proposed Code. It therefore becomes unnecessary to grade riot, as such, into felony levels, *e.g.*, "if bodily injury or death results", as in the District of Columbia provision. Note that an inciter of a riot can be guilty of a Class C felony as an accomplice of a person who, under § 1802 of the proposed Code, employs a firearm or destructive device while engaging in a riot, whether or not this constitutes an offense under any other provision of the proposed Code. If the actor is a leader and the riot involves 100 or more persons, the offense is a Class C felony. *Cf.* § 1103, dealing with armed insurrection.

Federal jurisdiction is prescribed for inciting riot in federal enclaves. It also extends to cases in which there is use of interstate facilities, including the mails, and interstate movement of persons. This corresponds to the federal jurisdiction contemplated by 18 U.S.C.

§ 2101. The exercise of this jurisdiction is limited by requiring the Attorney General to certify that a federal interest is present, before any undertaking to supplant local responsibility for preserving order. *Cf.* 18 U.S.C. § 2101(d). The section does not confer federal jurisdiction upon the basis that commerce has been "affected". But *cf.* 18 U.S.C. §§ 231 and 245(b)(3). The Supreme Court's expansive reading of "affecting commerce" would federalize virtually every civil disorder, presenting too frequently the need for the political decision of the Attorney General referred to above.

See Working Papers, pp. 431, 988–89, 1025–26.

§ 1802. Arming Rioters.

(1) Offense. A person is guilty of a Class C felony if he:

(a) knowingly supplies a firearm or destructive device for use in a riot;

(b) teaches another to prepare or use a firearm or destructive device with intent that any such thing be used in a riot; or

(c) while engaging in a riot, is knowingly armed with a firearm or destructive device.

"Riot" has the meaning prescribed in section 1801.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (e) or (h) of section 201 and, with respect to offenses under subsection (1)(a), also under paragraph (j).

Comment

This section on felonious arming for riots derives from the 1968 federal legislation against "civil disorders" (18 U.S.C. §§ 231 *et seq.*). The main change is made in subsection (2), where, for reasons given in the comment to § 1801, *supra*, the "affecting commerce" basis for federal jurisdiction has been dropped. Note that jurisdiction over this offense includes enclaves, use of interstate facilities and travel in interstate commerce. Attorney General certification, required by § 1801, is not required by this section, but the general admonition of § 207 states a Congressional policy to limit prosecution to cases involving a significant federal interest. The section also substitutes "knowingly" for the somewhat broader culpability in 18 U.S.C. § 231(a), which embraces mere negligence in the supply of arms to a possible rioter. On general principles, negligence should not be enough to convict of a felony. See Working Papers, pp. 431, 989, 1026–27, 1050.

§ 1803. Engaging in a Riot.

(1) Offense. A person is guilty of a Class B misdemeanor if he engages in a riot, as defined in section 1801.

(2) Attempt, Solicitation and Conspiracy; Presence. The pro-

visions of section 1801(2) are applicable to attempt, solicitation and conspiracy to commit an offense under this section. Mere presence at a riot is not an offense under this section.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201.

Comment

Section 1803 (like § 1801) derives from D.C. Code § 22-1127, which grades engaging in a riot and leading or inciting a riot as a misdemeanor punishable by up to one year's imprisonment and a fine up to $1,000. Inciting is graded in § 1801 as a Class A misdemeanor; mere participation is graded in this section as a Class B misdemeanor. *Cf.* 18 U.S.C. § 2101 (participation graded as a felony).

The proposed classification of mere participation as a Class B misdemeanor reflects four considerations: (1) the desirability of Congressional guidance to law enforcement, prosecuting, and judicial officials in discriminating among the mass of persons involved in a serious riot; (2) the availability of summary procedures for disposing of large numbers of "petty offenses;" (3) the considerable risk that a person may be convicted as a "participant" when he may have been only a person who came to the scene with a view to peaceful protest or demonstration, or an innocent observer trapped in a pressing mob (note the explicit exclusion of mere presence in subsection (2)); and (4) the diminished culpability which has been pointed out as characterizing participation in crowd actions.

Federal jurisdiction over the offense of engaging in a riot is limited to federal enclaves. *Cf.* 18 U.S.C. § 2101. This discriminates between the federal interest in leaders and inciters and mere participants. It avoids the possibility of flooding federal courts with prosecutions of mere participants in cases where the federal interest is slight. Of course, a participant would be liable to prosecution for any federal offense involving harm to persons or property he committed in the course of a riot, such as an assault on a federal law enforcement official, whether the conduct took place within or outside an enclave.

See Working Papers, pp. 431, 988.

§ 1804. Disobedience of Public Safety Orders Under Riot Conditions.

(1) Offense. A person is guilty of an infraction if during a riot, as defined in section 1801, or when one is immediately impending, he disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot. A public safety order is an order designed to prevent or control disorder, or promote the safety of persons or property, issued by an official having supervisory authority over at least ten persons in the police, fire, military or other forces concerned with the riot.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201.

Comment

This section, applicable only in federal enclaves, makes it an offense to disobey a reasonable public safety order, classifying the offense at the lowest level, the noncriminal "infraction". See § 3001(3) as to consequence of infraction. There are dangers in creating offenses defined by police "orders"; but the emergency of riot conditions justifies explicit recognition of a police discretion which is otherwise disguised as arrest for "participating" in the riot. Once the discretion is recognized it is possible to impose safeguards such as the requirement that the order be issued by someone higher in authority than the rank-and-file policeman. Fear has been expressed that some orders may be impossible to follow, *e.g.*, a dispersal order addressed to individuals packed in a mob. The requirement that a person engage in conduct as a basis of criminal liability—§ 301 of the proposed Code—constitutes a safeguard against such abuse of prosecution under this section.

Consideration was given to providing a statutory exemption for news media personnel, and possibly others such as elected public servants and other government officials, so long as they were not physically obstructing efforts to cope with the riot. *Cf.* Study Draft § 1804(1). It was recognized that city councilmen, Congressmen and other public officials would often have a duty or privilege to take an interest in riotous situations, and that the First Amendment has implications for the right of news media to be present. However, an explicit statutory exemption in their favor was rejected because it proved impossible to draft satisfactory definitions of the classes of excepted persons or the limits of their permissible activities. Fear was also expressed regarding a person's claims to represent the press or public authority, claims which would be difficult to appraise under riot circumstances. A substantial body of opinion in the Commission, however, favors statutory expression as the most effective means of securing the right of certain persons to be present at the riot so long as they do not physically obstruct efforts to cope with it.

With respect to offenses by federal public servants during riots, see § 1521 (unlawful acts under color of law), and the applicability of the general assault provisions (§§ 1611 *et seq.*) together with § 602 (justification for use of force in executing a public duty).

See Working Papers, pp. 431, 989–90, 1027–28.

§ 1805. Mutiny on a Vessel.

(1) Offense. A person is guilty of an offense if by force, threat of force or deception, he usurps command of a vessel. The offense or attempt to commit the offense is a Class B felony if the vessel is on the high seas, and otherwise is a Class C felony.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (*l*) of section 201.

Comment

This section carries forward the proscription of usurping command of a vessel contained in the existing mutiny offense (18 U.S.C. § 2193). Other proscriptions in the existing statute, *e.g.*, ". . . deprives [the master] of authority and command on board . . ." have been deleted as redundant or as unnecessary in a Code which deals generally with attempt and complicity. Although strictly speaking mutiny is an offense committed by the crew of a vessel, § 1805 covers usurpation of command by anyone—crew member, passenger or outsider—who uses the proscribed means. *Cf.* § 1635 of the proposed Code, which deals with usurping control of an aircraft.

The Class B felony grading of mutiny on the high seas recognizes the greater danger posed when it is initiated or continues in such circumstances. Existing law authorizes ten years' imprisonment.

Added to the jurisdiction explicitly provided in existing law is the piracy base.

FIREARMS AND EXPLOSIVES

Introductory Note

Two of the sections in this group, §§ 1812 and 1813, are intended to cover the felonious aspects of conduct prohibited under federal regulation of firearms and explosives. The regulatory legislation is not set forth in the Code. In this connection a majority of Commissioners recommend that Congress:

(1) ban the production and possession of, and trafficking in, handguns, with exceptions only for military, police and similar official activities; and

(2) require registration of all firearms.

A substantial body of opinion in the Commission: **opposes any federal involvement in firearms control beyond that embodied in existing legislation.**

The legislation here referred to includes Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. App. §§ 1201–1203) and the Gun Control Act of 1968 (18 U.S.C. §§ 921–928 [Title I], 26 U.S.C. §§ 5091–5872 [Title II]).

Among the arguments supporting the majority view are the following. Crimes of violence and accidental homicides will be markedly reduced by suppression of handguns, which, on the one hand, are distinctively susceptible to criminal and impetuous use, and, on the other hand, are not commonly used for sporting purposes as are long guns. State control is ineffective because of differing policies and leakage between states. A comprehensive and uniform registration law will facilitate tracing a firearm when it has been used for criminal purposes.

Among the arguments supporting the opposing view are the following. Suppression of handguns will not reduce the incidence of violent crime since criminals will probably still be able to obtain them while

law-abiding victims will not have them for defensive purposes. National supression of handguns would be unenforceable on the basis of present and foreseeable resources; and effective enforcement would tend toward the creation of a national police force, which is undesireable. A national law would violate principles of federalism and mandate similar treatment of vastly different problems. Comprehensive registration would tend to lead toward confiscation, which is undesirable.

See Working Papers, pp. 1031–58.

§ 1811. Supplying Firearms, Ammunition, Destructive Devices or Explosives for Criminal Activity.

(1) Offense. A person is guilty of a Class C felony if he:

(a) knowingly supplies a firearm, ammunition therefor, destructive device or explosive to a person who intends to commit a crime of violence or intimidation with the aid thereof or while armed therewith; or

(b) procures or receives the same with like intent.

(2) Definition. In this section "crime of violence or intimidation" means such a crime defined in sections 1501 to 1521, and such a crime defined in Chapters 16 and 17 of this Code when the offense is a felony.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (j) of section 201. Commission of an offense defined in this section shall not be a basis for application of section 201(b) to confer federal jurisdiction over commission of another offense except where the offense defined in this section involves a destructive device or explosive and the other offense is one defined in sections 1601 to 1603, 1611 and 1612.

Comment

This section adapts to the Code two measures in present law: 18 U.S.C. § 924(b) regarding firearms and new 18 U.S.C. § 844(d) (part of Title XI of the Organized Crime Control Act of 1970 (P.L. 91–452)) regarding explosives. Existing law is expanded somewhat by the proscriptions in subsections (1) (a) and (b) of supplying firearms and explosives to one who intends to commit a crime "while armed therewith" as well as to one who actually intends to use such materials in the commission of a crime. "Crime of violence or intimidation", defined in subsection (2), is substituted for "kill, injure . . . intimidate or unlawfully damage or destroy" in 18 U.S.C. § 844(d). As in present explosives law (18 U.S.C. § 844(d)) state, as well as federal, crimes are included, by virtue of the definitions of "offense" "crime" and "felony" in Code § 109.

Existing jurisdiction is maintained in subsection (3). While the general principle is to exclude a violation of this section as an offense

upon which "piggyback" jurisdiction can be conferred (§ 201(b)), an exception is made when the violation concerns destructive devices and explosives, in accordance with the recently expressed Congressional policy reflected in Title XI of the Organized Crime Control Act of 1970.

The provisions of 18 U.S.C. §§ 924(c) and 844(b) which increase penalties for federal offenses committed by means of, or while unlawfully carrying, a firearm or explosive are not included in the Code. Where misbehavior is independently criminal, as assault and robbery, the involvement of a firearm or explosive may be an appropriate criterion for sentence or for defining an aggravated offense. Accordingly, in the proposed Code, the crimes in which a gun or explosive is likely to contribute materially to the criminal behavior, *e.g.*, aggravated assault (§ 1612), arson (§ 1701), armed robbery (§ 1721), are already punishable with special severity as, variously, Class A, B or C felonies. Grading to reflect the firearm consideration could be extended to additional offenses; for example, theft of petty amounts might be raised to a felony when a firearm is carried unlawfully (§ 1735). Murder (§ 1601), rape (§ 1641), and kidnapping (§ 1631) carry penalties so high (at least Class B felony) that there is little gain in adding a term of years for illegal gun or explosive carrying.

The appeal of the principle of 18 U.S.C. §§ 924(c) and 844(h) can, therefore, better be reflected in the sentencing part of the proposed Code. For example, where it is provided that the sentencing judge must make a special finding to avail himself of the upper ranges of his sentencing discretion (§ 3202), it is appropriate, as has there been provided, that using a firearm or explosive sufficiently justifies a high sentence. Similarly, as now provided in § 3201(3), this fact may justify a judicially imposed minimum term.

The provisions of 18 U.S.C. § 842(h), § 924 (i) and (j) as to dealing in stolen firearms, ammunition and explosives are generally reflected in the theft grading of proposed Code § 1735.

§ 1812. Illegal Firearms, Ammunition or Explosive Materials Business.

(1) Offense. A person is guilty of an offense if he knowingly supplies a firearm, ammunition or explosive material to, or procures or receives a firearm, ammunition or explosive material for, a person prohibited by the regulatory law from receiving it.

(2) Definitions. In this section:

(a) "firearms" has the meaning prescribed in section — of the regulatory law;

(b) "explosive material" has the meaning prescribed in section — of the regulatory law;

(c) "ammunition" has the meaning prescribed in section — of the regulatory law; and

(d) "regulatory law" means Chapter — of this Code and any rules or regulations issued pursuant thereto.

(3) Grading. The offense is a Class C felony if the actor:

(a) was not licensed or otherwise authorized by law to handle, transfer or engage in transactions with respect to the firearm, destructive device or explosive material; or

(b) engaged in the forbidden transaction under circumstances manifesting his readiness to supply or procure on other occasions in disregard of lawful restrictions.

Otherwise the offense is a Class A misdemeanor.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (g) or (j) of section 201, or when a licensee under the regulatory law engages in the conduct. Commission of an offense defined in this section shall not be a basis for application of section 201(b) to confer federal jurisdiction over commission of another offense.

Comment

This section is intended for use in connection with a regulatory scheme (such as that in existing law, 18 U.S.C. §§ 842, 922 and 18 U.S.C. App. § 1202) which provides for supervision over the interstate and foreign flow of firearms and explosives but prohibits their acquisition by only a small minority of the general population. The section reflects the view that, under such a scheme, there should be more discrimination than is provided under existing law in distinguishing between felonies and misdemeanors. Title 18 U.S.C. § 924 makes it a felony to "violate any provision of this chapter". That includes some fairly innocuous and technical violations of the prophylactic rules laid down by Congress and the Secretary. For example, failure of a licensed dealer to secure from a customer an oath as to his age would be felonious even if the customer was of proper age. (See 18 U.S.C. § 922(c)(1)). So also, it would be a felony if a dealer selling to an out-of-state customer failed to send "by registered mail (return receipt requested)" sworn notice of sale to the chief law enforcement officer of the customer's place of residence or failed to wait seven days for a response, even though the dealer sent telegraphic notice and received telephonic response from the law enforcement officer as the basis for delivering in six rather than seven days. (*Ibid*). Failure of a licensed dealer to "make an appropriate entry in . . . or properly maintain" required records is a felony under 18 U.S.C. § 922(m) however inconsequential the default.

The significance of such a blanket characterization of hundreds of "violations" as felonies is not merely that trival defaults may be harshly penalized. Prosecutors and judges might exercise discretion in such cases. But equally important is the needless burden on prosecutors and district courts when no misdemeanor is provided for expeditious handling of minor charges.

Section 1812 brings into the Code the criminal provisions of the

regulatory law relating to supplying firearms to and procuring firearms for ineligibles, primarily to discriminate between felonious and less serious misconduct in this area. Other conduct made subject to criminal sanctions by the regulatory law would continue to be covered by the regulatory law as misdemeanors.

§ 1813. Trafficking In and Receiving Limited-Use Firearms.

(1) Offense. A person is guilty of a Class C felony if he:

(a) traffics in limited-use firearms in violation of the regulatory law; or

(b) receives a limited-use firearm with knowledge that it is being transferred to him in violation of the regulatory law.

(2) Definitions. In this section:

(a) "traffics" means:

(i) transfers to another person;

(ii) possesses with intent to transfer to another person;

(iii) makes or manufactures; or

(iv) imports or exports;

(b) "limited-use firearm" has the meaning prescribed for "firearm" in the regulatory law; and

(c) "regulatory law" means Chapter 53 of Title 26, United States Code, Chapter — of this Code and any rules and regulations issued pursuant thereto.

(3) Jurisdiction. Commission of an offense defined in this section shall not be a basis for application of section 201(b) to confer federal jurisdiction over the commission of another offense.

Comment

This section is intended for use with a regulatory scheme which generally suppresses trafficking in and possession of certain kinds of firearms. See Introductory Note preceding § 1811, *supra*. At present such a scheme is in effect, under the tax laws, with respect to machine guns, sawed-off long guns, etc.; and the section is keyed both to the existing provisions and undrafted provisions (indicated by the blank reference to a Chapter in the Code) implementing the majority recommendation of a ban on handguns. Where, as here, weapons are intended to be totally suppressed among the civilian population, fewer violations are trivial, and there is justification for embracing more conduct than that identified in § 1812 under felony sanctions.

§ 1814. Possession of Explosives and Destructive Devices in Buildings.

A person is guilty of a Class A misdemeanor if he possesses an explosive or destructive device in a federal government building

without the written consent of the government agency or person responsible for the management of such building. "Federal government building" means a building which is owned, possessed, or used by or leased to the United States.

Comment

This section carries forward 18 U.S.C. § 844(g), recently enacted as part of Title XI of the Organized Crime Control Act of 1970 (P.L. 91–452). It is probable that Congress did not intend to penalize inadvertent, technical violations of this provision. This intent could be made explicit by providing an affirmative defense that the explosive material was possessed for a lawful purpose, which would not undermine the enforcement scheme since, under the Code, the burden of proof would be on the defendant.

DANGEROUS, ABUSABLE, AND RESTRICTED DRUGS

Introductory Note

The following sections on drugs, §§ 1821 to 1829, were being developed by the Commission at the same time that the 91st Congress was working on new provisions dealing with the same subject. The work of the Congress resulted in enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91–513). The criminal provisions of the new Drug Act and the Code sections differ in some respects; but except with respect to the penalty for possession of marihuana, the Commission expresses no preference for one mode of treatment or the other and is presenting the Code sections substantially as they appeared in the Study Draft only for the purpose of calling the attention of the Congress to both modes of treatment. Principal differences between the new Drug Act and the Code sections are noted in the comments to those sections.

The drug offenses included in the proposed Code depend, for complete definition, upon the existence of a comprehensive regulatory scheme set forth outside of Title 18; such a scheme is contained in the new Drug Act. Although some of the sections proposed here would require some modification of the regulatory provisions of the new Drug Act, an attempt has been made to integrate these sections with the regulatory scheme of that Act. Those penal provisions involving regulatory matters, *e.g.*, violation of record keeping requirements, would remain outside Title 18, either as Class A misdemeanors or perhaps subject to the regulatory offense provision (§ 1006).

§ 1821. Classification of Drugs.

For purposes of sections 1821 to 1829 and unless modified by the Attorney General in accordance with this section, "dangerous drug," "abusable drug," and "restricted drug" have the meanings prescribed in section 1829. The Attorney General is authorized to classify and reclassify any "controlled substance" as defined in

section 102 of the regulatory law within one of these three classifications, in accordance with the factors set forth in section 201 of the regulatory law. In making such classifications and reclassifications, the Attorney General shall follow the procedure prescribed in section 201 of the regulatory law. Culpability with respect to classification is not required.

Comment

All "controlled substances," as defined in the regulatory law (see § 102(6) of the new Drug Act), are here divided into three groups for purposes of criminal sanctions. The new Drug Act divides them into five groups. Here "dangerous drugs" include "hard" narcotics, *e.g.*, heroin, potent hallucinogens, *e.g.*, LSD, injectable amphetamines and some cannabis preparations, *e.g.*, hashish. "Abusable drugs" include barbiturates, oral amphetamines, marihuana and peyote. "Restricted drugs" are nonprescription medications, such as cough syrups.

This section gives the Attorney General the power to change the classification of any drug which is classified and to add new drugs to any of the three categories. The procedure detailed in the regulatory law must be followed. That procedure under § 201 of the new Drug Act is as follows: the Attorney General shall request advice from the Secretary of HEW and shall consider factors enumerated in § 201(c) before making his finding. In the categorization for criminal purposes the following factors might be added to the list: (1) the social cost of criminalizing trafficking in or possession of a drug, particularly when the penalties are high; (2) the level of severity of criminal sanctions necessary to regulate effectively unlawful transactions in a drug.

See Working Papers, pp. 1060, 1064, 1077–80.

§ 1822. Trafficking in Dangerous and Abusable Drugs.

(1) Class B Felony Trafficking. A person is guilty of a Class B felony if, except as authorized by the regulatory law, he knowingly sells a dangerous drug for resale or traffics in a dangerous drug in a quantity in excess of that established from time to time by the Attorney General, in accordance with the procedure prescribed in section 201 of the regulatory law, as indicative of trafficking for resale.

(2) Class C Felony Trafficking. A person is guilty of an offense if, except as authorized by the regulatory law, he knowingly traffics in a dangerous or abusable drug. The offense is a Class C felony unless subsection (3) applies.

(3) Misdemeanor Trafficking. Trafficking in a dangerous or abusable drug shall be a Class A misdemeanor if:

(a) the defendant did not act for profit or to further commercial distribution; and

(b) the defendant did not transfer or otherwise dispose of a dangerous or abusable drug to a child under eighteen or facilitate such transfer or other disposition, or, if the defendant did engage in such conduct, he was less than five years older than the child.

The special classification provided in this subsection shall apply if the defendant is charged with trafficking under this subsection or if, at sentencing, the required factors are established by a preponderance of the evidence.

Comment

Subsection (1) penalizes wholesaling of dangerous drugs and gives the Attorney General the power to establish quantities of dangerous drugs which are indicative of wholesale dealing in them. Alternatively, Class A felony penalties could be made available to leaders of groups of ten or more who engaged in any drug felony on a continuing basis. *Cf.* Study Draft § 1005; § 408 of the new Drug Act regarding penalties for continuing criminal drug enterprises.

The procedure for determining the quantities should be set forth in the regulatory law. Although the new Drug Act does not distinguish among crimes on the basis of quantity, the procedure used for classifying drugs (advice of HEW Secretary, etc.) could also be used for this purpose.

There are a number of alternative approaches to Class B grading. Trafficking in dangerous opiates and other narcotics often takes place through organized crime channels, and therefore could be made subject to more severe penalties, as is done in the new Drug Act regardless of whether it is shown to be for resale or of the quantity involved. (§ 401(b)(1)(A)) Alternatively since addicts often are small-scale traffickers, and engage in trafficking with other addicts only to satisfy their own needs, the statute itself might list quantities of each dangerous drug in excess of which trafficking would be a Class B felony so as to distinguish between major and minor transactions. Or, instead of absolute quantities, any quantity listed in the statute or by the person or body establishing the quantity might be made presumptive of wholesale trafficking, allowing a defendant to escape the more severe penalties by appropriate proof at sentencing. The Attorney General could be instructed to establish regional criteria on the theory that what is small scale in New York is large scale in a small rural community.

Subsection (2), providing the basic penalty for trafficking in dangerous or abusable drugs, establishes a position similar to that taken in § 401(b)(1)(B) of the new Drug Act. Subsection (3) excludes from felony sanctions transfers to persons over 18 which are not for profit or to further commercial distribution. Note that a gift to prove to a potential buyer that one sells top-quality marihuana is a transfer to further commercial distribution. Mistake as to age of the recipient is not exonerating under § 302(3)(c), which provides that, as a general rule, culpability is not required for grading provisions. The burden of proving the ameliorating facts is on the defendant in a

sentencing proceeding unless the prosecutor has charged the lesser crime in the first instance.

See Working Papers, pp. 1060–61, 1062–64, 1100–21, 1142–44.

§ 1823. Trafficking in Restricted Drugs.

(1) Class A Misdemeanor Trafficking. A person is guilty of an offense if, except as authorized by the regulatory law, he knowingly traffics in a restricted drug. The offense is a Class A misdemeanor unless subsection (2) applies.

(2) Class B Misdemeanor Trafficking. Trafficking in a restricted drug shall be a Class B misdemeanor if the defendant did not act for profit or to further commercial distribution. The special classification provided in this subsection shall apply if the defendant is charged with trafficking under this subsection or if, at sentencing, the required factors are established by a preponderance of the evidence.

(3) Trafficking For Own Use. It is an affirmative defense to a prosecution under this section that the defendant did not transfer or intend to transfer or otherwise dispose of the drug to another person.

Comment

This section distinguishes between commercial and noncommercial trafficking in restricted drugs as § 1822 does with respect to trafficking in dangerous and abusable drugs. Mere possession of restricted drugs would not be unlawful under the Code and, therefore, trafficking which amounts only to possession for one's own use is excluded. *But cf.* § 401(b) of the new Drug Act, which provides a one-year penalty for all trafficking in restricted drugs whether or not it is commercial.

See Working Papers, pp. 1063, 1100, 1123–24, 1142–44.

§ 1824. Possession Offenses.

A person is guilty of an offense if, except as authorized by the regulatory law, he knowingly possesses a usable quantity of a dangerous or abusable drug. If the drug is a dangerous drug, the offense is a Class A misdemeanor. If the drug is an abusable drug other than marihuana, the offense is an infraction upon a first offense, a Class B misdemeanor if it is the second conviction of the defendant for trafficking in or possessing a dangerous or abusable drug, and a Class A misdemeanor if it is the third or subsequent conviction of the defendant for such trafficking or possessing. If the drug is marihuana, the offense is an infraction.

[A person is guilty of a Class A misdemeanor if, except as authorized by the regulatory law, he knowingly possesses a usable quantity of a dangerous or abusable drug.]

Comment

The principal text would make distinctions among the three categories of drugs. Possession of hard narcotics and potent hallucinogens would be a Class A misdemeanor. Possession of marihuana, certain barbiturates and other abusable drugs would be an infraction, with upgrading for subsequent offenses with respect to abusable drugs other than marihuana. Possession of a restricted drug would not be an offense. This section requires that a usable quantity of the drug be possessed; mere traces found in an automobile or premises leave too much doubt as to the identity of the person who, presumably then in possession of usable quantities, left these evidentiary traces behind.

With respect to differences between this section and the new Drug Act, Commission preference is expressed in the principal text for treatment of possession of marihuana as an infraction, an offense under the Code which is subject to a fine only, as opposed to treatment, as under the new Drug Act, as a misdemeanor punishable by up to one year's imprisonment.

The principal text is based on the view that available evidence does not demonstrate significant deleterious effects of marihuana in quantities ordinarily consumed; that any risks appear to be significantly lower than those attributable to alcoholic beverages; that the social cost of criminalizing a substantial segment of otherwise law abiding citizenry is not justified by the, as yet, undemonstrated harm of marihuana use; and that jail penalties for use of marihuana jeopardize the credibility and therefore the deterrent value of our drug laws with respect to other, demonstrably harmful drugs. Legalization is not recommended at this time for some of the same reasons listed below supporting the misdemeanor penalty.

The bracketed alternative in the text reflects a substantial body of opinion in the Commission that the misdemeanor penalty provided in the new Drug Act should be retained for illegal possession of abusable drugs, as well as dangerous drugs, and that no distinction should be made with respect to marihuana, at least until the Commission on Marihuana and Drug Abuse, established under § 601 of the new Drug Act, has reported. The alternative text reflects the view that there is significant evidence suggesting harmful effects of marihuana, at least of its long-term use; that infraction classification, involving only modest fine, unpayable by many offenders and therefore not imposable under the Code, and no jail term, even for violation of probation or chronic offenders, is an inadequate control, especially as a support for those who desire to resist social pressures to use marihuana; that having, in alcohol, one uncontrollable substance does not mean we should forfeit a reasonable opportunity to retain control over another; that the social costs of misdemeanor sanctions are amply moderated by § 1827 permitting absolution for offenders; and that the credibility of community disapproval of marihuana is undermined by too precipitate reduction of penalties.

See Working Papers, pp. 1060, 1063, 1124–42, 1142–44.

§ 1825. Authorization a Defense Under Sections 1822 to 1824.

In a prosecution under sections 1822 to 1824 authorization, in fact, by the regulatory law is a defense.

Comment

In providing that authorization is a defense, this section is explicit that the government need not, in the first instance, negative the existence of an exemption, *e.g.*, the defendant was a practitioner. However, once there is evidence in the case sufficient to raise a reasonable doubt on the issue, the prosecution has the burden of proving beyond a reasonable doubt that the regulatory law did not authorize defendant's conduct. See § 103. *Cf.* § 515 of the new Drug Act, under which the burden of going forward with evidence of an exemption is placed on the person claiming the exemption. See Working Papers, p. 1061.

§ 1826. Federal Jurisdiction Over Drug Offenses.

Federal jurisdiction over an offense defined in sections 1822 to 1824 extends to any such offense committed anywhere within the United States or the special maritime or territorial jurisdiction, as defined in section 210, pursuant to the powers of Congress to regulate commerce and under the findings of Congress expressed in section 101 of the regulatory law.

Comment

This section establishes plenary federal jurisdiction over drug offenses, as does the new Drug Act (§ 101). An alternative to plenary jurisdiction for all offenses would be plenary jurisdiction for the trafficking offenses but only enclave jurisdiction for the possession offenses. Since this would produce difficulties in deciding who could be arrested in certain situations, *e.g.*, in a raid on a place where drugs were being distributed, plenary jurisdiction is proposed over possession offenses, subject to discretionary restraint in the exercise of such jurisdiction under § 207, and guidelines established by the Attorney General. Note that the grant of plenary jurisdiction avoids the need for presumed bases for federal involvement, *e.g.*, that a drug was illegally imported, which were a feature of federal drug laws prior to the new Drug Act. See Working Papers, p. 1059.

§ 1827. Suspended Entry of Judgment.

(1) Authority of the Court. Except as provided in subsection (3), whenever a court is authorized to enter a conviction for an offense under sections 1822 to 1824 which is not a felony, it may, without entering a judgment of guilty and with the consent of the defendant, defer further proceedings and place the defendant on probation in accordance with Chapter 31. Upon violation of a

condition of probation, the court shall discharge the defendant and proceed as provided in section 3103(4). Upon satisfactory completion of the term of probation, the court shall discharge the defendant and dismiss the proceedings against him.

(2) Consequences of Discharge. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction of an offense for any purpose.

(3) Exclusions. This section does not apply to any person who has previously been convicted of a drug crime or who has previously had a judgment against him suspended under this section.

Comment

This section would permit the court to deal with a first offender without stigmatizing him with a criminal record. Such a provision is particularly appropriate in the area of drug legislation, but as it may also be a desirable way of dealing with other first offenders, *e.g.*, shoplifters, it could, alternatively, be made a general sentencing provision. The section is similar to § 404(b) of the new Drug Act.

Because the reduction to misdemeanor in § 1822 occurs at sentencing it would be inappropriate to deny the benefit of this section to a person whom a jury has found guilty of a felony. Therefore this section authorizes a court to use it whenever a conviction for less than a felony is authorized. Prior conviction of a drug crime serves to deny the benefit of this section. (A crime is any felony or misdemeanor as defined by the proposed Code without regard to whether or not there is federal jurisdiction. Thus state crimes are counted as prior convictions to the extent that the conduct would have been illegal had there been federal jurisdiction. (See definition of "crime" in § 109.)

Section 404(b) of the new Drug Act also provides for expunging records of arrest, trial and conviction in certain cases and permits the offender to deny that such events occurred. Chapter 35 of the proposed Code deals with collateral consequences of conviction; but its provisions, which apply to all offenders, reflect the view that attempt to suppress the facts is not an effective or appropriate way to deal with the problems posed by such consequences.

See Working Papers, pp. 1121–23.

§ 1829. Definitions for Sections 1821 to 1829.

In sections 1821 to 1829:

(a) "traffics" means:

(i) (A) transfers or otherwise disposes of a drug to another person;

(B) prescribes a drug not in the course of professional practice;

(C) possesses a drug with intent to transfer or otherwise dispose of it to another person;

(ii) manufactures a drug; or

(iii) imports a usable quantity of a drug into the United States, or exports a usable quantity of a drug from the United States. "Imports" includes landing in the United States or receiving at the place where it was landed in the United States or from a person who brought it from the place where it was landed in the United States a usable quantity of a drug imported into the United States and landed in the United States;

(b) unless modified by the Attorney General in accordance with section 1821, "dangerous drug" means:

(i) any substance classified as a Schedule I or Schedule II controlled substance under section 202 of the regulatory law except a material, compound, or preparation which contains any quantity of marihuana or peyote and does not contain a dangerous drug;

(ii) any material, compound, or preparation in a form not primarily adapted for oral use which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(A) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(B) phenmetrazine and its salts;

(C) any substance which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers;

(D) methylphenidate;

(iii) any cannabis preparation;

(c) unless modified by the Attorney General in accordance with section 1821, "abusable drug" means:

(i) any substance classified as a Schedule III or Schedule IV controlled substance under section 202 of the regulatory law except as provided in paragraph (b)(ii) of this section;

(ii) marihuana;

(iii) peyote;

(d) unless modified by the Attorney General in accordance with section 1821, "restricted drug" means any substance classified as a Schedule V controlled substance under section 202 of the regulatory law;

(e) "cannabis preparation" means the separated resin, whether crude or purified, obtained from marihuana or from

the mature stalks of any plant of the genus cannabis; any preparation, compound, or derivative of the resin; or any tincture of marihuana; but it does not include fiber produced from the mature stalks of any plant of the genus cannabis, oil or cake made from the seeds of the plant, or any other preparation, compound, or derivative of the mature stalks (except the separated resin) or of the fiber, oil, or cake;

(f) "marihuana" means all parts, including the seeds, of any plant of the genus cannabis, whether growing or not; 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;

(g) "regulatory law" means the Comprehensive Drug Abuse Prevention and Control Act of 1970.

Comment

"Traffics" is defined very broadly, and embraces the conduct proscribed in the new Drug Act. Agreeing or offering to transfer need not be explicitly covered here, since such conduct is covered by the general conspiracy, attempt and solicitation provisions. See Working Papers, pp. 1055, 1059–60, 1080–1100, 1105–11.

GAMBLING

Introductory Note

The following sections on gambling, §§ 1831 and 1832, were being developed by the Commission at the same time that the 91st Congress was working on new provisions dealing with the same subject. The work of the Congress resulted in enactment of Title VIII of the Organized Crime Control Act of 1970 (P.L. 91–452). Title VIII and the Code sections, particularly Code § 1831, differ in some respects; but the Commission expresses no preference for one mode of treatment or the other and is presenting the Code sections as they appeared in the Study Draft only for the purpose of calling the attention of the Congress to both modes of treatment.

Among the differences are the following. Title VIII establishes plenary federal jurisdiction over gambling activity which violates state laws, but limits the federal interest according to the size of the enterprise. The criterion, under new 18 U.S.C. § 1955, is whether the gambling enterprise "involves five or more persons who conduct, finance, manage, supervise, direct or own all or part" of the illegal gambling business, and has been "in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." All violations are felonies punishable by up to five years' imprisonment. Code § 1831 would continue reliance upon

conventional jurisdictional bases, *e.g.*, use of interstate commerce; but distinctions in size of the enterprise (similar to those employed in Title VIII to define the scope of the federal interest) would serve to distinguish Class C felonies from Class A misdemeanors. Title VIII also makes violation of the state law a part of the government's burden in every prosecution; Code § 1831 makes the issue of lawfulness a matter of defense, as a result of which the prosecution has no burden to prove illegality under state law until there is evidence in the case sufficient to raise a reasonable doubt that it is lawful. In addition, Title VIII explicitly excludes gambling conducted for the benefit of a charitable organization, regardless of whether it is prohibited by local law. Title VIII does not deal directly with the reform of existing law reflected in Code § 1832. Neither of the Code sections contains forfeiture provisions such as those in new 18 U.S.C. § 1955, since it is contemplated that all forfeiture provisions would be placed in a different part of Title 18.

Title VIII contains a new offense (18 U.S.C. § 1511) which proscribes a conspiracy "to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business" when at least one of the conspirators is an official or employee of the state or political subdivision and at least one conducts, finances, manages, supervises, directs or owns part of the illegal gambling business. Code § 1368 encompasses somewhat more local bribery and similar offenses by permitting prosecution of such offenses committed in the course of *any* federal offense, including for example, drug offenses as well as illegal gambling.

§ 1831. Illegal Gambling Business.

(1) Offense. A person is guilty of an offense if he engages or participates in the business of gambling, unless, as provided in subsection (2), it was legal in all places in which it was carried on. Without limitation, a person shall be deemed to be engaged in the business of gambling if he:

(a) conducts a wagering pool or lottery;

(b) receives wagers for or on behalf of another person;

(c) alone or with others, owns, controls, manages or finances a gambling business;

(d) knowingly leases or otherwise permits a place to be regularly used to carry on a gambling business;

(e) maintains for use on any place or premises occupied by him a coin-operated gaming device, as defined in 26 U.S.C. § 4462; or

(f) is a public servant who shares in the proceeds of a gambling business whether by way of a bribe or otherwise.

(2) Defense. It is a defense to a prosecution under this section that the gambling business was legal in all places in which it was carried on. The place in which a gambling business is carried on

includes any place from which a customer places a wager with or otherwise patronizes the gambling business, as well as the place in which the wager is received.

(3) Grading. The offense is a Class C felony if:

(a) the defendant employed or utilized three or more persons to carry on the gambling business;

(b) the defendant, or the gambling business or part thereof which he owned, controlled, managed or financed, accepted wagers in excess of $2,000 in a single day;

(c) the defendant received lay-off wagers or otherwise provided reinsurance or wholesaling functions in relation to persons engaged in a gambling business; or

(d) a public servant was bribed in connection with the gambling enterprise.

Otherwise the offense is a Class A misdemeanor.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (e) or (h) of section 201, or when any gambling device, as defined in section 1832, used in the commission of the offense, moves across a state boundary.

Comment

Section 1831 would be the basic federal statute relating to gambling. It proscribes any significant participation in the conduct of a gambling business, except to the extent that such business is legal where carried on. It declares that all such gambling businesses are illegal in federal enclaves.

Ordinary social gambling would not be a federal offense, since the section applies only to those who "engage or participate in the *business* of gambling." In this respect it follows existing law. *Cf.* 18 U.S.C. § 1084 (transmitting wagering information, by person "engaged in the business of betting or wagering"); 18 U.S.C. § 1952 (interstate travel pursuant to "business enterprise involving gambling . . ."); 26 U.S.C. § 4401 (tax on persons "engaged in the business of accepting wagers"). Note that the phrase "without limitation" renders the list of conduct in subsection (1)(a)–(f) nonexclusive as to the conduct that constitutes engaging in a gambling business.

The section follows 18 U.S.C. § 1952, as recently construed in *Rewis v. United States*, 418 F. 2d 1218 (5th Cir. 1969), in that federal jurisdiction exists if customers cross state boundaries (paragraph (h) of § 201). However, no criminal liability would be imposed if the business was legal where carried on. In any event there would be no criminal liability imposed on customers since persons who merely patronize a gambling business are not engaging or participating in the business.

Among the issues raised are (i) whether jurisdiction should be broader, and (ii) whether the grading provided in subsection (3) is optimal. As to jurisdiction, the alternatives are to add paragraph (g) of § 201 (affecting commerce), or even to bring all gambling within

federal cognizance on the basis of Congressional findings that illegal gambling necessarily affects interstate and foreign commerce, that illegal gambling is a mainstay of organized crime which affects commerce, and that local and interstate gambling are so intertwined as to require integrated federal controls. As to grading, an alternative would be to grade gambling uniformly as a felony. Another approach would be to reword subsection (3)(a) and (b) to cover all employees without regard to the position held, in cases in which the gambling business involves three or more, or accepted wagers in excess of $2,000 in a single day. This would parallel paragraph (d), under which all participants in the business are guilty of a Class C felony if a public servant was bribed.

See Working Papers, pp. 1167–89.

§ 1832. Protecting State Antigambling Policies.

(1) Offense. A person is guilty of a Class A misdemeanor if he knowingly carries or sends any gambling device into a state from any place outside such state.

(2) Defenses. This section shall not apply to:

(a) a gambling device carried or sent into a state, or any part thereof, where such gambling was legal, or en route to such place;

(b) any carriage in the usual course of business by a common or public contract carrier;

(c) any newspaper or similar publication; or

(d) any ticket or other embodiment of the claim of a player or bettor which was carried or sent by him.

Inapplicability under this subsection is a defense.

(3) Definition of "Gambling Device". In this section "gambling device" means:

(a) any device covered by 15 U.S.C. § 1171 and not excluded by subsections (2) and (3) of 15 U.S.C. § 1178; or

(b) any record, paraphernalia, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, bolita or similar game.

Comment

In addition to the federal interest in suppressing organized illegal gambling, expressed in § 1831, there is a federal concern to protect the states against subversion of their antigambling laws. This federal concern is implemented in this section by prohibiting the importation of gambling devices into states in which gambling by means of such de-

vices is illegal. Note that it is unnecessary to prove, under this section, that the defendant was "engaged in the business of gambling." The section is concerned with supply of gambling equipment to those who will or may employ it illegally.

The exclusion of newspapers and similar publications in subsection (2)(c) precludes the possibility that news contained therein, *e.g.*, racing information, will bring the newspaper within the definition of gambling device; some publications, *e.g.*, "scratch sheets," *are* gambling devices, and do not come within the exclusion.

Corresponding provisions of existing law are 18 U.S.C. § 1301 (importing, transmitting, or receiving lottery tickets, advertisements, etc. in interstate and foreign commerce); 18 U.S.C. § 1302 (use of mails to transmit lottery tickets, proceeds, advertisements, etc.); 18 U.S.C. § 1953 (transporting wagering and lottery records, tickets, paraphernalia, or "other devices"); 15 U.S.C. §§ 1171–78 (transportation of gambling devices).

Among the changes incorporated in this section are the following:

(1) The prohibitions are generalized to the extent possible. For example, the limitation of 18 U.S.C. § 1953 to wagering pools "*with respect to a sporting event*" has been eliminated. Cards and dice are not included in the term "gambling device" since such objects are so generally used for social games and are so easily available within any state that it would be pointless for the federal government to try to close state boundaries to such devices.

(2 The private citizen's transportation of his own lottery ticket into a state in which lotteries are illegal is explicitly excluded from the federal proscription by subsection (2)(d). *Cf.* 18 U.S.C. § 1953(b), excluding parimutuel tickets "where legally acquired." Although the inartfully-drawn 18 U.S.C. §§ 1301 and 1302 appear to cover such transactions, they have not been so applied.

(3) Re-enactment of the largely ineffectual provisions of 18 U.S.C. § 1084 (transmission of information "assisting in the placing of bets") with the necessary exclusions of news reporting is not contemplated. That statute is in any event limited to persons "engaged in the business of betting," and so is blanketed by proposed § 1831.

(4) 18 U.S.C. § 1304 (providing misdemeanor penalty for "radio broadcasting" of "information concerning any lottery") is not scheduled for re-enactment. The coverage is too narrow in one sense ("radio") and overbroad in its apparent impact on news. Provisions outside the penal code relating to the regulation of radio, TV, and CATV licensing can more appropriately deal with the subject matter of the existing statute.

See Working Papers, p. 1168.

PROSTITUTION AND RELATED OFFENSES

§ 1841. Promoting Prostitution.

(1) Offense. A person is guilty of an offense if he:

(a) operates a prostitution business or a house of prostitution;

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(b) induces or otherwise intentionally causes another to become engaged in sexual activity as a business; or

(c) knowingly procures a prostitute for a prostitution business or a house of prostitution.

(2) Grading. The offense is a Class C felony if it is under paragraphs (b) or (c) of subsection (1), or if it is under paragraph (a) and the actor owns, controls, manages or otherwise supervises the prostitution business or house of prostitution. Otherwise the offense is a Class A misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (e) or (h) of section 201.

Comment

This section is primarily directed against prostitution having interstate aspects, carrying forward the principal thrust of the Mann Act (18 U.S.C. §§ 2421 *et seq.*) and one of the anti-racketeering statutes (18 U.S.C. § 1952—the "Travel Act"). Interstate transportation of a prostitute, now proscribed by the Mann Act, is subsumed under the proposed provision if the transportation occurs as an aspect of promotion of the business of prostitution. Those who order or induce a prostitute to go from one state to another, or recruit a prostitute to come to a brothel in another state, are guilty of "promoting prostitution" within the terms of the provision. Jurisdiction under 18 U.S.C. § 1952—traveling in interstate or foreign commerce or using any facility of interstate or foreign commerce including the mail in connection with the operation of a prostitution business—is also retained. The statute thus reaches the activities of organized interstate prostitution rings. Note that noncommercial acts of immorality involving interstate travel, prosecuted in the past under the Mann Act, are outside the proscriptions of the section in accordance with recent federal prosecutive policy.

By means of an explicit grading distinction, only the owners, managers and supervisors of a brothel or prostitution business are guilty of a Class C felony under subsection (1)(a). Those who knowingly play lesser roles in the enterprise—maids, errand boys, drivers—are guilty of a Class A misdemeanor only. Absent that explicit distinction all aiders and abettors in the operation of prostitution enterprises would be guilty of a felony pursuant to the general complicity provisions.

See Working Papers, pp. 1191, 1194–95, 1199.

§ 1842. Facilitating Prostitution.

(1) Offense. A person is guilty of an offense if he:

(a) knowingly solicits a person to patronize a prostitute;

(b) knowingly procures a prostitute for a patron;

(c) knowingly leases or otherwise permits a place con-

trolled by the actor, alone or in association with others, to be regularly used for prostitution, promoting prostitution, or facilitating prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means;

(d) knowingly induces or otherwise intentionally causes another to remain a prostitute. A person who is supported in whole or substantial part by the proceeds of prostitution, other than the prostitute or the prostitute's minor child or a person whom the prostitute is required by law to support, is presumed to be knowingly inducing or intentionally causing another to remain a prostitute.

(2) Grading. The offense is a Class C felony if the actor intentionally causes another to remain a prostitute by force or threat, or the prostitute is the actor's wife, child or ward or a person for whose care, protection or support he is responsible, or the prostitute is, in fact, less than sixteen years old. Otherwise it is a Class A misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201 or when the offense occurs within such reasonable distance of any military or naval camp, station, fort, post, yard, base, cantonment, training or mobilization place as the Secretary of Defense shall determine to be needful to the efficiency, health, and welfare of the Army, the Navy, or the Air Force, and shall designate and publish in general orders or bulletins.

Comment

This proscription of conducting any continuous prostitution enterprise permits suppression of prostitution in federal enclaves and, as presently provided (18 U.S.C. § 1384), around military bases. The variety of state laws on the subject makes application of the proposed section to all federal enclaves preferable to assimilation of state laws.

The presumption in subsection (1)(d) is established as an alternative to a substantive offense of living off a prostitute's earnings, because the presumption admits of the possibility that a person, though aware that another with whom he is living is a prostitute, is not in fact "pimping" for her or otherwise promoting the crime. However, absent rebuttal, and given the common existence of "pimps" in the practice of prostitution, the most reasonable conclusion to be drawn from the fact that a person is supported by the income of a prostitute is that the person is knowingly encouraging such prostitution, and the matter warrants consideration by a jury.

See Working Papers, pp. 1193–94, 1196, 1199–1200.

§ 1843. Prostitution.

(1) Offense. A person is guilty of prostitution, a Class B misdemeanor, if he or she:

(a) is an inmate of a house of prostitution or is otherwise engaged in sexual activity as a business; or

(b) solicits another person with the intention of being hired to engage in sexual activity.

(2) Jurisdiction. Federal jurisdiction over an offense defined in this section is the same as prescribed for section 1842.

Comment

This provision treats the prostitute as a minor offender. Federal jurisdiction over this offense is limited to federal enclaves and the areas around military bases. *Cf.* § 1861, which deals with loitering to solicit sexual activity, whether or not for hire. Unlike a number of revised state criminal codes this Code does not impose criminal liability for patronizing a prostitute. *Cf.* Study Draft § 1844. See Working Papers, pp. 157, 1193–94, 1196, 1199–1200.

§ 1848. Testimony of Spouse in Prostitution Offenses.

Testimony of a person against his or her spouse shall be admissible to prove offenses under sections 1841 to 1843 involving that person's prostitution.

Comment

Present federal case law under the Mann Act recognizes an exception to the general common law rule that a person may not testify against his spouse over the latter's objection; and that exception is explicitly preserved by this section. The general privilege will still apply to prostitution crimes not involving the spouse. See Working Papers, pp. 1197–98.

§ 1849. Definitions for Sections 1841 to 1849.

In sections 1841 to 1849:

(a) "sexual activity" means sexual intercourse, deviate sexual intercourse, or sexual contact as defined in section 1649;

(b) a "prostitution business" is any business which derives funds from prostitution regularly carried on by a person under the control, management or supervision of another;

(c) a "house of prostitution" is any place where prostitution is regularly carried on by a person under the control, management or supervision of another;

(d) a "prostitute" is a person who engages in sexual activity for hire;

(e) an "inmate" is a prostitute who acts as such in or through the agency of a house of prostitution.

Comment

Note that "sexual activity" includes homosexual and other deviate sexual practices, so that a person who hires himself out for such deviate practices would violate the proposed prostitution provisions. See Working Papers, p. 1196.

OBSCENITY AND LEWDNESS

§ 1851. Disseminating Obscene Material.

(1) Offense. A person is guilty of an offense if he disseminates obscene material, or if he produces, transports, or sends obscene material with intent that it be disseminated. "Disseminate" means sell, lease, advertise, broadcast, exhibit, or distribute.

(2) Defenses. It is a defense to a prosecution under this section that dissemination was restricted to:

(a) institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material; or

(b) noncommercial dissemination to personal associates of the actor [; or

(c) dissemination carried on in such a manner as, in fact, to minimize risk of exposure to children under eighteen or to persons who had no effective opportunity to choose not to be so exposed].

(3) Grading. The offense is a Class C felony if dissemination is carried on in reckless disregard of risk of exposure to children under eighteen or to persons who had no effective opportunity to choose not to be so exposed. Otherwise the offense is a Class A misdemeanor. [The offense is a Class A misdemeanor.]

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (e) or (f) of section 201.

Comment

Section 1851, apart from the bracketed defense in subsection (2)(c), reflects the view that obscene material is harmful to individuals and society; that the federal government should continue to play a role in suppressing commercial trafficking in obscenity, and that *Stanley* v. *Georgia*, 394 U.S. 557 (1969), sustaining the right of an individual to possess obscene material in the privacy of his own home, does not

mean that a commercial supplier has a correlative right to sell obscene materials to adults who wish to have it. Divergent views are summarized in the Working Papers, pp. 1203–43.

The section simplifies existing law (18 U.S.C. §§ 1461–64) and deletes anachronistic references to contraceptives and abortifacients. An effort to give some precision to the concept of "obscenity" (see Study Draft § 1851) was abandoned in view of the current state of flux in the relevant constitutional law, leaving it to the courts to continue to evolve the test on a case-by-case basis.

The defenses set forth in paragraphs (a) and (b) of subsection (2) reflect the prosecution policy of the federal government. See *Redmond* v. *United States*, 384 U.S. 264 (1966). Bracketed paragraph (c) of subsection (2) would afford an additional defense that would permit dissemination of concededly obscene materials to adults. This reflects a substantial body of opinion in the Commission that harmful results from exposure to obscenity have not been demonstrated; that the attempt to suppress obscenity infringes on First Amendment and other constitutional rights, and that federal law enforcement resources are inappropriately diverted and wasted in this field.

Grading in subsection (3) reflects the consensus that there should be some discrimination between, on the one hand, commercial exploitations involving exposure of obscenity to children or unwilling adults, and more limited circulation, on the other. The bracketed provision in subsection (3) reflects a substantial body of opinion in the Commission that misdemeanor sanctions are adequate in any event, in view of the availability of felony penalties for persistent misdemeanants, under § 3003.

Federal jurisdiction under this section includes enclaves, use of a facility of commerce or movement of the obscene material across a state or United States boundary.

An alternative approach that would permit distribution of some obscenity but would require labelling of "potentially offensive sexual material" and "adult sexual material" is set forth in the comment to § 1851 of the Study Draft.

§ 1852. Indecent Exposure.

(1) Offense. A person is guilty of a Class A misdemeanor if, with intent to arouse or gratify the sexual desire of any person, including the actor, he exposes his genitals or performs any other lewd act under circumstances in which, in fact, his conduct is likely to be observed by a person who would be offended or alarmed.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201.

Comment

Section 1852 penalizes sex-related behavior involving a substantial likelihood of alarming or giving serious offense to others. The section

is derived from modern code revisions (N.Y. Pen. L. § 245.00; Mich. Rev. Crim. Code § 2325; A.L.I. Model Penal Code § 251.1). In order to minimize constitutional vagueness problems, the section prohibits overt conduct: actual exposure under circumstances in which it would be offensive or alarming. The concept of offense or alarm to "others" is an effort to define a kind of public nuisance. Jurisdiction is confined to federal enclaves.

DISORDERLY CONDUCT

§ 1861. Disorderly Conduct.

(1) Offense. A person is guilty of an offense if, with intent to harass, annoy or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed or alarmed by his behavior, he:

(a) engages in fighting, or in violent, tumultuous or threatening behavior;

(b) makes unreasonable noise;

(c) in a public place, uses abusive or obscene language, or makes an obscene gesture;

(d) obstructs vehicular or pedestrian traffic, or the use of a public facility;

(e) persistently follows a person in or about a public place or places;

(f) while loitering in a public place for the purpose of soliciting sexual contact, he solicits such contact; or

(g) creates a hazardous, physically offensive, or seriously alarming condition by any act which serves no legitimate purpose.

(2) Grading. The offense is a Class B misdemeanor if the defendant's conduct violates subsection (1)(f). Otherwise it is an infraction.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201.

(4) Complaint by Member of the Public Required. Prosecution under paragraphs (c), (e) and (f) of subsection (1) shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer.

Comment

This statute defines what constitutes disorderly conduct in federal enclaves. It is largely derived from N.Y.Pen.L. §240.20, but includes, as well, offensive sexual solicitation and persistent following of a person. The thrust of the statute is prevention of harassment or annoyance of others. Because the conduct described in paragraphs (c), (e)

and (f) of subsection (1) may not be offensive to the person to whom it is directed and because protection of the sensibilities of a law enforcement officer are not the purpose of the section, it is provided that a private person must initiate the complaint.

Part C. The Sentencing System

Chapter 30. General Sentencing Provisions

§ 3001. Authorized Sentences.

(1) In General. Every person convicted of an offense against the United States shall be sentenced in accordance with the provisions of this Chapter. The term "court", as used in Part C of this Code, includes magistrates to the extent of their powers as provided elsewhere by law.

(2) Felonies and Misdemeanors. Every person convicted of a felony or a misdemeanor shall be sentenced to one of the following alternatives:

(a) probation, a split sentence or unconditional discharge as authorized by Chapter 31;

(b) a term of imprisonment as authorized by Chapter 32; or

(c) a fine as authorized by Chapter 33. A fine authorized by Chapter 33 may be imposed in addition to a sentence to probation or to a term of imprisonment.

(3) Infractions. Every person convicted of an infraction shall be sentenced to one of the following alternatives:

(a) probation or unconditional discharge as authorized by Chapter 31; or

(b) a fine as authorized by Chapter 33. A fine authorized by Chapter 33 may be imposed in addition to a sentence to probation.

(4) Organizations. Every organization convicted of an offense against the United States shall be sentenced to one of the following alternatives:

(a) probation or unconditional discharge as authorized by Chapter 31;

(b) a fine as authorized by Chapter 33; or

(c) the special sanction authorized by section 3007.

A fine authorized by Chapter 33 or the special sanction authorized by section 3007 or both may be imposed in addition to a sentence to probation.

(5) Civil Penalties. This Chapter shall not be construed to deprive the courts of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, require forfeiture of or disqualification from office or position, or impose any

other civil penalty. An appropriate order exercising such authority may be included as part of the judgment of conviction.

[(6) Reduction in Class. If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes that it would be unduly harsh to enter a a judgment of conviction for that class of offense, the court may enter a judgment of conviction for the next lower class of offense and impose sentence accordingly.]

Comment

This section provides a single comprehensive list of the options available for sentencing offenders, apart from employment forfeitures and disqualifications, dealt with in Chapter 35, and property forfeitures, not dealt with in the Code. It is useful as a starting point for a judge's thinking when he reaches the sentencing stage, and as a reference point for provisions such as §§ 3004 and 3103(4).

Bracketed subsection (6) reflects the view of some members of the Commission that a judge should have the discretion to reduce the class of offense after conviction just as the prosecutor now has the discretion to charge a lesser offense initially. The inclusion of such a provision was rejected on the ground that judicial discretion to lower the classification of an offense would tend to undermine the careful grading of offenses built into the Code by the Congress.

See Working Papers, pp. 367, 1303–04.

§ 3002. Classification of Offenses.

(1) Felonies. Felonies are classified for the purpose of sentence into the following three categories:

(a) Class A felonies;

(b) Class B felonies; and

(c) Class C felonies.

(2) Misdemeanors. Misdemeanors are classified for the purpose of sentence into the following two categories:

(a) Class A misdemeanors; and

(b) Class B misdemeanors.

(3) Infractions. Infractions are not further classified.

Comment

The sentencing categories in present federal law are chaotic and inconsistent. Very similar crimes have widely disparate sentences. There exist some 65 to 75 categories, without an apparent rational basis for that number of distinctions. This section establishes six categories for all offenses in federal penal law. Provision is made for significant differences in the gravity of different offenses; and the scheme which

emerges is an orderly one. Similar classifications have been provided in other modern code revisions. See Working Papers, pp. 1250–51, 1258–61, 1292, 1302, 1303.

§ 3003. Persistent Misdemeanants.

(1) Criterion. A defendant convicted of a Class A misdemeanor may be sentenced as though convicted of a Class C felony if the court is satisfied that there is an exceptional need for rehabilitative or incapacitative measures for the protection of the public, in view of the fact that this is the third conviction against the defendant within five years for Class A misdemeanors or more serious crimes.

(2) Computation of Prior Crimes. The second crime to be counted must have been committed after defendant was sentenced for the first crime to be counted and the misdemeanor for which defendant is being sentenced under this section must have been committed after defendant was sentenced for the second crime to be counted.

(3) Reasons. The court shall set forth in detail the reasons for its action whenever the sentence authorized in subsection (1) is imposed.

Comment

This section recognizes that some individuals who continue to commit misdemeanors after prior conviction are not deterred by the misdemeanor penalty or aided by the previous correctional measures and require rehabilitation impossible to accomplish during the term of imprisonment available for misdemeanors. This provision might be useful in dealing with recidivist petty thieves, and drug and gambling misdemeanants, among others. Note that "Class A misdemeanor" includes all crimes defined as such by this Code, without regard to whether they were federal crimes. See § 109 (General Definitions). For the treatment of persistent felony offenders, see § 3202.

Subsection (2) is intended to answer the question as to the number of convictions which have occurred when, for example, several offenses have been disposed of at a single sentencing. In such a situation, the fact that an offense was committed earlier than another does not indicate failure of the sentencing process. On this theory the section provides that these convictions should be treated as one. For treatment of consecutive sentences for misdemeanors at a single federal sentencing, see § 3204.

Procedural provisions to accompany this section have not been drafted. It might be provided, *inter alia*, that notice of intention to seek felony sanctions must be given at the time of the misdemeanor charge. See Working Papers, p. 446.

§ 3004. Presentence Commitment for Study.

In cases where a term of imprisonment of more than one year is authorized and the court is of the opinion that imprisonment presently appears to be warranted but desires more detailed information as a basis for determining the appropriate sentence than has been provided by the presentence report, the court may commit a convicted defendant to the custody of the Bureau of Corrections for a period not exceeding 90 days. The Bureau shall conduct a complete study of the defendant during that time, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the rehabilitative resources or programs which may be available to suit his needs. By the expiration of the period of commitment, or by the expiration of such additional time as the court shall grant, not exceeding a further period of 90 days, the defendant shall be returned to the court for final sentencing and the court shall be provided with a written report of the results of the study, including whatever recommendations the Bureau believes will be helpful to a proper resolution of the case. An order committing a defendant under this section shall be a provisional sentence to imprisonment for the maximum term authorized by Chapter 32. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives available under section 3001.

Comment

This section represents a consolidation of three existing provisions: 18 U.S.C. §§ 4208(b), 4252 and 5010(e). The presentence report prerequisite to commitment under this section constitutes the major alteration in existing law. Availability to the defense of the results of a § 3004 study should be governed by rules similar to those applicable to disclosure of presentence reports, dealt with in Rule 32 of the Federal Rules of Criminal Procedure. See Working Papers, pp. 1271–72, 1304–05.

§ 3005. Resentences.

(1) Increased Sentences. Where a conviction has been set aside on direct review or collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously satisfied, unless the court concludes that a more severe sentence is warranted by conduct of the defendant occurring subsequent to the prior sentence.

(2) Reasons. The court shall set forth in detail the reasons for its action whenever a more severe sentence is imposed on resentencing.

Comment

This section follows *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), which permits the imposition of a higher sentence on reconviction subsequent to a reversal of conviction. This approach is followed on the view that no fixed limit should be set on the ability of the court to do justice in the individual case. The court may increase the sentence only on the basis of conduct occurring subsequent to the original sentence, although some would construe *Pearce* as permitting the increase on the basis of *any* new information brought to the attention of the court.

An alternative, which reflects a substantial body of opinion in the Commission, would go beyond *Pearce*, as a matter of policy, to prohibit a more severe resentence under any circumstances. *Cf.* ABA Standards, Sentencing Alternatives and Procedures § 3.8 (Approved Draft, 1968). This policy is based on the view that administration of a standard which, in effect, requires inquiry into the purpose and effect of a more severe resentence is not warranted by the few instances in which the original sentence may have been inappropriate, and that subsequent misconduct, if criminal, can be dealt with upon conviction for such conduct. See Working Papers, p. 1306.

§ 3006. Classification of Crimes Outside This Code.

If the maximum imprisonment authorized for a federal offense defined outside this Code exceeds 30 days, the offense shall be a Class A misdemeanor; if such imprisonment is 30 days or less, a Class B misdemeanor; if there is no such imprisonment, an infraction. Notwithstanding the classification provided in this section, the term of imprisonment imposed shall not exceed the maximum authorized by the statute defining the offense, and the offense shall not be deemed a crime if the statute defining the offense provides that it is not a crime.

Comment

This section brings the non-Title 18 offenses within the sentencing system of the Code and establishes the policy that all felonies should be defined in the Code itself. An important implication is that any legislation, whether or not originating in the Judiciary Committees of Congress, would require the approval of those Committees insofar as the legislation contemplates the employment of prison sanctions in excess of those provided for misdemeanants.

See § 209 for similar treatment of assimilated offenses.

Those offenses remaining outside Title 18 which carry a maximum prison term of more than one year would be reduced to Class A misdemeanors. Those carrying a maximum between 30 days and one year would be classified as Class A misdemeanors, but maxima of less than a year outside Title 18 would not be disturbed. Code provisions such

as those dealing with probation and collection of fines would apply to these extra-Code misdemeanors.

There is no limit on the fine which a statute defining an offense outside this Code may impose. Section 3301(1) provides that the Code limits on fines apply except when a statute defining an offense outside the Code sets another limit. Since many offenses outside this Code are related to economic regulation, higher fines than those fixed for Code misdemeanors may be appropriate.

§ 3007. Special Sanction for Organizations.

When an organization is convicted of an offense, the court may require the organization to give notice of its conviction to the persons or class of persons ostensibly harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise.

[§ 3007. Special Sanction for Organizations.

When an organization is convicted of an offense, the court may require the organization 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.]

Comment

This section would establish a special sanction for an organization convicted of an offense. By authorizing a court to order an organization convicted of an offense to give notice to the putative victims to facilitate restitution, this section brings organizational liability into closer parity with individual liability. See 15 U.S.C. § 1402(d) (disclosure of defect in motor vehicles). A broader sanction envisioning "publicity," rather than "notice," was rejected as inappropriate with respect either to organizations or to individuals, despite its possible deterrent effect, since it came too close to the adoption of a policy approving social ridicule as a sanction.

The bracketed alternative reflects the view of a substantial body of opinion in the Commission that the sanction should go further. Thus the alternative permits the court to require "publicity" to persons "interested in or affected" by the conviction so that such publicity could go, for example, to potential customers or to a class of persons who were the object of an attempted but frustrated scheme to defraud.

Another special sanction would be to make possible restitution by the organization to persons affected by the offense, in a proceeding ancillary to the criminal case. However, a provision empowering the sentencing court to direct institution of such a proceeding (*cf.* Study Draft § 405(1)(b)) was not included in view of the separate consideration which the 91st Congress was giving to class actions by consumers.

See Working Papers, pp. 163, 165–66, 191–93, 203–06.

Chapter 31. Probation and Unconditional Discharge

§ 3101. Criteria for Utilizing Chapter.

(1) Eligibility. A person who has been convicted of a federal offense may be sentenced to probation or unconditional discharge as provided in this Chapter.

(2) Criteria. The court shall not impose a sentence of imprisonment upon a person unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public because:

(a) there is undue risk that during a period of probation the defendant will commit another crime;

(b) the defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment under Chapter 32; or

(c) a sentence to probation or unconditional discharge will unduly depreciate the seriousness of the defendant's crime, or undermine respect for law.

(3) Factors to be Considered. The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations called for by subsection (2):

(a) the defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

(b) the defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property;

(c) the defendant acted under strong provocation;

(d) there were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

(e) the victim of the defendant's conduct induced or facilitated its commission;

(f) the defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

(g) the defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(h) the defendant's conduct was the result of circumstances unlikely to recur;

(i) the character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) the defendant is particularly likely to respond affirmatively to probationary treatment;

(k) the imprisonment of the defendant would entail undue hardship to himself or his dependents;

(*l*) the defendant is elderly or in poor health;

(m) the defendant did not abuse a public position of responsibility or trust; and

(n) the defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise.

Nothing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

Comment

Probation is not regarded under present law as a "sentence," but rather as an event which occurs when the execution or imposition of a sentence is suspended. Subsection (1) determines that probation is a sentence, an affirmative correctional device. Unlike present federal law, probation is not barred to persons convicted of certain crimes or classes of crimes. If it should be deemed imperative that Congress express itself as to the undesirability of a sentence of probation for certain crimes or classes of crimes, an appropriate method which would permit avoidance of the problems created by mandatory sentence provisions would be a provision establishing, in effect, a presumption *against* probation—that the court must state its reasons for imposing probation upon conviction of the specified crime.

Statutory suggestion of criteria for a sentence of probation, provided in subsection (2), is new in federal law. The provision is not intended to discourage imposition of prison sentences in appropriate cases, but merely to discourage automatic imposition of such sentences. Recent studies on the effectiveness of probation, as well as economic considerations, justify this position.

Subsection (3) lists factors which a judge should consider in determining whether the sentence should be probation or imprisonment. Codifying the criteria should assist in reducing sentencing disparities.

See Working Papers, pp. 1267–69, 1300, 1306–07.

§ 3102. Incidents of Probation.

(1) Periods. Unless terminated as provided in subsection (2), the periods during which a sentence to probation shall remain conditional and be subject to revocation are:

(a) for a felony, 5 years;

(b) for a misdemeanor, 2 years;

(c) for an infraction, 1 year.

(2) Early Termination. The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection (1) if warranted by the conduct of the defendant and the ends of justice.

(3) Final Judgment. Notwithstanding the fact that a sentence to probation can subsequently be modified or revoked, a judgment which includes such a sentence shall constitute a final judgment for all other purposes.

Comment

This section restates the substance of present law with some modifications. It would continue the present maximum term of five years (18 U.S.C. § 3651), but would limit it to felonies. Subsection (2) would continue present law as to the power to terminate probation early, not only to benefit the probationer but also to conserve supervisory resources (18 U.S.C. § 3653); but the section changes present law in denying the court the power to fix initially a shorter period of probation. Until the offender has been on probation, the length of the period of probation needed is difficult to determine.

Subsection (3) makes it clear that a sentence to probation is like any other sentence for purposes of appeal and otherwise.

See Working Papers, pp. 1307–09.

§ 3103. Conditions of Probation; Revocation.

(1) In General. The conditions of probation shall be such as the court in its discretion deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so. The court shall provide as an explicit condition of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

(2) Appropriate Conditions. When imposing a sentence to probation, the court may, as a condition of the sentence, require that the defendant:

(a) work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;

(b) undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose;

(c) attend or reside in a facility established for the instruction, recreation or residence of persons on probation;

(d) support his dependents and meet other family responsibilities;

(e) make restitution or reparation to the victim of his conduct for the damage or injury which was sustained. When

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restitution or reparation is a condition of the sentence, the court shall fix the amount thereof, which shall not exceed an amount the defendant can or will be able to pay, and shall fix the manner of performance;

(f) pay a fine authorized by Chapter 33;

(g) refrain from possessing a firearm, destructive device or other dangerous weapon unless granted written permission by the court or probation officer;

(h) refrain from excessive use of alcohol, or any use of narcotics or of another dangerous or abusable drug without a prescription;

(i) report to a probation officer at reasonable times as directed by the court or the probation officer;

(j) permit the probation officer to visit him at reasonable times at his home or elsewhere;

(k) remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer;

(*l*) answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment;

(m) satisfy any other conditions reasonably related to his rehabilitation.

(3) Certificate. When a defendant is sentenced to probation, he shall be given a certificate explicitly setting forth the conditions on which he is being released.

(4) Modification; Revocation. The court may modify or enlarge the conditions of a sentence to probation at any time prior to the expiration or termination of the period for which the sentence remains conditional. If the defendant violates a condition at any time prior to the expiration or termination of the period, the court may continue him on the existing sentence, with or without modifying or enlarging the conditions, or, if such continuation, modification or enlargement is not appropriate, may impose any other sentence that was available under section 3001 at the time of initial sentencing.

(5) Transfer to Another District. Jurisdiction over a probationer may be transferred from the court which imposed the sentence to the court for any other district, with the concurrence of both courts. Retransfers of jurisdiction may also occur in the same manner. The court to which jurisdiction has been transferred under this subsection shall be authorized to exercise all powers permissible under this Chapter over the defendant.

Comment

Title 18 U.S.C. § 3651 contains a short list of possible conditions of probation. This section provides a more elaborate statement of the conditions of probation in order to promote a more uniform and considered approach to probation. Note that the word "offense" in subsection (1) includes state offenses. See § 109 (General Definitions).

Subsection (4) continues present law allowing modification of the conditions of probation (18 U.S.C. § 3651), but provides that upon revocation of probation, the court may utilize any sentence originally available. This corresponds to the current practice of "suspending imposition" of sentence, and rejects the alternative available under existing law, of "suspending execution" of a predetermined sentence. Flexibility to deal with what may be very different kinds of violations is thus mandated. Those judges who believe that a predetermined sentence helps to deter violations of probation may still impress the defendant with the fact that the full maximum will be available in the event of revocation. Whether continuation on probation is "appropriate" and the kind of sentence to be imposed on revocation of probation depend on the nature of the violation and whether it indicates a likelihood of return to criminality or a need for correction.

Violation of conditions of probation might be made a regulatory offense (see § 1006). This would provide an alternative to revocation of probation as a sanction for minor breach of conditions. It would also be useful when probation is imposed for an infraction since the sanction of imprisonment would not otherwise be available.

Subsection (5) carries forward the substance of 18 U.S.C. § 3653, except for deletion (as suggested by the Committee on the Administration of the Probation System of the Judicial Conference of the United States) of the requirement that the period of probation not be terminated without the consent of the sentencing court.

See Working Papers, pp. 1310–11.

§ 3104. Duration of Probation.

(1) Commencement; Multiple Sentences. A period of probation commences on the day it is imposed. Multiple periods, whether imposed at the same time or at different times, shall run concurrently. Periods of probation shall also run concurrently with any federal, state or local jail, prison or parole term for another offense to which the defendant is or becomes subject during the period.

(2) Delayed Adjudication. The power of the court to revoke a sentence to probation for violation of a condition shall extend for the duration of the period provided in section 3102 and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every

reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Comment

This section does not have a counterpart in Title 18. The provision for the concurrent running of multiple periods of probation is based on the same premise as is the limitation of the maximum period to five years—either probation will work within a relatively short period of time or it will not work at all. In providing that probation runs concurrently with a prison or parole term for another offense, the section differs from existing law. The imposition of a term of imprisonment during a term of probation represents a fundamental alteration of the treatment plan. The new prison and parole terms will supersede the probation sentence unless the court undertakes a new treatment plan pursuant to probation revocation.

Subsection (2) allows time for dealing with a probationer who cannot be found for revocation proceedings before the expiration.

See Working Papers, pp. 1311–12.

§ 3105. Unconditional Discharge.

The court may sentence a person convicted of an offense other than a Class A or B felony to an unconditional discharge without imprisonment, fine, conditions or probationary supervision if it is of the opinion that imposition of conditions upon the defendant's release would not be useful. If a sentence of unconditional discharge is imposed for a crime, the court shall set forth in detail the reasons for its action.

Comment

Under existing federal law, the court effects an unconditional discharge by imposing a sentence of one day's probation. This section represents a more candid approach to such discharge, and is especially significant because § 3102 provides for periods of probation fixed by statute, subject to early discharge. Since unconditional discharges for other than an infraction should not be automatic or unrationalized, a statement of reasons for granting such a discharge is required. See Working Papers, p. 1312.

§ 3106. Split Sentence.

When imposing a sentence to probation for a felony or a Class A misdemeanor, the court, in addition to imposing conditions under section 3103, may as part of the sentence commit the defendant to the custody of the Bureau of Corrections at whatever time or for such intervals within the period of probation as the court shall determine. The period of commitment shall not exceed six months. Interval commitments shall not be required unless the Bureau

of Corrections has certified that appropriate facilities are available. That the defendant submit to commitment imposed under this section shall be deemed a condition of probation for the purposes of section 3103(4).

Comment

The split sentence provision is derived from 18 U.S.C. § 3651. The purpose of this provision is to permit the shock of short-term imprisonment in a disposition which is primarily court-supervised probation. Intermittent imprisonment would permit a man to keep his job and spend nights or week-ends in jail. An alternative would be to limit the term of imprisonment on a "split-sentence" to a shorter period, *e.g.*, 60 days, on the ground that it would be sufficient for "shock-effect." See Working Papers, pp. 1300, 1310–11.

Chapter 32. Imprisonment

§ 3201. Sentence of Imprisonment: Incidents.

(1) Authorized Terms. The authorized terms of imprisonment are:

(a) for a Class A felony, no more than 30 years;

(b) for a Class B felony, no more than 15 years;

(c) for a Class C felony, no more than 7 years;

(d) for a Class A misdemeanor, no more than 1 year [6 months];

(e) for a Class B misdemeanor, no more than 30 days.

Such terms shall be administered as provided in Part C of this Code.

(2) Components of Maximum Term for Indefinite Sentence. A sentence of imprisonment of more than six months shall be an indefinite sentence. The maximum term of every indefinite sentence imposed by the court shall include a prison component and a parole component. The parole component of such maximum term shall be (i) one-third for terms of nine years or less; (ii) three years for terms between nine and fifteen years, and (iii) five years for terms more than fifteen years; and the prison component shall be the remainder of such maximum term. If, however, the parole component so computed is less than three years, the court may increase it up to three years.

(3) Minimum Term. An indefinite sentence for a Class A or B felony shall have no minimum term unless by the affirmative action of the court a term is set at no more than one-third of the prison component actually imposed. No other indefinite sentence shall have a minimum term. The court shall not impose a minimum term unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case, such as warrant imposition of a term in the upper range under section 3202. The court shall set forth its reasons in detail. Except in the most extraordinary cases, the court shall obtain both a presentence report and a report from the Bureau of Corrections under section 3004 before imposing a minimum term.

(4) Minimum Term; Alternative; Further Powers. In lieu of imposing a minimum term, the court may make a recommendation

to the Board of Parole as to when the defendant should first be considered for parole. The court shall not recommend a parole eligibility date which is beyond the time when the court could have fixed a minimum term under subsection (3). The court shall have the authority to reduce an imposed minimum term to time served upon motion of the Bureau of Corrections made at any time, upon notice to the United States Attorney.

Comment

In place of the 16 different maximum terms presently to be found in Title 18, apart from the death penalty and life imprisonment, five distinct classes are established in the Code on the view that the Congress can indicate only in a general way levels of gravity of offenses and should not try to make more refined categories. Every offense under the Code is allocated to one or another of the classes or is classified as an infraction, for which no prison term is authorized.

The authorization of maximum terms in this section, however, serves a significantly different function from the authorization under existing federal criminal laws. Under existing laws the authorized term indicates the outer limit of the virtually unfettered discretion which the judge may exercise in sentencing an offender to prison. Under the Code the sentencing judge's discretion with respect to felonies is limited by provisions which permit him to sentence in the upper ranges of the authorized maximum only in aggravated instances falling within the class of offense (§ 3202).

The sentence limits for Class A and B felonies reflect predominantly incapacitative goals. The lowest level felony, Class C, is conceived of as mainly a category for serious crimes of such a nature as to call for an effort to rehabilitate the offender before he is returned to society. The maximum term for the most serious misdemeanors, Class A, is the same as the present level, one year, but a substantial body of opinion in the Commission favored a six-month limit, as indicated by the bracketed phrase in subsection (1)(d). Among the reasons for keeping the limit at one year are: the weight of federal tradition, the belief that, even though misdemeanor sentences longer than six months should be rarely imposed, the longer maximum has deterrent value, and the fact that, faced with the choice of a felony classification or a classification with a six-month maximum, there is a danger that more crimes might be classified as felonies than is warranted. The bracketed alternative of six months reflects the view of some Commissioners that longer sentences, up to a year, serve little if any penological purpose, may harm rather than help the prisoner, and thus impose unnecessary drains on the correctional system, and that a six-month maximum provides sufficient deterrence, serves "taste-of-jail" purposes and may facilitate expeditious disposition of cases by nonjury trial before federal magistrates. In any event, misdemeanor sentences in excess of six months will be subject to parole, as in existing law.

A maximum term imposed under this section is the maximum time that the person sentenced remains within the jurisdiction of the cor-

rectional authorities; and part of that time (the "parole component") he must be enlarged on parole. This contrasts with present law under which a prisoner may serve out his sentence within the walls and emerge without parole supervision. The parole component also defines the maximum time that must be served on parole where the Parole Board releases the prisoner at some early point in his sentence. Although ordinarily the parole component is envisioned as one-third of the prison component, three-year and five-year maximums are set for parole under long sentences, and provision is made for judicial flexibility in allocating time between prison and parole where the maximum term imposed is relatively short. This removes any incentive for lengthening the total term in order to assure an adequate period of post-prison supervision. It might be desirable to authorize the Board of Parole to make the same sort of decision (adding to the period of parole supervision—always within the limits of the judicially-imposed sentence) at the time of release.

Under existing law, all prison sentences have a minimum term—a period which an offender must serve in prison before becoming eligible for parole—unless the court affirmatively acts (18 U.S.C. § 4208). It is difficult at best for a judge to predict at the time of sentencing that under no circumstances will a particular person be ready for parole until a certain period has expired. The result may be that a person is kept in prison after the optimum time for his release. For some offenders, however, community reassurance may call for a minimum term. Subsection (3) determines that only for Class A and B felony sentences may a minimum term be set and then only if the judge affirmatively acts. Note, however, that even when a minimum term is not or cannot be set, the Board of Parole is not required to consider parole prior to 60 days before the end of the first year of imprisonment (§ 3401(2)). Note also that all terms where the prison component is three years or more are subject to § 3402(1), which provides that only in the most extraordinary circumstances should a prisoner be paroled during his first year in prison. The longest minimum is one-third of the prison component imposed, as under 18 U.S.C. §§ 4202, 4208.

Subsection (4) permits the judge to influence the parole date without actually imposing a minimum term. A procedure for reducing a minimum term improvidently set is also established.

A substantial body of opinion in the Commission favors at least a modified form of mandatory minimum prison terms to supplement the minimum term provision in subsection (3). This view would be effected by a provision that mandated minimum terms for certain egregious offenses, *e.g.*, wholesaling in hard narcotics (§ 1822(1)), unless the judge determines that such a sentence would be grossly severe due to extraordinary factors in the case which he explains in detail. Such a provision would be premised on the view that presumptive prison terms have deterrent value and that it is an appropriate legislative responsibility to set sentencing guidelines here as elsewhere. Counter considerations include: such provisions impede the fixing of optimal sentences and distort the plea-bargaining process. See § 3101, *supra*, for a similar suggestion regarding probation.

See Working Papers, pp. 1048–49, 1260–62, 1273–82, 1283–85, 1292–96, 1312–17.

§ 3202. Upper-Range Imprisonment for Dangerous Felons.

(1) Authorization. The maximum term for a felony shall not be set at more than 20 years for a Class A felony, 10 years for a Class B felony or 5 years for a Class C felony unless, having regard to the nature and circumstances of the offense and the history and character of the defendant as it relates to that offense, the court is of the opinion that a term in excess of these limits is required for the protection of the public from further criminal conduct by the defendant because the defendant is a dangerous special offender.

(2) Definitions. A defendant is a dangerous special offender for purposes of this section if:

(a) he has previously been convicted of two or more felonies committed on occasions different from one another and from such felony and for one or more of such convictions he has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either his release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous felony; or

(b) he committed such felony as part of a pattern of criminal conduct which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(c) his mental condition is abnormal, and makes him a serious danger to the safety of others, and he committed such felony as an instance of aggressive behavior with heedless indifference to the consequences of such behavior. An offender shall not be found to be a dangerous special offender under this paragraph unless the court has obtained a report from the Bureau of Corrections under section 3004 which includes the results of a comprehensive psychiatric examination;

(d) such felony was, or he committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of criminal conduct and he did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct; or

(e) he manifested his special dangerousness by using a firearm or destructive device in the commission of the offense or flight therefrom.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (a). In support of findings under paragraph (b), it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (b), a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (b), special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension of such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (b) and (c), criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(3) Notice. Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (1), and setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an

issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

(4) Hearing. Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. Except in the most extraordinary cases, the court shall obtain both a presentence report and a report from the Bureau of Corrections under section 3004 before holding a hearing under this subsection. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term as specified in subsection (1). The court shall place in the record

its findings including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

Comment

This section establishes the system under which long prison terms may be imposed. Subsection (1) recognizes that maximum limits are set by statute in order to permit dealing appropriately with the worst offenders. Such long term sentences mainly perform an incapacitative function and should therefore be imposed only on defendants who are exceptionally dangerous. In the ordinary case, a judge should consider sentences in a narrower range.

This principle is expressed in Title X of the Organized Crime Control Act of 1970 (P.L. 91–452; 18 U.S.C. § 3575) through an extension of all maxima to 25 years, subject to a requirement that the actual maximum imposed be proportionate to the maximum otherwise authorized for the felony. See generally S. Rep. No. 91–617, 91st Cong., 1st Sess., pp. 83–100, 162–67 (1969). Section 3202 adapts the Title X provisions to the sentencing structure of this Code. Instead of the variety of maxima for felonies in existing law, the Code limits the number to three distinctive classes. Instead of being judicially determined, the proportionate maximum can thus be more precisely expressed by the Congress as the upper range of the maximum authorized for the class of felony.

An alternative to providing for leaders of organized crime only within the upper ranges of the class of crime committed in their enterprise, *e.g.*, trafficking in narcotics, illegal gambling, would be to provide a narrowly defined offense for leading organized crime, graded at the Class A or B felony level according to the number of persons involved. *Cf.* § 1005 of the Study Draft. If the procedural restraints on employing upper range sanctions should give rise to pressures to raise the general level of maximum sentences or to reclassify particular offenses into a higher class of felony merely to provide for exceptional cases, it would appear preferable to focus on such cases in the manner noted—by providing a narrowly defined offense subject to higher penalties. A substantial body of opinion in the Commission, however, considers the present range of sentences inadequate to meet the incapacitative goal of the Code and would support substantial increases in the felony maxima.

See Working Papers, pp. 382–84, 385–402, 431, 1048–49, 1257–58, 1261–62, 1269–71, 1295, 1317–18.

§ 3203. Commitment to Bureau of Corrections.

(1) In General. A person sentenced to imprisonment for a felony or a misdemeanor under this Chapter or for nonpayment of a fine under Chapter 33 shall be committed for the term designated by the court to the custody of the Bureau of Corrections, which shall specify the place of confinement where the sentence shall be served.

(2) Youth Offenders. If an offender is under the age of 22 years at the time of conviction, the court as part of its sentence may recommend that he be confined and treated in facilities established under Chapter —— for the rehabilitation of youth offenders.

(3) Narcotics Addicts. If the court determines after a study by the Bureau of Corrections under section 3004 that an offender is a narcotics addict and that he can be treated, the court as part of its sentence may recommend that he be confined and treated in facilities established under Chapter —— for the rehabilitation of narcotics addicts.

Comment

Existing law provides for commitment to the custody of the Attorney General, which function has been delegated to the Bureau of Prisons; subsection (1) refers directly to the Bureau (renamed the Bureau of Corrections).

The other two subsections deal with special cases—youths and addicts—to the correction of each of which an entire chapter of Title 18 is presently devoted. The greater flexibility offered by the Code in dealing with all offenders obviates the need for special sections on youthful offenders and narcotics addicts. Special facilities for the treatment of these two types of offenders are desirable, however, and subsections (2) and (3) permit the court to recommend incarceration in such facilities. If special facilities for any other group, such as alcoholics, are established, a similar provision could be added for them. See Working Papers, pp. 1161–63, 1318–21.

§ 3204. Concurrent and Consecutive Terms of Imprisonment.

(1) Authority of Court. When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, the sentences shall run concurrently or consecutively as determined by the court. Sentences shall run concurrently unless otherwise specified by the court.

(2) Multiple Sentences. A defendant may not be sentenced consecutively for more than one offense to the extent:

(a) one offense is an included offense of the other;

(b) one offense consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other; or

(c) the offenses 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.

(3) Maximum Limits Where Felony Involved. The aggregate maximum of consecutive sentences to which a defendant may be subject shall not exceed the maximum term authorized by section 3201(1) for the most serious felony involved, except that a defendant being sentenced for two or more Class C felonies may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a Class B felony if each Class C felony was committed as part of a different course of conduct or each involved a substantially different criminal objective [and a defendant being sentenced for two or more Class B felonies may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a Class A felony if each Class B felony was committed as part of a different course of conduct or each involved a substantially different criminal objective].

(4) Maximum Limits for Misdemeanors. When sentenced only for misdemeanors, a defendant may not be consecutively sentenced to more than one year, except that a defendant being sentenced for two or more Class A misdemeanors may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a Class C felony if each Class A misdemeanor was committed as part of a different course of conduct or each involved a substantially different criminal objective.

(5) Criteria and Reasons. The court shall not impose a consecutive sentence unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case, for reasons which the court shall set forth in detail.

(6) Application to Multiple Proceedings. The limitations provided in this section shall apply not only when a defendant is sentenced at one time for multiple offenses but also when a defendant is sentenced at different times for multiple offenses all of which were committed prior to the imposition of any sentence for any of them. Sentences imposed both by other federal courts and by any state or local courts shall be counted in applying these limitations.

(7) Effect of Consecutive Terms. In determining the effect of consecutive sentences and the manner in which they will be served, the Board of Parole shall treat the defendant as though he has been committed for a single term which is the aggregate of the maximum terms validly imposed. Any such term longer than six months shall have the following incidents:

(a) the parole component of such single term shall be: (i) one-third for terms of nine years or less, except that, if one-third of such single term is less than three years, the parole component shall be the aggregate of the parole components of the terms imposed, but no more than three years; (ii) three years for terms between nine and fifteen years, and (iii) five years for terms more than fifteen years;

(b) the minimum term, if any, shall constitute the aggregate of all validly imposed minimum terms.

(8) Effect of State Sentences. Subject to any permissible cumulation of sentences explicitly authorized by this section, the Bureau of Corrections shall automatically award credit against the maximum term and any minimum term of any federal sentence for all time served in a state or local institution since the commission of the federal offense or offenses.

Comment

Subsection (1) continues the authority of a federal court to impose either concurrent or consecutive terms in the case of conviction for more than one offense. Subsection (2) prohibits consecutive sentences in three situations where the multiple crimes result from one criminal objective. An alternative and more general statement might be: "The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective." In the event that subsections (3) and (4) are not adopted, some such limitation on the open-ended imposition of consecutive terms would be appropriate.

Subsections (3) and (4) would substantially change federal law by setting, for consecutive sentences, a maxium other than the total authorized for the combined offenses. The principle underlying subsection (3) is that multiple offenders may, like persistent offenders, evidence dangerousness which justifies a long sentence. It applies whenever a defendant is sentenced for a felony and for any other crime. Sentences for all crimes may be aggregated up to the upper range maximum for the most serious felony involved.

Class C felonies may be aggregated into the Class B felony range. The felonies must, however, be parts of different courses of conduct or involve substantially different criminal objectives. Thus, stealing a check from the mails, forging and then uttering it would not permit consecutive sentences into the Class B felony range, but stealing the check, assaulting the postal inspector who was investigating the case and bribing a witness would permit such cumulation.

The bracketed addition reflects a substantial body of opinion in the Commission that an additional deterrent is necessary to prevent repetition of Class B offenses, which embrace egregious misconduct, *e.g.*, rape, armed robbery, and that such repeated misconduct may warrant incapacitation for as long a period as commission of a single Class A felony. The counter consideration is that the authorized limits for a

Class B sentence are high enough for these purposes and that the Class A felony range should be available only for a few specifically defined and especially heinous offenses.

Subsection (4) sets forth the general rule when a defendant is sentenced only for misdemeanors. Sentences may be cumulated to a maximum of one year. When, however, a defendant is convicted of unrelated Class A misdemeanors he may be consecutively sentenced into the Class C felony sentence range.

Subsection (5) is desgned to assure a reasoned use of consecutive sentences. Subsection (6) complements the last sentence of subsection (1); the sentence imposed will run concurrently with other sentences, state or federal, in the absence of affirmative action by the court. Subsection (7) provides that, for such purposes as determining the proper facility for confinement, a defendant must be treated as subject to one sentence, even though consecutive sentences have been imposed, and indicates how the various components are to be determined.

See Working Papers, pp. 382, 893, 896, 1258, 1282–83, 1321–25.

§ 3205. Calculation of Terms of Imprisonment.

(1) Commencement of Sentence. The sentence of imprisonment of any person convicted of a federal offense shall commence to run from the date on which such person is received at the institution at which the sentence is to be served.

(2) Credit. The Bureau of Corrections shall give credit toward service of the maximum term and any minimum term of a sentence to imprisonment for all time spent in custody as a result of the offense or acts for which the sentence was imposed.

(3) Other Charges. If a defendant is arrested on one charge and later prosecuted on another charge growing out of conduct which occurred prior to his arrest, the Bureau of Corrections shall give credit toward service of the maximum term and any minimum term of any sentence to imprisonment resulting from such prosecution for all time spent in custody under the former charge which has not been credited against another sentence.

Comment

The first two subsections effect no change in present law. See 18 U.S.C. § 3568. Subsection (3), which is new, is intended to grant similar credit for a defendant who is first arrested on one charge and later prosecuted for another offense which was later discovered or which was the undisclosed basis for the first arrest. See Working Papers, p. 1325.

Chapter 33. Fines

§ 3301. Authorized Fines.

(1) Dollar Limits. Except as otherwise provided for an offense defined outside this Code, a person who has been convicted of an offense may be sentenced to pay a fine which does not exceed:

(a) for a Class A or a Class B felony, $10,000;

(b) for a Class C felony, $5,000;

(c) for a Class A misdemeanor, $1,000;

(d) for a Class B misdemeanor or an infraction, $500.

(2) Alternative Measure. In lieu of a fine imposed under subsection (1), a person who has been convicted of an offense through which he derived pecuniary gain or by which he caused personal injury or property damage or loss may be sentenced to a fine which does not exceed twice the gain so derived or twice the loss caused to the victim.

Comment

Existing federal law contains inconsistencies with respect to fines as well as to imprisonment; there are 14 different fine levels in Title 18 with little correlation in amounts authorized for offenses which are similar in nature or seriousness.

The amounts stated in subsection (1) are intended as maximum limits for cases in which economic gain or loss was not involved or is not easily measured. Subsection (2) is particularly useful for the offenses for which fines are most apt to be utilized—economic offenses. For counterparts in existing federal law, see 18 U.S.C. §§ 201(e) and 645.

Note that offenses outside Title 18 may have fines which exceed the limits imposed in this section. See § 3006 and comment thereto, *supra*. Because the number of sanctions which can be used against a convicted organization is limited, it might be desirable to set a separate and higher fine limit for such offenders, for use when subsection (2) is unsatisfactory.

See Working Papers, pp. 192–93, 1262–64, 1300, 1325–26.

§ 3302. Imposition of Fines.

(1) Criteria. In determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of the defendant. The court shall not sentence a defendant to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of

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the offense, or which the court is not satisfied that the defendant can pay in full within a reasonable time. The court shall not sentence the defendant to pay a fine unless:

(a) he has derived a pecuniary gain from the offense;

(b) he has caused an economic loss to the victim; or

(c) the court is of the opinion that a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant.

(2) Installment or Delayed Payments. When a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, the fine shall be payable forthwith.

(3) Nonpayment. When a defendant is sentenced to pay a fine, the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid. The response of the court to nonpayment shall be determined only after the fine has not been paid, as provided in section 3304.

Comment

Existing federal law does not establish by statute general rules for the imposition of fines. Subsection (1) states the basic principle that the fine imposed should be related to the resources of the defendant. The court is also prohibited from setting a fine which will so deplete a defendant's resources that he cannot compensate the victim of his crime. Because fines do not have affirmative rehabilitative value and because the impact of the imposition of a fine is uncertain, *e.g.*, it may hurt an offender's dependents more than the offender himself, fines are discouraged in subsection (1) unless some affirmative reason indicates that a fine is peculiarly appropriate.

Subsection (3) is analogous to the prohibition against deciding at sentencing the sanction for violation of probation (§ 3103). In neither situation can the reason for noncompliance be foreseen.

See Working Papers, pp. 1262–64, 1285–86, 1301, 1326–27.

§ 3303. Remission of Fine.

A defendant who has been sentenced to pay a fine and who has paid any part thereof may at any time petition the sentencing court for a remission of the unpaid portion. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine in the amount imposed no longer exist or that it would otherwise be unjust to require payment of the fine in full, the court may remit the unpaid portion in whole or in part or may modify the method of payment.

Comment

There is no counterpart to this section in existing federal law. The prohibition in § 3304 against the use of coercive measures against the defendant who is unable to pay makes it reasonable to permit adjustment of a fine to fit altered conditions. The statute provides for remission of part of a fine rather than revocation of the entire fine because arguably revocation by the court is unconstitutional in that only the President has the power to pardon and reprieve. However, remission can take place after any payment, no matter how small. See Working Papers, pp. 1286, 1326.

§ 3304. Response to Nonpayment.

(1) Response to Default. When an individual sentenced to pay a fine defaults in the payment of the fine or in any installment, the court upon the motion of the United States Attorney or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment. The court may issue a warrant of arrest or a summons for his appearance.

(2) Imprisonment; Criteria. Following an order to show cause under subsection (1), unless the defendant shows that his default was not attributable to an intentional refusal to obey the sentence of the court, or not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the defendant imprisoned for a term not to exceed six months if the fine was imposed for conviction of a felony or 30 days if the fine was imposed for conviction of a misdemeanor or an infraction. The court may provide in its order that payment or satisfaction of the fine at any time will entitle the defendant to his release from such imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.

(3) Modification of Sentence. If it appears that the default in the payment of a fine is excusable under the standards set forth in subsection (2), the court may enter an order allowing the defendant additional time for payment, reducing the amount of the fine or of each installment, or remitting the unpaid portion in whole or in part.

(4) Organizations. When a fine is imposed on an organization, it is the duty of the person or persons authorized to make disbursement of the assets of the organization, and their superiors, to pay the fine from assets of the organization. The failure of such persons to do so shall render them subject to imprisonment under subsections (1) and (2).

(5) Civil Process. Nothing in this section shall be deemed to alter or interfere with employment for collection of fines of any means authorized for the enforcement of money judgments rendered in favor of the United States.

Comment

This section replaces 18 U.S.C. §§ 3565 and 3569, which deal in arbitrary terms with nonpayment of fines. Those sections permit a judgment providing for imprisonment until a fine is paid, and allow release after 30 days upon a finding of the prisoner's inability to pay and execution of a pauper's oath. The proposed approach, on the other hand, is to require a separate proceeding to determine whether there was such culpability for the nonpayment as to warrant a prison sanction in the first place, and to grant such powers to the court as to permit flexibility in treatment of the nonpayer, *i.e.*, give him the "keys to the jail," hold out the possibility of his release to induce payment, or to "taste jail" regardless of payment as a sanction for his contumacy. Payment of the fine can also be made a condition of probation, under § 3103(2)(f). Additional flexibility to modify the fine or method of payment is provided in subsection (3). See Working Papers, pp. 1286, 1300–01, 1328–29.

Chapter 34. Parole

§ 3401. Parole Eligibility; Consideration.

(1) Eligibility. Every prisoner sentenced to an indefinite term of imprisonment shall be eligible for release on parole upon completion of the service of any minimum term or, if there is no minimum, at any time.

(2) Consideration for Parole. The Board of Parole shall consider the desirability of parole for each prisoner at least 60 days prior to the expiration of any minimum term or, if there is no minimum, at least 60 days prior to the expiration of the first year of the sentence. Following such consideration, the Board shall issue a formal order granting or denying parole. If parole is denied, the Board shall reconsider its decision at least once a year thereafter until parole is granted and shall, if parole is denied, issue a formal order at least once a year.

Comment

This section substantially restates federal law and practice. The Board is not required to consider parole until near the end of the offender's first year in prison; and, in § 3402(1), it is indicated that parole should not be granted during the first year of a substantial term except in the most extraordinary circumstances. Provision is made for parole in sentences longer than six months, as in existing law. See Working Papers, pp. 1329–30.

§ 3402. Timing of Parole; Criteria.

(1) In General. Except in the most extraordinary circumstances, a prisoner sentenced to a term of imprisonment, the prison component of which is three years or more, shall not be released on parole during the first year of his imprisonment. Thereafter, whenever the Board of Parole considers the parole of a prisoner who is or soon will be eligible for parole, he shall be released on parole, unless the Board is of the opinion that his release should be deferred because:

(a) there is undue risk that he will not conform to reasonable conditions of parole;

(b) his release at that time would unduly depreciate the seriousness of his crime or undermine respect for law;

(c) his release would have a substantially adverse effect on institutional discipline; or

(d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date.

(2) Long Sentences. Whenever the Board of Parole considers the release on parole of a prisoner who has actually served the longer of five years or two-thirds of the prison component of his sentence, he shall be released on parole, unless the Board is of the opinion that his release should be deferred because there is a high likelihood that he would engage in further criminal conduct.

(3) Mandatory Parole. A prisoner who has not been paroled prior to the expiration of the entire prison component of his sentence shall then be released on parole.

Comment

Subsection (1) states the policy that all prisoners sentenced to a rehabilitative term in prison should be confined for at least one year; but the Board of Parole is granted some flexibility should unusual circumstances exist, *e.g.*, a nondangerous prisoner has an incurable fatal disease. After the first year, or any minimum term, the presumption shifts from favoring confinement to favoring parole unless one of the four stated reasons appears. Note that, under § 3406, as in existing law, there is no judicial review of Parole Board decisions.

Subsection (2) states the policy that after service of two-thirds of a long sentence in prison the only acceptable reason for continuing confinement is the substantial likelihood that the prisoner would commit another crime if released.

Subsection (3), like 18 U.S.C. § 4163, states the circumstances under which release is mandatory. Under the proposed Code, such release will be on parole. It should be noted that abolition of "good-time" provisions is proposed under the Code, so that the desire for early parole will alone remain as the predominant motive for good behavior. Such is presently the case under the federal youthful offender provisions. An alternative "good-time" provision may be found in the Working Papers, p. 1336.

See Working Papers generally, pp. 1261, 1272–73, 1283–85, 1299, 1330–31.

§ 3403. Incidents of Parole.

(1) Period of Parole. The period during which a parole shall remain conditional and be subject to revocation is the parole component of the sentence which has been imposed.

(2) Early Discharge from Supervision or Release from Conditions. The Board of Parole may discharge the parolee from supervision or release him from one or more of the conditions of parole prescribed in section 3404(2) at any time after the expira-

tion of one year of succesful parole if warranted by the conduct of the parolee and the ends of justice.

(3) Conditions; Modifications; Revocation. Conditions of parole shall be determined as provided in section 3404. The Board of Parole may modify or enlarge the conditions of parole at any time prior to the expiration of the period for which the parole remains conditional. If the parolee violates a condition at any time prior to the expiration of the period, the Board may continue him on the existing parole, with or without modifying or enlarging the conditions, or, if such continuation, modification or enlargement is not appropriate, may revoke the parole and reimprison the parolee for a term computed in the following manner:

(a) the recommitment shall be for that portion of the maximum term which had not been served at the time of parole, less the time elapsed between the parole of the prisoner and the commission of the violation for which parole was revoked; and

(b) the prisoner shall be given credit against the term of reimprisonment for all time spent in custody since he was paroled which has not been credited against another sentence.

(4) Re-parole. A prisoner who has been reimprisoned following parole may be re-paroled by the Board of Parole subject to the same provisions of the statute which governed his initial parole. The total time during which the prisoner can remain subject to the jurisdiction of the Bureau of Corrections and the Board of Parole can in no event exceed the maximum term imposed by the court.

Comment

The length of the period of parole under existing law is in inverse proportion to the amount of the imposed prison term which has been served. Thus, a good risk who is released early will be subject to a long period of parole, while a prisoner held until the end of his term will have virtually no supervision when he is released. This section states that regardless of the point during his term at which a prisoner is released, he will be subject to a term of parole the length of which is determined by the length of the sentence initially imposed rather than by the date of his release. Early release from supervision is permitted in order to conserve supervisory resources as well as to provide an incentive to swifter adjustment.

Conditions of parole may be changed and modified, as conditions of probation may be. If parole is revoked, the offender may be reimprisoned for the maximum term (prison component actually imposed plus parole component) less the part of the term already satisfactorily served (prison time served plus parole time served prior to the violation for which parole is revoked). This changes existing law, under which a parolee receives no credit for his "clean time" on the street prior to the violation. Unlike 18 U.S.C. § 4207, the Code does not per-

mit the Board of Parole to set a shorter term of imprisonment upon revocation of parole.

Subsection (4) provides that re-parole is subject to the rules applicable to an initial parole. A person can be alternately paroled and imprisoned until he either serves his entire parole component continuously without a violation or serves the maximum term of his sentence.

See Working Papers, pp. 1298–99, 1331–33.

§ 3404. Conditions of Parole.

(1) In General. The conditions of parole shall be such as the Board of Parole in its discretion deems reasonably necessary to insure that the parolee will lead a law-abiding life or to assist him to do so. The Board shall provide as an explicit condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation.

(2) Appropriate Conditions. As conditions of parole, the Board may require that the parolee:

(a) work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;

(b) undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose;

(c) attend or reside in a facility established for the instruction, recreation or residence of persons on probation or parole;

(d) support his dependents and meet other family responsibilities;

(e) refrain from possessing a firearm, destructive device or other dangerous weapon unless granted written permission by the Board or the parole officer;

(f) refain from excessive use of alcohol, or any use of narcotics or of another dangerous or abusable drug without a prescription;

(g) report to a parole officer at reasonable times as directed by the Board or the parole officer;

(h) permit the parole officer to visit him at reasonable times at his home or elsewhere;

(i) remain within the geographic limits fixed by the Board, unless granted written permission to leave by the Board or the parole officer;

(j) answer all reasonable inquiries by the parole officer and promptly notify the parole officer of any change in address or employment;

(k) satisfy other conditions reasonably related to his rehabilitation.

(3) Certificate. When a prisoner is paroled, he shall be given a certificate explicitly setting forth the conditions on which he is being released.

Comment

Title 18 U.S.C. § 4203(a) specifies several conditions for parole. The Code is more specific as to such conditions, as it is with respect to conditions for probation (§ 3103). Since the Parole Board can act collegially while federal judges act independently, the need for such specificity as to parole conditions is not so great. This section, however, is useful as a declaration of Congressional concerns about parole policy. See Working Papers, p. 1333.

§ 3405. Duration of Parole.

(1) Commencement; Multiple Sentences. A period of parole commences on the day the prisoner is released from imprisonment. Periods of parole shall run concurrently with any federal, state or local jail, prison or parole term for another offense to which the defendant is or becomes subject during the period.

(2) Delayed Adjudication. The power of the Board of Parole to revoke parole for violation of a condition shall extend for the duration of the period provided in section 3403(1) and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the parolee and to conduct the hearing prior to the expiration of the period.

Comment

This section parallels § 3104, which deals with probation. See that section and comment thereto, *supra*. See Working Papers, p. 1333.

§ 3406. Finality of Parole Determinations.

The federal courts shall not have jurisdiction to review or set aside, except for the denial of constitutional rights or procedural rights conferred by statute, regulation or rule, the discretionary action of the Board of Parole regarding but not limited to the release or deferment of release of a prisoner whose maximum term has not expired, the imposition or modification of conditions

of a first or subsequent parole, and the reimprisonment of a parolee for violation of parole conditions during the parole period.

Comment

This section states that discretionary action of the Board of Parole is an administrative decision not subject to judicial review on its merits. The phrase "but not limited to" is used to avoid a construction of the provision which would allow judicial review of matters not mentioned. See Working Papers, pp. 1333–34.

Chapter 35. Disqualification from Office and Other Collateral Consequences of Conviction

§ 3501. Disqualification From and Forfeiture of Federal Office.

(1) Disqualification. A person convicted of a crime listed below may, as part of the sentence, be disqualified from any, or a specified, federal position or category thereof for such period as the court may determine, but no longer than five years following completion of any other sentence imposed:

(a) treason (section 1101) and the crimes affecting national security defined in sections 1102 to 1105, 1107 and 1111 to 1117;

(b) bribery and other crimes of unlawful influence upon public affairs and betrayal of public office defined in sections 1356, 1361 to 1367, 1371 and 1372;

(c) unlawful acts under color of law (section 1521);

(d) felonious theft under sections 1732 to 1735 or felonious fraud under sections 1751 to 1753 and 1756, when the subject of the offense was deposited with, entrusted to or otherwise under the control of the defendant, in his capacity as a public servant or officer of a national credit institution; or

(e) a crime expressly made subject to this section by statute.

(2) Forfeiture. A person convicted of a crime listed in subsection (1)(a) or of bribery (section 1361) shall forfeit any federal position he then holds, and a person convicted of any other crime listed in subsection (1) may, as part of the sentence, be required to forfeit such position.

(3) "Federal Position" Defined. In this section "federal position" does not include any position for which qualifications or provisions with respect to length of term or procedures for removal are prescribed by the Constitution.

Comment

This section provides uniform treatment for cases in which a criminal conviction should or may carry the sanction of forfeiture of or disqualification from federal office or employment. Existing provisions do not follow a single line. Conviction of bribery (18 U.S.C. § 201), for example, does not require forfeiture of office but permits the sentencing court to impose disqualification. A public bank examiner's conviction of theft from a member or insured bank, on the other hand, results in automatic disqualification (18 U.S.C. § 655).

With respect to disqualification, the section leaves the matter entirely to the court's discretion, partly because the question is one more of government needs than of the appropriate sanction and partly

because disqualification may create problems with respect to rehabilitation, particularly in areas where the government is the principal employer. It is difficult to rationalize totally the proposed line between offenders subject to mandatory forfeiture of office and those subject to forfeiture in the court's exercise of discretion. An alternative, consistent with the principle of flexibility in sentencing generally, would be to make all forfeiture a matter of discretion, possibly with an extension of the power to all serious offenses.

Limitation on the period of disqualification is consistent with the proposal in § 3504 that all disqualifications be automatically terminated five years after completion of the sentence. The section does not curtail powers of removal or disqualification vested elsewhere in federal law. See 5 U.S.C. § 7532, regarding security risks.

While the section largely carries forward existing policies, it does make some alterations. For example, it broadens the category of fiduciaries subject to forfeiture and disqualifications beyond bank examiners. *Cf.* 12 U.S.C. § 1829, imposing conditions governing employment by F.D.I.C. insured banks of persons convicted "of any criminal offense involving dishonesty or breach of trust."

Issues raised by this section are:

(1) whether disqualification is a matter which ought to be dealt with by a sentencing judge or by others, particularly as to federal positions for which existing machinery is adequate, *e.g.*, the military establishment and lower-level Civil Service positions;

(2) whether the subject might more appropriately be treated in Title 5, where a greater variety of alternatives can be employed. See, for example, 5 U.S.C. § 7325, which provides that a 30-day suspension may be imposed by the Civil Service Commission, in lieu of the removal from office required for unlawful political activity, if it is unanimously determined that "removal is unwarranted." See also 29 U.S.C. § 504, under which the Board of Parole may determine the fitness of a person to hold labor union office after a criminal conviction; and

(3) whether the list of offenses is appropriate.

See Working Papers, pp. 1339–42.

§ 3502. Disqualification From Exercising Organization Functions.

An executive officer or other manager of an organization convicted of an offense committed in furtherance of the affairs of the organization may, as part of the sentence, be disqualified from exercising similar functions in the same or other organizations for a period not exceeding five years, if the court finds the scope or willfulness of his illegal actions make it dangerous for such functions to be entrusted to him.

Comment

There is precedent for this section in existing provisions disqualifying persons convicted of certain offenses from holding positions in banks where deposits are insured by the F.D.I.C. (12 U.S.C. § 1829).

Cf. new 18 U.S.C. § 1964 (civil remedy of disqualification of racketeer); Companies Act of 1948 of Great Britain, § 188. Although corporate criminal liability for an agent's misdeeds is limited to offenses committed "within the scope of his employment" under the principal text in § 402(1), the broader criterion of acts done "in furtherance of the affairs of the organization" is employed in the present section dealing with disqualification of the offending officer. It is not a mitigation, but on the contrary an aggravation, that the official committing a crime on behalf of the organization actually went outside the scope of his employment, *i.e.*, he disregarded the organizational limits on his authority as well as the criminal law.

§ 3503. Order Removing Disqualification or Disability.

The court may, in an order entered as provided in this section, relieve the defendant of any or all disqualifications and disabilities imposed by law as a consequence of conviction. The order may be made at the time of sentencing:

(a) to be effective at a specified time within five years if the sentence is unconditional discharge;

(b) to be effective otherwise upon the certification, or appropriate combination of certifications, of (i) the clerk of the court that a fine has been paid, (ii) the Probation Office that the defendant has satisfactorily completed his term of probation, (iii) the Board of Parole that the defendant has satisfactorily completed his parole, or (iv) the Bureau of Corrections that the defendant satisfactorily completed a term in prison on conviction of a misdemeanor for which parole is not authorized.

The order may be made at any time after sentence if the court is satisfied that the defendant has satisfactorily completed his sentence.

Comment

See comment to § 3505, *infra*.

§ 3504. Termination of Disqualification After Five Years.

Any disqualification or disability imposed by law as a consequence of conviction terminates at the end of the first five-year period, commencing after completion of sentence, during which the defendant has not been convicted of another crime committed subsequent to the disqualifying or disabling conviction.

Comment

See comment to § 3505, *infra*.

§ 3505. Effect of Removal of Disqualification.

Removal of a disqualification or disability under sections 3503 and 3504:

(a) has only prospective operation and does not require the restoration of the defendant to any office, employment or position forfeited or lost as a consequence of his conviction;

(b) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant to the determination of an issue involving the rights or liabilities of someone other than the defendant;

(c) does not preclude consideration of the conviction for purposes of sentence if the defendant subsequently is convicted of another offense;

(d) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or public servant authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege which such court, agency or public servant is empowered to deny, but in such case the court, agency or public servant shall also give due weight to the issuance of the order under section 3503 or the applicability of section 3504, as the case may be;

(e) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant for the purpose of impeaching the defendant as a witness, but the issuance of the order under section 3503 or the applicability of section 3504, as the case may be, may be adduced for the purpose of his rehabilitation.

(f) does not apply to the federal disqualification, if any, to receive, possess or supply a firearm, destructive device or ammunition.

Comment

Sections 3503–05 would provide a method for ameliorating the collateral consequences of a federal criminal conviction. Existing federal law deals in a similar manner only with youthful offenders (18 U.S.C. § 5021); all others must resort to the presidential pardon procedure, which deals with the problem not only haphazardly but also unfavorably to the poor and ignorant. A number of states, as well as most foreign countries, have established more available and orderly procedures for terminating disabilities. Some offer greater relief, *e.g.*, annulment of the conviction, than that proposed here. Since most disqualifications and disabilities from conviction are state imposed, *e.g.*, loss of voting rights and ineligibility for occupational

licenses, the usefulness of these provisions may depend upon the extent to which the states are willing to comply. It is possible, however, that Congress could constitutionally limit the effect which a state can give to a federal conviction, on the ground that it is an incident of its penal policy for federal offenders.

The pattern of the sections is to provide automatic restoration of rights after five years from the end of a sentence, if there is no conviction evidencing a return to crime (§ 3504), and discretionary restoration earlier, either by a decision at the time of sentencing or upon application anytime thereafter (§ 3503). Both of these provisions must be viewed against the limitations stated in § 3505 (derived from A.L.I. Model Penal Code § 306.6(3)), which is designed to insure against the rewriting of history or the fettering of the exercise of discretion where the facts of the crime are relevant.

The five-year period provided in § 3504 follows 29 U.S.C. § 504, which bars persons from holding labor union offices for five years subsequent to conviction or imprisonment for certain crimes. The automatic operation of § 3504 is intended to avoid the discrimination, resulting from lack of financial resources or knowledge of the law, which is likely to occur should initiative by the offender be required. Moreover, there seems little value in requiring the courts to pass on such applications. Alternatives to the unlimited application of the automatic restoration provided in this section might be: to permit the sentencing court to order in a particular case that § 3504 not apply except upon petition of the defendant and express court order, or to permit the United States Attorney to interpose objections to the automatic operation of the section upon the statement of reasonable grounds.

See Working Papers, pp. 1343–46.

INTRODUCTORY COMMENT TO CHAPTER 36

This Chapter reflects a sharp division within the Commission on the subject of capital punishment. The principal text embodies the view of those favoring abolition of capital punishment. The bracketed provisional Chapter expresses the strongly held views of some Commissioners that capital punishment should be retained for certain grave offenses.*

It may be useful to summarize here the arguments for and against capital punishment, which are elaborated in the Working Papers at pages 1347–76. The arguments against capital punishment include the following. Studies of the deterrent effect of capital punishment do not support the view that there is an extra margin of deterrence as between the death sentence and life imprisonment. Abolition states show no higher murder rate than comparable states retaining the death penalty. The murder rate shows no significant correlation with abolition or reinstatement of capital punishment in a particular state or country. From a moral point of view, the infliction of capital punishment is intolerable because errors of justice do occur and are irremediable once the accused has been executed. The state should in any event abjure deliberate killing so as to demonstrate the supreme value which this nation places on the sanctity of life. Capital punishment falls unequally on rich and poor, black and white; and, in any event, it must operate almost by chance when only a very small number of those who commit "capital offenses" are in fact put to death. The role of chance and bias in capital punishment is underlined by the extreme difficulty of defining criteria for the imposition of the death sentence and the involvement of lay juries who, encountering the responsibility once in a lifetime, cannot give consistency to any capital punishment policy. The existence of capital punishment encourages extreme procedural safeguards against it and by extension against all major criminal sanctions, to the point where law enforcement generally is impeded and the system of criminal justice loses credibility.

The arguments in favor of retaining capital punishment include the following. Existing studies of the efficacy of capital punishment as a deterrent are inconclusive. Too many factors are present to warrant strong conclusions. The efficacy of capital punishment as a deterrent, moreover, has not really been tested in recent experience due to failure to carry out the provisions which the law does make for its use. In any event as a matter of individual experience and common sense, the death penalty is the most feared sanction, and it has served to deter at least some would-be killers, traitors, etc. Provision for capital punishment, even if rarely carried out, also serves to express the special horror of the community against the ultimate crimes, and this attitude penetrates the conscience of the community so as to create inhibitions against such conduct apart from any question of individuals directly and consciously responding to the law's threat. Furthermore the law should reflect widely-held views of the just deserts of criminality. Some crimes, particularly the deliberate homicide, deserve the highest punishment. The murderer forfeits his life to society. Any

*Senators Ervin and McClellan expressly desired to be noted as among those holding these views.

other sanction would cheapen the life intentionally taken. The failure to express these deeply held feelings will encourage resort to extra-legal retribution through vigilante groups.

It is evident that such a clash of views is only marginally amenable to resolution by statistical or other sciences, in the present state of knowledge; differences of opinion will reflect profound and not wholly articulable differences in philosophy and political outlook. The Commission has therefore thought it appropriate to present below not only the principal provision reflecting the view of the abolitionists, but also a provisional Chapter reflecting a substantial body of retentionist opinion in the Commission, together with recommendations regarding the methods of handling capital punishment if Congress chooses to retain it.

Chapter 36. Life Imprisonment

§ 3601. Life Imprisonment Authorized for Certain Offenses.

Notwithstanding the provisions of sections 3001, 3201 and 3202, the court may impose a sentence of life imprisonment or a sentence up to the maximum term authorized under section 3201 for a Class A felony in the following cases:

(i) where the defendant has been convicted of treason;

(ii) where the defendant has been convicted of murder and the court is satisfied that the defendant intended to cause the death of another human being.

A sentence to life imprisonment shall have a minimum term of 10 years unless the court sets a longer minimum up to 25 years. The period of parole under a life sentence, for the purposes of section 3403(1), shall be the balance of the parolee's life or any lesser period fixed by the court at sentencing.

Comment

This section defines the alternative to capital punishment for the most heinous offenses. There was substantial support for the view that some other offenses should be included, *e.g.*, Class A kidnapping. Under existing law, which permits capital punishment, the court is only permitted to fix a minimum term for life imprisonment up to 15 years. See 18 U.S.C. §§ 4202, 4208. The minimums incorporated here reflect the fact that this provision is an alternative to capital punishment. For the same reason, there was substantial support in the Commission either for a legislative preclusion of parole or for a judicial power to preclude parole. As the text stands, the court would have the discretion to impose a Class A sentence as authorized under § 3201.

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[Provisional Chapter 36. Sentence of Death or Life Imprisonment]

[§ 3601. Death or Life Imprisonment Authorized for Certain Offenses.

Notwithstanding the provisions of sections 3001, 3201 and 3202, if the defendant is convicted of intentional murder or treason, a sentence of death or of life imprisonment may be imposed in accordance with the provisions of this Chapter. If the sentence is life imprisonment, the court may set a minimum term up to 15 years. The period of parole under a life sentence, for the purposes of section 3403(1), shall be the balance of the parolee's life or any lesser period fixed by the court at sentencing.]

Comment

This section reflects a substantial body of opinion in the Commission that the death sentence should be retained for intentional murder, treason and perhaps other offenses. Alternatives to the text, in retaining capital punishment, would be: (1) to extend the list of capital offenses, perhaps to all instances where it exists under present federal law; (2) to restrict capital punishment for murder to (a) intentional murder of the President, Vice President, President-elect or Vice President-elect of the United States; (b) intentional murder of a law enforcement officer, or a public servant having custody of the defendant or another, to prevent the performance of his official duties; and (c) intentional murder by a convict, under sentence of imprisonment for murder or under sentence of life imprisonment or death, while in custody or immediate flight therefrom. *Cf.* Study Draft § 3602. The provision of a minimum term up to 15 years in a life sentence is taken from existing law, 18 U.S.C. §§ 4202, 4208.

[§ 3602. Separate Proceeding to Determine Sentence.

(1) Court or Jury. Unless the court imposes sentence under section 3603, it shall conduct a separate proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted before a jury unless the defendant, with the approval of the court, waives it. If a jury determined the defendant's guilt and it is not discharged by the court for good cause, the proceeding shall be conducted with that jury. Otherwise it shall be conducted with a jury empaneled for that purpose.

(2) Evidence and Instructions. In the proceeding, evidence may be presented by either party as to any matter relevant to sentence, including the nature and circumstances of the crime, defendant's character, background, history, mental and physical

condition, and any aggravating or mitigating circumstances. Any such evidence, not legally privileged, which the court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant and the prosecution are accorded a fair opportunity to rebut such evidence.

(3) Verdict and Sentence. The determination whether a sentence of death shall be imposed shall be in the discretion of the court, except that when the proceeding is conducted before the court sitting with a jury, the court shall not impose a sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or life imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the court shall impose a sentence of life imprisonment.]

Comment

The separate penalty trial procedure provided by this section is designed to exclude from the trial stage testimony relevant only to punishment and likely to prejudice the trial of guilt. Under subsection (1), the defendant is entitled to have the penalty issue put to a jury even though he has elected to have his guilt determined by the court alone or to plead guilty. The right to waive a jury, however, is subject to approval of the court, on the view that the court should be entitled to share responsibility with a jury in imposing the extreme penalty. Contrary to federal practice at the trial stage, the section denies to the prosecution any participation in the decision as to whether there should be a penalty jury.

The provisions of subsections (2) and (3) are derived from A.L.I. Model Penal Code § 210.6(2). *Cf.* N.Y. Pen. Law § 125.35.

This section contemplates that the judge may decide, without conducting a separate proceeding and without participation of a jury, that he will impose life imprisonment rather than the death penalty. An alternative supported by a substantial body of opinion in the Commission would be to require the holding of the supplementary hearing in order to afford the prosecution an opportunity to adduce evidence in favor of the death penalty and to permit the decision to impose the death penalty to be made by the jury subject to review by the court. See § 3603, *infra.*

Some Commissioners, however, object to jury sentencing in any case, whether or not capital punishment is involved.

[§ 3603. Death Sentence Excluded.

The court shall impose a sentence of life imprisonment if it is satisfied that:

(a) the defendant was less than eighteen years old at the time of the commission of the crime;

(b) the defendant's physical or mental condition calls for leniency;

(c) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt; or

(d) there are other substantial mitigating circumstances which render sentence of death unwarranted.]

Comment

This section mandates a choice in favor of life imprisonment. In addition to its duty to take the death issue away from the jury in these cases, the court would, under § 3602(3), always have discretion to take the issue from the jury or overrule the jury in favor of a life sentence. Thus concurrence of court and jury, if any, is required to impose the death sentence or alternative life sentence.

An alternative, supported by a substantial body of opinion in the Commission, to the provision in this section directing the judge to favor life imprisonment in certain cases would be to require submission of the issue to a jury before the court makes its own determination. The judge would thus be in the position of setting aside a jury verdict in favor of death, presumably only where he regarded the jury verdict as arbitrary. In addition, some Commissioners would favor lowering the age requirement in paragraph (a) to 16, while others questioned the effect of the requirement of paragraph (c), believing that it might serve to block the imposition of the death penalty in cases where it was appropriate.

[§ 3604. Criteria for Determination.

(1) Consideration of Aggravating and Mitigating Circumstances. In deciding whether a sentence of death should be imposed, the court and the jury, if any, may consider the mitigating and aggravating circumstances set forth in the subsections below.

(2) Mitigating Circumstances. In the cases of both treason and murder the following shall be mitigating circumstances:

(a) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(b) the defendant acted under unusual pressures or influences or under the domination of another person.

(c) at the time of the offense, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(d) the defendant was young at the time of the offense.

(e) the defendant was an accomplice in the offense committed by another person and his participation was relatively minor.

(f) the offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation, plausible, in fact, by ordinary standards of morality, for his conduct.

(g) the defendant has no significant history of prior criminal activity.

(3) Aggravating Circumstances (Treason). In the case of treason, the following shall be aggravating circumstances:

(a) the defendant knowingly created a great risk of death to another person or a great risk of substantial impairment of national security.

(b) the defendant violated a legal duty concerning protection of the national security.

(c) the defendant committed treason for pecuniary gain.

(4) Aggravating Circumstances (Murder). In the case of murder, the following shall be aggravating circumstances:

(a) the defendant was previously convicted of another murder or a felony involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity.

(b) at the time the murder was committed the defendant also committed another murder.

(c) the defendant knowingly created a great risk of death to at least several persons.

(d) the murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, usurping control of an aircraft, espionage or sabotage.

(e) the murder was committed for pecuniary gain.

(f) the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(g) the murder was of a law enforcement officer, or a public servant having custody of the defendant or another, to prevent or on account of the performance of his official duties.

(h) the murder was of the President, Vice President, President-elect or Vice President-elect of the United States.

Comment

This section is adapted from A.L.I. Model Penal Code provisions on the penalty trial (§ 210.6). There the aggravating circumstances serve to make the distinction between any murder and the kind of murder for which the death penalty is available.

Appellate Review of Sentence

Title 28, United States Code

§ 1291. Final Decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court. *Such review shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings.*

Comment

Under existing law, all aspects of a criminal case except sentence are subject to appellate review. Several states provide for review of sentences, and the American Bar Association has endorsed it as a standard for the proper administration of criminal justice. In 1967 the Senate passed a review-of-sentence measure (S. 1540, 90th Cong., 1st Sess.). In the Organized Crime Control Act of 1970 (P.L. 91–452; 18 U.S.C. § 3576), appeal is permitted by both the government and the defendant from the district court's decision following a special dangerous offender sentencing hearing. In addition to the reasons usually advanced, review is deemed essential to carry out the sentencing approach of the Code, under which standards are imposed at several points for the exercise of discretion by the sentencing court, *e.g.*, circumstances which warrant imposition of upper range felony sentences (§ 3202).

The simple amendment to 28 U.S.C. § 1291 proposed here (italicized portion) is intended to reflect only the Commission's view that there should be some kind of sentence review and not a Commission recommendation as to its features. Among the possibilities are: permitting appeal from sentence like any other appeal; permitting the appellate court to decrease, but not increase, the sentence; permitting appeal by the government as well as the defendant; restricting appeal to specified kinds of sentences, *e.g.*, long prison terms, and permitting appeal only upon leave of the appellate court.

See Working Papers, pp. 1334–35, 1375.

Table I

DISPOSITION OF TITLE 18 PROVISIONS

Explanatory Note:

The first column below lists sections of existing Title 18, mostly in Part I-Crimes, all of which would be replaced by enactment of the Final Report provisions. The second column indicates the disposition of those sections: either the Final Report section or sections which are considered to cover the substance of all or the various parts of an existing provision or the Title of the United States Code to which it is proposed that all or part of an existing provision be transferred. The difference between existing Title 18 and the Final Report in approaches to defining crimes makes the disposition somewhat complex in some cases. In such cases this table provides only clues to disposition; for explanation and discussion one must look to the Final Report comment regarding the sections referred to, or to the relevant pages of the Working Papers. Note that offenses to be transferred from Title 18 can be classified no higher than a Class A misdemeanor (§ 3006) and may, in lieu of such classification, be made subject to the regulatory offense provision (§ 1006).

It should be borne in mind, particularly when considering the disposition of an offense with severe penalties into one or more minor offenses, that two bases for federal jurisdiction significantly expand the coverage of all provisions defining federal offenses. One, the so-called "piggyback" base (§ 201(b)), establishes federal jurisdiction over virtually all offenses against persons or property when committed in the course of committing another federal offense defined in this Code. The other (§ 202) establishes federal jurisdiction over an included offense where there is federal jurisdiction over the inclusive offense.

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9	210
10	219(a), (b)
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435	Title 15
436	1733; Title 18, Pt. E
437	1372; Title 25
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1861	1732; Title 43
1862–63	1712
Ch. 93. Public Officers and Employees	
1901	1732, 1737, 3501; Title 5
1902	1371–72
1903	1372
1904	1371–72
1905	1371, 3501
1906	1371; Title 12
1907–08	1371, 3501; Title 12
1909	1363; Title 12
1910	Title 28
1911	1732, 1737; Title 28
1912	1363, 1732, 3501
1913	Title 5
1915	Title 19
1916	1737; Title 5
1917	1352, 1512; Title 5
1918	———
1919	1352, 1732
1920	1352, 1732
1921	1732; Title 5
1922	1352, 1511, 1617; Title 5
1923	1732, 1734
Ch. 95. Racketeering	
1951	1001, 1004, 1721, 1732
1952	1361, 1403, 1701, 1732, 1822–24, 1831–32, 1841
1953	1831–32
1954	1758; Title 18, Pt. E
1955	1831; Title 18, Pt. D
Ch. 96. Racketeering Influenced and Corrupt Organizations	
1961–68	[not considered]
Ch. 97. Railroads	
1991	1001, 1711, 1713
1992	707, 1601–03, 1613, 1701–02, 1705
Ch. 99. Rape	
2031	1641–42
2032	1641, 1646

Title 18 Sections	Proposed Code Sections and Other Titles Involved
Ch. 101. Records and Reports	
2071	1356, 1705, 1732
2072	1753; Title 7
2073	1732–33, 1737, 1753
2074	Title 15
2075	Title 5
2076	Title 28
Ch. 102. Riots	
2101–02	206, 707, 1801–02
Ch. 103. Robbery and Burglary	
2111–12	1721
2113	1601–03, 1611–13, 1711, 1721, 1732
2114	1611–13, 1721
2115	1711
2116	1301, 1611–12, 1712–13
2117	206, 707, 1001, 1712–13
Ch. 105. Sabotage	
2151	1105
2152	1107, 1301, 1705, 1712
2153–54	1004, 1105–07
2155–56	1004, 1105, 1107
2157	———
Ch. 107. Seamen and Stowaways	
2191	1612, 1633
2192	1001, 1003–04, 1110, 1633, 1801, 1803
2193	1805
2194	1631–33
2195	Title 46
2196	1613
2197	1732, 1751, 1753
2198	1642
2199	1714, 1733
Ch. 109. Searches and Seizures	
2231	1301, 1366, 1611–13, 1616
2232	1301, 1323
2233	1301, 1323, 1401, 1732
2234–36	1521
Ch. 111. Shipping	
2271	1004, 1705, 1732
2272	1705, 1732
2273	1705
2274	1001–04, 1705; Title 46
2275	1601, 1611–13, 1701–05
2276	1001, 1705, 1711–13
2277–78	Title 46
2279	1712; Title 46

Title 18 Sections	Proposed Code Sections and Other Titles Involved
Ch. 113. Stolen Property	
2311	1735(7), 1736, 1741(f), 1754(k), (*l*)
2312	1732, 1736
2313	1732
2314–15	1732, 1751, 1752
2316–17	1732
2318	Title 15
Ch. 115. Treason, Sedition, and Subversive Activities	
2381	1101–02
2382	1118
2383–85	1103
2386	1104; Title 50
2387	1110
2388	1004, 1109–11, 1303
2389–90	1101–03, 1203
2391	1004, 1109–11, 1303
Ch. 117. White Slave Traffic	
2421	1841
2422–23	1631–32, 1841–42
2424	———
Ch. 119. Wire Interception and Interception of Oral Communications	
2510	1563; Title 18, Pt. D
2511	1561; Title 18, Pt. D; Title 47
2512	1562
Ch. 213. Limitations	
3281–91	701
Ch. 223. Witnesses and Evidence	
3487	1739(2)(a)
Ch. 227. Sentence, Judgment, and Execution	
3565	3303–04
3568	3205
3569	3303–04
3575	3202
3576	28 U.S.C. § 1291 (amended)
Ch. 231. Probation	
3651	3101–06
3653	3102–04; Title 18, Pt. D
Ch. 305. Commitment and Transfer	
4082(a)	3203(1)
Ch. 309. Good Time Allowances	
4161–66	———
Ch. 311. Parole	
4202	3401–02
4203	3402–05

Title 18 Sections	Proposed Code Sections and Other Titles Involved
4207	3403
4208(a)	3201(3), (4), 3401
4208(b)	3004, 3205(2)
Ch. 314. Narcotic Addicts	
4252	3004, 3205(3)
Ch. 402. Federal Youth Corrections Act	
5010(e)	3004
18 App. Unlawful Possession or Receipt of Firearms	
1201-03	1812; Title 26

Table II

OFFENSES OUTSIDE TITLE 18 AFFECTED BY CRIMINAL CODE

The first column below lists most of the sections outside Title 18 defining federal offenses which would be specially affected by provisions of the proposed new Federal Criminal Code. A section has been included in the list (1) if some or all of its provisions would be deleted because they are covered by Code provisions, (2) if the section is incorporated in the Code by reference, or (3) if a felony penalty provided in the section will be reduced at least to the Class A misdemeanor level by operation of § 3006. The second column lists the Code sections which affect the existing section. Since the principal purpose of any deletion is to eliminate duplication of a Code provision, substantial portions of existing provisions may have to be retained for other purposes, such as: to continue a minor offense in the regulatory Title, perhaps subject to the regulatory offense provision (§ 1006); to retain authority for civil penalties; to retain the prohibition of conduct which triggers a Code provision, *e.g.*, a prohibition against importation which is an element in smuggling (§ 1411). Determinations as to what provisions should be retained or how they should be classified, if offenses, have not been made by the Commission staff prepared suggestions will be found in volume III of the Working Papers. Not included in this table are the many minor offenses outside Title 18 which, pursuant to Code § 101, would be affected by the general and sentencing provisions of the Code, and which may be amended to be made subject to the regulatory offense provision (§ 1006). Explanation and discussion of the manner in which the Code provisions affect the existing sections listed may in many instances be found either in the Final Report comment regarding the Code section referred to or in the relevant pages of the Working Papers. Extensive discussions and compilations of offenses outside Title 18 may be found in the Working Papers.

United States Code Sections	Proposed Criminal Code Sections
Title 2 (The Congress)	
167g	Chapter 17
192	1342–49
252(b)	3006
269(b)	3003, 3006
Title 5 (Government Organization and Employees)	
304(b)	1341–49
552(a)(3)	1341–49
1507(a)	1341–49
8125	1341–49
Title 7 (Agriculture)	
13	1732, 3006
60	1301, 1356, 1751, 1758
87c	1321, 1361–63, 1366, 1381, 1611–14, 1617, 1751, 1753, 3003
87f(g)	1732
135f(c)	1371, 3006
150gg	1751–54
163	1411, 1751–54
195	1345, 3006
221	3006
270	1751–54, 1732, 1737, 3006
282	1411
472	1371
473	1352, 1356
473c–2	1301, 1352, 1356, 1361–64, 1753
491	1705, 1732
499n	1751–54
503	1352
511k	1301, 1352, 1356, 1361–63, 1381, 1751–54
608d	1371
608e–1	1411
608f	3006
610(g)	1372
615(b–3)(2)	1732
615(b–3)(3)	1352, 1401, 1751–54
953	1352
1011	1712
1156	1352
1157	1372
1373	1352, 1356, 1371
1379(i)	1732, 1751–54
1380n	1411
1622(h)	1751–54
1642(c)	1351–52

United States Code Sections	Proposed Criminal Code Sections
Title 7—Continued	
1986	1362–63, 1365, 1371–72
2023	1759
2150	1345
Title 8 (Aliens and Nationality)	
333–36	1222–23, 1632
1185	1221–25, 1352, 1751–54, 3006
1252	3006
1306(c), (d)	1352, 1751–54
1324	1222–23
1325	1221
1326	1221
1327	1221–23
1328	1221–23, 1841–42
Title 10 (Armed Forces)*	
2276	1352, 3006
4501	3006
7678	1301, 1352, 1705, 1732, 3006
9501	3006
Title 11 (Bankruptcy)	
205(p)	3006
Title 12 (Banks and Banking)	
92a	1732, 1737, 3006
95	1773
95a(3)	1204, 1411
378	3006
617	3006
630	1001, 1352, 1732, 1737, 1753
631	3006
1141j	1372, 3006
1464	*Cf.* 1345
1715z–4	3006
1725(g)	*Cf.* 1732, 1753
1847	1352
1909	1352
Title 13 (Customs)	
211	1364
213	1352
214	1371
Title 14 (Coast Guard)	
84	1301
638	3006
639	*Cf.* 1753

* Uniform Code of Military Justice provisions are not affected by the Code.

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United States Code Sections	Proposed Criminal Code Sections
Title 15 (Commerce and Trade)	
50	1323, 1342–49, 1352, 1356, 1371, 3006
54	*Cf.* 3003
76	1411, 3006
77	3006
77x	1772, 3006
77yyy	1772, 3006
78u(c)	1342–49
78ff	1772, 3006
79r	1342–49
79z–3	1352, 1356, 3006
80a–41	1342–49
80a–48	3006
80b–9	1342–49
80b–17	3006
158	1732, 3006
645	1352, 1372, 1732, 1737
714m	1352, 1732, 1737
717m	1342–49
717t	3006
1176	3006
1242	3006
1243	3006
1281	1701–09
1717	1352, 1732, 3006
Title 16 (Conservation)	
3, 9a, 26, 45e, 98, 117c, 123, 127, 146, 152, 170, 198c, 204c, 256b, 354, 395c, 403c–3, 403h–3, 404c–3, 408k, 430v, 460k–3, 460m–5, 471, 551, 606, 690g, 693a, 730	*Cf.* Chapter 17, esp. § 1705
114, 413, 433	1705, 1732
371	1732
414	1712
707	3006
825f	1342–49
825o	3006
831t	1352, 1732, 1737, 3006
Title 19 (Customs Duties)	
60	1361–62, 1732
283	1411
1304(e)	1411
1341	1301, Chapter 16
1436	1352, 1411, 1751, 1753
1464	1411, 3006

United States Code Sections	Proposed Criminal Code Sections
Title 19—Continued	
1465	1411, 3006
1586	1411
1620	1362–63, 3006
1708	1411, 3006
1919	1352, 1732
1975	1352, 1732
Title 20 (Education)	
581(4)(B)	3006
Title 21 (Food and Drugs)	
104	1411, 1704–05, 3006
117	1704–05
122	1704–05
127	1704–05
134e	1704–05
145	1613
158	1411, 1704–05
333(a)	1371, 1613, 1732, 1751, 1753, 3003
333(b)	1821–29
372a	1751
461	1371, 1611–19, esp. 1613, 1751
622	1361 et seq.
675–76	1301, 1411, 161–19, esp. 613, 1751
841	1822–23
842	1371–72, 1822–23; Title 21
843	1352, 1356, 1732, 1822–23; Title 21
844	1824, 1827
845	1822(3)
846	1001, 1004
848–51	3202
960	1822–23
961	1822–23; Title 21
962	3202(2)(a)
963	1001, 1004
Title 22 (Foreign Relations and Intercourse)	
253	3006
286f	1342–43, 1371–72
287c	1204
447(c)	1204
455	3006
618	1206, 1352, 3006
1179	1732, 1737, 3006
1182	1363
1198	1732, 1737
1199	3006
1200	1753

United States Code Sections	Proposed Criminal Code Sections
Title 22—Continued	
1203	1351–52, 1751
1623	1342–43
1631n	3006
1934	1352, 3006
Title 24 (Hospitals, Asylums and Cemeteries)	
154	1705, 1712, 1732
286	1705
Title 25 (Indians)	
70b	3006
Title 26 (Internal Revenue Code)	
5601	1401–09, 1352, 1751
5602	1401–09
5603	1401–09, 1352
5604(a)	1401–09, 1751–52
5605	1401–09
5606	1401–09
5607	1401–09
5608	1401–09
5661	1401–09
5671	1401–09
5672	1401–09
5674	1401–09
5676(1)(2)(3)	1401–09, 1751–52
5681	1403–09
5682	1401–09
5685	1403–09, 1813, 3006
5686	1403–09
5689	1401–09, 1751–54
5691	1401–09
5762(a)	1401–09, 1352
5861	1813, 3006
5871	1813, 3006
7201	1401–09
7202	1401–09
7203	1401–09
7204	1402
7206	1352, 1401
7207	1352
7208	1401–09, 1751–52
7210	1342
7211	1732
7212	1301, 1366, 1732
7213	1371
7214	1352, 1361–63, 1521, 1732, 3006
7215	1402

United States Code Sections	Proposed Criminal Code Sections
Title 26—Continued	
7231	1402
7232	1401–09, 1352
7233	1401–09, 3006
7234	1401–09, 1411, 3006
7235	1403, 3006
7236	1403, 3006
7239	1401–09
7240	1372
7241	1352, 1401–09
Title 27 (Intoxicating Liquors)	
206	1401–09
Title 29 (Labor)	
162	1301, 1611–19
439(b)	1352
461	1352
501(c)	1732
522(b)	1617, 1732
Title 30 (Mineral Lands and Mining)	
689	1352, 1732, 1734
819	1352, 1613, 3003
Title 31 (Money and Finance)	
395	3006
665(i)(1)	1732, 1737, 3006
1018	1362–63
Title 33 (Navigation and Navigable Waters)	
368	1613, 3006
447	1361–63
507	1732
682	1701–05
990	1352, 1361, 1732, 1737
Title 35 (Patents)	
186	1112–15, 3006
Title 36 (Patriotic Societies)	
379	1732
Title 38 (Veterans' Benefits)	
787	1352, 1732
3405	1732, 1737, 3006
3501	1732, 1737
3502	1732, 1734
Title 40 (Public Buildings, Property and Works)	
13m	Chapter 17
193h	Chapter 17
193s	Chapter 17

United States Code Sections	Proposed Criminal Code Sections
Title 41 (Public Contracts)	
54	1732, 1758, 3006
Title 42 (Public Health and Welfare)	
261(a)	1303, 1306, 1309, 1821–29, 3006
408	1352, 1732
1306	1371
1307	1352, 1381, 1732
1713	1352, 1732
1874	1352, 3006
1973i, 1973j	1352, 1511, 1531
1973aa–3	1352, 1511, 1531
1973bb–2	1511, 1531
1974	1356
1974a	1356, 1732
1995	1341–49
2000e–8(e)	1371
2000g–2	1371
2272	1121
2273	1105–07, 1112, 3006
2274	1112–15
2275	1116
2276	1105–07, 1112, 1116, 1121
2277	1112–16
2278a	1712
2515	1352, 1356, 1371–72, 1732, 1737, 3006
2703	1732
3188	3006
3220	1352, 1732, 3006
3631	1512–14, 1601–03, 1611–19
Title 43 (Public Lands)	
104	1342–43
183	3006
254	1352, 1362–63, 1732
362	1705
1191	1751–54, 1732
Title 45 (Railroads)	
60	1321
81	3006
228m	1352
359	1352, 1732
Title 46 (Shipping)	
83i	1352, 1732
142	3006
143	3006

United States Code Sections	Proposed Criminal Code Sections
Title 46—Continued	
170	1352, 1601–03, 1613
229e	1352, 1751–54
231	1352, 1751–54
239	1321, 1346, 1351–52
369	1301, 1356
403	1352
408	1751–54
410	1751–54
413	1613, 3006
481	1613, 3006
526m	1613
658	1613
701	1411, 1611–12, 1616, 1705, 1732
728	3006
808	3006
820	1352
835	3006
838	1352
839	1352
941	1732, 1738, 3006
1124 (1228)	1342–43
1171 (1228)	1352
1228	3006
Title 47 (Telegraphs, Telephones and Radiotelegraphs)	
21	1705
27	1301, 1611–13, 3006
220	1352, 1356, 3006
381	1613
409(m)	1342–45
501	3003, 3006
506	1617, 1732
508	1758
606	1105–07, 1617, 1701–05
Title 49 (Transportation)	
1 (17)	1758
10	1732–33, 3006
20	1352, 1356, 3006
20a	3006
41	3006
46	1342–49
121	1751–54, 1732
1472	1323, 1342–43, 1352, 1371, 1601–09, 1611–19, 1631–39, 1641–50, 1721, 1731–41, 1751–54, 1805, 1852

United States Code Sections	Proposed Criminal Code Sections
Title 50 (War and National Defense)	
167k	1105, 1121, 3006
192	1105–07, 1205, 3006
210	1002, 1103, 1352, 1732, 3006
217	3006
783(a)	1103–04, 1301
783(b)–(d)	1112–16
794	1352, 3006
797	1705, 1712
822	1302, 1306, 3006
823	1118, 1306, 3006
824	1301
855	1122
Title 50 App. (War and National Defense—Appendix)	
3(a)	1204, 3006
3(b)	3006
3(c), (d)	1117, 3006
5(b)	1204, 3006
12	3006
16	1117, 1204, 3006
19	1352
327	1371, 3006
462	1108–09, 3006
468	3006
643a	1371
643b	1341–49
783	1112
1152	1341–49, 1371
1191(c), 1193(h), 1215(e)	1352, 3006
1941d	1372
2160(f)	1371–72
2213a	1732
2405(a)	3003, 3006
2405(b)	1204

Table III

NOTABLE CHANGES FROM STUDY DRAFT TEXT

Study Draft Sections	
101	Transitional provisions on the applicability of the Code were deleted. The second sentence of Final Report subsection (2) was added.
102	Final Report paragraph (a)(i) and the second phrase of Final Report paragraph (d) were added.
103	The second sentence of Final Report subsection (2) was added.
104	Study Draft § 104 on the investigative jurisdiction of agencies will appear in Part D of Title 18. Final Report § 104 is new.
109	The definitions in the following paragraphs of Final Report § 109 were revised or added since the Study Draft: (a), (e), (f), (g), (i), (j), (k), (m), (q), (t), (u), (v), (w), (x), (y), (z), (aa), (ab), (ae), (ah), (ai), (ak), and (am).
201	Application of paragraph (b) was limited to offenses defined in this Code. Candidates for President and Vice President, members of Congress and federal judges were added to Final Report paragraph (c) as persons protected at all times.
207	Final Report paragraphs (a) and (c), and the references to "foreign" prosecutions, were added.
208	The list of officials in paragraph (a) was expanded to correspond to the list in § 201(c). Fraud, theft and obstruction of a government function were added to paragraph (c).
209	The second sentence of Final Report subsection (1) was added.
210	A provision on Indian jurisdiction appears as Final Report § 211(1). Final Report § 210 was part of Study Draft § 213. Paragraphs (d) and (g) of Final Report § 210 were added.
211	A provision on Canal Zone jurisdiction appears as Final Report § 211(2).
213	Renumbered as Final Report § 219. Paragraph (a) of Study Draft § 213 is Final Report § 210. Paragraph (e) of Study Draft § 213 was expanded to include production credit associations and land bank associations.
301	"Voluntary" was deleted from subsection (1) Subsection (2) was revised in terms of legal duty, rather than a duty provided by statute.

Table III—Continued

Study Draft Sections	
302	The clause to the effect that motive is unimportant was deleted from subsection (1)(a). Subsection (1)(f) defining "culpably" was deleted. Subsections (2) and (6) were consolidated into Final Report subsection (2). The culpability required for attendant circumstances was changed to "knowingly" in subsection (3)(a). Grading was added to subsection (3)(c). Subsection (5) was revised to cover the two situations noted in the comment to Final Report § 302.
401	The affirmative defense of renunciation, contained in Study Draft subsection (3), was deleted.
402	Study Draft subsection (1)(a) appears in brackets and Final Report subsection (1)(a) was added. In subsection (1)(c) and (d) "in furtherance of its affairs" was changed to "within the scope of his employment".
403	This section was deleted. Policy regarding the matters covered by this section is expressed in Final Report § 406(2).
404	Renumbered as Final Report § 403. In subsection (4), the clause that the person "manifests his assent" was added.
405	This section was deleted. Subsection (1)(a) appears as the bracketed alternative of Final Report § 3007. The principal text of Final Report § 3007 was added. Subsection (2) of Study Draft § 405 is Final Report § 3502.
406	Renumbered as Final Report § 409. "Member" was deleted from the definition of "agent". Final Report subsection (2) was added.
501	The age of mandatory juvenile treatment was lowered to 15 for certain crimes; and the provisions on discretionary treatment of those under 18 were added to this section instead of Part E of Title 18.
502	Subsection (3) was added to subsection (1). The defenses in subsection (4) (Final Report subsection (3)) were made affirmative defenses.
503	The second sentence of Final Report § 503 was added.
602	Final Report subsection (3) was added.
603	The provision in Final Report paragraph (b) permitting one to resist clearly excessive force was added.
605	Final Report paragraph (d)(iii) was added.

Table III

Study Draft Sections	
607	The word "only" was deleted from subsection (2), Final Report bracketed subsection (2)(a) was added. Paragraphs (b), (c) and (d) of subsection (2) now apply to any felony involving violence. In subsection (2)(f) "is not likely to create" was changed to "does not carry with it an unreasonable." Final Report subsection (2)(h)(iii) was added.
608	This section was deleted.
609	Renumbered as Final Report § 608.
610	Renumbered as Final Report § 609. The phrase "good faith" was added.
611	Renumbered as Final Report § 610.
619	"Hurling a destructive device" was added to paragraph (b).
701	Limitations was changed from a "defense" to a "bar". Subsection (2)(a) was revised to spell out which crimes have the ten year limitation period. All misdemeanors and infractions were made subject to a uniform three year period rather than some being subject to a five year period and others a two year period. The definition of "criminal syndicate" was added to subsection (4) from Study Draft § 1005 (now deleted). The period for commencing a new prosecution in subsection (5) was lengthened from thirty days to three months.
702	The phrase "or acting in the expectation of reward, pecuniary or otherwise, for aiding law enforcement" was deleted from subsection (3).
703	Subsections (3), (4) and (5) were deleted.
——	Final Report § 706 is new.
706	Renumbered as Final Report § 707.
707	Renumbered as Final Report § 708. The provision permitting the United States Attorney General to certify a subsequent state prosecution was deleted.
708	Renumbered as Final Report § 709.
1001	Subsection (3) was deleted and now appears in Final Report § 1005.
1003	The requirement of an overt act was added to subsection (1). Subsection (4) was deleted and now appears in Final Report § 1005.
1004	The second sentence of Final Report subsection (1) was added. The third sentence of subsection (3) was deleted. Subsection (5) was deleted and now appears in Final Report § 1005.

Table III—Continued

Study Draft Sections	
1005	This section was deleted. Final Report § 1005 is new.
1006	The second sentence of Final Report subsection (1) and the second sentence of Final Report subsection (2)(b) were added. The second sentence of subsection (2)(c) and subsection (4) were deleted.
1101	The words "or facilitates" and the "except that" clause at the end of Final Report § 1101 were added.
1102	The defense in subsection (2) was made an affirmative defense.
1103	Consolidated with Study Draft § 1104. Anticipatory and facilitating conduct was deleted from subsection (1). Subsection (3) was deleted.
1104	Consolidated with Study Draft § 1103. Subsection (2) was revised as Final Report subsection (3).
1105	Renumbered as Final Report § 1104.
1106	Renumbered as Final Report § 1105. The reference to "a vital public facility" in Final Report subsection (1)(a) was added. Final Report subsection (1)(d) was added.
1107	Renumbered as Final Report § 1106.
1108	Renumbered as Final Report § 1107. The words "which is, in fact" were added to avoid requiring culpability as to the value of the loss caused.
1109	Renumbered as Final Report § 1108. This section was revised for clarification. Final Report subsection (2) was added.
1110	Renumbered as Final Report § 1109.
1111	Renumbered as Final Report § 1110. Paragraphs (a), (b) and (c) of Final Report subsection (2) were added.
1113	Renumbered as Final Report § 1112. Subsection (1) was revised to correspond more closely to existing law. In subsection (2) "including security intelligence" was substituted for "military or diplomatic codes". In subsection (4)(a): subparagraph (v) was expanded from "military and diplomatic codes" to "security intelligence of the United States," Final Report subparagraph (vi) was added, and Study Draft subparagraph (vi), renumbered (vii), was revised to correspond more closely to existing law. The definitions in paragraphs (b) and (d) of Final Report subsection (4) were added.

Table III

Study Draft Sections	
1114	Renumbered as Final Report § 1113.
———	Final Report § 1114 is new.
1115	"Former public servant" was added to the coverage of the section. Final Report subsection (2) was also added.
1116	Paragraph (b) was expanded to include solicitations of §§ 1112 and 1114.
1120	Prisoners of allies of the United States were added to the coverage of this section.
1121	Title 42 U.S.C. § 2276 was added to the coverage of this section. The Class C felony grading and the defense were deleted.
———	Final Report § 1129 is new.
1221	Reasonable belief was deleted as an affirmative defense under subsection (3)(a). Culpability was added to subsection (2)(a).
1225	Final Report paragraph (b) was added.
1229	Final Report subsection (1) was added.
1304	Subsection (2) was revised to require culpability for grading circumstances.
1305	Coverage of releases other than under the Bail Reform Act of 1966 was deleted.
1310	Conspiracy was added to subsection (1)(a).
1321	Subsection (3)(b) was revised for clarification. Subsection (4) was deleted.
1322	Jurisdiction was extended to when the law enforcement officer is a federal public servant.
1323	Subsection (2) was deleted. The words "intentionally and" were deleted from Study Draft subsection (3) (Final Report subsection (2)).
1325	The "unless" clause in the definition of "near" in Final Report subsection (1) was added.
1327	The definition of "retained" in subsection (3) was deleted and was incorporated in Final Report subsection (1).
1341	The term of imprisonment available for summary contempt was raised from the suggested five or thirty days to six months. The bracketed "except" clause at the end of subsection (4) was deleted.
1345	Subsection (2) was deleted and the word "lawful" was added to subsection (1), to correspond to the contempt standard.
1349	Lack of certification in subsection (5) was changed from an affirmative defense to a bar, but the burden of proof has been explicitly placed on the defendant.
1351	Final Report bracketed subsection (2) was added. Subsection (3) was revised for clarification.

Table III—Continued

Study Draft Sections	
1352	Final Report subsection (2)(e) was added. Subsection (4) was revised to retain the language of existing law.
———	Final Report § 1353 is new.
1353	Renumbered as Final Report § 1354. The offense was changed from a Class B misdemeanor to a Class A misdemeanor.
1354	Renumbered as Final Report § 1355.
1355	Renumbered as Final Report § 1356.
1361	Subsection (3) was revised for clarification.
1368	Subsection (2) was revised to limit jurisdiction to specified bases under § 201, as noted in the comment to Final Report § 1368. Plenary jurisdiction when an elected local public servant is involved was deleted.
1381	The word "federal" was deleted from subsection (1). Final Report subsection (5) was added.
1401	The word "excise" was added to subsection (1)(e) and (f). Final Report subsection (2) was added.
1411	Making a false statement with intent to deceive was added to subsection (1)(b). "Absolutely or conditionally" was added to subsections (1)(d) and (e) and subsection (2)(d).
1501	This section was deleted and was replaced by Final Report §§ 1501 and 1502.
1511 to 1515	"By force or threat of force" and "or interferes with," from existing law, and the bracketed phrase "or by economic coercion" were added to the introductory clause.
———	Final Report § 1516 was added.
1521	The section was changed to apply only to federal public servants and to persons acting under color of federal law, and the culpability requirement was changed from "knowingly" to "intentionally."
1535	"Or armed men" was deleted, as noted in the comment to Final Report § 1535.
1541	This section was deleted, with a recommendation that the existing law from which it was derived be transferred to another Title.
1542	Renumbered as Final Report § 1541.
1561	Final Report subsection (2)(d) was added.
1601	Alternative B was chosen. In paragraph (c)(i) "request, command, importune, cause" was changed to "command, induce, procure, counsel." The last sentence of Final Report § 1601 was added.

Table III

Study Draft Sections	
1612	Final Report subsection (1)(d) was added.
1613	Jurisdictional base § 201(b), as changed in the Final Report, was deleted; and the scope of Study Draft § 201(b), applying to offenses defined both inside and outside the Code, was added.
1615	Grading was changed from a Class A misdemeanor to a Class C felony. The last sentence of Final Report § 1615 was added.
1618	The grading of subsection (1)(a) was changed from a Class B misdemeanor to a Class A misdemeanor. Telephone threats were added to subsection (1)(a).
1634	The last sentence of Final Report subsection (1) was added. Subsection (3) was deleted, for transfer to another part of Title 18.
1648	Subsection (3) was deleted. Subsection (b) was renumbered as Final Report subsection (4). Subsection (5) was placed in brackets.
1701	Maintaining a fire and destroying a substantial part of a building were added to subsection (1). Jurisdiction was expanded when an explosive or destructive device is used.
1702	Maintaining a fire was added to subsection (1). Any substantial part of a building was added to subsection (1)(b).
1703	Maintaining a fire was added to subsection (1).
1705	Provisions relating to interruption or impairment of public services were transferred to Final Report § 1706. Grading was revised, and jurisdiction was extended when an explosive or destructive device is used.
——	Final Report § 1706 is new.
——	Final Report § 1708 is new.
1709	The issue of consent was deleted from paragraph (b) for treatment under Final Report § 1708.
1719	The phrase "at all times" was deleted from paragraph (c).
1721	The words "or menaces" were added to subsection (1).
1731	Study Draft subsection (2) was revised for clarification.
1736	Unauthorized use which exceeds $500 in value was made a Class C felony in Final Report subsection (3).
1737	The words "director, agent, employee of, or a person controlling" were added.

Table III—Continued

Study Draft Sections	
1739	The definition of spouse was added to subsection (1)(b). Final Report subsection (2)(c) was added.
1740	The limitation to threats to inflict serious bodily injury in subsection (3) was deleted. Subsection (4)(h) was revised to limit offenders to persons connected with a small business investment company. Subsection (4)(o) was deleted as unnecessary; and subsection (4)(p) was deleted because existing security fraud law was retained in Final Report § 1772. Final Report subsection (4)(o) was added.
1741	The "unless" clause in Final Report paragraph (a)(i) was added to retain existing law.
1751	Final Report subsection (2)(b)(v) and Final Report subsection (3)(b)(ii) were added. The words "or part thereof" were added to subsection (3)(e).
1754	The word "certification" was added to paragraph (b)(ii). The words "a postage meter stamp or" were added to paragraph (j).
1756	Final Report subsection (1)(e) and subsection (2) were added.
1758	Subsection (3)(d) was generalized to include all interstate facilities.
1759	Final Report § 1759 is new. Study Draft § 1759 was renumbered as Final Report § 1771. Subsection (4) of Final Report § 1771 was added.
1760	Renumbered as Final Report § 1772. Title 15 U.S.C. § 77q(a) and Rule 10 b–5 were added to the coverage of this section. Subsection (2) was deleted.
——	Final Report § 1773 is new.
1801	In paragraphs (a) and (b) of subsection (1), the requirement that the five persons being addressed be in a group was deleted. "Create" was added to the proscribed conduct in subsection (1)(a). Subsection (1)(c) was deleted, in view of the general conspiracy offense. The bracketed alternative of "ten" was added to the definition of "riot." The concept of "current or impending riot" in subsection (2) was replaced by the concept of substantial likelihood that the conduct will imminently produce a violation. Final Report subsection (3) was added. Jurisdiction was revised so as not to require that a riot actually ensue.

Table III

Study Draft Sections	
1802	The requirement in subsection (1) that the riot be current or impending was deleted. Final Report subsection (1)(c) was brought over from Study Draft § 1803.
1803	The second sentence of subsection (1) was deleted and "a Class B misdemeanor" was substituted for "an offense."
1804	The last two sentences of subsection (1) were deleted.
1811	This section was deleted. Final Report § 1811 is new.
1812	This section was deleted. Final Report § 1812 is new.
1813	This section was deleted. Final Report § 1813 is new.
1814	This section was deleted. Final Report § 1814 is new.
1822	Subsection (4) was deleted.
1824	Subsection (2) was deleted. The bracketed version of the offense in Final Report § 1824 was added.
1829	"Schedule IV" was added to paragraph (c)(i). "Schedule IV" was changed to "Schedule V" in paragraph (d).
1844	This section was deleted.
1851	The definition of "obscene" in subsection (1) was deleted. The age in bracketed paragraph (2)(c) was raised from "sixteen" to "eighteen." Final Report subsection (3) was added.
1853	This section was deleted.
——	Final Report § 1861 is new.
3001	The definition of "court" in Final Report subsection (1) was added. Final Report bracketed subsection (6) was adapted from Study Draft § 3004.
3003	Subsection (2) was revised for clarification.
3004	This section was deleted. Its substance appears in brackets as Final Report § 3001 (6).
3005	Renumbered as Final Report § 3004. Persistent and consecutive misdemeanor sentences of more than one year were added to this section. The concept of provisional maximum sentence was added.
3006	Renumbered as Final Report § 3005. The "unless" clause of Final Report subsection (1) was added.

389-626—71——25

Table III—Continued

Study Draft Sections	
3007	Renumbered as Final Report § 3006, and revised to deal only with periods of imprisonment, and not with fines.
——	Final Report § 3007 is new. It is adapted from Study Draft § 405.
3101	In subsection (2) "necessary" was changed to "the more appropriate sentence." The phrase that the converse of the factors should be considered where appropriate was added to subsection (3). Paragraphs (m) and (n) and the last sentence of Final Report subsection (3) were added.
3102	Subsection (3) appears as Final Report § 3103(4).
3103	Paragraph (h) of Final Report subsection (2) was added. Study Draft subsection (4) appears as Final Report § 3106. Final Report subsection (4) was Study Draft § 3102(3). The last phrase of subsection (5) was deleted.
——	Final Report § 3106 is new. It was taken from Study Draft § 3103(4).
3201	Study Draft subsections (1), (2) and (3) were deleted. Final Report subsections (1) and (2) are new. Study Draft subsections (4) and (5) are Final Report subsections (3) and (4). Principal substantive changes include permitting prison components of less than 3 years in felony sentences and establishing parole components which relate in length to the prison component actually imposed, rather than the class of offense committed.
3202	This section was revised to incorporate the dangerous special offender sentencing of the Organized Crime Control Act of 1970.
3203	This section was deleted. Certain aspects of it may be found in Final Report § 3202(2)(d).
3204	This section was deleted. Its provisions may be found in Final Report § 3201(1).
3205	Renumbered as Final Report § 3203.
3206	Renumbered as Final Report § 3204. Final Report subsection (2)(a) was added. Study Draft subsection (3) is Final Report subsections (3), (4) and (6). Aggregation of felonies into the next higher class was added. The last sentence of Study Draft subsection (4) was deleted. Study Draft subsection (5) (Final Report subsection (7)) was revised to conform to the revised method of computing parole.
3207	Renumbered as Final Report § 3205.

Table III

Study Draft Sections	
3302	Subsection (2) was deleted. Subsection (3) was consolidated with subsection (1).
3303	The section was revised to provide for remission of a part of the fine rather than revocation of the entire fine.
3403	Subsection (2) was revised to provide for "discharge from supervision" rather than "termination of parole." Subsection (5) was deleted.
3404	Paragraph (2)(f) is new.
———	Final Report § 3502 is new.
3502	Renumbered as Final Report § 3503.
3503	Renumbered as Final Report § 3504. This section was revised for clarification.
3504	Renumbered as Final Report § 3505. Final Report paragraph (f) was added.
———	Final Report § 3601 is new.
[3601]	The last two sentences of Final Report [§ 3601] were added. The crimes which are subject to this bracketed Chapter were added to the first sentence.
[3602]	This bracketed section was deleted.
[3604]	Renumbered as Final Report [§ 3602].
[3605]	Renumbered as Final Report [§ 3604]. The last sentence of subsection (1) was deleted. The test of ordinary standards of morality was added to subsection (2)(f). The words "or has a substantial history of serious assaultive or terrorizing criminal activity" were added to subsection (4)(a). The crimes of usurping control of an aircraft, espionage and sabotage were added to subsection (4)(d). Paragraphs (g) and (h) of Final Report subsection (4) were added and are adapted from the Study Draft limitations on capital murder.
28 U.S.C. § 1291	The word "modify" was substituted for "reduce it on the ground that it is excessive."

APPENDIX A

Public Law 89–801
89th Congress, H.R. 15766
November 8, 1966

AN ACT

To establish a National Commission on Reform of Federal Criminal Laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the National Commission on Reform of Federal Criminal Laws is hereby established.

MEMBERSHIP OF COMMISSION

SEC. 2. (a) The Commission shall be composed of—

(1) three Members of the Senate appointed by the President of the Senate,

(2) three Members of the House of Representatives appointed by the Speaker of the House of Representatives,

(3) three members appointed by the President of the United States, one of whom he shall designate as Chairman,

(4) one United States circuit judge and two United States district judges appointed by the Chief Justice of the United States.

(b) At no time shall more than two of the members appointed under paragraph (1), paragraph (2), or paragraph (3) be persons who are members of the same political party.

(c) Any vacancy in the Commission shall not affect its powers but shall be filled in the same manner in which the original appointment was made, and subject to the same limitations with respect to party affiliations as the original appointment was made.

(d) Seven members shall constitute a quorum, but a lesser number may conduct hearings.

DUTIES OF THE COMMISSION

SEC. 3. The Commission shall make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice. It shall be the further duty of the Commission to make recommendations for revision and recodification of the criminal laws of the United States, including the repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the ends of justice.

COMPENSATION OF MEMBERS OF THE COMMISSION

SEC. 4. (a) A member of the Commission who is a Member of Congress, in the executive branch of the Government, or a judge shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission.

(b) A member of the Commission from private life shall receive $75 per diem when engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

THE DIRECTOR AND STAFF

SEC. 5. (a) The Director of the Commission shall be appointed by the Commission without regard to the civil service laws and Classification Act of 1949, as amended, and his compensation shall be fixed by the Commission without regard to the Classification Act of 1949, as amended.

(b) The Director shall serve as the Commission's reporter, and, subject to the direction of the Commission, shall supervise the activities of persons employed under the Commission, the preparation of reports, and shall perform such other duties as may be assigned him within the scope of the functions of the Commission.

(c) Within the limits of funds appropriated for such purpose, individuals may be employed by the Commission for service with the Commission staff without regard to civil service laws and the Classification Act of 1949.

(d) The Chairman of the Commission is authorized to procure services to the same extent as is authorized for departments by section 15 of the Act of August 2, 1946 (5 U.S.C. 55a), at rates not to exceed $75 per diem for individuals.

ESTABLISHMENT OF THE ADVISORY COMMITTEE

SEC. 6. (a) There is hereby established a committee of fifteen members to be known as the Advisory Committee on Reform of Federal Criminal Laws (hereinafter referred to as the "Advisory Committee"), to advise and consult with the Commission. The Advisory Committee shall be appointed by the Commission and shall include lawyers, United States attorneys, and other persons competent to provide advice for the Commission.

(b) Members of the Advisory Committee shall not be deemed to be officers or employees of the United States by virtue of such service and shall receive no compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them by virtue of such service to the Commission.

GOVERNMENT AGENCY COOPERATION

SEC. 7. The Commission is authorized to request from any department, agency, or independent instrumentality of the Government any information and assistance it deems necessary to carry out its functions under this Act; and each such department, agency, and instru-

mentality is authorized to cooperate with the Commission and, to the extent permitted by law, to furnish such information and assistance to the Commission upon request made by the Chairman or any other member when acting as Chairman.

REPORT OF THE COMMISSION; TERMINATION

SEC. 8. The Commission shall submit interim reports to the President and the Congress at such times as the Commission may deem appropriate, and in any event within two years after the date of this Act, and shall submit its final report within three years after the date of this Act. The Commission shall cease to exist sixty days after the date of the submission of its final report.

ADMINISTRATIVE SERVICES

SEC. 9. The General Services Administration shall provide administrative services for the Commission on a reimbursable basis.

AUTHORIZATION OF APPROPRIATIONS

SEC. 10. There are hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts, not to exceed a total of $500,000, as may be necessary to carry out the provisions of this Act.

Public Law 91-39
91st Congress, H.R. 4297
July 8, 1969

AN ACT

To amend the Act of November 8, 1966.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8 of the Act of November 8, 1966 (80 Stat. 1516) is amended by striking out "within three years after the date of this Act" and inserting in lieu thereof "within four years after the date of this Act".

SEC. 2. Section 10 of such Act is amended by striking out "not to exceed a total of $500,000" and inserting in lieu thereof "not to exceed a total of $850,000", and adding at the end thereof a new sentence as follows: "Authority is hereby granted for appropriated money to remain available until expended."

OCTOBER 12, 1970.

Hon. EDMUND G. (PAT) BROWN,
Chairman, The National Commission on Reform of Federal Criminal Laws, 1111 20th Street NW., Room 531, Washington, D.C. 20036

DEAR CHAIRMAN BROWN: I herewith enclose a copy of the resolution on the final report of the National Commission on Reform of Federal Criminal Laws adopted by the Committee on the Judiciary of the House of Representatives on September 29, 1970, at a meeting of the

full committee on that date. This resolution, unanimously adopted, has been spread upon the minutes of that meeting and the staff director's certified copy is herewith attached to this communication.

With cordial regards, I am,

Sincerely yours,

Emanuel Celler
Emanuel Celler, Chairman.

RESOLUTION: COMMITTEE OF THE JUDICIARY
HOUSE OF REPRESENTATIVES
ON THE
FINAL REPORT OF
THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

Whereas, Public Law 89-801 created the National Commission on the Reform of Federal Criminal Laws, charging such Commission to make a full and complete review of the statutes and case law of the Federal system of criminal justice; and

Whereas, one-half of the members of said Commission (six members) are also Members of Congress, to wit, three Members of the Senate and three Members of the House of Representatives; and

Whereas, Public Law 91-39 provided that said Commission should submit its Final Report by November 8, 1970 but not terminate until sixty days thereafter, to wit on January 8, 1971; and

Whereas, A Study Draft of a Federal Criminal Code and accompanying Working Papers were published by August 1970 and comment thereupon by government agencies and other interested parties is still being received and considered by the Commission preliminary to the drafting of its Final Report; and

Whereas, The forthcoming Congressional elections and the recent large volume and paramount importance of Congressional legislative business has precluded and will impede the full participation of the six Congressional members of the Commission and the attainment of a quorum at Commission meetings wherein the provisions of the Final report were to be voted upon prior to November 8, 1970;

Therefore, Be It Resolved, That it is the sense of the Committee on the Judiciary that the Commission should submit its Final Report by January 8, 1971, and that such submission shall be deemed compliance with the statutory mandate that such Final Report be submitted by November 8, 1970.

OCTOBER 13, 1970.

HON. EDMUND G. BROWN,
The National Commission on Reform of Federal Criminal Laws,
1111 20th Street NW.,
Washington, D.C. 20036

DEAR MR. CHAIRMAN: Enclosed for the apropriate attention of the Commission is a copy of a Resolution of the Judiciary Committee of October 6, 1970, in reference to the submission date of the Final Report of the National Commission on the Reform of Federal Criminal Laws.

Sincerely,

James O. Eastland.

RESOLUTION: COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON THE
FINAL REPORT OF
THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

Whereas, Public Law 89–801 created the National Commission on the Reform of Federal Criminal Laws, charging such Commission to make a full and complete review of the statutes and case law of the Federal system of criminal justice; and

Whereas, one-half of the members of said Commission (six members) are also Members of Congress, to wit, three Members of the Senate and three Members of the House of Representatives; and

Whereas, Public Law 91–39 provided that said Commission should submit its Final Report by November 8, 1970 but not terminate until sixty days thereafter, to wit on January 8, 1971; and

Whereas, A Study Draft of a Federal Criminal Code and accompanying Working Papers were published by August, 1970 and comment thereupon by government agencies and other interested parties is still being received and considered by the Commission preliminary to the drafting of its Final Report; and

Whereas, The forthcoming Congressional elections and the recent large volume and paramount importance of Congressional legislative business has precluded and will impede the full participation of the six Congressional members of the Commission and the attainment of a quorum at Commission meetings wherein the provisions of the Final Report were to be voted upon prior to November 8, 1970,

Therefore, Be It Resolved, That it is the sense of the Committee on the Judiciary that the Commission should submit its Final Report by January 8, 1971, and that such submission shall be deemed compliance with the statutory mandate that such Final Report be submitted by November 8, 1970.

OCTOBER 29, 1970.

Hon. JOHN N. MITCHELL,
Attorney General,
U.S. Department of Justice,
Washington, D.C. 20530

DEAR MR. ATTORNEY GENERAL: The National Commission on Reform of Federal Criminal Laws respectfully requests to be advised by the President, or alternatively the Attorney General on behalf of the President and as his legal advisor, whether it is agreeable that the Commission submit its Final Report to the President by January 8, 1971, instead of by November 8, 1970 as originally contemplated.

The reasons for this request and pertinent background materials are set forth in the attached identical Resolutions of the House and Senate Judiciary Committees. These Resolutions were secured by the Commission since it is mandated by law to submit its Report to the

Congress. A similar authorization from or on behalf of the President is being sought herein since the Commission is likewise mandated to report to the President.

Very truly yours,

Edmund G. Brown
Edmund G. Brown, Chairman.

NOVEMBER 3, 1970.

HON. EDMUND G. (PAT) BROWN,
Chairman, National Commission on Reform of Federal Criminal Laws,
1111 20th Street NW.,
Washington, D.C. 20036

DEAR MR. CHAIRMAN: The Attorney General has asked that I respond to your letter of October 29.

Please be advised that the Department of Justice, the department most intimately involved in any reform of our nation's criminal laws, has no objection to the brief additional period afforded the Commission to prepare and submit its final report.

It is my understanding that both the Senate and House Committees on the Judiciary have indicated that the two month postponement of the submission of the final report is agreeable to the Committees.

Looking forward to the opportunity to have the report examined in detail, I remain,

Sincerely,

Richard G. Kleindienst
Richard G. Kleindienst,
Deputy Attorney General.

APPENDIX B

BIOGRAPHIES OF COMMISSION MEMBERS

EDMUND G. BROWN, *Chairman.* Governor Brown was appointed Chairman of the Commission by President Johnson. He is a former San Francisco District Attorney and California Attorney General and served as Governor of California for eight years. He practices law as a partner in the Beverly Hills, California law firm of Ball, Hunt, Hart, Brown and Baerwitz.

RICHARD H. POFF, *Vice Chairman.* Congressman Poff of Radford, Virginia, author of the Act which created the Commission, was chosen Vice Chairman by his fellow Commission members. He has served in the House of Representatives since his election in 1952 and is a member of the Judiciary Committee.

GEORGE C. EDWARDS, JR. Judge Edwards, of Detroit, Michigan, serves on the United States Court of Appeals for the Sixth Circuit. He is a former Michigan Supreme Court Justice and Police Commissioner of Detroit. He is Chairman of the Committee on Administration of Criminal Laws of the Judicial Conference of the United States and is a member of its Advisory Committee on Rules of Criminal Procedure.

SAM J. ERVIN, JR. Senator Ervin, of North Carolina, is a member of the Senate Judiciary Committee and Chairman of its Subcommittees on Constitutional Rights, Revision and Codification and Separation of Powers. Before entering the Senate in 1954, Senator Ervin served as a Judge of the Burke County (North Carolina) Criminal Court, a Judge on the North Carolina Superior Court, and Associate Justice of the North Carolina Supreme Court. He is a former chairman of the North Carolina Commission for Improvement of the Administration of Justice. Senator Ervin also served in the House of Representatives.

A. LEON HIGGINBOTHAM, JR. Judge Higginbotham, of Philadelphia Pennsylvania, serves on the United States District Court for the Eastern District of Pennsylvania. He is a former Commissioner of the Federal Trade Commission, Assistant District Attorney for Philadelphia and Special Deputy Attorney General for the Commonwealth of Pennsylvania. He was Vice Chairman of the National Commission on the Causes and Prevention of Violence.

ROMAN L. HRUSKA. Senator Hruska, of Nebraska, is the ranking minority member of the Senate Judiciary Committee and of its Subcommittee on Criminal Laws and Procedures. He served in the House of Representatives before being elected to the Senate in 1954. He was a member of the National Commission on the Causes and Prevention of Violence.

ROBERT W. KASTENMEIER. Congressman Kastenmeier, of Watertown, Wisconsin, is a member of the House Judiciary Committee and chairman of its Subcommittee No. 3, which deals with revisions of

the laws. He is a member of the House Interior and Insular Affairs Committee and serves on the Subcommittees on Indian Affairs, National Parks and Recreation and Public Lands. He was first elected to Congress in 1958.

THOMAS J. MACBRIDE. Judge MacBride, of Sacramento, California, is Chief Judge of the United States District Court for the Eastern District of California. He is a former Deputy Attorney General for the State of California and a former member of the California House of Representatives. Judge MacBride is a member of the Judicial Conference Committee to Implement the Criminal Justice Act of 1964.

JOHN L. MCCLELLAN. Senator McClellan, of Arkansas, is a member of the Senate Judiciary Committee and chairman of its Subcommittee on Criminal Laws and Procedures. Senator McClellan is a former prosecuting attorney. He served in the House of Representatives before being elected to the United States Senate in 1942.

ABNER J. MIKVA. Congressman Mikva, of Chicago, Illinois is a member of the House Judiciary Committee. He served in the Illinois General Assembly, where he was chairman of the House Judiciary Committee and its Subcommittee on Revision of the Illinois Criminal Code, enacted in 1961. He was first elected to Congress in 1968.

DONALD SCOTT THOMAS. Mr. Thomas is a partner in the law firm of Clark, Thomas, Harris, Denius and Winters in Austin, Texas. He is a Fellow of the American College of Trial Lawyers.

THEODORE VOORHEES. Mr. Voorhees practices law in Washington, D.C. as a partner in the Philadelphia law firm of Dechert, Price & Rhoads. He is a former Chancellor of the Philadelphia Bar Association, former President of the National Legal Aid and Defender Association and past Chairman of the Conference of Bar Presidents. Mr. Voorhees is a member of the Office of Economic Opportunity National Advisory Committee on Legal Services Program.

CONGRESSMAN DON EDWARDS of San Jose, California, a member of the House Judiciary Committee, served on the Commission until his resignation in October 1969, at which time he was replaced by Congressman Mikva. JUDGE JAMES M. CARTER, appointed to the Commission when he was Chief Judge of the United States District Court for the Southern District of California, resigned upon his elevation to the United States Court of Appeals for the Ninth Circuit in December 1967. The Act establishing the Commission requires that there be two District Judges and only one Circuit Judge. Judge Carter was replaced by Judge MacBride.

APPENDIX C

BIOGRAPHIES

OF

ADVISORY COMMITTEE MEMBERS

TOM C. CLARK, *Chairman.* Justice Clark retired in 1967 after serving 18 years as an Associate Justice of the Supreme Court of the United States. He served as Attorney General of the United States in the years 1945–49 and before then was an Assistant Attorney General in charge of the Antitrust Division and the Criminal Division. He recently served as Director of the Federal Judicial Center.

CHARLES L. DECKER. Major General Decker, former Judge Advocate General of the United States Army, served as Executive Director of the National Defender Project for 6 years and is now a consultant on matters pertaining to criminal justice.

BRIAN P. GETTINGS. Mr. Gettings is the United States Attorney for the Eastern District of Virginia. He formerly served as a senior trial attorney in the Criminal Division, Organized Crime Section, U.S. Department of Justice from July 1962 to July 1967. Mr. Gettings served as Executive Director and Counsel for the House Republican Task Force on Crime from July 1967 to 1968. He has also served as a consultant to the Law Enforcement Assistance Administration.

PATRICIA ROBERTS HARRIS. Mrs. Harris, former United States Ambassador to Luxembourg and former Dean and Professor of Law at Howard University Law School, is now a practicing lawyer in Washington, D.C. in the law firm of Strasser, Spiegelberg, Fried, Frank & Kampelman. She has served as an attorney in the Appeals and Research Section of the Criminal Division of the U.S. Department of Justice.

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BYRON O. HOUSE (*deceased*). Justice House was a member of the Illinois Supreme Court, and a former State's Attorney for Washington County, Illinois. He died in September 1969.

HOWARD R. LEARY. Mr. Leary is the Police Commissioner of New York City and formerly was the Police Commissioner of Philadelphia, Pennsylvania.

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ELLIOT L. RICHARDSON. Mr. Richardson, now Secretary of Health, Education, and Welfare, has served as the Attorney General of Massachusetts and as United States Attorney for the District of Massachusetts. Mr. Richardson has also served as Lieutenant Governor of Massachusetts. He served on the Advisory Committee until his appointment as Undersecretary of State in early 1969.

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