# STUDY DRAFT

## OF A NEW

# FEDERAL CRIMINAL CODE

(Title 18, United States Code)



THE NATIONAL COMMISSION ON REFORM
OF FEDERAL CRIMINAL LAWS
(Established by Congress in Public Law 89-801)

The Study Draft consists of materials under consideration by the Commission preparatory to its Final Report to the President and Congress in November of 1970. The Study Draft provisions are not to be taken as representing the position of the Commission on any particular issue.

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THE NATIONAL COMMISSION ON REFORM
OF FEDERAL CRIMINAL LAWS

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**Suggestions, comments and criticisms concerning the Study Draft should be sent to**


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**To be most useful to the Commission in the preparation of its Final Report to the President and Congress, due November 8, 1970, suggestions should be submitted by August 1, 1970. With regard to making later submissions, please contact the Commission staff in advance.**

For extended comment on Study Draft provisions, consult Volumes I and II of the Commission's Working Papers.


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## OF
## EDMUND G. BROWN, CHAIRMAN
## SUBMITTING THE STUDY DRAFT
## FOR PUBLIC COMMENT

The Study Draft of the proposed new Federal Criminal Code is herewith published by authority of the National Commission on Reform of Federal Criminal Laws. Two volumes of Working Papers are being published at the same time; these are the reports of staff and consultants on the basis of which the Draft was prepared. The purpose of this publication is to give the people of the United States an opportunity to comment on the Draft before the Commission makes its decisions. Thousands of copies of the Study Draft and Working Papers are being distributed to members of Congress, the federal judiciary, the law enforcement agencies of the United States, the organizations of prosecuting and defense attorneys, scholars in criminal law and criminology, and other concerned individuals and groups. All are invited to give the Commission the benefit of criticism and suggestions.

The National Commission on Reform of Federal Criminal Laws was authorized by the Act of November 8, 1966.[1] Congressman Richard H. Poff of Virginia, later elected Vice Chairman of the Commission, was the principal author of the Act. The Commission is composed of three members of the Senate appointed by the President of the Senate, three members of the House of Representatives appointed by the Speaker of the House, three members appointed by the President of the United States, and one Circuit Judge and two District Judges appointed by the Chief Justice of the United States.[2] The Act provided for a 15-man Advisory Committee to be chosen by the Commission. The Honorable Tom C. Clark, retired Justice of the United States Supreme Court, accepted the chairmanship of this group of eminent persons.[3] The duties of the Commission were defined by Section 3 of the Act as follows:

> 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,

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1. P.L. 89-801, 80 Stat. 1516. The statute is reproduced in Appendix A at the end of this volume.
2. For a listing of the Commission members and a summary of their professional backgrounds, see Appendix B at the end of this volume.
3. For a listing of the Advisory Committee members and a summary of their professional backgrounds, see Appendix C at the end of this volume.

> 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.

Although this mandate covered the entire range of penal law, procedure, and practice, the Commission determined at the very beginning that it would be inadvisable to spread the available resources so widely. Taking into account that Congress, the Judicial Conferences, other Commissions and privately financed projects were engaged in intensive studies of many issues of criminal law other than a substantive penal code, the Commission selected reform of the substantive provisions of Title 18 of the United States Code as its central concern. Even this more limited task proved to be of such magnitude that the life of the Commission had to be prolonged by supplemental legislation deferring the due date of our final report to November 8, 1970.[4] The decision to focus on the substantive provisions of the criminal law has, I hope, been vindicated by the product. In any event, it has historic precedent as the following quotation indicates:

> When Sir Robert Peel first entered the British Cabinet as Home Secretary, two of his most urgent goals were police reform and law reform—in that order. His experience in office did not alter his estimate of the importance of these objectives, but it did cause him to reverse the order of their accomplishment; and his achievements in police reorganization and training came largely during his eventual Prime Ministership. It is said that he speedily learned that good police performance is highly dependent upon the existence of rationally conceived and clearly formulated criminal statutes.[5]

The Study Draft is something more than a staff report and less than a commitment by the Commission or any of its members to every aspect of the Draft. For nearly three years, the Commission has been meeting periodically with its Advisory Committee, consultants and staff. We reviewed detailed proposals and supporting reports prepared by staff and consultants following consultation with the law enforcement agencies and consideration of the recommendations of other bodies, such as the President's Commission on Law Enforcement and Administration of Justice, National Commission on Causes and Prevention of Violence, National Advisory Commission on Civil Disorders, American Bar Association Project on Standards for Criminal Justice, American Law Institute (Model Penal Code), National Council on Crime and Delinquency and numerous state penal law revision commissions. These discussion meetings led to revisions in the Draft to reflect new information and insights contributed by the Commissioners and Advisors.

Not unexpectedly, divisions of opinion emerged on issues so vital to the maintenance of an orderly society and the preservation of individual liberty. The Commission resolved to defer resolution of these controversies until the time of its final report, after public response to the Study Draft. The Study Draft itself poses these issues by

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4. P.L. 91-89, 83 Stat. 44. The statute is reproduced in Appendix A at the end of this volume.

5. *Williams* v. *District of Columbia*, 419 F. 2d 638, 640 (D.C. Cir. 1969).

putting forward alternative solutions at many points. For example, with respect to the maximum sentence available the Draft includes not only a general maximum of 30 years, but also contains alternatives for a life sentence and/or capital punishment for a few most heinous crimes. Similarly, the Draft reflects alternative views on the range of federal intervention to control possession and use of firearms or to restrict dissemination of obscenity. Alternative procedures for imposing very high sentences on leaders of organized crime are formulated. The Study Draft poses alternative departures from the traditional *M'Naghten* Rules defining the criminal responsibility of the mentally ill; a choice must be made among various substitutes for *M'Naghten* worked out in recent decisions of the Courts of Appeals and the alternative of eliminating insanity as a separate defense and considering mental infirmity only to the extent that the disability negatives the kind of culpability required for the commission of an offense.

Although many issues therefore remain unresolved, it is fair to report that substantial consensus has evolved on some fundamentals:

(1) The time has come to create, for the first time in our history, a systematic, consistent, comprehensive federal criminal code to replace the hodge-podge that now exists. If criminal law is to be respected, it must be respectable. Important areas of federal criminal law have never been put in statutory form, *e.g.*, the law of self-defense, the law relating to the justified use of force to resist criminals or to arrest for crime, the law of entrapment, the law of conspiracy, the limits of permissible imprisonment upon conviction of multiple crimes (the problem of consecutive sentences). It seems clear that such matters should not be left entirely to shifting and contradictory disposition by judges. A comprehensive and comprehensible code is the appropriate vehicle for Congress to exercise its responsibility and express itself on these matters so central to its office.

(2) A new approach to "federal criminal jurisdiction" is essential. It is impossible to continue to pretend, as we have under Nineteenth Century laws, that the federal government is not interested in the substantive problems of fraud, prostitution, gambling, drugs, firearms, or corruption of local government—but only in the "use of the mails" or "interstate commerce". The truth of the matter is that a large portion of the responsibility for law enforcement in these areas has been assumed by the federal government and much, as a matter of policy, not assumed. Use of the mails, movement of persons or property in interstate commerce—these are merely the constitutional bases for federal intervention. As a result of this clear perception, it is possible to write the new federal penal code very much like a state penal code: familiar crimes are defined simply, and the question of federal jurisdiction is treated separately as the policy technical question it is. No longer will we perpetuate the absurdity and injustice of declaring that a fraudulent scheme is punishable by up to five years if one letter is mailed, up to ten years if two letters are mailed, fifteen years for three letters, etc. The crime will be fraud, not mailing a letter.

A notable incidental benefit of this new clarity is that Congress can make general policy about the *exercise* of federal jurisdiction. Once it is recognized that the mailing of a letter or the movement of goods across a state line is merely the technical basis for federal inter-

vention, it follows that something more than the mailing of a letter is required to justify federal intervention: there must be a "substantial federal interest," defined in § 207 to include situations:

> "(a) where an offense apparently local in its impact is believed to be associated with organized criminal activities extending beyond state lines; (b) where federal intervention is necessary to protect civil rights; (c) where local law enforcement has been corrupted so as to undermine its effectiveness."

(3) A major overhaul of the sentencing system is overdue. Congress made its concern for this part of the project explicit in the statute creating the Commission, and there was no substantial controversy in the Commission about the general outline of the necessary reconstruction. The main lines of the design are barely indicated by the following features:

(a) The planless variety of sentences for individual offenses under existing law is to be replaced by an orderly classification of offenses into approximately half a dozen categories: Class A, B, and C felonies, Class A and B misdemeanors, and "infractions" (petty violations often of minor administrative regulations, regarded as non-criminal).

(b) Offenses carrying very high penalties are to be legislatively graded. For example, just as criminal homicide is traditionally graded into degrees of murder and manslaughter, so would rape under the Study Draft be graded: rape by a girl's chosen companion, following who-knows-what permitted intimacies, should be distinguished from ravishment by a brutal stranger on the city streets. (See Study Draft § 1641.) Present federal law authorizing the death penalty, indiscriminately, for "rape" leaves the sentencing judgment entirely to the discretion of individual judges. Espionage will not, as at present, carry the same penalty limits for treacherous assistance to an enemy and for giving information "relating to the national defense" to a foreigner "with reason to believe" (*i.e.*, negligently) that the information would be used "to the advantage of a foreign nation". (*Compare* 18 U.S.C. § 794 *with* §§ 1112–1115 of the Study Draft.)

(c) Post-imprisonment supervision of paroled convicts is to be an integral part of every felony sentence. This would revolutionize the present concept of parole as merely the unserved portion of a previously imposed prison sentence. That concept leads to long parole periods for those released by the Parole Board as good risks, and short periods of parole or none where the prisoner has been detained to the end of his sentence because he is judged a bad risk. Obviously bad risks have more need of parole supervision than good risks.

A more extensive and detailed overview of the Study Draft by Professor Louis B. Schwartz, staff director for the reform project, appears at p. xxv below.

One important project of the Commission, apart from the Study Draft, deserves mention at this point. In the course of our survey of defenses, the question of "immunity" came under scrutiny. The power of prosecutors and administrative agencies to compel witnesses to

testify on promise of immunity is presently the subject of innumerable conflicting statutes. Our studies resulted in the proposal of a uniform statute embodying a significant shift from immunizing *the transaction* to immunizing from *use of compelled testimony*. When it became evident that this subject fell logically into the category of procedure and evidence, rather than substantive criminal law, the recommendation was separately communicated by the Commission to the President and Congress and has, at this writing, resulted in a measure, passed by the Senate while a similar measure is now pending before the House.[6]

In concluding this brief introduction to the Study Draft, I am moved to record my great pleasure in presiding over this bipartisan search for rational, progressive solutions to some of the most explosive issues in public life. Swiftly, economically, and without fanfare or striving for factional advantage, we have taken a substantial step towards a modern federal penal code. We have enjoyed the confidence and encouragement of President Nixon as well as President Johnson.[7] It is of paramount importance to solidify this common ground to secure enactment of a modernized Code, along the lines generally envisioned by the structure and systemization of this Study Draft, than it is for any of us to prevail on any particular controversial issue or statute. I am hopeful that those to whom this Study Draft is submitted will help us by their comments to achieve this goal.

EDMUND G. BROWN,
*Chairman, National Commission on Reform of Federal Criminal Laws.*
June 1, 1970

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6. Title II, Organized Crime Act of 1969 (S. 30, 91st Cong., 1st Sess.); H.R. 11157 (91st Cong., 1st Sess.).

7. *See, e.g.*, 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.

# STUDY DRAFT OF A PROPOSED FEDERAL CRIMINAL CODE: PROGRESS AND ISSUES

By

Professor Louis B. Schwartz, Commission Director

CONTENTS

INTRODUCTION

Governor Brown's introduction to the Study Draft describes the collective effort of staff, consultants, Advisory Committee, and Commission, embodied in the Draft, and emphasizes the tentative character of the proposals now being submitted for public comment. My purpose here is to give a broad overview of the Study Draft, to make clear the general structure into which hundreds of individual proposals fit, and to point up the major issues that remain to be resolved.

1. *The Chaos of Existing Law.*

Title 18 of the United States Code, entitled "Crimes and Criminal Procedure" was established in its present form in 1948, following upon earlier "codes" of 1909 and 1877. These codes were essentially compilations of existing laws brought together in one place with only the grossest inconsistencies eliminated. The statutes thus brought together were of varying antiquity, from the 14th Century formulation of treason in terms of adhering "to their enemies, giving them aid and comfort," to a 19th Century enactment penalizing seduction of female steamship passengers, regardless of age or consent, by "solicitation or the making of gifts or presents," to 20th Century formulations dealing with racketeering, riot, and civil rights. Trivial offenses, like misuse of the Swiss Confederation coat of arms, are found in Title 18, while many grave felonies, including capital offenses, do not appear in this compilation of "Crimes and Criminal Procedure," but are found scattered throughout the 50 titles of the U.S. Code under such headings as Transportation (49 U.S.C. § 1472(i)—aircraft piracy) and Public Health and Welfare (42 U.S.C. § 2272—Atomic Energy Act violations).

Within Title 18 itself, chaos reigns. Modern penal codes arrange offenses according to the harm done or threatened by the offender. Thus, there are ordinarily chapters dealing with offenses against the person, ranging from murder to assault, offenses against property ranging from arson to malicious mischief, offenses against the state, etc. Title 18, however, knows no such logical ordering. It is alphabetical, running "Aircraft," "Animals," "Arson" through "White Slave Traffic." Such an organization of the material is consistent with the limited objective of the 1948 revision—to bring together scattered legislative enactments where they could be readily found—but it plays hob with any effort to make consistent legislative policy. For example, conspiracy to defraud the United States carries a maximum imprisonment of 5 years under "Conspiracy" (Chapter 19, § 371), and a maximum of 10 years under "Claims and Services" (Chapter 15, § 286).

Some of the chaos of existing law comes from making the circumstances which support federal jurisdiction part of the definition of the crime itself. Thus, there are a number of statutes in Title 18 which prohibit burglary, each applicable within a narrow range of federal power, *e.g.*, burglary of a post office (18 U.S.C. § 2115—5 years), burglary of an interstate pipeline (18 U.S.C. § 2117—10 years). Similarly, 18 U.S.C. § 1341 prohibits *use of mails* to defraud, not *theft* in the course of which the mails were used. The federal government has the power to punish because the mails are used, but the criminologically significant conduct is not the mailing of a letter, but the stealing.

Important sections of the federal criminal law do not appear at all in statutory form, *i.e.*, have never been the subject of Congressional consideration and enactment. The law of insanity, self-defense and entrapment is all judge-made. No statute sets forth a general rule on the liability of a corporation for the crimes of its agents. The result is that on some issues different circuit courts of appeals apply different "federal" law. On other issues, no court has spoken and it is thus impossible to say what the federal law is.

2. *The Organization of the Proposed Code.*

The Study Draft has been written with these problems of present law in mind: at its very core is the judgment that it is the Congress of the United States which can and should resolve them. The Study Draft affords the legislature, for the first time, a structured scheme for the clear expression of its will upon these matters of such vital importance to the country. It is divided into three parts. Part A, consisting of seven chapters, is devoted to General Provisions: matters common to many or all offenses. These are:

Chapter 1. Preliminary Provisions.
Chapter 2. Federal Penal Jurisdiction.
Chapter 3. Basis of Criminal Liability; Culpability; Causation.
Chapter 4. Complicity (*e.g.*, accomplice liability and corporate criminal liability).
Chapter 5. Responsibility Defenses: Immaturity; Intoxication; Mental Disease or Defect.
Chapter 6. Defenses Involving Justification and Excuse (*e.g.*, self-defense, use of deadly force, duress).
Chapter 7. Defenses Against Unfair or Oppressive Prosecution (*e.g.*, limitations, entrapment, double jeopardy).

Part B defines all the crimes, arranging them in nine chapters according to the type of social danger indicated by the offender's behavior.[1] Each offense is defined, as in a state code, in terms of the specific conduct proscribed; the scope of federal jurisdiction over that conduct is separately stated; it is not an "element of the offense" as

[1] 10. Offenses of General Applicability (*e.g.*, attempt, conspiracy); 11. National Security; 12. Foreign Relations, Immigration and Nationality; 13. Integrity and Effectiveness of Government Operations (*e.g.*, bribery, perjury, contempt); 14. Internal Revenue and Customs Offenses; 15. Civil Rights; 16. Offenses Involving Danger to the Person; 17. Offenses Against Property; 18. Offenses Against Public Order, Health, Safety and Sensibilities (*e.g.*, riot, firearms, drugs, obscenity).

under present law but a technical prerequisite for federal intervention. Part C details the sentencing system in seven chapters.[2]

This systematizing of the federal penal law is the core of the proposed reform, more important than any single one of the hundreds of proposed improvements in the substantive law. That is because this systematic Code makes it possible, now and in the future, to look at any particular provision in terms of its consistency with the whole system.

### FEDERAL JURISDICTION: THE ALLOCATION OF LAW ENFORCEMENT RESPONSIBILITIES BETWEEN STATE AND FEDERAL GOVERNMENTS

#### 1. *Distinguishing between Definition of Offense and Scope of Federal Jurisdiction.*

Nothing has so distorted federal criminal law as the habit of defining federal crimes in such a way as to make jurisdictional requirements appear to be penologically significant elements of the offense. This confuses federal power to prohibit certain conduct with the nature of the crime itself. This confusion is a hangover from the 18th Century when the states exercised virtually exclusive responsibility for law enforcement within their territories, and the federal government dealt with a narrow range of offenses of peculiarly national concern, *e.g.*, treason, piracy, revenue and customs offenses. It was natural, under those circumstances, to think that the federal feature of the offense was central to the exercise of federal penal power. But the 19th and 20th Centuries saw a vast expansion of federal criminal legislation directed against common crimes. "Private" conventional offenses like theft, fraud, prostitution, obscenity, extortion, usury, narcotics, illegal possession and use of weapons were brought within the federal ken by a myriad of statutes, based on Congress' powers in the areas of interstate commerce, mails, taxation, etc. Federal power was invoked because state power proved increasingly inadequate to deal with crime extending beyond state borders. The federal program was "auxiliary" to state law enforcement [3] and may properly be regarded as the first "Law Enforcement Assistance" effort.[4]

The expansion of federal auxiliary jurisdiction took place gradually, step-by-step, the steps being spread over more than a century. Each new statute, although dealing with the same misconduct, would incorporate an additional jurisdictional base. Statutes passed at different times would carry quite different penalties for the same misconduct, reflecting chiefly the current level of anti-crime feeling. Little regard was given to the fact that the same misconduct was differently penalized under earlier federal legislation based on a different jurisdictional element.

The Study Draft embodies a new approach to the definition of federal crimes. All offenses are defined in terms of the substantive misbehavior, just as is done in a state code where jurisdiction is

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[2] 30. General Sentencing Provisions; 31. Probation and Unconditional Discharge; 32. Imprisonment; 33. Fines; 34. Parole; 35. Disqualification from Office and Other Collateral Consequences of Conviction; 36. Sentence of Death or Life Imprisonment [A provisional chapter depending on whether capital punishment is retained]; Amendment to 28 U.S.C. § 1291: Appellate Review of Sentence.

[3] For further discussion see Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 Law and Contemp. Prob. 64 (1948).

[4] In 1968 Congress passed the Law Enforcement Assistance Act (42 U.S.C. §§ 3701 *et seq.*) to give financial and planning assistance to local law enforcement.

plenary within the territory of the state. If federal jurisdiction over the offense is less than plenary within the United States, jurisdiction is separately stated. The following paragraphs summarize the consequences of distinct treatment of jurisdictional and behavioral content of the law.

It becomes simpler to express and apply a sensible sentencing policy. No longer will federal sentence limits for fraud or obscenity or murder accidentally vary according to the particular federal jurisdictional base which is invoked. No longer will it be possible to treat one fraud as ten separate federal offenses if ten letters were mailed and as one offense if ten frauds were committed by only one use of the mails. The law will correspond to the reality that it is theft or obscenity or blackmail we are punishing, not the use of the mails which merely gives the national government a Constitutional basis for intervening.

Another benefit of the new approach will be increased efficiency in federal prosecutions. Federal indictments and informations will, like state charging documents, describe the substantive offense and allege that it was committed "within the jurisdiction of the United States, viz . . . ." Under § 205, "the existence of federal jurisdiction may be alleged as resting on more than one base but proof of any one base is sufficient." As defense counsel become aware that the entire arsenal of jurisdictional bases listed for the crime charged is available to the prosecution whenever a jurisdictional challenge is offered, it will be apparent that such a challenge will rarely be profitable. Moreover, under § 204, the government is relieved of any obligation to prove that the defendant *knew* that the mail or interstate commerce was involved in his criminal transaction. This is not a novel proposition,[5] but the Study Draft generalizes it in a logical and consistent fashion with important consequences. Thus, attacks upon or obstruction of federal employees will be federally prosecutable without risk that the defendant will escape conviction by contending that he thought the victim was a *state* officer or that he was obstructing a state rather than a federal function. This result follows under the Study Draft because the victim's status as a federal officer is a jurisdictional base rather than a defined element of the offenses of assault or obstruction.[6] The technical issues of jurisdiction will therefore tend to recede from their present prominence in federal criminal law.

For the first time in federal history, there will be a complete code of serious crimes for federal enclaves, based upon the special maritime and territorial jurisdiction, § 201(a). Thus it will no longer be necessary to assimilate a wide variety of state felonies with very different ways of defining the same crime. Additionally, all serious criminal conduct will be punishable in the maritime jurisdiction despite the fact that there is no state law to assimilate.

International extradition will be facilitated by the new approach since many of the treaties require the extraditable offense to be penal in both the demanding and the surrendering state. In the past, for-

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[5] *United States* v. *Licausi*, 413 F.2d 1118 (5th Cir. 1969) (defendant need not know that deposits of the bank he 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 that person assaulted was a federal officer); *United States* v. *Allegrucci*, 258 F.2d 70 (3d Cir. 1958) (receiver of stolen goods need not know they were stolen from interstate commerce).

[6] See §§ 1611(3) and 201(c) (assault); § 1301(4) (obstruction).

eign nations have made an issue of the fact that no analogue to "mail fraud" exists outside the United States, although, of course, all other nations penalize fraud or theft.

2. *Comprehensive Federal Jurisdiction Where* Any *Exists: "Piggyback"*

One of the most significant innovations proposed in the area of federal jurisdiction is the provision in § 201(b) that an offense is federally prosecutable if it is committed in the course of another offense for which federal jurisdiction exists. The Comments and Working Papers refer to this informally as "piggyback jurisdiction," to convey the notion that federal power to prosecute for a common crime, such as murder or arson, rides on the conceded or proved federal jurisdiction to prosecute for, let us say, obstructing a federal function or violating a federal civil rights statute.

It is deplorable that, under existing federal law, a man may be prosecuted for the federal offense of impersonating an official, but if he perpetrated a kidnapping by that means only the state can prosecute for the kidnapping (assuming no independent basis for federal jurisdiction exists, *e.g.*, crossing state lines). A man may be prosecuted for intimidating or retaliating against a federal witness or juror (maximum penalty 5 years, 18 U.S.C. § 1503), but if the behavior encompasses murder or kidnapping, only the state would have jurisdiction to prosecute for those crimes. It verges on the scandalous that federal civil rights prosecutions have in the past proceeded under statutes providing limited sanctions rather than for the murder that actually occurred in connection with the civil rights offense.[7] The recent murder of a prominent candidate for a labor union office led to federal indictment for conspiracy to obstruct justice and deprive the deceased of labor rights,[8] leaving the murder prosecution to the State of Pennsylvania.

The advantage of being able to prosecute all offenses together is not merely the economy of dispensing with overlapping state and federal law enforcement and the justice of permitting federal prosecution for the full enormity of the offense committed. An additional benefit of the piggyback jurisdiction is that it enables the draftsmen of the Code to classify many unaggravated offenses at a lower level. Thus simple impersonation may be graded as a misdemeanor, rather than a felony as at present,[9] because felony sanctions for theft will be available by reason of § 201(b) where the impersonation is used to defraud.[10] Similarly, unaggravated civil rights offenses [11] and obstruction of governmental function [12] may conveniently be classified as misdemeanors. Not only is misdemeanor classification more appropriate for such offenses entailing no serious consequences; equally im-

[7] Recent legislation partially remedies this defect by enhancing penalties where bodily injury or death results, but kidnapping and arson, for example, are not dealt with. See 18 U.S.C. § 245.

[8] 18 U.S.C. § 371 conspiracy to violate 18 U.S.C. § 1503 and 20 U.S.C. § 530. See N.Y Times, February 1, 1970, sec. IV, p. 6, col. 1; N.Y. Times, February 3, 1970, p. 30, col. 6; N.Y. Times, February 6, 1970, p. 19, col. 1.

[9] 18 U.S.C. § 912.

[10] See Study Draft §§ 1735, 1740(1).

[11] Compare 18 U.S.C. § 241 with Study Draft §§ 1501, 1511, *et seq.*

[12] Compare 18 U.S.C. § 1503 with Study Draft §§ 1301 (Physical Obstruction of Government Function), 1323. (Tampering with Physical Evidence), 1324 (Harassment of and Communication with Jurors) and 1367 (Retaliation).

portant is the increased efficiency in federal prosecution of minor offenses, since misdemeanor prosecutions may be instituted by information rather than grand jury indictment, and may be disposed of by federal magistrates rather than the United States District Courts.[13]

3. *Extraterritorial Jurisdiction.*

Section 208 defines and extends the extraterritorial reach of federal criminal law. The proliferation of American interests abroad and the dispersion of military and civilian personnel have given rise to new problems concerning the extraterritorial reach of American criminal law. Meanwhile, the Supreme Court of the United States has not permitted an expansion of the range of applicability of military law and courts martial: civilians abroad, employed by the American armed services or by defense contractors, and dependents of armed forces personnel cannot be tried by court martial.[14] Even military personnel who have been discharged cannot be tried by court martial for offenses committed prior to discharge.[15] The millions of ex-soldiers returned from abroad thus have an immunity from criminal responsibility for grave offenses committed abroad against citizens of the host country, fellow Americans, and the government itself. Nor can any of these presently be tried by American civilian courts for ordinary interpersonal crimes like murder, rape, or theft committed abroad even where the victim was an American and the offense occurred within an American military camp or diplomatic compound.[16] The courts of the host country would normally have jurisdiction over such offenses, but may be precluded from exercising that jurisdiction by diplomatic immunity of the offender or a status-of-forces treaty. Or the host country may be disinclined to intervene, or discouraged by our representatives from intervening, as where the victim as well as the offender is an American, or American security interests are involved. Finally, the offense might occur outside the territorial jurisdiction of any nation, *e.g.*, on the high seas or in outer space.

The following are striking examples of situations not presently covered by federal law, but reached under the proposed redefinition of federal extraterritorial jurisdiction: a) murder of an American ambassador by his wife or a member of his staff, b) murder by a serviceman who has since been discharged and c) assault by an American in Antarctica or in space.

4. *Discretionary Restraint on Exercise of Federal Jurisdiction.*

The Study Draft enlarges Congress' influence over the discretionary exercise of federal jurisdiction, and tends to restrain federal officials from moving into local and trivial transactions merely on the basis that a technical ground of federal jurisdiction can be found. Obviously, the mere fact that a letter was mailed, or that a prostitute or stolen automobile was moved across a state line does not prove that the transaction

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[13] 18 U.S.C. § 3401.

[14] *Reid* v. *Covert*, 354 U.S. 1 (1957) (wife); *McElroy* v. *U.S.*, 361 U.S. 281 (1960) (employee).

[15] *Toth* v. *Quarles*, 350 U.S. 11 (1955).

[16] Some offenses against the government itself, like treason and counterfeiting, are prosecutable wherever they are committed. See 18 U.S.C. § 2381 (treason, "within the United States or elsewhere"); 18 U.S.C. § 471 (compare with § 478—counterfeiting foreign obligations, which is limited to conduct "within the United States"; § 471 is not so limited).



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was of such national concern as to warrant resort to federal prosecutors and courts. It only makes these agencies available if other circumstances suggest the propriety of their intervention. Inevitably the federal investigating and prosecuting agencies will have considerable discretion here. But it has never been supposed that this discretion should be unlimited. Congress has an interest in preserving a proper balance between federal and local responsibility and in conserving federal resources by preventing their diversion to deal with petty, local matters. This concern of Congress is manifest in such provisions of existing federal penal law as the requirement that at least $5,000 worth of stolen property be involved before it becomes a federal offense to transport it in interstate commerce.[17]

What is new in the Study Draft is not the principle of Congressional guidance to prosecution policy in areas admittedly within federal jurisdiction, but two significant improvements in the application of the principle: a) The principle is given broader application by the provision in § 207 that all federal prosecutive and investigative agencies are authorized to decline or discontinue federal enforcement activities whenever it appears that the transaction is not of substantial federal concern. Federal concern may be lacking because of the triviality of the offense, the adequacy of local law to deal with it, etc. b) Arbitrary restraints like the $5,000 minimum under the National Stolen Property Act are either eliminated or converted into guidelines for the law enforcement agencies. This eliminates the issue as a defense to the accused, with the result that, although the agency is given statutory support for declining to exercise federal jurisdiction, it remains free to proceed where, for example, it has good reason to relate a particular $4,000 offense to the operations of a ring of interstate thieves and fences.

### THE SENTENCING SYSTEM

The present federal sentencing system, if it can be called a system, is defective in a number of respects, as indicated in the following paragraphs, which also summarize the reforms proposed in the Study Draft.

1. *The Senseless Variety of Authorized Sentences.*

There is an indefensible variety of sentences prescribed for offenses—a total absence of sensible classification of the seriousness of different crimes. In Title 18 alone, there are not less than 17 different maximum terms, apart from the death penalty:

> Life, 30 years, 25 years, 20 years, 15 years, 10 years, 7 years, 6 years, 5 years, 4 years, 3 years, 2 years, 1 year, 6 months, 3 months, 90 days, and 30 days.

Associated with these maximum imprisonment levels is a bewildering variety of maximum fines. For example, there are about 150 offenses in Title 18 carrying maximum imprisonment of one year. Eight different fine levels can be found associated with these one-year jail of-

[17] 18 U.S.C. § 2314. But note under the same section, no minimum value is assigned where the property is a "tax stamp" or forged "security", or where any "person" (victim or accomplice) is moved across a state line in the course of a fraud, however petty. See also the provision in 18 U.S.C. § 659 that there shall be no federal prosecution if a state has prosecuted the offender, and the provision in 18 U.S.C. § 245(a) that the Attorney General or the Deputy Attorney General must specifically authorize prosecution of certain new civil rights offenses as "in the public interest and necessary to secure substantial justice."

fenses: in one section the maximum fine will be $10,000, in another $3,000 or $300. One, for no apparent reason, carries no fine, but can be punished only by imprisonment.[18] Only occasionally and as if by chance are fines related to the amount of injury done or gain realized by the offender, and then the ratio of fine to amount involved may be one-to-one, two-to-one, or three-to-one.[19]

Given the different combinations of maximum imprisonment and fine possibilities, and the occasional specification of minimum sentences, a reasonable estimate would be that Congress has undertaken to differentiate 100 or more categories of offenses. There is not even a pretense of a basis for so complicated a classification. Modern codes typically grade offenses into six or seven classes.[20] It does not make sense for a legislature to try to make more refined categories. It can indicate in a general way levels of gravity of offenses. But gravity of offense is only one element entering into the actual imposition of sentence by a judge in a particular case, where the individual offender's character and circumstances assume critical importance. No legislature can plausibly state in advance that 30 days is long enough to deter unlawful hunting and trapping in national military parks, but 90 days is required for unlawful hunting on Indian lands.[21] It defies belief that penological considerations justify a 6-months maximum for attempting to influence a juror, a year for intimidating voters, 2 years for willfully violating limits on political contributions, and 3 years for impersonating a federal officer.[22] Gradations of culpability between the common federal felony maximum of 5 years (*e.g.*, 18 U.S.C. § 371), the 6 year limit for conspiracy to hinder federal officials (18 U.S.C. § 372), the 7 year limit for misprision of treason (18 U.S.C. § 2382), the 10 year limit for accessory after-the-fact to treason (18 U.S.C. §§ 2381, 3) are so refined as to be invisible. Historical accident rather than serious judgment is the only possible explanation for such classifications.

The solution offered in the Study Draft is to reduce this chaos of sentencing categories to six basic types: three classes of felony, two classes of misdemeanors, and a special category of low level regulatory offense, comparable to illegal parking or other minor traffic violations, which we call "infractions" and declare to be noncriminal.[23] Felony Classes A, B, and C authorize maximum terms of 30, 15, and 7 years, respectively. Misdemeanor Classes A and B authorize maximum terms of one year [a major issue posed in the Study Draft is whether this should be instead 6 months or 3 months] and 30 days, respectively. The "infraction" will not entail a jail sentence. Every offense under the Code is allocated to one or another of these classes.

Two basic propositions underlie this scheme. Sentence limits should reflect the purpose of each type of sentence; any upper limit should be regarded not as a norm, from which variations must be justified by the sentencing judge, *e.g.*, by "mitigating circumstances," but rather as the outer boundary of a discretion entrusted by Congress to the judges, a boundary to be approached only in the most aggravated instances falling within the category.

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[18] 18 U.S.C. § 2196 (drunkenness or neglect of duty by seamen).
[19] 18 U.S.C. §§ 646, 645, 201(e).
[20] *E.g.*, Mich. Rev. Crim. Code § 1201 (Final Draft 1967), A.L.I. Model Penal Code §§ 1.04, 6.01. (P.O.D. 1962).
[21] *Compare* 16 U.S.C. § 414 *with* 18 U.S.C. § 1165.
[22] *Cf.* 18 U.S.C. §§ 1504, 594, 609, 912.
[23] See Study Draft § 109(d).

Relating sentence limits to the purpose of each type of sentence requires reference to the standard criminologic analysis of the objects of a penal code: to deter offenses; to reform offenders; to incapacitate specially dangerous individuals, and finally, perhaps, to satisfy to some extent widely shared retributive impulses.[24] Thus, short sentences can hardly be designed to reform or rehabilitate individuals, except in the sense that a "short, sharp, shock"—the psychological blow from merely entering the jail cell—serves to drive home the dangers of law violation.[25] Neither the time available under the misdemeanor sentences nor the place where such sentences are usually served, viz. county prison, lend themselves to educational programs. Plainly, also, short sentences are inadequate for incapacitative purposes. That leaves deterrence as the only end to be served: enough exemplary punishment to make jail a significant consideration in the minds of those tempted to violate. The deterrent basis of the misdemeanor sentences contemplated by the Study Draft is manifest from the fact that misdemeanor sentences are to be for a definite period, in contrast to the "indefinite" sentence for felonies. Since no reeducation or rehabilitation program is or can be undertaken in short terms, there is no occasion for correctional authorities to measure the prisoner's "progress" towards reform with a view to early release, even if one can imagine such measurements to be practicable under the circumstances.

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. Of course, no one supposes that the categories are airtight. Some offenses will be put at this level because it is supposed that nothing less will deter the behavior, and some will be put here because of retributive or incapacitative considerations. But if we cling to the concept that Class C felony sentences are mainly reformative, we derive some guidance as to the proper limits of such sentences. It would be plausible to say that 3 years in confinement followed by 2 years under parole supervision would ordinarily be as much of a man's freedom as might realistically be commandeered for the purpose of reeducating him or exposing him to the psychotherapeutic resources of the prison system. Exceptionally, 2 additional years might be justified for such efforts. This adds up to the 7 year maximum proposed for Class C felonies, no more than 5 of which may be in confinement.

The sentencing judge will have discretion to fix a lower maximum, having regard to his estimate of the need and aptness for reform of the particular defendant, and the Parole Board may release the convict well before the expiration of the maximum set by the judge if it finds that the defendant progresses through his reeducational program rapidly.

The aggravated felonies, Class A and Class B, occupy the rest of the spectrum of punishment provided by the proposed Code. The most heinous crimes including treason, murder, and aggravated categories of rape, kidnapping, robbery, organized crime, espionage, sabotage are Class A felonies where a maximum of 30 years is authorized. The question remains open for final resolution by the Commission and

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[24] *Cf.* Study Draft § 102, "General Purposes".

[25] *Cf.* Andenaes, *Does Punishment Deter Crime?*, 11 Crim. Law Q. 76, 89–90 (Toronto, 1968) (commenting on discovery and arrest as sufficient for the shock purpose).

Congress, after comments have been received from the public and all interested professional groups, whether capital punishment or life imprisonment should be retained for some murders and perhaps one or two other exceptional offenses.[26] The issues are canvassed in the Working Papers,[27] and the Study Draft provides procedures for passing on the capital punishment question in particular cases, if Congress decides ultimately to retain it in federal criminal law. Life imprisonment, like capital punishment, is treated as a possible exceptional sanction to be used either in lieu of capital punishment, if it is abolished, or as an alternative sentence which may be imposed when capital punishment is authorized.[28]

Class B, the intermediate group of felonies, entails a legislative maximum of 15 years of which 3 must be on parole. Into this group fall not only traditional violent felonies such as manslaughter, arson, rape, robbery (where no aggravating circumstances raise them to the Class A level) but also major frauds, wholesale trafficking in certain drugs and a number of offenses involving substantial threat to national defense and international relations.

Sentence limits for Class A and B felonies reflect predominantly incapacitative goals. This is evident in the Study Draft provisions that maximum sentences beyond 20 and 7 years respectively for these felonies shall be imposed only for "exceptional risk to the safety of the public," [29] and that the Parole Board shall follow a release policy for long term prisoners that is based on the question whether "there is a high likelihood that he would engage in further criminal conduct." [30]

The long maxima authorized for Class A and B felonies must be considered in connection with other provisions of the sentencing scheme which may temper the rigor of sentence in actual administration. The upper ranges of sentencing power may be employed for persistent and professional or mentally abnormal criminals or others presenting "exceptional risk to the safety of the public." [31] There are presumptions in favor of probation and early parole.[32] Appellate review of sentences, proposed in the Study Draft through amendment of 28 U.S.C. § 1291, would aid in providing uniformity in application of these concepts.[33]

2. *Legislative Grading of Individual Offenses.*

A major reform of the proposed Code is the institution of a consistent plan of grading individual offenses. Present federal penal law employs grading erratically. Some crude grading appears in the homicide and assault provisions, and in the arson and kidnapping

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[26] See Study Draft § 3602.
[27] See Memorandum on Capital Punishment Issue, Vol. II.
[28] See Study Draft Chapter 36.
[29] Study Draft § 3202(2).
[30] Study Draft § 3402(2).
[31] See Study Draft § 3202(2).
[32] See Study Draft § 3101(2) and 3402(1) and (2).
[33] S. 1540, introduced by Senator Hruska, providing for appellate review of sentences was passed by the Senate in the last Congress. It was approved by the Judicial Conference and the ABA. It was reintroduced as S. 1561 in the present Congress and is now pending before the Criminal Laws and Procedure Subcommittee of the Judiciary Committee. *See also*, proposed section 3576 of the Organized Crime Control Act of 1969 (S. 30, 91st Cong. 1st Sess.) (hereinafter cited as S. 30).

sections. Some but not all of the theft, fraud and embezzlement sections grade according to amount involved. However, a great many serious offenses are not graded. The contrast between present federal law and the effort in the Study Draft to grade offenses in a rational way is illustrated by the law of rape. Within the plenary maritime and territorial jurisdiction of theUnited States, forcible rape is punishable by death or any term of imprisonment up to life.[34] Another Congressional enactment, for the District of Columbia, brings even "statutory rape" (*i.e.*, consensual intercourse with young girls) within the scope of capital punishment, but limits any imprisonment to a maximum of 30 years.[35] The Study Draft, on the other hand, grades rape into three degrees, putting consensual intercourse with adolescent girls into a separate fourth category.[36] Rape is a Class A felony if serious bodily injury is inflicted, if the case is one of ravishment by a stranger, or if the victim is less than 10 years old. It is a Class B felony where the victim was a "voluntary companion" of the alleged rapist, with no evidence of serious bodily injury to provide tangible support on the tricky issue of nonconsent. It is a Class C felony in the case of imposition on consenting mentally ill women or where the threat, although compelling, is less terrifying than threats of imminent death or serious injury.

Legislative grading is important as a matter of fairness between offenders far apart in the spectrum of social danger and as a desirable legislative control of the discretion of sentencing judges. It can and does, under the proposed Code, facilitate prosecutions by grading as misdemeanors minor instances of what would otherwise be felonies. Misdemeanors can be prosecuted by information rather than grand jury indictment, and the opportunity has been opened for disposing of misdemeanor charges before federal magistrates, thus helping to clear the dockets of federal district judges for more serious cases.[37]

3. *Minimum-Maximum Sentencing by the Judge.*

Present federal law authorizes in most cases the imposition of a so-called indefinite sentence, with a maximum (within limits set by the statute) and a minimum which may not be more than one-third of the maximum chosen by the judge. The purpose of indefinite sentencing is to achieve a reasonable allocation of authority and discretion among the competent agencies of government. In the first place, Congress designates the outside limits of the judges' discretion by stipulating in the Criminal Code the longest sentence that can be imposed for various offenses. Such maxima are presumably to be imposed only in cases of the "worst" offenses and offenders. The responsibility then passes to the judges to pick out from among those convicted of particular offenses the "worst" violators, upon whom the authority to punish may be exercised to its limit. Just as the legislatively determined maximum limits the judges' power, the judicially selected maximum limits the Parole Board's discretion.

The present federal system has worked reasonably on the whole, but substantial issues have been posed by recent legislative develop-

[34] 18 U.S.C. § 2031.
[35] Title 22, D.C. Code § 2801. (The death penalty would be unconstitutional under *United States* v. *Jackson*, 390 U.S. 570 (1968)).
[36] Study Draft §§ 1641(2) and 1642; *cf.* § 1645 (so-called statutory rape).
[37] 18 U.S.C. § 3401.

ments and proposals. On the one hand, there has been considerable support, especially from correctional authorities, for eliminating the judicially imposed minimum.[38] It is said that parole authorities are in a better position than judges to carry out intensive studies of the individuals involved and to follow a consistent, fair release policy. Congressional policy appears to have been moving against judicially fixed minima. Such minima are already barred in the case of juvenile and youth offenders,[39] and in other sentences a judge may specify that "the prisoner may become eligible for parole at such time as the board of parole may determine." [40] However, if the judge does not take the initiative to fix a lower minimum, the law fixes it at one-third of the maximum.

The Study Draft would alter this situation: there would be no minimum for Class C felonies, and none for the graver Class A and B felonies unless the judge took the initiative to set one and recorded his reasons why it was "required because of the exceptional features of the case." [41] When this arrangement is combined with appellate review of sentence, some progress towards a consistent judicial policy on minimum sentences would result. On the other hand, judicial review cannot be counted on to check more than gross abuse of sentencing discretion, and the Study Draft proposal does not wholly meet the contention that it is for Congress rather than the courts or individual judges, with divergent outlooks and penal policies, to allocate release power between the judiciary and the Parole Board.

Whether to retain the judicial power to set a minimum will be an important issue for the public, the Commission, and Congress to resolve. One possibility might be to retain it for selected categories of offense, *e.g.*, trafficking in hard narcotics, where present law employs Congressionally fixed *mandatory minima.*

4. *Legislatively Mandated Minima*

Present federal law includes a few instances of legislatively prescribed minimum sentences of substantial length without probation,[42] but for the most part Congress has vested judges with discretion to impose any penalty within the limits of the legislative maximum. Thus, even convicted murderers,[43] spies and rapists, whose offenses are deemed so heinous that capital punishment heretofore has been authorized, may be sentenced to any term within the maximum. On the other hand, criminal legislation dealing with dangerous drugs has in recent years required minimum sentences as high as ten years and precluded the normal use of probation and parole. Occasionally minor offenses carry minimum jail sentences although the judge remains free to put the offender on probation thus foregoing imprisonment altogether.[44]

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[38] Sharp (Chief, U.S. Prob. Div.) *Modern Sentencing in Federal Courts: The Effect on Probation and Parole.* 12 Am. U.L. Rev. 167,172,176 (1963); See Comment to § 1 of Model Sentencing Act of National Council on Crime and Delinquency (1963).

[39] 18 U.S.C. §§ 5017(a), 5037.

[40] 18 U.S.C. § 4208(a)(2).

[41] Study Draft § 3201(4).

[42] 18 U.S.C. §§ 2113(e) (murder in course of bank robbery—10 years), 2381 (treason—5 years) and 26 U.S.C. § 7237 (drug offenses—5 and 10 years).

[43] But *cf.* 18 U.S.C. § 2113 (murder in the course of bank robbery).

[44] *E.g.*, 26 U.S.C. § 7234(d) (oleomargarine tax—6 months minimum); 26 U.S.C. §§ 7235–36 (adulterating dairy products—30 day minimum).

The Study Draft poses the issue whether a legislatively prescribed minimum imprisonment should be employed for any crime. The American Law Institute in its Model Penal Code, the American Bar Association in its Standards on Sentencing Alternatives and Procedures,[45] and the President's Commission on Law Enforcement and Administration of Justice ("National Crime Commission")[46] recommended against mandatory minima without probation. There appears to be no satisfactory evidence that mandatory minima provide added general deterrence; high discretionary *maxima* (which most judges dealing with heinous offenses would be ready to use without legislative compulsion) may be more intimidating than the minimum. Compelling cases for clemency may occur among any class of offenders, and the principal effect of a legislative minimum which attempts to restrict the judge's discretion is to shift that discretion to prosecutors. The latter are free to charge or not charge an offense carrying a mandatory minimum, or to bargain for a plea to a lesser offense in exchange for dropping a charge carrying a mandatory minimum. This has the arguably undesirable effect that judges, operating in open court, are precluded from using their best impartial judgment in the matter of sentencing, while prosecutors remain free to dispose of the same issues with less visibility. In any event, it is impossible in practice to exclude judicial discretion entirely. It is not unknown for a judge to acquit or fail to impose sentence rather than impose what he considers to be an unjust minimum sentence.

On the other hand, it is undeniable that correctional officials, inadequately informed or naively hopeful, may, if unconstrained by a judicially imposed minimum (whether or not legislatively mandated), occasionally release to the community a convict who is quite likely to engage in serious crime. The great and troublesome issue posed in this area, then, comes down to this: is the danger of such premature releases an inevitable cost of any system which seeks early release of most prisoners to maximize the likelihood of resocialization; does a possible gain in deterrence from the legislatively fixed minimum overbalance the cost of needless detentions?[47]

5. *The Mandatory Parole Component of* All *Felony Sentences.*

One of the most important changes in philosophy and operation of the federal sentencing system is the proposal in § 3201 of the Study Draft to assure that every felon released from a federal penitentiary is subject to a period of parole supervision. Paradoxically, under present law, the most hardened and dangerous criminals get the least post-prison supervision. This comes about as a result of the conventional attitude towards parole as a "mitigation" of a sentence of imprisonment—a favor granted to the prisoner by allowing him to "serve" part of his sentence outside the walls if he behaves himself inside. In consequence, a prisoner whom the Parole Board regards as unsafe to release is detained until he has served out his maximum: no part of his sentence remains to be served outside under parole super-

[45] A.B.A. Standards, Sentencing Alternatives and Procedures § 3.2 (Approved Draft 1968).

[46] The Challenge of Crime in a Free Society, 142–43, 223–24 (1967).

[47] Mandatory minima for leading continuing criminal enterprises would be retained in section 509 of the Controlled Dangerous Substances Act of 1969 (S. 3246, 91st Cong. 1st Sess.) (hereinafter cited as S. 3246), which has been passed by the Senate.

vision. On the other hand, a "good" prisoner is released early in his indefinite sentence leaving a long portion of his maximum still to be served on parole.

When the concept of parole is changed from mitigation to rehabilition, it becomes possible to end the irrationality of making parole time inversely proportional to time actually served in prison. Thus, the Study Draft provides mandatory parole components of 5, 3, and 2 years in sentences for Class A, B, and C felonies respectively.

6. *Longer Sentences for Dangerous Offenders.*

The upper limits of sentences authorized for felonies under the Draft are quite high, 30 years for Class A, 15 years for Class B, and 7 years for Class C. It would be understood, as it is under existing law, that the upper ranges of available sentences are reserved for the most dangerous offenders. The Draft would make the will of Congress explicit in this regard by providing in § 3202 that if the sentence is to exceed 20, 7 or 5 years respectively, the judge must be of the opinion that the extraordinary term is:

> "desirable to protect the public because the defendant is a persistent felony offender, a professional criminal, or a dangerous mentally abnormal offender, or manifested his dangerousness by using a firearm in the commission of the offense or flight therefrom, or for some other reason presents an exceptional risk to the safety of the public."

The principle that legislation should distinguish between ordinary and extraordinary limits of sentencing has been approved by the American Law Institute in its Model Penal Code,[48] by the American Bar Association in its Standards on Sentencing Alternatives and Procedures (1968),[49] and by the National Council on Crime and Delinquency in its Model Sentencing Act.[50] It has been incorporated in a number of modern state penal codes and in an important pending bill, The Organized Crime Control Act of 1969.[51] Issues which remain to be resolved in this area have to do with the desirability of attempting to define such concepts as "persistent" and "professional" criminals, and with the procedure for proving the circumstances justifying exceptional sentence, *i.e.*, as part of proof of an offense embracing those circumstances or in a less formal sentencing procedure following conviction of a conventional crime. See comment to Study Draft § 3202 and discussion below relating to sentencing of leaders of organized crime.

7. *Regulating Cumulative Sentencing.*

One of the least defensible vagaries of the present sentencing system is the possibility left open to the prosecutor and the sentencing judge to cumulate sentences by reference to a whole series of charges for which defendant is convicted. Thus, where the mail fraud statute presently authorizes a 5 year maximum, it proved possible to sentence one defendant to 25 years imprisonment on the basis that five different

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[48] §§ 7.03 and 7.04 (P.O.D. 1962).
[49] Section 2.5 and commentary.
[50] See Model Sentencing Act § 5 reprinted in ABA Report, *supra*, note 45 at 330 and discussed at 86.
[51] S. 30, *supra* note 33, Title X. See S. Rep. 91-617 at p. 83.

mailings, pursuant to the single scheme to defraud, were alleged in five separate indictments.[52] All the authorities previously mentioned agree that this is bad policy, abuse of law, and a betrayal of the real but unexpressed will of Congress.

Even in a clear case of multiple offenses, as where the offender robbed five different banks, the maximum term intended by the Congress is surely not 125 years, arrived at by multiplying by five the 25 year maximum in 18 U.S.C. § 2113(d). Instead it would appear that the case should be recognized and treated as that of an unusually dangerous bank robber for whom the 25 year maximum was designed. That is the effect of the restrictions on consecutive sentencing found in § 3206 of the Study Draft. Consecutive sentences may not exceed the maximum authorized for the most serious offense committed.[53]

Balanced against the proposed restraint on cumulating long sentences is a new provision authorizing a felony sentence against "persistent misdemeanants." See Study Draft § 3003.

Another novel, sensible and humane feature of the Study Draft sentencing system is that it views a sequence of state and federal imprisonments as a single treatment plan: a long federal sentence imposed on one who is already serving a state sentence must be shortened by the time served in state prison.[54] Any other result would be inconsistent with the overriding federal policy to prescribe limits on the length of imprisonment even for multiple serious offenders. To depart from that policy where the consecutive sentences were imposed by "different sovereigns" would be arbitrary, based on political abstractions rather than functional goals of deterrence, incapacitation, etc.

8. *Probation.*

Probation is the conditional release of a convicted offender, without imprisonment, where the sentencing judge believes that the purposes of the criminal law are best served by such a disposition. Under existing federal practice, probation is commonly employed for first offenders, unless the offense is quite serious or the offender appears to present an exceptional threat to general security.[55] But there are wide variations in the practice of individual judges, and no legislative indications of a common policy to be followed. Section 3101 of the Study Draft spells out a Congressional policy against unnecessary imprisonment, and lists the factors to be considered by the sentencing court. The listed factors are those that most conscientious judges would use anyway, but listing is useful for inexperienced judges and counsel. Also, in connection with appellate review of sentences,[56] it may be expected to result in a more uniform probation practice expressive of national policy rather than the idiosyncracies of a particular judge.

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[52] *Beckett* v. *United States*, 84 F. 2d 731 (6th Cir. 1936). *See also Becker* v. *United States*, 91 F. 2d 550 (9th Cir. 1937) (two 5 year sentences to be served consecutively for two letters to the same victim); *cf. Sanders* v. *United States*, 415 F. 2d 621 (5th Cir 1969) (defendant could have received maximum consecutive sentences totaling 115 years under multiple count fraud indictment).

[53] Study Draft § 3206(3).

[54] Study Draft § 3206(6).

[55] Empey, *Alternatives to Incarceration*, HEW Social and Rehabilitation Service, Office of Juvenile Delinquency and Youth Developments, pp. 32, 74 (1967).

[56] See proposed amendment to 28 U.S.C. § 1291 at p. 311, *infra*.

9. *Fines.*

Chapter 33 of the Study Draft makes four main improvements on the present fine system:

(i) In place of a bewildering variety of maximum fines found in present law, there are substituted a set of four normal maxima, corresponding to the main classes of offense, *i.e.*, ordinary and aggravated felonies, and ordinary and petty misdemeanors. § 3301(1). The absurdities and inconsistencies of current federal fine law were extensively documented by our sentencing consultant, Professor Peter Low, from whose report only a few illustrations are here taken. Robbery of a federally insured bank entails a maximum fine of $5,000; robbery of a post office carries no fine.[57] Damaging property of the United States carries fines up to $10,000 if the damage exceeds $100; but another statute relating to federal property on a wildlife refuge sets a maximum fine of $500 regardless of the amount of damage.[58]

(ii) For all offenses, a fine may be imposed in an amount up to twice the gain realized by the offender or twice the damage caused by the offense, regardless of the normal fine limits mentioned in (i). § 3301(2). Existing federal law occasionally and erratically employs the principle of relating fines to criminal profit or damage.[59] Sections dealing with important commercial crimes, *e.g.*, mail fraud [60] and counterfeiting [61] make no provision for profit-related fines.

(iii) Fines must be proportioned to the financial resources of the defendant and not so high as to preclude restitution to the victim; *i.e.*, such restitution is given a higher priority as an obligation of the defendant than a purely penal payment to the government. § 3302.

(iv) The consequences of non-payment of a fine are to be determined not at the time the fine is imposed (the traditional pattern of "One Hundred Dollars or Thirty Days"), but after defendant has been given an opportunity to pay, in installments if the situation calls for it. It is "failure to make a good faith effort" to obtain funds for payment that results in imprisonment; the analogy is to disobedience to an injunction or other court order. § 3304.

10. *Forfeiture of and Disqualification from Office.*

The Study Draft brings order into the incredibly haphazard provisions of existing law on this subject.[62] Automatic forfeiture of office is restricted to a core of offenses relating to the integrity of government, *e.g.*, treason, bribery. A judge may require forfeiture upon conviction, of certain other offenses, *e.g.*, felonious theft, unlawful influence. § 3501. Any of these offenses gives rise to a discretion in the sentencing judge to disqualify. The policy here expressed is that normal removal

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[57] See 18 U.S.C. §§ 2113(a) and 2114.

[58] See 18 U.S.C. §§ 1361, 41.

[59] See discussion at note 19, *supra*.

[60] 18 U.S.C. § 1341 (an absurdly low $1,000 maximum).

[61] 18 U.S.C. § 471 ($5,000).

[62] Disqualification may be automatic (corrupt bank examiners, 18 U.S.C. § 655), or discretionary (bribery, 18 U.S.C. § 201(e)). The bar may be temporary (sedition, 18 U.S.C. § 2385) or permanent (insurrection, 18 U.S.C. § 2383). It may apply to particular posts (18 U.S.C. §§ 655, 1907) or to all federal employment (18 U.S.C. §§ 201, 2383). Forfeiture of an office currently held by the defendant may be required without disqualifying him for a new appointment in the federal service. 18 U.S.C. §§ 1905, 1912.

procedures, *e.g.*, under the civil service legislation, should ordinarily be relied on. However, there may be occasions when political pressures or corrupt influence frustrates normal removal procedures. Ultimate judicial power may be a useful alternative when it is feared that such pressures may be brought to bear.

A central contribution of the Study Draft lies in the area of termination of disqualification. The sentencing judge is given power to limit the duration of disqualification. § 3502. Even more important is the provision of § 3503 that all disqualifications and disabilities lapse five years after the sentence has been served, absent conviction of another crime. The great advantage of this arrangement is that it operates automatically, *i.e.*, without application for executive clemency or judicial action. Thus the benefits of eventual absolution are extended to the poor, the ignorant, and those without political influence. Moreover, since federal law is paramount, there is reason to believe that *state* disqualifications, *e.g.*, from office-holding, jury service, which depend on a federal conviction will likewise terminate automatically.

11. *Innovative Conditions of Confinement.*

The Study Draft does not touch the law regulating the conduct of the Bureau of Prisons. It is, however, designed to permit and encourage progress in the law and practice of imprisonment and rehabilitation. Under §§ 3103(2) and 3404(2), probationers and parolees may be required to "attend or reside in a facility established for the instruction, recreation or residence of persons on probation or parole." Thus provision is made for the use of institutions midway between the close confinement of prison and total release. Intermittent confinement, *e.g.*, at nights or on weekends, becomes a possibility, allowing the convict to continue a more or less normal relation to the community and the family. Section 3205 contemplates continuance and development of special facilities for treatment of juveniles and youthful offenders,[63] mental defectives,[64] and narcotics addicts,[65] including arrangements with non-governmental agencies for care, education and treatment.

12. *Capital Punishment and Life Imprisonment.*

Although the general sentencing scheme of the Study Draft envisions the 30-year term for Class A felonies as the most severe penalty, the question of retention of capital punishment has been explicitly reserved for further consideration by the Commission. A special sentencing section for use if capital punishment is retained undertakes to assure consideration of all factors that a jury should weigh before approving a death sentence, while keeping prejudicial evidence out of the guilt phase of the trial.[66] All aspects of the controversy are fully explored in the Working Papers to facilitate comment by those considering the alternatives posed in the Study Draft.

A separate question is whether life imprisonment rather than the 30-year Class A maximum should be authorized for any exceptional category of offense. The arguments made for substituting a 30-year maximum in place of life sentence are that longer detention into old age is unnecessary for deterrent or incapacitative purposes, and harsh;

[63] See Chapters 402 and 403 of Title 18.
[64] See Chapter 313 of Title 18.
[65] See Chapter 314 of Title 18.
[66] Study Draft §§ 3601–05.

that in federal practice we do not in fact detain lifers for periods longer than 30 years; that the few cases where it may be feared that the prisoner is mentally ill and therefore dangerous to release can and should be handled under civil commitment procedures that base themselves on the facts as they exist at the end of the prisoner's confinement rather than on determinations made 30 years earlier. Although life imprisonment has sometimes been called "slow death", the implications of life imprisonment have received relatively little attention, probably because opponents of capital punishment have found it useful to proffer this alternative to execution.

Should the 30-year limit be accepted in principle, life imprisonment might remain an available alternative for a very few offenses formerly capital, *e.g.*, certain murders and treason. Proponents and opponents of capital punishment might compromise on life imprisonment for such cases.

### OFFENSES DIRECTLY INVOLVING THE NATIONAL GOVERNMENT

A substantial part of the proposed Code is concerned with offenses which uniquely concern the federal government as a *national* government. Thus: Chapter 11 deals with threats to the very existence of the national government; Chapter 12, covering foreign relations, immigration and nationality, is concerned with the function of the United States as a sovereign power in the international community; Chapter 13 is concerned with protecting the integrity and effectiveness of government operations generally and Chapter 14, with the special problems of protecting national revenues; Chapter 15 deals with civil rights, a national concern by virtue of the guaranties contained in the Constitution of the United States.

1. *National Security.*

The Study Draft introduces no fundamental changes in this field. Perhaps the most interesting single change proposed relates to offenses which presently carry higher maximum penalties in time of war or national emergency. In the course of discussions of an early draft in which this line of demarcation was retained, a Commissioner pointed out that it was not relevant to modern conditions. We live in a time when "wars" are subtly distinguished from "international policing by armed forces" and national "emergencies" endure for a generation. Sabotage to missiles, early warning systems or "other defenses . . . against sudden enemy attack" threatens national existence, and belongs in the highest category of crime whether or not "war" has been declared.[67] On the other hand, it seems inadvisable to make the most severe punishment contingent on executive declaration of emergency or failure to terminate such an emergency. This is especially the case because in the President's consideration the civil consequences of emergency status must overshadow the criminal penalty question to the point of virtual extinction.

Other sentencing refinements have been made in the national security law. For example, present "espionage" law purports to make it a capital offense to deliver information "relating to the national defense" to a foreigner, not only where there is "intent" to injure the

[67] See Study Draft § 1106. *Cf.* § 1113(2) (espionage).

United States, but even if there is only "reason to believe" that the information will be used "to the advantage of a foreign nation." [68] It is plainly irrational to classify intentional treachery and mere negligence as equivalent misbehavior. The Study Draft makes appropriate discriminations.[69]

On the internal security side, interest will probably center on the proposal in § 1105 to make it a felony to engage in "paramilitary activities," *i.e.*, organized acquisition, caching, use, or training in the use of weapons for political purposes. This provision, patterned on certain foreign laws,[70] has the desirable purpose of discouraging the development of private armies, but poses problems of administration in relation to groups avowedly armed for "defensive" purposes. Section 1105 should be considered in connection with § 1103 (armed insurrection, a Class A felony for leaders) and § 1104 (advocating armed insurrection). An effort has been made to tailor these sections to constitutional and prudential requirements by restricting the application of inchoate offenses (conspiracy, attempt, solicitation) to situations where the danger is imminent.[71]

2. *Foreign Relations, Immigration and Nationality.*

Generally, the provisions dealing with foreign relations, immigration and nationality (§§ 1201–1229) continue current penal policy concerning enforcement of United States obligations in the international community, protection of United States neutrality and related matters.[72]

3. *Integrity and Effectiveness of Government Operations; Contempt.*

Chapter 13 deals with obstruction of government functions including sections on perjury, bribery, intimidation of witnesses and officials, and other forms of interference with the processes of law enforcement and government generally. While the Study Draft contributions in these areas are primarily the rationalization of penalties and precision in defining misconduct, §§ 1341–49 propose a major innovation in the area of contempt.

"Contempt of court" is an ancient, ill-defined quasicrime, which may be punished by a judge with limited regard to the usual rules of criminal procedure and without statutory limit on the term of imprisonment that may be imposed.[73] The crime embraces some misbehavior that is not otherwise punishable, *e.g.*, disrespectful conduct by a lawyer, refusal of a witness to answer questions, disobedience of an injunction; but it also overlaps a range of ordinary criminal behavior in court, extending from disorderly conduct to obstruction of justice and gross perjury.

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[68] 18 U.S.C. § 794.

[69] Study Draft § 1113 (espionage), §§ 1114–15 (mishandling national security information).

[70] *Cf.* 18 U.S.C. § 2386, requiring registration of certain organizations engaged in "civilian military activity."

[71] § 1103 (insurrection "in progress or is impending"); § 1104 (advocacy with "substantial likelihood" that it will "imminently" produce armed insurrection.)

[72] See discussion of regulatory offenses, *infra*, for further comment on §§ 1204–05 and §§ 1221–29.

[73] A Constitutional maximum of six months for contempt sentences imposed without jury trial appears to be emerging from a series of Supreme Court decisions. See, for example, *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

The Study Draft, §§ 1341–49, innovates in this area by making ordinary defined crimes out of most types of contempt, by sharply restricting the term of imprisonment (no more than 30 days) which the judge may summarily impose for contempt, and by creating a procedure under which the judge may, in lieu of utilizing summary contempt procedure or following a summary contempt conviction "necessary to prevent repetition of misbehavior disruptive of an ongoing proceeding", certify the case for prosecution as an ordinary specific offense.[74] This arrangement preserves the inherent self-defensive power of the courts while requiring that normal criminal procedure be followed in imposing substantial sentences for misbehavior amounting to ordinary crime.[75] "Civil contempt"—the power to imprison to compel compliance with a court order, on the understanding that the prisoner will be released whenever he does comply—is preserved.[76]

Among the expectable controversies on this subject will be: (1) whether the Code should impose any limitations on the sanctions which may be imposed for criminal contempt, and if that maximum should be at the Class B misdemeanor level, *i.e.*, up to 30 days, or only five days, considering that every substantial offense remains subject to a separate, and in some cases supplemental, prosecution; (2) whether a limit of one year should be placed on the power to detain in "civil contempt", in the view that the prisoner's protracted resistance to compliance shows the uselessness of further effort to coerce him, so that the affair at this point becomes penal, an exemplary infliction for past intransigence, rather than civilly coercive.[77]

The Study Draft modernizes and tightens up the law on perjury. At present the fact that a defendant made two utterly inconsistent statements is not sufficient evidence for conviction absent proof as to which one was untrue. Section 1351(3) changes the law by providing that the statements may be set forth in the alternative and that proof of the contradiction establishes a prima facie case that one of the two statements was false, and that the prosecution need not allege or prove which statement was untrue.[78] Subsection (2) of § 1351 finally eliminates the controversial two-witness rule and substitutes a corroboration requirement. Section 1352(1) permits prosecution, at the misdemeanor level, for sworn false statements which cannot be proved to be material.

The Study Draft treatment of false statements to government agencies (§ 1352) is an example of the general effort to consolidate offenses and rationalize grading. Under existing law, the general false statement offense (18 U.S.C. § 1001) is a felony, with a maximum penalty of five years imprisonment. A number of other statutes grade particular false statements as misdemeanors or petty offenses. Section 1352 reverses this situation, so that the general offense is a misdemeanor and selected serious false statements are upgraded to the felony level where

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[74] Study Draft §§ 1341(3), 1349.

[75] *Cf.* 18 U.S.C. § 3691 which provides that, in prosecuting violations of injunctions as contempt the accused shall be entitled to a jury trial, "which shall conform as near as may be to the practice in other criminal cases," where the misbehavior constitutes a criminal offense under federal or state law.

[76] Study Draft § 1341(4).

[77] *Cf.* S. 30, *supra* note 33, Title III, authorizing incarceration during the life of the grand jury, which might be up to 36 months under § 101 of the bill.

[78] S. 30, *supra* note 33, Title IV has a similar provision.

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 1110, respectively. In addition, the scope of the proposed 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.

4. *Internal Revenue and Customs Offenses.*

A major innovation in this area is accomplished by bringing under the Code (Chapter 14) major offenses relating to protection of the internal revenue of the United States. These offenses are presently dealt with in Title 26. Most minor and regulatory offenses would remain in that title. But no reason is seen why the major fraud and obstruction offenses should not be brought within the general system of the criminal code. Customs offenses are consolidated into a single, comprehensive offense of smuggling. § 1411.

5. *Civil Rights.*

In this area (Chapter 15) the main gains of the Study Draft are in simplifying and clarifying existing law. For example, as noted earlier, the basic civil rights offenses can be classified as misdemeanors, avoiding the need for grand juries, and otherwise facilitating prosecution, because of the unique "piggyback" jurisdiction created by § 201(b), which permits federal prosecution at the appropriate felony level for murder, kidnapping, obstruction of justice, or any other offense committed in connection with the civil rights violation. The post-Civil War civil rights legislation [79] is consolidated in § 1501; useless proof requirements are eliminated;[80] and the daunting complexity of the Civil Rights Act of 1968 [81] ameliorated by distributing the provisions among a series of distinctively captioned sections. For example, § 1511 covers the offenses provable without showing "discrimination", mostly direct interference with specified federal privileges and benefits, and § 1512 covers the discrimination offenses.

An important issue raised by the draft is whether to restrict § 1511, as 18 U.S.C. § 245 does, to intimidation "by force or threat of force." After much discussion, the phrase was deleted on the view that economic pressures to forego federal rights ought to be banned. At the same time, there was deleted from the 1968 language the prohibition against "interfering with" the protected rights; such broad language seemed to go too far once the requirement of force or threat was removed. The result is a compromise which leaves it to the courts to spell out the precise range of "injure or intimidate," taking into account Congress' intent both to go beyond violence and yet not so far as every conceivable "interference" such as might result, for example, from lawful though erroneous judgments of election officials, judicial decisions, discretionary judgments of federal employers or disbursing officers.

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[79] 18 U.S.C. §§ 241 and 242.
[80] *E.g.* "color of law" and "conspiracy" under 18 U.S.C. § 242.
[81] 18 U.S.C. § 245.

6. *Regulatory Offenses.*

The Study Draft embodies a major invention in the field of penal sanctions for violating administrative regulations and minor regulatory provisions of statutes: a model set of penalties rationally graded from "infraction" for unwitting violations to misdemeanor for willful and persistent defiance of regulatory authority.[82]

Nothing is more distinctive of a mature, modern industrial society than the vast proliferation of minutely specified rules and regulations for the conduct of government, business, unions, and indeed of "private" life, whether it be the manner of driving one's automobile, the character of the wiring and plumbing in one's house, or the nature of records and reports required in one's profession. Penal sanctions are widely and indiscriminately employed, often dispensing with any requirement that the prosecution prove that the defendant knowingly violated the rules; "strict liability", precluding even the defense of reasonable mistake of fact, is commonly provided, sometimes even at the felony level.[83] A not uncommon disposition is "whoever violates any provision of this statute or any rule or regulation thereunder shall be guilty of [a felony or misdemeanor]", although the great majority of the offenses contemplated are likely to be trivial or technical. A noteworthy feature of the legislative process in this connection is that while the Department of Justice initiates and Judiciary Committees must approve of legislation dealing with ordinary crimes, other departments and committees, knowledgeable in the particular field regulated but inexpert and not attuned to the problems of "regulating" human beings, *i.e.*, offenders, or the machinery of penal justice, generally dispose of penal aspects of regulatory law.

Where a mass of intricate regulatory requirements backed by penal sanctions is found outside Title 18, the Study Draft typically handles the situation by selecting out the serious offenses for inclusion in the Code, leaving the rest of the legislation untouched, except that nothing outside the Code may be punishable above the misdemeanor level. The burden of proof is put on the regulators to justify incorporating in Title 18 higher level penalties for carefully defined misbehavior. This approach characterizes the Study Draft dispositions in the areas of firearms, commercial controls, immigration and naturalization, and the selective military service, among others. In order not to disrupt existing law enforcement patterns, § 1006, with its provision for treating some regulatory offenses as infractions and others as Class B misdemeanors, is not made automatically applicable to existing complicated regulatory schemes. It would be hoped that as new regulatory statutes are enacted, § 1006 would be incorporated by reference, and that the same thing would happen when, from time to time, older regulatory legislation comes up for reconsideration.

CRIME WHICH TRANSCENDS THE POWER OF STATE LAW ENFORCEMENT

The United States is interested not only in the offenses directly involving the national government, but also in aiding state law enforcement where there are special difficulties arising from the multi-state

[82] Study Draft § 1006.

[83] *Cf. United States* v. *Balint*, 258 U.S. 250 (1922); *United States* v. *Dotterweich*, 320 U.S. 277 (1943). But see Study Draft § 302(2), sharply curtailing "strict liability".

aspects of criminal businesses. The area of federal criminal jurisdiction, auxiliary to state law enforcement, is the primary concern of Chapters 16, 17, and 18, although in some instances particular sections will embrace within a prohibition of common offenses situations where the federal government is itself the victim of the offense. See, for example, application of the theft sections not only to interstate transportation of stolen property but also to theft of government property.[84]

1. *Organized Crime and Criminal Businesses.*

The problem of crime as a continuing business has been a major concern in the Study Draft. Such crime has distinctive features that enhance the normal difficulties of law enforcement. The operation generally provides services and products which, if illicit, are nevertheless widely desired and availed of: gambling, prostitution, drugs, usurious loans, non-tax-paid liquor. The customer is a willing participant in the transaction so that there are no "victims" in the usual sense, ready to complain and testify against the wrong-doers.[85] The general community is split in its moral attitudes; the attempt to repress lacks the force of universal condemnation which is behind law enforcement when directed against murder, rape, robbery, or burglary. Profits are high for the criminal entrepreneurs, in part because the criminal law itself acts as a protective tariff limiting the number of "competitors". High profits are a source of corruption of law enforcement and other officials without whose complaisance or active cooperation much of the business would be impossible. The fact of organization, with numerous conspirators collaborating, almost openly, to serve a numerous clientele, helps suppress the normal inhibitions against defying the law. The phenomenon has been the subject of much scholarly attention in recent years, some of it pointing towards the desirability of restricting the use of criminal law for sumptuary controls not backed by a full and genuine consensus.[86] Other investigations have stimulated calls for intensified efforts to enforce the laws, especially against the organizers and leaders of criminal syndicates.[87] Attention has been called to the fact that the violent and coercive tactics of organized crime have been carried over into legitimate business fields in many instances, resulting in particularly vicious restraints of trade of a character usually dealt with under the antitrust laws.[88]

The general thrust of the Study Draft is to curtail the application of federal criminal law in relation to minor participants in violations of sumptuary laws and to focus federal law enforcement on organizers, leaders, and corrupt public officials participating in criminal syndicates. Thus, some offenses are defined in terms of engaging in the

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[84] See Study Draft §§ 1740 and 201 (j) and (d).

[85] On the other hand, it is difficult to regard the willful dissemination of addictive drugs as other than a victimization, whether or not the addict-user "consents". In a somewhat similar way, it can be argued that social conditions giving rise to irrational hope among the poor for easy gains foster an "addiction" to gambling, a self-crippling economic wound.

[86] See, for example, Packer, *The Limits of the Criminal Sanction* (1968).

[87] *The Challenge of Crime in a Free Society*, Report of the President's Commission on Law Enforcement and Administration of Justice 187–200 (1967); King, *Gambling and Organized Crime* (1969); S.30, Note 33 *supra*.

[88] *Cf.* Title IX S.30, note 33 *supra*, and S.Rep. 91–617, at pp. 76 *et seq.*

forbidden business.[89] Some offenses are graded according to whether the defendant was operating the business or only a minor functionary.[90] The statute of limitations is drafted so as to give prosecuting authorities an exceptionally long time to catch up with organized crime leadership.[91]

The most striking move made by the Study Draft on this front is to provide Class A felony treatment (up to 30 years) for leaders of large criminal syndicates.[92] This classification, it will be recalled, is reserved for the most heinous offenses, such as murder, treason, and aggravated rape, kidnapping and robbery. "Criminal syndicate" is defined as an association of ten or more persons engaging in typical racketeering crimes on a continuing basis. Leaders are those who:

> (i) organize, manage, supervise, finance the operation, or
> (ii) provide, as fellow-conspirators, legal, accounting or other managerial services, or
> (iii) employ violence or intimidation to carry out the syndicate's criminal objects, or
> (iv) as public officials intentionally promote the criminal enterprise.

These leaders would incur Class A felony sanctions if the number of associates is more than 25, or if the crimes of the syndicate include Class B felonies, *i.e.*, in general, crimes of violence or trafficking in dangerous drugs. Class B felony sanctions are provided for other leaders.

A major issue in the draft relates to the procedure by which these high penalties should be administered. Under proposed § 1005, the offense, including the defendant's leadership role, would have to be charged and proved beyond a reasonable doubt like a special kind of conspiracy. The alternative presented in § 3203 is a special sentencing arrangement, under which the substance of the conviction is some ordinary offense, such as illegal gambling, running a prostitution business, or trafficking in narcotics. The facts regarding the syndicate and defendant's role in it would be explored in a post-conviction sentencing proceeding before a judge alone, under the more flexible evidentiary rules applicable to sentencing, and without the necessity of proof beyond a reasonable doubt. There are troublesome problems either way. Some have argued that the first alternative, which seems to safeguard the defendant's rights more securely than the second, would in fact operate against him. By opening up a wide range of evidence relating to the syndicate, on an indictment which included both specific offenses and syndicate counts, this arrangement tends to assure conviction on the substantive count even if there was insufficient evidence for conviction on the syndicate count.

The sentencing alternative of § 3203 has its own difficulties. Some have argued that it would deny equal protection of the laws if Congress provided different maximum penalties "for the same offense". To this it has been answered that conscientious judges regularly take organized crime affiliations into account when sentencing for substantive offenses under existing law. Indeed, the high maxima character-

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[89] Prostitution § 1831(1)(a), gambling § 1831(1), usury § 1759(1).
[90] Prostitution § 1841(2), gambling § 1831(3).
[91] § 701(4).
[92] §§ 1005, 3203.

istic of existing penal law probably exist to make possible the exercise of such a discretion. It can be argued persuasively that a legislative scheme which moderates the "ordinary" maximum while providing longer confinement for a rationally selected class of offenders affords greater protection against discriminatory application of penal law than a system which leaves it to the uncontrolled discretion of each judge to impose the harshest sentence upon a defendant whether or not he functions as a leader of organized crime.

A significant alternative to the Study Draft proposals on sentencing for organized crime is embodied in the pending Organized Crime Control Act of 1969, S. 30, 91st Cong., 1st Sess., Title X. The bill would authorize extended sentences upon conviction of *any* felony, *e.g.*, under the tax, bankruptcy, arson, or securities laws, where the Study Draft is confined to gambling, drugs and other typical racketeering crimes. The critical finding would be that the felony was committed "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 that he was a leader in a conspiracy of three or more to engage in a pattern of criminal behavior. The procedure contemplated by Title X would take place at the sentencing stage, but incorporates notice and some other features of due process usually associated with the trial of guilt.

A discussion of how the Study Draft deals with four crimes which generate a great deal of profit for organized crime follows.

a. *Gambling.* The proposed gambling sections bring within federal reach anyone who "engages or participates in the business of [illegal] gambling" on a federal enclave or by use of the mail or means of interstate commerce, or when a person or gambling implement moves across a state boundary. The offense is a felony if defendant ran a business carried on by three or more persons, or on a scale involving more than $2,000 of bets in one day, or if an official is bribed. Otherwise it is a misdemeanor.

The great issues with respect to the anti-gambling provisions [93] relate to scope of federal jurisdiction and level of penalties. Some have urged that plenary federal jurisdiction be asserted over illegal gambling, on the pattern of the drug sections discussed below.[94] On this view every petty numbers writer or "bookie" would be a potential federal defendant, leaving it to the discretion of the federal law enforcement agencies when to use this authority—presumably when its exercise against petty criminals would be useful in coercing them to testify against higher-ups. Some who have favored this broad jurisdiction have also favored making even petty gambling offenses felonies, again for the purpose of coercing minor offenders to aid in prosecuting major violators. The Study Draft, however, incorporates a more conventional approach to both jurisdiction and sentencing. On this side the arguments were that local law enforcement responsibilities ought not to be so pervasively parallelled and supplanted, that the credibility of a federal penal code would be undermined by prescribing felony penalties for behavior which no one takes so seriously, and that grand jury

[93] Study Draft §§ 1831, 1832.
[94] See, *e.g.* Title VIII of S. 30, note 33 *supra*.

interrogation backed by contempt sanctions is a more effective and selective means of compelling testimony.

b. *Loan-Sharking.* The loan-sharking provisions of the Study Draft appear in § 1759. That section makes it a felony to engage in the business of lending at interest rates which render the loan unenforceable through ordinary judicial proceedings. The corresponding provisions of present law relate to "extortionate credit transactions", require difficult proof that the loan was made on the understanding that it would be enforced by violence, and create extraordinary presumptions and evidence rules to make such proof possible.[95] The Study Draft facilitates prosecution by eliminating the issues of violence and extortion. The basic conception is that the business of making legally uncollectible loans must rest on *either* implicit threat of violent collection *or* multiple fraudulent representations that the loans, interest rates, etc. are in fact valid and enforcible.

c. *Drug Crimes.* A major innovation in the Study Draft is the systematic distinction made between "trafficking" and possession for own use, *i.e.*, between the commercial exploiter and the user.[96] Admittedly, the line between is not always bright and clear; there are, of course, addict pushers. Nevertheless, a Congressional indication of intention to reserve harsher punishments for the exploiter certainly would accord with universal feelings on the subject and would guide the exercise of discretion by prosecutors and judges towards more uniform and humane treatment. On the same principle, "trafficking" itself is classified according to the scale of the activity. Thus, trafficking in dangerous drugs would be an aggravated felony if it is sale for resale or in excess of quantities established by the Attorney General as indicative of wholesale operations.[97] These are traditionally the domain of large scale criminal businesses. The invention of the concept of "trafficking" is itself a useful innovation of the Study Draft; it blankets a variety of transactions, including manufacture, import, export, sale, gift, or other transfer, and possession with intent to sell.[98] This simplifies prosecution and avoids multiple charges for what is in substance a single offense.

Additionally, prosecution of drug offenses would be facilitated by eliminating technical proof requirements relating to federal jurisdiction. For example, it has heretofore been necessary for the government to prove that the drugs involved were imported and that the defendant was aware of that fact. Recognizing the difficulty of proving that the drugs were imported and what the defendant, who might be an ignorant small-time pusher, knew about the importation, Congress provided certain "presumptions" of importation and knowledge thereof. In *Turner* v. *United States*[99] this presumption was sustained as to heroin on the ground that there were virtually no domestic sources of the drug, but reversed as to cocaine which could well be domestic in origin. No such problems would arise under §§ 1821–1829 of the Study Draft. Federal jurisdiction is made "plenary", *i.e.*, independent of any one basis for federal legislation.[100] Interstate and

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[95] 18 U.S.C. §§ 891–96.
[96] Compare Study Draft §§1822 and 1824.
[97] Study Draft § 1822(1).
[98] Study Draft §1829.
[99] 396 U.S. 398 (1970).
[100] *Accord*, S. 3246 note, 47, *supra*, § 101.

local traffic in narcotic and dangerous drugs is seen as so intermingled that effective regulation within the powers explicitly entrusted to Congress requires pervasive controls.

The Study Draft distinguishes, of course, between "hard" addictive narcotics and potent hallucinogens, the abusable stimulants and sedatives, and other useful commonly available but "restricted" drugs. Only the first category, for example, comes within the aggravated Class B felony;[101] it is a noncriminal "infraction" to possess an "abusable" drug,[102] and no offense at all to possess (without intent to traffic) a "restricted" drug. Changes in drug abuse "fashions" are anticipated by authorizing the Attorney General to add new drugs to any category and to reclassify drugs from time to time.[103]

The nationwide debate over the penal proscription of marihuana ensures a focus of controversy on the classification of marihuana and oral amphetamines as "abusable," rather than "dangerous" drugs,[104] in consequence of which first offense illegal possession would be only a noncriminal "infraction".[105] The range of opinion on this subject, of course, ranges from the view that marihuana should be legalized to the view that more severe penalties are appropriate.[106]

d. *Organized Crime and Bribery of Local Officials.* Not the least sigficant or controversial provision relating to organized crime is found in the proposed bribery law, under which it becomes a federal offense to bribe local officials.[107] Federal jurisdiction is rested on every conceivable base, *e.g.*, mails, interstate commerce, for all local public servants. For elected local public servants jurisdiction is plenary. This power is derived from the provision of Article IV, Section 4 of the Constitution that the United States "shall guarantee to every State in this Union a Republican Form of Government." Federal jurisdiction may be exercised if the Attorney General certifies that a "substantial federal interest exists" because "an offense apparently local in its impact is believed to be associated with organized criminal activities extending beyond state lines" or "where local law enforcement has been corrupted so as to undermine its effectiveness." *Cf.* § 207 where these considerations are made general criteria for exercises of federal jurisdiction but without certification. The local bribery provision grew out of discussions by the Commission and Advisory Committee in which some members expressed the view that the primary federal interest in illegal gambling was to promote the integrity and effectiveness of local law enforcement officials, without whose connivance illegal gambling could not be carried on. The novelty of federal jurisdiction over local bribery should not be exaggerated;[108] federal mail fraud prosecutions against

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[101] Study Draft § 1822(1). On the question of mandatory minimum sentencing, see discussion at note 47, *supra*.

[102] Study Draft § 1824(1). Subsequent offenses rise to misdemeanor level in abusable drugs other than marihuana.

[103] Study Draft § 1821.

[104] Study Draft § 1829(c).

[105] See Study Draft § 109(d) and (n).

[106] *Cf.* S. 3246 note 47 supra, § 501(e).

[107] Study Draft §§ 1361 *ff*, especially § 1368(2). *Cf.* § 802 of S. 30, note 33 *supra*, penalizing obstruction of local law enforcement with intent to facilitate an illegal gambling business.

[108] See 18 U.S.C. § 1952; *United States* v. *Corallo*, 413 F. 2d 1306 (2d Cir. 1969).

officials who were cheating the state are an established part of our jurisprudence.[109]

2. *Crimes Where State Law Enforcement is Impeded by Interstate Aspects.*

The federal government is inevitably drawn into law enforcement when multi-state aspects of a crime make it difficult for one state to prosecute. It may be impossible to ascertain which state a plane was over at the moment it was skyjacked, and thus which state has territorial jurisdiction.[110] It would be difficult at best for a state to investigate a kidnapping when the suspect came in from out of state and held the victim out of state for ransom.[111] Stringent state gun control laws may be undermined by interstate gun shipments. What follows is a discussion of four areas where a prime federal concern is aiding local law enforcement under such circumstances.

a. *Theft.* More clearly than in any other area, federal statutes dealing with theft reflect the incremental development of federal criminal jurisdiction. One set of statutes deals with use of the mails and interstate and foreign wire, radio and television communication to execute a scheme to defraud.[112] Another statute proscribes interstate transportation of stolen cattle,[113] another stolen motor vehicle and aircraft,[114] and still another stolen articles of any kind.[115] Separate statutes deal with theft of federally-owned property,[116] theft of property moving in interstate commerce,[117] theft within the special maritime and territorial jurisdiction,[118] theft by bank examiners,[119] theft of property from federally-insured banks.[120] A host of other provisions, both in and outside of Title 18, proscribe thefts of different kinds of special property, for example, embezzlement of assets of an employee welfare benefit plan.[121] Diverse formulations are used to define the conduct which shall constitute the offense. Sometimes no attempt is made to define the thieving behavior, as in the Dyer Act proscription against transporting a motor vehicle in interstate commerce, "knowing the same to have been stolen".

Picking up the notion of consolidation of theft offenses and formulations developed in the American Law Institute's Model Penal Code,[122] the Study Draft provides a core definition of the proscribed conduct and specifies separately the jurisdictional bases which will make theft, thus defined, a federal offense. Focusing upon the definition of the misconduct has resulted in careful discrimination between theft and unauthorized borrowing or use, a distinction often blurred in existing law. Consolidation of theft offenses exposes some interesting issues

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[109] See, *e.g.*, *Shushan* v. *United States*, 117 F. 2d 110 (5th Cir. 1941), *cert. denied*, 313 U.S. 574.
[110] See Study Draft § 1635.
[111] See Study Draft § 1631.
[112] 18 U.S.C. § 1341.
[113] 18 U.S.C. § 2316.
[114] 18 U.S.C. § 2312.
[115] 18 U.S.C. § 2314.
[116] 18 U.S.C. § 641.
[117] 18 U.S.C. § 659.
[118] 18 U.S.C. § 661.
[119] 18 U.S.C. § 655.
[120] 18 U.S.C. § 2113.
[121] 18 U.S.C. § 664.
[122] See section 223.1 (P.O.D. 1962).

as to the scope of federal jurisdiction. Extortion, *i.e.*, theft by threat, is presently subject to federal jurisdiction if it "affects commerce," [123] an extremely broad jurisdictional base under current notions of what affects commerce. Should this base be eliminated or should it be also the base for other kinds of theft? The Study Draft tentatively carries it forward, but adds the condition that the Attorney General expressly authorize prosecution on that base.[124]

b. *Riot.* The riot provisions of the Study Draft [125] may appropriately be discussed in this series of crimes calling for federal supplementation of state law enforcement efforts, since the extensive Congressional legislation on this subject in 1968 proceeded on the basis that incitement by out-of-state agitators was an important causal factor in the then recent and notorious disorders in various cities. Whether this is so remains controversial, but in any event a new federal code must address itself to this problem in order to provide an up-to-date solution for federal enclaves, including the District of Columbia, and to exclude the operation by assimilation [126] of antiquated and diverse local laws that would otherwise govern in federal territories other than the District.

The general thrust of the riot provisions of the Study Draft is to discriminate responsible leaders and inciters of riot from mere followers, reserving higher penalties for the former; to reserve federal intervention for quite large disorders presumably beyond the control of ordinary local law enforcement; to supplement ordinary police power with a right to insist on obedience to certain police orders in riot circumstances; and to delineate the right to use deadly force against rioters.

Existing federal anti-riot law consists of three statutes enacted in 1968. One made federal law enforcement applicable to many local disturbances if the offender had traveled in interstate or foreign commerce or used the mails, telephone or broadcasting facilities with intent to incite, organize, promote, or "participate" in a riot.[127] A second statute made it a federal offense to facilitate "civil disorders" in certain ways when interstate or foreign commerce was involved or adversely affected.[128] The third fragment of the 1968 anti-riot legislation is buried in Chapter 13—Civil Rights: a long, complicated § 245 dealing with "Federally Protected Activities". Section 245 penalizes violent injury or interference with anyone during a "riot or civil disorder" if he is engaged in a business "affecting" interstate commerce or sells commodities which "have moved in commerce". The situation is further complicated by the existence of a separate federal riot statute for the District of Columbia [129] and by the fact that a bewildering variety of more or less antiquated *state* riot laws apply within other federal enclaves by virtue of the Assimilative Crimes Act, which adopts state

[123] 18 U.S.C. § 1951.
[124] See Study Draft § 1740(3).
[125] §§ 1801–04.
[126] 18 U.S.C. § 13.
[127] 18 U.S.C. § 2101.
[128] 18 U.S.C. § 231. It is symptomatic of the disorder in the current federal penal code that these two closely related statutes are found far apart, one in Chapter 12 where "Civil Disorder" appears in due alphabetical sequence between Chapter 11—Bribery and Chapter 13—Civil Rights. "Riot" appears 174 pages later (in the 1968 print of the West Publishing Company) as Chapter 102, flanked by Chapter 101—Records and Reports, and Chapter 103—Robbery and Burglary.
[129] D.C. Code § 22–1122.

penal law for such enclaves if Congress has not otherwise provided.[130] Needless to say, this haphazard collection of separate enactments exhibits gross inconsistencies in respect to definition of the offense, treatment of offenders, and scope of federal jurisdiction.

In discussions preparatory to the Study Draft, it became evident that there were unique criminologic and policing aspects to riot, among them: (i) Riot involves the simultaneous commission of a variety of offenses by masses of people, among whom may be mingled many quite innocent persons who have gathered as onlookers or for peaceful demonstration. (ii) The numbers involved make impractical ordinary law enforcement procedures based on identification and subsequent prosecution of individual culprits for ordinary crimes; instead, police efforts must be concentrated on prevention. (iii) Prevention requires efforts to disperse unruly crowds, whether by physical deployment of police troops or by orders which the crowd, including its innocent members, may be required to obey in such emergencies. (iv) A minimal penalty should be imposed for such disobedience that is proportional to the guilt involved, and, from a police operational point of view, provides a basis for arrest, which may be the chief and final sanction in most cases. Moreover, a petty penalty puts the matter within the jurisdiction of magistrates rather than a federal district court, and so facilitates prompt and economical disposition of numerous cases. (v) Higher penalties should be reserved for those whose responsibility for more serious offenses, *e.g.*, inciting, arming, can be individualized in the conventional way. (vi) If the unique problem of riot is the unusual and difficult demand made on police resources, it follows that the crime of riot should be limited to occasions when the numbers involved exceed the ordinary capacity of a modern, mobile, urban police force to deal with particular offenses (assault, disorderly conduct, burglary, etc.) on the regular individual basis.

Following this analysis, the riot proposals of the Study Draft define riot as

> a public 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 law enforcement or other government function.

The number five would appear to be a minimum, although existing federal definitions make three suffice; a larger number might be preferred, for example, twelve as in the British Riot Act of 1714. This pragmatic judgment should be based, as suggested above, on estimates of the numbers that can effectively be dealt with by today's urban police without the slight "fudging" of individual responsibility involved in the group crime concept of riot. In relation to the mass disorders that are of current public concern even larger numbers might be appropriate.

The number of people necessary to constitute a riot has no relation to the number necessary for federal intervention. Certainly as the basis of federal intervention in state and local disorders, very considerable crowds should be involved. Accordingly, § 1801(3) provides for federal prosecution of out-of-state riot inciters and leaders only where 100 or more rioters are involved. This is a substantial

[130] 18 U.S.C. § 13; *cf.* Study Draft § 209.

departure from present law, which lays upon the Attorney General a duty to prosecute or explain in cases involving as few as three persons, and even where no riot at all has ensued.[131]

The Study Draft makes it an "infraction", the lowest level of offense, to disobey "reasonable public safety orders" in the context of a riot.[132] No such statute now exists.

"Engaging in" a riot is a Class B misdemeanor under § 1803, but this offense is confined to federal enclaves and maritime jurisdiction. At this point, the Study Draft poses a substantial issue, since present federal law makes mere "participation" in a riot by someone who has crossed a state line for that purpose, or made a telephone call connected with a riot or even a prospective riot, guilty of a federal felony.[133] Inconsistently, the virtually contemporary District of Columbia riot statute makes even inciting only a misdemeanor.[134]

Proposed § 1801 follows the District of Columbia statute in classifying incitement as a misdemeanor. It should be recalled in this connection that any serious crime in the course of a riot, with which the inciter can be connected either as principal or accessory, will be federally prosecutable at the appropriate felony level by virtue of the "piggyback" jurisdiction provided in § 201(b) of the Study Draft.

c. *Guns.* One of the most serious issues in public life today is what course national policy should take with regard to private possession of guns, particularly handguns. Existing federal controls under legislation enacted in 1968 may be roughly summarized as follows:

(i) Certain classes of weapons deemed unsuitable for lawful private use, *e.g.* machine guns, bombs, sawed-off shotguns, are virtually proscribed.

(ii) Manufacturers of and dealers in all sorts of guns must register and maintain records of gun and ammunition sales.

(iii) The guns themselves and transfers thereof must be registered.

(iv) Certain classes of persons, *e.g.*, drug addicts, fugitives from justice, are forbidden to acquire or possess guns.

(v) Federal constraints are imposed on transfer of guns interstate, by mail, or to out-of-state buyers with a view to preventing a seepage of guns from states with loose controls into states with tight controls.

Subdivision (v) represents a deliberate choice made in the 1968 legislation not to impose federal licensing standards, or total federal control, but rather to reinforce state standards. Some alternatives, as noted in the Study Draft, are:

(1) A broad prohibition of manufacture or sale of handguns, with narrow exceptions, at most, for military and police uses.[135]

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[131] 18 U.S.C. §§ 2101(d), 2102(a).

[132] § 1804. This section applies only in federal enclaves and maritime jurisdiction.

[133] 18 U.S.C. § 2101(a)(1)(B).

[134] *Cf.* 18 U.S.C. § 245(2)(b)(3) where violence in the course of a riot "affecting commerce" is punishable only as a misdemeanor unless physical injury results.

[135] *Cf.* H.R. 16990 (91st Cong., 2d Sess.) introduced by Cong. Abner Mikva. The bill is now in the Judiciary Committee of the House of Representatives. It would bar importation, manufacture, transfer, and transportation of handguns except for law enforcement and military personnel and licensed pistol clubs which maintain control of the weapons.

(2) A quite restrictive licensing program under which only individuals who proved exceptional need might have access to handguns. This contrasts with prevailing state licensing schemes which merely exclude certain classes of persons as untrustworthy. The objective here would be to reduce drastically, perhaps by 90%, the number of such guns in the country.[136]

Sections 1811–1814 are a largely technical adaptation of existing federal law to fit into the structure of the new Code, and do not represent even a tentative choice in favor of this as opposed to other alternatives. They do illustrate an important drafting technique employed, in other contexts [137] as well as in connection with guns, whereby serious penal offenses are separated out of an elaborate regulatory statute found outside Title 18 and administered by an executive department or agency. The felonies are brought into Title 18; the minor offenses remain with the regulatory provisions.

d. *Obscenity.* The obscenity laws of the United States have not been working satisfactorily, either from the point of view of those who look to law to maintain morality and propriety, or from the point of view of those who deplore intervention of state controls in these areas. A National Commission on Obscenity and Pornography has been studying the problem and is due to report later in 1970. Pending that report, a review has been made of available knowledge,[138] but it does not provide a firm basis either for adhering to or departing from present national policy. Accordingly, the Study Draft poses some alternatives well inside the extremes of, on the one hand, complete permissiveness such as Denmark has recently adopted, or, on the other hand, a return to pre-Roth,[139] 19th Century standards of repressing virtually any literary and pictorial material having an element of erotic interest. In any event provisions like 18 U.S.C. § 1462 providing up to ten years imprisonment for importing obscene or "filthy" material, explicitly including contraceptives or information relating thereto, must be reconsidered in the light of modern conditions and attitudes.

Existing law, as elaborated by decisions of the Supreme Court of the United States, is the base of proposed § 1851. Obscenity is defined as material appealing predominantly to the prurient interest of the audience, going beyond generally accepted American standards of candor in relation to sexual matters, and "utterly without social value". The obvious shortcomings of such a formulation were recognized in the Working Papers and discussion sessions of the Commission and Advisory Committee, but in default of an acceptable alternative backed by science or common sense, the matter rested there pending comments on this draft and the awaited report of the National Commission on Obscenity and Pornography. A point of salient interest and possible controversy is the bracketed alternative in Study Draft § 1851(2) which would exempt exhibition or sale of obscene material if the dissemination was carried out in such a manner as to:

> minimize risk of exposure to children under sixteen or to persons who had no effective opportunity to choose not to be so exposed.

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[136] *Cf. Final Report of the National Commission on the Causes and Prevention of Violence* at 181 (1969).

[137] *E.g.*, economic controls (§ 1204); immigration controls.

[138] See Working Papers, Consultant's Report on Obscenity, Vol. II.

[139] *Roth* v. *United States*, 354 U.S. 476 (1957).

This alternative, based on several recent decisions of lower federal courts,[140] expresses the view that willing adults cannot constitutionally be barred from reading and seeing what they please, and also a prevalent sense that the basic evils against which rational legislation may be directed in this field are: 1) affront to strongly held feelings of those unwillingly exposed to what is for them a shocking experience, and 2) the undermining of parental standards with respect to education, morality and taste.

Other issues in the draft relate to federal jurisdiction and to the classification of the offense. Presently, federal jurisdiction depends on use of the mails or means of interstate commerce or broadcast facilities to disseminate the obscenity.[141] Proposed § 1851(3) would broaden the federal base insofar as it invokes § 201(e) (mails or facilities in interstate and foreign commerce used in the commission of the offense). The analogy is to mail fraud and gambling, where the noxious material need not itself be transmitted by the "federal facilities"; it is enough, for example, that mail or an interstate telephone call is employed in any way to further a fraud or a gambling business. It may be that this presses the logic too far, even though § 207 of the Code makes it clear that federal jurisdiction is to be *exercised* only in the presence of a truly national interest. Those who are in any event dubious about federal controls in the field of obscenity may prefer to constrict the jurisdiction. On the other hand, it may be preferable to restrict the offense itself to "engaging in the business" of disseminating obscenity (as in the gambling and prostitution provisions of the Study Draft), retaining the broader jurisdictional base. Present enforcement efforts appear to be confined to commercial distribution.

As to sentence, existing felony provisions seem unsuitable, particularly in application to individuals who import, mail, or transport otherwise then in the course of a regular business in obscenity. The argument for misdemeanor classification even of commercial dissemination rests on the following circumstances: the unavoidable imprecision of the concept of obscenity, the uncertainty as to the harm it does, and the inappropriateness of the presumably "reformative" Class C felony sentence. The problem of the obscenity merchant is clearly deterrence, not reeducation. Any substantial jail sentence within the misdemeanor range suffices for deterrence, particularly in view of the availability of felony sanctions against repeaters.[142] On the other hand, if the Obscenity Commission's studies should reveal that obscenity leads to serious harm to children or adults, comparable to dangerous drugs, the penalty should be escalated appropriately.

To the foregoing relatively orthodox approach, the consultant's report posed an alternative with the following features: 1) "Potentially offensive sexual material" disseminated through the mail would have to be labeled in a manner prescribed by the Post Office Department. The statute would have a detailed and explicit statement of what is potentially offensive, thus achieving a precision not possible in § 1851. 2) The labeling would implement a power accorded to

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[140] *Karalexis* v. *Byrne*, 306 F. Supp. 1368 (D. Mass. 1969), *prob. juris. noted*, 6 Crim. L. 4190 (Mar. 23, 1970); *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969); *cf. United States* v. *Thirty-Seven Photographs*, 6 Cr. L. 2343 (C.D. Cal. Jan. 27, 1970); *United States* v. *Lethe*, 7 Cr. L. 2144 (E. D. Cal. Apr. 29, 1970).

[141] 18 U.S.C. §§ 1461–65.

[142] *Cf.* § 3003—Persistent Misdemeananta.

the recipient to reject unwanted material and to cause the post office not to deliver it to him. 3) Precisely described material unsuitable for minors would have to be labeled "adult material" if distributed in interstate commerce. This labeling requirement would implement a sort of "local-option" power accorded to states to prohibit sale of such adult material to minors. Among other salient differences between this set of alternatives and proposed § 1851 is that it would eliminate all federal controls over local booksellers and theaters, on the theory that their purveyance is adequately subject to adults' election to see or not to see erotica.

GENERAL PROVISIONS

It has long been established that there are no common law crimes against the United States.[143] Thus every federal crime must be defined by statute. However, much that is relevant to criminality has never been codified. Thus, courts look to the common law for definitions of words.[144] Defenses such as insanity and entrapment have been entirely formulated by the courts.[145]

That the courts rather than Congress have been responsible for the development of the law in these areas means neither that the courts acted improperly nor that Congress should not act. Clearly, there should be a defense of self-defense. If the federal courts had interpreted the prohibition against common law crimes to include a prohibition on common law defenses as well, Congress doubtless would have acted long ago. But there are many reasons why action by Congress now would be good. In certain areas, *e.g.*, the insanity defense, the result of Congress' failure to speak is that the Courts of Appeal are divided and enforce a different "federal" law in various regions of the country. Congress can set such controversies to rest. Additionally, codification makes it simpler to find and understand the relevant law on a subject. Moreover, these issues are often central to the determination of criminality; it is important that the elected representatives of the people effectively participate in the fundamental choices of penal policy posed in this area of the law. For these reasons, the Study Draft contains Part A—a codification of general concepts and defenses presently dealt with almost entirely in case law.

The first three chapters define certain terms, such as the words of culpability, and set forth the rules as to federal jurisdiction. Chapter 4 deals with complicity, the circumstances under which one person becomes criminally liable for the misconduct of another.

a. *Sanctions Against Corporations and Other Organizations.* Sections 402–06 deal with the law relating to group or organizational criminal liability, with regard to which there are only fragmentary provisions in existing federal legislation. As corporations, unions, political parties, philanthropic foundations and other organizations assume ever-larger roles in modern life, the question whether it is useful and fair to apply criminal law to group activity demands reexamina-

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[143] *United States* v. *Hudson*, 7 Cranch 32(1812); *United States* v. *Eaton*, 144 U.S. 677 (1892).

[144] *United States* v. *Smith*, 5 Wheat. 154 (1820). See *United States* v. *Turley*, 352 U.S. 407 (1957).

[145] See historical discussion in *Durham* v. *United States*, 214 F. 2d 862, 869 (D.C. Cir. 1954) (insanity defense); *Sherman* v. *United States*, 356 U.S. 369, 378 (1958) (defense of entrapment).

tion. Most people would recognize that a large organization cannot fairly be held responsible for every offense committed by any of its numerous employees. Some would argue that the organization itself should never be held criminally liable; that any fines imposed fall on innocent shareholders; and that punishment of the culpable individuals in the organization is the only fair and effective way to proceed. To the contrary, it is argued, the public condemnation of criminal conviction is itself (whether or not fines are imposed) an important sanction in a world where public relations and corporate "image" are major concerns of management. Furthermore, it seems discriminatory against individual entrepreneurs to subject their business derelictions to prosecutions if equivalent corporate derelictions which may represent company policy or reckless mismanagement are masked as misdeeds of obscure individuals.

As a result of these and other considerations, the Study Draft:

(1) retains criminal liability of corporations and other organizations:

a) for serious offenses committed or authorized by controlling echelons, and

b) for minor offenses, whether or not so authorized, committed in furtherance of the corporate affairs (in practice these would be chiefly violations of regulatory law).

(2) makes responsible supervisory officials liable for an organizational offense where "willful default in supervision" contributed to its occurrence;[146]

(3) authorizes the sentencing court to require a convicted organization to give "appropriate publicity" to the conviction, *e.g.*, by notice to affected persons, or advertising;[147]

(4) provides for class action, in proceedings supplementing the criminal prosecution, for damages resulting from the offense;[148] and

(5) provides for removal, at the discretion of the court, of a culpable corporate official and for disqualifying him from similar responsibilities for a period up to 5 years;[149] the analogy is to removal and disqualification of public officials.[150]

b. *The Insanity Defense.* Chapter 5 codifies the responsibility defenses of immaturity, intoxication and mental disease or defect. Few subjects in criminal law have been more intensely debated than the criterion for excusing misbehavior when the offender suffers from mental illness or defect. The classic "*M'Naghten* Rule" provided for exculpation if the offender's mental illness at the time of the deed rendered him incapable of knowing the nature and quality of his actions or that his acts were wrongful. Sometimes, this was supplemented by the so-called "irresistible impulse" test, permitting acquittal if defendant's "will . . . has been so completely destroyed that his actions are not subject to it, but are beyond his control."[151] The *M'Naghten* Rule, having been subject to heavy attack by psychiatrists and others, was rejected in the Model Penal Code of the American Law Institute in favor of exculpation based on defendant's "lack of

[146] § 404(4).
[147] § 405(1)(a).
[148] § 405(1)(b).
[149] §405(2).
[150] See Study Draft §§ 3501–04.
[151] *Davis* v. *United States*, 165 U.S. 373,378 (1897).

substantial capacity to conform" his behavior to the law. The United States Courts of Appeal have been shifting away from *M'Naghten* in varying directions and with unequal speed,[152] absent Congressional guidance. There are scholars who would favor abolishing the defense of insanity, leaving the issue to be dealt with at the sentencing stage.[153]

There is some ground for believing that the controversy over the insanity defense may have more ideological than practical significance. Those who favor abolishing the defense concede that it would still be necessary to decide, before conviction, whether the mental illness had negatived the "intent" specified in the definition of any particular offense. Some who regard the *M'Naghten* Rule as an obsolete and misleading formulation would be prepared to concede that proper results can be achieved under an enlightened and flexible administration of those rules. The practical problems to be solved are to permit and encourage psychiatrists to testify in terms that make sense in their own profession, to require that testimony be based on substantial examination of the accused, to safeguard the public against dangerous lunatics where the criminal conviction is inappropriate because of mental illness, and to provide proper treatment for the ill, whether in penal institutions, mental hospitals, or at large on medical probation.

The basic test proposed by the Study Draft is lack of "substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." § 503. Associated with this will be detailed provisions governing the procedures for trying the issue of exculpatory mental illness, commitment for examination, release from commitment, etc.[154]

c. *Use of Deadly Force in Self-Defense and Law Enforcement.* Chapter 6 codifies for the first time a number of defenses which justify or excuse otherwise criminal conduct. These defenses include self-defense (§ 603), defense of others (§ 604), defense of property (§ 606), necessity (§ 608), mistake of law (§ 610) and duress (§ 611).

Among the great practical and moral issues deserving of public consideration in the formulation of a penal code is the question of the extent to which potentially fatal measures, *i.e.*, gunfire, may be employed in self-defense, the prevention of crime and the apprehension of law-breakers. Present federal law on the subject is non-statutory and chaotic. Section 607 of the Study Draft deals with the issue. Among the significant dispositions there made are the following:

(1) In the defense of one's self or others, deadly force may not be employed if the menaced injury can be avoided by retreat, but *no person is required to retreat from his dwelling or place of work unless he was the original aggressor or unless the assailant also dwells or works in the same place.*

(2) Deadly force may be used to prevent serious felonies only if less dangerous preventive means would expose someone to substantial risks.

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[152] See discussion circuit by circuit in Working Papers. Consultant's Report on Criminal Responsibility—Mental Illness: Section 503, Vol. I.

[153] See Working Papers, *ibid.*

[154] The procedural provisions prepared for and considered by the Commission appear at Working Papers, *ibid.* These were not incorporated in the text of the Study Draft because some were of the opinion that these procedural issues ought not to be part of the substantive code, especially since reform of the procedure was contemporaneously under scrutiny by the Judicial Conference of the United States.

(3) Officers may employ deadly force to arrest for only the most serious felonies of violence unless there is some other indication (*e.g.*, flight with a gun) that the person to be arrested is likely to endanger human life if not apprehended forthwith.

Section 609(a) deals with the defense of mistake of fact, and modifies the traditional rule only insofar as it makes it clear that negligence in making a mistake does not invalidate the defense if the offense itself cannot be committed negligently.

Section 609(2) is a novel formulation:

> A person's conduct is excused if it would otherwise be justified or excused under this Chapter but is improperly hasty or marginally excessive because he was confronted with an emergency precluding adequate appraisal or measured reaction.

This provision recognizes that a man engaged in legitimate self-defense or law enforcement activities does not become a felon merely because in the excitement of the emergency he goes *slightly* beyond legitimate limits, as they might be determined to be in a later calm calculation in a courtroom.[155]

d. *Entrapment and Other Defenses Against Abusive Prosecution.* Chapter 7 defines defenses of oppressive prosecution: statute of limitations, entrapment and multiple prosecution. Section 701 establishes four basic periods of limitations: none for murder, 10 years for serious national security felonies and felonies committed by organized crime involving connivance of a public servant, 5 years for all other felonies and for all misdemeanors involving a breach of trust, and 2 years for all other offenses. The period is tolled by the filing of a complaint.

The defense of entrapment, although of highest importance in the administration of the narcotics laws, among others, has never been dealt with by Congress. This is the more surprising when one reflects that the leading Supreme Court decision on the subject [156] purports to rest on legislative intent in the Prohibition Act to limit the offense of illicit liquor-selling so as to exclude sales brought about at the initiative of government undercover agents, if they used such persuasion as would induce "innocent" persons to overcome their normal inhibitions against lawbreaking. Federal judges, including Justices of the Supreme Court, and legal critics have been sharply divided from the beginning on this approach to the entrapment problem. Critics make the following main points: 1) if the existence of the defense depends on construction of each criminal statute, there can be no uniformity or predictability about its scope; 2) if the issue turns on the initial "innocence" of the accused, it becomes necessary to introduce evidence of prior crimes and other evidence that he was a willing offender, contrary to the usual principle that an offense is to be tried without prejudicing the jury by evidence of other crimes of the defendant; 3) "entrapment" is fundamentally a question not of guilt or innocence of the defendant (who would certainly not be acquitted if a private friend of his had similarly persuaded him to commit a crime) but of

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[155] *Cf.* Holmes, J. in *Brown* v. *United States*, 256 U.S. 335 (1921). But note that Holmes' formula making failure to retreat one of many factors "to be considered with all the others in order to determine whether the defendant went further than he was justified," provides no guidance to the jury or to the prosecutors.

[156] *Sorrells* v. *United States*, 287 U.S. 435 (1932).

proper standards of law enforcement, as in search and seizure, stop-and-frisk, and interrogation in the absence of defense counsel.

The Study Draft, § 702, adopts the position of these critics and of the American Law Institute in the Model Penal Code, treating entrapment as an issue distinct from guilt or innocence. The defense may be raised by motion in advance of trial, and must be proved by the defendant by a preponderance of the evidence. Issues deserving of careful consideration by the public and by Congress are posed in this connection: 1) Is this the better reconciliation of the concerns for law enforcement and due process? 2) Should the burden of proof be placed on the defendant or, as in the case of admissibility of challenged confessions, on the state? 3) Should there be probable cause or reasonable suspicion before law enforcement officials initiate any inducement to crime?

Sections 703–08 codify a number of rules on the question of multiple prosecutions. For the first time in the federal system a rule on compulsory joinder in criminal cases is established. Subsequent prosecutions are barred not only for the same offense (double jeopardy) but also for an offense which should have been joined in the first trial as a means of preventing oppressive successive prosecutions.

The Study Draft's new approach to the definition of federal crimes, *i.e.*, separating the description of the harmful conduct from the circumstances of federal jurisdiction, will focus the issue of successive state and federal prosecutions. At present, a state prosecution for stealing a car is technically for an offense different from interstate transportation of a stolen motor vehicle.[157] There will be no question, under the Study Draft, that a federal prosecution for theft with the jurisdictional circumstance that the car was transported over a state line is for the same crime as a theft within the territory of the state. Successive prosecutions based on the same conduct or same criminal episode is permitted in the other jurisdiction only if the two laws are intended to prevent substantially different harms or if the United States Attorney General certifies that the second prosecution is necessary to protect the interests of the second sovereign, *e.g.*, where a prior state prosecution of a civil rights offense is frustrated by local resistance.[158]

## CONCLUSION

Hopefully, the Study Draft measures up to the high standards set for it in a remarkable speech given by the Honorable Elliot L. Richardson to an Orientation Conference for United States Attorneys in Washington, D.C. on August 1, 1969. Mr. Richardson, presently Undersecretary of State and formerly United States Attorney for Massachusetts and Attorney General of Massachusetts, was a member of the Advisory Committee of the National Commission on Reform of the Federal Criminal Laws. In his speech, he related the mounting problem of criminal law enforcement to a general erosion of authority,

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[157] 18 U.S.C. § 2312.

[158] *Cf. Waller* v. *Florida*, 7 Cr. L. 3017 (April 16, 1970). That case involved a single sovereign, the State of Florida; it was held that the State could not try a man for larceny after he had already been convicted under a city ordinance of destroying the same property, on the basis of the same conduct.

whether of parents or governments, and a possible overextension of penal prohibitions into areas of moral choice. He concluded:

> . . . The ultimate test must lie in the law's capacity to enlist rational understanding and voluntary compliance. It is through applying this test that a body such as the National Commission on Reform of Federal Criminal Laws, for which I had the privilege of serving on the Advisory Committee, renders its most important service . . . .
>
> . . . Having recognized that rationality and the skepticism which it has generated have contributed to the erosion of our system of order, we find in the end that our only sensible course is to invoke a deeper skepticism and a more constructive rationality. For it will take skepticism to identify those parts of the system that no longer make sense in a modern society, and it will take rationality to strengthen those elements of the system that are necessary to decent order among us.

# 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. The provisions of this Code shall apply to all offenses defined in this Code and committed after the effective date thereof. The provisions of this Code shall apply to all offenses defined outside this Code and committed after the effective date thereof, unless the context otherwise requires. Offenses committed prior to the effective date of this Code shall be governed by the law, statutory or nonstatutory, existing at the time of the commission thereof, except that a defense or limitation on punishment available under this Code shall be available to any defendant tried or retried after the effective date. For the purposes of this section, an offense has been committed prior to the effective date only if all elements of the offense occurred prior thereto.**

*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.

A possible addition to subsection (2) is suggested by A.L.I. Model Penal Code § 1.01, which would include the following:

> Provisions of this Code governing the treatment and the release or discharge of prisoners, probationers and parolees shall apply to persons under sentence for offenses committed prior to the

effective date of this Code, except that the minimum or maximum period of their detention or supervision shall in no case be increased.

Whether or not the full benefit of this provision is to be conferred on existing prisoners, it would appear that, if the principle of parole-eligibility for all prisoners who have served at least one-third of their terms is adopted as proposed in Part C of this draft, it should apply to those serving terms under statutes being repealed.

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.

**§ 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) the deterrent influence of the penalties hereinafter provided; (ii) the rehabilitation of those convicted of violations of this Code; and (iii) such confinement as may be necessary to prevent likely recurrence of serious criminal behavior;**

**(b) by definition and grading of offenses, to limit official 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;**

**(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.

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 draft integrates the intended rule of construction with the statement of purposes, in the introductory paragraph of this section.

**§ 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, including attendant circumstances; (b) the required culpability; (c) any required result; and (d) 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] [by a preponderance of the evidence].**

**(2) Defenses. Subsection (1) does not require negating a defense by allegation in the indictment, information, or other charge or by proof unless the issue is in the case as a result of evidence sufficient to raise a reasonable doubt on the issue.**

**(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. The difference between these questions is highlighted by the bracketed alternatives presented in subsection (1) as to the standard of proof to be required for jurisdiction. A further possibility is to make lack of federal jurisdiction a matter of a 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 difference 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 of sufficient age and 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.

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 § 1001(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.

"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.

An alternative formulation of the judicial test set forth in subsection (4)(a) would be: "unless the evidence as a whole clearly precludes a finding of the presumed fact beyond a reasonable doubt."

A "prima facie case" is similar to a presumption in that the existence of certain facts makes it "more likely than not" that another fact is true; but it 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).

### § 104. Investigative Jurisdiction of Agencies Not Affected.

**Nothing in this Code shall be deemed to alter the authority or responsibility of any agency of the United States to investigate offenses; but the agencies are authorized to enter into agreements**

**reallocating investigative authority so as to promote efficiency in the enforcement of this Code.**

*Comment*

Under existing Title 18, in which similar offenses are in a number of instances separately defined because different federal jurisdictional bases are involved, the investigative jurisdiction of federal agencies can sometimes be defined by simple reference to a particular offense. For example, the F.B.I. is assigned jurisdiction over thefts covered by 18 U.S.C. § 659 (from interstate shipments), and the Bureau of Customs over thefts covered by 18 U.S.C. § 549 (from customs custody). When Congress has consolidated offenses into one provision, there is concern for the effect such consolidation may have on existing agency jurisdiction, occasionally finding expression in such provisions as subsection (c) of 18 U.S.C. § 1952 (travel in aid of racketeering enterprises): "Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

But, also under existing Title 18, there are many instances in which jurisdiction among agencies is not determined by the manner in which the offense is defined. For example, violations of the official bribery law (18 U.S.C. § 201) are investigated by intelligence divisions of various agencies, as well as by the F.B.I. The proposed Code follows this approach, *i.e.*, that it is not an appropriate function of the definition of an offense to determine agency jurisdiction. This section is intended to make that clear. If Congress is to determine agency jurisdiction (as in 18 U.S.C. § 1952), an appropriate provision can be placed in a Part of the Code other than that defining offenses. Otherwise the determinations may be made other than by statute, as they are under provisions such as the bribery law.

**§ 109. General Definitions.**

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

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

**(b) "this Code" means the Federal Criminal Code;**

**(c) "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 established 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;**

**(d) "crime" means a misdemeanor or a felony;**

(e) "element of an offense" has the meaning prescribed in section 103(1);

(f) "felony" means an offense for which a term of imprisonment of five years or more is authorized by a federal statute;

(g) "force" means physical action;

(h) "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 pursuant to interstate compact or international treaty between or among governments;

(i) "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;

(j) "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;

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

(*l*) "included offense" has the meaning prescribed in section 703(3);

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

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

(o) "intentionally" has the meaning prescribed in section 302(1);

(p) "knowingly" has the meaning prescribed in section 302(1);

(q) "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 violation of laws;

(r) "misdemeanor" means an offense for which a term of imprisonment of [one year] or less is authorized by a federal statute;

(s) "negligently" has the meaning prescribed in section 302(1);

(t) "offense" means conduct for which a term of imprisonment or a fine is authorized by a federal statute whether or not federal jurisdiction exists with respect to such conduct;

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

(v) "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;

(w) "person" means a human being and, where relevant, an organization;

(x) "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;

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

(z) "recklessly" has the meaning prescribed in section 302(1);

(aa) "section" means a section of this Code; "subsection" or "paragraph" refers to a subsection or paragraph of the section in which the term is used;

(ab) "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;

(ac) "thing 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;

(ad) "United States", in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone;

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

*Comment*

Words and phrases which 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. 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.**

**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;**

**(b) 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;**

**(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 or any member or member-designate of the President's cabinet or the Supreme Court, 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 piracy, as defined in section 212.**

*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 jurisdictional bases unless there is a good reason to the contrary——federal jurisdiction is changed to some extent. A special precatory provision, § 207, is proposed, providing guidelines indicating the limits within which legal jursdiction should be exercised.

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 is the basis for federal jurisdiction over another Code offense. It is a novel device which permits simple resolution of otherwise complex drafting problems. Such problems arise when the basic misconduct (impersonating a federal official) is not only punishable in itself, but also is the jurisdictional handle by which there might be federal prosecution for a more serious harm (kidnapping or fraud). (The states have no such problem because their territorial limits are the basis of jurisdiction for all offenses.) Existing federal treatment of this problem is unsatisfactory. Impersonation, for example, is presently a felony, with a three-year maximum penalty—treatment too severe for mere impersonation of a marshal in order to serve legal process, but not severe enough for the very serious harms which might be committed by impersonation of federal officials. Other existing provisions, *e.g.*, civil rights, deal with this problem by aggravating the penalty when injury or death "results," not the most satisfactory way of imposing criminal liability which subjects the offender to severe penalties. Paragraph (b), on the other hand, in effect incorporates the Code offenses of injury to persons and property—with their careful attention to culpability requirements and grading differentials—into those hybrid offenses which are minor wrongs in themselves but are also grounds for federal prosecution of more serious offenses.

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. This jurisdictional base, the first part of paragraph (c), would be continued for assault and homicide and would be extended to kidnapping as well. Attacks on federal public servants "on *account* of their official duties" are penalized as retaliation (§ 1367), which can be "piggybacked" under paragraph (b) into whatever form the retaliation took.

It is proposed that all federal public servants should be covered while engaged in their official duties, rather than merely specified officials as in 18 U.S.C. § 1114. 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 proposal 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. This draft extends such protection to members of the President's cabinet and the Supreme Court. Members of Congress could also be added to this list.

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).

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. Issues that this base raises include:

(1) to what extent should this base be used for crimes of violence? 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;

(2) should there be 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), and 18 U.S.C. § 245(b)(3) (injuries during a riot to a person engaged in a business 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 later 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.

Paragraph (i) will be a base for theft. It should be compared with paragraph (f), which protects the facilities of commerce.

While paragraph (i) describes what the character of the property must be 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 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 false statements by employees (18 U.S.C. § 1006). 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 for general survey of federal jurisdiction.

**§ 202. Jurisdiction Over Included Offenses.**

**If federal jurisdiction of a charged offense exists, federal jurisdiction to convict of an included offense 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 § 703, 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. For example, introducing a misbranded fur product into commerce (15 U.S.C. § 69a) might be an included offense to theft by deception; but the jurisdictional base relied upon for the theft, *e.g.*, use of the mails, is not specified for the misbranding.

**§ 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 jurisdiction, but must intend only to engage in conduct which would give rise to a jurisdictional circumstance.

Subsection (2) applies the Code approach to jurisdictional circumstances to situations in which the substantive criminal conduct has been completed but the jurisdictional circumstance 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.

**§ 206. Federal Jurisdiction Not Pre-emptive.**

**The existence of federal jurisdiction over an offense shall not, in itself, prevent any state, any territory or possession of the United States, or the District of Columbia 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* § 707 barring prosecution by a state in most instances 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 or local interests. A substantial federal interest exists in the following circumstances, among others: (a) where an offense apparently local in its impact is believed to be associated with organized criminal activities extending beyond state lines; (b) where federal intervention is necessary to protect civil rights; (c) where local law enforcement has been corrupted so as to undermine its effectiveness. Where federal law enforcement efforts are discontinued in deference to local prosecution, federal agencies are directed to cooperate with**

**state and local 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 pin-pointed—by requiring certification 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.

**§ 208. Extraterritorial Jurisdiction.**

**Except as otherwise expressly provided, extraterritorial jurisdiction over an offense exists when:**

**(a) the President of the United States, or the President-elect is a victim or intended victim of a crime of violence;**

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

**(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;**

**(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) jurisdiction is conferred upon the United States 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. The list of crimes in paragraph (c) might well be expanded, *e.g.*, to reach the person who bribes a federal public servant abroad. 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 per-

petrator. 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. The notion of who "accompanies" American military forces abroad is well established in military law.

Paragraph (g) incorporates all jurisdiction conferred on the United States by treaty. Paragraph (h) covers crimes by or against nationals outside the jurisdiction of any nation, *e.g.*, in Antarctica or on the moon.

**§ 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 in which the enclave is located, would be punishable as an offense under the law of the state then in force, except that this section does not apply when federal law penalizes or immunizes the conduct. Inapplicability under this subsection is a matter of law.**

**(2) Grading. If the maximum confinement authorized by the law of the state 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 law, and the offense shall not be deemed a crime if state law provides that it is not a crime.**

**(3) Definitions. In this section:**

**(a) "state" includes not only a state of the United States but also a territory, district or possession of the United States;**

**(b) "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 § 3007 (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. Offenses which are assimilated become federal offenses, and 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.

**§ 210. Offenses by Indians or on Indian Territory.**

**[Reserved for such special provisions relating to offenses by Indians against Indians or on Indian reservations as may be necessary. See 18 U.S.C., Ch. 53 and § 3242.]**

**§ 211. Jurisdiction in the Canal Zone.**

**[Reserved for a list of provisions of the Code to be applied to the Canal Zone, similar to those now listed in 18 U.S.C. § 14.]**

**§ 212. Piracy.**

**(1) Piracy in Violation of the Law of Nations. For the purposes of section 201 (*l*) the offense is piracy 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 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.**

**(2) Definitions. In this section:**

**(a) "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;**

**(b) "aircraft" includes spacecraft.**

*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.

**§ 213. Definitions for Chapter 2.**

**In this Chapter:**

**(a) "special maritime and territorial jurisdiction of the United States" includes:**

**(i) the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the 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, territory, district, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of any particular state;**

**(ii) 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;**

**(iii) 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;**

**(iv) 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;**

**(v) 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 laws of the United States, or any state, territory, district, or possession 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**

**(vi) any aircraft while in flight in air commerce as defined in 49 U.S.C. § 1301(4);**

**(b) "interstate commerce" means commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession, or the District of Columbia;**

**(c) "foreign commerce" means commerce with a foreign country;**

**(d) "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;**

**(e) "national credit institution" means a member bank of the Federal Reserve System; a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, 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 definition of special maritime and territorial jurisdiction is taken from 18 U.S.C. § 7 and 49 U.S.C. § 1472(k); 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.

## Chapter 3. Basis of Criminal Liability; Culpability; Causation

**§ 301. Basis of Liability for Offenses.**

**(1) Voluntary Conduct. A person commits an offense only if he voluntarily 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 a statute provides that the omission is an offense or otherwise provides that he has a 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 voluntarily 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 meaning of the term "voluntary" could be illustrated by including a list of acts which are not to be considered as "voluntary;" or "voluntary" could be defined as that over which the actor has control. The latter possibility, it should be noted, could raise problems in the insanity defense area, among others.

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.

**§ 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, whether or not there is a further objective toward which the conduct is directed;**

**(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, plain 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 conduct;

(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;

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

(f) "culpably" if he engages in the conduct intentionally, knowingly, recklessly, or negligently.

(2) Requirement of Willfulness for Crimes. 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.

(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 attendant circumstances.

(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.

(d) Except as otherwise expressly provided, no culpability is 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 cupability 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) Knowledge or Belief That Conduct is an Offense Not Required. Except as otherwise expressly provided or unless the context otherwise requires, knowledge or belief that conduct is an offense is not an element of the conduct constituting the offense.**

**(6) No Requirement of Culpability for Infractions. 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, a person commits the infraction if he engages in the conduct either culpably or not culpably.**

*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 only purpose, not motive. 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 last 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.

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.

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*.

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), while the prosecution has the burden of proving the non-existence of a defense once it

has satisfactorily been raised, *e.g.*, it must prove that the defendant was at least 16 if immaturity is claimed under § 501, it does not have to prove that defendant was culpable as to the nonexistence of the defense, *e.g.*, that he knew he was at least 16. (Section 609—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) states the proposition that ignorance of the law is generally no excuse. For those specific circumstances under which mistake of law *is* a defense, see § 610. Subsection (6) eliminates the issue of culpability in prosecution of infractions, since these are not "crimes" (see § 109(d), and are not punishable by imprisonment.

### § 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 general rule as to affirmative defenses, as to which the prosecution has no burden of proof, is that the defendant must prove actual existence of the facts which establish the defense. For example, § 1306 (4) (Escape) provides an affirmative defense that there was irregularity or a lack of jurisdiction in the detention escaped from, if the escape involved no substantial risk of harm or the detaining authority did not act in good faith under color of law. Under this section the affirmative defense could not be established if in fact there *was* a substantial risk of harm or the detaining authority *did* act in good faith, even though a defendant could show his reasonable ignorance of these facts or his belief that they did not exist.

### § 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.

### § 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 the proposed 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.

# Chapter 4. Complicity

**§ 401. Accomplices.**

**(1) Liability Defined. A person is guilty of an offense committed by the conduct of another person when:**

**(a) acting with the kind of culpability required for the offense, he causes or aids an innocent or irresponsible person to engage in such conduct; or**

**(b) with intent that an offense be committed, he commands, induces, procures, or aids such other person 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.**

**(3) Affirmative Defense of Renunciation and Withdrawal. It is an affirmative defense in a prosecution under subsection (1) that, under circumstances manifesting a voluntary and complete renunciation of his culpable intent, the defendant attempted to prevent the commission of the offense by taking affirmative steps which substantially reduced the likelihood of the commission thereof. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by (a) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or an accomplice or which make more difficult**

**the consummation of the offense, or (b) a decision to postpone the offense until another time or to substitute another victim or another but similar objective.**

*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 the conduct of an innocent agent 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. But see § 1005 (Organized Crime Leadership).

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

Subsection (3) expresses a policy also used for the crimes of attempt, criminal solicitation, and conspiracy (§§ 1001(3), 1003(4), and 1004(5)), and is intended to encourage voluntary abandonment of a culpable purpose prior to the causing of any harm.

**§ 402. Corporate Criminal Liability.**

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

**(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 in furtherance of its affairs; or

(d) any offense for which an individual may be convicted without proof of culpability, committed by an agent of the corporation in furtherance of its affairs.

(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*

See comment to § 403, *infra*.

**§ 403. Criminal Liability of Unincorporated Associations.**

**An unincorporated association may be convicted under circumstances corresponding to those set forth in section 402 with respect to corporations.**

*Comment*

Sections 402 and 403, a codification of present case law with minor variations, set forth those circumstances under which an organization becomes liable for offenses committed by its agents. For felonies, the prosecution must prove authorization by 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 organizations by law. Liability for misdemeanors and nonculpable offenses also arises from the conduct of *any* agent of the organization who commits the offense in furtherance of the affairs of the organization. Distinctions based on the size of the organization, whether it is or is not a business or is or is not incorporated are not made.

**§ 404. 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 per-**

**formed 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 subject 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 his willful default in supervision within the range of that responsibility contributes to the occurrence of an offense for which the organization may be convicted. 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 defaults in supervision which contribute to the occurrence of an offense, without the necessity of proving specific culpability of the agent.

**§ 405. Special Sanctions in Cases of Organizational Offenses.**

**(1) Organization. When an organization is convicted of an offense, the court may, in addition to or in lieu of imposing other authorized sanctions, do either or both of the following:**

**(a) 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;**

**(b) direct the Attorney General, United States Attorney, or other attorney designated by the court to institute supplementary proceedings in the case in which the organization was**

**convicted of the offense to determine, collect and distribute damages to persons in the class which the statute was designed to protect who suffered injuries by reason of the offense, if the court finds that the multiplicity of small claims or other circumstances make restitution by individual suit impractical.**

**(2) Officer. When an executive officer or other manager of an organization is convicted of an offense committed in furtherance of the affairs of the organization, the court may include in the sentence an order disqualifying him from exercising similar functions in the same or other organizations for a period not exceeding five years, if it finds the scope or willfulness of his illegal actions make it dangerous or inadvisable for such functions to be entrusted to him.**

*Comment*

That imprisonment of organizations is impossible and that fines may be absorbed as a cost of doing business limit the effectiveness of the usual sanctions which may be employed to deter offenses by organizations. Adverse publicity authorized by this section may be particularly feared by organizations that depend heavily on good public relations. Title 15 U.S.C. § 1402(d) (disclosure to the public of information about defects in motor vehicles) is an example of use of publicity to achieve policy goals in the regulatory area. This section also makes possible restitution by the organization to persons affected by the offense, in a proceeding ancillary to the criminal case. If this provision is approved, the Supreme Court should adopt rules of procedure similar to Fed. R. Civ. P. 23.

There is precedent for subsection (2) in existing provisions disqualifying persons convicted of certain offenses from holding positions in banks insured by the F.D.I.C. (12 U.S.C. § 1829). See also § 3501, dealing with disqualification from federal office.

## § 406. Definitions for Chapter 4.

**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 member, partner, director, officer, servant, employee, or other person authorized to act in behalf of an organization.**

*Comment*

Governments are excluded from the definition of "organization" and hence from liability for offenses under this Chapter. Even if states are exempted, weighty considerations may call for changing the

definition to make municipalities and state administrative agencies amenable to federal prosecution, particularly in areas such as environmental pollution and civil rights. If this change is made, § 405(2) would probably have to be modified to preclude federal removal or disqualification of state or local officials.

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

### § 501. Immaturity.

**A person is not criminally responsible for his behavior when he was less than sixteen years old. In any prosecution for an offense, lack of criminal responsibility by reason of immaturity is a defense.**

*Comment*

This section substantially codifies existing federal practice although it departs from present statutes in a few significant respects. 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. This section would require prosecution as a juvenile of a child for all acts committed prior to his sixteenth birthday.

Immaturity is denominated a defense; the prosecution need not introduce any evidence as to a defendant's age unless he has introduced sufficient evidence to raise a reasonable doubt that he is 16 years old or over. See § 103(2), defining the consequences of a "defense" designation.

This section requires conforming amendments to existing provisions dealing with juveniles, now set forth in 18 U.S.C. §§ 5031–33, so that a person under 16 must be tried as a juvenile regardless of the nature of the penalty, *i.e.*, even though punishable by death or life imprisonment, and regardless of whether he consents. Other improvements can be effected at the same time: transferring from the Attorney General to the court the authority to determine when a 16- or 17-year-old may be prosecuted as an adult, granting such authority regardless of the nature of the penalty, and eliminating the requirement that the 16- or 17-year-old consent to juvenile treatment.

### § 502. Intoxication.

**(1) Defense Precluded. Except as provided in subsection (4), intoxication is not, in itself, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate an element of the offense charged, except as provided in subsection (2).**

**(2) Recklessness. When recklessness establishes an element of**

**the offense, if the actor is unaware of a risk because of self-induced intoxication, such unawareness is immaterial.**

**(3) Not Mental Disease. Intoxication does not, in itself, constitute mental disease within the meaning of section 503.**

**(4) 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 a defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality or to conform his conduct to the requirements of law.**

**(5) 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. The language is derived primarily from A.L.I. Model Penal Code § 2.08. Subsection (1) provides that in most cases intoxication is relevant only to the extent that it negates 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. Alternatively, this principle could be incorporated into the definition of "recklessly" in § 302. Subsection (4) denominates two forms of intoxication which are defenses.

This section is intended to be compatible with § 503 (Mental Disease or Defect). For a draft of an intoxication statute compatible with the abolition of the insanity defense, *see* Working Papers.

**§ 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. In any**

**prosecution for an offense, lack of criminal responsibility by reason of mental disease or defect 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 the draft. (*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*, — F.2d —, 7 Cr. L. 2104 (9th Cir. 1970); *Wion* v. *United States*, 325 F.2d 420 (10 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.

The A. L. I. formulation explicitly denies the defense to "sociopaths," *i.e.*, habitual offenders without other symptoms. 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. In view of the general policy against constraining expert testimony, it may be better not to pose issues regarding the range of evidence on which the diagnosis is based. The Sixth and Ninth Circuits have not adopted that portion of the A. L. I. formulation; the draft here follows that course.

Comprehensive 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.

## 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 Innocent 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 innocent 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 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 in one place the entire federal law on the subject.

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.

**§ 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.**

*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.

**§ 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. 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.

**§ 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 § 609(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).

**§ 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 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;**

**(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 non-deadly 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.

**§ 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.

**§ 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 only in the following instances:**

**(a) when it is expressly authorized by a federal statute or occurs in the lawful 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 Class A or B 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, aircraft or spacecraft 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 Class A or B felony 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 Class A or B 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, is not likely to create 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, aircraft or spacecraft, 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 warned that such force will be used if they do not obey;

**(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;**

**(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, aircraft or spacecraft, and who does not know that, if such is the case, the public servant or such officer himself is 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. Subsection (2) sets forth the only instances in which deadly force is justified.

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.

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) or under § 608.

Subsection (2)(c) deals with the use of deadly force to prevent "property" crimes. "Class A and B felonies" include, among others, treason, sabotage and thefts of especially large amounts. An alternative to this 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 § 609(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. 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.

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.

## § 608. Conduct Which Avoids Greater Harm.

**Conduct is justified if it is necessary and appropriate to avoid harm clearly greater than the harm which might result from such conduct and the situation developed through no fault of the actor. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the penal statute defining the offense, either in its general application or with respect to its application to a particular class of cases arising thereunder.**

*Comment*

This section affirms the proposition that a man is not to be punished as a criminal if his prohibited conduct averted more harm than it caused. This is sometimes called the "choice of evils" rule. The second

sentence makes it clear that it is the legislature's judgment of harm that controls, not the subjective evaluation made by the offender. Thus assassination of a Senator or a civil rights leader could not be justified on some theory of the good consequences that would flow from his decease.

**§ 609. 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 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 improperly hasty or marginally 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.

**§ 610. Mistake of Law.**

**Except as otherwise expressly provided, a person's 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). For a broader version of the defense, see Working Papers.

## § 611. 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 draft 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 alternatives considered in connection with this section were: (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.

**§ 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 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. Defenses Against Unfair or Oppressive Prosecution

**§ 701. Statute of Limitations.**

**(1) Defense. It is a defense that prosecution 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 in cases of exceptionally serious felonies against the existence of the state, which are as a class unlikely to come promptly to the attention of the authorities, *viz.*, treason and 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 defendant's 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 felonies and for all misdemeanors involving theft from or fraud against the government, breach of fiduciary duty, or betrayal of public office;**

**(c) two 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 the defendant's 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. "Criminal syndicate" has the meaning prescribed in section 1005(2). 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 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.**

**(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 thirty days after the dismissal even though the period of limitation has expired at the time of such dismissal or will expire within such thirty days.**

**(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 defense, so that if the claim is not timely raised, it is waived, unlike under 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 (1), 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 many minor offenses, rather than only the few minor revenue offenses presently subject to a short period.

Subsection (4) 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 (5) 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 (4) and (5), as well as in subsection (1)(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.

## § 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 or acting in the expectation of reward, pecuniary or otherwise, for aiding law enforcement.**

*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. Whether to adhere to the older approach or shift to the new is an important issue in the Study Draft.

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.

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.

## § 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.**

**(3) Conviction of Included Offenses. A defendant may be convicted of an offense included in an offense charged in the indictment or information, but may not be convicted of both the offense charged and the included offense. An offense is so included when:**

**(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;**

**(b) it consists of criminal facilitation of or an attempt or solicitation to commit the offense charged or an offense otherwise included therein; or**

**(c) it 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.**

**(4) Submission of Included Offenses to the Jury. The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.**

**(5) Sufficiency of Evidence on Appeal. If the district court on a motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged, but that there is sufficient evidence to support a conviction for an included offense, and that the trier of fact necessarily found every fact required for conviction of that included offense, the verdict of judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial.**

*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 703–08 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.

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 except as to included offenses. Limitations on other kinds of 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 (§ 3206). Perhaps even included offenses should be dealt with in that manner.

The definition of included offense in subsection (3) expands the usual meaning of the term (same or less than all the facts) to cover facilitation and solicitation, which may require proof of different or additional facts.

Subsection (4) codifies present law: a defendant is not entitled to a jury charge with respect to an included offense if there is no rational basis for acquittal on the offense charged and conviction on the included offense. The draft *permits* the judge to give such a charge on the view that the judge's power to invite jury mitigation should be as broad as the prosecutor's discretion in plea bargaining. In view of proposed § 3004, which authorizes the sentencing judge to "step-down" a conviction, the discretion authorized here could well be deleted. Subsection (5) codifies present case law on entry of judgment of conviction for included offenses. Both subsections (4) and (5) may ultimately be placed in the part of the Code which will deal with procedure.

### § 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 determi-**

**nation 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.

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

**A prosecution is barred by a former prosecution of the de-**

**fendant 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.

**§ 706. Former Prosecution in Another Jurisdiction: When a Bar.**

**When conduct constitutes a federal offense and an offense under the law of a state or a foreign nation, a prosecution in the state 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.**

*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 dependant 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 the draft as proposed 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 state. See § 208 regarding extraterritorial federal jurisdiction.

**§ 707. Subsequent Prosecution by a State: When Barred.**

**When conduct constitutes a federal offense and an offense under the law of a state, a federal prosecution is a bar to subsequent prosecution by a state 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 prose-**

**cuted; 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; unless the Attorney General of the United States certifies that the interests of the state would be unduly harmed if the state prosecution is barred and that the interests of the United States would not be impaired by state prosecution.**

*Comment*

This section represents a novel attempt to have a federal standard apply where a state 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 draft is similar to that proposed in § 706, which is applicable when the state 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 state acquittal does not apply here, so that an absolute bar of some dimension against a subsequent state prosecution is a reasonable alternative.

**§ 708. When Former Prosecution Is Invalid or Fraudulently Procured.**

**A former prosecution is not a bar within the meaning of sections 704, 705, 706 and 707 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 appropriate 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.

Subsection (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.

# 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 an offense, he intentionally engages in conduct constituting a substantial step toward commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's intent to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense 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 an offense is guilty of criminal attempt if the conduct would establish his complicity under section 401 were the offense committed by the other person, even if the other is not guilty of committing or attempting the offense, for example, because he has a defense of justification or entrapment.**

**(3) Renunciation and Withdrawal. It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his culpable intent, the defendant avoided the commission of the offense attempted by abandoning his culpable effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further steps which prevented the commission thereof. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by (a) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or an accomplice or which makes more difficult the consummation of the offense, or (b) a decision to postpone the offense until another time or to substitute another victim or another but similar objective.**

**(4) 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 danger-**

**ously close to commission of the offense, 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.**

**(5) 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 criminal offense. 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, renunciation, 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). Note that, as in many modern criminal law revisions, the defense of impossibility is precluded.

Subsection (3) recognizes that renunciation tends to negate dangerousness, and that making it a defense encourages voluntary abandonment of a culpable purpose prior to the causing of any harm. The defense also serves to moderate the potentially broad scope of the offense resulting from extension of criminality to some behavior traditionally characterized as preparation. See similar provisions in §§ 401(3), 1003(4) and 1004(5).

Subsection (4) 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 reviewable on appeal, if against the defendant, under the proposed amendment of 28 U.S.C. § 1291, *infra*. In a few instances in the proposed 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. Note that, under § 3206, a person cannot be sentenced consecutively for attempt and the completed offense.

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

**§ 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 crime which is, in fact, 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 facilitator is only *knowledge*, whereas that required of an accomplice is *intent* that the crime be committed. But a facilitator must know that the conduct he is facilitating constitutes a crime (although he need not know it is classified as a felony), and must provide substantial assistance. Under the draft 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 last sentence of subsection (1) has its counterpart in § 401(1), dealing with complicity. See comment to § 401, *supra*.

## § 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 crime which is, in fact, a felony, whether as principal or accomplice, with intent to promote or facilitate the commission of that crime, and under circumstances strongly corroborative of that intent.**

**(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) Renunciation and Withdrawal. It is an affirmative defense to a prosecution under this section that the defendant, after soliciting another person to commit a felony, persuaded him not to do so or otherwise prevented the commission of the felony, under circumstances manifesting a complete and voluntary renunciation of the defendant's criminal intent. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by (a) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another or which makes more difficult the consummation of the crime or (b) a decision to postpone the crime until another time or to substitute another victim or another but similar objective.**

**(5) Grading. Criminal solicitation shall be subject to the penalties provided for attempt in section 1001(4).**

**(6) 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 committed, the solicitor is criminally liable for conspiracy. Thus, solicitation may be viewed as an attempt to form a conspiracy. This section would 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. 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. "Particular" crimes 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. An alternative would be to penalize solicitation only if the person solicited was so far persuaded as to commit an overt act in compliance with the solicitation. Such a rule would preclude prosecution based on solicitation allegedly addressed to a law enforcement official or undercover agent.

**§ 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 the objective of the conspiracy.**

**(2) Parties to Conspiracy. If a person knows 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. Abandonment may be effected by a person timely advising those with whom he has agreed of his abandonment or by timely informing a law enforcement officer of the existence of the conspiracy. A conspiracy shall be deemed to have been abandonded 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) Renunciation and Withdrawal. It is an affirmative defense to a prosecution under this section that the defendant, after agreeing with another that one or more of the conspirators will engage in criminal conduct, persuaded him or them not to engage in such conduct or otherwise prevented the commission of the crime under circumstances manifesting a voluntary and complete renunciation of his criminal intent. A renunciation is not**

**"voluntary and complete" if it is motivated in whole or in part by (a) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another conspirator or which makes more difficult the consummation of the crime or (b) a decision to postpone the crime until another time or to substitute another victim or another but similar objective.**

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

**(7) Grading. Conspiracy shall be subject to the penalties provided for attempt in section 1001(4).**

**(8) 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 in the Code. 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), etc.

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. *Grading and Sentencing.* Existing law (18 U.S.C. § 371) establishes 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 (7) of this section relates the penalty to the class of the offense which is the objective of the conspiracy. One cannot, however, be sentenced consecutively for conspiracy and the substantive crime. See § 3206.

4. *Complicity.* Subsection (6) 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.*

5. *Codification and Clarification.* Subsections (2), (3) and (4) constitute statutory treatment of matters which have heretofore been left to judicial development.

One alternative to the draft would be to replace the "overt act" requirement, which continues existing law, with a "substantial step" requirement (*cf.* § 1001(1)), on the theory that an overt act may be innocent in itself and not particularly corroborative of the existence of a conspiracy.

## § 1005. Organized Crime Leadership. (Alternative I)

**(1) Offense. A person is guilty of leading organized crime if he knowingly organizes, manages, directs, supervises, or finances a criminal syndicate, or knowingly employs violence or intimidation to promote or facilitate its criminal objectives, or with intent to promote or facilitate its criminal objectives furnishes legal, accounting, or other managerial assistance, or intentionally promotes or facilitates its criminal objectives by any act or omission of a public servant in violation of his official duty. No person shall be convicted under this section on the basis of accomplice liability unless he aids or participates in one of the ways herein specified.**

**(2) Definitions. A criminal syndicate is an association of ten or more persons for engaging on a continuing basis in crimes of the following character: illicit trafficking in narcotics or other dangerous substances, liquor, weapon, or stolen goods; gambling; prostitution; extortion; 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 section, exists among persons who collaborate 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.**

**(3) Grading. The offense is a Class A felony if the number of associates exceeds twenty-five or if the activity of the association embraces Class A or B felonies. Otherwise the offense is a Class B felony.**

**(4) Attorney General's Certification. No prosecution shall be instituted under this section unless the Attorney General certifies that the nature and scope of the criminal association is of national concern and warrants invocation of the extraordinary sanctions herein provided.**

**(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section when any crime engaged in by the association is a federal crime.**

*Comment*

Traditional conspiracy notions of an agreement of two or more to commit a crime seem outdated when applied to an organized criminal business characterized by specialization of function, continuity of operation with changing personnel and a system of internal laws. Obviously, provisions such as this section which make for severe penalties against leaders of criminal syndicates will not alone solve the problem of organized crime; but it may be a significant step forward. An alternative approach is to provide extended sentences for ordinary crimes committed through large criminal syndicates, as in proposed § 3203. A current Senate bill, The Organized Crime Control Act of 1969 (S. 30), adopts the sentencing procedure. Arguments favoring that alternative include: the factors which warrant imposition of more severe penalties than in the case of an ordinary offender relate more to issues involved in treatment than issues involved in the determination of criminal liability; the sentencing process permits greater flexibility with respect to proof and to changing circumstances, *i.e.*, organized crime moves, from time-to-time, into new fields of operation; consideration of some of these factors at the trial may unduly prejudice determination of guilt as to the underlying crime. See also the comment to § 3203, *infra*.

Arguments favoring this section include: circumstances which warrant imposition of the severe penalties prescribed should be specifically defined by the Congress, and their availability should result from jury findings made in the usual manner and under traditional standards; definition as a specific crime may raise the level of deterrence.

A possible middle ground is the establishment of a two-stage trial, analogous to that proposed for imposition of the death penalty. See provisional Chapter 36 and comment thereto, *infra*.

It should be noted that none of the several methods for enhancement of penalties for organized crime leadership is warranted if the maximum authorized for the underlying offense is set at an exceptionally high level in order to reach such conduct upon conviction of that offense alone.

Note that the culpability required in subsection (1) differs for different kinds of activity: for the organizers, enforcers and others who run the syndicate the required culpability is knowledge of the

scope and criminal objectives; for the lawyers and other managerial assistants, the corrupted public servants and those who corrupt them, the required culpability is intent to promote the business. The last sentence of subsection (1) is designed to preclude criminal liability as full accomplices of the leaders for those who work for the business as underlings.

To provide greater flexibility "criminal syndicate" could be defined, in subsection (2), without reference to specific crimes; but, without such specification, many business crimes without organized crime connections would be covered, *e.g.*, housing code violations, truck overloading.

The federal jurisdictional base proposed in the draft is the fact that the association commits a federal crime. Jurisdiction therefore depends upon the jurisdictional base or bases provided for that crime. This offense could also have any or all of the bases listed in § 201, *e.g.*, use of interstate facilities, affecting commerce, etc.; or, upon appropriate findings by the Congress, *e.g.*, that such syndicates do have an effect on interstate or foreign commerce, even when their operations are essentially local, jurisdiction could be plenary.

**§ 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. "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) Non-Culpable 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.**

**(c) Flouting Regulatory Authority. A person is guilty of a Class A misdemeanor if he flouts regulatory authority by willful and persistent disobedience of penal regulations. Proof of persistent disobedience may be made by showing two or more violations of the same body of regulations, whether or not of the same regulation; but no violation more than two years prior to the commencement of the prosecution shall be considered in this connection unless that violation occurred within five years and resulted in a judicial or administrative disposition of record against the accused.**

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

**(4) Presumption That Professional's Violation Is Willful. Willfulness is presumed in the case of a person engaged, whether as owner, employee, or otherwise, in a business, profession, or other calling subject to licensing or pervasively regulated, when charged with violating a penal regulation applicable to him in that capacity.**

*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 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.

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 non-penal 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.

Note that "willfully disobeys," in subsection (2)(b), requires not only that conduct which is, in fact, contrary to a penal regulation be engaged in willfully but that the willfulness 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 disobeying the regulation. In the regulatory law area, conduct which is not generally understood to be illegal is often the subject of prohibition.

# Chapter 11. National Security

*Introductory Note*

Sections 1101 through 1122 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 of restricted data on atomic energy, now dealt with in Title 42, is covered by proposed sections 1112 and 1113; some Trading With the Enemy Act provisions, now in Title 50, are covered by section 1116; 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 communist organization members (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, be retained in its present form in Title 50, possibly subject to regulatory offense penalties (see § 1006), since more serious aspects of these provisions will be covered by Code offenses, *e.g.*, false statements (in an employment application or questionnaire) (see § 1352).

## § 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 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 or domiciled in the United States or a territory thereof.**

*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 military activity of the enemy during international war is also new. The current catchall language in 18 U.S.C. § 2381, *e.g.*, giving aid and comfort to the enemy, covers both serious and trivial conduct and affords no rational basis for grading. Words more inclusive than "participates", such as "facilitates", would present similar difficulties; and it therefore appears preferable to rely upon judicial construction of "participates" to reach conduct beyond actual membership in military forces. Note that § 1102, *infra*, deals with facilitation in the United States. Note that wartime or peacetime hostile conduct, whether or not by a national, is embraced by espionage or sabotage.

The definition of a "national of the United States" is proposed in lieu of the current, more general reference to a person who owes allegiance. One consequence of this formulation is that it facilitates definition of a defense that one reasonably believed he was not a national, which presently appears to be a ground for avoiding criminal liability. Retention of "owing allegiance" would permit greater flexibility in coverage of those who are not citizens. The draft, however, uses the concept of domicile in order to provide more precision in determining the scope of the offense. Note that § 1102 would cover "treasonous" conduct of *any* person within the United States. Like the existing statute, this section is not explicit as to the constitutionally-based requirements of two witnesses plus an overt act.

### § 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) Defenses. It is a 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 a national of the United States, as defined in section 1101; but if he was in fact such a national, it is nevertheless an affirmative defense that he reasonably believed he was not such a national.**

*Comment*

This offense is coordinate with treason (§ 1101), but has broader scope inasmuch as it covers hostile acts by non-nationals when committed within the United States. It also reaches facilitation, whether by nationals or non-nationals, of enemy military activity. A non-national's service in enemy armed forces pursuant to the laws of war is, of course, excepted from the section.

**§ 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, knowing that such armed insurrection is in progress or is impending, he facilitates it or solicits, incites, or conspires with another to engage in or to facilitate it.**

**(2) Leading Armed Insurrection. A person is guilty of a Class A felony if he organizes, directs, leads, or provides a substantial portion of the resources of an armed insurrection within subsection (1) or any part of such insurrection involving 100 persons or more.**

**(3) Attempt; Conspiracy; Facilitation; Solicitation. A person may be convicted under sections 1001 through 1004 of an attempt or conspiracy to violate this section, or of facilitating or soliciting a violation of this section, only if he engages in conduct when the armed insurrection is in progress or is impending.**

*Comment*

This section 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, the draft distinguishes between leaders (subsection (2)) and mere participants (subsection (1)). Note that the section also covers facilitation, solicitation and incitement of insurrection with knowledge it is in progress or impending. Subsection (3) assures that prosecutions for inchoate offenses involving armed insurrection do not undercut the requirement, deriving from the First Amendment, that verbal behavior be so close to the feared evil as to create a clear and present danger.

This offense should be considered along with § 1104, dealing with advocacy. Together they cover 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.

**§ 1104. Advocating Armed Insurrection.**

**(1) Offense. 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 section 1103, 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 section 1103; 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.**

**(2) Attempt; Conspiracy; Facilitation; Solicitation. A person may be convicted under sections 1001 through 1004 of an attempt or conspiracy to violate this section, or of facilitating or soliciting a violation of this section, only if the prohibited advocacy occurs.**

*Comment*

This section 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. This offense is keyed to § 1103 (engaging in armed insurrection) through its culpability element, the intent to induce armed insurrection, and the requirement that the conduct be likely to induce a violation of § 1103. The offense of advocacy is viewed as a step removed from actual insurrection or inciting actual insurrection. This section, like section 1103, incorporates judicially-expressed constitutional requirements, *e.g.*, the "clear and present danger" test.

**§ 1105. 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 or state 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 tentative proposal 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?

**§ 1106. 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;**

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

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

**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) Catastrophic Peacetime 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 §§ 1107 and 1108, 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 catch-all 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 draft 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.

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 § 1108.

**§ 1107. 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 (c) of section 1106(1), or, whether or not in time of war, in the conduct prohibited in section 1106(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.

**§ 1108. 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 (c) of section 1106 (1) and thereby causes a loss 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.

**§ 1109. Avoiding Military Service Obligations.**

**(1) Offense. A person is guilty of a Class C felony if, 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) unlawfully fails to register pursuant to the regulatory act;**

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

**(c) unlawfully refuses induction into the armed forces; or**

**(d) unlawfully refuses or fails to perform, or avoids the performance of, civilian work required of him pursuant to the regulatory act.**

**(2) Definitions. In this section:**

**(a) "unlawfully" means in violation of the regulatory act;**

**(b) "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.**

*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). This section provides more discriminating grading, selecting those violations which are properly felonies and leaving other violations subject to misdemeanor penalties only or to the regulatory offense provision (§ 1006). Note that this section explicitly requires the intent to avoid service or performance of civilian work in lieu of service. Note also that use of false statements accompanied by the prohibited intent is covered by § 1110(1)(b).

**§ 1110. Obstruction of Recruiting or Induction into Armed Forces.**

**(1) Offense. 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 1109; 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.**

**(2) Definitions. In this section:**

**(a) "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;**

**(b) "regulatory act" has the meaning prescribed in section 1109(2)(b).**

*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, subsection (1)(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. Similarly, 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, subsection (1) (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.

**§ 1111. 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. 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. The grading is based, as under the existing law, upon the existence or non-existence of war.

**§ 1112. 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).

**§ 1113. Espionage.**

**(1) Offense. A person is guilty of espionage if he intentionally reveals national defense information to a foreign power with intent to injure the United States or to benefit a foreign power in the event of military or diplomatic confrontation with the United States.**

**(2) Grading. Espionage is a Class A felony if committed in time of war or if the information directly concerns military or diplomatic codes, 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. Otherwise espionage is a Class B felony.**

**(3) Attempted Espionage 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 toward commission of espionage under section 1001: obtaining, collecting, eliciting, or publishing information directly related to the military establishment or entering a restricted area to obtain such information.**

**(4) Definitions. In this section:**

**(a) "national defense 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;**

**(iii) military communications, intelligence, research, or development;**

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

**(v) military or diplomatic codes;**

**(vi) any other information which is likely to be diplomatically or militarily useful to an enemy;**

**(b) "foreign power" includes any foreign faction, party, military or naval force, whether or not recognized by the United States, any international organization, and any armed insurrection within the United States.**

*Comment*

This new formulation of espionage is designed to take into account problems identified by the courts in construing existing espionage

statutes, 18 U.S.C. §§ 793–798. The term "reveals" is used as a reflection of 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 this section and the definition of national defense information in subsection (3)(a) are also suggested by judicial construction of existing law. Note the inclusion of restricted data under the Atomic Energy Act and of military and diplomatic codes, now covered by 42 U.S.C. § 2274 and 18 U.S.C. §§ 798 and 952. This eliminates need for special provisions on those subjects.

Subsection (2) changes the grading scheme of existing law in a manner similar to the change with respect to sabotage. See comment to § 1106, *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).

**§ 1114. Mishandling Sensitive 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 defense 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 defense 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 defense information, fails to deliver it on demand to a public servant of the United States entitled to receive it.**

**"National defense information" has the meaning prescribed in section 1113(4).**

*Comment*

This section deals with reckless mishandling of national defense 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 eliminates the need for special provisions on restricted data under the Atomic Energy Act and provisions dealing with military and diplomatic codes. See 42 U.S.C. § 2274; 18 U.S.C. §§ 798, 952.

**§ 1115. Mishandling Classified Information.**

**A public servant is guilty of a Class C felony if he intentionally 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 the President for reasons of national security.**

*Comment*

This section brings the provisions of 50 U.S.C. § 783(b) into Title 18. The draft 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.

**§ 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 violate section 1114 or section 1115.**

*Comment*

This section is the counterpart of § 1114 for certain recipients of sensitive information and provides Class C felony treatment of such persons when they solicit violations of §§ 1114 and 1115.

**§ 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)).

**§ 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 1106), espionage (section 1113), 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. The draft extends coverage to 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.

**§ 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.

**§ 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 of a person apprehended or detained as an enemy alien by the United States; 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, 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. The reference in existing law to a prisoner of war or enemy alien held or detained by an "ally" has been deleted because the complexities involved in discriminating treatment of such cases far outweigh the need for proscription in view of the likelihood that aiding such an escape would not occur within the territorial jurisdiction of the United States.

**§ 1121. Unlicensed Manufacture and Disposition of Vital Materials.**

**A person is guilty of an offense if he intentionally engages in conduct prohibited or declared to be unlawful by 42 U.S.C. §§ 2077, 2122 or 2131 (relating to atomic energy) or 50 U.S.C.**

**§ 167c (relating to helium). The offense is a Class B felony if committed with intent to injure the United States or benefit a foreign power in the event of military or diplomatic confrontation with the United States. Otherwise it is a Class C felony. It is a defense to a prosecution under this section that the conduct was, in fact, authorized by statute or a regulation, rule, order or license issued or agreement made pursuant thereto.**

*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, and utilization and production facilities. 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.

**§ 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. Further consideration of the utility of these provisions, particularly in light of the self-incrimination problems they appear to pose, may lead to dropping the section.

## 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 foreign power with which the United States is at peace;**

**(b) organizes a military expedition assembled in the United States to engage in armed hostilities against a foreign power with which the United States is at peace; 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) "foreign power" means a foreign government, whether or not recognized by the United States, or a faction engaged in armed hostilities;**

**(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.

**§ 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) to gather information relating to the national defense of a foreign nation with which the United states is at peace 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 to kill a public servant of a foreign nation with which the United States is at peace, on account of his official duties; or**

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

*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 draft). 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 draft). The provision in the draft dealing with murders 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.

## § 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, in fact, 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 describe 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.

**§ 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 penal policy underlying the Study Draft, 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)(b) 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 the draft 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 proposed Code. It would then be the obligation of the Congress to decide, by appropriate amendment of the Code, whether the circumstances of a particular proclamation warrant backing with felony sanctions.

### § 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 statute of the United States 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 regulation of 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 of the Study Draft.

**§ 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 registration 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.

## IMMIGRATION, NATURALIZATION, AND PASSPORTS

*Introductory Note*

Sections 1221 through 1225 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. The drafts 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 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 defendant's reapplying for admission to the United States prior to the defendant's reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, or the defendant reasonably believed the Attorney General had expressly consented to his reapplying for such admission; 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 draft 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.

**§ 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 engage in conduct in the United States which would, in fact, constitute a felony. 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. The draft 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.

**§ 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 engage in conduct in the United States which would constitute a felony.**

**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 general hindering law enforcement provisions of the proposed Code's § 1303. There is no change in substance; but the grading represents a departure from existing law in line with the grading principles proposed in § 1222. Consideration has been given to including in the draft 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.

### § 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 in the proposed Code (§ 1352), is upgraded to a felony. Note that obtaining the result by deception requires that the deception be material.

### § 1225. Obtaining Passport by Deception.

**A person is guilty of a Class C felony if he intentionally obtains the issuance of a United States passport by deception.**

*Comment*

This section carries forward the policy of 18 U.S.C. § 1542, treating fraudulent acquisition 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.

**§ 1229. Definition for Sections 1221, 1224 and 1225.**

**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*

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

# 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. Note that 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). It should also be noted that physical interference situations which are too serious to warrant 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.*, draft sections 1321 (witnesses), 1366 (public servants), 1617 (criminal coercion). Provisions similar to the proposed section appear in recent state code revisions. The possibility that minor conduct might be swept within the reach of the proscription suggests adding a requirement that either the force applied or the obstruction be substantial.

**§ 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 a government function by resisting 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.* The draft reflects the view that slight reflexive action such as a push or the closing of a door should not be an offense. 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).

**§ 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 1353, respectively.

While the draft 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 establishes 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.

**§ 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 crime is a Class C felony if the principal crime is a Class A or Class B felony, and is a Class A misdemeanor if the principal crime is a Class C felony or 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. See § 1303. 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.

**§ 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 or [18 U.S.C. § 5035, relating to release of juveniles] or any other statute to which this section is expressly made applicable, upon condition or undertaking that he will subsequently appear at a specified time and place, he fails to appear at that time and place.**

**(2) Grading. The offense is a Class C felony if the actor was released pursuant to the Bail Reform Act of 1966 in connection with a charge of felony or while awaiting sentence or pending appeal or certiorari after conviction of any crime and he knowingly fails to appear. 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; but it is drafted for general application to any situation in which a person is required to appear as a condition of release so that it may be made expressly applicable without change in form or principle to situations other than bail jumping, such as deportation proceedings. This draft does extend the offense to release of juveniles (now authorized by 18 U.S.C. § 5035); presently there is no criminal sanction for non-appearance of conditionally-released juveniles.

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.

**§ 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 escape 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 escape from official detention, or (b) the person escaping was in official detention by virtue of his arrest for, or on charge of, 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". The draft 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, following existing law by generally denying a defense based on illegality but changing the present requirement, when the prosecution is for escape from arrest, that the arrest be lawful to a requirement that the arrest need only 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 of-

fense with which he is charged is retained; but the draft 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.

**§ 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 non-penal 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 non-penal 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.

**§ 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. The draft 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 draft are similar to those in the inciting riot provisions of the proposed Code (§ 1801). Note that the draft 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.

**§ 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 pro-**

**cures, 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, but would be subject to lesser penalties in the manner of any other regulatory offense by appropriate amendment of that provision.

**§ 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 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 or an Assistant 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 set forth 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.

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 or threat directed against another or engages in deception or bribery of another:**

**(a) with intent to influence the other's testimony in an official proceeding; or**

**(b) with intent to induce or otherwise cause the other:**

**(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 lawfully 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 defendant did not threaten unlawful harm and sought thereby to influence the other to testify truthfully.**

**(b) This section does not apply to the offer, giving or agreement to give, or the solicitation, acceptance or agreement to accept, a thing of value as consideration for a person's refraining from initiating the prosecution or investigation of an offense as a good faith attempt to pay or obtain what either one of the parties believes due the recipient or proposed recipient as restitution or indemnification for harm caused by the offense. Inapplicability under this paragraph is an affirmative defense.**

**(c) It is no defense to a prosecution under this section that an official proceeding was not pending or about to be instituted.**

**(4) Definitions. In this section:**

**(a) "uses force or threat directed against another or deception or bribery of another" includes the use of force or threat directed against and deception or bribery of the other's spouse, guardian or a relative residing in the same household with him;**

**(b) a person engages in bribery of the person whose conduct he intends to influence, induce or cause, if he offers, gives or agrees to give such other person a thing of value as consideration for the conduct sought.**

**(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section when the official proceeding is a federal official proceeding.**

**(6) 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 draft 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".

Note that an essential element of the felony 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 jurisdictional "piggyback" 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; § 1343, refusal to testify, and § 1341, which deals with criminal contempt but makes the offense subject to the general provisions of the Code as to complicity, conspiracy, and the like. Retaliation against a witness is covered by § 1367.

The explicit exclusion of payments in settlement of claims under subsection 3(b) recognizes that, where the conduct causing the harm may also be a crime, it may readily be inferred that the payment was made for a purpose proscribed by this section. When the question of the exclusion arises, the defendant has the burden of establishing it.

The explicit inclusion of persons close to the witness, under subsection (4)(a), is intended to maintain the scope of existing law, as "endeavor" is presently construed. Bribery is defined in a manner consistent with the bribery provision in the proposed Code, § 1361. Definitions of "official proceeding" and "thing of value" are set forth in § 109.

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 (6) is carried forward in virtually the same terms as it appears in the existing bribery law, 18 U.S.C. § 201(j).

**§ 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 defense in subsection (3)(c) and the definition in subsection (4)(b) of section 1321 apply to this section.**

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

*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*. The present requirement that the law enforcement officer, as well as the offense involved, be federal has been deleted because of the difficult but unnecessary problems of proof which it invites. 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.

**§ 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) Solicitation. A person is guilty of an offense if he solicits another to commit the offense defined in subsection (1).**

**(3) Grading. The offense is a Class C felony if the actor intentionally and substantially obstructs, impairs or perverts prosecution for a felony. Otherwise it is a Class A misdemeanor.**

**(4) 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.**

**(5) 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 that, since the general offense of criminal solicitation (§ 1003) applies only to felonies, the continuation of criminal sanctions for the unsuccessful solicitation of another to destroy evidence must be explicitly declared. Note also related provisions: § 1342, dealing with failure to produce under a subpoena *duces tecum*; § 1351, perjury; and § 1352, false statements. An issue posed by the draft is whether any felony penalty is warranted for conduct short of actual perjury and, if it is, whether the limitation proposed in subsection (3) is sufficient.

**§ 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).

**§ 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.**

**(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 draft, borrowing from a similar New York statute (N.Y. Penal Law § 215.50(7)), draws an outside line at 200 feet. 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.

**§ 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 assisting 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.

**§ 1327. Nondisclosure of Retainer in Criminal Matter.**

**(1) Offense. A person who has been retained 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 retainer, 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) Definition. In this section "retained" means employed or engaged for compensation or pecuniary reward.**

**(4) 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. Note that § 1365 prohibits trading in special influence—offering or accepting money for using the influence of kinship or official position upon a public servant.

CRIMINAL CONTEMPT AND RELATED OFFENSES

**§ 1341. Criminal Contempt.**

**(1) Power of Court. A court of the United States shall have power to punish by fine or imprisonment or both 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 prosecution for criminal contempt under this section shall be deemed as for an offense for the purposes of Part A (General Provisions) and Part C (Sentencing) of this Code. Criminal contempt by 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, shall be treated as a Class A misdemeanor [, except that the defendant may be sentenced to pay a fine in any amount deemed just by the court]. Criminal contempt otherwise shall be treated [as an infraction, except that the defendant may be sentenced to a term of imprisonment of no more than five days] [as a Class B misdemeanor].**

**(3) Successive Prosecutions. Notwithstanding the provisions of sections 704, 705, 706, and 707 (relating to multiple prosecutions), a prosecution for criminal contempt under this section is not a bar to a subsequent prosecution for any other offense if the court certifies in the judgment of conviction of criminal contempt, or the order terminating the prosecution without acquittal or dismissal, that summary prosecution 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 prosecution.**

**(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 [, except that a court's power to order detention shall be limited to a period not exceeding one year].**

*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.

In view of the draft proposal of curtailment of the sentencing power beyond that effected by the Supreme Court, no effort has been made to modify the language of 18 U.S.C. § 401; and its provisions have been retained in subsection (1) of the draft, a step which will perpetuate the judicial construction of them which has occurred over the years. The curtailment of the sentencing power (5 days? 30 days?) stems from the view that, if jail terms longer than the proposed maxima are considered necessary to vindicate the court's authority, the regular method of prosecution should be preferred. This view is carried out by the creation of specific statutory offenses under which a regular prosecution may be conducted: § 1342 (failure to appear as witness), § 1343 (refusal to testify) and § 1344 (hindering proceedings by disorderly conduct).

A deviation from this plan is the manner of treatment of disobedience of final orders and temporary and permanent injunctions. Such conduct is punishable under this section at the same level as the specific statutory offense (§ 1345) in view of the fact that some sort of deliberative proceeding, with its own safeguards, usually including notice, has preceded the order, and the order, addressed to the violator, has proscribed specific conduct. Tentatively proposed as part of this exceptional treatment is preservation of a court's power to impose a fine in any amount it deems just. It can be argued that the need for such power occasionally arises in view of the fact that fines considerably greater than the amount normally fixed are from time-to-time imposed, and sustained by appellate courts. In any event, to accord with the Supreme Court's restriction, the maximum jail term should be no longer than six months; if a longer maximum is decided upon for a Class A misdemeanor (see § 3204), it will be necessary to add an express limit here.

Since the draft 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) preserves the courts' civil contempt power to compel obedience or to compensate for failure to obey, as distinguished from

punishment for past conduct. The draft proposes, in brackets, a limit of one year on the power to incarcerate for civil contempt. At present the maximum is arbitrary, *e.g.*, the life of the grand jury before which a witness refuses to testify. The major issue is whether at some point the element of punishment in the confinement outweighs the element of its coercive purpose, and the confinement should therefore be limited.

For a provision granting power to the court to recommend prosecution for contumacious conduct as a specific offense, see § 1349.

**§ 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 commissioner or magistrate, a referee in bankruptcy and 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 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 built into the draft. 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 non-reckless failure to appear or inability to produce and for insubstantial non-compliance. 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.

**§ 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 commissioner, 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.

**§ 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 draft extends the prohibition to all official proceedings, Congressional and administrative as well as judicial.

**§ 1345. Disobedience of Judicial Order.**

**(1) Offense. A person is guilty of a Class A misdemeanor if he disobeys or resists a 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) Defense. It is a defense to a prosecution under this section that the order or injunction was not lawful.**

**[(3) 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.

**§ 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.

**§ 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 Commissioner, 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 commissioner, 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) Defense of Lack of Certification. Failure to comply with the certification requirements of this section is an affirmative defense. The defendant 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, mandatory 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 an affirmative defense, as it is under current law when Congress is involved.

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.**

**(3) Inconsistent Statements. Where in the course of one or more official proceedings, the defendant made manifestly inconsistent statements under oath or equivalent affirmation, 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 and should be considered in connection with this section.

Under the draft, 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 draft follows existing law which treats misstatements as perjury when made with reckless disregard as to truth or falsity. "Statement" is defined in § 1354 to include a representation concerning a state of mind if the state of mind is a separate subject of the statement. Under § 1354 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 § 1354 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." Subsection (3) introduces a major change with respect to perjury prosecutions in which two manifestly inconsistent material statements are made in the course of official proceedings. In such cases 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 1354 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.

**§ 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; or**

**(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.**

**(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 a branch of government, whether executive, legislative or judicial,**

**or government agency has the power to adjudicate rights, establish binding regulations, make monetary awards or contracts, or grant governmental privileges with respect to the matter.**

**(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*

This section 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 1109, respectively.

The scope of the proposed 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) is derived from judicial construction of 18 U.S.C. § 1001. Generally, 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.

Note that 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 draft 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.

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 § 1353.

Note that under § 1354 "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.

**§ 1353. False Reports to Security Officials.**

**(1) Offense. A person is guilty of a Class B 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 B 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 draft 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 draft 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 fact the statement was made.

Note that "law enforcement officer" is defined in § 109.

**§ 1354. General Provisions for Sections 1351 to 1353.**

**(1) Materiality. Falsification is material under sections 1351, 1352 and 1353 regardless 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 or 1352 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 or 1353 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 and 1352 "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 §§ 1351–1353. 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; 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.

**§ 1355. 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 others under 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 draft 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.

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 thing of value was offered, given or agreed to be given, or solicited, accepted or agreed to be accepted, as consideration for the recipient's official action or violation of a known legal duty as a public servant if:**

**(a) the consideration was a thing of pecuniary value; and**

**(b) the actor knew that it 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 (i) investigation, arrest, or judicial or administrative proceeding, or (ii) bid, contract, claim, or application, and that interest could be affected by the recipient's performance or non-performance 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(x) 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(u), means any exercise of discretion. Note that, by virtue of the jurisdictional base designated in § 1368, this section will 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 draft 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, the draft 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.

**§ 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:**

**(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.

**§ 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).

**§ 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. The draft adds coverage of political endorsements to existing provisions governing federal employment (18 U.S.C. §§ 210, 211; 13 U.S.C. § 211). This 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).

**§ 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).

**§ 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.

The draft 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 disadvantages, 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.

## § 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 informa-**

**tion 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 draft 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.

**§ 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) Local Bribery and Intimidation. There is federal jurisdiction over offenses defined in sections 1361, 1362, 1366 and 1367 (a) under any paragraph of section 201 or (b) when the official action, duty or service involved is as an elected local public servant. "Local" means of any state, county, municipal or other political unit of government within any state of the United States, other than the government of the United States or of a foreign**

**nation. No prosecution shall be instituted pursuant to this subsection unless the Attorney General certifies that a substantial federal interest, as described in section 207, exists.**

*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. The extension of federal jurisdiction in subsection (2) to bribery and intimidation of *local* officials recognizes a federal interest in preserving the effectiveness of local law enforcement, particularly against subversion by organized criminals. Broad federal jurisdiction in this area might be rested on Article 4, Section 4 of the Constitution, under which the federal sovereign guarantees to the states a republican form of government. This responsibility could be construed as a power to preserve the states from any intrusion of nonpolitical pecuniary influences into government. The scope of this constitutional power is as yet untested, and might be limited to elective and representative character of state government. Paragraph (b) is drawn to fall within the limited construction. Paragraph (a) incorporates the conventional bases of federal jurisdiction, *e.g.*, use of the mails, upon which reliance may be placed with confidence.

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. The draft 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). Note that under subsection (2)(b) proof of interstate activity will not be necessary when the public servant involved is an elected local official.

The requirement of certification by the Attorney General recognizes the need to impose high political responsibility for the exercise of jurisdiction which constitutes intervention in local government affairs. No such requirement now exists for offenses of this character, although authorization is required for prosecutions under the Fugitive Felon Act, dealing with state felons, and for some civil rights prosecutions. See comment to § 207, *supra*. Such certification is intended to be conclusive, as provided in the last sentence of § 207.

**§ 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.

OFFICIAL MISCONDUCT REGARDING CONFIDENTIAL INFORMATION AND SPECULATION

### § 1371. Unlawful Disclosure of Confidential Information.

**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 or makes known in any manner 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. The draft 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 draft 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 subject thereto.

### § 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 fed-**

**eral 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 suggestion 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.

IMPERSONATING OFFICIALS

**§ 1381. Impersonating Officials.**

**(1) Offense. A person is guilty of an offense if he falsely pretends to be:**

**(a) a federal public servant or foreign official and acts as if to exercise the authority of such public servant or foreign official; or**

**(b) a federal public servant or a former federal 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.**

*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 jurisdictional "piggyback" provision (§ 201(b)), the minor, undifferentiated impersonation can be classified as a misdemeanor, but remain a vehicle for prosecution of the more serious crimes. Present coverage of employees of a few semi-official organizations, *e.g.*, Red Cross (18 U.S.C. § 917), 4-H Clubs (18 U.S.C. § 916), is continued in the proposed Code through a special jurisdictional base for theft, when committed by impersonation of such employees (§ 1740(4)(c)). The draft 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 contemplated that the balance will be transferred from the Criminal Code, and perhaps made subject to the regulatory offense provision (§ 1006).

# 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.**

**A person is guilty of tax evasion, a Class C felony, 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, estate or gift tax return when due; or**

**(f) he otherwise attempts in any manner to evade or defeat any income, estate or gift tax.**

*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 the draft. 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 draft 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 (narrowed under the draft to income, estate and gift tax) 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 paragraph (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. Proof of a deficiency may, as a practical matter, be helpful in most cases to establish intent to evade; but such proof is not required and is not likely to be necessary to establish that intent in the kinds of non-deficiency cases in which a felony prosecution is warranted, *e.g.*, gross understatement of income coupled with a manifestly "windfall" deduction. The other change is that the making of false material statements will no longer be felonious, as it presently is under 26 U.S.C. § 7206, without intent to evade. The existence of that intent distinguishes tax evasion from the general false statement misdemeanor (§ 1352). Possible issues in the draft include:

(1) whether understatements of income, or selected other categories of knowing false statements, should be made felonious without proof of intent to evade, or treated as presumptive evidence of intent to evade;

(2) whether failure to file a return, with purpose to evade the tax, should be felonious in the case of excise tax returns as well as income, estate, and gift tax returns. *Cf.* paragraph (e) and § 1402(a);

(3) whether the offense should be graded in accordance with the amount of tax evaded. *Cf.* § 1411(2) (smuggling graded by amount); § 1735 (class B felony if ordinary fraud involves more than $100,000; misdemeanor if less than $500 involved).

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.

**§ 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(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.

**§ 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. 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.

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.

**§ 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.

**§ 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*, —— U.S. ——, 90 S. Ct. 642 (1970)) may require a different approach. The presumptions set forth in subsection (2) appear to be valid under the tests 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).

**§ 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(a), dealing with false material statements with intent to evade, is thus required to reach such means of evasion.

CUSTOMS OFFENSES

**§ 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 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 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 is being evaded or the introduction of which is prohibited 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 because the object may cause serious bodily injury or substantial 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 article, goods, wares and merchandise and an animate as well as inanimate thing;

(c) "United States" does not include the Virgin Islands, 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 which charges smuggling under this section and which contains enough information about the events alleged to have taken place fairly to apprise the defendant of the nature of the charges against him shall be sufficient without further specifying the precise legal category of smuggling of which the defendant may be convicted. 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), provided that 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 infractions.

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 substituted 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.

The draft 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.

An issue to be resolved is whether felony penalties for all smuggling should be retained on the ground 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. The draft 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. Although considerations similar to those involved in grading tax evasion (§ 1401) are involved in grading smuggling according to the amount of duty evaded, the following factors are thought to warrant that grading test for smuggling: (1) the availability of alternative grading distinctions, *e.g.*, value of the object and use in a business; (2) the customs enforcement scheme places less reliance upon the deterrent value of the penalty and more upon the possibility of discovery than is true with respect to tax evasion; and (3) should the lesser penalty produce an increase in minor transgressions, the consequences in the customs area would be less serious than in the tax area.

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, profiters 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 discriminating. See, *e.g.*, § 1822(4), dealing with importation of marihuana for one's own use. This principle may have general applicability and ultimately be included 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. Deprivation of Rights.

**A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise or enjoyment of, or because of his having so exercised, any right, privilege or immunity secured to him by the Constitution or laws of the United States.**

*Comment*

This is an amalgamation of post-Civil War legislation presently embodied in 18 U.S.C. §§ 241 and 242. Provisions which have become unnecessary due to an expanded view of the scope of federal rights and congressional power to protect them have been deleted. In particular, it is unnecessary to provide, as it is provided in present § 242, that a deprivation of federal rights be under color of state law or that there is a federal right not to be subjected to discriminatory penalties. The draft follows § 242 rather than § 241 in that a single person may be guilty of the offense (§ 241 reaches only conspiracies) and that aliens as well as citizens are protected from deprivation of federal rights.

The offense is classified as a misdemeanor, as is the offense under present § 242. Section 241 is a felony carrying up to ten years' imprisonment. Both sections authorize life imprisonment "if death results" from the commission of the offense. Under the proposals regarding federal jurisdiction (see § 201(b)), 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 this section. This "piggyback" 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.

The 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 proposed § 1501. Section 1501 will provide a base for further development of federal protection of federal rights by judicial interpretation. Note that § 1501, like present §§ 241 and 242, applies to any form of "injury" or "intimidation"; there is no requirement of forceful intimidation or discrimination such as may appear in some of the more specific provisions below. On the other hand the scope and effectiveness of § 1501 and its current analogues may be circumscribed by the 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.

INTERFERENCE WITH PARTICIPATION IN SPECIFIED ACTIVITIES

**§ 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 intentionally injures or intimidates 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 subsection (1) of 18 U.S.C. § 245 (b), part of the Civil Rights Act of 1968. Subsection (2) of 18 U.S.C. § 245(b) is picked up in draft § 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.

An important issue raised by the draft is whether to restrict the offense, as 18 U.S.C. § 245 does, to intimidation "by force or threat of force." The phrase was deleted on the view that economic pressures to forego federal rights ought to be banned. At the same time, there was deleted from the 1968 language the prohibition against "interfering with" the protected rights; such broad language seemed to go too far once the requirement of force or threat was removed. The result is a compromise which leaves it to the courts to spell out the precise range of "injure or intimidate" taking into account Congress' intent both to go beyond violence and yet not so far as every conceivable "inter-

ference" such as might result, for example, from lawful though erroneous judgments of election officials, judicial decisions, discretionary judgments of federal employers or disbursing officers.

As to classification of the offense as a misdemeanor, see 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." Although § 245 makes some progress towards a rational sentencing structure, it still falls far short of the arrangement in the proposed Code under which appropriate federal prosecution and punishment would follow such offenses as murder, arson, kidnapping and aggravated assault connected with a civil rights offense.

**§ 1512. Discrimination in Public Education, State Activities, Public Accommodations, Employment, Housing, Interstate Travel.**

**A person is guilty of a Class A misdemeanor if, whether or not acting under color of law, he intentionally injures or intimidates 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 prerequisite 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 debated in the course of drafting was 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 against 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. On the other hand, if both § 1511 and this section were restricted to use of force, the case for transfering paragraph (g) to § 1511 would be stronger. Here, as elsewhere in considering specific civil rights offenses, it must be borne in mind that the general protection under § 1501 of "the free exercise or enjoyment" of federal rights supplements all civil rights provisions.

## § 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 intentionally injures or intimidates**

**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). Protection is here extended beyond the person claiming the federal right, to persons who are willing to accord those rights, *e.g.*, to providers of nondiscriminatory housing, but may be subjected to intimidation or retaliation for that willingness. Issues with respect to "force," "interference," and grading are the same for the offense defined here as they are for the offense defined in § 1511.

### § 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 intentionally injures or intimidates 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 proposed § 1515, *infra*. Protection is extended to those aiding or encouraging others to take advantage of their rights.

The draft substitutes "person" 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 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.

### § 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 intentionally injures or intimidates 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' resolution 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.

Another issue is whether the word "lawfully" should be retained. If retained, part of the government's burden of proof beyond a reasonable doubt would be 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.

In connection with the conservative position on federal jurisdiction to which the proposals above have tentatively adhered, it should be noted that deletion of paragraph (3) of 18 U.S.C. § 245, 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, is recommended. Not only does that provision push federal jurisdiction to extremes, but it also seems to make invidious distinctions between businessmen and other victims of riots.

## ABUSE OF OFFICIAL AUTHORITY

### § 1521. Unlawful Acts Under Color of Law.

**A person acting under color of law is guilty of a Class A misdemeanor if he knowingly:**

**(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 police or prison officials that has been most often dealt with under the vague terms of 18 U.S.C. § 242. It also covers all other official misuse of force. It dispenses with the need for proving the *Screws*-type specific intent to deprive the victim of federal constitutional rights. It applies equally to federal and state officials, to those purporting to exercise official authority, and to those private persons acting in concert with officials. *Cf. United States v. Price*, 383 U.S. 787 (1966) and *Williams v. United States*, 341 U.S. 97 (1951).

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.

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 § 1511.

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.

**§ 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.

**§ 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.

**§ 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.

**§ 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 or armed men 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 as unnecessary.

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. Compare also § 602 of the proposed Code, which provides a defense for behavior in execution of a public duty.

### POLITICAL CONTRIBUTIONS

**§ 1541. Political Contributions by Specified Organizations and Others.**

**(1) Contributor. A national bank, federal savings and loan association, corporation organized by authority of a federal or state statute, labor organization, or government contractor shall be guilty of a Class A misdemeanor if such organization or person makes a contribution or expenditure in connection with any primary, special, or general election, or political convention or caucus held to select candidates for political office.**

**(2) Recipient. A person shall be guilty of a Class A misdemeanor if he knowingly solicits, accepts or agrees to accept any contribution prohibited by subsection (1).**

**(3) Definitions. In this section:**

**(a) "government contractor" means a person or organization contracting with the United States during the period of negotiation or performance on any contract to confer any service or benefit on the United States, other than a private citizen acting solely in that capacity and contracting for regular or part-time employment or provision of other personal services;**

**(b) "labor organization" means an organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.**

*Comment*

This section derives from 18 U.S.C. § 610, and substantially incorporates also 18 U.S.C. § 611 by including and defining "government contractors." The draft is broader than § 610 in two respects: federal savings and loan associations and government contractors are added to the list of entities; and the restraint applies to all entities with respect to all elections, whereas under § 610 the restraint on nonfederal corporations and unions is limited to federal elections. In reaching all elections this section follows 18 U.S.C. § 245(b)(1)(A), revised as proposed § 1511. Criminal liability of individuals acting for an organization is dealt with under general provisions of the proposed Code, § 404.

Title 18 U.S.C. §§ 608 and 609 are quite dissimilar to 18 U.S.C. § 610, although all deal with political contributions. Sections 608 and 609,

which limit the *amounts* of expenditure, have not been effective because it is easy for contributors to stay within the specified maximum for separate contributions while making large aggregate contributions to a number of different candidates and committees. The Department of Justice reports no case of enforcement. Similarly, 2 U.S.C. § 248, which limits the amount of expenditure by candidates for Congress, has proved ineffective. Transfer of 18 U.S.C. §§ 608 and 609 out of Title 18 to Title 2 for restudy as a regulatory rather than penal offense is recommended. By contrast, 18 U.S.C. § 610 articulates a flat prohibition against any contribution by specified entities and does not require a regulatory approach. In practice it has been found useful.

**§ 1542. 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, like 18 U.S.C. § 610, flatly prohibits political contributions from a specific source. Although it may be desirable to exclude the influence of "foreign money" on domestic politics, the effectiveness of the existing and proposed sections 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 than under § 1541; (3) the problem of identification of "foreigners" in relation to expenditures by transnational enterprises, *e.g.*, an American hold-

ing company or individual controlling a foreign corporate enterprise, an American subsidiary of a foreign parent.

The limited effectivness of a total exclusion provision suggests that a provision imposing registration and disclosure requirements might be preferable. Section 613 could be eliminated entirely or transferred out of Title 18 for reconsideration in a regulatory context.

## 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 draft 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 a violent situation and reaches outsiders trying to interfere with the collective bargaining process. Note that, 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. Note the

recommendation in the Final Report (at page 78) of the National Commission on Causes and Prevention of Violence that civil remedies be available.

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; or**

**(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.**

**(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (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 draft 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 cur-

rent 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.

The present provisions also proscribe "willful" interception and disclosure of wire or oral communications. In terms of the culpability definitions of the proposed Code, the draft 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 or illicit wiretapping or eavesdropping purposes. In terms of the proposed culpability provisions, this could be translated into acts "in reckless disregard" of the requisite facts. The draft, 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 draft 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), (b), (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 and 1562.**

**In sections 1561 and 1562:**

**(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*. In the final draft these definitions may be placed with the provisions which authorize wiretapping and eavesdropping and be incorporated 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), (b), (c), (e) or (f) of section 201.**

*Comment*

This section substantially re-enacts 18 U.S.C. § 1702, proscribing intentional obstruction of correspondence. The draft proposed 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 general 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. The draft 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 a Class A felony if he:

(a) intentionally or knowingly causes the death of another human being; or

(b) causes the death of another human being under circumstances manifesting extreme indifference to the value of human life. [*Alternative A:* Such indifference is presumed if the actor is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a Class A or B felony or a felony involving force or danger to human life. An accomplice of such actor in the commission of or attempt to commit such felony is deemed an accomplice in the conduct causing the death. A participant in such felony is deemed to have caused a death resulting from resistance to the commission of the felony or from prevention or an attempt to prevent flight of a participant, whether or not the killing is committed by a participant.] [*Alternative B:* 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, request, command, importune, cause or aid the commission thereof; and

(ii) was not armed with a firearm, destructive device, knife or other weapon which under the circumstances indicated an intent or readiness to inflict serious bodily injury; and

(iii) did not reasonably believe that any other participant was armed with such a weapon; and

**(iv) did not reasonably believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury.]**

*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 non-capital murder, has broken down with the decline of capital punishment and the blurring of the distinction between the terms "deliberate and premeditated" and "intentional". The decision to eliminate second-degree murder could hinge on the decision regarding capital punishment. If capital punishment is retained or partially retained so that its application to murder cases is limited—as by provisional Chapter 36—the decision as to second-degree murder could be affected.

Paragraphs (b) and (c) offer alternative ways to deal with the felony-murder doctrine. Under the traditional felony-murder doctrine, which serves to upgrade certain criminal killings which 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 (b) would increase the list of felonies enumerated in the existing federal felony-murder provision (18 U.S.C. § 1111(a)): inclusion of all Class B felonies would add kidnapping; inclusion of all felonies involving force or danger to life would add such offenses as aggravated assault and felonious endangering. But the scope of present felony-murder would be contracted to the extent that involvement in the felony would be *only presumptively* reckless of life. An accomplice in the felony might avoid a murder conviction by proof that he had no reason to believe there was risk of homicide.

The second alternative is derived from § 125.25 of the recently enacted New York Penal Law. It would ameliorate the harshness involved in applying the old rule to the person who is not really culpable, and at the same time place a greater burden on him than Alternative A does to establish his lack of culpability. The 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 non-participant in the crime is excluded. The standards to be considered may be easier to comprehend and weigh than the alternative test—whether the circumstances manifested extreme indifference to the value of human life.

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.

**§ 1602. Manslaughter**

**A person is guilty of 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.* A.L.I. Model Penal Code § 210.3(1).

(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.

**§ 1603. Negligent Homicide.**

**A person is guilty of a Class C felony if with criminal negligence he 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." Under the definition of "negligently" prescribed in § 302 of the proposed Code, a person will be guilty of negligent homicide 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, plain and unjustifiable disregard . . . ."

**§ 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 deaths criminally caused on federal enclaves (18 U.S.C. §§ 1111–1112), of specified federal officers or employees in the course of their duties (18 U.S.C. § 1114), of the President or his successors (18 U.S.C. § 1751), or in the course of commission of certain federal crimes, such as bank robbery (18 U.S.C. § 2113) and civil rights offenses (18 U.S.C. § 245). Under this section 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, *e.g.*, post office robbery, organized crime offenses, obstruction of justice through intimidation of federal jurors and witnesses. Although federal intervention in some of these cases, *e.g.*, a deadly attack on a federal employee in his office by his jealous wife, may not be necessary, the provision permits the discretionary exercise of federal jurisdiction in cases in which there is a real federal interest. See § 207.

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. The term "simple assault" is not presently defined by statute, but has been given meaning by judicial interpretation of the term "assault" (18 U.S.C. §§ 111, 113).

Note that the reduction to the petty misdemeanor level of assaults which are a part of unarmed fights permits such cases to be expeditiously brought before a United States commissioner or 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.

**§ 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 firearm, destructive device or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury; or**

**(c) causes bodily injury to another human being while attempting to inflict serious bodily injury on any 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, or if any injury is inflicted by use of a firearm or destructive device or under other circumstances indicating a readiness or intent to inflict serious injury.

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 blindness, substantial paralysis, or multiple amputation) could be graded at a higher felony level.

**§ 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), (b) or (*l*) of section 201.**

*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. By virtue of the "piggyback" jurisdiction of § 201(b), this section will apply when endangerment occurs in the course of violation of penalized federal safety regulations, *e.g.*, those relating to shipment of explosives.

**§ 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, or not recklessly resulting in public disruption or in the creation of great and sustained fear in an individual, are dealt with as lesser crimes under §§ 1615, 1617 and 1618.

## § 1615. Threats Against the President and Successors to the Presidency.

**A person is guilty of a Class A misdemeanor 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.**

*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 result 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 non-serious, if foolish, efforts to ex-

press 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. Because most such threats pose no serious threat to Presidential safety, the offense is graded as a misdemeanor; a threat so frightening, disruptive or persistent as to amount to terrorization would be punishable as a felony under proposed § 1614.

**§ 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, 1511–15), robbery (§ 1721), definition of "restrain" for kidnapping and related offenses (§ 1639(a)).

**§ 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 over the offense is similar to present jurisdiction; but it is extended somewhat 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.

**§ 1618. Harassment.**

**(1) Offense. A person is guilty of a Class B misdemeanor if, with intent to frighten or harass another, he:**

**(a) communicates in writing 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) Jurisdiction. There is 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. With more serious situations covered elsewhere, the present offense may be classified as a Class B misdemeanor.

**§ 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.

## 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) engage in conduct which, in fact, constitutes a felony or an 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 could 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 the death penalty is abolished for kidnapping, and the death penalty, as a result of the decision in *Jackson* v. *United States*, 390 U.S. 570 (1968), no longer does exist for federal kindapping cases, the distinction may lose some of its significance for the kidnapper. In that event, a preferable grading

distinction might be whether or not the kidnapping victim was returned without having suffered serious bodily injury.

See § 1634 for federal jurisdiction.

**§ 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.

**§ 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 may, in the final draft, be explicitly treated as a jurisdictional provision, rather than a substantive defense. In any event, it should be



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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), § 608 (Conduct Which Avoids Greater Harm), would be available.

*See* Working Papers, pp. ——.

## § 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.**

**(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 213.**

**(3) Investigative Authority. Upon request of state or local law enforcement authorities, the Federal Bureau of Investigation is authorized to investigate any case of abduction occurring within the United States regardless of whether federal jurisdiction exists or appears to exist.**

*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. Subsection (3) 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. 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. Subsection (3) may be transferred from this substantive chapter of the Code. It is included in the Study Draft so that proper disposition of the present Lindbergh Law provisions may be considered.

**§ 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 the draft 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 in flight "in air commerce" as defined in 49 U.S.C. § 1301(4)—has been expressly carried forward as part of the definition of "special maritime and territorial jurisdiction of the United States" (§ 213(a)(vi)). 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.

**§ 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 substantially 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.

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 non-forcefully, 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? All conduct defined as rape in this provision would, in any event, be graded as a Class B felony.

See §§ 1648–50 for additional applicable provisions.

**§ 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 non-forceful imposition on females, *e.g.*, intercourse with mental incompetents, or by means of deception 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.

**§ 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.

**§ 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.

**§ 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). The draft 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 (§ 1632(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 § 1650(6), which provides a defense for conduct which is not criminal under the law of a surrounding state.

**§ 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.

**§ 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.

**§ 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) Sexually Promiscuous Complainants. It is an affirmative defense to prosecution under sections 1645 and 1647(g) that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.**

**(4) 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.**

**(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.**

**(6) State Law. Sections 1641 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.**

*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. Under subsection (3), proof by a preponderance of the evidence of promiscuity of a sexual partner is a defense to a charge of an offense designed to protect immature persons from sexual seduction; but mistake as to promiscuity of such a partner is no defense (see § 303).

**§ 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, *e.g.*, rape in the course of a federal kidnapping, and on the high seas in a "piracy" setting.

# Chapter 17. Offenses Against Property

## ARSON AND OTHER PROPERTY DESTRUCTION

*Introductory Note*

The property destruction offenses in existing federal law are numerous and varied. In some instances existing statutes are divided according to the definition of the basic misconduct, and are further subdivided according to the federal interest involved. Compare, for example, arson in federal enclaves (18 U.S.C. § 81) and the malicious mischief provisions (18 U.S.C., Ch. 65). In other instances the various kinds of misconduct (and, in addition, harm to persons) are grouped in a single statute according to the function which is being interfered with, *e.g.*, air commerce (18 U.S.C. § 32) and common (motor vehicle) carriers (18 U.S.C. § 33). Maximum penalties vary according to the means employed, nature of the property, amount of damage caused, and whether harm is caused to human beings; but no consistent line is followed.

In the proposed Code the aspects of these provisions involving harm to and endangerment of human beings are largely covered by the offenses set forth in Chapter 16, directly under the specific jurisdictional bases provided for those offenses and indirectly through the "piggyback" base (section 201(b)) which permits prosecution for those offenses when comitted in the course of committing a property destruction offense. In addition, the element of harm or risk of harm to human beings is taken into account in the formulation and grading of the property destruction offenses, which is a principal reason for maintaining the difference between property destruction or damage by fire or explosion (§§ 1701, 1702) and criminal mischief, which covers property destruction or damage by any means (§ 1705). Note that destruction and damaging of, and tampering with, property affecting national security are covered in §§ 1106–08.

### § 1701. Arson.

**(1) Offense. A person is guilty of arson, a Class B felony, if he starts a fire or causes an explosion with intent to destroy 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.**

*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 endanger-

ment is the principal concern, note that the draft 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 stations, at which humans are rarely 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 firefighting 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. The draft 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. Note that transporting an explosive in interstate commerce with intent to commit arson will constitute an attempt under this section and the attempt provision (§ 1001) and will be graded more severely than under existing law, which provides only for a misdemeanor penalty if injury or death does not result (18 U.S.C. § 837(b)).

**§ 1702. Endangering by Fire or Explosion.**

**(1) Offense. A person is guilty of an offense if he intentionally starts a fire or causes an explosion and thereby recklessly:**

**(a) places another person in danger of death or bodily injury;**

**(b) places 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 grouping) because of the special dangers posed by use of fire or explosives.

**§ 1703. Failure to Control or Report a Dangerous Fire.**

**(1) Offense. A person who knows that a fire which was started, 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.

**§ 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 or in the District of Columbia.**

*Comment*

This new offense, which carries substantial penalties, and jurisdictional bases co-extensive with those for arson, 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.

**§ 1705. Criminal Mischief.**

**(1) Offense. A person is guilty of criminal mischief 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. Criminal mischief is a Class C felony if the actor intentionally causes pecuniary loss in excess of $5,000, or intentionally causes a substantial interruption or impairment of public communication, transportation, supply of water, gas, power or other public service. Criminal mischief is a Class A misdemeanor if the actor recklessly causes any such loss, interruption, impairment or damage, or if the actor intentionally causes pecuniary loss in excess of $500. Otherwise criminal mischief 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.**

*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 extreme recklessness, the murder and manslaughter provisions of the Code would apply in case death resulted.

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 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.

## § 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, and has not consented to the actor's conduct with respect to the property;**

**(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. Only structures and facilities in use are covered where the terms "inhabited structure" or "vital public facility" are employed; abandoned sites are not.

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 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 engage in conduct therein which if committed would, in fact, constitute a crime.**

**(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." Existing 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), and are largely traceable to restricted notions of what constitutes attempt.

In view of the "substantial step" test in the general attempt provisions of the proposed Code (§ 1001), the felony of burglary is confined to criminal entries into buildings and occupied structures. This is not only because of the force of tradition, but also because it provides a method to avoid the necessity of proving the precise crime intended—theft, rape, robbery, kidnapping—by a person who is unlawfully on premises which normally house people. 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.

Existing federal jurisdiction could be retained by adding to the burglary definition a proscription against criminal entry of a "storage structure," which is defined (in § 1719, for other purposes) to include interstate transportation facilities (including loaded trucks and freight cars). Note that, while 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 possibly an attempted theft of an interstate shipment of goods (§§ 1732, 1735) or the offense of breaking into or concealing oneself in a vehicle (§ 1713).

**§ 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**



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**(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 at all times) 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 § 1113.

**§ 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 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.

**§ 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).

**§ 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 by the United States which is continuously guarded and where display of visible identification is required of persons at all times 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*.

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 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 injury 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 or threat 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) limit unnecessary federal entry into local bank robbery cases. Further, 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.

## 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 permanently to deprive the owner of his property. 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 contains enough information about the events alleged to have taken place fairly to apprise the defendant of the nature of the charges against him shall be sufficient without further specifying the precise legal category of theft of which the defendant may be convicted. 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 the defendant 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.

**§ 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, if the defendant's conduct is described in reasonable detail. Note under § 1739 circumstances which have special proof consequences, largely applicable to the provisions of this section.

**§ 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 mak-**

**ing provision to pay is prima facie evidence that the services were obtained by deception.**

*Comment*

Although theft of services is not presently covered by a general federal statute (there are a few specific proscriptions, *e.g.*, use of the mails without paying postage (18 U.S.C. §§ 1720 and 1725)), there is 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. It is expected that the provision will be used largely in federal enclaves.

**§ 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 many 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."

**§ 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 crime which is, in fact, 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, in fact, be a felony and it was stolen to gain such access; or**

**(i) the property is stolen from the United States mail and is, in fact, 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 (4), 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 charac-

ter 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(4). The principle stated here may warrant application to any attempt and thus may ultimately be included in the attempt section itself.

**§ 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. Unauthorized use of an aircraft is a Class C felony. All other unauthorized use of a vehicle 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 "joyriding" cases may be avoided.

Subsection (2) sets forth a defense to keep family disputes and arguments between friends out of the federal courts.

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.

**§ 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 of 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.

**§ 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.

**§ 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.**

**(2) Proof. (a) It shall be a prima facie case of theft under sections 1732 to 1734 if it is shown that an officer or employee of the government or of 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.**

*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.

**§ 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 to**

inflict serious bodily injury in the future to the person threatened or to any other person; 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 committed 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 subject of the offense is property owned by or in the custody of a small business investment company, as defined in 15 U.S.C. § 662;

(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) Military Service Clubs—when the offense is committed by an officer, agent or employee of a military officers' or servicemen's club for personnel on active duty, or of a military post exchange, and the subject of the offense is property owned by or in the custody of such club or post exchange;

(p) National Securities Exchanges—when a facility of a national securities exchange, registered under 15 U.S.C. § 78f, is used in the commission of the offense.

*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 (violation of SEC regulations, for example), or when federal property is stolen, there exists a general jurisdiction over theft offenses when the mails, radio, or tele-



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vision 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 the draft 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 jurisdictional 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 no more than 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. Note, too, that an expansion of federal jurisdiction is proposed via subsection (4) (o)—theft by officers, agents, or employees of military service clubs. Recent cases indicate the desirability of explicit federal jurisdiction over embezzlements from such clubs. Subsection (4) (p) serves to complete consolidation of securities frauds within the general theft offense, codifying judicial construction of the Securities Act of 1933 that a national securities exchange is a facility in interstate commerce. *United States* v. *Re*, 336 F. 2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

**§ 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; 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 or artifice 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 lawful 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. *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.

## 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; or

(v) 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 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 213), or a foreign government or bank;

(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 213);

(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 213);

(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 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 per-

mitted 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 constitute an attempt to utter the forged document. Explicit proscription of possession, however, reaches criminal activity at an inchoate point so that the danger of conviction of innocent persons is great, and proscription of possession *per se* might, therefore, well be omitted.

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". 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.

**§ 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.

**§ 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.

**§ 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 instru-**

ment 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, 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 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.

### § 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 draft 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 draft; 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 provi-

sion 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.

**§ 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; or**

**(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.**

**(2) 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.

**§ 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 draft 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).

**§ 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 em-**



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ployer 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 213) 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) Railroad Carrier—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of any carrier by railroad subject to regulation under 49 U.S.C. § 1, and the offense is committed in connection with 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. § 212 (offering loans or gratuities to bank examiners), § 213 (bank examiners accepting loans or gratuities), and § 214 (failing to disclose fee for endeavoring to procure Federal Reserve bank loan for another). The scheme of the draft 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)) and any commercial bribery in federal enclaves.

**§ 1759. 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 ac-**

cumulated interest and the balance is applied to the unpaid principal.

(4) 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.

(5) 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.

(6) 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 213.

*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 the draft 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. The draft 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, the draft focuses more sharply on loansharking by requiring that the illegel lending be engaged in as a "business," a concept which has been given content through judicial construction of federal gambling legislation.

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.

**§ 1760. Securities Fraud.**

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

**(a) willfully does anything declared to be unlawful in 15 U.S.C. §§ 77e, 77q(b)–(c), 77w, 77fff, 77xxx, or 78i(a)(1)–(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, willfully 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.**

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

*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. § 77q(a) is theft; § 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, the draft 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 draft retains felony penalties for selling unregistered securities (15 U.S.C. §§ 77e, 77fff), advertising a security without revealing the fact of payment for doing so from the issuer or dealer (15 U.S.C. § 77g(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.

With respect to the 1934 Act, however, the policy of the draft is different. 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 draft, 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 and §78j (also dealing with manipulative practices) is based on the fact that the latter prohibitions are dependent upon SEC rules and regulations. The policy is that felonies should be more explicitly defined by the Congress than they are in those provisions. 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).

# Chapter 18. Offenses Against Public Order, Health, Safety and Sensibilities

## RIOT AND MUTINY

**§ 1801. Inciting Riot.**

**(1) Offense. A person is guilty of a Class A misdemeanor if he:**

**(a) incites or urges a group of five or more persons to engage in a current or impending riot;**

**(b) gives commands, instructions or signals to a group of five or more persons in furtherance of a riot; or**

**(c) conspires to bring about a riot which actually ensues.**

**"Riot" means a public 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 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 with respect to a current or impending riot.**

**(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (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 riot involved 100 or more persons and was substantially furthered from outside the state where the riot 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 constitutionality 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 reference in the District of Columbia definition to "threat" of tumult is omitted from the present draft 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 draft, permits federal prosecution for any serious crime 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 § 1803 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.

Federal jurisdiction is prescribed for inciting riot in federal enclaves and during the course of committing any other federal offense. Federal jurisdiction 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 draft 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.

Subsection (2), limiting the applicability of the general attempt, solicitation and conspiracy provisions to actual or impending riots, avoids constitutional issues under the First Amendment. *Cf.* the explicit requirement of clear and present danger in 18 U.S.C. § 2102.

**§ 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 current or impending riot, as defined in section 1801; or**

**(b) teaches another to prepare or use a firearm or destructive device with intent that any such thing be used in a current or impending riot, as defined in section 1801.**

**(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (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, the "piggyback" provision, 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 draft 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

**§ 1803. Engaging in a Riot.**

**(1) Offense. A person is guilty of an offense if he engages in a riot, as defined in section 1801. The offense is a Class C felony if the actor employs a firearm or destructive device in the course of rioting; otherwise it is a Class B misdemeanor.**

**(2) Attempt, Solicitation and Conspiracy; Presence. The provisions 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 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.

## § 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. No such order shall apply to a news reporter or other person observing or recording the events on behalf of the public press or other news media, unless he is physically obstructing**

**efforts by such forces to cope with the riot or impending riot. Inapplicability of such order is a defense.**

**(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 non-criminal "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 of volition as a basis of criminal liability—§ 301 of the proposed Code—constitutes a safeguard against such abuse of prosecution under this section. The section recognizes the interest in public dissemination of news concerning riots; and unless the newsgatherer is physically obstructing police or firemen, the order to move or disperse cannot be applied to him.

With respect to offenses by police 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).

**§ 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), (b) 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, the draft covers usurpation of command by anyone—crew member, passenger or outsider—who

uses the proscribed means. *Cf.* § 1631 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 are the "piggyback" and piracy bases.

### FIREARMS

*Special Note:* Sections 1811 to 1814 are essentially technical adaptations of portions of the firearms legislation enacted by Congress in 1968 (the remainder of which would be transferred to another Title) to the other provisions of the proposed Code. Accordingly, those sections represent only one of a number of major policy alternatives under consideration by the Commission. The alternatives are elaborated in the Working Papers and in *Firearms and Violence in American Life*, A Staff Report Submitted to the National Commission on the Causes and Prevention of Violence, pp. 81–95, 142–46, App. A. and App. G. *Cf.* H.R. 16990, 91st Congress, 2d Sess., drawn along the lines of alternative 1 below.

**Alternatives to sections 1811 to 1814 include:**

**1. A ban on production of and trafficking in handguns, with exceptions only for military, police, similar official activities and licensed gun clubs;**

**2. Federal registration and licensing of handguns, under criteria that would drastically curtail the number of such guns in circulation, basically restricting them to persons who can establish distinctive needs;**

**3. A federally-mandated restrictive licensing system that would become operative in case the states failed to enact and enforce, locally, a comparable law.**

### § 1811. Persons Precluded from Receiving, Possessing, or Supplying Firearms, Destructive Devices and Ammunition.

**(1) Offense. A person in any of the categories set forth below is guilty of an offense if he receives, possesses or supplies a firearm, destructive device or ammunition:**

**(a) Charged and Convicted Criminal—a person who is under a charge, or who has been convicted by any court, of a crime;**

**(b) Fugitive—a fugitive from justice;**

**(c) Mental Defective—a person who is under any court adjudication declaring him a mental defective or to be mentally incompetent, or who is in the custody, care or supervision of a mental institution or facility;**

(d) Drug Addict—a person who is under any court adjudication declaring him an unlawful user of or to be addicted to any dangerous or abusable drug or in the custody, care or supervision of any medical or mental institution or facility for the care, correction, or cure of such use or addiction;

(e) Person Who Has Renounced Citizenship—a person who, having been a citizen of the United States, has renounced his United States citizenship and has not been readmitted to such citizenship;

(f) Illegal Alien—an alien who is unlawfully in the United States;

(g) Employees of Persons Precluded—a person acting in the course of his employment for a person who is in any of the aforementioned categories.

(2) Defenses.

(a) To Subsection (1)(a). Subsection (1)(a) does not apply to:

(i) Trustee—a prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm, destructive device or ammunition by competent authority of a prison;

(ii) Person Pardoned—a person who has been pardoned for a crime by the President of the United States or the chief executive of a state;

(iii) Licensee—a person licensed in conformity with [18 U.S.C. § 923] until his conviction becomes final as provided in [18 U.S.C. § 925(b)] or during the pendency of his application for, or upon grant pursuant to, relief from the Secretary as provided in [18 U.S.C. § 925(c)]; or

(iv) Other Person Granted Relief—any other person granted relief pursuant to [18 U.S.C. § 925(c)] from the disability of his conviction.

(b) To Subsection (1)(g). Subsection (1)(g) does not apply to an employee who is licensed pursuant to a statute to receive, possess or supply a firearm, destructive device or ammunition.

Inapplicability under this subsection is a defense.

(3) Definitions. In this section:

(a) "ammunition" has the meaning prescribed in [18 U.S.C. § 921(a)(17)];

(b) "charge" means federal indictment or federal information or their equivalents pending in a court;

(c) "court" means a court of the United States (including a military court thereof) or of a state or political subdivision of the United States;

(d) "crime" in subsections (1)(a) and (2)(a)(ii) means any crime, punishable by imprisonment for a term exceeding [one year], included in sections 1101 to 1107, section 1201, Chapter 16, sections 1711 to 1721 and Chapter 18, or any similar crime punishable in a court, except a state offense classified by the law of the state as a misdemeanor and punishable by a term of imprisonment of two years or less;

(e) "dangerous or abusable drug" has the meaning prescribed in section 1829;

(f) "destructive device" has the meaning prescribed in [18 U.S.C. § 921(a)(4)];

(g) "firearm" has the meaning prescribed in [18 U.S.C. § 921(a)(3)];

(h) "fugitive from justice" means a person who is fleeing or concealing himself to avoid prosecution for a crime, to avoid giving testimony in any criminal proceeding or to avoid contempt proceedings for alleged disobedience of any lawful process requiring attendance and the giving of testimony or production of documentary evidence before any court empowered to conduct criminal proceedings.

(4) Grading. The offense is a Class C felony if it is under subsections (1)(a) through (d) or if it is under subsection (1)(g) and the employer is a person in any of the categories set forth in subsections (1)(a) through (d). Otherwise it is a Class A misdemeanor.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (g) 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.

*Comment*

This section consolidates two of the major provisions of Title IV (18 U.S.C. § 922(g) and (h)) and the main provisions of Title VII as amended (18 U.S.C. App. § 1202(a), (b) and § 1203) of the Omnibus Crime Control and Safe Streets Act of 1968. The proposed section harmonizes these provisions and adapts them to other provisions and policies of the proposed Code. The essential differences between the pertinent provisions of the two Titles are that Title IV proscribes firearms transactions in interstate and foreign commerce with respect to certain categories of disqualified persons and provides a five-year maximum penalty, whereas Title VII proscribes intrastate firearms transactions with respect to many of the same persons and provides a two-year maximum penalty. The differences have been resolved by keying the grading to the category of person involved and by standardizing jurisdiction for all categories.

Among other changes made in existing law are: (1) interstate as well as intrastate transactions in ammunition as well as firearms and destructive devices are uniformly proscribed for all categories of disqualified persons; (2) some permanent disqualifications are removed, *e.g.*, release from supervision by a mental institution terminates the disqualification; (3) official recognition of the ground for disqualification is required for some categories, *e.g.*, "unlawful user" of drugs; (4) the subsection (1)(a) category is somewhat narrowed from its present, undifferentiated coverage of all felonies, *e.g.*, felonies related to regulation of business practices; (5) the definition of "fugitive from justice" includes fugitives from federal prosecution and is extended to certain contemnors; (6) dishonorably discharged persons are omitted as a separate category but convictions in a military court are explicitly added to subsection (1)(a) by virtue of the definition in § 1811(3)(c).

The defenses in subsection 2(a) are adapted from existing law. The defense in subsection 2(b), which is new, is designed to exclude the situation in which a person who is disqualified nevertheless has a legitimate need to hire lawful security protection, *e.g.*, the storeowner under outpatient mental care who hires a guard to protect against theft. Code provisions on justification and excuse (Chapter 6) provide defenses for, *e.g.*, the ineligible person who momentarily possesses a firearm to comply with the law or to defend against an imminent crime.

The references in brackets in the definitions are to existing regulatory provisions in Title 18 which would be transferred to a different Title upon enactment of the proposed Code.

The preclusion of commission of the offense defined in this section as a jurisdictional base for other offenses, *e.g.*, homicide, is intended to avoid the vast expansion of federal jurisdiction which would otherwise result.

**§ 1812. Supplying Firearms, Destructive Devices, and Ammunition for Criminal Activity and to Ineligible Persons.**

**(1) Supplying for Criminal Activity. A person is guilty of a Class C felony if he:**

**(a) knowingly supplies a firearm, destructive device or ammunition to a person who intends to commit a crime with the aid thereof or while armed therewith; or**

**(b) procures or receives the same with like intent.**

**(2) Supplying to Ineligible Persons. A person is guilty of an offense if he supplies a firearm, destructive device or ammunition to any person who, under section 1811, is ineligible to possess it. The offense is a Class C felony if the ineligible person is a person in any of the categories (1)(a) through (1)(d) of section 1811. Otherwise it is a Class A misdemeanor.**

**(3) Definitions. The definitions prescribed in subsection (3) of section 1811 apply to this section.**

**(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b) or (j) of section 201 or when the principal crime is a federal crime, and, in addition, over an offense defined in subsection (2) of this section:**

**(a) under paragraph (g) of section 201; or**

**(b) when the defendant is a licensee under [18 U.S.C. § 923]. 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*

Subsection (1) substantially re-enacts 18 U.S.C. § 924(b). Subsection (2) substantially re-enacts 18 U.S.C. 922(d) with some verbal changes, *e.g.*, "supplies" replaces "sells, disposes, ships, or transports." "Crime," as used in 18 U.S.C. § 924(b), includes essentially any felony. Its meaning in section 1812 is more appropriately limited to the disqualifying crimes as defined in § 1811(3)(d). Existing law is expanded somewhat by the proscription in subsection (1)(a) of supplying a firearm to one who intends to commit a crime "while armed therewith" as well as to one who intends actually to use it. The grading parallels that provided in § 1811.

The provisions of 18 U.S.C. § 924(c) which increase penalties for federal offenses committed by means of a firearm or while unlawfully carrying a firearm are not included in the present submission. Where misbehavior is independently criminal, as assault and robbery, the involvement of a firearm may be an appropriate criterion for sentence or for defining an aggravated offense. Accordingly, in the proposed Code, the crimes in which a gun is likely to contribute materially to the criminal behavior, *e.g.*, aggravated assault (§ 1612) and armed robbery (§ 1721), are already punishable with special severity as, variously, Class A, B or C felonies. Murder (§ 1601), rape (§ 1641), and kidnapping (§ 1632) carry penalties so high (at least Class B felony) that there is little gain in adding a term of years for illegal gun carrying.

The appeal of the principle of 18 U.S.C. § 924(c) might, therefore, better be reflected in the sentencing part of the proposed Code. For example, where it is provided that the sentencing judge must record in writing his reasons for availing himself of the upper ranges of his sentencing discretion (§ 3202), it is appropriate, as has there been provided, that being armed with a firearm sufficiently justifies a high sentence. Similarly, as now provided in § 3201(4), this fact justifies a judicially imposed parole-eligibility date. This discrimination between firearms and other weapons seems warranted. In addition, the grading of certain offenses could be altered to reflect the firearm consideration. For example, theft of petty amounts might be raised to a felony when a firearm is carried unlawfully (§ 1735). In addition to these possibilities and those set forth in the Special Note, *supra*, the alternatives before the Commission range through re-enactment of 18 U.S.C. § 924(c) to enhancement of its penalty provisions (as proposed in S. 849 and H.R. 319, 91st Cong., 2d Sess.) and/or elimination of the provisions in 18 U.S.C. §§ 921 *et. seq.* (as proposed in H.R. 8822, 91st Cong, 2d Sess.).



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The provisions of 18 U.S.C. § 924(i) and (j) as to dealing in stolen firearms are generally reflected in the theft grading of proposed Code § 1735.

**§ 1813. Traffic in Firearms, Destructive Devices and Ammunition.**

**(1) Offense. A person is guilty of a Class C felony if he willfully engages in conduct declared to be unlawful in [18 U.S.C. § 922(a), (b), or (k)] or prohibited by [18 U.S.C. § 922(c)] or willfully fails to do anything required by [18 U.S.C. § 923(i)].**

**(2) Defenses. It is a defense to a prosecution under this section that the conduct was, in fact, authorized by a federal statute or a regulation, rule, order or license issued pursuant thereto. It is an affirmative defense to a prosecution for a felony under this section (but not for a misdemeanor under [18 U.S.C. § 924]), that the conduct of the defendant did not, and could not reasonably have been expected to, involve or result in access to a firearm, destructive device or ammunition by a person ineligible under section 1811 or by a person intending to commit a crime with the aid thereof or while armed therewith.**

**(3) Jurisdiction. Federal jurisdiction over an offense defined in this section exists as provided in the statutes set forth in subsection (1), except that, as provided in section 204, culpability is not required with respect to the fact that interstate or foreign commerce is involved. Commission of an offense defined in this section or in any of the statutes enumerated in subsection (1) shall not be a basis for application of section 201(b) to confer federal jurisdiction over commission of another offense.**

*Comment*

See comment to § 1814, *infra*.

**§ 1814. Machine Guns, Destructive Devices and Certain Other Firearms.**

**(1) Offense. A person is guilty of a Class C felony if he willfully engages in conduct declared to be unlawful in 26 U.S.C. § 5861.**

**(2) Defenses. It is a defense to a prosecution under this section that the conduct was, in fact, authorized by a federal statute or a regulation, rule, order or license issued pursuant thereto. It is an affirmative defense to a prosecution for a felony under this section (but not for a misdemeanor under 26 U.S.C. § 5861)**

**that the defendant was not a person ineligible under section 1811 and the conduct of the defendant did not, and could not reasonably have been expected to, involve or result in access to a firearm by a person ineligible under section 1811 or by a person intending to commit a crime with the aid thereof or while armed therewith.**

**(3) Jurisdiction. Federal jurisdiction over an offense defined in this section exists as provided in 26 U.S.C. § 5861, except that, as provided in section 204, culpability is not required with respect to the fact that interstate commerce is involved. Commission of an offense defined in this section or in 26 U.S.C. § 5861 shall not be a basis for application of section 201(b) to confer federal jurisdiction over commission of another offense.**

*Comment*

The provisions incorporated by reference in § 1813 deal with interstate and foreign firearms transactions by any person, intrastate commercial firearms transactions by licensees and obliterated or missing serial numbers. (The statute numbers are bracketed since they will be different when the new Title 18 is enacted.)

The provisions incorporated by reference in § 1814 are in Chapter 53 of the Internal Revenue Code (National Firearms Act), which deals with machine guns, "sawed-off" rifles and shotguns, silencers, and destructive devices. It was amended in 1968.

Sections 1813 and 1814 reflect two policy judgments. The first is to provide more discrimination than does 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 failure of a manufacturer, importer or dealer to comply with regulations issued by the Treasury Department (26 U.S.C. § 5843) subjects him to ten years' imprisonment (26 U.S.C. § 5871).

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 may 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.

Discrimination between felonies and misdemeanors is effected by changing the general penalty, in the grading provisions of the regulatory law, to a level no greater than a Class A misdemeanor, and bringing into Title 18 only such conduct as warrants felony treatment. Moreover, affirmative defenses are provided to reduce the felony to a misdemeanor in the circumstances described. (An alternative method for achieving this reduction, *i.e.*, at the sentencing proceeding rather than at the trial, is exemplified in §§ 1822 and 1823, which deal with drug trafficking.)

The second policy reflected in §§ 1813 and 1814 is to avoid duplication of other provisions in the proposed Code. For example, the false statement provisions of § 1352 will replace those in the Title 18 firearms offenses. Some duplicative provisions in Title 26 are continued to insure felony treatment, because of the nature of the firearms involved, where otherwise only misdemeanor sanctions would be available, *e.g.*, false statements (§ 1352) and unlawful importing (§ 1411).)

Explicit provisions are required in both §§ 1813 and 1814 to effect the policy of the proposed Code that culpability not be required as to a fact which is solely a jurisdictional base. In addition, it is explicitly provided that there is no federal jurisdiction over another federal offense solely because it was committed in the course of violating a federal firearms provision.

## DANGEROUS, ABUSABLE, AND RESTRICTED DRUGS

### *Introductory Note*

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. An up-to-date, integrated revision of that scheme is contained in the Controlled Dangerous Substances Act of 1969, which—at this writing—has been passed by the Senate as S. 3246 and is pending in the House. Although some of the sections proposed here would require some modification of the regulatory provisions of S. 3246 (and substantial changes in existing law if S. 3246 is not enacted), an attempt has been made to integrate these sections with that bill.

S. 3246 also contains penal provisions, the most important of which cover the same ground as the provisions proposed here with respect to illicit drug traffic. 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). Generally speaking, the differences between S. 3246 and the draft sections reflect in part the integration of common ideas into the sentencing structure and other general policies of the proposed Code and in part somewhat different views as to appropriate discriminations in grading or criminalizing certain conduct.

The policy of the United States expressed in these provisions is to

employ penal sanctions to control the dissemination of dangerous, abusable, and restricted drugs without undue restrictions on the practice of medicine and pharmacy, research, and legitimate manufacture or distribution, with reasonable discrimination between commercial exploitation and mere use, and with a view to the facilitation of medical and psychiatric rehabilitation of addicts and other victims. (A statement such as the foregoing may be appropriate in the bill enacting the proposed Code.)

Unlike existing law the proposed Code does not provide for mandatory minimum sentences. S. 3246 proposes also to do away with all mandatory minima except for continuing criminal enterprises (see §§ 1005 and 3203 in the proposed Code).

## § 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 dangerous 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 dangerous substances," as defined in the regulatory law (see § 102(f) of S. 3246), are here divided into three groups for purposes of criminal sanctions. S. 3246 divides them into four groups for purposes of regulation. 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 non-prescription 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 S. 3246 is as follows: the Attorney General shall request advice from the Secretary of HEW and from the Scientific Advisory Committee established by Title VI of the Act, and shall consider factors enumerated in Title II 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. If

S. 3246 is not enacted, the procedure and factors to be considered should be established in the existing regulatory law.

**§ 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) or subsection (4) 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.**

**(4) Trafficking For Own Use. If the defendant did not transfer or intend to transfer or otherwise dispose of the drug to another person, trafficking in marihuana shall be an infraction, and trafficking in any other abusable drug shall be an infraction for 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. 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. Class A felony penalties would be available for leaders of groups of ten or more persons who engaged in Class B felonies, *e.g.*, wholesale trafficking, or for leaders of groups of 25 or more persons engaged in any crimes on a continuing basis. 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. See §§ 1005 and 3203. *Cf.* S. 3246, § 509 on penalties for continuing criminal drug enterprises.

The procedure for determining the quantities should be set forth in the regulatory law. Although S. 3246 does not distinguish among crimes on the basis of quantity, the procedure used for classifying drugs (advice of HEW Secretary and Scientific Advisory Committee, 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 S. 3246, regardless of whether it is shown to be for resale or of the quantity involved. (§ 501(c)(1)). Often, however, addicts are small-scale traffickers, engage in trafficking with other addicts only to satisfy their own needs, and can thus be distinguished from their suppliers. The statute itself might list quantities of each dangerous drug in excess of which trafficking would be a Class B felony. 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. It is recognized, however, that establishing such criteria may be very difficult.

Subsection (2), providing the basic penalty for trafficking in dangerous or abusable drugs, establishes a position similar to that taken in § 501(c)(2) of S. 3246. Subsection (3) excludes 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. A reasonable mistake as to age of the recipient is not exonerating, but could prompt a judge to use his discretion under § 3004 to reduce the category of the crime. 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.

Subsection (4) recognizes that certain conduct which comes within the meaning of the word "trafficking" may, in some cases, amount only to possession for one's own use. The burden of proof is again placed on the defendant at sentencing unless the lesser offense is charged in the first instance. The distinction between marihuana and other abusable drugs reflects the position of many authorities in the current debate

as to the criminal treatment of marihuana. Further consideration may lead to treating other substances in the same manner.

**§ 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 proposed draft; and, therefore, trafficking which amounts only to possession for one's own use is excluded. *Cf.* section 501(c)(3) of S. 3246, which provides a one-year penalty for all trafficking in restricted drugs whether or not it is commercial.

**§ 1824. Possession Offenses; Defense of Dependence.**

**(1) Offense. 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.**

**(2) Defense. It is an affirmative defense to a prosecution under this section that the drug was possessed for personal use by a defendant who was so dependent on the drug that he lacked substantial capacity to refrain from use.**

*Comment*

This section 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. The question whether marihuana should be legalized can be better answered after study by a commission such as the Committee on Marihuana proposed by § 801 of S. 3246.

Subsection (2) proposes for consideration a defense (with the burden of establishing it on the defendant) analogous to the defenses of insanity (§ 503) and pathological intoxication (§ 502(4)). The defense in subsection (2) is, of course, a defense only to a charge of possession of the drug; addiction is not, for example, a defense to a charge of robbery allegedly committed to procure drugs to satisfy the addiction.

**§ 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.* § 708 of S. 3246, under which the burden of proof is placed on the defendant, but the weight of that burden is not indicated.

**§ 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 - the special maritime or territorial jurisdiction, as defined in section 213, 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 S. 3246. If S. 3246 is not enacted, some statement of Congressional findings as to the necessity of plenary jurisdiction, such as that which appears in § 101 of S. 3246, will be required. 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 appear in existing law.

**§ 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 3102(3). 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 may, in the final draft, be a general sentencing provision. The section is similar to § 507(a) of S. 3246.

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 507(b) of S. 3246 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.

**§ 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 dangerous 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) methyphenidate;

(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 controlled dangerous 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 IV controlled dangerous 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 [Controlled Dangerous Substances Act of 1969].

*Comment*

"Traffics" is defined very broadly, and embraces the conduct proscribed in S. 3246. Agreeing or offering to transfer need not be explic-

itly covered here, since such conduct is covered by the general conspiracy, attempt and solicitation provisions.

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, in fact, 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), (b), (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*

This section would be the basic federal statute relating to gambling. It prescribes 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.

Ordinarily 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) non-exclusive as to the conduct that constitutes engaging in a gambling business.

The draft 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 urged by some is that all gambling offenses should be felonies in order to give prosecutors leverage for bargaining with low-level participants to testify against higher-ups. 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. Note the higher penalties which would be available on proof of leadership in organized crime under § 1005 or § 3203.

**§ 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, the District of Columbia, or a possession of the United States from any place outside such state, District, or possession.**

**(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 devices 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. § 1081 (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.

## 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;**

**(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), (b), (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 draft 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 non-commercial acts of immorality involving interstate travel, prosecuted in the past under the Mann Act, are outside the proscriptions of the draft, 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.

**§ 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 controlled 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.**



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**(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, some of which include indiscriminately employed felony sanctions.

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.

**§ 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.* § 1853, which deals with loitering to solicit sexual activity, whether or not for hire.

**§ 1844. Patronizing Prostitutes.**

**(1) Offense. A person is guilty of an infraction if he hires a prostitute to engage in sexual activity with him, or if he enters or remains in a house of prostitution for the purpose of engaging in sexual activity.**

**(2) Jurisdiction. Federal jurisdiction over the offense defined in this section is the same as prescribed in section 1842.**

*Comment*

Under this new criminal provision, which is introduced in many modern criminal code revisions, those who patronize prostitutes commit an infraction, a minor offense. In addition to establishing culpability of the customer, the provision may serve as a practical aid in the suppression of prostitution in federal areas. Given this provision, any person found in a house of prostitution may be arrested; his role, whether customer or facilitator of the business, may later be sorted out.

**§ 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 1844 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 the draft. The general privilege will still apply to prostitution crimes not involving the spouse.

**§ 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.

OBSCENITY AND LEWDNESS

**§ 1851. Disseminating Obscene Material.**

**(1) Offense. A person is guilty of a Class A misdemeanor 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. Material is "obscene" if, taken as a whole, it:**

**(a) has as its dominant theme an appeal to prurient interest in sex of the average person or, in the case of material designed for or disseminated to a special group, to the prurient interest in sex of the members of the group; and**

**(b) exceeds the candor permissible in description or representation of sexual matters, judged by standards generally accepted in the United States as limiting such description or representation; and**

**(c) is utterly without social value to the persons to whom the dissemination is addressed.**

**Advertising and manner of distribution may be considered, where relevant, in determining the social value of the material.**

**(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 sixteen or to persons who had no effective opportunity to choose not to be so exposed].**

**(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (e) or (j) of section 201.**

*Comment*

This section retains as much of existing obscenity law as the Supreme Court has indicated is constitutionally valid. The tripartite test was first outlined in *Roth v. United States*, 354 U.S. 476 (1957), and elaborated on in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The last sentence of subsection (1) incorporates the pandering rule of *Ginzburg v. United States*, 383 U.S. 463 (1966). Note that this section prohibits distribution; it does not prohibit possession of pornographic materials even in enclaves. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

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). The bracketed portion of subsection (2) reflects a recent case (*Karalexis v. Byrne*, 306 F. Supp. 1363 (D. Mass. 1969) in which a three-judge district court construed *Stanley* to hold unconstitutional a prohibition on the distribution of obscenity to consenting adults where there are adequate controls to prevent exposure to children or offense to the sensibilities of the public. The bracketed portion poses the issue whether discreet distribution to consenting adults should be legal as in Denmark. If so, it may be appropriate to redraft subsection (1) so as to define the offense as dissemination under circumstances involving exposure to children or imposition on non-consenting adults. A prospective report of the National Commission on Obscenity and Pornography, due in September 1970, may be helpful in choosing among the alternatives.

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.

The Commission's consultant on obscenity prepared a set of four statutes which constitute an alternative to the outright prohibition on distribution of obscenity contained in the above section. These statutes require labelling of "potentially offensive sexual material" and "adult sexual material," define these concepts in detail and provide elaborate administrative controls. This would make it appropriate to locate them in a Title other than Title 18. The statutes read as follows:

I. UNSOLICITED MAILINGS OF POTENTIALLY OFFENSIVE MATERIAL

(a) *Purpose.* It is the purpose of this section to afford mail recipients the option not to receive through the mail unsolicited potentially offensive sexual materials.

(b) *Requirement of Symbol.* Every person who, for himself or by his agents, mails or causes to be mailed potentially offensive sexual

material, as defined in subsection (h) herein, to an addressee or addressees who have not expressly requested receipt of the mailed material from the sender, shall place a symbol upon the envelope or outer wrapping thereof. The form, placement, size and other attributes of the required symbol, and the effective date of the requirement of this subsection, shall be set forth in regulations promulgated by the Postmaster General of the United States; *Provided that* (i) the regulations shall not, insofar as possible, require significant extra expense to be incurred by persons subject thereto in order to comply with their requirements, nor shall the symbol prescribed under this subsection contain language or signs indicating a judgment regarding the quality or value of the materials to which it is required to be affixed, and, (ii) the regulations shall not require compliance therewith sooner than 90 days after publication of such regulations both in the Federal Register and by the posting thereof at all United States Post Offices.

(c) *Publication of Symbol and Return of Mail.* The Postmaster General shall take suitable steps to acquaint the public with the symbol required by subsection (b) and with the definition of potentially offensive material contained in subsection (h) of this section. Any person who receives mail bearing the symbol required by subsection (b) of this section, and who does not wish to open such mail, may either destroy it or mark it "refused," in which case he may redeliver it to the Post Office from which delivery was made, where it shall be destroyed. The right of destruction or refusal under this subsection may be made by a parent or guardian on behalf of his or her minor children who reside with the parent or guardian.

(d) *Exercise of Option by Mail Recipients.* Every person who wishes not to receive unsolicited mailings of any potentially offensive sexual materials, as defined in subsection (h) herein, may so notify the Postmaster General on a form provided by the Postmaster for that purpose. Such forms, which shall contain the definition of potentially offensive sexual materials set forth in subsection (h) of this section, shall be made available to the public at every United States Post Office and shall be deliverable to the Postmaster through any Post Office. A notification under this subsection may be made by a parent or guardian on behalf of his or her minor children who reside with the parent or guardian and, when authorized, a person may give such notice on behalf of other adults receiving mail at the same mail address. The Postmaster General shall take suitable steps to inform mail recipients of their option under this subsection.

(e) *Revocation of Exercise of Option.* Any person who, having notified the Postmaster General pursuant to subsection (d) of this section, wishes to revoke that notification, may do so on a form provided by the Postmaster General for that purpose. Such forms shall be made available to the public at every United States Post Office and shall be deliverable to the Postmaster through any Post Office. The Postmaster General may, by regulation, prescribe a reasonable period of time before such revocation shall become effective and the Postmaster may further provide, by regulation, reasonable restrictions upon the frequency with which the powers conferred upon mail addressees by subsections (d) and (e) of this section may be alternatively exercised.

(f) *Non-Delivery of Mail Carrying Symbol to Persons Exercising Option.* The Postmaster General shall, within 180 days after enactment of this section, devise and implement procedures to prevent the delivery of mail bearing the symbol required by subsection (b) of this section to persons who have notified him pursuant to subsection (d) of this section; *Provided that*, if practical considerations so require, the Postmaster may restrict the application of such procedures to mail addressees where the option under subsection (d) of this section has been exercised by or on behalf of all persons residing at that address.

(g) *Penalties.* Violation of the requirement of subsection (b) of this section is a Class A misdemeanor. No prosecution shall be initiated under this section without the written authorization either of the Attorney General of the United States or the Assistant Attorney General in charge of the Criminal Division of the Department of Justice. This function may not be delegated.

(h) *Definitions.* For the purposes of this section:

(i) "person" means natural person, corporation or other legal entity;

(ii) "potentially offensive sexual material" means:

(A) any pictorial representation, photographic or otherwise, of uncovered human genital areas, of human sexual intercourse, sodomy, masturbation or direct physical stimulation of clothed or unclothed genitals, of flagellation or torture indicating an erotic relationship; or any description of, advertisement of or offer to sell such pictorial material where such description or advertisement includes such materials or a detailed verbal description thereof;

(B) any artificial human penis or vagina or device primarily designed physically to stimulate genitals, or any description, advertisement or offer to sell or distribute such an artificial organ or device where such description or advertisement presents either a pictorial representation or a detailed verbal description of such organ or device or its manner of use; or

(C) any pictorial or verbal material consisting primarily of instructions in or depictions of human sexual techniques or of detailed fictional or factual descriptions or depictions of human sexual practices, or any description, advertisement, or offer to sell or distribute such material, where such advertisement or description presents an excerpt or excerpts from such material incorporating descriptions or depictions of sexual techniques or practices or presents a summary of the contents of the material describing in detail its treatment of sexual techniques or practices;

*Provided that*, material otherwise within the definition of this subsection shall not be deemed to be potentially offensive sexual material if it constitutes only a small and insignificant part of the whole of a single catalogue, book or other work the remainder of which does not primarily treat sexual matters and, *provided further*, that the Postmaster General shall, from time to time issue regulations of general applicability exempting certain types of material, or material addressed to certain categories of addressees, such as advertisements for

works of fine art or solicitations of a medical, scientific or other similar nature addressed to a specialized audience, from the definition of potentially offensive sexual material contained in this subsection, where the purpose of this section does not call for application of the requirements of this section.

(i) *Prohibition Upon Use of Symbol in Prosecution.* The compliance by any person with the requirement of subsection (b) of this section shall not be used against him, either as evidence of his violation of laws pertaining to obscenity or related matters or as a reason for initiating or pursing any investigation of him for violations of such laws, or in any other manner whatsoever. The prohibition of this subsection shall be applicable to all law enforcement officers and all proceedings within the United States whether federal, state, or local, and shall extend to the fruits of any investigation undertaken contrary to the provisions of this subsection.

II. ADULT SEXUAL MATERIAL

(a) *Purpose.* It is the purpose of this section to enable state and local governments effectively to regulate the distribution of certain sexual materials to minors and to permit voluntary private self-regulation of the distribution of such materials to minors.

(b) *Requirement of Label.* Every person who, for himself or by his agents, imports into the United States or produces in the United States, for distribution in interstate commerce therein, material which is adult sexual material or any unit of which is adult sexual material, as defined in subsection (e) herein, shall place legibly upon the top front cover or equivalent place the label, "adult material."

(c) *Local Option to Prohibit Distribution of Labelled Material to Minors.* Any unit of state or local government within the United States may, at its option, prohibit the knowing sale or distribution to minors, without parental consent, of adult sexual material bearing the label required by subsection (b) of this section.

(d) *Penalties.* Whoever violates the requirement of subsection (b) of this section or whoever removes or obliterates any label required to be attached to material by subsection (b) of this section, shall be guilty of a Class A misdemeanor.

(e) *Definitions.* For the purposes of this section:

(i) "person" means natural person, corporation or other legal entity;

(ii) "minor" means any person less than seventeen years of age, except such persons who are married or who reside away from their parents or guardian in attendance at a college or university, in pursuance of employment, or while enrolled in a job-training program;

(iii) "adult sexual material" means any unit of pictorial or verbal material which is made up in whole or in large part of a depiction or description or depictions or descriptions of human sexual intercourse, masturbation, sodomy, direct physical stimulation of clothed or unclothed genitals, or flagellation or torture indicating an erotic relationship, or any unit of pictorial materials which is primarily a depiction of uncovered adult human genitals or of

erotic sexual activity on the part of nude or substantially undressed persons;

(iv) A unit of material is any independently distributed material or any material distributed as part of an anthology or collection of separate materials which constitutes more than a small and insignificant part of the whole.

(f) *Prohibition Upon Use of Compliance in Prosecution.* The compliance by any person with the requirement of subsection (b) of this section shall not be used against him, either as evidence of his violation of laws pertaining to obscenity or related matters, or as a reason for initiating or pursuing any investigation of him for violation of such laws, or in any other manner whatsoever. The prohibition of this subsection shall be applicable to all law enforcement officers and all proceedings within the United States, whether federal, state or local, and shall extend to the fruits of any investigation undertaken contrary to the provisions of this subsection; *Provided, however*, that the prohibition of this subsection shall not be applicable to proceedings under statutes enacted pursuant to subsection (c) of this section or to proceedings under section IV of this Title occasioned by material described in subparagraph (b) (i) (A) of section IV.

III. OFFENSE TO SENSIBILITIES.

(a) A person is guilty of offense to sensibilities if he displays, distributes or communicates potentially offensive sexual materials to another or to others, without consent.

(b) For the purposes of this section, "potentially offensive sexual material" means:

(i) in cases where the communication is individual in nature, as in house-to-house distribution or individually distributed leaflets:

(A) any pictorial representation, photographic or otherwise, of uncovered adult human genital areas, of human sexual intercourse, sodomy, masturbation, or direct physical stimulation of clothed or unclothed genitals, of flagellation or torture indicating an erotic relationship, or any description of, advertisement of or offer to sell such pictorial material where such description or advertisement includes such materials or a detailed verbal description thereof;

(B) any artificial human penis or vagina or device primarily designed physically to stimulate genitals, or any description, advertisement or offer to sell or distribute such an artificial organ or device where such description or advertisement presents either a pictorial representation or a detailed verbal description of such organ or device or its manner of use; or

(C) any pictorial or verbal material consisting primarily of instructions in human sexual techniques or of fictional or factual descriptions of human sexual practices, or any description, advertisement, or offer to sell or distribute such material, where such advertisement or description presents an excerpt or excerpts from such material incorporating descriptions of sexual techniques or practices or presents a summary of the contents

of the material describing in detail its treatment of sexual techniques or practices.

(ii) In cases where the communication is several in nature, as in broadcasts or public displays, any pictorial representation, photographic or otherwise, of uncovered adult human genital areas, of human sexual intercourse, sodomy, masturbation or direct physical stimulation of clothed or unclothed genitals, of flagellation or torture indicating an erotic relationship, or of any artificial human penis or vagina;

*Provided that*, material otherwise within the definition of this subsection shall not be deemed to be potentially offensive sexual material if it constitutes only a small and insignificant part of the whole of a single catalogue, book or other work the remainder of which does not primarily treat sexual matters.

(c) Offense to sensibilities is a Class A misdemeanor.

(d) This section shall not be applicable to distributions of material by mail upon which a symbol is required to be affixed by section 1 of this Title, nor shall it be applicable to communications several in nature, such as broadcasts, which are prefaced or covered by notice of their sexual content, so as to permit persons effectively to decline to see the potentially offensive matter.

(e) Prosecution should be initiated under this section only where (i) the federal government exercises general legislative jurisdiction over the place where the offensive communication was received, or, (ii) the receipt of the offensive communication violated the legislative policy of the state of reception and where that policy cannot effectively be vindicated because of jurisdictional or other similar limitations upon state law enforcement.

IV. DISTRIBUTION OF ADULT SEXUAL MATERIAL TO MINORS.

(a) A person is guilty of distribution of adult sexual material to minors if he sells, distributes, displays or communicates adult sexual material to a minor or minors without the consent of the parent or guardian of the minor.

(b) For the purposes of this section:

(i) "adult sexual material" means:

(A) any material bearing a label under the provisions of subsection (b) of section II of this Title, and which is required to bear such a label; or

(B) any unit of pictorial or verbal material which is made up in whole or in large part of a depiction or description or depictions or descriptions of human sexual intercourse, masturbation, sodomy, direct physical stimulation of clothed or unclothed genitals, of flagellation or torture indicating an erotic relationship, or any unit of pictorial material which is primarily a depiction of uncovered adult human genitals or of erotic sexual activity on the part of nude or substantially undressed persons.

(ii) "Minor" means any person less than seventeen years of age, except such persons who are married or who reside away from their parents or guardians in attendance at a college or university, in

pursuance of employment, or while enrolled in a job-training program.

(iii) A unit of material is any independently distributed material or any material distributed as part of an anthology or collection of separate materials which constitutes more than a small and insignificant part of the whole.

(c) Distributing adult sexual material to minors is a Class A misdemeanor.

(d) It is a defense to a prosecution under this section to show that a communication of adult sexual material to a minor or minors was part of a single simultaneous distribution or communication to several or many persons, a substantial portion of whom were not minors, where the communication to minors was a necessary consequence of the communication to the adult audience.

(e) Prosecutions should be initiated under this section only where (i) the federal government exercises general legislative jurisdiction over the place where the distribution to a minor was accomplished or, (ii) where the distribution to a minor violated the legislative policy of the state where the distribution was received and where that policy cannot effectively be vindicated because of jurisdictional or other similar limitations upon state law enforcement.

## § 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*

See comment to § 1853, *infra*.

## § 1853. Loitering to Solicit Sexual Activity.

**(1) Offense. A person is guilty of a Class B misdemeanor if, under circumstances in which, in fact, his conduct is likely to cause offense or alarm to others, he loiters in any public place with intent to solicit another or offer himself for the purpose of engaging in sexual activity.**

**(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201.**

*Comment*

Sections 1852 and 1853 penalize sex-related behavior involving a substantial likelihood of alarming or giving serious offense to others. The drafts are derived from modern code revisions (N.Y. Pen. Law §§ 245.00, 240.35; Mich. Rev. Crim. Code §§ 2325, 5540(c); Calif. Pen. Code Revision §§ 1609, 1610; A.L.I. Model Penal Code §§ 251.1, 251.3). In order to minimize constitutional vagueness problems, both sections prohibit overt conduct: actual sexual exposure, and conduct manifesting an intent to solicit or offer sexual activity under circumstances in which it would be offensive or alarming. Note that § 1853 applies both to normal and deviate sexual solicitation. The concept of offense or alarm to "others" is an effort to define a kind of public nuisance; it would not reach, for example, an isolated private proposal of sexual relations although the addressee might find the proposal offensive. On the other hand, loitering for the purpose of making proposals indiscriminately to persons in or near a public facility involves so high a likelihood of offending others that restraint on such activity appears warranted. Conceivably, prosecution of offenses under § 1853 should be limited to cases where complaint is lodged by one, other than a law enforcement officer, who has been annoyed.

# 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.**

**(2) Felonies and Misdemeanors. Every person convicted of a felony or a misdemeanor shall be sentenced to one of the following alternatives:**

**(a) probation 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) any special sanction authorized by section 405.**

**A fine authorized by Chapter 33 and any or all special sanctions authorized by section 405 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, remove a person from office, or impose any other civil penalty. An appropriate**

**order exercising such authority may be included as part of the judgment of conviction.**

*Comment*

This section provides a single comprehensive list of the options available for sentencing offenders. There never has been such a provision in federal law. Most of the balance of the sentencing part of the Code is incorporated in this section by reference.

**§ 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.

**§ 3003. Persistent Misdemeanants.**

**(1) Criterion. A defendant convicted of a Class A misdemeanor may be sentenced as for 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. For the purpose of determining whether a person stands convicted for the third time, two**

**or more convictions for crimes that were committed prior to the time the defendant was convicted and sentenced for any of such crimes shall be deemed to be only one conviction.**

**(3) Reasons. The court shall set forth in detail the reasons for its action whenever the sentence authorized in subsection (1) is imposed.**

*Comment*

A few provisions in present federal law provide for enhanced punishment for subsequent offenses, *e.g.*, 18 U.S.C. § 1461; but there is no general provision on the subject. This section recognizes that certain 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 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 draft provides that these convictions should be treated as one. For treatment of consecutive sentences for misdemeanors at a single federal sentencing, see § 3206.

Procedural provisions to accompany this section have not been drafted. It should be provided, *inter alia*, that notice of intention to seek felony sanctions must be given at the time of the misdemeanor charge.

**§ 3004. Reduction in Category.**

**(1) Reduction. 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 record the conviction as being for that category of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court may enter a judgment of conviction for the next lower category of offense and impose sentence accordingly.**

**(2) Reasons. The court shall set forth in detail the reasons for its action whenever the power granted in subsection (1) is exercised.**

*Comment*

This section recognizes that cases will occasionally arise for which the flexibility provided within the appropriate sentencing category will not suffice to avoid unduly harsh results. The power expressly granted here to the court is one which is sometimes exercised at present in permitting pleas to lesser offenses.

**§ 3005. Presentence Commitment for Study.**

**In felony cases where the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, the court may commit a convicted defendant to the custody of the Bureau of Prisons 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 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. After receiving the report and the recommendations, the court shall proceed 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 § 3005 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.

**§ 3006. Resentences.**

**Where a conviction or sentence has been set aside on direct review or on 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.**

*Comment*

Although an increased sentence for the same offense, where warranted by a factor not previously cognizable, is not constitutionally barred (*North Carolina v. Pearce*, 395 U.S. 711 (1969)), the policy of the draft reflects much modern opinion on the subject. The provision for crediting against the new sentence the portion of the old sentence which has been satisfied is, however, a constitutional requirement (*North Carolina v. Pearce, supra*).

**§ 3007. Classification of Crimes Outside This Code.**

**(1) Where Imprisonment Greater Than Class A Misdemeanor. All federal crimes defined outside this Code, except those defined in 10 U.S.C., Ch. 47 (Uniform Code of Military Justice), for which imprisonment beyond that provided for a Class A misdemeanor is authorized are hereby classified as Class A misdemeanors.**

**(2) Where Imprisonment Equal to or Less Than Class A Misdemeanor. Except as provided in subsection (1) and in 10 U.S.C., Ch. 47, if the maximum imprisonment authorized for an offense defined outside this Code exceeds 30 days, the offense shall be treated as 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 subsection, the term of imprisonment imposed shall not exceed the maximum authorized by the statute defining the offense, the maximum fine shall be as 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 aids in carrying out the reform effort of integrating and systematizing all federal offenses, including those not defined in the Criminal Code itself. Subsection (1) effects the policy that all violations warranting a felony jail penalty should be included in the Code itself. See § 209 for similar treatment of assimilated offenses.

Because the authorized fines in felonies outside of Title 18 were probably fixed with a view toward having the fine correlate to the length of the possible jail sentence, they are reduced to the level available for a Class A misdemeanor. See § 3301.

The draft, on the other hand, permits greater flexibility with respect to offenses outside Title 18 which have jail penalties no greater than that provided for Class A misdemeanors. Thus, a fine much higher



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than that authorized for a Class A misdemeanor may be established where a high fine is appropriate, such as in the Sherman Act. However it is expected that the example of the Code classifications, together with the regulatory offense provision (§ 1006), will ultimately result in greater uniformity. Under subsection (2) the maximum jail term (when less than a Class A misdemeanor) and fine would be retained as fixed by the provisions defining the offense, but such offenses are nevertheless assigned classifications so that they will be subject to such Code provisions as those dealing with probation and collection of fines.

## 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 eligible for probation unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that his imprisonment is necessary 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 offense, or undermine respect for law.**

**(3) Factors to be Considered. The following factors, while not controlling the discretion of the court, shall be accorded weight in favor of withholding a sentence of imprisonment:**

**(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; and**

**(*l*) the defendant is elderly or in poor health.**

*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, the draft does not bar probation 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. Codifying the criteria should assist in reducing sentencing disparities.

**§ 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) Conditions; Modification; Revocation. Conditions of probation shall be determined as provided in section 3103. 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.**

**(4) 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 draft 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) 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, contrary to the current practice of tying the hands of the revoking judge by setting a maximum at the time of the original sentence lower than that authorized by statute. Flexibility to deal with what may be very different kinds of violations is thus permitted. Under consideration is a proposal to make violation of conditions of probation a regulatory offense (see § 1006). This might be particularly useful when probation is imposed for an infraction since the sanction of imprisonment would not otherwise be available. Procedural aspects of modification and revocation should be dealt with in the Federal Rules of Criminal Procedure.

Subsection (4) makes it clear that a sentence to probation does not preclude appeal.

**§ 3103. Conditions of Probation.**

**(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 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) report to a probation officer at reasonable times as directed by the court or the probation officer;

(i) permit the probation officer to visit him at reasonable times at his home or elsewhere;

(j) remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer;

(k) answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment;

(*l*) 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) Split Sentence. When imposing a sentence to probation, the court, in addition to conditions imposed under subsection (2),

**may require as a condition of the sentence that the defendant submit to a period of imprisonment in an appropriate institution at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court shall determine. The period of confinement under this subsection shall not exceed the shorter of 60 days or the maximum term of imprisonment authorized for the offense by Chapter 32.**

**(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, except that the period of probation shall not be terminated without the consent of the sentencing court.**

*Comment*

Title 18 U.S.C. § 3651 contains a short list of possible conditions of probation. The draft section provides a more elaborate statement of the objectives 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).

The split sentence provision of subsection (4) is derived from 18 U.S.C. § 3651; but the period is reduced from six months to 60 days. The purpose of this provision is to permit the shock of short-term imprisonment in a disposition which is primarily court-supervised probation. Availability of such imprisonment is particularly important in felony cases where a sentence of imprisonment must otherwise be for a maximum term of at least three years, for rehabilitative purposes, under § 3201. Intermittent imprisonment, not possible under present law, would allow flexibility; a man could keep his job and spend nights or week-ends in jail.

**§ 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 or state 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 draft 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.

## § 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.

# Chapter 32. Imprisonment

**§ 3201. Sentence of Imprisonment for Felony: Incidents.**

**(1) Indefinite Sentence. A sentence of imprisonment for a felony shall be indefinite. The maximum term shall be determined in accordance with subsection (3). The minimum, if any, shall be determined in accordance with subsection (4).**

**(2) Components of Maximum Term. The maximum term of every indefinite sentence to imprisonment for a felony shall include a prison component and a parole component. The court shall have discretion in fixing the length of the prison component as provided in subsection (3), but shall have no discretion in fixing the length of the parole component.**

**(3) Maximum Term. The maximum term of an indefinite sentence to imprisonment for a felony shall be fixed by the court according to the following limitations:**

**(a) for a Class A felony, at no less than 8 years and no more than 30 years. The parole component of every Class A sentence shall be 5 years, and the remainder of the imposed term shall be the prison component;**

**(b) for a Class B felony, at no less than 6 years and no more than 15 years. The parole component of every Class B sentence shall be 3 years, and the remainder of the imposed term shall be the prison component;**

**(c) for a Class C felony, at no less than 5 years and no more than 7 years. The parole component of every Class C sentence shall be 2 years, and the remainder of the imposed term shall be the prison component.**

**(4) Minimum Term. An indefinite sentence for Class A or B felonies shall have no minimum term, unless by the affirmative action of the sentencing court a term is set at no more than one-third of the prison component actually imposed. An indefinite sentence for a Class C felony shall have no 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 an extended term under section 3202. The court shall set forth its reasons in detail. Except in the most extraordinary cases, the court shall obtain both a presen-**

**tence report and a report from the Bureau of Prisons under section 3005 before imposing a minimum term.**

**(5) 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 (4). The court shall have the authority to reduce an imposed minimum term to time served upon motion of the Bureau of Prisons made at any time, upon notice to the United States Attorney.**

*Comment*

For each sentence to imprisonment for a felony, the sentencing judge must set a maximum term. For sentences for Class A and B felonies, he may also set a minimum term in accordance with subsection (4). Within this range, the sentence is indefinite, that is, the exact release date will be determined by the Board of Parole based on the prisoner's progress.

Each sentence to imprisonment is composed of a prison component and a parole component. The parole component is fixed by statute: 5 years for Class A felony, 3 years for Class B felony and 2 years for Class C felony. The length of the maximum prison component is set by the judge. The prison component is the maximum time a person can be held in prison before release on parole. The parole component is the maximum length of time a person must satisfactorily serve on parole before he is discharged, regardless of at what point in his confinement he is released. The section changes present law, under which parole is calculated as the unserved prison term; if an offender progresses rapidly and is released early he has a long period of supervision, but if he is a poor risk and kept in prison until the end of his sentence, his readjustment to life on the outside is virtually unsupervised. Under the proposed Code, parole is viewed as a transitional process necessary for every offender sent to prison; the length of time for serving on parole should not be inversely proportional to the time actually served in prison. Violation of parole and return to prison, however, reactivate the total unserved prison and parole components of the sentence. Examples of the manner in which the periods are calculated may be found in the Working Papers.

Because a useful rehabilitative program frequently takes several years, and the necessary period of confinement cannot be determined in advance, the shortest maximum prison component for a felony is fixed by statute at three years. The prisoner may, of course, be paroled after spending less time in confinement. An issue posed by this limitation on sentencing alternatives is whether there is sufficient reason to permit a maximum prison component less than three years and greater than the 60 days permitted under a split sentence (§ 3103(4)). Note, however, that a judge may reduce a Class C felony to a Class A misdemeanor under § 3004 and sentence the offender accordingly.

The maximum terms for felonies are 30 years, 15 years and 7 years; the maximum prison components are 25 years, 12 years and 5 years, respectively. For provisions and comment regarding life imprisonment and capital punishment, see Chapter 36.

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 has arisen. For some offenders, however, community reassurance may call for a minimum term. Subsection (4) 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 prison terms are subject to § 3402, 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. If life imprisonment is an available sentence for any offense, a ceiling on a possible minimum term should be set. Ten years should be sufficient, although existing law provides 15 (18 U.S.C. § 4202).

Subsection (5) 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.

If it is deemed imperative that Congress express itself as to the undesirability of parole eligibility prior to expiration of a particular period of persons convicted of 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 early eligibility—that the court must state its reasons for not imposing a minimum term upon conviction of the specified crime. See § 3101, *supra*, for a similar suggestion regarding probation.

**§ 3202. Sentence of Imprisonment for Felony: Extended Terms.**

**(1) Reasons. The court shall set forth in detail the reasons for its action if a maximum term in excess of 8 years for a Class A felony, 6 years for a Class B felony or 5 years for a Class C felony is imposed.**

**(2) Criteria. The maximum term of an indefinite sentence for a felony shall not be set at more than 20 years for a Class A felony, 7 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, the court**

is of the opinion that a term in excess of these limits is appropriate and desirable to protect the public because the defendant is a persistent felony offender, a professional criminal, or a dangerous, mentally abnormal offender, or manifested his dangerousness by using a firearm in the commission of the offense or flight therefrom, or for some other reason presents an exceptional risk to the safety of the public. Except in the most extraordinary cases, the court should obtain both a presentence report and a report from the Bureau of Prisons under section 3005 before imposing such a term.

(3) Persistent Felony Offender.

(a) Criterion. A persistent felony offender is a person, over 21 years of age, who stands convicted of a felony for the third time, as provided in this subsection.

(b) Computation of Prior Felonies. Two or more convictions for felonies that were committed prior to the time the defendant was convicted and sentenced for any of such felonies shall be deemed to be only one conviction. Convictions which have been set aside in post-conviction proceedings or which have been pardoned shall not be included.

(c) Time Limitation. At least one of the prior felony convictions shall have been for an offense committed within the five years next preceding the commission of the offense for which the offender is being sentenced or, during such period, the offender was released, on parole or otherwise, from a prison sentence or other confinement imposed as a result of a prior felony conviction.

(4) Professional Criminal. A professional criminal is a person, over 21 years of age, who stands convicted of a felony which was committed as part of a continuing illegal business in which he acted in concert with a large number of other persons and occupied a position of organizer, a supervisory position or other position of management, or was an executor of violence. An offender shall not be found to be a professional criminal unless the circumstances of the offense for which he stands convicted show that he has knowingly devoted himself to criminal activity as a major source of his livelihood or unless it appears that he has substantial income or resources which do not appear to be from a source other than criminal activity.

(5) Dangerous, Mentally Abnormal Offender. A dangerous, mentally abnormal offender is a person, over 21 years of age, as to whom it is concluded that his mental condition is gravely abnormal, that his criminal conduct was characterized by a pat-

**tern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to the consequences, and that such condition makes him a serious danger to the safety of others. An offender shall not be found to be a dangerous, mentally abnormal offender unless the court has obtained a report from the Bureau of Prisons under section 3005 which includes the results of a comprehensive psychiatric examination.**

*Comment*

This section establishes the system under which long prison terms may be imposed. Subsection (1) requires a statement of reasons for imposing more than the lowest maximum term available. This should encourage a rational and uniform use of long sentences, insure that considerable thought is given to their imposition and provide a basis for appellate review.

Subsection (2) 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.

The criteria listed in subsection (2) constitute factors to be considered, not findings to be made, before imposition of an extended term. Some of the factors are defined in subsections (3), (4) and (5). State convictions for conduct which would be a federal felony if there were federal jurisdiction count as prior felonies for determination of persistent felony offender status. Subsections (3), (4) and (5) tentatively present the issue as to whether statutory definition is excessively formal and rigid, and definition might better be left to development by appellate courts. Note that in general multiple offenders may be consecutively sentenced up to the maximum for the extended term for the most serious offense. See § 3206(3). Appellate review of extended sentences should be possible. See proposed amendment to 28 U.S.C. § 1291, *infra*. It is toward uniformity and rationalization of particularly long sentences that appellate courts can most contribute.

Note that the definition of "professional criminal" is broader than that provided for the person who can be specially sentenced for leading organized crime (§ 3203). The reason for the difference is that, under this section, the maximum penalty is enhanced within the original classification while, under the special organized crime section, the classification itself is raised. Accordingly it is appropriate to reach a larger group of persons under this section.

The firearm criterion in subsection (2) is derived from 18 U.S.C. § 924(c), which makes it an offense (punishable by 1–10 years) to use a firearm to commit a federal felony. Note that, by virtue of this provision, where an offense is already aggravated by use of a dangerous weapon, use of a firearm aggravates it to the maximum of the extended term. Under 18 U.S.C. § 924(c), it is also an offense (with the same penalty) unlawfully to *carry* a firearm during commission of a federal felony. Under proposed § 1811 unlawful possession is a separate crime, for which—under the "piggyback" provision (§ 201(b))—there will be

federal jurisdiction if committed during another federal offense. Accordingly, the extended-term maximum will often be available under the provisions applicable to consecutive sentences (§ 3206(3)). For further comment on existing firearms law, see comment to § 1812, *infra*.

Extended terms could also be authorized for crimes committed while on bail. Under § 3206, however, such crimes would subject the offender to consecutive sentences up to the maximum available for the extended term of the most serious offense, if they are federal crimes.

Although special provisions are here set forth to deal with sentences at the higher range authorized for a crime, it is not contemplated that procedures significantly different from those involved in any other sentencing proceeding are necessary. To the extent that different procedures are called for, they could be developed within the framework of the Federal Rules of Criminal Procedure.

**§ 3203. Sentence for Leading Organized Crime. (Alternative II)**

**(1) Basis for Sentence. A person who is convicted of a felony under this Code committed on behalf of or in the course of operations of a criminal syndicate may be sentenced as a leader of organized crime pursuant to this section if:**

**(a) the Attorney General certifies, in advance of the trial with notice to the defendant, that the nature and scope of the criminal association is of national concern and warrants invocation of the extraordinary sanctions herein provided, and**

**(b) the court finds after hearing pursuant to subsection (3) that the defendant knowingly organized, managed, directed, supervised, or financed a criminal syndicate, or knowingly employed violence or intimidation in the course of promoting or facilitating its criminal objects, or with intent to promote or facilitate its criminal objects, furnished legal, accounting or other managerial assistance or intentionally promoted or facilitated its criminal objects by any act or omission of a public servant in violation of his official duty.**

**The sentence shall be for a Class A felony if the number of associates exceeds 25 or if the activity of the association embraced Class B felonies; otherwise it shall be for a Class B felony. No person shall be sentenced under this section on the basis of accomplice liability unless he aided or participated in one of the ways herein specified.**

**(2) Definitions. A criminal syndicate is an association of ten or more persons for engaging on a continuing basis in crimes of the following character: illicit trafficking in narcotics or other dangerous substances, liquor, weapons, or stolen goods; gam-**

**bling; prostitution; extortion; 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 shall be deemed a criminal syndicate although it is or was only a part of a larger association. Association, within the meaning of this section, exists among persons who collaborated 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 arms length relationship in an illicit distribution operation.**

**(3) Hearing. The court shall not make the finding referred to in subsection (1) unless:**

**(a) reasonable notice is served on the defendant, including a statement of the essential facts upon which the prosecution proposes to rely in establishing that he was a leader of organized crime;**

**(b) the prosecution proves the facts by witnesses, affidavits, or in any other reliable way;**

**(c) the defendant is accorded reasonable opportunity to make proof to the contrary;**

**(d) the court is satisfied by a preponderance of the evidence that defendant was a leader of organize crime; and**

**(e) the court summarizes in writing and in reasonable detail the basis for its finding.**

**If defendant exercised managerial or supervisory authority over ten or more persons who were, in fact, engaged in committing the relevant crime on a continuing basis, and defendant's wealth or income is incompatible with his own legal sources of wealth or income, it shall be presumed that he was a leader of organized crime and knew the character and extent of the crimes committed.**

*Comment*

This section is a treatment alternative to § 1005. See comment to § 1005, *supra*, for considerations affecting the choice as to definition as a crime or provision of a sentencing alternative.

A current Senate bill, S.30 (The Organized Crime Control Act of 1969), proposes a new section 3575 to Title 18 which would authorize sentences up to 30 years for dangerous special offenders convicted of a felony. Two types of the special offenders contemplated by the bill are somewhat similar to the persistent felony offender and professional criminal contemplated by the criteria in § 3202. The third situation

contemplated in the bill is the felony committed in furtherance of a conspiracy with three or more other persons to engage in crime with the defendant as a leader (defined much as in this section) of the conspiracy. Major differences between S.30 and § 3203 include the requirement of Attorney General certification in § 3203, the size of the conspiracy (10 persons in § 3203, 4 persons in S.30), and possibly the nature of the conspiracy ("association . . . for engaging on a continuing basis" in certain specified crimes in § 3203 versus "conspiracy . . . to engage in a pattern of conduct criminal under applicable laws of any jurisdiction" in S.30).

A separate sentencing hearing is provided for in subsection (3). The court, without the jury, determines whether the special sentence should be imposed. The sentence and the reasons for it would be subject to appellate review. (Amended 28 U.S.C. § 1291, *infra*). The presumption in the last paragraph presumes culpable knowledge on the part of a defendant who is shown to have been issuing orders to a group of people who were, in fact, engaged in crime as a continuing enterprise. Even so slight an assist to the prosecution, though, might be viewed as unwise on policy or constitutional grounds.

Also under consideration has been a provision that the Attorney General's power of certification cannot be delegated.

**§ 3204. Sentence of Imprisonment for Misdemeanor.**

**A sentence of imprisonment for a misdemeanor shall be for a definite term fixed by the court according to the following limitations:**

**(a) for a Class A misdemeanor, at no more than [one year] [six months] [three months];**

**(b) for a Class B misdemeanor, at no more than 30 days.**

*Comment*

This section provides for the longest custodial sentence during which no serious attempt at rehabilitation is expected to be made. The bracketed alternatives pose the issue whether the existing federal line of demarcation between felony and misdemeanor, *i.e.*, one year (although many federal misdemeanors presently carry six months or less), should be retained. There is growing awareness that misdemeanor sentences longer than six months, and even longer than three months, serve little, if any, penological purpose, may harm rather than help the prisoner, and thus impose unnecessary drains on the correctional system. Indeed, existing federal law already recognizes that a six-month maximum is sufficient for "taste-of-jail" purposes, as provided by the split sentence provisions (18 U.S.C. § 3651), under which the offender may be sentenced to serve up to six months in custody and the balance of his term on probation. Moreover, a maximum no longer than six or three months may facilitate expeditious disposition of cases by nonjury trial before federal magistrates.

Other reform projects have given serious consideration to revision of traditional penalties for minor crimes. In West Germany, doubts as to the value of short jail terms prompted proposals to abolish them altogether and to rely on alternative sanctions. In New York, the Penal Law Revision Commission stated that it would recommend a maximum term on the order of six months for its highest misdemeanor unless there was a conditional release system for misdemeanants, *i.e.*, a kind of unsupervised parole for which an offender sentenced to more than 60 days would become eligible after 30 days (see Proposed N.Y. Penal Law, p. 287 (1964)). In the federal context a viable release system for misdemeanants is more difficult and costly to establish, by virtue of the fact that many misdemeanants serve terms in local jails and are thinly and widely scattered. Since misdemeanor sentences are not intended to serve a rehabilitative function and there is little for the releasing authority to consider beyond that which could be taken into account by the sentencing court, reliance upon a conditional release system for misdemeanants seems less feasible than setting a lower statutory maximum.

Continuation of the one year maximum, however, is supported by 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 fear that, faced with the choice of a felony classification or a classification with a six-month maximum, Congress will classify more crimes as felonies than is warranted.

In any event, if one year is the maximum, provisions permitting parole of a defendant after serving six months, as under 18 U.S.C. § 4202, should be considered.

**§ 3205. Commitment to Bureau of Prisons.**

**(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 Prisons, 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 Prisons under section 3005 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**



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**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.

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.

**§ 3206. 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 consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other; or**

**(b) 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. The aggregate maximum of consecutive sentences to which a defendant may be subject shall not exceed the maximum term authorized by section 3201(3) for the most serious felony involved. When sentenced only for misdemeanors, a defendant may not be consecutively sentenced to more than the maximum for one Class A misdemeanor, except that, if he is convicted of three or more Class A misdemeanors for which consecutive sentences are permissible under subsection (2), he may be sentenced as for 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. These limitations 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 the courts of any state or territory shall be counted in applying these limitations.**

**(4) 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. Except in the most extraordinary cases, the court should obtain both a presentence report and a report from the Bureau of Prisons under section 3005 before imposing a consecutive term.**

**(5) 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 with the following incidents:**

**(a) the prison component shall consist of the aggregate of the validly imposed prison components, plus the aggregate of the validly imposed definite sentences for misdemeanors;**

**(b) the parole component shall consist of the parole component which is provided by section 3201(3) for the most serious of the offenses involved; and**

**(c) the minimum term, if any, shall constitute the aggregate of the validly imposed minimum terms.**

**(6) Effect of State Sentences. Subject to any permissible cumulation of sentences explicitly authorized by this section, the Bureau of Prisons shall automatically award credit against the maximum term and any minimum term of any federal sentence for all time served in a state 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 two 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 subsection (3) is not adopted, some such limitation on the open-ended imposition of consecutive terms would be appropriate.

Subsection (3) would substantially change federal law by setting, for consecutive sentences, a maximum 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. The first sentence of the subsection applies whenever a defendant is sentenced for a felony and for any other crime. Sentences for all crimes may be aggregated up to the maximum for the extended term for the most serious felony involved. When a defendant is sentenced only for misdemeanors, the second sentence of the subsection applies, and is intended to prevent an intermediate sentence—one too short for rehabilitation but longer than necessary for shock purposes. Sentences for Class A and B misdemeanors may be aggregated to the maximum available for a Class A misdemeanor. If the available sentence for a Class A misdemeanor is one year, consecutive sentences for three of them equal the prison component for a Class C felony; and it is provided that they may be thus aggregated.

Subsection (4) is designed to assure a reasoned use of consecutive sentences. Subsection (5) 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.

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.

**§ 3207. 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 Prisons 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 Prisons 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.

# 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 § 3007 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.

Explicit provisions with respect to procedure for making the subsection (2) determination may be required, prescribing appropriate notice, standard of proof (preponderance of the evidence rather than reasonable doubt?) and admissibility of evidence (all but that which is legally privileged?). *Cf.* Proposed N.Y. Crim. Proc. Law § 400.30 (1969).

**§ 3302. Imposition of Fines.**

**(1) General 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 an individual. The court shall not sentence a defendant to pay a fine if the fine will prevent him from making restitution or reparation to the victim of the offense.**

**(2) Fine Alone. When any other disposition is authorized by statute, the court shall not sentence an individual to pay a fine only 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 the fine alone will suffice for the protection of the public.**

**(3) Fine With Other Sanctions. The court shall not sentence an individual to pay a fine in addition to any other sentence authorized by section 3001 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.**

**(4) 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.**

**(5) 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 prohibited, however, 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 subsections (2) and (3), unless some affirmative reason indicates that a fine is peculiarly appropriate.

Subsection (5) is analogous to the prohibition against deciding at sentencing the sanction for violation of probation (§ 3102). In neither situation can the reason for noncompliance be foreseen.

**§ 3303. Revocation of a Fine.**

**A defendant who has been sentenced to pay a fine may at any time petition the sentencing court for a revocation of the fine or any unpaid portion thereof. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine no longer exist or that it would otherwise be unjust to require payment of the fine, the court may revoke the fine or 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 revocation or adjustment of a fine to fit altered conditions.

**§ 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 revoking the fine or 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. Following a default in the payment of a fine or any installment thereof, the sentencing court may order that the fine be collected by 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. Note that 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). Note that subsection (4) poses the threat of jail to corporate officers who refuse to pay the fine. Subsection (5) carries forward existing law. See 18 U.S.C. § 3565.

## Chapter 34. Parole

**§ 3401. Parole Eligibility; Consideration.**

**(1) Eligibility. Every prisoner sentenced to an indefinite term of imprisonment for a felony shall be eligible for release on parole upon completion of the service of any minimum term imposed by the court under section 3201(4) 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 except in the most extraordinary circumstances. If the misdemeanor maximum is one year, however, both § 3401 and § 3402(1) should be adapted to provide for earlier parole consideration and release. See § 3204 and comment thereto, *supra*.

**§ 3402. Timing of Parole; Criteria.**

**(1) In General. Except in the most extraordinary circumstances, a prisoner sentenced to an indefinite term of imprisonment for a felony which does not contain a minimum term under section 3201(4) 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 a substantial 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 promote disrespect 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 three years or more 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.

**§ 3403. Incidents of Parole.**

**(1) Period of Parole. Unless terminated sooner as provided in subsection (2), 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 Termination. The Board of Parole may terminate a period of parole and discharge the parolee at any time after the expiration of one year of successful 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 or termination of the period for which the parole remains conditional. If the parolee violates a condition at any time prior to the expiration or termination 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 of imprisonment imposed by the court under section 3201(3) 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 Prisons and the Board of Parole can in no event exceed, however, the maximum term of imprisonment imposed by the court under section 3201(3).**

**(5) Procedure for Revocation. Parole shall not be revoked without giving the parolee an opportunity to appear before an examiner designated by the Board of Parole to contest the grounds upon which revocation is proposed.**

*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 classification of his crime rather than by the date of his release. Early termination is permitted, as it is for probation (§ 3102), 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, this draft does not permit the Board of Parole to set a shorter term of imprisonment upon revocation of parole. A result of reimprisonment upon parole violation may be that an offender ends his term in jail. Under consideration is a proposal for a further year of supervision in such cases, with the kinds of sanctions proposed for regulatory violations. See § 1006.

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.

Subsection (5) carries forward 18 U.S.C. § 4207. It may be desirable, however, to set forth the procedures for parole revocation in greater detail.

**§ 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) report to a parole officer at reasonable times as directed by the Board or the parole officer;**

**(g) permit the parole officer to visit him at reasonable times at his home or elsewhere;**

**(h) remain within the geographic limits fixed by the Board, unless granted written permission to leave by the Board or the parole officer;**

**(i) answer all reasonable inquiries by the parole officer and promptly notify the parole officer of any change in address or employment;**

**(j) satisfy other conditions reasonably related to his rehabilitation.**

**(4) 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, permits the Congress to declare parole policy.

## § 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 or state 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*.

**§ 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 of imprisonment 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.

## 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 1106, 1108 and 1112 to 1117;**

**(b) bribery and other crimes of unlawful influence upon public affairs and betrayal of public office defined in sections 1355, 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 property or service which is the subject of the offense has been entrusted to the defendant, for examination or otherwise, as a fiduciary, or 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" means any such position for which qualifications or provisions with respect to length of term or procedures for removal are not 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 draft 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 § 3503 that all disqualifications be automatically terminated five years after completion of the sentence. The section does not diminish powers of removal or disqualification vested elsewhere in federal law. See 5 U.S.C. § 7532, regarding security risks.

While the draft 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.

**§ 3502. 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;**



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**(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 a period on parole which began prior to the expiration of the entire prison component of his sentence, or (iv) the Bureau of Prisons 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 § 3504, *infra*.

### § 3503. Termination of Disqualification or Disability Five Years After Sentence Completed.

**Any disqualification or disability imposed by law as a consequence of conviction terminates five years after the defendant has completed his sentence if he has not been convicted of another crime committed subsequent to his original conviction.**

*Comment*

See comment to § 3504, *infra*.

### § 3504. Effect of Removal of Disqualification or Disability.

**Removal of a disqualification or disability under sections 3502 and 3503:**

**(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 3502 or the applicability of section 3503, as the case may be; and**

**(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 3502 or the applicability of section 3503, as the case may be, may be adduced for the purpose of his rehabilitation.**

*Comment*

Sections 3502–04 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 clemency procedures for all offenders. 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 will be determined by the extent of the constitutional power of Congress to limit the effect which a state can give to a federal conviction. It is believed that Congress has constitutional power to do that as 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 (§ 3503), and discretionary restoration earlier, either by a decision at the time of sentencing or upon application anytime thereafter (§ 3502). Both of these provisions must be viewed against the limitations stated in § 3504 (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 § 3503 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 § 3503 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 the draft might be: to permit the sentencing court to order in a particular case that § 3503 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.

# Chapter 36. Sentence of Death or Life Imprisonment

*Introductory Note*

This entire Chapter is provisional, pending decision by the Commission whether to recommend retention of the death penalty, or the alternative of life imprisonment, for any category of crime. If the death penalty is retained, the primary purpose of this Chapter would be to provide for jury participation in the death penalty decision in a proceeding separate from the trial as to guilt.

**§ 3601. Sentence of Death or Life Imprisonment Authorized.**

**Notwithstanding the provisions of sections 3001 and 3201, a sentence of death or of life imprisonment may be imposed in accordance with the provisions of this Chapter.**

*Comment*

This introductory section is needed in view of the restrictions on sentencing set forth in §§ 3001 and 3201, particularly the limit of 30 years on conviction of a Class A felony.

**§ 3602. When Sentence of Death or Life Imprisonment Authorized.**

**A sentence of death or of life imprisonment is authorized only for a defendant found guilty of:**

**(a) treason (section 1101);**

**(b) first degree murder (section 1601).**

**[§ 1601. Murder.**

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

* * *

**(2) Grading. Murder is in the first degree, punishable as provided in Chapter 36, if it is:**

**(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; or**

**(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.**

**Otherwise murder is in the second degree, a Class A felony.]**

*Comment*

This section represents a position between preservation of capital punishment for all situations in which it is presently authorized under federal law and complete abolition. The line of demarcation for murder follows provisions in effect in New York, with the addition of Presidential and Vice Presidential assassinations. In New York the distinction between capital and other murders is made at the sentencing stage. N.Y. Pen. Law § 125.30. The proposed draft, on the other hand, follows the view that the crucial facts upon which the availability of the death penalty rests should be determined at the trial stage. This result can be achieved by modifying the Code murder provisions, § 1601, as shown in the bracketed provisions above.

The draft section reflects the policy that the penalty of life imprisonment should be available only as an alternative to the death penalty.

**§ 3603. Death Sentence Excluded.**

**If a defendant is found guilty of a crime listed in section 3602, 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 the cases mentioned. In addition to its duty to take the death issue away from the jury in these cases, the court would, under § 3604(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.

**§ 3604. Further Proceedings 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 is 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.

**§ 3605. 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. [The death sentence shall not be imposed unless one of the aggravating circumstances be found.]**

(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 youth of the defendant 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 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.

(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 many 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 or kidnapping.

(e) the murder was committed for pecuniary gain.

**(f) the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.**

*Comment*

This section is adapted from A.L.I. Model Penal Code provisions on the penalty trial (§ 210.6). There they 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 reduce it on the ground that it is excessive 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.); at present the Senate is again considering an identical bill (S. 1561, 91st Cong., 2d Sess.). Appellate review is proposed in the draft because, even in addition to the reasons usually advanced, certain features of the sentencing approach of the Code depend in large measure for their effectiveness upon uniform interpretations by appellate courts, *e.g.*, circumstances which warrant imposition of the extended term (§ 3202). The proposed amendment to 28 U.S.C. § 1291 (italicized portion) reflects the view that the sentence should be reviewable in the same manner as any other decision by the district court. With respect to the controversial issue as to whether the appellate court should be able to increase, as well as decrease, the sentence, this draft would deny it the power to increase.

## 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 Study Draft provisions. The second column indicates the disposition of those sections: either the Study Draft 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 Study Draft 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 Study Draft 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 (§ 3007) 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 penalities 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. The other (§ 202) establishes federal jurisdiction over an included offense where there is federal jurisdiction over the inclusive offense.

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| 2152 | 1108, 1301, 1705, 1712 |
| 2153–54 | 1004, 1106–08 |
| 2155–56 | 1004, 1106, 1108 |
| 2157 | ——— |
| **Ch. 107. Seamen and Stowaways** | |
| 2191 | 1612, 1633 |
| 2192 | 1001, 1003–04, 1111, 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) and (*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 |
| 2383–84 | 1103 |
| 2385 | 1104 |
| 2386 | 1105; Title 50 |
| 2387 | 1111 |
| 2388 | 1004, 1110–12, 1303 |
| 2389–90 | 1101–03, 1203 |
| 2391 | 1004, 1110–12, 1303 |
| **Ch. 117. White Slave Traffic** | |
| 2421 | 1841 |
| 2422–23 | 1631–32, 1841–42, 1844 |
| 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 | 3207 |
| 3569 | 3303–04 |
| **Ch. 231. Probation** | |
| 3651 | 3101–05 |
| 3653 | 3102–04; Title 18, Pt. D |
| **Ch. 305. Commitment and Transfer** | |
| 4082(a) | 3205(1) |
| **Ch. 309. Good Time Allowances** | |
| 4161–66 | ——— |
| **Ch. 311. Parole** | |
| 4202 | 3401–02 |
| 4203 | 3402–05 |
| 4207 | 3403 |

| Title 18 Sections | Proposed Code Sections and Other Titles Involved |
|---|---|
| 4208(a) | 3201(4) and (5), 3401 |
| 4208(b) | 3005, 3207(2) |
| Ch. 314. Narcotic Addicts | |
| 4252 | 3005, 3207(2) |
| Ch. 402. Federal Youth Corrections Act | |
| 5010(e) | 3005 |
| 18 App. Unlawful Possession or Receipt of Firearms | |
| 1201–03 | 1811–12 |

## Table II

## PROVISIONS 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 § 3007. 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; the Commission invites suggestions, particularly from those responsible for administration of the affected sections. 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 Study Draft 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 |
| 212 | 1342–49 |
| 252(b) | 3007 |
| 269(b) | 3007, 3003 |
| **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, 3007 |
| 60 | 1301, 1355, 1751, 1758 |
| 87c | 1361–63, 1366, 1751, 1753, 1381, 1321, 1611–14, 1617, 3003 |
| 87f(g) | 1732 |
| 135f(c) | 1371, 3007 |
| 150gg | 1751–54 |
| 163 | 1411, 1751–54 |
| 195 | 1345, 3007 |
| 221 | 3007 |
| 270 | 1751–54, 1732, 1737, 3007 |
| 282 | 1411 |
| 472 | 1371 |
| 473 | 1352, 1355 |
| 473c–2 | 1301, 1361–64, 1352, 1355, 1753 |
| 491 | 1732, 1705 |
| 499n | 1751–54 |
| 503 | 1352 |
| 511k | 1751–54, 1301, 1361–63, 1355, 1352, 1381 |
| 608d | 1371 |
| 608e–1 | 1411 |
| 608f | 3007 |
| 610(g) | 1372 |
| 615(b–3)(2) | 1732 |
| 615(b–3)(3) | 1751–54, 1352, 1401 |
| 953 | 1352 |
| 1011 | 1712 |
| 1156 | 1352 |
| 1157 | 1372 |

| United States Code Sections | Proposed Criminal Code Sections |
|---|---|
| **Title 7—Continued** | |
| 1373 | 1355, 1352, 1371 |
| 1379(i) | 1751–54, 1732 |
| 1380n | 1411 |
| 1622(h) | 1751–54 |
| 1642(c) | 1351–52 |
| 1986 | 1362–63, 1365, 1371–72 |
| 2023 | 3007 |
| 2150 | 1345 |
| **Title 8 (Aliens and Nationality)** | |
| 333–36 | 1222–23, 1632 |
| 1185 | 1221–25, 1352, 1751–54, 3007 |
| 1252 | 3007, 1305 |
| 1306(c) and (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, 3007 |
| 4501 | 3007 |
| 7678 | 1301, 1352, 1705, 1732, 3007 |
| 9501 | 3007 |
| **Title 12 (Banks and Banking)** | |
| 95 | 3007 |
| 95a(3) | 1204, 1411 |
| 378 | 3007 |
| 617 | 3007 |
| 630 | 1731–41 |
| 631 | 1381, 1731, 1751, 1753, 3007 |
| 1141j | 1371–72, 3007 |
| 1464 | *Cf.* 1345 |
| 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 | 3007 |
| 639 | *Cf.* 1753 |

* Uniform Code of Military Justice provisions are not affected by Study Draft.

| United States Code Sections | Proposed Criminal Code Sections |
|---|---|
| Title 15 (Commerce and Trade) | |
| 50 | 1323, 1342–49, 1352, 1371, 3007 |
| 54 | *Cf.* 3003 |
| 76 | 3007, 1411 |
| 77 | 3007 |
| 77x | 3007, 1760 |
| 77yyy | 3007, 1760 |
| 78u(c) | 1342–49 |
| 78ff | 3007, 1760 |
| 79r | 1342–49 |
| 79z–3 | 1352, 1355, 3007 |
| 80a–41 | 1342–49 |
| 80a–48 | 3007 |
| 80b–9 | 1342–49 |
| 80b–17 | 3007 |
| 158 | 1732, 3007 |
| 645 | 1352, 1732, 1737, 1372 |
| 714m | 1732, 1352, 1737 |
| 717m | 1342–49 |
| 717t | 3007 |
| 1176 | 3007 |
| 1242 | 3007 |
| 1243 | 3007 |
| 1281 | 1701–09 |
| 1717 | 3007, 1732, 1352 |
| 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, 460n–5, 471, 551, 606, 690g, 693a, 730 | *Cf.* Chapter 17, esp. § 1705 |
| 114, 413, 433 | 1705, 1732 |
| 371 | 1732 |
| 414 | 1712 |
| 707 | 3007 |
| 825f | 1342–49 |
| 825o | 3007 |
| 831t | 1352, 1732, 1737, 3007 |
| Title 19 (Customs Duties) | |
| 60 | 1361–62, 1732 |
| 283 | 1411 |
| 1304(e) | 1411 |
| 1341 | 1301, Chapter 16 |
| 1436 | 1352, 1411, 1751, 1753 |
| 1464 | 1411, 3007 |
| 1465 | 1411, 3007 |
| 1586 | 1411 |

| United States Code Sections | Proposed Criminal Code Sections |
|---|---|
| Title 19—Continued | |
| 1620 | 1362–63, 3007 |
| 1708 | 1411, 3007 |
| 1919 | 1352, 1732 |
| 1975 | 1352, 1732 |
| Title 20 (Education) | |
| 581(4)(B) | 3007 (consider replacement by 1352) |
| Title 21 (Food and Drugs) | |
| 104 | 1411, 1704–05, 3007 |
| 117 | 1704–05 |
| 122 | 1704–05 |
| 127 | 1704–05 |
| 134e | 1704–05 |
| 145 | 1613 |
| 158 | 1411, 1704–05 |
| 174 | 1821–29 |
| 176a | 1821–29 |
| 176b | 1821–29 |
| 182 | 1821–29 |
| 184a | 1821–29 |
| 1881 | 1821–29 |
| 191–93 | 1821–29 |
| 333(a) | 1371, 1613, 1732, 1751, 1753, 3003 |
| 333(b) | 1821–29 |
| 377a | 1751 |
| 461 | 1371, 1611–19 esp. 1613, 1751 |
| 515 | 1821–29 |
| 622 | 1361 et seq. |
| 675–76 | 1301, 1411, 1611–19 esp. 1613, 1751 |
| Title 22 (Foreign Relations and Intercourse) | |
| 253 | 3007 |
| 286f | 1342–43, 1371–72 |
| 287c | 1204 |
| 447(c) | 1204 |
| 455 | 3007 |
| 618 | 1206, 1352, 3007 |
| 1179 | 1732, 1737, 3007 |
| 1182 | 1363 |
| 1198 | 1732, 1737 |
| 1199 | 3007 |
| 1200 | 1753 |
| 1203 | 1351–52, 1751 |
| 1623 | 1342–43 |
| 1631n | 3007 |
| 1934 | 1352, 3007 |

| United States Code Sections | Proposed Criminal Code Sections |
|---|---|
| **Title 24 (Hospitals, Asylums and Cemeteries)** | |
| 154 | 1705, 1712, 1732 |
| 286 | 1705 |
| **Title 25 (Indians)** | |
| 70b | 3007 |
| **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, 1814, 3007 |
| 5686 | 1403–09 |
| 5689 | 1401–09, 1751–54 |
| 5691 | 1401–09 |
| 5762(a) | 1401–09, 1352 |
| 5861 | 1814, 3007 |
| 7201 | 1401–09 |
| 7202 | 1401–09 |
| 7203 | 1401–09 |
| 7204 | 1402 |
| 7206 | 1401, 1352 |
| 7207 | 1352 |
| 7208 | 1401–09, 1751–52 |
| 7210 | 1342 |
| 7211 | 1732 |
| 7212 | 1301, 1366, 1732 |
| 7213 | 1371 |
| 7214 | 1352, 1361–63, 1521, 1732, 3007 |
| 7215 | 1402 |
| 7231 | 1402 |
| 7232 | 1401–09, 1352 |
| 7233 | 1401–09, 3007 |
| 7234 | 1401–09, 1411, 3007 |
| 7235 | 1403, 3007 |
| 7236 | 1403, 3007 |

| United States Code Sections | Proposed Criminal Code Sections |
|---|---|
| Title 26—Continued | |
| 7237 | 1821–29, 1371 |
| 7238 | 1821–29 |
| 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) | 1732, 1617 |
| Title 30 (Mineral Lands and Mining) | |
| 689 | 1732, 1734, 1352 |
| 819 | 1352, 1613, 3003 |
| Title 31 (Money and Finance) | |
| 395 | 3007 |
| 665(i)(1) | 1732, 1737, 3007 |
| 1018 | 1362–63 |
| Title 33 (Navigation and Navigable Waters) | |
| 368 | 1613, 3007 |
| 447 | 1361–63 |
| 506 | 1342–43 |
| 507 | 1732 |
| 682 | 1701–05 |
| 990 | 1352, 1361, 1732, 1737 |
| Title 35 (Patents) | |
| 186 | 1113–15, 3007 |
| Title 36 (Patriotic Societies) | |
| 379 | 1732 |
| Title 38 (Veterans' Benefits) | |
| 787 | 1352, 1732 |
| 3405 | 1732, 1737, 3007 |
| 3501 | 1732, 1737 |
| 3502 | 1732, 1734 |
| Title 40 (Public Buildings, Property and Works) | |
| 13m | Chapter 17 |
| 193h | Chapter 17 |
| 193s | Chapter 17 |
| Title 41 (Public Contracts) | |
| 54 | 1732, 1758, 3007 |

| United States Code Sections | Proposed Criminal Code Sections |
|---|---|
| **Title 42 (Public Health and Welfare)** | |
| 261(a) | 1306, 1303, 1309, 1821–29, 3007 |
| 408 | 1352, 1732 |
| 1306 | 1371 |
| 1307 | 1352, 1732, 1381 |
| 1713 | 1732, 1352 |
| 1874 | 3007, 1352 |
| 1973i, 1973j | 1511, 1531, 1352 |
| 1974 | 1355 |
| 1974a | 1355, 1732 |
| 1995 | 1341–49 |
| 2000e–8(e) | 1371 |
| 2000g–2 | 1371 |
| 2272 | 1121 |
| 2273 | 3007, 1106–08, 1113 |
| 2274 | 1113–15 |
| 2275 | 1116 |
| 2276 | 1106–08, 1113, 1116 |
| 2277 | 1113–16 |
| 2278a | 1712 |
| 3188 | 3007 |
| 3220 | 3007, 1352, 1732 |
| **Title 43 (Public Lands)** | |
| 104 | 1342–43 |
| 183 | 3007 |
| 254 | 1352, 1362–63, 1732 |
| 362 | 1705 |
| 1191 | 1751–54, 1732 |
| **Title 45 (Railroads)** | |
| 60 | 1321 |
| 81 | 3007 |
| 228m | 1352 |
| 359 | 1352, 1732 |
| **Title 46 (Shipping)** | |
| 83i | 1352, 1732 |
| 142 | 3007 |
| 143 | 3007 |
| 170 | 1352–53, 1601–03, 1613 |
| 229e | 1751–54, 1352 |
| 231 | 1751–54, 1352 |
| 239 | 1321, 1346, 1351–52 |
| 369 | 1301, 1355 |
| 403 | 1352 |
| 408 | 1751–54 |
| 410 | 1751–54 |
| 413 | 3007, 1613 |
| 481 | 3007, 1613 |

| United States Code Sections | Proposed Criminal Code Sections |
|---|---|
| **Title 46—Continued** | |
| 526m | 1613 |
| 658 | 1613 |
| 701 | 1411, 1611–12, 1616, 1732, 1705 |
| 728 | 3007 |
| 808 | 3007 |
| 820 | 1352 |
| 835 | 3007 |
| 838 | 1352 |
| 839 | 1352 |
| 941 | 1732, 1737–38 |
| 1124 (1228) | 1342–43 |
| 1171 (1228) | 1352 |
| 1228 | 3007 |
| **Title 47 (Telegraphs, Telephones and Radiotelegraphs)** | |
| 21 | 1705 |
| 27 | 1301, 3007, 1611–13 |
| 220 | 1352, 1355, 3007 |
| 381 | 1613 |
| 409(8)(m) | 1342–45 |
| 501 | 3003, 3007 |
| 506 | 1617, 1732 |
| 508 | 1758 |
| 606 | 1106–08, 1617, 1701–05 |
| **Title 48 (Territories and Insular Possessions)** | |
| 1421m | 1821–29 |
| **Title 49 (Transportation)** | |
| 1 (17) | 1758 |
| 10 | 3007, 1732–33 |
| 20 | 3007, 1352, 1355 |
| 20a | 3007 |
| 41 | 3007 |
| 46 | 1342–49 |
| 121 | 1751–54, 1732 |
| 1118 | 1352, 1732, 1753 |
| 1472 | 1805, 1601–09, 1611–19, 1631–39, 1751–54, 1371, 1352, 1342–43, 1852–53, 1731–41, 1641–50, 1721, 1823 |
| **Title 50 (War and National Defense)** | |
| 167k | 1106, 1121, 3007 |
| 192 | 1106–08, 1205, 3007 |
| 210 | 1002, 1103, 1352, 1732, 3007 (or repeal?) |
| 217 | 3007 |
| 783(a) | 1103–05, 1301, 1501 |



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| United States Code Sections | Proposed Criminal Code Sections |
|---|---|
| 783(b)-(d) | 1113-16 |
| 794 | 1352, 3007 |
| 797 | 1705, 1712 |
| 822 | 1302, 1306, 3007 |
| 823 | 1118, 1306, 3007 |
| 824 | 1301 |
| 855 | 1122 |
| Title 50 App. (War and National Defense—Appendix) | |
| 3(a) | 1204, 3007 |
| 3(b) | 3007 |
| 3(c), (d) | 1117, 3007 |
| 5(b) | 1204, 3007 |
| 12 | 3007 |
| 16 | 1117, 1204, 3007 |
| 19 | 1352 |
| 327 | 1371, 3007 |
| 462 | 1109-10, 3007 |
| 468 | 3007 |
| 643a | 1371 |
| 643b | 1341-49 |
| 783 | 1113 |
| 1152 | 1341-49, 1371 |
| 1191(c), 1193(h), 1215(e) | 1352, 3007 |
| 1941d | 1372 |
| 2405(a) | 3003, 3007 |
| 2405(b) | 1204 |
| 2160(f) | 1371-72 |
| 2213a | 1732 |

# 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 func-

tions under this Act; and each such department, agency, and instrumentality 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.

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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."

## 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 is serving his first term as a member of the U.S. House of Representatives.

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 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.

FRED B. HELMS. Mr. Helms is a practicing attorney and a member of the law firm of Helms, Mulliss, McMillan & Johnston in Charlotte, North Carolina. He is a former prosecuting attorney, a member of the Commission for Improvement in Administration of Justice in North Carolina.

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.

ROBERT M. MORGENTHAU. Mr. Morgenthau served as United States Attorney for the Southern District of New York for approximately nine years.

LOUIS H. POLLAK. Dean Pollak is Dean of the Yale Law School and a Professor of Constitutional Law. He has served as a director of the NAACP Legal Defense and Education Fund.

CECIL F. POOLE. Mr. Poole served as United States Attorney for the Northern District of California for approximately eight years. He is presently a Professor of Law at the University of California at Berkeley and engaged in private practice.

MILTON G. RECTOR. Mr. Rector is the Director of the National Council on Crime and Delinquency and serves on the Board of Directors of the American Correctional Association. He is a member of the New York City Coordinating Council on Criminal Justice, The National Legal Aid and Defender Association and the International Center for Comparative Criminology. He was a delegate to the United Nations 2nd and 3rd World Congress on Prevention of Crime and Treatment of Offenders.

JAMES VORENBERG. Professor Vorenberg is a Professor of Law at Harvard Law School and the former Executive Director of the President's Commission on Law Enforcement and Administration of Justice.

WILLIAM F. WALSH. Mr. Walsh is a practicing criminal defense attorney in Houston, Texas, and former chairman of the Criminal Law Section of the American Bar Association. He is a Fellow of the American College of Trial Lawyers.

MARVIN E. WOLFGANG. Dr. Wolfgang is a Professor of Sociology and Criminal Statistics, head of the Department of Sociology, and Director of the Center for Studies in Criminology and Criminal Law at the University of Pennsylvania. He is a former President of the American Society of Criminologists, the author of numerous works on criminology, a member of the President's Commission on Obscenity and Pornography and Associate Secretary General of the International Society of Criminology.

ELLIOT L. RICHARDSON. Mr. Richardson, now Undersecretary of State, 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.

GUS TYLER. Mr. Tyler is Assistant President of the International Ladies Garment Workers Union. He is the author of the book, "Organized Crime in America" and numerous articles on organized crime and the problems of recidivism.

**[The following portion of § 201 is reproduced below to facilitate reference to the specific jurisdictional bases provided in the various Study Draft offenses.]**

## § 201. Common Jurisdictional Bases.

* * *

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;

(*b*) 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;

(*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 or any member or member-designate of the President's cabinet or the Supreme Court, 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 piracy, as defined in section 212.