

February 6, 1973

(This page to be added to Parole material submitted to Subcommittee A on February 1st.)

COMMENT

Source: Similar provisions are found in the Committee Print of the proposed federal criminal code §3-12F3(c) (p. 211 of the Print) and the Proposed Massachusetts Criminal Code chapter 264 §29.

Current Law: There is presently no provision in the law of Maine dealing with this subject.

The Draft: There is a threefold purpose to this section. One is to provide the Board of Parole with as much relevant information as possible when it makes a release decision. More importantly, however, is the opportunity this section provides for having inmates themselves participate meaningfully in the decision. By providing inmates a view of the criteria which will govern this important step in the corrections process and permitting them to focus on these criteria in their presentation to the Board, there is also created the opportunity for communication between the Board and the inmate on the specific strengths and weaknesses which appear in the immediate future of the inmate.

TITLE D-3 SENTENCING (SUB A)

1973

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CHAP 36 Sec 1	A 1, 2, 3, 4	1-2	1-26	2-1	Amended		3-8		
2	A 5, 6	1-2	1-26	2-1	Amended		3-8		
3	A 6, 7, 8	1-2	1-26	2-1	Amended		3-8		
4	A 9, 10, 11	1-2	1-26	2-1	None		3-8		
5	A 12, 13	1-2	1-26	2-1	None		3-8		
6	A ^{14, 15} a, b, c	1-24	1-26	2-1	Amended		3-8		
7	A ^{16, 17} 18, 19	1-24	1-26	2-1	Amended		3-8		
8	A 20, 21	1-24	1-26	2-1	None		3-8		

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March 16, 1973 meeting

Title D2 - Substantive Offenses (Sub B)

1973

DRAFTS	Page No.	Date	Date of Covering Memo	Date of Subc Meeting	Subc Action	Date of Redraft	Date of Memo to Comm.	Date of Comm. Meeting	Commission Action
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Chap 23 Sec 1 B 1,2,3	2-9	2-9	2-9	(2-15) Cancelled	none		3-8		
2 B 4,5	2-9	2-9	2-9	"	"		3-8		
3 B 6,7,8	2-9	2-9	2-9	"	"		3-8		
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TITLE D - General Principles (SOB C)

1973

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7	C 12, 13	3-1	3-2	3-7	Amended		3-8		

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March 16, 1973 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 23 Sex Offenses

Section 1. Definitions and General Provisions

In this chapter the following definitions apply:

A. "spouse" means a person legally married to the actor or a person with whom the actor is living as man and wife, but does not include a legally married person living apart from the actor under a judicial decree of separation.

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

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

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

2. No person may be prosecuted or convicted for violating this chapter unless:

A. the alleged offense was reported to or discovered by a law enforcement officer (k) within three months after its occurrence; or (ii) within one month after a parent, guardian, or other competent person interested in the victim and who is not a party to the offense learns of it, if the alleged victim was younger than

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16 years of age, incompetent, or unable to make complaint; or

B. there is direct or circumstantial evidence, deemed credible by the court, other than the testimony of the alleged victim which proves or which corroborates testimony of the alleged victim which proves the commission of the crime by the defendant.

COMMENT

Source: This section is patterned on the proposed criminal code of Massachusetts, chapter 265 section 20, and Senate 1, 93d Congress, First Session, section 2-7A1.

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

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

If the husband were involved in the rape as an aider and abettor, the common law rule would not preclude his criminal liability for the rape. See *State v. Flaherty*, 128 Me. 141, 145 (1929).

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

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

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

There does not appear to be any Maine law on the question of whether a mistake as to the age of the victim will provide a defense, in a sex offense which depends upon such age.

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

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

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

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

The provisions of subsection 2 also change the present law by enacting safeguards against false conviction.

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 23 Sex Offenses

Section 3. Gross Sexual Misconduct

A person is guilty of gross sexual misconduct

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

A. he compels such other person to submit:

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

(ii) by threat that imminent death, serious bodily injury, or kidnaping will be inflicted on such other person or on any other human being; or

B. the other person is under the age of 14; or

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

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

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

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

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

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

3. Sexual abuse of minors and unlawful sexual contact are offenses included in gross sexual misconduct.

4. Violation of subsection 1 is a class A crime if the victim suffers serious bodily injury as a result of the offense. Otherwise, violation of this section is a class B crime.

COMMENT

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

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

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

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

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

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

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

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 23 Sex Offenses

Section 4. Sexual Abuse of Minors

1. A person is guilty of sexual abuse of a minor if, being at least 18 years of age, he engages in sexual intercourse or a sexual act with another person who has attained his 14th birthday but has not attained his 16th birthday.

2. It is a defense to a prosecution under this section that the actor reasonably believed the other person to be 16 years of age or older.

3. Unlawful sexual contact is an offense included in sexual abuse of minors.

4. Sexual abuse of minors is a class C crime.

COMMENT

Source: This section follows the provisions of present law found in Title 17, §3152.

Current Maine Law: §3152 provides:

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

The Draft: This section treats intercourse and a sexual act as subject to the same rules. It adopts the age limits set out to govern intercourse in the present law.

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 23 Sex Offenses

Section 5. Unlawful Sexual Contact

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

A. the other person does not expressly or impliedly acquiesce in such sexual contact; or

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

C. the other person is less than 14 years of age; or

D. the other person is 14 or 15 years old and the actor is 20 years old or older; or

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

F. 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 such other person.

2. Sexual misconduct is a class D crime, except that if the other person is less than 14 years of age, the offense is a class C crime.

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COMMENT

Source: This section is based on section 2-7E3 of Senate 1, 93d Congress, First Session, and the proposed Massachusetts Criminal Code, chapter 265, section 18.

Current Maine Law: Title 17 §1951 provides:

"Whoever, having attained his 20th birthday, takes any indecent liberty or liberties or indulges in any indecent or immoral practice or practices with the sexual parts or organs of any other person, male or female, who has not attained his or her 16th birthday, either with or without the consent of such male or female person, or, whoever, having attained his 20th birthday, induces or procures any person who has not attained his or her 16th birthday to take any indecent liberty or liberties or to indulge in any indecent or immoral practice or practices with the sexual parts or organs of any person, male or female, other than the said person who has not attained his or her 16th birthday, shall, upon conviction thereof, be punished by imprisonment at hard labor for not less than one year nor more than 10 years."

This offense may be committed upon proof of sexual intercourse by persons within the stated age limits. *State v. Lindsey*, 254 A.2d 601 (Me. 1969). It may not be committed, however, by a touching of the child through his clothing. *State v. Rand*, 156 Me. 81 (1960).

The Draft: Subsection 1D creates a limited privilege from liability under this section for teenagers whose ages are in close proximity. Subsection 1C, however, makes clear that when the child is under the age of 14, the offense takes place regardless of the actor's age.

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

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

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March 16, 1973 meeting

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 9. Plea Negotiations

*Subject to
Rule-making
by SJC.*

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

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

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

Comment

This is the generalized section on plea negotiations which the Commission suggested should be included in this chapter.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 23 Sex Offenses

Section 1. Definitions and General Provisions

1. In this chapter the following definitions apply:

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

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

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

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

2. No person may be prosecuted or convicted for violating this chapter unless:

A. the alleged offense was reported to or discovered by a law enforcement officer (k) within three months after its occurrence; or (ii) within one month after a parent, guardian, or other competent person interested in the victim and who is not a party to the offense learns of it, if the alleged victim was younger than

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16 years of age, incompetent, or unable to make complaint; or

B. there is direct or circumstantial evidence, deemed credible by the court, other than the testimony of the alleged victim which proves or which corroborates testimony of the alleged victim which proves the commission of the crime by the defendant.

*Changes to
Prosecution*

Approved as amended 3-16-73.

TITLE D2 SUBSTANTIVE OFFENSESChapter 23 Sex OffensesSection 2. Rape

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

A. with any female under the age of 14; or

B. with any female, not his spouse, and he compels her to submit: (i) by force and against her will; or

(ii) by threat that death, serious bodily injury, or kidnaping will be imminently inflicted on her or on any other human being.

2. Sexual abuse of minors and unlawful sexual contact are offenses included in rape.

3. It is an affirmative defense that the defendant and the female were living together as man and wife at the time of the offense.

4. Rape is a class A crime. It is, however, a defense which reduces the crime to a class B crime that the female was a voluntary social companion of the defendant at the time of the offense and had, on that occasion, permitted him sexual contact.

Approved as amended 3-16-73.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 23 Sex Offenses

Section 3. Gross Sexual Misconduct

A person is guilty of gross sexual misconduct

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

A. he compels such other person to submit:

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

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

B. the other person is under the age of 14; or

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

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

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

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

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nature of the contact involved; or

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

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

3. Sexual abuse of minors and unlawful sexual contact are offenses included in gross sexual misconduct.

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

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

6. Violation of subsection 2A, 2C or 2E is a class B crime. Violation of subsection 2B or 2D is a class C crime.

Approved as amended 3-16-73.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 23 Sex Offenses

Section 4. Sexual Abuse of Minors

1. A person is guilty of sexual abuse of a minor if, being at least 18 years of age;

A. he engages in sexual intercourse with another person who has attained his 14th birthday but has not attained his 16th birthday; or

B. he engages in a sexual act with a person who has attained his 14th birthday, but has not attained his 18th birthday.

2. It is a defense to a prosecution under subsection 1A that the actor reasonably believed the other person to be 16 years of age or older; and to a prosecution under subsection 1B that he reasonably believed the other person to be 18 years of age or older.

3. Unlawful sexual contact is an offense included in sexual abuse of minors.

4. Sexual abuse of minors is a class C crime.

Tabled for Commission review of amendments 3-16-73.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 23 Sex Offenses

Section 5. Unlawful Sexual Contact

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

A. the other person does not expressly or impliedly acquiesce in such sexual contact; or

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

34. Widge C. the other person is less than 14 years of age; or

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

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

2. Sexual ^{contact} misconduct is a class D crime, except that if the other person is less than 14 years of age, the offense is a class C crime.

Acted on by subcommittee
October 12, 1972

October 6, 1972

1-31

Commission 59

March 28, 1973

Sub C 2 a

March 16, 1973

TITLE D1 GENERAL PRINCIPLES

Chapter 12 Criminal Liability

Section 1. Basis for Liability

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

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

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

Approved 3-16-73

TITLE D1 GENERAL PRINCIPLES

Chapter 12 Criminal Liability

Section 2. Ignorance and Mistake

1. Ignorance or mistake as to a matter of fact or law is a defense if: raises a reasonable doubt concerning

A. the ignorance or mistake/negates the kind of culpability required for the commission of the offense; or

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

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

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

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

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

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

- (1) a statute, ordinance or other enactment;
 - (2) a final judicial decision, opinion or judgment;
 - (3) an administrative order or grant of permission; or
 - (4) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the statute defining the offense.
- This subsection does not impose any duty to make any such official interpretation.

Approved as amended 3-16-73.

Commission 62

Sub C 5

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TITLE D1 GENERAL PRINCIPLES

Chapter 12 Criminal Liability

Section 3. Immaturity

1. No criminal proceeding shall be commenced against any person under the age of seventeen/except as a result of a finding of probable cause authorized by section 2611 (3) of title 15, or in regard to the offenses over which juvenile courts have no jurisdiction, as provided in section 2552 of title 15.

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

Approved as amended 3-16-73.

Commission 63

Sub C 7

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March 1, 1973

TITLE D1 GENERAL PRINCIPLESChapter 12 Criminal LiabilitySection 4. Duress

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

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

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

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

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

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

Tabled 3-7-73, pending review of justification drafts.

Tabling approved 3-16-73.

TITLE D1 GENERAL PRINCIPLES

Chapter 12 Criminal Liability

Section 5. Consent

1. It is a defense that when a defendant engages in conduct which would otherwise constitute an offense against the person or property of another, that such other consented to the conduct and that an element of the offense is negated as a result of such consent.

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

A. neither the injury inflicted nor the injury threatened was such as to threaten life or serious bodily injury; or

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

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

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

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

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

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

Approved as amended, 3-16-73.

Commission 66

Sub C 11

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TITLE D1 GENERAL PRINCIPLESChapter 12 Criminal LiabilitySection 6. Causation

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

Approved as amended, 3-16-73.

Commission 67

Sub C 12

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TITLE D1 GENERAL PRINCIPLES

Chapter 12 Criminal Liability

Section 7. Intoxication

1. It is a defense that when a defendant engages in conduct which would otherwise constitute an offense, there is evidence of intoxication which is such as to create a reasonable doubt concerning an element of the crime. Otherwise, intoxication is no defense.

2. As used in this section, "intoxication" means a disturbance of mental of physical capacities resulting from the introduction of alcohol, drugs, or other similar substances into the body.

Tabled as amended, 3-16-73.

PLEASE NOTE: Date of page referred to in this Table of Contents is noted to left of each section. Distributed at Commission Meeting March 16, 1973.

STATE OF MAINE

COMMISSION TO PREPARE A REVISION OF THE CRIMINAL LAWS

MATERIAL ACTED ON BY COMMISSION AS OF JANUARY 23, 1973

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March 19, 1973

INTRODUCTION TO DRAFT OF SUBTITLE D4: DRUGS April 25, 1973 meeting

In accordance with the directions of the Drug Subcommittee, an effort has been made entirely to separate the "criminal" from the "administrative" drug laws. Thus, all drug laws regulating doctors, pharmacists, et al. - in short, all those laws allowing certain persons and institutions to keep and deal in various ways with drugs will presumably continue to be located solely within Title 22 of the Maine Revised Statutes, and will not be considered by the Commission to Prepare a Revision of the Criminal Laws.

This plan necessitates, however, leaving entirely undefined in the Drug Subtitle of a new Title 17 precisely what persons may and may not do with respect to the various drugs that are commonly abused. The present draft of Subtitle D4 of Title 17 simply assumes that any revision of Title 22 will, in appropriate instances, permit doctors, pharmacists, law enforcement officers, and others to possess heroin, for example, in certain defined circumstances; and that Title 22 will permit patients who are given proper prescriptions for certain potentially dangerous drugs ~~will be allowed~~ to obtain and possess such drugs, etc. The present draft, then, deals with the situations which will face the police and the criminal courts in dealing with those persons whose drug activities fall rather clearly, for the most part, without the "administrative" or permissive provisions of a putative revised Title 22.

The imagined revision of Title 22 can be as simple or as complex as its authors desire. From the point of view of this Commission, all that really need be done to separate the "criminal" from the "administrative" drug laws is for all the statutes in Title 22 which establish "criminal" penalties to be repealed, and then, if necessary, re-enacted in positive or permissive, rather than negative or prohibitory form.

Two examples should make this clear. 22 MRSA 2383 prohibits the doing of certain acts with respect to marihuana: "Whoever manufactures, cultivates, grows, possesses or has under his control Cannabis . . . except as authorized by this chapter, shall be punished . . ." Section 2385, which now reads, "The provisions of this chapter restricting the possession of Cannabis . . . shall not apply to public officers . . ." need only be amended, in order to preserve the "administrative" status quo, to the following: "The provisions of Chapters 42 and 43 of Subtitle 4 of Title 17, restricting the possession of and the trafficking in marijuana [which would include transferring or giving it to another person, see Draft, sec. 411 (23) (D)] shall not apply to public officers . . . in the performance of their official duties, etc."

Similarly, section 2212-C now provides: "Whoever, except the laboratory of the Department of Health and Welfare, exchanges, delivers, barter, gives or furnishes [certain hallucinogenic substances, e.g., LSD] shall upon conviction thereof be punished, etc." If Draft section 421 were adopted, such conduct would constitute trafficking in a Schedule W drug, a Class B crime, and thus there would be no reason to retain section 2212-C in its present form. However, that section, although cast primarily in terms of a prohibition, also contains positive or permissive language which could easily (although somewhat absurdly) be preserved by amending section 2212-C as follows: "The laboratory of the Department of Health and Welfare may exchange, deliver, barter, give or furnish the following hallucinogenic substances . . . LSD . . . etc." Of course, it is not to be expected that the revisors of Title 22 would want to adopt such particularized and unsystematic statutes; these are suggested only to make clear the general scheme by which the labor in the drug field can be rationally divided between this Commission and the Commission on Drug Abuse. The latter can define, as generally or as particularly as it likes, who may do what with any and all drugs, and under what restrictions and conditions, whilst the latter can apply criminal sanctions to those who, having no statutory permission under Title 22, or in violation of any restrictions or conditions laid down therein, do certain defined things with certain specified drugs. In order clearly to separate the functions of the two Commissions, it is respectfully submitted that the Commission on Drug Abuse, or any redrafters of Title 22, do not provide any criminal penalties (i.e., punishments of imprisonment) for any violation of any provision in that Title; rather, if, in particular instances, it is felt that the general punishments provided in the drugs subtitle of Title 17 are too harsh, as applied to certain administrative violations, such violations may, by the imposition of a possible fine, only, be made mere civil violations by Title 22 itself.

Again, an example may help make things clear. Assume that Title 22 will require pharmacists, for example, to place certain labels on drugs which they dispense to patients for whom physicians have written prescriptions. If a pharmacist then, say, forgets to put the required label on a bottle of penicillin pills which he sells to a customer, the pharmacist will have committed a crime under Draft section 421 (4), i.e., Unlawful trafficking in a Schedule Z drug,

which is a Class D crime. If the drug in question was Methadone (a heroin substitute) instead of penicillin, the resulting crime would have been of Class B. Now, if the revisors of Title 22 think that such violations by the pharmacist here should be at least theoretically subject to these criminal penalties, they need do nothing other than provide what pharmacists may and must do. If, on the other hand, such criminal penalties are thought to be too severe, the hypothetical labelling provision of a revised Title 22 might conclude substantially as follows: "If a physician, pharmacist, et al. unintentionally fails to affix a label to the said container, as required in the preceding paragraph, such failure shall constitute a civil violation punishable by a forfeiture of not more than \$500." As expressly provided in Draft sec. 2421 (1) (B), such a civil violation provision in Title 22 would completely remove such administrative violation from the ambit of the criminal law.

March 19, 1973

CHART OF EXISTING MAINE DRUG LAWS

(Principal Criminal Laws Relating to Drugs)

For the convenience of the members of the Commission, and to avoid the necessity of having to append long and repetitive Notes to the draft of subtitle D4: Drugs, the Reporter on Drug Laws has prepared the following chart of all the principal criminal laws relating to drugs that are now in force in the State of Maine.

How to Read the Chart

The numbered vertical columns, 1 through 17, contain all the various acts, or things a person can do, which are punishable under the existing statutes; and the horizontal rows contain all the various drugs, substances, or (in the case of hypodermic needles and syringes) articles that the act relates to. As will be seen by glancing at the chart, there is a large and confusing number of acts that are enumerated in the statutes, and the various sections often contain similar and overlapping, although rarely identical, language to describe the same general sort of forbidden conduct. Thus, it is forbidden to "sell, exchange, deliver, barter, give or furnish" but it is forbidden to "sell, furnish, or give away or offer to sell, furnish or give away" barbiturates, and so forth.

Therefore, each vertical column containing the criminal act in question is cross-referenced to the column containing the nearest applicable language. If no column is applicable, there is simply a blank.

The chart contains the following abbreviations:

incl	means "including"
yr, yrs	means "year" or "years"
mos	means "months"
&/or	means "either (imprisonment) or (a fine), or both"
2d	means "second offense"
3d	means "third offense"

& subsqnt	means "(second or third offense) and all subsequent offenses"
exc	means "except"
SS	means "suspended sentence"
w/o	means "without"
No parole, min.	means "no parole until the minimum statutory term of imprisonment shall have been served" (this phrase has been more fully written out on the chart where space permits)

In addition, the following conventions are used:

Unless otherwise indicated, every 4-digit number is a reference, by section, to Title 22 of MRSA. Example: "2210" means "22 MRSA, sec. 2210."

Unless otherwise indicated, every sentence of fine or imprisonment is a maximum sentence. Example: "2 yrs &/or \$1,000 means "imprisonment by not more than 2 years, or a fine of not more than \$1,000, or both such fine and imprisonment."

Where minimum and maximum sentences, whether of fine or imprisonment, are shown, the minimum is mandatory. Example: "2 - 8 yrs & \$1,000 means 'imprisonment by not less than 2 nor more than 8 years, and a fine of not more than \$1,000.'"

The section containing the punishment is underlined; other sections to which the punishment section may refer are noted first, without underlining. Examples: "2375, 2380, 2 - 8 yrs & \$1,000" in Column 11 means "By 22 MRSA 2380, a violation of section 2375 (obtaining drugs by fraud) is punishable by imprisonment for not less than 2 years nor more than 8 years and by a fine of not more than \$1,000 for the first offense." "2212-B, 2212-E, 1 - 5 yrs & \$1,000" in column 6 means "22 MRSA sec. 2212-E makes the sale of any of the substances listed in section 2212-B (including hallucinogens) punishable by imprisonment for not less than 1 nor more than 5 years and by a fine of not more than \$1,000, for the first offense."

With respect to second and subsequent offenses, if the phrase "No SS or probation", or "No parole, min." begins a new sentence after a period, the phrase applies to all sentences applied for the crime in question, whether it be a first, second, or third offense. But if the phrase "w/o SS or probation" is not separated but, rather, comes at the end of a sentence describing the punishment for a second or subsequent offense, the phrase applies only to such second or subsequent offense. Examples: "No SS or probation", in column 2, means that a sentence cannot be suspended, nor can probation be given for any conviction of selling or offering to sell amphetamines. But "2d & subsqnt, 5 - 20 yrs w/o SS or probation", in column 3, means that the prohibition against a suspended sentence or probation applies only to second and subsequent convictions of possession of narcotics.

Footnotes are indicated by numbers in parentheses ().

<p>DRUG or ARTICLE ↓</p> <p>ACT →</p>	<p>1 SELL, FURNISH, GIVE AWAY, or OFFER TO SELL, etc</p>	<p>2 SELL or OFFER TO SELL</p>	<p>3 POSSESS, BE IN POSSESSION, HAVE UNDER CONTROL (10)</p>
<p>CANNABIS, incl THC, Marihuana, Hashish (1)</p> <p>PEYOTE, incl Mescaline (2)</p> <p>(Definitions 2382)</p>	<p>See column 17.</p>	<p>See column 17.</p>	<p>See column 16.</p>
<p>HALLUCINOGENS, incl LSD, DMT, DET, DPT, THC, DOM or STP, PCP, MDA, MDMA, TMA, JB-318 & JB-336. (Listed, 2212-B) (3)</p>	<p>Sell, see column 6. (No offer to sell, etc)</p> <p>Furnish, give, see column 5.</p>	<p>Sell, see column 6. (No offer to sell)</p>	<p>2212-B, 2 yrs &/or \$1,000</p>
<p>AMPHETAMINES, incl Methamphetamine (4)</p>	<p>See column 2.</p>	<p>2210-A, 2215, 1-5 yrs & \$1,000. 2d, 5-10 yrs & \$5,000. 3d & subseqnt, 10-40 yrs & \$10,000. No SS or probation.</p>	<p>2210, 2215, 2 yrs &/or \$1,000</p>
<p>BARBITURATES, incl Veronal, Barbital (5)</p>	<p>2210, 2215, 2 yrs &/or \$1,000</p>	<p>See column 1.</p>	<p>2210, 2215, 2 yrs &/or \$1,000</p>
<p>PRESCRIPTION DRUGS (6)</p> <p>(Defined, 2210)</p>	<p>2210, 2215, 2 yrs &/or \$1,000</p>	<p>See column 1.</p>	<p>2210, 2215, 2 yrs &/or \$1,000</p>
<p>NARCOTICS, incl Cocaine, Isonipocaine; Opium, Morphine, Heroin (7)</p> <p>(Definition, 2361)</p>	<p>Sell, see column 7. (No offer to sell, etc)</p>	<p>See column 7. (No offer to sell)</p>	<p>2362, 20 yrs &/or \$50,000. 2d & subseqnt, 5-20 yr w/o SS or probation. (11)</p>
<p>"POTENT MEDICINAL SUBSTANCES" (8)</p> <p>(Designated pursuant to 2201)</p>	<p>2201, 2210, 2215, 2 yrs &/or \$1,000</p>	<p>See column 1.</p>	<p>2201, 2210, 2215, 2 yrs &/or \$1,000</p>
<p>HYPODERMIC NEEDLE, SYRINGE (9)</p> <p>(Defined, 2362-A)</p>	<p>See column 14. (No offer to sell, etc)</p>	<p>See column 14. (No offer to sell)</p>	<p>2362-A, 2 yrs &/or \$100</p>

Act Drug	4 FURNISH, GIVE AWAY or OFFER TO FURNISH, etc	5 EXCHANGE, DELIVER, BARTER, GIVE or FURNISH	6 SELL	7 MANUFACTURE, SELL, PRESCRIBE, AD- MINISTER, DISPENSE or COMPOUND
CANNA	See column 17.	See column 17.	See column 17.	Manufacture, see column 16.
PEYOT MESCA				Sell, etc, see column 17.
HALLU	See column 5. (No offer to furnish or give away)	2212-B, 2212-C, 10 yrs &/or \$3,000. 2d & subsqnt, 2-10 yrs w/o SS or probation. (12)	2212-B, 2212-E, 1-5 yrs & \$1,000. 2d, 5-10 yrs & \$5,000. 3d & subsqnt, 10-40 yrs & \$10,000. No SS or probation.	Sell, see column
AMPHE	2210, 2215, 2 yrs &/or \$1,000	See column 4.	See column 2.	Sell, see column
BARBI	See column 1.	See column 1.	See column 1.	Sell, see column
PRESC DRUGS	See column 1.	See column 1.	See column 1.	Sell, see column
NARCO	See column 7. (No offer to furnish, etc)	See column 7.	See column 7.	2362-C, 1-20 yrs & \$50,000. 2d, 5-20 yrs & \$50,000. 3d & subsqnt, 10-40 yrs & \$50,000. No SS or probation. (13)
"POTE MEDI SUBS"	See column 1.	See column 1.	See column 1.	Sell, see column
HYPO NEEDL SYR	See column 14. (No offer to furnish, etc)	See column 14.	See column 14.	Sell, see column 14.

Act Drug	8 MANUFACTURE	9 BEING UNDER INFLU - ENCE IN PUBLIC (14)	10 PRESCRIBING BY PHYSICIAN, DENTIST, VETERINARIAN (15)	11 OBTAIN OF ATTEN TO OBTAIN BY DE CEIT, FRAUD, etc (16)
GANNA PEYOT MESCA	See column 16.			(17)
HALLU				2375, 2380, 2-8 yrs & \$1,000. 2d (18) 5-15 yrs & \$2,000 3d & subsqnt (18) 10-20 yrs & \$5,000 No SS exc first. No parole, min.
AMPHE		2210, <u>2215</u> , 2 yrs &/or \$1,000		(17)
BARBI		2210, <u>2215</u> , 2 yrs &/or \$1,000		(17)
PRESC DRUGS		2210, <u>2215</u> , 2 yrs &/or \$1,000		
NARCO	(Cocaine, Alpha & Beta Eucaine) 2205, <u>2214</u> , 11 mos &/or \$50 - \$1,000. See also column 7.		2207, <u>2214</u> , 11 mos &/or \$50 - \$1,000. See also column 7.	2375, 2380, 2-8 yrs & \$1,000. 2d (18) 5-15 yrs & \$2,000 3d & subsqnt (18) 10-20 yrs & \$5,000 No SS exc first. No parole, min.
'POTE MEDI SUBS"		2210, <u>2215</u> , 2 yrs &/or \$1,000		2375, 2380, 2-8 yrs & \$1,000. 2d (18) 5-15 yrs & \$2,000 3d & subsqnt (18) 10-20 yrs & \$5,000 No SS exc first. No parole.
HYPO NEEDL SYR				

Act Drug.	12 ADMINISTRATIVE VIOLATIONS of chapt 557, re NARCOTICS (19)	13 CHILD UNDER 18, SELL, GIVE, ADMINISTER, or DISPENSE TO, or CON- SPIRE TO SELL, etc	14 DELIVER, SELL, EXCHANGE	15 BEING PRESENT WHERE KEPT OR DE- POSITED OR IN CO- MPANY of POSSESSOR
CANNA PEYOT MESCA			See column 17.	2383, 11 mos &/or \$1,000
HALLU			Deliver, exchange, see column 5. Sell, see column 6.	
AMPHE			Deliver, exchange, see column 4. Sell, see column 2.	
BARBI			See column 1.	
PRESC DRUGS			See column 1.	
NARCO	Ch. 557, 2380, 2-8 yrs & \$1,000. 2d (18), 5-15 yrs & \$2,000. 3d & subsqnt (18), 10-20 yrs & \$5,000. No SS exc first. No parole, min.	17 MRSA sec. 858, 20 yrs & \$10,000. No SS exc in case of first offense. No parole until statutory minimum served.	See column 7.	
POTE MEDI SUBS"			See column 1.	
HYPO NEEDL BYR			2362-A, 2 yrs &/or \$100	

Act Drug	16 MANUFACTURE, CULTI- VATE, GROW, POSSESS OR HAVE UNDER CONTROL	17 SELL, EXCHANGE, DELI- VER, BARTER, GIVE or FURNISH, OR OFFER to SELL, etc (20)	ACT ← DRUG or ARTICLE
CANNA PEYOT MESCA	2383, 11 mos & \$1,000. 2d & subsqt, 2 yrs & \$2,000.	2384, 5 yrs &/or \$1,000. 2d & subsqt, 2-10 yrs w/c SS or probation.	CANNABIS, incl Marihuana, Hashish, THC (1) PEYOTE, incl MESCALINE (2)
HALLU	Possess, see column 3.	Sell, see column 6. Exchange, deliver, barter, give or fur- nish, see column 5. (No offer to sell, etc)	HALLUCINOGENS, incl LSD, DMT, etc (3)
AMPHE	Possess, see column 3.	Sell or offer to sell, see column 2. Furnish, give, or offer to furnish, give, see column 4.	AMPHETAMINES, incl Methamphetamine (4)
BARBI	Possess, see column 3.	See column 1.	BARBITURATES, incl Veronal, Bar- bital (5)
PRESC DRUGS	Possess, see column 3.	See column 1.	PRESCRIPTION DRUGS (6)
NARCO	Manufacture, see column 7. Possess, see column 3.	Sell, see column 7. (No offer to sell, etc)	NARCOTICS, incl Cocaine, Opium Heroin, Mor- phine (7)
"POTE MEDI SUBS"	Possess, see column 3.	See column 1.	"POTENT MEDICINAL SUBSTANCES" (8)
HYP NEEDL SYR	Possess, see column 3.	See column 14. (No offer to sell, etc)	HYPODERMIC NEEDLE SYRINGE (9)

FOOTNOTES

(All sections are in 22 MRSA, unless otherwise indicated)

(1) Sec. 2382, subsec. 1, defines "cannabis" so as to include not only marijuana, but also hashish, a concentrated and more powerful form of the weed, and the tetrahydrocannabinols (THC) which are the "active ingredients" in both marijuana and hashish. But THC, a hallucinogen, is also specifically included in the list of hallucinogens which are regulated by sections 2212-B, C, and E. See note (3).

(2) Sec. 2382, subsec. 2, defines "peyote" so as to include its "active ingredient", mescaline, a hallucinogenic drug. But although so included here, mescaline is also separately mentioned in the sections punishing the illegal possession (sec. 2383) or sale (sec. 2384) of marijuana and peyote. All these substances are treated identically for all purposes under Maine law.

(3) Sec. 2212-B punishes the possession of certain listed hallucinogenic drugs of varying dangerousness and potency. Tetrahydrocannabinol (THC) is specifically mentioned here, although that drug is also controlled by the more recent sec. 2382, since the definition of "cannabis" therein clearly includes THC. This drug, although possible to synthesize, is almost always obtained by chemical extraction from marijuana, e.g., by a solvent.

(4) Secs. 2212-0, 2212-A, ". . . any amphetamines or derivatives or compounds thereof." This covers methamphetamine dichloride, or "speed", the most commonly abused of the stronger amphetamines. Certain "amphetamines" are powerful hallucinogens, and are rightly so classified under Maine law. See sec. 2212-B.

(5) Sec. 2210 lumps the strong, dangerous barbiturates (e.g., amobarbital, butobarbital) with the common, less harmful varieties (e.g. barbital, phenobarbital).

(6) Sec. 2210, "any drug bearing on its container the legend 'Caution--Federal law prohibits dispensing without prescription.'"

(7) Sec. 2361, subsec. 15, defines "narcotic drugs" so as to include "coca leaves, opium, isonipecaine and every other substance neither chemically nor physically distinguishable from them and any other drugs to which the federal laws relating to narcotic drugs may now apply; and any drug found by the board [of commissioners of the profession of pharmacy] . . . to have an addiction-forming or addiction-sustaining liability similar to morphone or cocaine . . ." Actually, cocaine and the other coca derivatives are not addicting in the same way as the opiate derivatives, and are not regarded as true narcotics by most pharmacologists.

(8) Sec. 2201, "The Board of Commissioners of the Profession of Pharmacy . . . may . . . by regulations, designate as potent medicinal substances" certain drugs, including barbiturates, amphetamines and other stimulants and depressants.

(9) Sec. 2362-A, ". . . hypodermic syringe, hypodermic needle, or any instrument adapted for the use of narcotic drugs by parenteral administration."

(10) This column contains all references to possessory drug offenses, whether the language is "possess or have under . . . control" (e.g., sec. 2362), "have in possession" (e.g., secs. 2210, 2362-A), or whether, in the statute, possession is not separately dealt with, but is lumped in with selling, furnishing, etc. (as in sec. 2210). The one exception is with respect to marijuana, peyote, and mescaline, where possession is left with "manufacture, cultivate, grow, possess, or have under control," rather than taken out for treatment here. See column 16.

(11) The lawful possession of Narcotics is governed by sec. 2365. See also Note (13).

(12) The title of section 2212-C, "Selling of certain hallucinogenic drugs" (e.e., those listed in sec. 2212-B) is misleading, since the text of the section forbids one only to "exchange, deliver, barter, or furnish." Unlawful "selling" is specifically prohibited in sec. 2212-E, which is likewise captioned "Selling of certain hallucinogenic drugs."

(13) Lawful prescriptions for narcotics are covered in sec. 2363. See also Note (11). Sec. 2206, which was repealed by St. 1971, c. 487, sec. 1, forbade all persons except pharmacists or physicians from furnishing, selling, or keeping for sale opium and the derivatives thereof. This appears to have been the only reference in recent Maine law to a "possession with intent to sell" type of drug offense. It was, however, only a misdemeanor, punishable by a fine.

(14) Sec. 2212, "Whoever . . . is found to be under the influence of any of the substances enumerated in section 2210 in any street, highway, or other public place . . ."

(15) Sec. 2207 prohibits only prescribing, etc., which is not for bona fide treatment purposes.

(16) Sec. 2375, subsec. 1, "No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug: A. By fraud, deceit, misrepresentation or subterfuge; or, B. By the forgery or alteration of a prescription or any written order; or, C. By the concealment of a material fact; or, D. By the use of a false name or the giving of a false address." Subsec. 5, "No person shall make or utter any false or forged prescription or false or forged written order."

(17) None of these drugs are specifically mentioned in sec. 2375, parts of which are set out in Note (16) above; but any or all of these drugs could be designated "potent medicinal substances" pursuant to sec. 2201. See Note (8).

(18) Sec. 2380, ". . . for a second offense, or if, in case of a first conviction of violation of any provision of this chapter, the offender shall previously have been convicted of any violation of the laws of the United States or of any other state, territory or district relating to narcotic drugs or marijuana, the offender shall be punished by a fine of not more than \$2,000 and by imprisonment for not less than 5 nor more than 15 years. For a third or subsequent offense, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the laws of the United States or of any other state, territory or district relating to narcotic drugs or marijuana, the offender shall be punished by a fine of not more than \$5,000 and by imprisonment for not less than 10 nor more than 20 years . . ."

(19) Sec. 2380 punishes, in the manner indicated, all manner of administrative violations of the chapter dealing with narcotics. These include offenses which can only be committed by physicians, pharmacists, veterinarians and others who may deal lawfully with drugs, and will not be set out here.

(20) By its terms, sec. 2384 punishes only the selling, exchanging, delivering, bartering, giving or furnishing of Cannabis, Mescaline, or Peyote; but "sale" is defined in sec. 2382, subsec. 3 so as to include "barter, exchange or gift, or offer thereof."

OUTLINE OF SUBTITLE D4

DRUGS

Chapter 41. Definitions and Schedules of Drugs

- Section 411. Definitions
- Section 412. Schedules W, X, Y, and Z

Chapter 42. Trafficking in Drugs

- Section 421. Unlawful Trafficking in Scheduled Drugs
- Section 422. Trafficking in Counterfeit Drugs
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Chapter 43. Possession of Drugs

- Section 431. Unlawful Possession of Schedule W, X, Y, and Z Drugs

Chapter 44. Miscellaneous Drug and Drug-Related Crimes

- Section 441. Allowing Premises to be Used for Drug Crime
- Section 442. Acquiring Drugs by Fraud
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Chapter 45. Analysis and Destruction of Scheduled Drugs by State Laboratories

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Chapter 46. Forfeiture of Drugs and Other Property

- Section 461. Property Subject to Forfeiture
- Section 462. Seizure and Custody of Property Subject to Forfeiture
- Section 463. Commencement, Conduct, and Disposition of Forfeiture Proceedings
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- Section 465. Summary Seizure and Destruction of Contraband Plants

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- Section 471. Arrest without Warrant by Police Officer for Drug Crimes
- Section 472. Schedule Z Drugs Contraband Subject to Seizure.

March 12, 1973

SUBTITLE D4 DRUGS

Chapter 41 Definitions and Schedules of Drugs

Section 411. Definitions

As used in this subtitle, the following words shall, unless the context clearly requires otherwise, have the following meanings:

1. "Agency", any department, commission, board, agency, laboratory or institution of the State of Maine, or of any subdivision thereof, which is charged with the enforcement or performance of any provision of this subtitle.

2. "Attorney General", the Attorney General or an Assistant Attorney General.

3. "Counterfeit drug".

A. A substance which is or is intended to be represented by a trafficker to be a particular scheduled drug, but which is in fact not such a drug.

B. This term shall not include any drug or substance lawfully administered in good faith by a physician or other medical practitioner to a patient as a placebo or as a substitute for any drug.

4. "County Attorney", a County Attorney or Assistant County Attorney.

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5. "Drug".

A. A substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; or

B. a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals; or

C. a substance, other than food, intended to affect the structure, or any function of the body or brain of man and animals, exclusive of alcohol and tobacco; or

D. a substance intended for use as a component of any article specified in clauses A, B, or C, exclusive of devices or their components, parts or accessories; or

E. any other substance subject to regulation under Title 22; or

F. unless otherwise provided in this Title, a substance containing any amount of a drug, as defined herein.

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6. "Hashish".

A. Marijuana of which the concentration therein of delta-9 or delta-8 tetrahydrocannabinol exceeds two and one half per cent.

B. Proof that marijuana has been chemically or mechanically refined, treated or processed in such manner as to increase the proportion of resin and resinous material therein, as compared to marijuana which has merely been culled of stems, stalks, and seeds, dried, and ground up, shall create a presumption that such marijuana is hashish.

7. "Hypodermic apparatus", hypodermic syringe, hypodermic needle, or any instrument designed or adapted for the administration of any drug by injection.

8. "Isomer", the optical isomer, except wherever appropriate, the optical, position or geometric isomer.

9. "Manufacture".

A. To produce, prepare, propagate, compound, convert or process, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis;

B. To package or repackage a substance, or label or relabel its container, except that this term does not include the repackaging or relabelling of a Scheduled drug which is lawfully possessed by a person for his own use.

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10. "Marijuana".

A. All parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin, not including the mature stalks of the plant, fiber produced from the stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil, or cake of the sterilized seed of the plant or the sterilized seed of the plant which is incapable of germination.

11. "Narcotic drug", any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical syntheses:

A. Opium and any opiate, and any salt, compound, derivative or preparation of opium or opiate; or

B. Any salt, compound, isomer, ester, ether, derivative or preparation thereof which is chemically equivalent or identical to or with any of the substances referred to in clause A, but not including the isoquinoline alkaloids of opium; or

C. Opium poppy and poppy straw.

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12. "Opiate".

A. Any substance having an addiction forming or addiction-sustaining property or liability similar to morphine or capable of conversion into a drug having^{such} addiction-forming or addiction-sustaining property or liability.

B. This term does not include, unless specifically designated or listed in Schedule W, X, Y, or Z the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts, dextromethorphan, but does include its racemic and levorotatory forms.

13. "Opium poppy", the plant of the species *Papaver somniferum* L., except its seeds.

14. "Poppy straw", all parts, except the seeds, of the opium poppy, after mowing.

15. "Prescription drug", any drug upon which the manufacturer or distributor has placed, or is obliged to place, in order to comply with federal law and regulations, the following legend: "Caution, Federal law prohibits dispensing without prescription."

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16. "Scheduled drug", any Schedule W, X, Y or Z drug.
17. "Schedule W drug", any drug named, listed, or described in Schedule W of section 412.
18. "Schedule X drug", any drug named, listed, or described in Schedule X of section 412.
19. "Schedule Y drug", any drug named, listed, or described in Schedule Y of section 412.
20. "Schedule Z drug", any drug named, listed, or described in Schedule Z of section 412.
21. "State laboratory", a laboratory of any state agency which is capable of performing any or all of the analyses that may be required to establish that a substance is a Scheduled or a counterfeit drug, including, but not limited to, the laboratory of the State Department of Health and Welfare and any such laboratory that may be established within the Maine State Police.
22. "Law enforcement officer", a police officer, or agent of any agency.
23. "Traffick".
 - A. To make, create, manufacture; or
 - B. to grow or cultivate, except with respect to marijuana; or
 - C. to deal, barter, trade, conduct any sort of business in; or

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D. to sell, give, furnish, dispense, administer, prescribe, deliver, or transfer to another;

E. to possess with the intent to do any act mentioned in ~~subsection 4A or 4D.~~
clause C or D.

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Chapter 41 Definitions and Schedules of Drugs

Section 412. Schedules W, X, Y and Z

For the purposes of defining crimes under this subtitle and of determining the penalties therefor, there are hereby established the following Schedules, designated W, X, Y and Z.

1. Schedule W

A. Unless listed or described in another Schedule, all narcotic drugs, including but not limited to heroin (diacetylmorphine), methadone, pethidine, morphine and opium.

B. Unless listed or described in another Schedule, any amphetamine, or its salts, isomers, or salts of isomers, including but not limited to methamphetamine, or its salts, isomers, or salts of isomers.

C. Unless listed or described in another Schedule, or unless made a nonprescription drug by federal law, barbituric acid or any derivative of barbituric acid, or any salt of barbituric acid or of a derivative of barbituric acid, including but not limited to amobarbital, butobarbital, pentobarbital, secobarbital, thiopental, and methohexital.

D. Methaqualone or its salts.

E. Methprylon.

F. Flurazepam.

G. Carbromal.

H. Chloral hydrate.

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I. Glutethimide.

J. Unless listed or described in another Schedule, any of the following hallucinogenic drugs, or their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) 3, 4-methylenedioxy amphetamine *MVA*
- (2) 5-methoxy-3, 4-methylenedioxy amphetamine
- (3) 3, 4, 5-trimethoxy amphetamine
- (4) 4-methyl-2, 5, -*dimethoxy (STP)*amphetamine
- (5) Diethyltryptamine
- (6) Dimethyltryptamine
- (7) Phencyclidine *2d most common*
- (8) Lysergic acid diethylamine *amide*

K. Lysergic acid.

L. Lysergic acid amide.

M. Cocaine, coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances, except decocainized coca leaves or extractions whereof which do not contain cocaine or ecgonine.

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2. Schedule X

A. Unless listed or described in another Schedule, any of the following drugs having a depressant effect on the central nervous system:

- (1) Chlorhexadol
- (2) Sulfondiethylmethane
- (3) Sulfonethylmethane
- (4) Sulfonmethane

B. Phenmetrazine and its salts.

C. Nalorphine.

D. Methylphenidate.

E. Chlordiazepoxide or its salts.

F. Diazepam.

G. Unless listed in another schedule, any of the following hallucinogenic drugs, or their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) Bufotenine
- (2) Ibogaine
- (3) Mescaline, including but not limited to peyote
- (4) N-methyl-3-piperidyl benzilate

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- (5) N-ethyl-3-piperidyl benzilate
- (6) Psilocybin
- (7) Psilocyn
- (8) Tetrahydrocannabinols, including but not limited to hashish.

H. Unless listed in another class, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs or any salts thereof:

(1) Not more than 300 milligrams of dehydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 300 milligrams of dehydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 1.8 grams of dehydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

(4) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit with one or more active nonnarcotic ingredients in recognized therapeutic amounts.

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(5) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

3. Schedule Y

- A. Barbital
- B. Chloral betaine
- C. Ethchlorvynol
- D. Ethinamate
- E. Methohexital
- F. Methylphonbarbital
- G. Paraldehyde *Knockout drug*
- H. Petrichloral
- I. Phenobarbital
- J. Codeine (methyilmorphine)

K. Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredient in sufficient proportion to confer upon the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

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(1) Not more than 2.5 milligrams of diphenoxylate with not less than 25 micrograms of atropin sulfate per dosage unit.

4. Schedule Z

A. All prescription drugs other than those included in Schedules W, X, or Y.

B. Marijuana.

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SUBTITLE D4 DRUGS

Chapter 42 Trafficking in Drugs

Section 421. Unlawful Trafficking in Scheduled Drugs

1. A person is guilty of unlawful trafficking in a Scheduled drug if he intentionally or knowingly trafficks in a Scheduled drug, unless the conduct which constitutes such trafficking is either

A. expressly authorized by Title 22, or

B. expressly made a civil violation by Title 22.

2. Unlawful trafficking in a Schedule W drug is a Class B crime.

3. Unlawful trafficking in a Schedule X drug is a Class C crime.

4. Unlawful trafficking in a Schedule Y or Z drug is a Class D crime.

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TITLE D4\ DRUGS

Chapter 42 Trafficking in Drugs

Section 422. Trafficking in Counterfeit Drugs

1. A person who intentionally or knowingly trafficks in a counterfeit drug shall be guilty of a Class C crime; except that a defendant convicted of a violation of this section who proves by a preponderance of the evidence that the counterfeit drug was in fact substantially harmless to human life and health when taken or administered in the customary or intended manner shall be guilty of a Class D crime.

2. Issues of fact concerning the harmfulness or substantial harmlessness of a counterfeit drug shall be tried to a court without a jury after the defendant has pleaded or been found guilty.

3. A person may be guilty of a crime both under this section and also under section 421 if he intentionally or knowingly trafficks in a counterfeit drug which is itself a Scheduled drug.

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SUBTITLE D4 DRUGS

Chapter 42 Trafficking in Drugs

Section 423. Aggravated Trafficking

1. A person who trafficks with a child under 18 in a Scheduled or counterfeit drug in violation of section 421 or 422 shall be guilty of aggravated trafficking.

2. A person who trafficks in a Scheduled or counterfeit drug in violation of section 421 or 422 shall be guilty of aggravated trafficking if

A. such person has previously been convicted of a crime under this chapter; or

B. such person has previously been convicted of a crime, however designated, under the former laws of the State of Maine, or under the existing or former laws of the United States or of any State, where the conduct which forms the basis of such previous conviction would constitute a crime under this chapter.

3. Aggravated trafficking is a crime one Class more serious than such trafficking would otherwise be.

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SUBTITLE D4 DRUGS

Chapter 43 Possession of Drugs

Section 431. Unlawful Possession of Schedule W, X and Y Drugs

1. A person is guilty of unlawful possession of a Scheduled drug if he intentionally or knowingly possesses a Scheduled drug, unless the conduct which constitutes such possession is either

A. expressly authorized by Title 22, or

B. expressly made a civil violation by Title 22.

2. Unlawful possession of a Schedule W ~~or X~~ drug is a Class C crime.

3. Unlawful possession of a Schedule ^{X or} Y drug is a Class D crime.

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TITLE D4 DRUGS

Chapter 44 Miscellaneous Drug and Drug-Related Crimes

Section 441. Allowing Premises to be Used for Drug Crime

A person who knowingly allows or permits premises owned, leased possessed or controlled by him to be used by another person for the purpose of committing any crime under this subtitle shall be guilty of a Class D crime.

Section 442. Acquiring Drugs by Fraud

A person who intentionally or knowingly acquires or obtains, or attempts to acquire or obtain, possession of a Scheduled drug by misrepresentation, fraud, forgery, deception or subterfuge, including but not limited to the making or tendering of a forged or falsified prescription, or the nondisclosure of a material fact, shall be guilty of a Class C crime.

Section 443. Stealing Drugs

A person who steals a Scheduled drug from a person authorized to possess or traffick in such drug shall be guilty of a Class C crime.

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Section 444. Trafficking in Hypodermic Apparatuses

A person who intentionally or knowingly trafficks in a hypodermic apparatus shall be guilty of a Class C crime, unless the conduct which constitutes such trafficking is either

- A. expressly authorized by Title 22; or
- B. expressly made a civil violation by Title 22.

Section 445. Possession of Hypodermic Apparatuses

A person who intentionally or knowingly possesses a hypodermic apparatus shall be guilty of a Class D crime, unless the conduct which constitutes such possession is either

- A. expressly authorized by Title 22; or
- B. expressly made a civil violation by Title 22.

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SUBTITLE D4 DRUGS

Chapter 45 Analysis and Destruction of Scheduled Drugs by State
Laboratories

Section 451. Analysis of Scheduled Drugs

1. A law enforcement officer or agency which comes into possession of a Scheduled drug, or of a substance which is reasonably suspected to be a Scheduled or counterfeit drug, may obtain a chemical analysis thereof from a State laboratory without fee.

2. A State laboratory which receives a drug or substance for analysis under this chapter shall, if it is capable of so doing, analyze the same as requested, and shall issue a certificate stating the results of such analysis. Such certificate, when duly signed and sworn to by a qualified chemist, or by a laboratory technician whose testimony as an expert has been received in any court of the State of Maine, of the United States, or of any State, shall be admissible in evidence in any court of the State of Maine, and shall create a presumption that the composition and quality of the drug or substance is as stated therein.

3. Transfers of drugs and substances to and from a State laboratory for purposes of analysis under this chapter may be by certified or registered mail, and when so made shall be deemed to comply with all the requirements regarding the continuity of physical evidence.

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4. Nothing contained in this section shall be deemed to prevent analyses of drugs from being performed by laboratories of the United States, of another State, or of private persons or corporations.

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TITLE D4 DRUGS

Chapter 45 Analysis and Destruction of Scheduled Drugs by State Laboratories

Section 452. Destruction of Scheduled Drugs

1. When Scheduled drugs are to be destroyed pursuant to chapter 46 of this subtitle, such destruction shall be performed without fee by the State laboratory which analyzed such drugs, and a certificate of destruction shall be issued to the law enforcement officer or agency requesting such destruction.

2. If the analysis of such drugs was by a person or laboratory other than the State laboratory, or, if such drugs were not analyzed by any person or laboratory, destruction of such drugs shall be made by the laboratory of the State Department of Health and Welfare in the manner provided in subsection 1.

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TITLE D4 DRUGS

Chapter 46 Forfeiture of Drugs and Other Property

Section 461. Property Subject to Forfeiture

The following property shall be subject to forfeiture to the State, and all property rights therein are in the State:

1. All Scheduled drugs, counterfeit drugs, and hypodermic apparatuses which have been possessed or trafficked in by any person in violation of this subtitle.

2. All materials, products, equipment, books, records, and research materials, including but not limited to formulas, microfilm, tapes, and data, and all conveyances, including aircraft, vehicles, or vessels

A. which are used in connection with or to facilitate the commission of a crime under chapter 42; or

B. which are intended for use in connection with or to facilitate the commission of any crime under chapter 42 which has either actually been committed or attempted, or which is the object of a criminal conspiracy, where such intent was not voluntarily renounced or abandoned.

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3. Notwithstanding any provision of subsection 2,

A. No conveyance shall be subject to forfeiture by reason of any act or omission by a person other than the owner thereof whenever such conveyance was unlawfully in the possession of such other person in violation of the criminal laws of the State of Maine, or of the United States, or of any State.

B. No conveyance shall be subject to forfeiture by reason of any act or omission by a person other than the owner thereof which is done or omitted without the knowledge or consent of the owner, unless the said owner should have known that the conveyance was or would be used in connection with or to facilitate the commission of a crime under chapter 42. Proof that the conveyance was so used by any person on three or more occasions shall create a presumption that the owner of the conveyance either knew or should have known thereof.

C. No conveyance which is used to facilitate the trafficking in marijuana in violation of chapter 42 shall be forfeited unless the marijuana, including any substances with which it may be mixed weighs more than 2 pounds in the aggregate.

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Chapter 46 Forfeiture of Drugs and Other Property

Section 462. Seizure and Custody of Property Subject to Forfeiture

1. Any court within whose territorial jurisdiction lies the property for which forfeiture is sought, or any court which has jurisdiction over any related criminal proceeding may, whenever such property is not already in the custody of the State, whether as evidence in a criminal proceeding, or otherwise, issue at the request of the State ex parte any preliminary order or process as may be necessary to seize and secure such property and to provide for its custody. Such preliminary order or process shall issue only upon a showing of probable cause, and the application for such order or process and the issuance, execution and return thereof shall, so far as applicable, be subject to the provisions of Rule 41 of the Maine Rules of Criminal Procedure or of the Maine District Court Criminal Rules, as the case may be.

2. Property which is in the possession of the State or its agents subsequent to its seizure for use as evidence in a criminal prosecution, or as otherwise permitted by law, may be held in custody without further court order or process until forfeiture proceedings under this chapter and all related criminal proceedings have been terminated.

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3. Property for which forfeiture is sought may be seized without court order or process whenever

A. the seizure is incident to any administrative inspection authorized by Title 22; or

B. the police officer or other duly authorized person making the seizure has reasonable cause to believe that such property poses a danger to health or safety, and that such property was used, or is intended to be used, in violation of this subtitle; or

C. such seizure is otherwise authorized under the constitution and laws of the State of Maine or of the United States.

4. Property which is seized under this chapter shall not be subject to replevin under Rule 64 of the Maine Rules of Civil Procedure or the Maine District Court Civil Rules, but shall remain in the custody of the appropriate officer or agency pursuant to the provisions of this section, subject only to the orders and judgments of the court.

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5. Any law enforcement officer or agency which has custody of a Scheduled drug or any other property for which forfeiture is sought shall keep and maintain full and complete records indicating

- A. from whom said property was received, whether such source be designated by name or as a confidential informant;
- B. under what authority such property was held;
- C. the exact kinds, quantities and forms of such property, so far as the same can reasonably be determined; and
- D. the disposition of such property.

Such records shall be open to inspection at all reasonable times by authorized persons, including police officers, federal agents, or officers of any agency which is charged with the enforcement of federal or State drug control laws.

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Chapter 46 Forfeiture of Drugs and Other Property

Section 463. Commencement, Conduct, and Disposition of Forfeiture Proceedings.

1. A County Attorney or the Attorney General may file in the Superior Court, for and on behalf of the State of Maine, a complaint seeking an order of forfeiture of any property which is subject to forfeiture under this chapter. Such complaint shall be filed in the Superior Court within whose territorial jurisdiction the said property lies or in the Superior Court having final jurisdiction, in the event of an indictment or appeal from a conviction in a District Court over any related criminal proceeding. The State shall thereupon promptly give notice by certified or registered mail to the owner of said property and to other known parties in interest, unless the court orders that notice be given in some other manner. Not less than two weeks after such notice, the court shall hold a hearing on the complaint.

2. In any forfeiture proceeding under this section, the State shall have the burden of proving all material facts by a preponderance of the evidence, except that the owner of the property or any party adverse in interest to the State shall have the burden of proving by a preponderance of the evidence any defense, exception, or mitigating circumstance set forth in subsection 3 of section 461.

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3. A forfeiture proceeding under this chapter shall be deemed a civil action in the nature of a proceeding in rem, and shall, except as provided in subsection 1 of section 462, be governed by the Maine Rules of Civil Procedure.

4. Whenever any property is ordered forfeited to the State pursuant to this chapter, the Court shall enter a final order of judgment to provide for the disposition of said property as follows:

A. by assigning said property to an authorized agency, for its official use;

B. by ordering the sale of said property at public auction or otherwise; and further ordering that the proceeds of said sale be awarded to the appropriate agency to pay for the reasonable expenses of the forfeiture proceedings, seizure, storage, custody, advertising and notice, and that any balance be deposited in the treasury of the State of Maine or of any subdivision thereof;

C. by ordering that a designated agency destroy the said property; or

D. by ordering any other disposition of the said property by, or for the use of, the State of Maine or any subdivision thereof which is not prohibited by law.

5. The foregoing provisions of this section are, with respect to the forfeiture and disposition of contraband, in addition to and not in limitation of, the alternative procedures set forth in sections 464 and 465.

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Chapter 46 Forfeiture of Drugs and Other Property

Section 464. Destruction of Contraband Drugs and Hypodermic Apparatuses

1. Notwithstanding any other provision of this chapter, any Scheduled drug, counterfeit drug, or hypodermic apparatus made subject to forfeiture by section 461 are hereby declared contraband.

2. All such contraband which comes into the possession of a law enforcement officer or agency pursuant to this chapter shall be summarily destroyed, with or without court order, at the conclusion of any civil or criminal proceeding in which such contraband may be necessary as evidence or, if no such proceeding be instituted, upon the filing with the appropriate agency of a written request by the County Attorney or the Attorney General. Such destruction shall be as provided in section 452.

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Chapter 46 Forfeiture of Drugs and Other Property

Section 465. Summary Seizure and Destruction of Contraband Plants

Notwithstanding any other provision of this chapter, whenever there is growing wild a species of plants from which a Scheduled drug may be extracted or derived, or whenever the owners or cultivators of such plants cannot be determined, or whenever upon demand by a police officer the person in occupancy or control of the land or premises where such plants are growing fails to produce reasonable proof that he is authorized to possess or traffick in such plants, a police officer may seize such plants as contraband and without further process summarily destroy them himself or cause them to be destroyed pursuant to section 452.

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TITLE D4 DRUGS

Chapter 47 Special Procedures with Respect to Drugs and Drug Crimes

Section 471. Arrest without Warrant by Police Officer for Drug Crimes

1. A police officer shall have the authority to arrest without a warrant any person who he has probable cause to believe has committed or is committing any crime under this subtitle.

2. The powers of arrest conferred upon police officers by this section are not exclusive, but are in addition to all other powers provided by law.

Section 472. Schedule Z Drugs: Contraband Subject to Seizure

All Schedule Z drugs, the unauthorized possession of which constitutes a civil violation under Title 22, are hereby declared contraband, and may be seized and confiscated by the State, with or without process, as provided by law, as if their unauthorized possession constituted a crime.

COMMENTS ON SUBTITLE D4: DRUGS

Chapter 41 Definitions and Schedules of Drugs

Section 411. Definitions

Subsec. 1. "Agency".

Source: New.

Current Maine Law: There is no corresponding concept in current Maine drug law.

The Draft: This broad definition is adopted in recognition that the enforcement of drug laws is not peculiarly the province of the police and prosecutors, but involves persons and institutions generally thought of as being in the health and scientific fields; it saves needless repetition in the text of Chapters 45 and 46, dealing, respectively, with Analysis and Destruction of Scheduled Drugs, and Forfeiture.

Subsecs. 2 and 4. "Attorney General" and "County Attorney."

Source: New.

Current Maine Law: There is no corresponding definition.

The Draft: The purposes of these definitions is to make it clear that, with respect to the procedures set out in Chapters 45 and 46, the Attorney General and the several County Attorneys can effectively act through their duly appointed assistants.

Subsec. 3. "Counterfeit drug".

Source: Based on definition of "Counterfeit substance" in Mass. GL c. 94C, sec. 1.

Current Maine Law: Current law makes no attempt to punish the selling of counterfeit drugs as such; there is no corresponding definition.

The Draft: To the Massachusetts definition has been added clause B, so as to avoid possible interference with bona fide medical practitioners and researchers. See Section 422, Trafficking in Counterfeit Drugs.

Subsec. 5. "Drug".

Source: Based on definition of "Drug" in Mass. GL c. 94C, sec.1.

Current Maine Law: Current law controls a number of "drugs" and "substances" without having to define these terms themselves. See, e.g., 22 MRSA secs. 2212-B, 2212-C, 2212-D, 2212-E.

The Draft: This definition differs from that of the Mass. law in that Clause D expressly excludes alcohol and tobacco, which are beyond the scope of this subtitle; Clause E attempts to anticipate changes in the scope and comprehensiveness of Title 22; and Clause F makes it clear that the definition applies to the adulterated forms in which many illegal drugs are often sold.

Subsec. 6. "Hashish".

Source: Adapted from the definition of "Tetrahydrocannabinol" in Mass. GL c. 94C, sec. 1.

Current Maine Law: 22 MRSA sec. 2382, et seq., treats on an equal basis marijuana, its more concentrated form hashish, and even, semble, the isolated "active ingredient" tetrahydrocannabinol which may be chemically extracted from the marijuana plant. See Footnotes (1) and (3) to the Chart of Existing Maine Drug Laws.

The Draft: The draft differs from Mass. law, first, in that it includes delta-8 as well as delta-9 tetrahydrocannabinol, since both these substances are psychotropically active, and are difficult to distinguish chemically. Secondly, since, while marijuana and its extracts are very easy to identify qualitatively, an accurate quantitative analysis of the tetrahydrocannabinols therein requires sophisticated and expensive equipment; therefore, by clause B, which is new, suitably qualified government experts would be given the opportunity to establish that the substance in question was hashish (rather than marijuana on a combination of chemical (i.e., the existence of marijuana, and therefore tetrahydrocannabinols, therein) and physical (i.e., the color, appearance, consistency, gumminess, etc. of the sample) grounds.

Subsec. 7. "Hypodermic apparatus".

Source: New; based on 22 MRSA sec. 2362-A and Mass. GL c. 94C, sec. 27.

Current Maine Law; The Draft: 22 MRSA sec. 2362-A controls "hypodermic syringe [s], hypodermic needle [s] or any instruments [s] adapted for the use of narcotic drugs by parenteral administration." The draft, to avoid repetition (see secs 444, 445), covers all these with the single word "apparatus", and removes the reference to narcotic drugs as unnecessary.

Subsec. 8. "Isomer".

Source: Mass. GL c. 94C, sec. 1.

Current Maine Law: Not applicable. See Comment on Subsec. 5, "Drug", above.

The Draft: There is no substantial change from the Mass. definition. The liberal use of "isomer", "derivative", "salt", etc. in pharmacological statutes is essential to avoid leaving loopholes for the sophisticated. See, e.g., Draft sec. 412 (B) and (C).

Subsec. 9. "Manufacture".

Source: Mass. GL, c. 94C, sec. 1.

Current Maine Law: With respect to narcotic drugs, see 22 MRSA sec. 2361, subsec. 13.

The Draft: To the Massachusetts definition has been added, in Clause B, the proviso excluding repackaging or relabelling of drugs by persons who lawfully possess them for their own use. The substantive sections of the Draft do not contain any reference to "manufacturing", which is not made a separate offense; rather, it is included in the broad term "trafficking", subsec. 23, below.

Subsec. 10. "Marijuana".

Source; Current Maine Law: 22 MRSA sec. 2382, subsec. 1, first sentence.

The Draft: The second sentence of the current Maine definition, which is omitted in the Draft, brings within its scope the substantially stronger drugs hashish and even tetrahydrocannabinol (THC). See Comment to subsec. 6, "Hashish", above, and reference cited. In the Draft, marijuana, on the one hand, and THC and hashish, on the other, are grouped separately. See Draft sec. 412 (2) (G) (8) and sec. 412 (4) (B).

Subsec. 11. "Narcotic drug".

Source: Mass. GL, c. 94C, sec. 1.

Current Maine Law: 22 MRSA sec. 2361, subsec. 15, defines "narcotic drugs" to include "coca leaves, opium, isonipecaine and every other substance neither chemically nor physically distinguishable from them and any other drugs to which the federal laws relating to narcotic drugs may now apply; and any drug found by the board [of commissioners of the profession of pharmacy] . . . to have an addiction-forming or addiction-sustaining liability similar to morphine or cocaine . . ."

The Draft: Cocaine and the other derivatives of coca leaves are not addicting in the same way as the opiate derivatives, and are, therefore, not regarded as true narcotics by most pharmacologists. Accordingly, the Draft differs from Massachusetts and Maine law in omitting them - although cocaine, etc. is placed in the same group of drugs as heroin and the stronger narcotics for purposes of control. See Draft sec. 412 (1) (A) and (M). The Draft recognizes (as does Maine law, 22 MRSA sec. 2364) that some "narcotic drugs" (e.g. heroin and morphine) are more dangerous than others (e.g. dehydrocodeine, etc.), which, in turn, are more dangerous than still others (e.g. codeine). See Draft sec. 412, subsecs. (1) (A), (2) (H), and (3) (J).

Subsecs. 12, 13, 14. "Opiate", "Opium poppy", "Poppy straw".

Source: Mass. GL, c. 94C, sec. 1.

Current Maine Law: 22 MRSA sec. 2361, subsec. 17, "'Opium' includes morphine, codeine and heroin and any compound, manufacture, salt, derivative, mixture or preparation of opium, but does not include apomorphine or any of its salts."

The Draft: These definitions, taken virtually intact from Massachusetts law, are necessary only because all these words are used in the definition of "narcotic drug", above. It is only "narcotic drug" that appears in the various Schedules established by Draft sec. 412.

Subsec. 15. "Prescription drug".

Source: Based on the definition in Mass. GL, c. 94C, sec. 1.

Current Maine Law: 22 MRSA, sec. 2210, ". . . any drug bearing on its container the legend 'Caution - Federal law prohibits dispensing without prescription . . .'"

The Draft: The Draft is substantially the same as both the Maine and Massachusetts definitions, except that the added clause, "or is obliged to place, in order to comply, etc." recognizes the possibility that the drugs in question in fact neither are nor ever have been so labeled.

Subsec. 16, 17, 18, 19, 20. "Scheduled drug; Schedules W, X, Y and Z".

Source: Adapted from Mass. GL, c. 94C, sec. 31, which establishes Class A, B, C, D, and E controlled substances.

Current Maine Law: There is no corresponding definition or classification.

The Draft: Discussion of the pharmacological and other considerations for classifying the various drugs in one or another of these Schedules will be found in the Comments on Draft section 412.

The reason for creating a relatively small number of classes or schedules of drugs is that society's responses to criminal misconduct under the proposed Maine Criminal Code are limited. If one puts aside the sanctions attending a Class A crime as too severe for drug offenses (save in exceptional circumstances, perhaps; see Draft sec. 423, Aggravated Trafficking), there are really only three "criminal" responses left, namely designating drug offenses as Class B, C. or D. These, plus the sanction of a civil violation, require, at most, only four categories into which all the known drugs of abuse may be sorted, according to one's own view of which ones are most dangerous, etc. Of course, the classification of the various drugs into this or that Schedule may be debated amongst equally informed physicians, lawyers, pharmacologists, users, parents, and legislators; what is here asserted is only the practicality of having a small number of categories or Schedules at all, rather than attempting to deal, as Maine law now does, with the drug problem by an infinitely particularized scattering of statutes. See the Chart of Existing Maine Drug Laws.

Subsec. 21. "State laboratory".

Source: New.

Current Maine Law: Cf. 22 MRSA sec. 2361, subsec. 12, "'Laboratory' means a laboratory approved by the Bureau of Health as proper to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific and medical purposes and for purposes of instruction."

The Draft: This definition, and the chapter in which it is used, Draft chap. 45, "Analysis and Destruction of Scheduled Drugs by State Laboratories", was conceived to meet the practical and financial problems faced by Maine law enforcement officials in regard to obtaining chemical analyses of drugs which come into their hands. The proposed changes to Maine law will be discussed in the Comments on Draft chap. 45.

Subsec. 22. "Law enforcement officer".

Source: New.

Current Maine Law: There is no comparable definition; cf. 22 MRSA 2385.

The Draft: This definition (which in the draft is out of alphabetical order) incorporates the definition of "Agency", in subsec. 1, above. It differs from the usual definitions of law enforcement officers in that it includes all public employees who in any way aid in the enforcement or performance of any provision of the criminal laws relating to drugs, including, inter alia, laboratory technicians, judges, clerks of various state agencies, et al. Since the purpose of the sections in which the defined phrase is used is not to confer upon anyone any sort of immunity from the operation of the criminal law, there is no reason not to have such a broad definition. As pointed out in the Introduction to this Draft Subtitle, any such immunity or permission to possess, transport, transmit, or transfer contraband drugs will presumably be contained not in Title 17, as revised, but in Title 22, as revised.

Subsec. 23. "Traffick".

Source: Adapted from Senate 1, 93d Congress, First Session, A Bill to establish a Federal Criminal Code, sec. 1-1A4, General Definitions, subsec. 67: "'traffics' means produces or manufactures; sells, transfers, dispenses, or otherwise disposes of to another person; possesses or receives with intent to sell, transfer, dispense, or otherwise dispose of to another person; or imports or exports; and in the case of a drug, includes prescribes not in the course of professional practice."

Current Maine Law: As graphically demonstrated in the Chart of Existing Maine Drug Laws which has been prepared by the Reporter for the convenience of the Commission, current Maine law contains an astonishing number of repetitive, overlapping, but nonetheless different expressions to cover most of the sorts of conduct which in the Draft is termed "trafficking". With respect to barbiturates, prescription drugs, and "potent medicinal substances" (designated pursuant to 22 MRSA sec. 2201) the language is "sell, furnish or give away or offer to sell, furnish or give away". 22 MRSA sec. 2210. With respect to heroin and the other narcotics, the language is, "manufacture, sell, prescribe, administer, dispense or compound". 22 MRSA sec. 2362-C. And so on. The attempt here is to include all these sorts of acts, which commonly comprises the general notion of "dealing", as opposed to mere "using", and designate them by a single, reasonably accurate, all-inclusive word.

The biggest proposed change in Maine law (aside from plugging the loopholes between "offering", "bartering", "exchanging", and the like - e.g., note that "exchanging" or "bartering" hallucinogenic drugs carries a longer possible prison term than "selling" those same drugs 22 MRSA secs. 2212-B, 2212-C, 2212-E) is to create, within the definition of "traffick", clause E, the crime of "possession with intent to sell, give", etc. Although there is no such offense now in Maine, 22 MRSA sec. 220 until repealed by St. 1971, c. 487, sec. 1, provided that "No person, except a registered apothecary or a physician . . . shall furnish, sell or keep for sale any opium, morphine, laudanum, or preparations containing opium, morphine or a derivative of opium". The offense so created was, however, merely a misdemeanor punishable by a fine of not less than \$50 nor more than \$1,000.

The draft, clause B, retains current Maine law with respect to marijuana, in that "growing or cultivating" this plant, in contradistinction to "growing or cultivating" peyote (from which mescaline is derived), opium poppies, or coca plants, constitutes mere possession rather than trafficking. See 22 MRSA, sec. 2383, "Whoever manufactures, cultivates, grows, possesses or has under his control Cannabis, Mescaline or Peyote . . ."

"Growing or cultivating" so much marijuana, however, that "intent to sell" can be inferred beyond a reasonable doubt by a finder of fact subjects the grower to possible punishment as a trafficker - not because he "grew" the marijuana, but because, having grown it, he now possesses it with an intent which the Draft would forbid. The touchstone is common sense and reasonableness. In their interest, maximum permissible amounts of various contraband drugs which one can possess without becoming a trafficker (e.g., "not more than one ounce of marijuana; not more than 1 tenth of one grain of cocaine; not more than 2 and one-half peyote buttons") are not set out in the Draft and are not recommended. The reasons are twofold: (1) Maximum permissible amounts to possess have a way of becoming minimum possible amounts on the basis of which ^{convictions} possession with intent to sell can be obtained, and thus act as a shield for small-time dealers. (2) The amount of a given drug which, in fact, bespeaks an intent to sell or otherwise dispose of it, varies tremendously from community to community. For example, in a university town a "key" (kilogram, 2.2 pounds) of marijuana may be the amount that a reasonably well-off but cost-conscious user will buy for his own use, whereas that same amount in the hands of a particular person in another part of the state or, indeed, in another part of the same town, may be extremely reliable and convincing evidence that such person intended to sell the stuff in small lots to the local highschoolers. It is submitted, therefore, that where the intent to sell is to be derived, if at all, solely from the amount possessed (see Commonwealth v. Ellis, 356 Mass. 574, 254, NE 2d 408 (1970) the police and the courts should be neither encouraged nor forbidden to act on the basis of specific statutory maximum amounts purporting to separate mere possession from possession with intent to sell.

March 16, 1973

April 13, 1973 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 24 Kidnapping and Related Offenses

Section 1. Aggravated Kidnapping

1. A person is guilty of aggravated kidnapping if he intentionally restrains another person with the intent to:

- A. Hold him for ransom or reward; or
- B. Use him as a shield or hostage; or
- C. Inflict bodily injury upon him or subject him to conduct defined as criminal in chapter 23; or
- D. Terrorize him or a third person; or
- E. Facilitate the commission of another crime, or flight thereafter; or
- F. Interfere with the performance of any governmental or political function.

2. "Restrain" means to restrict substantially the movements of another person, ^{knowing that he does not have} without his consent or other lawful authority by:

- A. removing him from his residence or ^{place of} business; or
- B. moving him a substantial distance from the vicinity where he is found; or
- C. confining him for a substantial period either in the place where the restriction commences or in a place to which he has been moved.

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3. Kidnapping and Criminal Restraint are crimes included in Aggravated Kidnapping.

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

*Different element
One crime
with several degrees*

*74 - Same crime
with sentencing flexibility*

March 16, 1973

COMMENT

Source: This section incorporates material from Section 2-7D1, Senate 1, 93d Congress, 1st Session, and Section 720 of the Hawaii Penal Code of 1973. Similar sections are in most of the other criminal code revisions.

Current Maine Law: There are presently four separate statutes in Maine which deal with this subject: Title 17 §§1, 2, 2051, 2051A.

§1. Abduction of women

"Whoever takes a woman unlawfully and against her will and by force, menace or duress compels her to marry him or any other person, or to be defiled, shall be punished by imprisonment for any term of years. Whoever so takes a woman, with intent by such means to compel her to do so, shall be punished by imprisonment for not less than one year nor more than 10 years."

§2 Abduction of women while armed with firearm

"Whoever, if armed with a firearm, takes a woman unlawfully and against her will and by force, menace or duress compels her to marry him or any other person or to be defiled shall be punished by imprisonment for any term of years. Whoever, if armed with a firearm, takes a woman with intent by such means to compel her to do so shall be punished by imprisonment for not less than 2 nor more than 25 years. The imposition or execution of a sentence for a violation of this section shall not be suspended and probation shall not be granted."

§2051. Definition; jurisdiction and consent

"Whoever unlawfully confines or imprisons another, or forcibly transports or carries him out of the State or from place to place within it, or so seizes, conveys, inveigles or kidnaps any person, by any means whatever and holds him for ransom or reward, shall be punished by imprisonment for life. If 2 or more persons enter into

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an agreement, confederation or conspiracy, such person or persons shall be punished by imprisonment for such term of years as the court in its discretion shall determine. Indictments for these offenses may be found and tried in the county where such person was carried or brought, or in the county where the offense was committed. On trial, the consent of such person shall not be a defense unless it appears that it was not obtained by fraud, threats or duress.

§2051-A. Firearm

"Whoever, if armed with a firearm, except in the case of a minor by his parent, kidnaps or unlawfully confines, inveigles, decoys, imprisons, transports or carries another out of the State, or from place to place within it, shall be punished by imprisonment for any term of years. The imposition or execution of such sentence shall not be suspended and probation shall not be granted.

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

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

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

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 24 Kidnapping and Related Offenses

Section 2. Kidnapping

1. A person is guilty of kidnapping if he knowingly restrains another person:

A. under circumstances which, in fact, expose such other person to risk of serious bodily injury; or

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

2. As used in this section, "restraint" has the meaning set forth in section 1, subsection 2.

3. Criminal Restraint is a crime included in Kidnapping.

4. Kidnapping is a Class C crime.

*Make part of
Section 1*

March 16, 1973

COMMENT

Source: This section is based upon Section 2-7D2 of Senate 1, 93d Congress, First Session.

Current Maine Law: There is no separate statute, or case law, dealing specifically with the circumstances set forth in this draft.

The Draft: This section is very much like the one defining Aggravated Kidnapping. It defines the offense as requiring two elements. One is the restraint which is set out in section 1; the other is the presence of either of the two circumstances included as A and B in subsection 1. These circumstances represent cases which are less serious than a restraint with one of the intentions specified in Aggravated Kidnapping in the sense that the defendant here is not purposely setting about to create terror and severe risks to personal safety.

March 20, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 24 Kidnapping and Related Offenses

Section 3. Criminal Restraint

1. A person is guilty of criminal restraint if he:
- A. knowingly restrains another person; or
 - B. intentionally or knowingly takes, retains or entices a child under the age of sixteen, or an incompetent person, from the custody of his parent, guardian or other lawful custodian, knowing he has no legal right to do so, with the intent to hold the person permanently or for a prolonged period.
2. Criminal restraint is a class D crime.

Revised State Lines

COMMENT

Source: This section is taken from the Proposed Criminal Code of Massachusetts. Chapter 265 §15.

Current Maine Law: Title 17 §2051, quoted in the Comment to section 1 excepts from the general kidnapping statute, "the case of a minor kidnapped by his parent". The same exemption appears in section 2051, dealing with kidnapping while armed. There is no statute dealing expressly with unlawfully interfering with the custody of a child.

2. As used in this section; "restrain" has the meaning set forth in section 1, subsection 2.

The Draft: This section sets out a lesser form of kidnapping, characterized by unprivileged interferences with personal liberty of movement. The offense defined in subsection 1A involves the basic unlawful control over another which, if accompanied by a designated intention, would be Aggravated Kidnapping under section 1, or kidnapping under section 2 if it were to be done under the circumstances of potential harm contained in subsection 1 of section 2.

The offense defined in subsection 1B is essentially a safeguard against resolving custody disputes between parents by self-help.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 24 Kidnapping and Related Offenses

Section 1. Kidnapping

1. A person is guilty of kidnapping if:

A. he knowingly restrains another person with the intent to:

1. hold him for ransom or reward; or
2. use him as a shield or hostage; or
3. inflict bodily injury upon him or subject him to conduct defined as criminal in chapter 23; or
4. terrorize him or a third person; or
5. facilitate the commission of another crime, or flight thereafter; or

6. interfere with the performance of any governmental or political function

B. he knowingly restrains another person:

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

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

April 18, 1973

March 16, 1973

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

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

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

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

3. Criminal Restraint is a crime included in Kidnapping.

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

Approved April 13, 1973, with the addition of subsection 1 B from what was section 2 of this chapter; the inclusion of schools in subsection 2 A; and substitution of the word "knowingly" in subsection 1A, for the word "intentionally." This latter change is aimed at requiring that the actor be aware of all of the elements which make up "restraint" as defined in subsection 2.

The question of the burden of pleading and proving the facts set forth in subsection 4 have been dealt with by a revision of section 4 of chapter 11.

Commission 70

Sub B 16

April 18, 1973

March 20, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 24 Kidnapping and Related Offenses

Section 2. Criminal Restraint

1. A person is guilty of criminal restraint if:

A. he knowingly restrains another person; or

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

C. he intentionally or knowingly takes, retains, or entices:

1. a child under the age of 14; or

2. an incompetent person; or

3. a child who has attained his 14th birthday but has not attained his 16th birthday, provided that the actor is at least 18 years of age, from the custody of his parent, guardian or other lawful custodian, knowing he has no legal right to do so, with the intent to hold the person permanently or for a prolonged period.

2. Criminal Restraint is a Class D crime.

Commission 71

Sub B 16 a

April 18, 1973

March 20, 1973

Comment

This section has been rewritten pursuant to decisions taken at the Commission meeting held on April 13, 1973. Subsection 1 B reflects the decision to penalize parents under the circumstances of criminal restraint only if they remove the child from the state. Subsections 1 B and 1 C serve to create a limited privilege to engage in what would otherwise be an offense when the actor is under the age of 18 and the "victim" is 14 or 15 years old. These are the same ages as exempt consensual teen-age sexual activity from criminality under chapter 23, section 4.

Sub B 17

March 30, 1973

May 17, 1973 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 1. Consolidation

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

Sub B 18

March 30, 1973

COMMENT

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

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

The Draft: The purpose of this section is to insure that there is no possibility of a miscarriage of justice by virtue of a person being charged with the wrong offense. The technical distinctions among common law offenses which create such possibilities will be dropped from the restatement of theft law in this code to the maximum extent possible. But it is well to provide that any further distinctions which may be lurking in the code's terms shall not give rise to unwanted procedural results.

March 30, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 2. Definitions

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

1. "Property" means anything of value, including real estate and things growing on, affixed to or found thereon, tangible and intangible personal property, captured or domestic animals, birds or fishes, written instruments or other writings representing or embodying rights concerning real or personal or signatures or endorsements on such instruments or writings, property, labor, services or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

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

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

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

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

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

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

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

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

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

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

Sub B 22

March 30, 1973

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

E. Amounts of value involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the class or grade of the offense.

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

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COMMENT

Source: These definitions are taken largely from the New Hampshire Criminal Code section 637:2. Similar definitions are in the Proposed Massachusetts Criminal Code chapter 266 sections 1 and 17.

Current Maine Law: There presently is no comprehensive set of definitions of the key terms used in the Maine law of theft. The definitions do appear, however, as part of the substantive elements of several crimes.

The property which may be the subject of criminal theft is, for example, defined in numerous statutes which prohibit theft of one or another sorts of things. The most comprehensive statement of the protected property appears in Title 17 section 2101 which prohibits the taking and carrying away of:

". . . money, goods, chattels, or any writ, process, public record, bond, bank bill or note, promissory note, bill of exchange, order, certificate, book of accounts, conveyance of real estate, valuable contract, receipt, release, defeasance, or instrument in writing whereby any demand, right or obligation is created, increased, diminished, or extinguished . . ."

On the other hand, Title 17 section 3551 punishes receiving stolen property without providing any definition of "property".

An additional source of definitions of property is found in specialized statutes such as Title 17 section 3856 which punishes carrying away "timber or wood on the land of another", and "digging up, taking and carrying away therefrom earth, sand, stone, grass, corn, grain, fruit, hay or other vegetables." Section 1092 of Title 17 forbids stealing any domestic animal or dog, while section 2106 makes it criminal to take "any beast or bird ordinarily kept in a state of confinement and not the subject of larceny at common law." In section 3858 of Title 17, it is an offense to capture "a colony or nest of wild bees."

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In regard to the definition of "obtain" in this section, Maine appears to follow the common law requirement that theft must include a taking and carrying away. See *State v. Somerville*, 21 Me. 14, 19 (1842). The definition of larceny in section 2101 of Title 17 is also in terms of taking and carrying away.

In regard to the "taking" element in common law larceny, Maine follows the common law rule that the taking may occur outside of Maine, and may be prosecuted in Maine if the property taken is conveyed into Maine with larcenous intent. *Younie v. State*, 281 A.2d 446 (Me. 1971).

Maine follows the common law rule concerning the state of mind which must accompany the taking and carrying away in order for larceny to be established. *Stanley v. Prince*, 118 Me. 360 (1919).

In order to constitute larceny there must be not only a taking and carrying away of the goods of another, but there must also exist contemporaneously the felonious intent, the *animus furandi*, on the part of the taker, which means a taking without excuse or color of right with the intent to deprive the owner permanently of his property and all compensation therefor. At p. 364.

As to "property of another", it has been declared that the ownership of property stolen need not be alleged and proved, if it is not known, see *State v. Logan*, 119 Me. 146 (1920); *State v. Small*, 156 Me. 10 (1960). If, however, it turns out at the trial that the ownership was known to the grand jury, the defendant is entitled to be discharged or tried on a new indictment in which the ownership is alleged. *State v. Davidson*, 119 Me. 146, 148 (1920). Where there is no allegation at all of ownership, the complaint of indictment is defective. *State v. Small*, 156 Me. 10 (1960). It has been held that the defect appears even when it is alleged that the goods were taken out of the possession of another person. *State v. McAloon*, 40 Me. 133 (1855). This latter holding may not any longer be good law, since the Supreme Judicial Court has indicated that as a result of Title 15 section 752, proof of a bailment is sufficient proof of ownership. *State v. Jutras*, 154 Me. 198 (1958). This statute provides:

Sub B 25

March 30, 1973

In an offense in any way relating to real or personal estate it is sufficient and not a variance if it is proved at the trial that, when the offense was committed, the actual or constructive possession of or the general or special property in the whole of such estate or in any part thereof was in the person or community alleged in the indictment to be the owner thereof.

The effect of section 752 is more likely to be on the matter of a variance, leaving intact the requirement that ownership, and not mere possession, must be alleged.

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

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

Subsection B's definition of "obtain" serves to do away with any distinction between common law larceny, which is generally held to be an offense against possession, and false pretense offenses, which usually relate to offenses against title. The bracketed phrase is included in order to raise with the Commission the question of whether the doctrine of continuing larceny should be continued or rejected. This rule, which holds that a person committing larceny out of the state may be prosecuted in Maine, provided he brings the stolen goods with him, was recently reaffirmed in *Younie v. State*, 281 A.2d 446 (Me. 1971).

Under common law, the circumstances described in subsection C would very likely be found to satisfy the requirement of mens rea.

Sub B 26

March 30, 1973

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

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

Sub B 27

March 30, 1973

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 25 Theft

Section 3. Theft by Unauthorized Taking or Transfer

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

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

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COMMENT

Source: This section is taken from the New Hampshire Criminal Code §637:3.

Current Maine Law: There are now many statutes which punish the conduct defined as theft in this section. Title 17 §2101 (larceny); §2106 (taking beasts or birds kept in confinement); §2107 (embezzlement); §2109 (fraudulent conversion); §§2110, 2111 (larceny by trustee).

Since this section incorporates the definitions made in section 2 of this chapter, the present Maine law concerning the particular elements of the offenses defined by these statutes has largely been set forth in the Comment to section 2.

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

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