ONE HUNDRED AND SEVENTH LEGISLATURE

Legislative Document No. 314

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

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

HARRY N. STARBRANCH, Secretary

Presented by Senator Collins of Knox.

Cosponsor: Senator Clifford of Androscoggin.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SEVENTY-FIVE

AN ACT Creating the Maine Criminal Code.

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

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

TITLE 17-A
MAINE CRIMINAL CODE

PART 1
GENERAL PRINCIPLES

CHAPTER 1
PRELIMINARY

§ 1. Title; effective date; severability

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

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

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

Comment*

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

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

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

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

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

§ 2. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

§ 3. All crimes defined by statute: Civil actions

1. No conduct constitutes a crime unless it is prohibited

A. By this code; or

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

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

Comment*

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

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

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

§ 4. Classification of crimes; civil violations

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

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

§ 5. Pleading and proof

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

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

A. By allegation in the indictment or information; or

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

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

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

Comment*

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

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

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

§ 6. Application to crimes outside the code

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

Comment*

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

§ 7. Territorial applicability

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

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

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

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

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

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

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

G. Jurisdiction is otherwise provided by law.

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

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

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

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

Comment*

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

§ 8. Statute of limitations

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

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

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

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

3. The periods of limitations shall not run:

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

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

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

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

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

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

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

6. For purposes of this section:

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

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

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

Comment*

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

§ 9. Plea negotiations

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

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

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

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

Comment*

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

§ 10. Definitions of culpable states of mind

1. "Intentionally."

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

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

2. "Knowingly."

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

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

3. "Recklessly."

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

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

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

4. "Criminal negligence.

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

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

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

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

Comment*

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

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

§ 12. De minimis infractions

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

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

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

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

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

Comment*

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

§ 13. Lesser offenses

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

Comment*

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

§ 14. Separate trials

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

Comment*

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

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

CHAPTER 3

CRIMINAL LIABILITY

§ 51. Basis for liability

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

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

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

Comment*

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

§ 52. Ignorance and mistake

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

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

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

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

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

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

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

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

(1) a statute, ordinance or other enactment;

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

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

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

Comment*

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

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

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

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

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

§ 53. Immaturity

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

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

Comment*

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

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

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

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

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

§ 54. Duress

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

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

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

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

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

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

Comment*

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

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

§ 55. Consent

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

§ 56. Causation

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

Comment*

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

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

§ 57. Criminal liability for conduct of another; accomplices

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

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

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

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

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

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

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

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

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

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

A. He is the victim of that crime; or

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

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

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

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

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

Comment*

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

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

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

§ 58. Mental abnormality

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

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

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

Comment*

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

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

§ 60. Criminal liability of an organization

1. An organization is guilty of a crime when:

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

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

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

Comment*

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

§ 61. Individual liability for conduct on behalf of organization

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

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

Comment*

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

§ 62. Military orders

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

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

Comment*

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

CHAPTER 5

JUSTIFICATION

§ 101. General rules

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

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

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

Comment*

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

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

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

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

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

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

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

§ 102. Public duty

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

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

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

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

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

Comment*

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

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

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

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

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

§ 103. **Competing harms**

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

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

Comment*

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

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

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

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

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

§ 104. Use of force in defense of premises

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

Comment*

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

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

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

§ 105. Use of force in property offenses

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

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

Comment*

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

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

§ 106. Physical force by persons with special responsibilities

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

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

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

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

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

§ 107. Physical force in law enforcement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

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

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

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

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

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

§ 108. Physical force in defense of a person

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

PART 2

SUBSTANTIVE OFFENSES

CHAPTER 7

OFFENSES OF GENERAL APPLICABILITY

§ 151. Conspiracy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

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

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

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

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

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

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

§ 152. Attempt

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

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

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

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

Comment*

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

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

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

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

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

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

§ 153. Solicitation

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

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

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

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

Comment*

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

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

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

§ 154. General provisions regarding chapter 7

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

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

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

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

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

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

Comment*

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

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

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

CHAPTER 9

OFFENSES AGAINST THE PERSON

§ 201. Criminal homicide in the first degree

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

2. The circumstances referred to in subsection 1 are:

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

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

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

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

E. The criminal homicide was committed for pecuniary benefit;

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

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

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

Comment*

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

§ 202. Criminal homicide in the 2nd degree

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

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

Comment*

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

§ 203. Criminal homicide in the 3rd degree

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

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

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

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

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

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

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

Comment*

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

§ 204. Criminal homicide in the 4th degree

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

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

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

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

Comment*

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

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

§ 205. Criminal homicide in the 5th degree

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

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

Comment*

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

§ 206. Criminal homicide in the 6th degree

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

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

Comment*

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

§ 207. Assault

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

2. Assault is a Class D crime.

Comment*

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

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

§ 208. Aggravated assault

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

A. Serious bodily injury to another; or

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

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

2. Aggravated assault is a Class B crime.

Comment*

See comments to section 207.

§ 209. Criminal threatening

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

2. Criminal threatening is a Class D crime.

Comment*

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

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

§ 210. Endangering human life

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

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

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

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

5. Endangering human life is a Class B crime.

Comment*

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

§ 211. Terrorizing

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

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

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

2. Terrorizing is a Class C crime.

Comment*

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

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

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

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

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

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

§ 212. Reckless conduct

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

2. Reckless conduct is a Class D crime.

Comment*

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

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

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

CHAPTER 11

SEX OFFENSES

§ 251. Definitions and general provisions

1. In this chapter the following definitions apply.

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

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

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

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

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

Comment*

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

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

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

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

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

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

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

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

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

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

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

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

§ 252. Rape

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

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

§ 253. Gross sexual misconduct

A person is guilty of gross sexual misconduct

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

A. He compels such other person to submit:

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

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

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

§ 254. Sexual abuse of minors

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

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

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

Comment*

Title 17, section 3152 presently provides:

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

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

§ 255. Unlawful sexual contact

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

CHAPTER 13

KIDNAPPING AND CRIMINAL RESTRAINT

§ 301. Kidnapping

1. A person is guilty of kidnapping if either:

A. He knowingly restrains another person with the intent to

(1) hold him for ransom or reward;

(2) use him as a shield or hostage;

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

(4) terrorize him or a 3rd person;

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

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

B. He knowingly restrains another person:

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

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

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

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

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

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

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

Comment*

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

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

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

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

§ 302. **Criminal restraint**

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

A. He knowingly restrains another person; or

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

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

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

(2) an incompetent person; or

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

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

3. Criminal restraint is a Class D crime.

Comment*

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

CHAPTER 15

THEFT

§ 351. Consolidation

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

Comment*

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

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

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

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

§ 352. Definitions

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

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

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

B. Tangible and intangible personal property;

C. Captured or domestic animals, birds or fishes;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

§ 353. Theft by unauthorized taking or transfer

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

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

Comment*

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

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

§ 354. Theft by deception

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

§ 355. Theft by extortion

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

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

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

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

Comment*

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

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

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

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

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

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

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

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

Comment*

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

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

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

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

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

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

§ 357. Theft of services

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

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

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

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

Comment*

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

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

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

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

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

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

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

§ 358. Theft by misapplication of property

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

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

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

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

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

Comment*

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

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

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

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

§ 359. Receiving stolen property

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

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

Comment*

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

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

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

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

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

§ 360. Unauthorized use of property

1. A person is guilty of theft if:

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

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

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

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

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

Comment*

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

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

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

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

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

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

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

§ 361. Claim of right; presumptions

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

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

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

Comment*

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

§ 362. Classification of theft offenses

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

2. Theft is a Class B crime if:

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

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

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

3. Theft is a Class C crime if:

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

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

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

4. Theft is a Class D crime if:

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

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

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

Comment*

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

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

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

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

CHAPTER 17

BURGLARY AND CRIMINAL TRESPASS

§ 401. Burglary

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

2. **Burglary is classified as:**

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

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

C. All other burglary is a Class C crime.

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

Comment*

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

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

§ 402. Criminal trespass

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

A. He enters in any secured premises; or

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

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

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

Comment*

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

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

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

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

§ 403. Possession of burglar's tools

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

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

Comment*

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

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

§ 404. Trespass by motor vehicle

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

A. The residential property of another; or

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

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

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

Comment*

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

CHAPTER 19

FALSIFICATION IN OFFICIAL MATTERS

§ 451. Perjury

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

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

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

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

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

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

5. As used in this section:

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

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

6. Perjury is a Class C crime.

Comment*

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

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

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

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

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

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

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

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

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

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

§ 452. False swearing

1. A person is guilty of false swearing if:

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

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

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

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

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

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

4. False swearing is a Class D crime.

Comment*

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

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

§ 453. Unsworn falsification

A person is guilty of unsworn falsification if:

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

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

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

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

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

2. Unsworn falsification is a Class D crime.

Comment*

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

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

§ 454. Tampering with witness or informant

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

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

(1) to testify or inform falsely; or

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

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

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

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

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

Comment*

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

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

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

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

§ 455. Falsifying physical evidence

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

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

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

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

Comment*

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

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

§ 456. Tampering with public records or information

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

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

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

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

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

Comment*

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

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

§ 457. Impersonating a public servant

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

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

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

Comment*

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

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

CHAPTER 21

OFFENSES AGAINST PUBLIC ORDER

§ 501. Disorderly conduct

A person is guilty of disorderly conduct if:

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

A. Making loud and unreasonable noises; or

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

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

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

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

5. As used in this section:

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

(1) public ways as defined in section 505;

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

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

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

6. Disorderly conduct is a Class E crime.

Comment*

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

§ 502. Failure to disperse

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

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

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

Comment*

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

§ 503. Riot

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

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

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

2. Riot is a Class B crime.

Comment*

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

§ 504. Unlawful assembly

A person is guilty of unlawful assembly if:

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

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

3. Unlawful assembly is a Class C crime.

Comment*

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

§ 505. Obstructing public ways

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

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

3. Obstructing public ways is a Class D crime.

Comment*

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

§ 506. Harassment

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

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

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

C. Makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

D. Makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

E. Knowingly permits any telephone under his control to be used for any purpose prohibited by this section.

2. The crime defined in this section may be prosecuted and punished in the county in which the defendant was located when he used the telephone, or in the county in which the telephone called or made to ring by the defendant was located.

3. Harassment is a Class D crime.

Comment*

This section is similar to the 1967 enactment against annoying telephone calls in section 3704 of Title 17.

§ 507. Desecration and defacement

1. A person is guilty of desecration and defacement if he intentionally desecrates any public monument or structure, any place of worship or burial, or any private structure not owned by him.

2. As used in this section, "desecrate" means marring, defacing, damaging or otherwise physically mistreating, in a way that will outrage the sensibilities of an ordinary person likely to observe or discover the actions.

3. Desecration is a Class E crime.

Comment*

Section 1252 of Title 17 prohibits desecration of a monument or place of burial, while section 3965 is a similar provision relating to state buildings. This section of the code broadens the coverage of these statutes and protects against mistreatment that would outrage ordinary persons.

§ 508. Abuse of corpse

1. A person is guilty of abuse of corpse if he intentionally and unlawfully disinters, digs up, removes, conceals, mutilates or destroys a human corpse, or any part or the ashes thereof.

2. It is a defense to prosecution under this section that the actor was a physician, scientist or student who had in his possession, or used human bodies or parts thereof lawfully obtained, for anatomical, physiological or other scientific investigation or instruction.

3. Abuse of corpse is a Class D crime.

Comment*

This section continues the prohibition in section 1251 of Title 17 as well as the exemption from liability described in subsection 2.

§ 509. False public alarm or report

1. A person is guilty of false public alarm or report if:

A. He knowingly gives or causes to be given false information to any law enforcement officer with the intent of inducing such officer to believe

that a crime has been committed or that another has committed a crime, knowing the information to be false; or

B. He knowingly gives false information to any law enforcement officer or member of a fire fighting agency, including a volunteer fire department, concerning a fire, explosive or other similar substance which is capable of endangering the safety of persons, knowing that such information is false, or knowing that he has no information relating to the fire, explosive or other similar substance.

2. False public alarm is a Class D. crime.

Comment*

The purpose of this section is to prevent the unnecessary use of public security resources. Like section 503 of Title 17, subsection 1, paragraph B prohibits false bomb reports; subsection 1, paragraph A is designed to discourage crime investigations that have no basis.

§ 510. Cruelty to animals

1. A person is guilty of cruelty to animals if, intentionally or recklessly:

A. He kills or injures any animal belonging to another person without legal privilege or the consent of the owner. The owner or occupant of property is privileged to use reasonable force to eject a trespassing animal;

B. He overworks, tortures, abandons, gives poison to, cruelly beats or mutilates any animal, or exposes a poison with the intent that it be taken by an animal;

C. He deprives any animal which he owns or possesses of necessary sustenance, shelter or humanely clean conditions;

D. He owns, possesses, keeps, or trains any animal with the intent that it shall be engaged in an exhibition of fighting, or if he has a pecuniary interest in or acts as a judge at any such exhibition of fighting animals; or

E. He keeps or leaves sheep on an uninhabited or barren island lying off the coast of Maine during the month of December, January, February or March without providing sufficient food and proper shelter.

2. As used in subsection 1, paragraph B, "mulilates" includes, but is not limited to, cutting the bone, muscles or tendons of the tail of a horse for the purpose of docking or setting up the tail, cropping or cutting off the ear of a dog in whole or in part. As used in subsection 1, "animal" means birds, fowl, fish and any other living sentient creature that is not a human being.

3. It is an affirmative defense to prosecution under this section that:

A. The defendant's conduct conformed to accepted veterinary practice or was a part of scientific research governed by accepted standards; or

B. The defendant's conduct was designed to control or eliminate rodents, ants or other common pests on his own property.

4. Cruelty to animals is a Class D crime.

Comment*

Chapter 43 of Title 17 contains many provisions on the subject of cruelty to animals. This section of the code collects the most important of these; the administrative and enforcement provisions will remain in Title 17.

§ 511. Violation of privacy

1. A person is guilty of violation of privacy if, except in the execution of a public duty or as authorized by law, he intentionally:

A. Commits a civil trespass on property with the intent to overhear or observe any person in a private place; or

B. Installs or uses in a private place without the consent of the person or persons enttled to privacy therein, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place; or

C. Installs or uses outside a private place without the consent of the person or persons entitled to privacy therein, any device for hearing, recording, amplifying or broadcasting sounds originating in that place which would not ordinarily be audible or comprehensible outside that place.

2. As used in this section "private place" means a place where one may reasonably expect to be safe from surveillance but does not include a place to which the public or a substantial group has access.

3. Violation of privacy is a Class D crime.

Comment*

There is no counterpart to this section in the present law. It is designed to prevent seeing or hearing of things that are justifiably expected to be kept private.

§ 512. Failure to report treatment of a gunshot wound

1. A person is guilty of failure to report treatment of a gunshot wound if, being a licensed physician, he treats a human being for a wound apparently caused by the discharge of a firearm and knowingly fails to report the same to a law enforcement officer within 24 hours.

2. Failure to report treatment of a gunshot wound is a Class E crime.

Comment*

This section continues the prohibition now found in section 3957 of Title 17.

§ 513. Maintaining an unprotected well

1. A person is guilty of maintaining an unprotected well if, being the owner or occupier of land on which there is a well, he knowingly fails to enclose the well with a substantial fence or other substantial enclosing barrier or to protect it by a substantial covering which is securely fastened.

2. Maintaining an unprotected well is a Class E crime.

Comment*

This section continues the prohibition now found in chapter 129 of Title 17.

§ 514. Abandoning an airtight container

1. A person is guilty of abandoning an airtight container if:

A. He abandons or discards in any public place, or in a private place that is accessible to minors, any chest, closet, piece of furniture, refrigerator, icebox or other article having a compartment capacity of 1½ cubic feet or more and having a door or lid which when closed cannot be opened easily from the inside; or

B. Being the owner, lessee, manager or other person in control of a public place or of a place that is accessible to minors on which there has been abandoned or discarded a container described in subsection 1, paragraph A, he knowingly or recklessly fails to remove such container from that place, or to remove the door, lid or other cover of the container.

2. Abandoning an airtight container is a Class E crime.

Comment*

This section continues the prohibition now found in section 3951 of Title 17.

§ 515. Unlawful prize fighting

1. A person is guilty of unlawful prize fighting if:

A. He knowingly engages in, encourages or does any act to further a premeditated fight without weapons between 2 or more persons, or a fight commonly called a ring fight or prize fight; or

B. He knowingly sends or publishes a challenge or acceptance of a challenge for such, or carries or delivers such a challenge for acceptance, or trains or assists any person in training or preparing for such fight, or acts as umpire or judge for such fight.

2. This section shall not apply to any boxing contest or exhibition:

A. Conducted by license and permit of the Maine State Boxing Commission; or

B. Under the auspices of a nonprofit organization at which no admission charge is made.

3. Unlawful prize fighting is a Class E crime.

Comment*

This section continues the rules now found in section 551 of Title 17 and adds an exemption for nonprofit organizations under subsection 2, paragraph B.

§ 516. Champerty

1. A person is guilty of champerty if, with the intent to collect by a civil action a claim, account, note or other demand due, or to become due to another person, he gives or promises anything of value to such person.

2. This section does not apply to agreements between attorney and client to bring, prosecute or defend a civil action on a contingent fee basis.

3. Champerty is a Class E crime.

Comment*

This section is a simplified version of Title 17, section 801.

CHAPTER 23

OFFENSES AGAINST THE FAMILY

§ 551. Bigamy

1. A person is guilty of bigamy if, having a spouse, he intentionally marries or purports to marry, knowing that he is legally ineligible to do so.

2. Bigamy is a Class E crime.

Comment*

This section is a combination of the New Hampshire Criminal Code, section 639:1 and the Hawaii Penal Code, section 900. The present bigamy statute is Title 17, section 351. It has been held that the State must plead that the defendant was not within the statutory exception, and that the factors of seven year absence and not known to be living, constitute a single exception. State v. Damon, 97 Me. 323 (1903). That is, it is no defense to raise a reasonable doubt concerning how long the other spouse has been missing unless a doubt is also raised about whether the defendant knew the spouse to be alive; the defendant prevails only if there is a reasonable doubt as to both.

This section seeks to simplify the law of bigamy and to change the substantive rules concerning when a person who has previously been married, is permitted to marry again without violating the penal law.

The basic requirement of this crime is that the defendant knew that he was legally ineligible to marry. The inclusion of the requirement that he also have a spouse is designed to keep the statute from being a broad "illegal marrying" prohibition that would extend to young persons who married before they were legally eligible to do so.

Under this statute it makes no difference how long a spouse may have been missing and believed to be dead. If the defendant honestly believes that the spouse is not alive, he is free to marry without violating penal law.

The scope of this offense could be broadened by providing that it is an affirmative defense which the defendant must establish that he thought he was eligible to marry; further expansion would be brought about by

requiring that he has been **reasonable** in arriving at this belief. These alternatives have not been adopted on the ground that an absence of good faith is the essence of the offense and should, therefore, be proved by the State.

§ 552. Nonsupport of dependents

1. **A person is guilty of nonsupport of dependents if he knowingly fails to provide support which he is able to provide and which he knows he is legally obliged to provide to a spouse, child or other person declared by law to be his dependent.**

2. **As used in this section, "support" includes but is not limited to food, shelter, clothing and other necessary care.**

3. **Nonsupport of dependents is a Class E crime.**

Comment*

This section is a modification of the Hawaii Penal Code, section 903. The basic statute on this subject is Title 19, section 481, as amended in 1969. The fundamental change brought about by the 1969 revision was to drop any reference to failure to support a wife, and to leave the statute solely in terms of failure to support children under the age of 18. It also appears that the 1969 statute continues the rule which had developed under the earlier version, to the effect that only legitimate children are within its provisions. **State v. McCurdy,** 116 Me. 359 (1917).

This section provides a comprehensive prohibition relating to all circumstances in which one person is a dependent of another and there is a culpable failure to provide the support called for by the relationship. This section does not, however, undertake to define who is a dependent of whom; other statutes do this. Title 19, section 301 presently obliges a man to support his wife and minor children; section 219 of the same Title requires adult children to support their dependent parents.

§ 553. Abandonment of child

1. **A person is guilty of abandonment of a child if, being a parent, guardan or other person legally charged with the long-term care and custody of a child under the age of 14, or a person to whom such care and custody has been expressly delegated, he leaves the child in any place with the intent to abandon him.**

2. **Abandonment of a child is a Class D crime.**

Comment*

Ths section is patterned on the Hawaii Penal Code, section 902. It is similar to Title 19, section 487 of the present law in Maine.

Ths section raises the age of present law from 6 to 14, but otherwise leaves the elements of the offense basically as they are now. The Hawaii age limit has been proposed, in preference to the present age of 6, on the ground that the deterrent force of the law is still required for the older children who are still largely incapable of making major decisions for themselves and are still not ready to be wholly responsible for themselves.

§ 554. Endangering the welfare of a child

1. A person is guilty of endangering the welfare of a child if, except as provided in subsection 2, he knowingly permits a child under the age of 16 to enter or remain in a house of prostitution; or he knowingly sells, furnishes, gives away or offers to sell, furnish or give away to such a child, any intoxicating liquor, cigarettes, tobacco, air rifles, firearms or ammunition; or he otherwise knowingly endangers the child's health, safety or mental welfare by volating a duty of care of protection.

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

A. The defendant was the parent, foster parent, guardian or other similar person responsible for the long-term general care and welfare of a child under the age of 16 who furnished such child a reasonable amount of intoxicating liquor in the actor's home and presence; or

B. Any person acting pursuant to authority expressly or impliedly granted in Title 12.

3. Endangering the welfare of a child is a Class D crime.

Comment*

This section is patterned on the New Hampshire Criminal Code, section 639:3, but it also includes many provisions of present Maine law; chapter 35 of Title 17 is made up of 11 sections relating to protection of children. In addition, section 859 punishes contributing to delinquency.

This section is designed to substitute for section 859 of the present statutes and to insure that the prohibitions specifically mentioned in chapter 35 of Title 17 are continued, with the following exceptions. The section relating to narcotic drugs is not included since that will be covered in the drug law revisions, and the section on begging or exhibiting is not included as being unnecessary.

§ 555. Endangering welfare of an incompetent person

1. A person is guilty of endangering the welfare of an incompetent person if he knowingly endangers the health, safety or mental welfare of a person who is unable to care for himself because of advanced age, physical or mental disease, disorder or defect.

2. As used in this section "endangers" includes a failure to act only when the defendant had a legal duty to protect the health, safety or mental welfare of the incompetent person.

3. Endangering the welfare of an incompetent person is a Class D crime.

Comment*

This section is a modified version of the Hawaii Penal Code, section 905. There does not appear to be any statutory provision on this subject.

This section is a counterpart to the code's provision relating to endangering the welfare of children. In many penal codes these are treated together

in one section, e.g., New Hampshire Penal Code, section 639:9. It would, however, be awkward to attempt to consolidate the two sections as they are presently written.

This section relates to all persons in regard to positive acts of endangering, not merely those who are guardians of incompetent persons. Omissions are punishable, however, only when they are on the part of those who have an affirmative legal duty to act.

§ 556. Incest

1. A person is guilty of incest if, being at least 18 years of age, he has sexual intercourse with another person who is at least 18 years of age and as to whom he knows marriage is prohibited by Title 19, section 31.

2. Incest is a Class D crime.

Comment*

This section is similar to the Proposed Criminal Code of Massachusetts, chapter 272, section 7. Title 17, section 1851 now provides:

> When persons within the degrees of consanguinity or affinity, in which marriages are declared incestuous and void, intermarry or commit fornication or adultery with each other, they shall be punished by imprisonment for not less than one year nor more than 10 years.

This section provides for the crime of incest only when the participants are at least 18 years old. Sexual intercourse with a child under the age of 14 will be rape under section 252 of chapter 11, which intercourse with a child between 14 and 18 is punishable as sexual abuse of minors under section 254 of chapter 11.

CHAPTER 25

BRIBERY AND CORRUPT PRACTICES

§ 601. Scope of chapter

Nothing in this chapter shall be construed to prohibit the giving or receiving of campaign contributions made for the purpose of defraying the costs of a political campaign. No person shall be convicted of an offense solely on the evidence that a campaign contribution was made, and that an appointment or nomination was subsequently made by the person to whose campaign or political party the contribution was made.

Comment*

The purpose of this section is to insure that legitimate campaign contributions do not become the subject of criminal prosecutions merely because the contributor received an appointment or nomination by the person who benefiitted from the contribution. It is taken from the New Hampshire Criminal Code, section 640:1.

§ 602. Bribery in official and political matters

1. A person is guilty of bribery in official and political matters if:

A. He promises, offers, or gives any pecuniary benefit to another with the intention of influencing the other's action, decision, opinion, recommendation, vote, nomination or other exercise of discretion as a public servant, party official or voter; or

B. Being a public servant, party official, candidate for electoral office or voter, he solicits, accepts or agrees to accept any pecuniary benefit from another knowing or believing the other's purpose to be as described in subsection 1, paragraph A, or fails to report to a law enforcement officer that he has been offered or promised a pecuniary benefit in violation of subsection 1, paragraph A.

2. As used in this section and other sections of this chapter, the following definitions apply.

A. A person is a "candidate for electoral office" upon his public announcement of his candidacy.

B. "Party official" means any person holding any post in a political party whether by election, appointment or otherwise.

C. "Pecuniary benefit" means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally.

3. Bribing in official and political matters is a Class C crime.

Comment*

Bribery by public officers is now prohibited by sections 601, 603, 605, 606 of Title 17. This section goes beyond present law by including bribery of candidates as well as those already elected or appointed to public office. In addition, the definition of "public servant" in section 2 of chapter 1 serves to expand present law by including consultants among those who may not be bribed.

§ 603. Improper influence

1. A person is guilty of improper influence if he:

A. Threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion, recommendation, nomination, vote or other exercise of discretion;

B. Privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the intention of influencing that discretion on the basis of considerations other than those authorized by law; or

C. Being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of paragraphs A or B.

2. "Harm" means any disadvantage or injury, pecuniary or otherwise, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official or voter is interested.

3. Improper influence is a Class D crime.

Comment*

This section is designed to protect the integrity of the government function by forbidding threats whose aim is to influence the exercise of official discretion and by prohibiting appeals to discretion outside the established channels of communication. The rule in subsection 1, paragraph B is limited, however, to judicial and administrative proceedings because legislative and executive officers are traditionally subject to such a variety of special pleas for the exercise of their discretion that there are no prevailing norms, short of penalties for threat or outright bribery, that prohibit communications to them for favor. In the absence of a widely held view that there is something wrong about appealing to legislative and executive personnel, the law ought not to create the condemnation on its own.

§ 604. Improper compensation for past action

1. A person is guilty of improper compensation for past action if:

A. Being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty; or

B. He promises, offers or gives any pecuniary benefit, acceptance of which would be a violation of paragraph A.

2. Improper compensation for past action is a Class D crime.

Comment*

This section seeks to fill a gap in the law dealing with official integrity which is occasioned by giving or receiving what, in essence, is a bribe after the official action has taken place. The rationale for reaching unofficial compensation under these circumstances is described by the comments to the Model Penal Code, section 240:3:

> Soliciting or accepting pay for past official favor should be discouraged because it undermines the integrity of administration. Compensation for past action implies a promise of similar compensation for future favor. Apart from this implied bribery for the future, when some "clients" of a public servant undertake to pay him for favors, others who deal with the same public servant are put under pressure to make similar contributions or risk subtle disfavor.

§ 605. Improper gifts to public servants

1. A person is guilty of improper gifts to public servants if:

A. Being a public servant he solicits, accepts or agrees to accept any pecuniary benefit from a person who he knows is or is likely to become

subject to or interested in any matter or action pending before or contemplated by himself or the governmental body with which he is affiliated; or

B. He knowingly gives, offers, or promises any pecuniary benefit prohibited by paragraph A.

2. Improper gifts to public servants is a Class E crime.

Comment*

This section supplements the bribery provisions which prohibit giving things to public servants with the wrong motive, by prohibiting such transactions when the thing given comes from the "wrong" source. It seems to be a warranted assumption that gifts from persons who have an interest in an official matter before the public servant would be so often made with the hope and intent of influencing him that it is appropriate to prohibit all such gifts generally. This prohibition also serves to contribute significantly to the appearance, as well as the substance, of public integrity.

§ 606. Improper compensation for services

1. A person is guilty of improper compensation for services if:

A. Being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for advice or other assistance in preparing or promoting a bill, contract, claim or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise; or

B. He gives, offers or promises any pecuniary benefit, knowing that it is prohibited by paragraph A.

2. Improper compensation for services is a Class E crime.

Comment*

Like other parts of this chapter, this section seeks to prevent a particular evasion of the bribery laws, namely, where the public servant purports to be acting privately but where the work he does is so intimately related to his official role that he is serving two masters when the public interest requires that it only be served.

§ 607. Purchase of public office

1. A person is guilty of purchase of public office if:

A. He solicits, accepts or agrees to accept, for himself, another person, or a political party, money or any other pecuniary benefit as compensation for his endorsement, nomination, appointment, approval or disapproval of any person for a position as a public servant or for the advancement of any public servant; or

B. He knowingly gives, offers or promises any pecuniary benefit prohibited by paragraph A.

2. Purchase of public office is a Class D crime.

Comment*

This section reaches one of the most pernicious invasions of the integrity of the public's business. Few public interests exceed that of having the most qualified persons fill public office. When the selection for public office is based not on quality but on a **quid pro quo**, the stage is set for inefficiency of performance, a breakdown of morale among civil servants, and even corrupt practices.

§ 608. Official oppression

1. A person is guilty of official oppression if, being a public servant and acting with the intention to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office, or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

2. Official oppression is a Class E crime.

Comment*

This section is designed to prevent the abusive use of official power. It does not attach criminal penalties to all unauthorized actions or inactions, however; only those that are done with the specified intention come within the prohibition.

§ 609. Misuse of information

1. A person is guilty of misuse of information if, being a public servant and knowing that official action is contemplated, or acting in reliance on information which he has acquired by virtue of his office or from another public servant, he:

A. Acqiures or divests himself of a pecuniary interest in any property, transaction or enterprise which may be affected by such official action or information; or

B. Speculates or wagers on the basis of such official action or information; or

C. Knowingly aids another to do any of the things described in paragraphs A and B.

2. Misuse of information is a Class E crime.

Comment*

The aim of this section is to prevent public servants from taking advantage of their positions in order to gain personal profits. This in turn should contribute significantly to the lessening of conflicts of interest when official discretion is to be exercised and should also help to maintain the image of government processes as being strictly in the interests of the public.