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

A PROPOSED NEW
FEDERAL CRIMINAL CODE
(Title 18, United States Code)

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THE NATIONAL COMMISSION ON REFORM OF
FEDERAL CRIMINAL LAWS

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FOREWORD


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

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

At the conclusion of this first phase of intensive study, the Commission published the Study Draft on June 9, 1970, in order to assure the fullest of public review before the Commission made its decisions. This procedure, affording a pre-Report view of proposals under consideration, was unique in Commission practice, and suggestions and criticisms addressed to the Study Draft added greatly in the preparation of the Final Report. Many departments and agencies of the Government cooperated with the Commission staff in submitting memoranda. The Commission has had the benefit of informal exchanges with committees of the U.S. Judicial Conference. A number of prosecutors and private practitioners have written to the Commission, and their comments have been taken into account in revising the Study Draft provisions.


The Commission has given much thought to the question of making relevant portions of the Code effective upon enactment. The Commission believes that the Code should be implemented in its entirety from the time it becomes law. However, it has been informed that a large number of courts plan to begin using the Code before the end of 1971.

The adoption of criminal sanctions by the States is no more urgent than its adoption by Congress. The Commission has taken note of the fact that a number of States have already adopted some of the features of the Code, and that this action has been followed by the passage of similar legislation in other States. The Commission believes that it is essential to have one comprehensive code of criminal law in the United States, and that this can best be accomplished by a single national code.

The Commission urges that the States consider adopting the Code, and that they do so without delay.
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TITLE 18
UNITED STATES CODE

Part A. General Provisions

Chapter 1. Preliminary Provisions

§ 101. Title; Effective Date; Application.
(1) Title and Citation. Title 18 of the United States Code
shall be entitled "Crime and Corrections" and may be cited as
"18 U.S.C. §—" or as "Federal Criminal Code §—".
(2) Effective Date and Application. This Code shall become
effective one year after the date of enactment. Unless otherwise
provided this Code shall apply to prosecutions under any Act of
Congress except the Uniform Code of Military Justice, District
of Columbia Code and Canal Zone Code.

Comment

Existing Title 18 is entitled "Crime and Criminal Procedure." The
new title, "Crime and Corrections," makes it possible to retain the
Code in its present place in the alphabetical sequence of the titles of
the United States Code, but also to obviate reference to "corrections"
as an appropriate indication of the scope and direction of the
common usage and, as an alternative citation, indicates the integrated
and systematic treatment of the criminal laws provided by the pro-

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

Although it was originally contemplated that this section would
contain transitional provisions, e.g., application of the Code to those
serving sentences under present law, these provisions have been de-
leted on the view that they would constitute a perpetual amnesia unless included in the Code itself. They would appear, however, in the Act
enacting the Code, and, according to practice, be visible in the Revised
Notes to the Code for so long as they are needed.

Since the general and standing provisions are intended to apply in
all federal prosecutions, it has been thought desirable to be explicit as
to the exceptions. If provisions of this Code are to apply to prose-
cutions under the existing Code, that judgment can be made in the
enacting or enacting of those Codes. The same would be true of the
§ 102. General Purposes.
The general purposes of this Code are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individuals or public interests for which federal protection is appropriate. To this end, the provisions of this Code are intended, and shall be construed, to achieve the following objectives:

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

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

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

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

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

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

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

§ 103. Proof and Presumptions.

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

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

(3) Affirmative Defenses. Subsection (1) does not apply to any
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§ 103. Federal jurisdiction a matter of defense. Since the policy heretofore underlying federal criminal legislation has been to make jurisdiction an element of the offense, except where it is primary, there has been no test of the constitutionality of these provisions for discriminating the case of federal jurisdiction. It may well be that, almost any need for the government to prove that a defendant was of the federal interest (see 328 U.S. 505, 521 (1946)), the difference between continuing jurisdiction and no jurisdiction at all. Although other approaches in a practical effect so slight as not to warrant a test of constitutionality.

Subsection (2) provides as easy method for designating those facts which the prosecution need prove beyond a reasonable doubt only after the issue has been raised. This permits a narrowing of issues at trial; it is not necessary that the prosecution, in every case, prove facts which are purely collateral by a defendant, e.g., that the defendant is sure. This method also permits simple clarification of the prosecution's burden with respect to exceptions, exclusions, and the like, many of which are treated analogously in existing statutes. The second sentence of subsection (2) modifies the judge-makes rules regarding exceptions which is in force in several of the Federal circuits. See Working Papers, p. 14. Since an attempt has been made in drafting the Code to fully with exceptions as defenses, its usefulness will be in determining the obligations of the prosecution in cases brought under statutes outside this Act, including those where such statutes are not interpreted by reference, e.g., under § 1172.

A defendant may prove an affirmative defense by a preponderance of the evidence. See, e.g., United States v. Martin, 348 U.S. 132, 138 (1954). It specifies that when the tax is a part of the evidence which the defendant is required to prove beyond a reasonable doubt, an alternative would be to require only proof by a preponderance of the evidence. A further possibility is to make test of

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Federal Criminal Code

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

A “presumption” is distinguished, in subsection (5), from a preponderance of the evidence. The “presumption” designation is used in those few situations in which guidance as to the burden of proof is necessary to promote uniformity in court decisions as to sufficiency of the prosecution’s case, and to provide a warning to prospective defendants which is more explicit than is the definition of the offense. See, e.g., relevant § 1361.


§ 106. Authorization and Certification by Attorney General

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

Comment

This section relates to the requirement in a few places in the Code, that particular prosecution be specifically authorized by the Attorney General. This device, carried forward from existing law, pinpoints responsibility for the exercise of federal jurisdiction. See, e.g., § 1330 (right to avoid state prosecution).

§ 109. General Definitions

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

(a) “aerial” includes spacecraft;
(b) “nearly” means any impairment of physical condition, including physical pain;
(c) “this Code” means the Federal Criminal Code;
(d) “court of the United States” means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court estab-

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

(a) “crime” means a misdemeanor or a felony and does not include an infraction; but “criminal” and “criminally,” when used as an adjective or adverb, refer to any offense;
(b) “dangerous weapons” means any switch blade or gravity knife, mace, baton, or any other weapon used in the commission of a violent crime;
(c) “destructive devices” means any explosive, incendiary or poison gas bomb, grenade, mine, rocket, missile or similar device;
(d) “element of an offense” has the meaning prescribed in section 101(f);
(e) “explosives” means gunpowder, gunpowder, blackpowder, or other similar substances,
(f) “firearms” means a weapon which will expel, or is readily capable of expelling, a projectile by the action of an explosive and is any firearm, including any handgun, shotgun, rifle, or other similar device used for hunting or for target practice, or any weapon designed to expel a projectile by the action of an explosive;
(g) “government” means (i) the government of any state or any political unit within any state, (ii) any agency, subdivision or department of the foregoing, including the executive, legislative, and judicial branches, (iii) any corporation or other association organized by a government for the execution of a government program and subject to control by a government or (iv) any corporation or agency established
(a) "government agency" includes any department, independent establishment, commission, administration, authority, board or bureau of a government or any corporation in which a government has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense;

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

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

(d) "included offense" means an offense (1) which is established by proof of the same or less than all the facts required to establish commission of the offense charged, (2) which consists of criminal facilitation of or an attempt or solicitation to commit the offense charged, or (3) which differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission;

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

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

(g) "intentionally" and variants thereof designate the standard prescribed in section 30(1);

(h) "judge" includes Justice of the Supreme Court;

(i) "knowingly" and variants thereof designate the standard prescribed in section 30(1);

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

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

(l) "magistrate" includes commissioner;

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

(n) "negligently" and variants thereof designate the standard prescribed in section 30(1);
Chapter 2. Federal Penal Jurisdiction

§ 221. Common Jurisdictional Bases.

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

Bases commonly used in this Code are as follows:

(a) the offense is committed within the special maritime and territorial jurisdiction of the United States as defined in section 233;

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

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

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

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

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

(g) the offense affects interstate or foreign commerce;

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

(i) the property which is the subject of the offense is moving in interstate or foreign commerce or constitutes or is part of an interstate or foreign shipment;
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(j) the property which is the subject of the offense is moved across a state or United States boundary in the commission or consummation of the offense;

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

(l) the offense is committed under circumstances amounting to piracy, as prescribed in section 221.

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

Comment

Existing federal criminal law differs from state criminal law most markedly in the approach to jurisdiction; while a state punishes all criminal conduct within its borders, federal jurisdiction rests upon several different bases, e.g., protection of the federal government, special maritime and territorial jurisdiction. Because the extension of federal jurisdiction has been a process of accretion, spreading over many years, many offenses are regarded by the courts as offenses of one particular place. For example, 18 U.S.C. § 1313 deals with frauds within the special maritime and territorial jurisdiction, and 18 U.S.C. § 1701 deals with assault on federal officers. As a result, multiple provisions deal with the same basic conduct, the jurisdiction required only because there is more than one basis for federal jurisdiction over each  

A new approach is proposed in this Code. Most crimes are defined without regard to where the conduct occurs, or whether the United States has the power to prosecute. In a manner similar to that in which offenses are defined in state codes, federal jurisdiction over the misconduct is set forth separately. Hence jurisdiction has no bearing on a person's culpability, the prosecution is not required to prove culpability as to jurisdiction. See § 309. Many crimes have more than one jurisdictional base; that is, if any one of a number of circumstances occurs, the federal government has the power to prosecute. It is proposed that jurisdictional bases be stated separately and that they be combined so that offenses engaged in the performance of his official duties as for the President or another specified high-level official. The definition of the offense to conduct—murder—is the same regardless of the base. This approach permits consolidation of the many sections of existing Title 18 which now deal separately because they involve different federal interests. It also solves or lessens the issue of conspiracy and accomplice liability because the harmful conduct is the focus of the definition of the offense, rather than the basis for federal jurisdiction over it.

No attempt has been made to increase or decrease the reach of federal jurisdiction across the board. However, federal jurisdiction has proven labyrinthine over the years, and inconsistency has resulted. By taking a uniform approach—that similar crimes should have similar juris-
Paragraph (d) is a base for property crimes against the United States, consolidating notions of securities, custody, control, and "in preparation for" now dealt with in separate statutes. Title 18 U.S.C. § 1055, for example, limits robbery to property belonging to the United States, while § 1514 deals with the mail. Present coverage of federal burglary in sections, including banks (§ 1951), post offices (§ 1711), certain vehicles (§ 2115) and certain common carrier facilities (§ 2131). Paragraph (d) would apply federal law to any burglary of any federal building, whether or not in a federal enclave, and also any burglary, whether or not of a federal building, where the target property was federal.

Paragraph (e) substantially retains the present jurisdiction over fraud (18 U.S.C. §§ 1541 (mail) and 1553 (wire, radio or television in interstate or foreign commerce)), embezzlement (18 U.S.C. §§ 1961 (mail) and 1621 (use of common carrier to transport)), and orga-
nized crime (18 U.S.C. §§ 1962—use of any facility in interstate or foreign commerce, including the mail), among others. The phrase "in the commission" includes planning or attempting the crime. Title 18 U.S.C. § 1060 prohibits use of the mails to secure money or securities. If the jurisdiction is appropriate, jurisdiction might thus extend to the destination of the mail at least. Furthermore, if the offenses, 18 U.S.C. § 1346 (mailing a kickback threat or demand for ransom). Alternatively this base could be limited to specific offenses where the use of the mails or facilities of commerce are pre-
ferred means of carrying out the offense and to those offenses most likely to be engaged in by organized criminals. There may be need for another more limited base for extortion or threat crimes. Title 18 U.S.C. § 113 limits federal jurisdiction to situations in which a facility of commerce was used to transmit the communication contain-
ing the threat, but does not cover other uses of these facilities to carry out the crime, e.g., telephoning an accomplice.

Paragraph (f) is necessary to lay the basis for federal interven-
tion to protect vital, quasi-public national facilities even if they are "privately" owned. For the scope of existing law, see 18 U.S.C. §§ 81-82 (dangerous tampering with airplanes and interstate motor transport), 18 U.S.C. §§ 227 and 229 (destruction of vessels); 18 U.S.C. § 892 (transportation of explosives and other dangerous sub-
stances); and 18 U.S.C. § 2117 (burglary of post offices or foreign vehicles or property).
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18 U.S.C. § 939 (exception to enumerated crimes). For a proposal limiting exercise of jurisdiction under this base to cases certified by the Attorney General, see § 1740(b).

Examples of present law which use the base act set forth in paragraph (a) are: 18 U.S.C. § 1932 (kidnap victim transported), 18 U.S.C. § 2332 (prostitute transported), and 18 U.S.C. § 2332 (racketeer travel). The growth of the concept can be seen from these sections. In the case of the 18 U.S.C. § 2332 (racketeer travel) offense, the United States Supreme Court in United States v. Rosenthal, 322 U.S. 479, 64 S.Ct. 1187, 88 L.Ed. 1327, held in a habeas corpus proceeding in the district court of the District of Columbia that the offender traveled is enough. It is difficult to see a rational policy line in this distinction. If Interstate transportation of a kidnap victim suffices for federal jurisdiction, interstate movement of the kidnapper to commit the offense should also suffice. The Code approach of using travel as a jurisdictional base permits prosecution of the kidnapper under an offense graded according to the nature of the crime, rather than arbitrarily at 5 years or $5,000, as under 18 U.S.C. § 1932.

Paragraph (b) will be a base for theft. It should be compared with paragraph (c), which protects the facilities of commerce. Paragraph (b) describes what the character of the property must be, e.g., part of an interstate shipment, at the time the offense is committed. In order to make an offense against a federal offense, e.g., theft, arson, Paragraph (b) describes what must be done with the property in the course of commission or consummation of the offense, e.g., moved across state lines if federal jurisdiction is to exist. This base, too, will be used in theft, particularly with respect to disposition of stolen property. See, e.g., 18 U.S.C. § 1348 (transporting stolen motor vehicle or engine). Paragraph (c) is similar to paragraph (d) (protection of federal property) in 18 U.S.C. §§ 2109 and 2112, which protect bank property from robbery, theft, embezzlement, misapplication and bribe. However, since existing federal law does not extend to protecting back property from arson and other forms of criminal destruction, this base is not used for all the crimes for which paragraph (d) is used and therefore it must be stated separately.

Property of nonfederal agencies other than national credit institutions is also protected by existing law, but only against depredations by its employees, e.g., funds of agencies supported by OEO (42 U.S.C. § 7705). Also, the operation of such specie, as well as those of national credit institutions, are protected from certain conduct, such as bribery of their employees (18 U.S.C. § 831). Specialized bases to cover these situations appear with the crimes themselves.

Incorporating the notion of piracy as a jurisdictional base (paragraph (1)) constitutes an approach which is more realistic and workable than is the attempt to define unique crimes of piracy, as is present law. Except for jurisdictional facts, crimes constituting piracy consist of conduct which is murder, robbery, kidnapping, etc. Section 18 U.S.C. § 812 provides for the circumstances which must exist, e.g., ship to ship, to make the offense piracy and thus subject to federal prosecution.


§ 202 Jurisdiction Over Included Offenses.

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

Comment

This section contemplates a situation in which the offense charged has a jurisdictional base which an included offense does not have. An included offense, as defined in § 109, is one, for example, which is established by proof of the same or less than all the facts required to establish the offense charged. That jurisdiction should exist for the charged offense and not for the included offense because it would be an accident of legislative drafting rather than the result of different substantive policies. Such courses should be avoided under the proposed Code, where all attempts have been made to anticipate the problem. For example, offenses of the same character, such as embezzlement and aggravated assault, are expressly given the same jurisdictional base as murder.

§ 203 Prospective Federal Jurisdiction.

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

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

Comment

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

There are two situations in which there is federal jurisdiction over inchoate crimes. One is where a circumstance which grows in to federal jurisdiction over the completed offense has already occurred (even though mitigated—e.g., kidnapping is not required to be a fact which gives rise to jurisdiction—see § 996), e.g., a dealer has moved across a state border. Another is where there would be federal jurisdiction over the offense if it were completed or committed as intended. Thus, if a thief intends to steal certain diamonds which are, in fact, part of an interstate shipment, an attempt to steal them is a federal crime. Note that he need not intend that the federal government have jurisdiction, but must intend only to engage in conduct which would give rise to a jurisdictional circumstance. See, e.g., United States v. Kellner, 421 F.2d 319 (8th Cir. 1970).
Subsection (2) applies the Code approach to jurisdictional circumstances to situations in which the substantive criminal conduct has been completed but the jurisdictional circumstances have not. In such situations the Code approach facilitates consistent treatment of the same conduct as in present law when attempts are not generally included in the section prohibiting the completed crime. See supra note 3, § 1(a).

Subsection (2) provides that there is federal jurisdiction over the completed offense if the jurisdictional circumstances were known of conduct engaged in or intended to be engaged in (3). For example, if a person has conspired to defraud and has deposited in his bank a check (the proceeds of the fraud) as an out-of-state bank, he has committed the completed federal crime of theft by deception even though federal agents seize the check before it is cleared through the mails. The conduct which has occurred (depositing the check) would expose the existence of the jurisdictional circumstance (movement of the check through the mail).

§ 204 - Federal Jurisdiction over an Offense Shall Not, in itself, Prevent Any State or Local Government from Exercising Jurisdiction to Enforce Its Own Laws Applicable to the Conduct in Question.

Comment

While there are few cases in which the enactment of criminal laws by Congress results in federal preemption of the field, out of an abundance of caution Congress has adopted measures to a number of the criminal offenses making it explicit that such a result is intended. The section thus creates a presumption of general applicability. See also § 706, barring prosecution of a crime under state law after the federal government has prosecuted the offense.

§ 205 - Discretionary Restriction in Exercise of Concurrent Jurisdiction.

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

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

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

Comment

This section affords Congress the opportunity to recognize explicitly and to have its say as to a principle basic to federal law enforcement: that establishment of federal jurisdiction by Congress does not mean that it must be exercised to its fullest extent. Although a policy statement similar to this section may be found in existing provisions dealing with violators of federal laws who are under 18 (18 U.S.C. § 1001—
the United States Attorney may defer to local authorities, if they will take the offender and “it will be to the best interest of the United States and of the juvenile offender”), it is not customary for the Congress to provide prescriptive guidelines for the exercise of federal jurisdiction.

In some instances arbitrary limitations have been incorporated in the definition of the offense, e.g., transporting across state lines stolen property valued at $5,000 or more (19 U.S.C. § 2514). In other instances, where such lines are virtually impossible to draft, the exercise of federal jurisdiction is curtailed—e.g., at least responsibility is preserved, by requiring authorization by the Attorney General before a federal prosecution can proceed, e.g., forgery of state securities (18 U.S.C. § 501), civil rights violations (18 U.S.C. § 243).

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


§ 208. Extraterritorial Jurisdiction

Except as otherwise expressly provided by statute or treaty, extraterritorial jurisdiction over an offense exists when:
(a) one of the following is a victim or intended victim of a crime of violence: the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice President-elect, or any individual who is acting as President under the Constitution and laws of the United States, a candidate for President or Vice President or any member or member-designate of the President’s cabinet, or a member of Congress, or a federal judge;
(b) the offense is treason, or is espionage or sabotage by a national of the United States;
(c) the offense consists of a forgery or counterfeiting, or an uttering of forged copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents issued by the United States; or perjury or a false statement in an official proceeding of the United States; or a false statement in a matter within the jurisdiction of the government of the United States; or other fraud against the United States, or theft of property in which the United States has an interest, or, if committed by a national or resident of the United States, any other obstruction of or interference with a United States government function;
(d) the accused participates outside the United States in a federal offense committed in whole or in part within the United States, or the offense constitutes an attempt, solicitation, or conspiracy to commit a federal offense within the United States;
(e) the offense is a federal offense involving entry of persons or property into the United States;
(f) the offense is committed by a federal public servant who is outside the territory of the United States because of his official duties or by a member of his household residing abroad or by a person accompanying the military forces of the United States;
(g) such jurisdiction is provided by treaty; or
(h) the offense is committed by or against a national of the United States outside the jurisdiction of any nation.
Although the issue of the extraterritorial applicability of the federal criminal law is one which does not arise frequently, the problems it generates when it does are serious. There has never been a clear and simple statement of the circumstances under which the federal government will prosecute for crimes committed abroad. Moreover, there are gaps which only legislation can cover.

Paragraph (a), (b), and (c) of this section deal with protection of the federal government and its instrumentalities. Paragraph (c) is consistent with its breadth with the probable construction of United States v. Morrison, 505 U.S. 574 (1992). Paragraph (d) covers conduct outside the United States involved in commissions or intended commission of crimes within the United States. Paragraph (e) makes federal sanctions available against foreign heads of state for the incitement of persons and property over the borders.

Paragraph (f) is a response to the Supreme Court case holding that civilians accompanying the armed forces and former soldiers are not subject to criminal law. When the crime occurs in or in transit to and from the United States, the host nation may be reluctant to take action against the perpetrator. Paragraph (g) covers conduct by or against nationals outside the jurisdiction of any nation, e.g., in Antarctica or on the moon, subject, as paragraph (f) indicates, to the provisions of other nations or treaties.

See Working Papers, pp. 143, 153-161, 425, 496.

§ 209. Assimilated Offenses.

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

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

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

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

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

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

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

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

Comment

This definition is taken primarily from 18 U.S.C. § 2. Paragraph (d) applies Code offenses to federal territories where there are no local laws, the same manner as 42 U.S.C. § 1412a, which provides that a crime committed on such place shall be deemed to have been committed on land a United States ship. Paragraph (g) brings the jurisdiction of 49 U.S.C. § 1472(1), (j), and (k) into the Code. It reflects the latest revision implementing the Declaration on Offenses and Certain Other Acts Committed on Board Aircraft enacted as P.L. 94–441 on October 14, 1975.

§ 211. SPECIAL LIMITED JURISDICTION.


(2) Canal Zone. This Code is applicable in the Canal Zone as provided in the Canal Zone Code. It is also applicable, as there provided, to the corridor over which the United States exercises jurisdiction pursuant to the provisions of Article IX of the General Treaty of Friendship and Cooperation between the United States of America and the Republic of Panama, signed March 2, 1906, to the extent that such application to the corridor is consistent with the nature of the rights of the United States in the corridor as provided by treaty.

Comment

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

The scope of Indian country jurisdiction appears to change periodical, depending upon the desire of particular tribes and signing relationships with the states. Moreover, appropriate reform of such jurisdictional provisions commenced more than criminal law reform, including such questions as "who is an Indian?" Accordingly it is recommended that the jurisdictional provisions be retained to Title 18, where they were located prior to the 1948 revision, with appropriate reference therein in the Code.

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

§ 212. Piracy As Jurisdictional Basis.

For the purposes of section 211 (i) the offense is within piracy jurisdiction if it is committed for private ends by the crew or the passengers of a private ship or a private aircraft, or committed by the crew of a naval ship or government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft, and is directed:

(a) on or over the high seas, against another ship or aircraft or against persons or property on board another ship or aircraft; or
In this Chapter:
(a) "interstate commerce" means commerce between one state, as defined in section 109, and another state;
(b) "foreign commerce" means commerce with a foreign country;
(c) "President-elect" and "Vice President-elect" mean such persons as are the apparent McNamara candidates for the offices of President and Vice President, respectively, as ascertained from the results of the general elections held to determine the electors of President and Vice President in accordance with 2 U.S.C. § 1 L.2;
(d) "national credit institution" means a member bank of the Federal Reserve System; a bank, holding association, land bank, intermediate credit bank, bank for cooperation, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States; a bank the deposits of which are insured by the Federal Deposit Insurance Corporation; a Federal Savings and Loan Association; an "insured institution" as defined in 12 U.S.C. § 1731; and a "Federal Credit Union" as defined in 12 U.S.C. § 1752.

Comment
The definitions of interstate and foreign commerce are from 19 U.S.C. § 1; the definitions of President-elect and Vice President-elect are from 18 U.S.C. § 1731(5); and the definition of national credit institution is substantially from 18 U.S.C. § 1712. For other commonly used terms, see General Definitions in § 106. Note that "state" in the definition of interstate commerce, by virtue of § 109(a)(8), includes the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Chapter 3. Basis of Criminal Liability; Culpability; Cautionation
§ 301. Basis of Liability for Offenses.
(1) Conduct. A person commits an offense only if he engages in conduct, including an act, an omission, or a decision, in violation of a statute which provides that the conduct is an offense.
(2) Omissions. A person who omits to perform an act does not commit an offense unless he has a legal duty to perform the act.
(3) Publication Required. A person does not commit an offense if he engages in conduct in violation of only a statute or regulation thereunder that has not been published.

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

Subsection (1) states the minimum condition of criminal liability: a person must engage in conduct; that he has a certain status or that certain circumstances exist will not render him criminally liable. Conduct includes omissions and decisions. The issue of the voluntariness of the conduct, however, whether or not it is conscious and the result of determination or effort, is not dealt with explicitly in this subsection because, while doing so might have limited utility, it would raise the question of the voluntariness of conduct for the purpose of the application of the mens rea element of mens rea for the purpose of the application of the mens rea element of mens rea.

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

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

See Working Papers, pp. 106-18 and 261.

§ 302. Requirements of Culpability.
(1) Kinds of Culpability. A person engages in conduct:
(a) "intentionally" if, when he engages in the conduct, he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so;
(b) "knowingly" if, when he engages in the conduct, he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so;
(c) "recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of con-
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duct, except that, as provided in section 502, awareness of the risk is not required where its absence is due to voluntary intoxication;

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

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

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

(3) Factors in Which Requirement of Culpability Applies.

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

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

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

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

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

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

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

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

Comment

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

Subsection (1) sets forth the four possible culpable mental states recognized in the Code. "Intentionally" means purpose. When a specific mens rea (specific intent) is required, the offense will be defined as conduct "intentionally" required, as distinguished from "intentionally" as distinguished between the one who will and one who is unwilling or unable. It is distinguished from "recklessly" by the phrase "unaccompanied by substantial doubt." "Recklessly" requires conscious and unjustifiable disregard. The "gross deviation" phrase of subsection (1)(c) makes clear that criminal recklessness is not the same as the recklessness which incurs tort liability. Subsection (1)(d) uses the term "unreasonable" to make clear that the criminally negligent person need not see existence of the likelihood that he is engaging in the prohibited conduct; a negligent failure to be aware is sufficient.

The "negligence" contemplated for criminal liability also differs from the "standard" used as a "gross deviation" from acceptable behavior or required. "Willfully" is defined to encompass the three higher kinds of culpability, and thus has a meaning clearly different from its variable and uncertain meaning in existing law.

Clarification of these concepts, hereafter found in judicial opinions and judicial instructions to juries, has been sought with an economy of language. It is proposed that the words "reasonably" and "negligently" and the terms "should have known" and "should have been aware" will continue to be translated into their layman terms and not transmitted in legal terms. A substantial body of opinion in the United States has written reservations about the translation of federal jurisprudence of the highly refined scheme of mental culpability here proposed. It is not to be expected that it can be satisfactorily translated into understandable jury instructions or that it is susceptible of proof by present limitations on sources of evidence. Indeed, it can be argued that such a scheme might lead over the long run to pressures to obtain evidence of culpability in situations not now thought lawful. See Eisen, History of Continental Criminal Procedure App. B pp. 405- 406 (1901). Absent such proof, the scheme might tend to undermine the proposed grading of offenses, e.g., homicide. (§ 1091-03)
§ 391. Mistaes of Fact in Affirmative Defenses.

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

Comment

The distinguishing of defenses according to whether the prosecution or defendant has the burden of proof, as provided in § 391, has resulted in a line between them in the Code which permits provision of general rules as to the culpability requirements. Section 392(3)(ci) deals with the general culpability rules with respect to "defenses," which the prosecution must disprove beyond a reasonable doubt. This section deals with the general culpability rule for "affirmative defenses," which the defense must establish by a preponderance of the evidence. Most of the defenses in the "affirmative defense" category in this Code are of such a nature that a mistaken belief in the existence of the condition should be excusing, e.g., treason, and withdrawal with respect to inchoate offenses (§ 390) and that is stated in the general rule. When excusals are warranted, they are expressly provided for in the definition of the affirmative defense. See, e.g., § 258(2)(b) (sapping with consent).

§ 391. Ignorance or Mistake Negating Culpability.

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

Comment

This section states the obvious fact that if a mistake negates the culpability which is required, a person does not commit an offense. That is, if he mistakenly believes he is doing a deed, but it is really a crime, he is not guilty of manslaughter. (Of course, if he was reckless, he might be guilty of manslaughter.) The mistake must negate culpability; he thought he was shooting a woman when the object was a man in treason. Although the section may be unnecessary from the point of view of strict logic, it is included as a convenient cross-referencing device to persons accustomed to regarding mistake as an issue distinct from the culpability requirements in the definition of the offense. See Working Papers, pp. 135-36, 465.

§ 395. Casual Relationship Between Conduct and Result.

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

Rules governing causation have never been specified in federal crimi-
nal statutes. The major problem in expounding such rules is presented
by situations in which two or more factors "cause" the result. This
section is a modified "but for" test with a provision that excludes those
situations in which the concurrent cause was clearly sufficient to pro-
duce the result and the accused's conduct clearly insufficient. An alter-
native approach would be to have no specific provision on causation,
leaving the matter to judge-made law. While this section may not be
useful in all cases where causation must be explained, it is intended to
be an aid to uniformity and clarification whenever it does apply. "But
for" is a minimal requirement for guilt; and resolving that question
permits focusing on the more important issue of culpability as to the
result caused. See Working Papers, pp. 163-85.

§ 485. Accomplices.

(1) Liability Defined. A person may be convicted of an offense
based upon the conduct of another person when:
   (a) acting with the kind of culpability required for the
       offense, he causes the other to engage in such conduct; or
   (b) with intent that an offense be committed, he commands,
       induces, procures, or aids the other to commit it or, having
       a legal duty to prevent its commission, he fails to make proper
       effort to do so; or
   (c) he is a co-conspirator and his association with the offense
       meets the requirements of either of the other paragraphs of
       this subsection.

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

(2) Defense Precluded. Except as otherwise provided, in any
prosecution in which the liability of the defendant is based upon
the conduct of another person, it is no defense that:
   (a) the defendant does not belong to the class of persons
       who, because of their official status or other capacity or char-
       acteristic, are by definition of the offense the only persons
       capable of directly committing it; or
   (b) the person for whose conduct the defendant is being
       held liable has been acquitted, has not been prosecuted or con-
       victed or has been convicted of a different offense, or is im-
       mune from prosecution, or is otherwise not subject to justice.

Comment

This section is basically a restatement of 18 U.S.C. § 2 with modifi-
cations to codify or alter case law. The proposed language is sub-
stantially similar to that used in a number of recent state revisions.
Subsection (1)(a) sets forth the circumstances under which liability
for causing the conduct of another will attach and clarifies 18
U.S.C. § 2(b). Subsection (1)(b) must be read in connection with
§ 1032 (Complicit Solicitation). Accomplice liability is limited to
a person who aids another with intent that the other commit an
offense; aiding with knowledge that the person aided intends to com-
mit a crime is punishable, if at all, as the lesser offense of facilitation.
The subsection also states explicitly that breach of a legal duty to
§ 402. Corporate Criminal Liability.

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

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

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

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

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

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

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

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

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

(2) Defense Precluded. It is no defense that an individual upon whose conduct liability of the corporation for an offense is based has been acquitted, has not been prosecuted or convicted or has been convicted of a different offense, or is immune from prosecution, or is otherwise not subject to justice.

Comment

This section sets forth those circumstances under which a corporation becomes liable for offenses committed by its agents. For offenses, the prosecution must prove involvement of management, an act or omission of an individual in a position of authority, or a failure to maintain effective supervision of corporate affairs.


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

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

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

(3) Accomplice of Organization. When an individual is convicted of an offense as an accomplice of an organization, he is sub-
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subsequent to the sentence authorized when a natural person is convicted of that offense.

(a) Denial of Supervision. A person responsible for supervising relevant activities of an organization is guilty of an offense if he manifestly knows or has reason to believe that the organization should be prosecuted, or that the organization may be convicted by his willful default in supervision within the range of that responsibility which contributes to the occurrence of that offense. Conviction under this subsection shall be of an offense of the same class as the offense for which the organization may be convicted, except that if the latter offense is a felony, conviction under this subsection shall be for a Class A misdemeanor.

Comment

This section deals with the liability of agents of an organization. It makes explicit the rule that the human perpetrator is not absolved by the fact that an organization is liable for the offense. It also imposes liability upon agents for occasions to perform acts required for organizations and for manifesting consent to the commission of an offense by default in supervision which contributes to the occurrence of an offense. See Working Paper, pp. 186, 216–18, 220–23, 299–305.

§ 409. General Provisions for Chapter 4.

(1) Definitions. In this Chapter:

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

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

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

Comment

Governments are excluded from the definition of "organization" and hence from liability for offenses under this Chapter. Even if states are expropriated, there are considerations which may call for changing the definition, in the opinion of some Commissioners, to make municipalities and state administrative agencies accountable to federal prosecution, particularly in areas such as environmental pollution and civil rights. If this change is made, § 9206, dealing with disqualified convicted organization officials from holding regular positions, would probably have to be modified to provide federal re-
Chapter 5. Responsibility Defenses: Juveniles; Intoxication; Mental Disease or Defect


A prosecution of any person as an adult shall be barred if the offense was committed:
(a) when he was less than fifteen years old in any case, or
(b) when he was less than sixteen years old in the case of offenses other than murder, aggravated assault, rape and aggravated involuntary sodomy; or
(c) when he was less than eighteen years old unless trial as
an adult is ordered by the district court to promote justice.

Comment

This section substantially codifies existing federal practice, except
that it lowers the critical age to 15 for serious crimes against persons.
Although the listed offenses have been selected on the basis of their
involving criminal behavior, they would extend to certain property
crimes as well, e.g., Chan A robbery, because those crimes involve ag-
gravated assault. Under 18 U.S.C. § 502 a child of any age must be
tried as an adult if the Attorney General so directs, if the child has
committed a crime punishable by death or life imprisonment, or if he
refuses to consent to prosecution as a juvenile. In recent years, how-
ever, no child under 18 has been prosecuted as an adult.

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

This section requires conferring counsel and to existing provi-
sions dealing with juvenile procedure now set forth in 18 U.S.C.

§ 503. Intoxication.

(1) Defense Precluded. Except as provided in subsection (2),
intoxication is not a defense to a criminal charge. Intoxication
does not, in itself, constitute mental disease within the meaning of
section 503. Evidence of intoxication is admissible whenever it is
relevant to negate or to establish an element of the offense charged.

(2) Recklessness. A person is reckless with respect to an ele-
ment of an offense even though his disregard thereof is not com-
science, if his not being conscious thereof is due to self-induced
intoxication.

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

(4) Definition. In this section:
(a) "Intoxication" means a disturbance of mental or physical
capacities resulting from the introduction of alcohol, drugs or
other substances into the body;
(b) "Self-induced intoxication" means intoxication caused
by substances which the actor knowingly introduces into his
body, the tendency of which to cause intoxication he knows or
ought to know, unless he introduces them pursuant to medical
advice or under such circumstances as would otherwise afford
a defense to a charge of crime.

Comment

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

An alternative to this section preferred by many members of the
Commission is as follows: "Intoxication is a defense to the criminal
charge only if it negates the culpability required as an element of the
offense charged. In any prosecution for an offense, evidence of in-
toxication of the defendant may be admitted wherever it is relevant to
negate the culpability required as an element of the offense charged,
except as provided in subsection (2)." Under the alternative subsec-
tions (3) and (4) would be omitted. For the rationale, see comment
to § 505, supra.

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


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§ 463.

Mental Disease or Defect.

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

Comment

Present federal law as to the defense of insanity is not uniform. Neither Congress nor the Supreme Court has set forth a definitive rule. The courts of appeals have greatly developed the law on the subject in recent years, generally finding no room from a "medical" formulation toward the American Law Institute formulation substantially presented here. In the District of Columbia Circuit the defense applies where the unlawful act is the "product" of mental disease or defect (Jenckes v. United States, 357 F.2d 966 (1966)), defined as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior control" (McDowell v. United States, 312 F.2d 347, 351 (1963)). In the Third Circuit emphasis has been placed on the capacity to conform his conduct to the requirements of the law violated; lack of appreciation of the criminality is expanded as a factor supporting inability to conform (United States v. Chovan, 350 F.2d 333 (1965)). In the Seventh, Ninth, and Tenth Circuits the defense is taken under the "medical" formulation (United States v. Zalasky, 327 F.2d 22 (7th Cir. 1964); Teleno v. United States, 379 F.2d 600 (10th Cir. 1967); United States v. Brown, 447 F.2d 850 (9th Cir. 1971); United States v. Alegro, 363 F.2d 1003 (8th Cir. 1966); United States v. Johnson, 371 F.2d 666 (5th Cir. 1967); United States v. Lane, 370 F.2d 864 (5th Cir. 1967); United States v. Abbott, 357 F.2d 666 (5th Cir. 1966)). Other possibilities are a medical/judicial formulation and abridgment of the defense completely. Both are expressed in statutory form in the Working Papers, footnote, p. 384.

An alternative to this section preferred by some members of the Commission, as adapted from the cogent report (Working Papers, p. 364), is as follows: "Mental disease or mental defect is a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense." Beyond this alternative and in favor of § 505 as it appears in the text, it is argued that a person manifestly unqualified as committing murder or other crime would without the culpability requirement under § 505 be held criminally liable. Section 505 would take possibilities left under unqualified psychiatric testimony, his insanity manifesting itself primarily by the reduced ability to kill or to avoid criminal acts to a justification for killing. It is further argued against the alternative that any effort to refer the mental illness issue to the general formulate...
Chapter 6. Defenses Involving Justification and Excuse

§ 503. Justification.

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

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

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

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

Comment

Congress has never enacted the rules which justify or excuse the use of force against another or which generally provide a justification or an excuse for the commission of otherwise unlawful conduct. Chapter 6 sets forth (1) to change some unsatisfactory judicial decisions, to clarify areas which are not clear under existing law and to modify aspects of the federal law on the subject. This partial codification is not an attempt to freeze the rules so they now exist. It may therefore be desirable to be explicit that the rule is not intended to provide the judicial development of other justifications, or the so-called "choice of evils" rule, i.e., that emergency measures to avoid greater injury may be justified, but has not been included in this Chapter on the view that while its intended application would be extremely rare in cases actually prosecuted, even the best of statutory formulations (see N.Y. Pen.L. § 33.10) is a potential source of extravagant difficulty in ordinary cases, particularly in the context of the adoption of the broad morals of fact and law provisions found in the Code. Codification, as opposed to case-by-case prosecutorial discretion, is regarded as premature. On the other hand, some Commissioners believe that the penal code is seriously deficient if it does not explicitly recognize that avoidance of greater harm is, if not a duty, at least a privilege of the citizen.

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

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

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

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

Comment

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

Subsection (2) prohibits a person from relying on plainly unlawful orders from a public servant, but recognizes that the average citizen cannot be expected to be familiar with the many rules and regulations governing the conduct of public servants.

Subsection (3) provides that use of force is justified in the making of a citizen’s arrest. The limit to such use of force is given in subsection (4) as a reference principally to §§ 608, 608.1, 609, 610, and 613. It should be noted that the section determines only the extent of liability in using force in each circumstance and does not assign the authority to make the arrest or effect arrest, even when the actor is mistaken as to the underlying fact.

See Working Papers, pp. 310-12.

§ 604. Self-Defense.

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

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

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

Comment

This section states the rule permitting the use of force to protect oneself from imminent injury. Federal law on resisting unlawful arrest has been changed, by paragraph (a), to make legality of the arrest irrelevant. The phrase "by law" includes state law, so that a state sheriff, for example, who issues an arrest warrant on a shipboard of goods in interstate commerce is not guilty of theft under the federal law. Federal supremacy prohibits a person from relying on a state law which beaks contrary federal law.


A person is justified in using force upon another person in order to defend anyone else if (a) the person defended would be justified
§ 605. Use of Force by Persons with Parental, Custodial or Similar Responsibilities.

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

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

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

(c) a person responsible for the maintenance of order in a vehicle, train, vessel, aircraft, or other carrier, or in a place where others are assembled, or a person acting at the responsible person's direction, may use force to maintain order;

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

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

Comment

This section defines the permissible use of nondeadly force by persons in a position of responsibility for the welfare of others. A distinctive feature of the privilege enjoyed by parents and others in bonafide under paragraphs (a) and (b) of this section is that "necessity" for the use of reasonable force need not be proved. The criminal law is generally inappropriate for regulating parental discipline in disciplining children. See Working Papers, pp. 96-98.

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

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

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

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

Comment

The only change in present law on the use of nondeadly force to protect property made by this section is the imposition of the explicit requirement that a request to desist be made, if feasible and safe. Paragraph (b) proscribes the defense if termination of the trespass
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create a substantial risk of serious bodily injury to the trespasser. For example, a ship's captain may not justify use of force to remove a stowaway from his ship in mid-ocean. See Working Papers, p. 206.

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

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

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

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

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

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

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

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

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

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

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

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

(i) when used by a duly licensed physician, or a person acting at his direction, if such force is necessary in order to administer a recognized form of treatment to promote the physical or mental health of a patient and if the treatment is administered (i) in an emergency, or (ii) with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian or other person entrusted with his care and supervision, or (iii) by order of a court of competent jurisdiction;
(1) when used by a person who is directed or authorized to use deadly force by a public servant or an officer of a ship or aircraft and who does not know that, if such is the case, the public servant or such officer is himself not authorized to use deadly force under the circumstances.

Comment

Subsection (1) states the proposition that force in excess of that which is necessary and appropriate is not justified. Exceptions for justified use of deadly force are listed in subsection (2). It is recognized that there may be a further judicial development with respect to justified or reasonable use of deadly force. However, a proposal to add to the text an explicit standard or justification for the use of deadly force "where necessary and appropriate under all the facts and circumstances" was not adopted, on the ground that it would undermine the legislative effort to make its own views on deadly force effective. Nevertheless, a substantial body of opinion in the Commission would prefer to see the justifications in this and related provisions (§§ 602-606) restate in positive terms, with the addition of such a provision, and to express the favored idea as "reasonable" rather than "justified." See Pound, "Justifiable Force," 34-38 (1938).

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

Subsection (2) (b) confines the defensed use of deadly force to instances in which it is used to prevent serious danger to the person. Federal law is changed by requiring retreat, if feasible, except in the extraordinary circumstances, cf. Brown v. United States, 286 U.S. 134 (1932), "failure to retreat is . . . a circumstance to be considered with all others . . .", one such exception—that retreat from one's place of work is not necessary—would be the possibility that government files or equipment would be required to be left unprotected where a justification is not available under paragraph (a).

Subsection (2) (c) deals with the use of deadly force to prevent specified "property" crimes and any "malicious endangerment." An alternative to the latter phrase would be "wilder felony theft or property destruction," but since that would embrace such crimes as theft of more than $500, it may be viewed as placing too little value on human life. Because it is arguable that a robbery or a burglary may be completed when the felon turns to leave the premises, it is provided explicitly that the use of deadly force is justified at that time. The use of deadly force is not, however, justified if the felon has abandoned his crime of robbery and all the elements of his crime. An alternative to "substantial danger" in the last part is "risk," which, with § 603 (1), would make approach sufficiently to justify the use of deadly
§ 606. Excuse.

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

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

Comment
This section sets forth two circumstances under which conduct, otherwise criminal, is excused from punishment. Subsection (1) determines that the culpability of one who mistakenly believes that the facts are such as to justify his conduct is to be measured by whether or not he was negligent or reckless in arriving at that belief. Subsection (2) incorporates a famous insight by Mr. Justice Holmes in Brown v. United States, 284 U.S. 334 (1931) ("Detached reflection cannot be expected in the presence of an uplifted knife.") Whether excuse, under subsection (1), is a defense or affirmative defense, depends upon what the justification or excuse is designated to be. Excuse under subsection (2) is a defense by virtue of § 601(1). Alternatively, it could be made an affirmative defense. See Working Papers, pp. 271-72.

§ 609. Mistake of Law.

Except as otherwise expressly provided, a person's good faith belief that conduct does not constitute a crime is an affirmative defense if he acted in reasonable reliance upon a statement of the law contained in:
(a) a statute or other enactment;
(b) a judicial decision, opinion, order or judgment;
(c) an administrative order or grant of permission; or
(d) an official interpretation of the public servant or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the crime.

§ 610. Final Report

Comment
This section sets forth those circumstances under which a person is excused from criminal liability for his conduct because he mistakenly believed his conduct did not constitute a crime. The defense is not available for infractions where proof of culpability is generally not required. Mistake of law is an affirmative defense; it must be established by a preponderance of the evidence. See § 105(5). Note that the reliance must be "reasonable," and that good faith is explicitly required. In most instances, it would be unreasonable for a layman to fail to consult a lawyer, and would not be in good faith if he failed to make full disclosure to him of all relevant facts. For a broader version of the defense, see Working Papers, p. 138.

An alternative favored by a substantial body of opinion in the Commission would limit the defense to situations where knowledge of the law might be regarded as especially relevant to culpability, e.g., tax and draft evasion, conflict of interest. This approach is favored in the view that "... to admit the excuse at all would be to encourage ignorance..." Holmes, The Common Law 41 (1902). Consequently, it is argued, mistake of law ought only be a defense where knowledge of the law is an element of the offense. It is argued for the view embedded in the text, however, that it does not "encourage ignorance" since it explicitly requires a good faith effort by the accused to inform himself from usually reliable sources, and puts the burden of proof on the defendant.


§ 438. Duress.

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

(2) Defense Precluded. The defense defined in this section is not available to a person who, by voluntarily entering into a criminal enterprise, or otherwise, willfully placed himself in a situation in which it was foreseeable that he would be subjected to the force. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.
§ 610. Definitions for Chapter 4.

In this Chapter:

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

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

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

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

Comment

In addition to the definitions set forth, here, note should be taken of the definitions of "bodily injury," "harm" and "public servant" in § 100—General Definitions.
other than receiving participants more than one year prior to commencement of prosecution and prosecution could, with reasonable diligence, have been commenced more than one year prior to its commencement. "Leader" means one who organizes, manages, directs, supervises or finances a criminal syndicate or knowingly employs violence or intimidation to promote or facilitate the criminal objects, or with intent to promote or facilitate its criminal objects, furnishes legal, accounting or other managerial assistance. A "criminal syndicate" is an association of two or more persons for engaging in a continuing series of criminal offenses of the following character: illicit trafficking in narcotics or other dangerous substances, liquor, weapons, or stolen goods; gambling; prostitution; extortions; bribery; theft of property having an aggregated value of more than $100,000; engaging in a criminal enterprise; counterfeiting; bankruptcy or insurance frauds by arson or otherwise; and smuggling. If more than ten persons are so associated, any group of ten or more associates is a "criminal syndicate" although it is or was only a part of a larger association. Association, within the meaning of this subsection, exists among persons engaged in carrying on the criminal operation although:

(a) associates may not know each other's identity;
(b) membership in the association may change from time to time; and
(c) associates may stand in a wholesaler-retailer or other arms length relationship in an illicit distribution operation.

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

(b) Commencement of Prosecution.

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

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

(i) for an offense included in the offense charged, if no to
§ 702. Entrapment.

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

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

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

Comment

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

As an "affirmative" defense, entrapment must be established by the defendant by a preponderance of the evidence. See § 703. Although entrapment is preserved as a ground for dismissal of the prosecution, its basis to grounds for suppression of evidence illegally obtained by the prosecution could be reflected in a procedural provision that, upon motion by the defendant, the issue is tried in a manner similar to that provided for suppression issues.

Alternatively, once the propriety of the prosecution depends on the propriety of the law enforcement technique, the defense could be stated as a defense, in which the government would have the burden of proving the issue from jury consideration, even though the court, in order to avoid duplication of effort, may defer hearing evidence on the issue until the trial.

A possible additional standard for law enforcement behavior would be to require reasonable suspicion that a person being solicited to commit an offense or with whom an illegal transaction is engaged is of such a person to engage in such an offense or transaction.
§ 704. When Prosecution Barred by Former Prosecution for Same Offense.

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

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

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

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

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

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

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

§ 705. Comment

This section substantially restates present federal case law on double jeopardy. Paragraphs (a) and (b) state the effect of prior acquittal or conviction, including the rule that conviction of an included offense means acquittal of the inclusive offense. Paragraph (b) incorporates doctrines of res judicata and collateral estoppel, including as a bar, for example, a finding that the period of limitation had expired as to the offense. Paragraph (d) deals with trials which start after jeopardy attaches, and attempts to draw a reasonable balance between requiring an accused to go to trial a second time and forbidding a second prosecution although the first had to be terminated through no fault of the court or prosecution. See Working Papers, pp. 351-36, 363-65.

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

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

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

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

Comment

Federal case law is far from clear at present as to what constitutes "the same offense" for double jeopardy purposes. This section supplements § 704 (d) and § 704. If the different offense should have been tried with the first offense under the compulsory joinder provision of § 704 (d), the double jeopardy provisions of § 704 apply. Even if the different offense was not subject to compulsory joinder, e.g., if the court ordered a separate trial to promote justice or the United States Attorney did not know of the offense at the time of the first arraignment, a second prosecution is barred if res judicata or collateral estoppel apply. See Working Papers, pp. 351-36, 363-65.
§ 706. Prosecutions Under Other Federal Codes.

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

Comment

This section outlines the rule that prosecutions by the same sovereign under different bodies of law are subject to the restrictions provided in §§ 704 and 705. See Walker v. Florida, 389 U.S. 388 (1967); Drought v. United States, 964 U.S. 331 (1972).

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

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

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

(b) the first prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition which must be established for conviction of the offense of which the defendant is subsequently prosecuted; unless the Attorney General of the United States certifies that the interests of the United States would be unwise harmed if the federal prosecution is barred. In this section, "local" means of any political unit within any of the 50 states.


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

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

(b) the federal prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which necessarily required a determination inconsistent with a fact or a legal
§ 709

Failure to establish the meaning prescribed in section 705.

Comment

This section represents a novel attempt to have a federal standard apply where a local court is judging the validity of a local prosecution under the rubric of double jeopardy. At present there is no uniform policy, some states imposing some kind of bar, others leaving it to the local prosecutor's discretion. This provision is similar to § 705, which applies when the local prosecutor first; and the comment to that section is substantially relevant here. Note, however, that a consideration there—federal supremacy—favoring discretionary power in the Attorney General to proceed notwithstanding a prior local acquittal does not apply here, as there is here an absolute bar against a subsequent local prosecution.

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

See Working Papers, pp. 331, 359-360.

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

A former prosecution is not a bar within the meaning of sections 706, 707, 709, 712, and 709 under any of the following circumstances:

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

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

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

Comment

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